

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT**Application for Leave and Notice of Appeal****For Office use**

Supreme Court record number of this appeal	<input checked="" type="checkbox"/>	60/2015
Subject matter for indexing	<input type="checkbox"/>	

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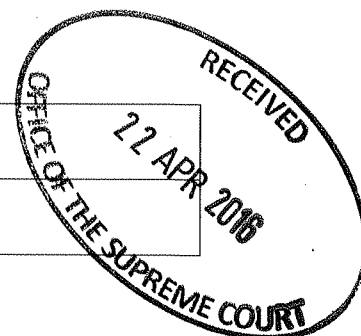
[Title and record number as per the High Court proceedings]

The People (At the Suit of the DPP)	V	Gary Campion
High Court Record Nr	Court of Appeal Record Nr	256/07
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Gary Campion	
Solicitors for Applicant(s)/Appellant(s)	Madden and Finucane	
Name of Respondent(s)	The Director of Public Prosecution	
Respondent's solicitors	The office of the DPP	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/>	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?	<input type="checkbox"/>	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 P., Birmingham J. Sheehan J.
Date of order/Judgment	31 st July 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	
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Original status X	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
	<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	Madden and Finucane		
Email	patrickmadden@madden-finucane.com		
Address	88 Castle Street Belfast, Co. Antrim	Telephone no.	048 90 238007
		Document Exchange no.	434 NR
Postcode	BT1 1HE	Ref.	

How would you prefer us to communicate with you?

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

Counsel			
Name	Martin O'Rourke QC SC		
Email	martin.orourke@barlibrary.com		
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		Document Exchange no.	
Postcode			

Counsel			
Name	Patrick O'Neill		
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Address	Distillery Building, Church Street, Dublin 7	Telephone no.	0851212375
		Document Exchange no.	DX818171
Postcode			

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

Current postal address	
e-mail address	
Telephone no.	

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

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

Respondent's full name	The Director of Public Prosecutions
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Original status

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

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

Solicitor			
Name of firm	The office of the Director of Public Prosecutions		
Email			
Address	Infirmary Road, Dublin 7	Telephone no.	
		Document Exchange no.	
		Ref.	
Postcode			

How would you prefer us to communicate with you?

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

Counsel			
Name	Dennis Vaughan Buckley SC		
Email			
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		Document Exchange no.	
		Postcode	

Counsel			
Name	Shane Costello SC		
Email			
Address	5 Arran Square, Smithfield,	Telephone no.	

	Dublin 7	Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

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

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

(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)

(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

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

The Appeal is sought with respect to the following Specific parts of the judgment of the Court of Appeal:

1. Wherein it was held at paragraph 32 that:

“The scope for expert professional evidence on whether a witness is reliable or indeed capable of telling the truth will be very limited. The decision making process will normally not be enhanced by the prospect of professional witnesses intervening and offering conflicting and competing opinions on a matter that is so quintessentially one for a jury. The situation may well be different in cases involving disputed

confessions...”

Insofar as the judgment finds that such expert medical evidence is, or may be inadmissible, or that its admissibility is confined to confession cases, it is inconsistent with well established authorities; see *Toohy v Metropolitan Police Commissioner [House of Lords] [1965] A.C. 505* (see in particular @ page 608 B-G); *DPP v Kehoe [1992] ILRM 481*; *R v O'Brien [2000] EWCA Crim 3*, and in particular the decision of the Court of Appeal in England and Wales in *Pinfold and MacKenney v R [2004] 2 Cr. App. R. 5*

