AN CHÚIRT UACHTARACH
THE SUPREME COURT

O'Donnell J
McKechnie J
MacMenamin J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2019:000067
[2020] IESC 000
Court of Appeal record number 2019/219
[2013] IECA 59
Central Criminal Court bill number: CCC 2019 no 0009

BETWEEN
THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
PROSECUTOR/RESPONDENT

- AND -

ANTHONY BUCK
ACCUSED/APPELLANT

Judgment of Mr Justice Peter Charleton delivered on Friday, 24th April 2020

1. By a determination issued by this Court on 30 January 2019, the applicant Anthony Buck was granted leave to appeal a decision of the Court of Appeal dismissing his application to claim a miscarriage of justice under s 2 of the Criminal Procedure Act 1993. The issue of law of general public importance which arises on appeal concerns the correct interpretation and application of sections 2(3), 2(4) and 2(5) of the 1993 Act. The terms 'new fact' and 'newly discovered fact' appeared to this Court to have been used interchangeably in connection with the Anthony Buck's section 2 application and in particular in connection with the dismissal of that application on foot of a motion issued by the Director of Public Prosecutions asserting that there was no possible basis for his claim of miscarriage of justice to succeed. In consequence it is necessary to consider: firstly, the correct interpretation of the miscarriage of justice provisions in the 1993 Act; secondly the applicability of any jurisdiction to strike out an application under that legislation as hopeless; and, thirdly, the merits of Anthony Buck's application.

Chronology

2. Anthony Buck was convicted by a jury on 20 February 1998 of the murder of David Nugent on 9 July 1996, and of robbery, Quirke J presiding. The trial lasted some three weeks. He was subsequently sentenced to 12 years imprisonment for robbery to run concurrently with the life sentence imposed on the murder conviction and backdated to run from 11 November 1997. By judgment delivered by Lynch J on 6 December 1999, the Court of Criminal Appeal dismissed his application for leave to appeal against conviction.

Several issues were raised in the context of that application for leave, but the grounds run on appeal essentially centred on the validity of Anthony Buck's arrest and also the ruling by the trial judge that admissions made by him in the course of his detention were voluntary. An appeal was certified to this Court pursuant to the provisions of s 29 Courts of Justice Act, 1924. In a judgment delivered by Keane CJ this Court dismissed the appeal. Central to that appeal were the circumstances in which an accused could be questioned by gardaí after he had claimed to have requested the presence of a solicitor, but before a solicitor had arrived, and also on the right of reasonable access to a solicitor; see *The People (DPP) v. Buck* [2002] 2 IR 268, [2002] IESC 23.

3. In essence, the course of events then becomes so complex with applications under the 1993 Act and responses thereto, that matters are best understood in chronological sequence:

> 9 July 1996 – The murder and robbery of the victim happens.
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> 20 February 1998 – In the Central Criminal Court, Anthony Buck is convicted of murder (life sentence) and robbery (12 years running concurrently), Quirke J presiding.
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> 6 December 1999 – The Court of Criminal Appeal dismisses Anthony Buck's application to appeal his conviction, but permits him to bring a matter of law of exceptional public importance to the Supreme Court.
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> 17 April 2002 – The Supreme Court dismisses Anthony Buck's case, finding that every effort was made by the gardaí to provide him with a solicitor, that his constitutional rights to access a solicitor had not been breached and that the evidence taken during the course of the gardaí interviews was admissible.
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> 10 September 2014 – Anthony Buck applied to the Court of Appeal contending that there were new, or newly discovered, facts pertaining to his case, amounting to a miscarriage of justice.
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> 11 December 2015 – The Court of Appeal dismisses Anthony Buck's appeal in which he argued that the Supreme Court decision in *The People (DPP) v Gormely and White* [2014] 2 IR 591, on access to legal advice while in custody, constituted a newly discovered fact. Birmingham J found this claim to be without substance or merit, essentially as what was involved was a plea of law and not the adducing of factual material within the meaning of the 1993 Act; [2015] IECA 344. This judgment was on foot of a response by the Director of Public Prosecutions to the s 2 miscarriage of justice application by way of motion to strike the application out as having no reasonable chance of success.
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> 13 July 2016 - Anthony Buck writes to the High Court as a prisoner, under the informal procedure enabling those detained to seek redress, and complains that his constitutional and human rights were infringed in his trial and raising points about

his solicitor and about the admissions he made; *Buck v DPP* [2016] IEHC 402. McDermott J dismisses the application stating at paragraphs 19-20:

> I am not satisfied that the applicant has established an arguable case that his trial was in any way unfair or set out facts from which the court could conclude that his conviction was based on any evidence procured during the course of his detention at a time when he did not have access to a solicitor. This is simply not the case. I am not satisfied that there is any basis for a complaint based on the provisions of the European Convention on Human Rights or the European Convention on Human Rights Act 2003.

25 October 2016 – Anthony Buck initiated a second application to raise new or newly discovered facts. The grounds for this application were added to on 16 February 2017 and 11 October 2017.

20 January 2017 – Anthony Buck applied to the Supreme Court for leave to appeal, claiming that the decision of the Court of Appeal in the judgment of 11 December 2015 involved an issue of law of general public importance, but leave was not granted.

23 February 2018 – The Court of Appeal accepted the Director of Public Prosecution's motion to dismiss Anthony Buck's second s 2 application on the basis that no new or newly discovered facts were raised in the application and that in consequence the application was bound to fail; [2018] IECA 59

24 July 2018 – Anthony Buck applied for leave to appeal to the Supreme Court relating to the matters raised by the 2018 decision of the Court of Appeal on the second s 2 appeal.

30 January 2019 – Anthony Buck was granted leave by the Supreme Court to appeal issues concerning the distinction between new and newly discoverable facts; [2019] IESCDET 16.

Background

4. The victim David Nugent was found dead in a field on the grounds of St Michael's Hospital in Clonmel some time after midday on 9 July 1996. According to Professor John Harbison, the victim died from a combination of head injuries and of stabbing to the chest and abdomen. For the purposes of what follows, it may be important to note that the only DNA evidence recovered at the scene was on a stone found near the victim's body. That DNA came from the victim's blood, or blood and tissue, and it thus appears that the stone was one of the weapons used to murder him. The prosecution case centred on three main building blocks of evidence. The first was the alleged sighting of Anthony Buck by two witnesses, Francis Hawkins and Lee Ahearne, jumping over the wall of the field immediately after both heard screams emanating from the area where the murder was perpetrated. Other witnesses also heard screams. Francis Hawkins alleged that Anthony Buck had made admissions to him regarding the death of the victim. The second area of testimony concerned the evidence of friends of the victim. These alleged that Anthony

Buck had told them that he was due to meet with the victim on the evening in July. The third focus in the evidence was the admissions made by Anthony Buck in the course of his detention at Cahir Garda Station on 14 and 15 July 1996.

5. If proven beyond reasonable doubt, these facts, if accepted by a jury, would be sufficient to convict a person accused of the murder. The robbery, in essence, was part of that matrix of fact.

The contentions and the replies

6. Here, before going on to consider the construction of the provisions of the 1993 Act, it is useful to set out in tabular form the issues put forward by Anthony Buck, amounting, it is claimed, to 13 different grounds. Each of these is claimed to constitute new facts or newly discovered facts establishing a miscarriage of justice. Also set out here is the response of the Director of Public Prosecutions to these. The evidence of Anthony Buck was made on affidavit. He could, if he had chosen to, which he did not, waive his legal professional privilege, and include evidence from the lawyers who had acted for him. Instead the court received an articulate and very helpful letter dated 10 February 2020. This is also quoted. It is worthwhile setting out the contentions and answers fully in order to identify the proper approach later in this judgment. Also of importance here is the timescale as to when it is claimed by Anthony Buck that a point was discovered newly, or the significance of a fact became apparent in the context of a former appeal or application. There are 13 grounds put forward. Some of these 13 grounds are grouped together:

    1) Anthony Buck claims that the same solicitor represented Anthony Buck, Colm Roche and Jonathan Dennehy in prosecutions arising out of the robbery and murder of the victim. Anthony Buck argued before the Court of Appeal that this involved a clear conflict of interest in the same solicitor representing Mr Roche and Mr Dennehy whilst also representing Anthony Buck in a trial arising out of the same incident albeit that Anthony Buck faced the additional charge of murder. About this, Anthony Buck writes that this was a newly discovered fact. He says this came to his attention in September 2015 but "it was not raised before the Court of Appeal during the initial section 2 appeal in December 2015". Nonetheless, he claims that it became a newly discovered fact because it was "a fact the significance of which wasn't fully appreciated by me during the previous proceedings, namely the first section 2 appeal." To this the Director of Public Prosecutions replies that the same solicitor represented the Applicant in his murder trial and other persons prosecuted for robbery of the victim is a fact. However, the DPP submits there is no explanation forthcoming, and certainly no reasonable explanation, as to why this was not raised in previous appellate proceedings. As such, the DPP submits this cannot be considered as a 'new fact' for the purposes of the legislation. The DPP further contends that this is not a fact that might have been used by the Anthony Buck's legal representatives at the trial to raise a reasonable doubt in the minds of the jury about a significant element of the prosecution case. The DPP states that in Anthony Buck's statement he mentions two other people, but not by name. The DPP says that Mr Roche and Mr Dennehy were not called and had nothing to do

with the trial but were instead prosecuted a year later for the robbery of the victim. The DPP asserts that a solicitor can act for a number of parties provided they are not making cross-allegations, and that what was involved here was not a conflict of interest.

