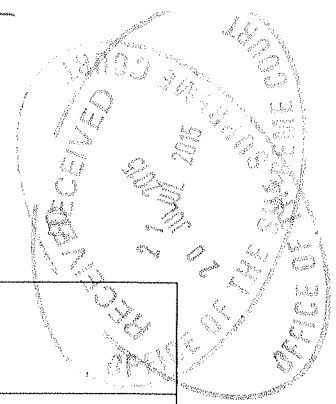


4/1/15



**SUPREME COURT**

**Application for Leave and Notice of Appeal**

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from

<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

Director of Public Prosecutions	v	Joe O'Reilly
CCA CP 250/2012		
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Joe O'Reilly	
Solicitors for Applicant(s)/Appellant(s)	Frank Buttimer and Company	
Name of Respondent(s)	Director of Public Prosecutions	
Respondent's solicitors	Chief Prosecution Solicitor	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
Yes	<input checked="" type="checkbox"/>	No
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	Yes	<input checked="" type="checkbox"/>	No
If Yes, please explain why			

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Ryan, Edwards, Birmingham JJ.
Date of order/ Judgment	11 <sup>th</sup> May 2015

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Joseph O'Reilly
-----------------------	-----------------

Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input checked="" type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	Frank Buttimer and Company		
Email	frank@buttimersols.ie, clodagh@buttimersols.ie		
Address	19 Washington Street, Cork	Telephone no.	021 427330
		Document Exchange no.	
Postcode	N/A	Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Patrick McGrath S.C.		
Email	pmegrathsc@gmail.com		
Address		Telephone no.	0868565873
		Document Exchange no.	816570
Postcode			

Counsel			
<b>Name</b>	Ronan Munro		
<b>Email</b>	rmunro@lawlibrary.ie		
<b>Address</b>	Law Library, 145-151	<b>Telephone no.</b>	0872364000
	Church St, Dublin 7.	<b>Document Exchange no.</b>	816590
<b>Postcode</b>			

If the Applicant / Appellant is not legally represented please complete the following

<b>Current postal address</b>	N/A
<b>e-mail address</b>	
<b>Telephone no.</b>	

<b>How would you prefer us to communicate with you?</b>			
<input type="checkbox"/>	<b>Document Exchange</b>	<input checked="" type="checkbox"/>	<b>E-mail</b>
<input type="checkbox"/>	<b>Post</b>	<input type="checkbox"/>	<b>Other (please specify)</b>

### 3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

<b>Respondent's full name</b>	Director of Public Prosecutions
-------------------------------	---------------------------------

**Original status**

<input type="checkbox"/>	<b>Plaintiff</b>
<input type="checkbox"/>	<b>Applicant</b>
<input checked="" type="checkbox"/>	<b>Prosecutor</b>
<input type="checkbox"/>	<b>Petitioner</b>

<input type="checkbox"/>	<b>Defendant</b>
<input checked="" type="checkbox"/>	<b>Respondent</b>
<input type="checkbox"/>	<b>Notice Party</b>
<input type="checkbox"/>	

<b>Solicitor</b>			
<b>Name of firm</b>	Chief Prosecution Solicitor		
<b>Email</b>			
<b>Address</b>	90 North King Street	<b>Telephone no.</b>	01 8588500
	Dublin 7	<b>Document Exchange</b>	

		<b>no.</b>	
		<b>Ref.</b>	
<b>Postcode</b>	<b>Dublin 7</b>		

**How would you prefer us to communicate with you?**

<input type="checkbox"/>	<b>Document Exchange</b>	<input checked="" type="checkbox"/>	<b>E-mail</b>
<input type="checkbox"/>	<b>Post</b>	<input type="checkbox"/>	<b>Other (please specify)</b>

<b>Counsel</b>			
<b>Name</b>	<b>Brendan Grehan S.C.</b>		
<b>Email</b>	<b>brendan.grehan@lawlibrary.ie</b>		
<b>Address</b>	<b>Law Library, Criminal Courts of Justice, Parkgate Street, Dublin 8</b>	<b>Telephone no.</b>	<b>0872605911</b>
		<b>Document Exchange e no.</b>	<b>301023</b>
<b>Postcode</b>	<b>Dublin 8</b>		