2. Having assessed the principal prosecution witness, Mr Cahill, as “highly unusual...in a number of ways” and having set out some of those matters at paragraphs 15-20 of its judgment, the Court of Appeal erred in failing to address adequately or to adjudicate upon the central submission of whether it was appropriate in the particular circumstances of the case for the defence to request a psychiatric/psychological examination of Mr Cahill. [See *Pinfold* below]
3. On the basis that the defence request for a psychiatric/psychological examination and assessment of Mr Cahill was appropriate the Court of Appeal (and the learned Trial Judge) erred in failing to assess whether the refusal of the witness to comply with this request rendered the trial unfair.
4. Wherein it was held that the Trial Judge had correctly dealt with the issue of obtaining and the admissibility of medical evidence, when in actual fact the Trial Judge decided upon the issue *per incuriam Pinfold and MacKenney v R [2004] 2 Cr. App. R. 5* and had expressly relied upon the decision of the Court of Appeal in England and Wales in *R v Mackenny and Pinfold (1983) 76 Cr. App. R. 271* which was reversed in the subsequent decision in *Pinfold (2004)*.
5. Wherein the Court found that the learned Trial Judge was correct to refuse a *Galbraith* direction in circumstances where, it is submitted, that the evidence of the main prosecution witness was so inherently unreliable that it was incumbent upon the Trial Judge to withdraw the case from the jury. The Court of Appeal has an important supervisory jurisdiction in this regard and that court was wrong to rely upon the decision in *DPP v Madden [1977] I.R. 336* (setting out the dicta of Holmes LJ in *S.S. Girloch [1899] 2 I.R. 1*) to support the decision of the learned Trial Judge. The unsatisfactory nature of the evidence of the witness in this case is self evident and does not depend upon a visual assessment of him. The bizarre content of his evidence can be assessed sufficiently from the transcript of the proceedings. The learned Trial Judge’s ruling was so clearly against the weight of testimony as to amount to a manifest defeat of justice.
6. Wherein the Court relied on the identification of the Applicant from his eyebrows in circumstances where the Court of Criminal Appeal (in a separate motion to address the lack of cross examination on behalf of the applicant at trial on the identification of the applicant by reference to his prominent eyebrow) refused to allow a ground of appeal to be added on the basis of the State’s submission that the witness’s reference to prominent eyebrows did not amount to identification of the applicant. Furthermore, the applicant was restrained by the Court of Appeal from making submissions regarding the identification of the applicant by reference to his eyebrows on the basis that there was no identification of the applicant.

In these circumstances the Court of Appeal’s reliance upon the identification of the applicant from the description of his eyebrows is a material error of law. This error is compounded by the learned Trial Judge’s failure to give any direction to the jury regarding such identification evidence.

(4B) Relevant Facts not considered to be in dispute

On the 15th October 2007 applicant's trial for the murder of Brian Fitzgerald on the 29th November 2002 commenced before Mr Justice Charlton at the Central Criminal Court sitting at Cloverhill Courthouse. The Applicant had three co-accused. The Applicant was found guilty by way of a unanimous verdict on the 15th November 2007

The main prosecution witness was Mr. James Martin Cahill. Mr. Cahill had pleaded guilty to being the gunman responsible for the murder of Mr. Fitzgerald and had given various statements to the Gardai regarding that crime and other crimes. Those statements were collated to form one statement in the book of evidence.

Mr Cahill was an unusual witness given his obvious depravity of thought and also his mental state *vis-à-vis* having visions and testifying that voices inside his head and the television were talking to him as regards events leading up to and including the murder of Mr Fitzgerald.

Mr Cahill underwent counselling from a clinical psychologist during his committal to the Midlands Prison. Some of Mr Cahill's medical notes were disclosed to the defence at trial. Enough information was gleaned from them by Dr. Bownes, Consultant Forensic Psychiatrist, retained on behalf of the defence, that he recommended that a psychiatric examination and opinion should be sought regarding Mr Cahill's fitness to give evidence in Court.

The defence was prohibited from introducing any evidence from Dr. Bownes on behalf of the applicant. The Trial Judge ruled that in the absence of Mr Cahill's consent he could not order a psychiatric assessment of the witness.

The information imparted to Mr Cahill through the voices he heard involved various alleged participants in the murder of Mr. Fitzgerald and their respective roles in the organisation and commission of that crime. Mr Cahill heard voices in his head when he was providing Gardai with his statement.

Various roles were attributed to the four accused men by Mr Cahill. The applicant's role according to the evidence of Mr. Cahill was that of accomplice at the scene of the murder.

The applicant applied to the learned trial Judge for a direction, based on the second limb of *Galbraith*, at the close of the prosecution case.

The application was refused by the learned Trial Judge. The Court of Appeal upheld the decision of the learned Trial Judge citing *DPP v Madden* [1977] I.R. 336 as the basis for its decision.

Evidence was given at the applicant's trial by the deceased man's wife, Mrs Alice Fitzgerald, who witnessed his murder from the sitting room window of their home.