2) The evidence at trial in the course of a *voir dire* concerning Anthony Buck's arrest and detention is claimed by him to have been unreliable and inadmissible. In particular, the evidence given by Kieran Cleary, solicitor, was claimed to be materially different to that which Anthony Buck's solicitor understood it would be. Anthony Buck argued before the Court of Appeal that this material difference came to his attention in June 2014 when preparations were being made for the s 2 application which was heard in December 2015. He writes: "I want to by crystal clear … at a consultation in 2014, information, imparted by John joy solicitor, first came to my notice and at that point in time it was a newly-discovered fact." He writes that he asked his lawyers to put if forward but: "This didn't happen." Anthony Buck also contends that the implications of his waiving his right to legal professional privilege to allow Kieran Cleary at his trial to give evidence were not fully explained to him by his solicitor at trial. The Director of Public Prosecution understands this to be a contention that the evidence at trial on the *voir dire* on his arrest and detention on 14 of July 1996 was unreliable and inadmissible and that the evidence given on this issue by Kieran Cleary solicitor, who attended with him at Cahir garda station on 14 of July 1996, was significantly different from what his solicitor at trial understood it would be. The DPP submits that this is quite clearly not a fact but rather a point of view on evidence that was adduced. Further on the issue of the evidence of Kieran Cleary, it is submitted that absent an affidavit from the solicitor who represented him at trial, this cannot be considered as credible. The DPP asserts that after Kieran Cleary gave evidence there was a consultation in custody that evening and nothing further was asserted about the evidence at the trial. What was involved was whether Kieran Cleary gave advice or spent, according to the custody record 30 minutes, his time with Anthony Buck discussing irrelevancies or whether there was proper access to legal advice.

3) It is claimed by Anthony Buck that the trial judge erred in his ruling on the admissibility of statements made by him during the course of his detention at Cahir Garda Station on 14 and 15 July 1996. In particular it was argued that the trial judge erred in finding that no statement of admission was made by him during the period when he says he had requested a solicitor and efforts were being made to find one. Notwithstanding that Anthony Buck denied the offence, there were matters adduced that could only have been argued by the prosecution as constituting admissions, he claims. This specifically relates to an interview conducted between 15.24 hours and 16.50 hours on 14 July 1996. This was of an admission to being in the vicinity of the general area around St Michael's Hospital and environs, having had a prior transaction with the victim, but denying attacking him or killing him. The Director of Public Prosecutions replies that any contention of an error on admissibility is not a fact but an opinion on the ruling made by the trial

judge following a thorough and extensive enquiry into the Applicant's arrest and detention on the 14 and 15 of July 1996. The questions of admissibility of the statements and access to a solicitor were at the core of the trial, centre stage at the first appeal to the Court of Criminal Appeal and fundamental in the appeal that was ultimately brought to the Supreme Court in 2002. The submission that the trial judge erred in finding that no statement of admission was made in the period when a solicitor had been sought but not located even when the Applicant put himself in the general area on the evening of the murder has to be considered in the context of other evidence and in the context of the law, argues the DPP. In terms of other evidence, the DPP replies that it is the case that a witness statement was taken from the Applicant on the 10 of July 1996 [date taken from submissions] wherein he put himself in and around the field at the time of the victim's murder but denied any involvement in it. The information provided, claims the DPP, to Garda Somers and Garda Kelly in the period from 15.24 to 16.50 hours went no further than the information gardaí already had from the witness statement provided by the Applicant days earlier. These were not admissions, it is claimed, since to be near a crime scene is not a crime and nor was any motive to kill disclosed. As regards the law, the DPP argues that it is well established that the mere presence of a person at the scene of a crime is insufficient to attribute criminal responsibility to that person for the crime committed.

4) The fourth point argued as a newly discovered fact or new fact by Anthony Buck concerns a decision made by investigating gardaí to allow Lee Ahearne to meet and speak to another suspect Francis Hawkins while in Garda custody. This calls into question the integrity, contends Anthony Buck, the veracity and credibility of statements made and subsequent evidence given at trial by those witnesses. It was argued by Anthony Buck before the Court of Appeal that this meeting was arranged so as to allow both suspects to 'manufacture' a contrived account in the furtherance of a prosecution as against Mr Buck. In his letter Anthony Buck says that was "a fact the significance of which was not appreciated by my former legal representatives at the court of trial." He says: "I was clearly aware of this meeting, as evinced by my own evidence at the court of trial. This matter was brought to the attention of John Joy, solicitor, in the pre-trial period. Yet the matter was not explored or pursued at the court of trial." He also writes that he wanted it brought to the fore in the Court of Criminal Appeal in 1999 but: "This didn't happen." To this the Director of Public Prosecutions replies that this issue about how Francis Hawkins and Lee Ahearne, detained on the 14 July 1996 at Cahir garda station in connection with the murder of the victim, met each other during the course of their detentions is a fact. It is suggested on behalf of Anthony Buck, submits the DPP, that the timing of this meeting called into question the integrity, veracity and credibility of statements made and the subsequent evidence given by these witnesses. It is submitted on behalf of the Anthony Buck that had his legal representatives been 'fully aware' of this issue at the trial, it would have been explored. To that, the DPP replies that the conditional submission advanced on this issue cannot now ground an application under Section 2(3) or (4) of the Act. It appears to the DPP that the

material relied upon in support of this ground is the custody record of Mr Ahearne. This was disclosed at the trial, and was asserted on this appeal. Whilst there is no information forthcoming on when this record was provided to Anthony Buck, the DPP contends that the fact of the record's existence was known at the time of the trial. Both of these witnesses were extensively cross examined during the course of the trial. There were apparent inconsistencies between the evidence given by both as regards the location and timing of their encounters with Anthony Buck on the night of the murder. Reference was made to these matters by the trial judge during the course of his charge to the jury. Insofar as Anthony Buck puts forward an argument that this matter gives rise to 'consideration of the issues the jurisdiction of a trial judge under PO'C principles', [2006] 3 IR 238, this is rejected by the DPP. In the context of the facts of this case, the DPP contends that credibility and reliability of witnesses and the weight to be attached to the evidence given by them was always going to be a matter for a jury to determine.

5) The fifth matter argued on behalf of Anthony Buck concerns an alleged failure to take forensic samples from Mr Ahearne during his detention at Cahir Garda Station on the 14 July 1996, particularly as Mr Ahearne admitted to visiting the crime scene on two occasions on the morning of the victim's death. Anthony Buck writes: "This is a fact not known to or appreciated by me or my legal representatives at the court of trial." He contends: "This fact first came to my notice post-conviction while thoroughly examining the custody records of Ahearne and Hawkins in furtherance of pursuing leave to appeal in 1998-99. I wanted this matter adduced in the Court of Criminal Appeal in 1999. This didn't happen." He also writes that he sought to have it adduced on the first alleged miscarriage of justice appeal but it was ignored. He describes it as "a fact the significance of which wasn't appreciated by my former legal representatives – as evinced by their failure to adduce same in the first section 2 appeal – yet a fact known to and the significance fully appreciated by me since 1998-1999." To this the Director of Public Prosecutions replies that it is a fact that no forensic samples were taken from Mr Ahearne during the course of his detention at Cahir garda station on 14 July 1996. In any event, the only DNA at or near the scene was that of the victim. While Anthony Buck says the failure to take samples is particularly relevant in relation to Mr Ahearne as he admitted to having visited the scene of the crime on two separate occasions the morning after the victim's death, however, the DPP submits that this fact cannot have any significance in the context of the evidence at the trial. Mr Ahearne only placed himself at the scene the morning after the murder and the only forensic evidence adduced at the trial related to the blood recovered from a rock located in the field which was found to have been that of the deceased victim.