<b>Counsel</b>			
<b>Name</b>	<b>Grainne O'Neill</b>		
<b>Email</b>	<b>goneill@lawlibrary.ie</b>		
<b>Address</b>	<b>Law Library, Four Courts, Dublin 7.</b>	<b>Telephone no.</b>	<b>8175680 and 0872407900</b>
		<b>Document Exchange e no.</b>	<b>814210</b>
<b>Postcode</b>	<b>Dublin 7</b>		

**If the Respondent is not legally represented please complete the following**

<b>Current postal address</b>	<b>N/A</b>
<b>e-mail address</b>	
<b>Telephone no.</b>	

**How would you prefer us to communicate with you?**

<input type="checkbox"/>	<b>Document Exchange</b>	<input checked="" type="checkbox"/>	<b>E-mail</b>
<input type="checkbox"/>	<b>Post</b>	<input type="checkbox"/>	<b>Other (please specify)</b>

4. Information about the decision that it is sought to appeal

**Please set out below:**

**Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned**

- 1. The Court of Appeal dismissed the application of the Applicant pursuant to section 2 of the Act of 1993 (miscarriage of justice application) as being an abuse of process or bound to fail.**
- 2. The entire of this decision is appealed. The Applicant wishes to proceed to full hearing of his application and have the central issues determined. This includes, inter alia, the extent to which a trial judge is bound to inquire into jury irregularity and the procedures attaching thereto.**

**(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)**

The Applicant was convicted of the Murder of his wife, Rachel O'Reilly on the 21<sup>st</sup> July, 2006, on foot of Bill No CC90/2006 after Trial lasting 21 days before Mr Justice White and a Jury. There were 11 Jurors at the Trial, a Juror having being discharged on the first day of

the Trial, due to having made prejudicial comments.

He was convicted of murder by unanimous decision of the remaining members of the Jury and sentenced to life imprisonment.

On day 4 of the trial, the Book of Evidence (or perhaps more likely a portion thereof) was found by the jury in the jury room. The jury drew it to the attention of the Court Registrar, who in turn informed the presiding judge. The presiding judge then informed prosecution and defence counsel of his intended approach to the issue.

The Applicant was informed as to what had occurred by his legal team and that it was explained to him that the judge intended to inquire of the jury whether the document had been read and, if it had been read by any of them, the jury would have to be discharged. Even if the document had not been read, there was the option to seek a discharge. The tactical and strategic considerations were discussed with the applicant, though it was made clear that ultimately the decision as to how to proceed was his.

It was then considered by the defence, that proceeding, particularly with the judge then presiding, presented tactical advantages to the Applicant (which are set out in the judgment at paragraphs 6-8 of the judgment). At paragraph 9 of the Court of Appeal Judgment that Court quotes from the transcript of the trial.

Essentially, the learned trial judge conducted an inquiry of the jury via the foreman. He asked if any of them had read any statements in the Book of Evidence or portion thereof, and the foreman replied, (without consulting with his fellow jurors) “not to my knowledge, no”.

The matter was not raised again during the trial, nor on appeal in the Court of Criminal Appeal during his appeal against conviction. The Applicant was advised ( at a consultation after the jury trial but prior to the appeal) effectively, that he could not revisit a tactical decision taken at trial, when he raised the issue of the Book of Evidence with his legal advisors. A memo of that consultation is set out at paragraph 10 of the judgment.

**(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute**

It appears to be the uncontested evidence of the Applicant (the Court recited the below

submissions of the Applicant at paragraph 13 to 15 inclusive of the judgment, but did not expressly rule if it accepted them) that:

1. All that the inquiry established was that to the knowledge of the foreman of the jury, none of the jurors had read the Book of Evidence.
2. The inquiry did not establish precisely what documents were found in the jury room, was it the full book of evidence or just a portion; if so, what portion? To whom did the document belong?
3. The foreman when questioned, responded immediately without consulting his fellow jurors. The jurors were not invited to withdraw to their room.
4. The inquiry was over in a matter of minutes and the issue was dealt with in a summary manner.