Mrs Fitzgerald provided details of what she saw to the Gardai on several occasions. There were discrepancies in the accounts provided by her.

At trial she was not cross-examined on behalf of the applicant in relation to the inconsistencies in her descriptions.

A motion was brought on behalf of the applicant to the Court of Criminal Appeal seeking the Court's leave to permit the applicant to argue a further ground of appeal that identification evidence given by Mrs Fitzgerald had not been challenged in the

course of cross examination. That motion was unsuccessful on the basis of the State's submission that Mrs. Fitzgerald's reference to eyebrows did not amount to an identification of the applicant.

At page 2 of its decision the Court of Appeal finds:

"It is not entirely without significance that Mr. Campion has very striking eyebrows"
(Emphasis Added)

5. Reasons why the Supreme Court should grant leave to appeal

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 submitted that the following matters arise which are of general public importance:

- (a) Is a defendant entitled to adduce expert medical evidence regarding the psychological/psychiatric condition of a prosecution witness where such evidence may assist the jury in assessing the reliability of the witness' evidence?
- (b) If such medical evidence is *prima facie* admissible, whether an accused may request the witness to undergo a psychological/psychiatric assessment by medical professionals?
- (c) If such a request is made and is refused by the witness who declines any such medical assessment whether any subsequent trial, without remedial measures to

address this issue, can be considered fair where there is objective evidence of the mental impairment of the witness including severe psychosis?

It is submitted that the above matters are of specific relevance to this application but moreover are matters of considerable importance to the criminal law generally and to other cases.

It is also submitted that the above matters ought to be considered by the Supreme Court in the interests of justice. It is in the interests of justice that the outcome of the applicant's trial and appeal to the Court of Appeal were proper and in accordance with law. For the following reasons it is submitted that both courts erred in law:

- i. The fair administration of justice requires that decisions made by trial courts are not made *per incuriam*. The Court of Appeal upheld the finding of the learned trial Judge that medical evidence would not be admissible to assist the jury in determining the case, notwithstanding the fact that the learned trial Judge had relied, *inter alia*, upon the case of *R v Mackenney and Pinfold* [1983] 76 Crim. Appeal Reports, when at the relevant time of making his decision that authority had been reversed by the decision of a subsequent Court of Appeal in the same case in *Pinfold and MacKenney v R* [2004] 2 Cr. App. R.5. This contrary to the interests of justice.
- ii. Justice requires that a trial must be conducted in accordance with fair procedures and in circumstances where the main prosecution witness is deranged to the point that his testimony is replete with inconsistency and largely undecipherable to the average person, the accused should be afforded the opportunity to present medical evidence highlighting the witness's psychiatric condition and its effect on his ability to give credible and reliable evidence.
- iii. The law requires that in circumstances where a jury properly directed could not convict on the state's evidence then the case should be withdrawn from the jury. The main prosecution witness's evidence was completely unsatisfactory given its level of inconsistency and logical incoherence. Allowing that evidence to go to a jury for consideration represents a manifest defeat of justice.
- iv. The conclusion of the Court of Appeal that it is "*not without significance that the applicant has very striking eyebrows*" is contrary to natural justice and fair procedures in circumstances where the applicant was denied the opportunity by the Court of Criminal Appeal of adding an appeal ground regarding identification evidence based on the submission by the prosecution that the witness's reference to eyebrows did not amount to an identification of the defendant.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

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

Grounds of Appeal

1. That the Court of Appeal erred in dismissing grounds 1-3 and upholding the learned trial Judge's failure to rule on whether James Martin Cahill was fit to give evidence; upholding the learned trial Judge's ruling that the trial would continue in the absence of a psychiatric assessment of the witness and; upholding the learned trial judge's ruling that the trial could continue after the grave psychiatric problems of James Martin Cahill became manifestly obvious after he started to give evidence.
2. That the Court of Appeal erred in dismissing ground 5 and upholding the learned Trial Judge's ruling that the applicant's case was not a suitable case for a *Galbraith* direction notwithstanding the inconsistencies and patent unreliability of the key prosecution witness in respect of whose evidence the jury could not be properly directed.