6) Sixthly, Anthony Buck contends that the differences in times in which Mr Hawkins, in different statements, places himself in the grounds of St Michael's hospital calls into question the impartiality and integrity of the Garda investigation. In addition Anthony Buck complains of a failure to include Mr Hawkins's Garda interviews in the book of evidence. He says there were "unauthorised alterations … to the

handwritten witness statements of prosecution witnesses Hawkins and Ahearne". On the timing matter, Anthony Buck says "in the post-conviction period of 1998-99, while thoroughly examining all the handwritten statements, these matters came to my notice. I wanted these matters adduced at the initial appeal in 1999. This didn't happen." He also says that he wanted this raised on the first alleged miscarriage of justice appeal but was effectively ignored by his own legal representatives. To this the Director of Public Prosecutions replies that any contention that Francis Hawkins provided different accounts of his movements on the night of the murder and morning after to gardaí is a fact. While, replies the DPP, Anthony Buck submits that this calls into question the impartiality and integrity of the garda investigation and points to a failure to include Mr. Hawkins's garda interviews in the book of evidence compiled to deal with his prosecution and questions this approach, this is not an issue for the 1993 Act. At trial, the DPP argues, Mr Hawkins was cross-examined vigorously on what was put forward as the piecemeal way in which he told gardaí what he knew about the murder. The assertion that this calls into question the integrity of the garda investigation is a matter of opinion, pleads the DPP, and cannot be considered as new fact for the purposes of this application.

7) The seventh issue raised by Anthony Buck concerns alleged discrepancies in typed memoranda of interview of Mr Ahearne as compared with handwritten notes. He says there were "unauthorised alterations … to the handwritten witness statements of prosecution witnesses Hawkins and Ahearne". On the timing matter, Anthony Buck says "in the post-conviction period of 1998-99, while thoroughly examining all the handwritten statements, these matters came to my notice. I wanted these matters adduced at the initial appeal in 1999. This didn't happen." He also says that he wanted this raised on the first alleged miscarriage of justice appeal but was effectively ignored by his own legal representatives. The Director of Public Prosecutions also notes that Anthony Buck complains that these memoranda did not appear in the book of evidence served on him and further says that alterations were made to the interviews by the gardaí without the consent of Mr Ahearne. As regards what the Anthony Buck says are deliberate alterations made to the Ahearne statements by gardaí, the DPP states that there is no basis for treating this as a credible assertion in the absence of sworn evidence from somebody who was present at the time the notes of the interview were being recorded. For this reason, the DPP submits that the Applicant has not passed the threshold for establishing this to be a 'fact' much less a 'new fact' or 'newly discovered fact' as defined within section 2 of the Act.

8) Anthony Buck claims, as an eighth point, that the jury at Mr Buck's trial received the entire custody record from Cahir Garda Station containing a reference made by him to his mother about Mr Ahearne. This was not, he writes, "appreciated by me or my legal representatives at the court of trial." As to when it was appreciated he writes: "Again, this is a matter that first came to my notice in the post-conviction period while studying the trial transcript and other documents in furtherance of pursuing leave to appeal." He writes that he "wanted this matter adduced at the

original appeal in 1999. This didn't happen." He makes the same contention about the first alleged miscarriage of justice appeal. The Director of Public Prosecutions replies that the jury received the entire custody record of the Applicant arising from his detention at Cahir garda station on 14 and 15 of July 1996 is a fact. It was received by them at their request. It is also a fact, contends the DPP, that within that record there was an entry recording to a threat made by the Applicant to his mother about a significant prosecution witness, Mr Lee Ahearne. On behalf of Anthony Buck, it is submitted that "the jury having a document recording a threat made to a witness, where their credibility is being wholly challenged, where there is no probative evidential value in that document can only have had the potential to influence the jury by the receipt of those matters not adduced in evidence." Firstly, argues the DPP, the document received contained an entry that a threat was made to the Applicant's mother about a prosecution witness, the threat was not made to the witness himself. Mr. Ahearne's evidence was an important part of the prosecution case and the jury had an opportunity to assess the credibility and reliability of his evidence in the context of what and who he said he saw on the night in question and the morning thereafter. Secondly, replies the DPP, there is no explanation, reasonable or otherwise, for not having argued this point before the Court of Criminal Appeal in December 1999. This is a requirement under the provisions of section 2(3) and, in the view of the DPP, has simply not been addressed on this issue. Finally, the DPP submits that on this and any of the issues raised within the material relied upon, a submission of 'potential to influence the jury' falls far short of what is required to render the convictions recorded as unsafe or unsatisfactory much less ground a miscarriage of justice application.

9, 10, 11)Grounds 9, 10 and 11 argued by Anthony Buck deal with various alleged inaccuracies in the trial judge's charge and in the summing up of evidence. He says "these are obviously matters that first came to my attention in the post-trial period." He "wanted these matters adduced in the initial appeal in 1999" and at the first alleged miscarriage of justice appeal but: "This didn't happen." Anthony Buck argued that the significance of these alleged inaccuracies had not been appreciated by his legal team at the time of the trial. The Director of Public Prosecutions replies that while Anthony Buck contends that there were inaccuracies in the trial judge's charge to the jury and in the summing up of evidence, it is unclear how these are put forward as grounds for a miscarriage of justice application. Requisitions were raised with the trial judge on aspects of the evidence he had summarised for the jury. The transcript of the trial which, on Anthony Buck's submission, records what he terms inaccuracies, was available, replies the DPP for the original appeal which was heard at the Court of Criminal Appeal in December 1999, within this transcript is a full recording of the evidence given and the trial judge's summing up. Once again, no explanation, argues the DPP, is advanced for failing to seek to make these points previously. For these reasons, it is submitted that there is no basis, at this remove, to consider these grounds in the context of this application.

12) The next ground, number 12, relates to a contention by Anthony Buck as to an alleged failure of gardaí to speak with various persons named by Adrian Doyle in the course of his detention. Mr Doyle put these persons in the area around the time of Mr Nugent's murder and this interview was only received by his former legal team in 2015. Thus, writes Anthony Buck: "obviously Doyle's memorandum wasn't made available until December 2015 and therefore couldn't possibly have been know to or appreciated by me or my former legal representatives at the court of trial or during subsequent appeals." He says he got the memo as part of 150 pages and did not appreciate this on going into court in December 2015. Anthony Buck also complains of the manner in which his legal team dealt with the evidence of Helen Wall at trial. He points to gaps in the garda investigation arising from a failure to speak to persons named in a first statement of prosecution witness Adrian Doyle as being persons who were in the area around the time of the victim's murder. Anthony Buck contends that Mr Doyle's first statement was only received by his former legal team in 2015. He also levels some criticism at his legal team for the manner in which the evidence of prosecution witness Helen Wall was dealt with at the trial. The point of this is that "people named by Doyle may very well have given statements to investigating gardaí and those statements may contain exculpatory material in respect of myself and/or accounts that totally contradict the accounts of prosecution witnesses Hawkins and Ahearne and/or what the witnesses themselves may have seen, heard or done when the crime was being committed." To this the Director of Public Prosecutions replies in relation to Helen Wall, that it appears as though the concerns expressed by the Anthony Buck on the manner in which her evidence was dealt with at trial seek to bring this ground in the category of a 'newly discovered fact'. The DPP rejects any contention that the Applicant's former legal team failed to appreciate the significance of the evidence of Ms Wall at the trial or during the appeal proceedings. Ms Wall was a witness to something of what had taken place in the grounds of St. Joseph's hospital late on the 8 of July into the early hours of the next day. Clearly, contends the DPP, she was a witness of some importance and she, the Respondent submits, was cross examined as such. Whilst, replies the DPP, Mr Doyle did put other persons in and around the area at the time of the murder, this has to be considered in the context of all of the other evidence most notably that the applicant himself, in his own witness statement, had placed himself around the area at the relevant time. As regards the contention that issues arise from the first statement of Adrian Doyle received in 2015, the DPP argues that since this was available at the time of the first s 2 application, it should not now be considered as part of a second such application.

13) Finally in respect of ground 13, Anthony Buck complained of inconsistency between the statement of Garda Dónal O'Connell and the evidence at trial. Anthony Buck contended that the significance of the additional evidence given by Garda O'Connell concerning attempts to contact a solicitor for the applicant and facilitating a meeting between the applicant and Mr Hawkins was not appreciated by his legal team at the time of the trial or in subsequent appeal proceedings. This arises because of a laconic formal statement just referring to, as opposed to elaborating

on facts recorded in, the custody record. He argues that a failure to have disclosed the telephone records from the Garda station is unfair, because he continues to dispute the bona fides of Gardaí who were seeking a solicitor for him. The Applicant, as understood in the reply of the Director of Public Prosecutions, complains that the statement of evidence of Garda Dónal O'Connell as contained within the book of evidence is at variance with his evidence to the trial insofar as the statement does not refer to two matters on which he gave oral evidence at the trial. He contends, as the DPP sees the matter, that the significance of the additional evidence given by Garda O'Connell concerning attempts to contact a solicitor for the Applicant and facilitating a meeting between the Anthony Buck and Mr Hawkins was not appreciated by his legal team at the time of the trial or in subsequent appeal proceedings. He further argues, as understood by the DPP, that a failure to seek out the telephone records from the garda station causes some unfairness to him as he continues to dispute the *bona fides* of gardaí who were seeking a solicitor for him. All aspects, replies the DPP, of the Anthony Buck's arrest and detention at Cahir garda station on the 14 and 15 July were before the court and jury during this trial. This included the attempts to contact a solicitor and the meeting between the Applicant and Mr. Hawkins. The jurisdiction conferred on a court under section 2, argues the DPP, is confined and limited, for good reason, to issues of fact that had not previously been adduced. The DPP submits that the issues referred to in this ground have already been aired and determined at the Anthony Buck's trial. In relation to the contention that there was a failure to seek out phone records, the Respondent submits that this is not a matter capable of grounding a section 2 application. The efforts made to contact a solicitor were disputed by the Applicant at trial and the issue cannot be revisited at this stage.