**The relevant orders and findings made in the High Court and/or in the Court of Appeal**

**The Court of Appeal dismissed the application of the Applicant at the interlocutory stage as being an abuse of process.**

The Court of Appeal found that “it absolutely clear that a conscious and deliberate decision was taken for tactical and strategic reasons to proceed with the trial, Having made that election,[the Applicant] cannot be permitted to resile from it. His attempt to do so, does indeed amount to an abuse of process and certainly it is an attempt that is bound to fail. In these circumstances the court will accede to the application by the DPP”.

*In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—*

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

It is in the **interests of justice** that there be an appeal to the Supreme Court as

1. The learned Court of Appeal erred in law in that they failed to carry out any objective evaluation of whether the conviction was unsafe and unsatisfactory. Instead the Court of Appeal erroneously and exclusively focused on the defence tactics at the jury trial.
2. The central issue, namely the duties of a trial judge in a criminal trial to inquire into jury irregularities, and also, perhaps of more practical significance, the procedures to be followed, was not considered or determined by the Court of Appeal. The Appeal was dismissed on an estoppel basis, effectively.

**It is a matter of general public importance because**

1. There is little or no guidance in case law as to the procedures to be followed when a jury irregularity is suspected. It remains unclear as to what the duties of a judge are in such circumstances, the scope of any inquiry of the jury, and whether there are universal practical procedures which a judge should follow. This important issue clearly transcends the facts of the case.
2. The principle that tactical decisions cannot normally be revisited (along the lines of *DPP v Cronin*<sup>1</sup>) was applied by the Court of Appeal effectively, though it was not cited in their judgment. However, even that principle is limited in scope in that it can never be used to ignore a fundamental injustice. The Court of Appeal did not even consider, or address, in its judgment, whether a fundamental injustice might be caused if the relevant tactical decision were not revisited, and the safety of

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<sup>1</sup> 2006 4 IR 329 The Supreme Court said, while discouraging appeals based on a trawl of a transcript, that there must be a relationship between appeals and the reality of the trial. It affirmed however, that there was an obligation to intervene if a fundamental injustice had occurred. It did emphasise that only in circumstances where the court was of the view that, due to some error or oversight of substance, a fundamental injustice had occurred should the court allow a point not raised at trial be argued on appeal. In addition, an explanation must be furnished as to why it was not raised at trial.



the conviction objectively assessed. It is submitted that there is clearly confusion being created by the dearth of jurisprudence (in the specific context of jury irregularity) about the significance of tactical decisions taken at trial. Tactical decisions taken in the course of a trial can only be a relevant rather than a conclusive factor.

3. Without prejudice to the foregoing, The primary issue arising in the proposed appeal, might be summarized in the form of 2 certified question as follows:
  - (a) Upon a jury irregularity arising, does the informed assent of prosecution and defence to proceed with the potentially tainted jury, conclusively determine the issue of whether a discharge is warranted?
  
  - (b) “Upon a jury irregularity arising in the form of inadmissible documents being left in the jury room, before the jury have retired to deliberate, is the presiding judge bound to consider whether he/she should individually interview the jurors, either as to the extent, if any, of contamination, or their respective abilities to proceed in accordance with their oaths, notwithstanding the irregularity, or both?”

**Please list (as 1, 2, 3, etc) concisely:**

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

The learned trial judges in the Court of Appeal erred in law or in fact or in a mixed question of fact and or law in that they:

1. Acceding to the application of the DPP that the Applicants application pursuant to section 2 of the Act of 1993 could properly be dismissed as an abuse of process at an interlocutory hearing, without proceeding to a full hearing of the appeal and consideration of the issues of principle involved. The central legal question of this Section 2 application (namely the duties of a trial judge when the issue of jury tampering or potential jury tampering arises) thereby escaped consideration by the Court of Appeal.

Relevant legal provisions: In *Meehan v DPP[2014] IECCA 10*, the Court of Criminal Appeal refused the DPPs application to dismiss the Applicant's application at the interlocutory stage. The Court stated, setting its face against dealing with the claim of abuse of process at the interlocutory stage: *"It is difficult to see how directing that the issues referred to by the DPP should be treated as some kind of "preliminary issues" at this stage would assist in the effective disposal of this application when in substance it would involve a full hearing on the merits of the applicant's application"*.