Legal Principles

With respect to ground number 1:

The evidence provided by the main prosecution witness, James Martin Cahill, was such that fairness and equality of arms could only be met if -

- The applicant had the opportunity to have the witness medically assessed, such medical assessment directed at establishing what effect the witness's mental condition had on his ability to provide credible evidence.
- Further and in the alternative, in the absence of a medical assessment because the witness refused such assessment, the evidence of the witness should have been ruled inadmissible or if it had been admitted it should have been withdrawn from the jury.
- In the *Pinfold* judgment the English Court of Appeal records the original evidence which was not permitted: see paragraph 54. Following the referral of the *Pinfold* case back to the Court of Appeal by the Criminal Cases Review Commission the court received fresh evidence from a forensic psychiatrist and part of his evidence is recorded at paragraph 58 of the judgment. In essence, the evidence received was to the effect that effect of a psychosis cannot easily be deciphered by the ordinary person. A witness suffering from the psychosis often does not know the truth from fiction and therefore does not display the normal indicators of someone who knowingly lying or attempting to deceive. The value of such an examination and subsequent

medical evidence being presented in the trial is exemplified in *Pinfold*. This is not to usurp the function of the jury but rather to equip it (and the Trial Judge upon an application of no case to answer) with the necessary information to allow it to assess properly the reliability and weight of the evidence of a person who may be suffering from severe personality disorders or severe psychopathic disorders.

Furthermore -

- The applicant was put at a material disadvantage in the preparation of his case *vis-a-vis* the prosecution. It is apparent that the prosecution had the witness's consent to any medical examination it proposed but the prosecution reserved any such requisition for the purposes of obtaining rebuttal evidence.

With respect to ground number 2:

- The prosecution case depended wholly and exclusively upon the reliability of the witness's evidence. Whilst the prosecution presented him as a reliable and credible witness the witness himself on the one hand sought to explain inconsistencies and lies in his statements and evidence by reference to voices in his head. Without the benefit of a full medical examination and report the defence were placed in an impossible position. If the witness was genuinely suffering from psychosis this must undermine the reliability and weight of all of his evidence. On the other hand if he was inventing or embellishing his psychosis to explain his inconsistencies then he was simply a deceitful and untruthful witness. Without the benefit of any psychiatric or psychological assessment the defence were left to defend the case without knowing which of the two positions were the most likely.

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

Martin O'Rourke Q.C., S.C. Patrick O'Neill B.L.

7. Other relevant information

Neutral citation of the judgment appealed against

Court of Appeal [2015] IECA 190

References to Law Report in which any relevant judgment is reported

R v Galbraith [1981] 1 WLR 1039

The People (At the Suit of the Director of Public Prosecutions) v Kehoe [1992] ILRM 481

R v Mackenny [1983] 76 Cr. App. R. 271

R v Terence Pinfold and Henry MacKenny [2003] EWCA Crim 3643

Toohy v Metropolitan Police Commissioner [1965] 49 Cr. App. R. 148

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:

- a) In the interests of a fair trial pursuant to Bunreacht na hÉireann and the ECHR, the applicant ought to have been permitted to call medical evidence on his behalf relating the ability of James Martin Cahill to give reliable evidence;
- b) The evidence of James Martin Cahill ought to have been withdrawn from the jury;
- c) The application for a direction to the jury that there was no case to answer ought to have been acceded to;
- d) The finding of the Court of Appeal that it is not entirely without significance that Mr Campion has very striking eyebrows amounts to reliance on identification evidence and as such, in the particular circumstances of the case, is contrary to natural justice and fair procedures.
- e) The conviction of the applicant for the murder of Brian Fitzgerald in the Central Criminal Court on the 15th November 2007 is quashed.

What order are you seeking if successful?

Order being set x vary/substitute
 appealed: aside

Original set x restore vary/substitute
 order: aside

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

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

The failure to allow the Applicant an opportunity to have James Martin Cahill medically examined with view to establishing his ability to give credible evidence is a denial of his rights to a fair trial as required under Article 6 of the European Convention on Human Rights.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own Yes x No

If Yes, please give details below:

make a reference to the Court of Justice of the Yes x No
 European Union?

If Yes, please give details below:

That the State' failure to allow the Applicant an opportunity to have James Martin Cahill medically examined with view to establishing his ability to give credible evidence is a denial of his rights to a fair trial as required under Article 6 of the European Convention on Human Rights.

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: *Madden & Finucane*

(Solicitor for) the applicant/appellant

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.