Court of Appeal

7. Upon a motion being brought by Anthony Buck for a second time before the Court of Appeal, the Director of Public Prosecutions issued a counter motion, the operative text of which sought:

> an order dismissing the miscarriage of justice application brought by the applicant insofar as it is advanced on the grounds, first amended grounds and second grounds with addendum material filed by the applicant on 24th October 2016, 16th February 2017 and 1st October 2017 on the basis that they do not disclose any new or newly discovered fact within the meaning of s. 2 of the Criminal Procedure Act 1993 as set out in the section and in jurisprudence on the section and that the application insofar as it is advanced on those grounds all of which were known to the applicant and his legal team in December 2015 when this Court dealt with the first miscarriage of justice application is bound to fail and therefore constitutes an abuse of process.

8. By this time, Anthony Buck was unrepresented and had brought the application claiming a miscarriage of justice to the Court of Appeal himself without the benefit of professional advocacy. The judgment of the Court, Hedigan J, Edwards and Mahon JJ concurring, was

that the application was bound to fail; *Buck v DPP* [2018] IECA 59. Despite that being the ruling, the court, nonetheless, set out all of the grounds upon which the application was advanced and analysed why, in respect of each, the application could not succeed. This is the judgment of the court at paragraph 10:

> The applicant is a lay litigant. He has nonetheless prepared his written application with great skill and in considerable detail. Moreover, at the hearing the court was impressed by the manner in which he presented his case. He was as brief as he could be and answered all questions of the court with courtesy, skill and care. In our judgment however, this second application puts forward no material that supports a second s. 2 application. Such as it is, it does not include new or newly-discovered facts as defined or interpreted by the Superior Courts. In our view the application is bound to fail and thus the respondent's motion must succeed. Our reasons for this conclusion are as follows;
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> (i) Dealing with the applicant's first ground that is advanced on the basis of the custody records of Colm Roche and Jonathan Dennehy arising from their arrests on 15th July and their re-arrest on 31st July and in respect of Dennehy, on 7th August. The identity of the lawyers representing the other persons prosecuted as a part of this investigation is a matter of public record. Moreover the custody records in respect of these persons must clearly have been known both to the applicant and to his legal team at the time of his trial and subsequent appeals.
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> (ii) As to the second ground, the applicant himself states that the difference in the evidence given by Ciaran Cleary, Solicitor, in the witness box as opposed to what he had said to the applicant's solicitor was something which was known to him at least in June 2014 when he was preparing his first s. 2 application heard by this Court in December 2015. This ground relating to evidence received by the trial judge in the course of the voir dire is something that would have been known to the applicant's legal advisors at the time of the trial. Even allowing that it were not, on his own case, the material difference in the evidence for which he contends, came to his attention in June 2014 when preparations were being made for the first s. 2 application. As to the complaint about his not understanding or being properly advised as to the significance of his waiving his right to legal professional privilege, this is put forward as an assertion devoid of any evidence such as an affidavit from legal representatives and would not appear to be credible evidence.
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> (iii) As to the third ground relating to the admissibility of statements made by the applicant and the trial judge's finding that no statement of admission was made by him during this period, nothing has been put forward that could be considered as evidence supporting this ground. In this regard, the trial judge conducted a thorough and extensive enquiry into this issue in the course of which he heard evidence of all of the interviews held with the applicant during that time. It is clear that the applicant did indeed

repeatedly deny involvement in the murder of Mr Nugent. Moreover this ruling of the trial judge on admissibility was upheld by the Court of Criminal Appeal and the Supreme Court in the judgments delivered on 6th December 1999 and 17th April 2002 respectively.

(iv) As to the fourth ground concerning the meeting between Mr Hawkins and Mr Ahearn at Cahir Garda Station, the applicant's contention that the significance was not appreciated by his legal team at the time of the trial is highly speculative and the height of improbability. The applicant's experienced legal team was headed by Patrick McEntee, Senior Counsel, who at the time of the trial would have been rightly regarded as the leader of the criminal bar. He could hardly have had more expert legal advice. It is clear from the cross examination of the applicant to which this Court was referred by the respondents herein that the fact of this meeting was well known to the applicant during his trial. Anything arising from that meeting could have been fully explored during the trial.

(v) As to the fifth ground concerning the failure to take forensic samples from Lee Ahearn during his detention on 14th July despite its having been authorised, and that the failure to carry out these forensic tests was not known to him or its significance was unappreciated by him or his legal team at the trial or subsequent appeals, the applicant relies on the custody record of Mr Ahearn. This was available at the time of the trial and thus any issues arising in relation to it could and should have been explored at that time. It may be noted that the significance of the argument in this regard is doubtful bearing in mind that Mr Ahearn only placed himself at the scene of the murder the morning after it and the only forensic evidence adduced at the trial related to blood recovered from a rock located in the field which was found to be the blood of the deceased man, Mr Nugent. The same improbability of the applicant's claim that his legal team did not appreciate the significance of this matter either at trial or on subsequent appeals is very high bearing in mind the level of expertise of the legal advice available to him at the time.

(vi) As to the sixth ground concerning the allegation that the Gardaí altered times at which Mr Hawkins placed himself in the grounds of St Joseph's hospital, his arrest at the time was again well known to the applicant and his legal team at the time of the trial and subsequent appeals. The existence of statements made during his detention would have been well known to the applicant's legal team. Moreover, Mr Hawkins was cross examined vigorously on behalf of the applicant. There is no basis laid to support the allegation that there was a deliberate alteration of the notes of the interview without the consent of the interviewee. There is no evidence from anybody present at the time when these notes were being recorded.

(vii) As to ground seven concerning alleged discrepancies in the typed-up memoranda of interview with Lee Ahearn on 14th July 1996 as compared with the handwritten notes, and the non-appearance of these memoranda

in the book of evidence, the applicant relies upon the typed-up memoranda of interviews with Mr Ahearn and handwritten notes of the same interviews. These are documents which constitute material that would have been known to the applicant at the time of the trial. There is moreover no evidence to back up the assertion that deliberate alterations and omissions exist within these documents.

(viii) As to the eight ground concerning the jury's receiving his entire custody record containing a reference to a comment made by the applicant to his mother, something not adduced during the trial, and that this was not appreciated by his legal team at the trial or at any subsequent appeals. It is again difficult to accept that the significance of this was not appreciated by his expert legal team at the trial or any of the subsequent appeals.

(ix) Concerning the ninth ground in relation to alleged inaccuracies in the trial judge's summing up of the evidence in his charge to the jury, it is again an unstatable proposition that, bearing in mind that the transcript of the trial was available to his legal team for the original appeal heard in December 1999 containing a full record of the evidence given and the judge's charge to the jury, that they would not have been fully aware of any inaccuracies and any significance thereto. This deals with grounds 9, 10 and 11.

(x) In his twelfth ground, the applicant raises concerns about a failure to speak to persons named in the first statement of Adrian Doyle. There is also criticism levelled at his legal team for the manner in which the evidence of Helen Wall was dealt with. On his own case, details of issues arising from the first statement of Adrian Doyle and the issues he alleges arise, having been received in 2015, were available during the time of the first s. 2 application. They cannot now be considered as part of a second such application. As to the evidence of Helen Wall, she was indeed a witness of some importance and, no doubt, it was in recognition of that fact that she was subjected to cross examination by the applicant's counsel. It again is the height of improbability that the applicant's legal team were unable to appreciate the significance of the evidence that she gave.