2. Failed to properly apply the law in that the learned Court had regard solely to the course taken by the Defence at trial and failed to carry out an objective evaluation of the new or newly discovered fact with a view to determining if the integrity of the trial process was compromised by the jury irregularity and the conviction thereby rendered unsafe or unsatisfactory.

Relevant legal provisions : The Court of Criminal Appeal in *McKevitt*<sup>2</sup> cited the Supreme Court authority of *The People (Director of Public Prosecution v Gannon*<sup>3</sup>. The Court of Criminal Appeal said as follows, at paragraph 32:

*“Gannon is an important authority also in that it establishes that what the Court of Criminal Appeal is required to do is carry out an **objective evaluation the newly discovered fact** with a view to determining, in the light of it whether the Applicant’s conviction was unsafe and unsatisfactory. **The Supreme Court in Gannon held that this Court cannot have regard solely to the course taken by the Defence at trial. ....**”*

3. Failed to rule at all on the central issue in the case which was the submission of the Applicant that the relevant fact the importance of which was not appreciated was the *inquiry* (and by extension its adequacy) into jury tampering carried out by the trial judge in the Central Criminal Court. Instead the Court ruled on whether the Applicant had appreciated the significance of the fact of the Book of Evidence being found in the jury room; this was not the central submission. See submission 1 (page 15, paragraph 54 of written submissions of the Applicant in the Court of Appeal). It is an error of law and a breach of constitutional fair procedures not to rule on the central argument, or to approach the ruling as if a different argument had been made.

Relevant legal provisions: It is submitted the above ground of appeal, if its factual basis is accepted, is axiomatic.

4. Failed, inter alia, by not considering the issue at all, to find that the inquiry conducted by the learned trial judge in the Central Criminal Court (White J.) was inadequate and failed to consider if, given the exposure of the jury to inadmissible material there was a presumption of prejudice and that this ought to have informed the manner in which the Trial Judge conducted his inquiry.

Relevant legal provisions: **US v Bradshaw 281 F.3d 278, 291 (1st Cir. 2002)**. (see paragraph 44 of written submissions in the Court of Appeal). This case sets out in

<sup>2</sup> [2013] IECCA 22

<sup>3</sup> [1997] IR 40

detail, a procedure which has found broad consensus in the United States of America.

**Remmer v United States** (347 US 227 1954) established that a hearing was necessary to investigate allegations of jury tampering and taint. It also established a presumption of prejudice.

For more detailed discussion of the above cases, see paragraphs 40 to 53 of the written submissions of the Applicant in the Court of Appeal.

5. Failed to consider, whether there was a judicial duty to consider discharging the jury, notwithstanding the assent of prosecution and defence to continuing with the tainted jury.

Relevant Legal provisions: The House of Lords<sup>4</sup> in **R v Smith and Mercieca** quashed a conviction where jury irregularities (internal frictions as between jury members, jury members not complying with directions) had not been properly cured by direction of the trial judge. It found that assent of the defence to proceed with the jury did not relieve the court of its duty to consider a discharge.

6. Failed to assess whether the conviction was unsafe and unsatisfactory and instead focused exclusively on the tactical decisions made at trial and thereby failed to apply the law as promulgated by the Supreme Court.

Relevant legal principles : As above but in particular, **DPP v Gannon, 1997 IR 40**.

**Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:**

7. Other relevant information

**Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608**

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<sup>4</sup> [2005] UKHL 12 on appeal from: [2004] EWCA Crim 1474

**References to Law Report in which any relevant judgment is reported**

See Sections 5 and 6 above for relevant references.

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

**An order setting aside the dismissal of the application of the Applicant and remitting the matter to the Court of Appeal for full hearing.**

What order are you seeking if successful?

Order being appealed:      set aside       vary/substitute

Original order:              set aside               restore               vary/substitute

**If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution**

N/A

**If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention**

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Client is in custody

Signed:

*Frank Buttimer + Co.*

(Solicitor for) the applicant/appellant

**Frank Buttimer and Company**

Please submit your completed form to:

**The Office of the Registrar of the Supreme Court**

**The Four Courts**

**Inns Quay**

**Dublin**

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.