(xi) In the last of his grounds, concerning a variation between the evidence of Garda Donal O'Connell as contained within the book of evidence and the evidence which he gave at trial, the same improbability concerning the alleged inability of his legal team to appreciate the significance arises here. The witness in question was cross examined extensively on these points and there is no basis for a submission that the significance of his evidence was not appreciated during the trial process

9. Overall, the ruling of the Court of Appeal was that on the basis of any possible analysis of the material put forward and the arguments advanced by Anthony Buck, there was no basis for any potential finding that any novel fact had been identified. At paragraph 11, the court acceded to the application of the Director of Public Prosecutions to dismiss the application:

In the light of the above it is clear that the applicant has in reality produced no new or newly-discovered facts. What he is doing in his application is examining in detail the record of his own trial and drawing conclusions from matters that seem to him to be contained in the custody records and statements and memoranda of interviews of Messrs Roche, Dennehy, Hawkins and Ahearn. Throughout his pleadings and indeed in his submissions to the Court the respondent refers to his belief and to things he thinks can reasonably be inferred. We agree with the respondents that in fact these very expressions support the view that there are no new facts or newly discovered facts available to ground this application. There is merely further argument based on the facts that existed at the time of the trial capable of being discovered by the applicant and his legal team or that were in fact discovered. Insofar as a s.2 application such as herein requires firstly that the Court ascertain if in fact there is a new or newly discovered fact before moving to the second part wherein it assesses the weight and credibility of that evidence, the applicant does not get past the first stage. It is clear there are no new or newly discovered facts. As to the argument that the applicant made concerning the ability of his legal representatives to appreciate the significance of certain matters at his trial, bearing in mind his representation at the time of his trial by the most distinguished criminal senior counsel of the day, this is an all but unstatable proposition. The same thing applies in relation to suggestions that his legal team did not comply with his instructions in the December 2015 application. In the light of all the above, the application does not meet the requirements as set out in DPP v. Willoughby and therefore, in this court's view, must fail. Upon this basis, the respondent's motion to dismiss the application must succeed.

10. The judgment, however, did not consider the basis upon which an application to strike out a claim of miscarriage of justice might succeed. Hence, it is briefly necessary to consider that issue.

The 1993 Act

11. Section 2 of the Criminal Procedure Act 1993 provides:

> (1) A person—
>
> (a) who has been convicted of an offence either—
>
> (i) on indictment, or
>
> (ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (b) of the Criminal Procedure Act, 1967 , and
>
> who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and
>
> (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,

may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

(2) An application under subsection (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.

(3) In subsection (1) (b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.

(4) The reference in subsection (1) (b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

(5) Where—

(a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and

(b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive,

he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection.

12. On this section a number of questions require to be resolved on this appeal. These are:

1. Is the case law, notably The People (DPP) v Willoughby [2005] IECCA 4 and *The People (DPP) v O'Reagan* [2007] 3 IR 805, dealing with an attempt on appeal from a criminal conviction to introduce new evidence or to raise a new point not put forward at the trial, applicable to applications for an alleged miscarriage of justice under s 2 of the 1993 Act?

2. What is the difference between an ordinary appeal from a criminal conviction, a s 2 application alleging a miscarriage of justice and that application and any subsequent application further claiming an appeal on an assertion of a miscarriage of justice?

3. Where one s 2 application is brought and then, later on, another, in that later application what is the status of facts or newly discovered facts or unappreciated

facts both as to time and as to facts known to an advisor or an accused but not brought forward?

4. What test for a s 2 application should be applied, and is that test to do with simply reopening the entire appeal that had previously failed, or is it an appeal concentrated on the alleged new fact as against the background of the facts proven at trial?

5. How is such an appeal to be managed by the Court of Appeal?

6. What status does an application by the Director of Public Prosecutions to strike out a section 2 application on the basis that this is bound to fail have, and how is any such motion to be approached?

7. Finally, it may be asked as to where the argument, assertion and counter argument leaves this appeal?

Adducing new evidence on appeal and a miscarriage of justice appeal

13. At paragraph 7 of the Court of Appeal judgment, Hedigan J gave a brief summary of the applicable principles for dealing with a miscarriage of justice application:

> The principles which the Court should apply in an application under section 2 are set out in *The People (Director of Public Prosecutions) v. Willoughby* [2005] IECCA 4. These principles have been endorsed by the Supreme Court in *The People (Director of Public Prosecutions) v. O'Regan* [2007] 3 IR 805. The principles are as follows: -
>
> "(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.
> (b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.
> (c) It must be evidence which is credible and which might have a material and important influence on the result of the case.
> (d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation."

14. It is clear from the express terms of the definition of 'new fact' provided by the relevant legislation, that the legislation creats its own test. The above test in *Willoughby* is not quite so helpful in that context.. A consideration of s 2(3) shows that a person tried on a criminal charge may decide not to call a witness but there may be "a reasonable explanation for his failure to adduce" that relevant evidence. This may be an instance of duress, whereby calling a witness will lead to the disclosure by the accused of a fact, and

the accused appreciates "the significance of which" but he alleges a case for not adducing that fact. Any excuse proffered must be demonstrated to be reasonable. It may be to do with duress; see *The People (DPP) v Gleeson* [2018] IESC 53. However, there is no limitation in what may be a reasonable excuse in the section, but it is apparent that the excuse for not disclosing a fact relevant to any defence available at trial must be more than that the accused or his legal representatives felt that a particular fact might not make a difference, or be somehow merely embarrassing or that a proposed witness might not stand up well on cross-examination. All of these are ordinary decisions are made in the context of a trial. For a case to be run, to result in a conviction and to be affirmed on appeal indicates that in the context of miscarriage of justice application, the new fact must be shown have arisen in a context where the accused was put under some extraordinary disablement whereby, notwithstanding that the accused knew of its significance, a reasonable explanation then existed for not adducing that evidence.

15. In contrast to s 2 of the 1993 Act, s 33 of the Courts of Justice Act 1924, inserted by s 7 of the Criminal Justice (Miscellaneous Provisions) Act 1997, provides that an appeal is to be "heard and determined" on a "record of the proceedings of the trial and on a transcript thereof verified by the judge before whom the case was tried" and where the judge considers the need, in the era of Digital Audio Recording this seems close to obsolete, any observations of the trial judge with the power by the appellate court "to hear new or additional evidence, and to refer any matter for report by the said judge." The prosecution approach a criminal case on the basis of full disclosure, save for confidential communications, and the requirement to proceed on the basis of a reasonably thorough police examination of the crime with the objective of finding the culprit; *DPP v Special Criminal Court* [1999] 1 IR 60. While, as a matter of principle, the defence do not have to answer a criminal charge, and the accused is not obliged to give evidence in his or her own defence, there is nonetheless an obligation to adduce evidence from which the jury may infer either that the prosecution has not proven its case beyond reasonable doubt or that material exists on the prosecution case demonstrating reasonably a doubt as to the guilt of the accused. In *The People (DPP) v Smyth and Smyth* [2010] 3 IR 688, the Court of Criminal Appeal reiterated that, save for the rare cases where the burden of proving a defence is on the accused, as in the possession of a packet containing drugs where the burden is of proving a reasonable doubt as to knowledge of the contents or suspicion thereof or as in insanity or diminished responsibility where that defence must be demonstrated, the defence have no burden of proof. There remains, however, a requirement on the accused of engaging through adducing evidence, as the Court stated at paragraph 15:

> At a criminal trial, the burden of proof is borne by the prosecution in respect of every issue; except on those issues on which the burden of proof is cast on the accused by statute. This burden is not to be confused with the burden of adducing evidence. Criminal trials would be chaotic were the accused entitled to run any potential defence which might be hypothetically open on the facts of the prosecution case. The accused must engage with the evidence. Where the defence of the accused to a murder charge is that he was defending himself, or that he was

provoked, or that he was acting in an automatous state, he carries the burden of adducing evidence on those issues in order to allow that defence to be argued by defence counsel in a closing submission to the jury. As it was put by Devlin J. in *Hill v. Baxter,* [1958] 1 Q.B. 277 at 284:-

> "It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleep walking or not in a trance or black out."

16. See also *The People (DPP) v Mahon* [2019] IESC 24 at [16] and *Sweeney v Ireland* [2019] IESC 39 at [15]. The entire point of litigation is for each side to engage with the court and to put forward their most convincing and tenable evidence. Similarly, a criminal case is not exclusively about the prosecution case but is a trial of whatever evidence is put forward for the consideration of the jury. While the accused is not obliged to call evidence, there is also an obligation not to hold evidence back so as to later seek to upset a conviction before an appellate court where there was no compelling reason not to adduce that evidence at the court of trial. As to why anyone would want to do that is difficult to imagine, but s 2 refers to the necessity on an application asserting a miscarriage of justice to show "a reasonable explanation" for not calling the evidence at trial. This is akin to the often repeated statutory formula of "without reasonable excuse", which on a search of the Irish Statute Book engages over 200 sections of primary legislation and 300 sections of secondary legislation. What is a reasonable explanation for not calling evidence at trial, or seeking to admit such evidence on appeal, since the assertion of a miscarriage of justice may only occur in the context of a conviction at trial and of an unsuccessful appeal, must be considered in the context of whatever pressure the accused was under whereby "a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him" was not previously adduced. Given what is at stake, the conviction of a person who later asserts a miscarriage of justice and his or her declaration to be a criminal through the verdict of a court or jury, it is clear that what may reasonably explain a failure to adduce a critical fact must engage a very serious situation.

17. In civil proceedings, there must be special grounds, the necessity for which is founded upon the principle of the trial being the event whereby justice is administered and the duty of the parties to any litigation to fully engage with it, before new evidence may be admitted on appeal. These are as set out by Walsh J in *Lynagh v Mackin* [1970] IR 180 and by Finlay CJ in *Murphy v Minister for Defence* [1991] 2 IR 161 at 164. These involve a consideration of whether the evidence was "in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial"; that "it would probably have an important influence on the result of the case, though it need not be decisive"; and that it is "such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

18. The issue as to what test should be applied by an appellate court in determining whether to allow new evidence to be admitted in criminal appeals was set down initially by the

Court of Criminal Appeal in *The People (DPP) v Willoughby* [2005] IECCA 4. The principles there set down, and ostensibly applied by the Court of Appeal in its judgment in this case are:

(a) Given that the public interest requires that a defendant bring forward his entire case at trial, exceptional circumstances must be established before the court should allow further evidence to be called. That onus is particularly heavy in the case of expert testimony, having regard to the availability generally of expertise from multiple sources.(b) The evidence must not have been known at the time of the trial and must be such that it could not reasonably have been known or acquired at the time of the trial.

(c) It must be evidence which is credible and which might have a material and important influence on the result of the case.

(d) The assessment of credibility or materiality must be conducted by reference to the other evidence at the trial and not in isolation.

19. These principles were endorsed by this Court in *The People (DPP) v O'Regan* [2007] 3 IR 805 and at par 71 Kearns J observed:

> Counsel for the accused has, wrongly in the opinion of the court, characterised the "Willoughby principles" as rigid and inflexible preconditions to the making of an application for the admission of new evidence. In the view of the court, the "saver" for exceptional circumstances defeats this submission. While the requirement for "exceptional circumstances" may be seen as setting the bar at a fairly high level, the policy considerations to which reference has already been made demand no less. The entire criminal justice system would be incapable of functioning if every trial was subject to a re-run on new grounds or new evidence in an appellate court. Thus it is entirely reasonable to insist upon a "due diligence" test in respect of evidence which was known to exist, or which could reasonably have been obtained at the time of trial but was not. Equally, it can only be seen as entirely reasonable and proportionate to incorporate in the principles a requirement that the proposed new evidence is credible and, if admitted, that it might have a material or important, though not necessarily decisive, influence on the result on the case. The court is also satisfied that any consideration of materiality must be conducted by reference to all the other evidence at the trial and not be considered in isolation.
>
> The application of these principles should not be seen as displacing or negativing in any way the overarching requirement that justice be seen to be done having regard to all the circumstances and facts of the particular case. In this regard, the court is again satisfied that the "saver" contained in the first of the stated principles is adequate to safeguard that particular requirement. No statement of principle enunciated in *The People (Director of Public Prosecutions) v Willoughby* [2005] IECCA 4, (Unreported, Court of Criminal Appeal, 18th February, 2005) is to be seen or understood as abrogating that requirement.

20. In contrast, s 2 of the 1993 Act contemplates that a fact may be known to the accused and may not be adduced because he or she has a reasonable explanation. Section 2 also contemplates the adducing of evidence of "a new or newly-discovered fact". This does not refer only to a fact known and appreciated as to its significance at the trial, a new fact under ss 2(3), but also, in ss 2(4) to a newly-discovered fact which can be either "a fact discovered by or coming to the notice of the" accused after the trial and conviction and appeal, but also "a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings."

21. As can readily be seen, the test under the 1993 Act can be either, in a first application, as to deliberate holding back and, in all applications, as to knowing a fact but not appreciating why it is of significance in the context of the issues in the trial, while the test for the admission of fresh evidence on appeal to the Court of Appeal focuses on a complete absence of awareness of a fact. The statutory bases are different What the tests surely have in common is the necessity for whatever the new fact is to have a basis in credibility and for such fact to be material in the context of the building blocks of the case. Similarly, in common must be the focus on the fact that is put forward as opposed to a reiteration of an entire appeal that has already been determined. Both tests, as to the admission of fresh evidence on appeal to the Court of Appeal, and as to the nature of a fact which may establish a miscarriage of justice on an application following conviction and appeal, may in logic require alignment. Since the test in *Willoughby* is a test of the common law, some flexibility and common sense in its application may be sufficient to avoid the possible anomaly of evidence being inadmissible for the appeal but also admissible s 2 application.

The accused and the accused's advisers

22. Where a fact is unknown, as in ss 3(4) and 3(5), it is simply that: a fact about which the accused did not have knowledge. That may be contrasted with belief; the conviction that a fact exists outside of knowledge of the fact. For instance, a metaphysical belief as a matter of faith or a belief that aliens have assumed human form and walk on the earth or that humankind never walked on the moon, or, on a practical level, that an acquaintance's mother must by now by calculation of age be dead. Henchy J in *Hanlon v Fleming* [1981] IR 489 helpfully stated that:

> While knowledge and belief frequently coincide or overlap (for example, I both know and believe that this is the Supreme Court), there are many matters which one may believe to be correct without being able to say that one knows them to be correct. For example, I may believe that there is life in outer space, that evolution is the origin of species, that a particular person did a particular act, but I may have to admit that I do not know, or do not know with any substantial degree of certainty, that such beliefs are well founded.

23. What s 2 is thus concerned with is facts, not opinions and not beliefs. But, both ss 2(3) and 2(4) also allow that a fact may be known to the accused but that its significance "was not appreciated by him or his advisers" either during the trial and appeal, which is ss 2(3) where this is a first application alleging a miscarriage of justice, or on a second

application under ss 2(4) "during the hearing of the [first] application and any subsequent re-trial" which "shows that there has been a miscarriage of justice in relation to the conviction".

24. As will be appreciated by a close reading of the affidavit evidence of Anthony Buck, and of his solicitor exhibiting the letter quoted above, there are many instances where it is said that he appreciated that a fact was important in the context of the case, to say it had significance is to say the same thing, and that he had tried to persuade his legal advisors to advance that fact as a point on appeal, explaining to them the importance of the fact, but that he was ignored or overruled. This brings in the issue as to whether the accused is to be treated as separate from his legal advisors, or as to whether the accused and his legal advisors are treated conjunctively in the legislation; and thus as a team. The Director of Public Prosecutions asserts that to split up the consciousness of an accused and that person's advisors, or advocates for the purposes of a case, is to do violence to the intention of the legislature as expressed in s 2 of the 1993 Act; whereas Anthony Buck asserts that an accused may be unfairly deprived of a point through those representing him dismissing the significance of a fact and that the legislation is therefore to be construed disjunctively.

25. Absent extraordinary circumstances, such as disruptive behaviour or a serious communicable disease, the accused is always to be present during a criminal trial. This is because the accused is acting at the trial, but through an advocate, to whom the accused remains entitled to give instructions of fact. Even where an accused must be outside the courtroom, the usual procedure is for him or her to be close by and in touch, possibly by electronic means, with necessary short adjournments allowed to foster continued communication with advisors. An advocate appears on behalf of an accused and not on his or her own behalf. Advocacy is a skill unlikely to be gifted coincidental to a criminal accusation. It requires application and experience to develop. While the 1993 Act refers to the "advisors" of the accused, this term covers both legal advice and the engagement of an advocate to present a case. An advocate speaks on behalf of an accused, but only on the basis of the factual instructions of that client. No lawyer is entitled to advise an accused person that the account that he or she gives as to why the case should be defended could be improved by the invention of facts. Such case as there is to be made as a matter of fact comes solely from the accused, as client. That case is not to be embellished, improved or diminished by advice. In so far as a factual premise is relevant to any prosecution witness, arising out of the instructions of the accused, that should be put to the witness for comment; *McDonagh v Sunday Newspapers* [2017] IESC 59 [38] – [41] and the cases therein cited.

26. An advocate is not to be distinguished from the accused on whose behalf he or she acts. If that were to be the purpose of any provision in legislation, clear wording would be needed. In the context of an appeal centred on an allegation of miscarriage of justice, it is very difficult to see how points might be held back in consequence of a decision of the accused's advisors. Delicate situations can occur whereby it may be troublesome or unsavoury to have to put to witnesses allegations derived from the accused's instructions,

or otherwise to make a point, but consistent with respect for human dignity, an advocate's task is to pursue that course. Situations can arise where there may be a lack of trust between an accused and his advisors. At all times, the accused has the choice of dismissing those representing him or her. The decision rests with the accused as must the responsibility, since advisors and accused in court speak as one.

27. The unity of purpose as between an accused and his advisors was central to the decision of this Court in *Ward v Special Criminal Court* [1999] 1 IR 60; *DPP v Special Criminal Court,* (High Court, unreported, 13 March 1998) Carney J. A dispute arose in a murder trial before the Special Criminal Court as to whether notes taken from confidential informants should be disclosed to the accused. The prosecution sought to uphold the common law position that information could be gathered in confidence and that disclosure could result in threat to life. The Special Criminal Court ordered that the relevant small file be disclosed to counsel and solicitors for the accused but not to the accused himself. This resulted in a judicial review which overturned the decision in the High Court. Carney J held that what was possible was for the court of trial to examine the documents itself to ensure that the claim of privilege was validly made but that it was not possible to divide the unity of client and legal advisor as the order provided. Carney J in the High Court, ruled that disclosure to lawyers was not an available substitute for disclosure to the accused. He concluded as follows:

> I have come to the view that the Special Criminal Court exceeded its jurisdiction in fundamentally altering the established relationship between defence lawyers and their client. It does not seem to be any answer that Mr Ward has consented to his legal team having sight of the statements on the terms that they are not disclosed to him without leave of the court. His present legal team would be discharged at any time and it does not seem to me that there would be a trial in accordance with constitutional justice if any subsequent legal representatives did not enjoy the full lawyer-client relationship with their client, but were under an obligation to keep secrets from him. I accordingly quash by order of certiorari the ruling of the Special Criminal Court dated 21 January, 1998.

28. In the Supreme Court, this ruling was upheld. O'Flaherty J rejected an argument on behalf of the accused Paul Ward that it would be both impractical and unrealistic to expect the trial court to carry the burden of ruling on disclosure where it cannot be privy to instructions from the accused or his representatives, or to the fruits of investigations carried out by the defence, or to circumstances where it has no knowledge of the vast bulk of the other unused material. O'Flaherty J stated:

> The State's response to the appellant's contention is to say that if we were to expand the law to that extent we would destroy the informer privilege. Further, they ask how can there be a distinction between an accused who is represented by lawyers and one who elects to conduct his own defence? Or if, in the course of this trial, the accused elected to dispense with his legal representatives, is he to be shut

out from seeing the same documents as they saw? Undoubtedly, there is force and substance in these points and I, for my part, accept them.

29. As a matter of ordinary construction, s 2 does not draw a distinction as between an accused appealing a conviction or asserting a miscarriage of justice and those who advise him. The wording of the legislation makes it clear that, in s 2(3) a fact may be known to the accused alone but not shared with his or her legal advisors because of "a reasonable explanation". As regards a newly-discovered fact, that is one "coming to the notice of the convicted person" or "discovered by him"; wording replicated for a second alleged miscarriage of justice application in s 2(5). As to a fact the significance of which is not appreciated, both s 2(4) for a first application and s 2(5) for a second application use the formula that a fact may be known but that the "significance of which was not appreciated by [the accused] or his advisers during either the hearing at trial, the appeal or the subsequent application or applications. That clearly preserves the unity of client and advisor that the common law appreciates. The sub-section is not disjunctive but conjunctive. Furthermore, while any decision as to whether or not to waive legal professional privilege is at all times that of the accused, the courts do not soundly act on mere assertion not backed by fact. With identity as between the accused and his or her advisors, ordinarily the court is entitled to have regard to any absence of evidence from such advisers as to their viewpoint. A similar situation prevails where there is an application to withdraw a guilty plea but here the need may be regarded as even more pressing; *ER v DPP* [2019] IESCDET 95. However, it is worth noting that should the situation arise where the accused appreciated the significance of a fact but his lawyers did not agree, there may be scope for an argument of 'ineffective assistance of counsel'. Should such a line of argument be pursued, standard case law would apply. See *People (DPP) v McDonagh* [2001] 3 IR 411.

30. Here, there was no evidence from any advisor of the accused and only assertion by the accused. The practical application of this principle to the case made by Anthony Buck is untenable where he claims that his legal advisors ignored his instructions or that he alone, in distinction to his lawyers, saw the significance of a fact

Several applications and the time factor

31. Expressly, s 2(3) permits that an accused should keep back a fact known to him and of significance to the case. The circumstances whereby that might happen have already been discussed and might involve duress or some other very serious cause. A first application claiming a miscarriage of justice enables the revelation then of that fact after a trial has taken place and after an appeal has unsuccessfully occurred. But, it is to be noted, that this is the only exception in the legislation to the rule that the trial is the place for the deployment of all relevant facts and the pursuit of whatever argument is apposite. In that context, a new fact, as defined by s 2(3) can include "a fact known to" the accused the "significance of which was appreciated" by him or her but where there was as of the trial and the appeal "a reasonable explanation for … failure to adduce evidence of that fact." There is not such exception as regards any further application after the first

application claiming a miscarriage of justice has failed or has resulted in a retrial and conviction.

32. Where this application stands is that there has been a trial, a conviction, an appeal and a first application claiming a miscarriage of justice and that has failed. Thus, the case falls to be considered under s 2(5). That does not permit of any situation where a fact is held back at the first application or any realisation of the significance of a fact is not utilised. Expressly, what can only be involved after there has already been a miscarriage of justice application is a further application based on facts "discovered by" the accused or "coming to his [or her] notice after the hearing of the application and any subsequent retrial" or it can be "a fact the significance of which was not appreciated by him or his advisers during the hearing of the" first such application "and any subsequent retrial".

33. There is a basis, of an exceptional kind, in s 2(3) whereby a fact may be held back from being laid before a court of trial or before an appellate court. There is no such exception as regards any application claiming that there has been a miscarriage of justice. All facts coming known to the accused or coming to his or her attention and all facts the significance of which become apparent to the accused or to his or her advisors must be laid before any court considering a claim that there has been a miscarriage of justice. Where any such application fails, it is stated in terms in s 2(5) that there is a temporal limit on returning to any point before that application for the introduction of facts which were known or the significance of which was appreciated by the accused or his advisors at any subsequent application claiming a miscarriage of justice.

34. Even were the construction of the legislation not to require that interpretation, the social value of the proper administration of justice would not countenance a situation of deliberately not bringing forward facts on what is an exception to an ordinary appeal but is founded on an assertion that there has been a miscarriage of justice. To hold such facts in reserve in order, when the first such application has failed, to bring a second such application is contrary to the principle that cases should be disposed of through each party putting forward their best case and that, exceptional circumstances apart, deploying facts known or known and appreciated later is an affront to the proper disposal of justice.

Applications bound to fail

35. As the chronology discloses, on the issue in September 2014 of an application to the Court of Appeal by Anthony Buck claiming a miscarriage of justice, the Director of Public Prosecutions responded with a motion to strike the proceedings as having no chance of success. In December 2015, the Court of Appeal acceded to that motion. Similarly, on the application now before this Court, issued by Anthony Buck in October 2016, the Director of Public Prosecutions replied with a motion to dismiss the proceedings on the same basis, which was acceded to in the judgment of the Court of Appeal of February 2017. On this appeal, it is not disputed that the courts have the entitlement to order their own procedures and that cases completely without any reasonable prospect of succeeding may be culled without the necessity for a full hearing. In theory that is fine, but in this case the need to analyse the entirety of the claims and counter positions of the parties could hardly be exemplified as an efficient use of court resources.

36. A valid use of the jurisdiction to stop proceedings on an application claiming a miscarriage of justice will mean a valid determination. That has happened in relation to the first such application and claims, though persuasively advanced, on behalf of Anthony Buck that this is the first application under the 1993 Act are incorrect. In reality, a higher standard than that at trial is to be met if a case is to be dismissed as bound to fail without proceeding to hearing.

37. A criminal trial is not the kind of proceeding to which striking out applications are apposite. Nonetheless, as was said in *Magee v MGN* [2003] 11 JIC 1402 at [13], the procedure is "at least in principle capable of being exercised in virtually any type of case." The former procedure under the Criminal Procedure Act 1967 of gathering statements and serving a book of evidence in the District Court was designed to ensure that a judge could strike out a charge which did not disclose any viable case against an accused. The accused, under the system which replaced this, the Criminal Procedure Act 1993, retains the entitlement of the accused to apply to end a case before trial on the same basis. As with the former procedure, it is rarely used, however under the 1967 Act cases were not sent forward for trial without a viable case being disclosed, though the accused might choose not to make that claim. Once convicted, the accused may appeal to the Court of Appeal and it is his or her entitlement to proceed to have that adjudicated. Despite an apparent lack of merit, there is no basis within the relevant statutory framework to prevent an appeal.

38. In principle, the position is different where an utterly unmeritorious application is made by a person whose appeal has failed but claims that there has been a miscarriage of justice. But any application to strike out such an application is subject to the same strictures whereby that jurisdiction is exercised by the courts "sparingly and only in clear cases"; *Barry v Buckley* [1981] IR 306 at 308. As McCarthy J observed in *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 at 428, the courts should be aware that an exercise on paper may in some circumstances be defective since "the trial of the action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages of the proceedings" in a context where the reference was to a case which may "appear" as "clear and established but the trial itself will disclose a different picture." Hence, the courts are reluctant to accede to an application to strike out, preferring an amendment to pleadings in preference to a summary discontinuance of proceedings. Pleadings, nonetheless, may fail to disclose a cause of action, but on a motion to dismiss affidavit evidence may be exchanged; *Gill v Bank of Ireland* [2009] IEHC 210 at [7]. That is what has happened here. Any conflict on such affidavits will be resolved in favour of the party against whom a strike out motion is brought on the basis of no reasonable cause of action being disclosed; *McCourt v Tiernan* [2005] IEHC 268 at [8] and the claim is to be treated as if all assertions were true and at the "high water mark"; *Sunreed Investment Ltd v Earl Gill* [2000] IEHC 124.

39. With these strictures in mind, an application under s 2 of the 1993 Act is capable of being disposed of by way of legal argument as to its validity. Hence, for instance, a ruling of law is not a newly discovered fact, nor is a fresh argument on a fact and nor is an opinion on

fact a newly discovered fact, unless there has been an advance of scientific knowledge that in reality changes the nature of a fact; *The People (DPP) v Kelly* [2008] 3 IR 697 at 710 and see *Walsh on Criminal Procedure* (2nd edition, 2016) 26-444 – 26-449. Similarly, where the same fact has been brought forward and has been analysed on a prior occasion or has been disposed of in the same form on an appeal, it cannot be said that there is a new fact and hence an application asserting a miscarriage of justice is bound to fail.

Miscarriage of justice

40. Applications under s 2 of the 1993 Act are premised on the existence of a miscarriage of justice. That term is not defined in the legislation. In ordinary parlance it may be thought to encompass a situation where an innocent man or woman is convicted. The procedure under s 2 is to be contrasted with that under s 9(1) which provides:

> (1) Where a person has been convicted of an offence and either—
>
> (a)
>
> (i) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and
>
> (ii) the Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice,
>
> or
>
> (b)(i) he has been pardoned as a result of a petition under section 7, and
>
> (ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice.

41. The appellate court is exercising all of the powers of an ordinary criminal appeal. Hence, the legislation contemplates that even though the accused may demonstrate that a conviction is unsafe or unsatisfactory, there may be sufficient evidence whereby a retrial may be justified. A finding of a miscarriage of justice under s 2 on the basis of a new fact does not amount to a finding that the person tried and convicted was innocent. That requires an additional level of proof. Hence the test for obtaining a certificate from the court under s 9 differs from that under s 2. The s 9 procedure requires more than the quashing of a conviction or, on a retrial ordered under a miscarriage of justice application, the acquittal of the accused. A finding is required that a miscarriage of justice has occurred. This is a civil procedure where factual innocence is to be established or a finding is made that the prosecution should never have been brought because there was never any credible evidence implicating the accused; the relevant cases are set out in *Walsh on Criminal Procedure* 26-475 – 26-471 and are not in contest on this appeal.

42. In the submissions on behalf of Anthony Buck, it is emphasised that since the appellate court exercises all the ordinary powers formerly vested in the Court of Criminal Appeal, all that is necessary is that a point on which a jury might have decided a case differently need only be demonstrated. While in *The People (DPP) v Meleady* [1995] 2 IR 517 at 541, Keane J stated that it is unnecessary to demonstrate in an application under s 2 of

the 1993 Act that a miscarriage of justice has occurred, nonetheless the point raised must be substantial and one which undermines in a significant way the prosecution case as accepted by the jury; see *The People (DPP) v Pringle (No 2)* [1997] 2 IR 225. This does not differ from the statement of Keane J in the *Meleady* case that the purpose of the legislation was not simply to provide redress where an accused the deployment of a new fact "conclusively demonstrated the innocence of the accused". The legislation also enables redress "hitherto not available, in cases where facts came to light for the first time after the appeal to this Court which showed that there might have been a miscarriage of justice." See also *The People (DPP) v Short (No 2)* [2002] 2 IR 696. That can arise where there has been a material non-disclosure of material relevant to a central issue in the prosecution case or which tends to demonstrate an actual defence for the accused; *The People (DPP) v Conmey* [2010] IECCA 105.

43. What is required is, as stated in *The People (DPP) v Gannon* [1997] 1 IR 40 at 48, an "objective evaluation of the newly-discovered fact with a view to determining in the light of it, whether the applicant's conviction was unsafe and unsatisfactory. The Court cannot have regard solely to the course taken by the defence at the trial." This is not to regard the uncovering of a fact that is of tangential relevance as fulfilling that test. Section 2(1)(a) makes it clear in all of the ways in which such an application is made that "a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction". As stated in the *Gannon* case, this requires the accused to bring forward credible evidence of a fact that shows that the conviction should not have occurred and that the jury in considering that fact might reasonably, as opposed to merely speculatively, not proceeded to conviction in the light of what that fact demonstrates. As was stated by Lynch J in the *Pringle (No 2)* case at 240, this requires the demonstration of a "defect or error in the trial such as would render the convictions unsafe and unsatisfactory".

44. What is not contemplated in the legislation is a complete rerunning of the original appeal which upheld the conviction of the accused. Rather, the focus of any such application is on the new fact or newly-discovered fact and the relationship of that to the central building blocks of the prosecution case, or of the defence case if one has been presented in evidence, and how that "shows that there has been a miscarriage of justice in relation to the conviction"; to use the wording of s 2(1)(a). While the focus of both civil and criminal trials is the identification and analysis of facts in issue, many peripheral facts are presented by way of background or as an aid to the demonstration of the narrative. These will rightly be seen at trial as insignificant but if left out of disclosure to the accused in the pre-trial process and later discovered may at first sight assume a larger status than reality demands.

This application

45. The above analysis has considered: the relationship of the test for the introduction of a new fact or a new argument on appeal and the correct test under s 2 of the 1993 Act; the difference of such an application and an appeal from conviction; how an initial and a subsequent application under s 2 differ and the temporal limitation as to facts put forward

and the appreciation of such facts by the accused or his or her advisors; what such an application should focus on and how it is to be managed; and the utility of an application to strike out such an application as bound to fail. There finally remains the question of the disposal of this appeal.

46. Here, reference should be made to paragraph 3 setting out the chronology of events and to paragraph 6 detailing the arguments of the accused, his statements as to when matters were realised, and the counter arguments of the Director of Public Prosecutions.

47. The conflict of interest point at ground 1 is insubstantial. There can be no suggestion of any factual basis for suggesting that simply because a solicitor acts for several clients that he will not pursue the interests of each to the best of professional ability. In reality, there is not conflict here. As regards ground 2, this was sought by the accused to be raised in a prior application and his awareness, supposing the point to have validity which is not the case, is to be identified with his advisors. As regards ground 3 and what is claimed to be an evidential point, the accused states he was aware of it and that it was a point the significance of which was "fully appreciated by me since 1998-1999." As regards the meeting or confrontation, the accused again says he had "sought for the matter to be dealt with at the Court of Criminal Appeal", as far back as his first appeal. Time has thus run. In point 5, there is a claim of failure to pursue DNA evidence, but this is again a point appreciated at earlier applications; supposing the point to have substance, which it does not. As regards corrections or alterations to witness statements, point 6 and 7, it is correct that central witnesses at first gave a different story, but this was canvassed at trial. Further, as the accused says it was "a fact known to and the significance fully appreciated by me since 1998-99." As regards the custody record of Lee Ahearne and the recording of a threat by the accused, this was also, on the accused's account "a fact known to and the significance [of which was] fully appreciated by me since 1998-99. It is among a cluster of points where the accused blames his legal advisors. Yet, there is an identity of function of the accused and his advisors under the 1993 Act. Grounds 9, 10 and 11 concern alleged mistakes by Quirke J as trial judge. Of this the accused says: "For the purposes of the current section 2 appeal, the facts remain facts the significance of which wasn't fully appreciated by my former legal representatives – yet a fact known to and the significance fully appreciated by me since 1998-99." Ground 12 and the memo of a witness, here it is claimed that from this other witnesses could have been discovered. The memo was furnished before the first application. The point about a witness possibly leading to other witnesses is insubstantial unless it could be demonstrated to have a practical effect on the trial. Further, the accused says he had a view of the point but did not bring it to the attention of his solicitor "as I knew he would do absolutely nothing to adduce the matter in the first section 2 appeal." Finally, a Garda gave a laconic statement but referred to the custody record but nothing that had happened in his actual witness notice. That is not a substantial point and in addition was, on the accused's account, canvassed at trial and "fully appreciated by me since 1998-99."

Result

48. Consequently, in the result, the application should be struck out as having no reasonable prospect of succeeding.