THE COURT OF APPEAL

[114/15]

Neutral Citation No: [2023] IECA 70

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GRAHAM DWYER

APPELLANT

JUDGMENT of the Court delivered on the 24th day of March 2023 by Birmingham P.

Introduction

1. Following a lengthy, high-profile trial in the Central Criminal Court, on 27th March 2015, the appellant, Mr. Graham Dwyer, was convicted of the murder of Ms. Elaine O'Hara. He has appealed his conviction. Initially, a large number of grounds were formulated, but these have now been grouped in what has been described as a thematic way. So grouped, the issues on appeal are:

(i) The admissibility of the interviews conducted with the appellant in the course of his detention.

(ii) Issues relating to reliance on certain call data evidence.

(iii) A complaint about certain matters impacting on the fairness of the trial and prejudicing the appellant.

(iv) A complaint that there ought to have been a directed verdict of not guilty.

In the course of this judgment, we will address each of these themes. The question of reliance on call data evidence was to the fore during the course of the appeal hearing. We propose to deal first with the non-call data evidence issues, and then turn to the call data evidence issues. However, before doing so, we want to provide an overview to the background to the trial and subsequent conviction.

Background

2. On 13th September 2013, a French woman, Ms. Magali Vergnet, who was involved in dog training and dog walking, was walking dogs on private land in the Killakee area of the Dublin mountains. In a wooded area, she came across what appeared to her to be a quantity of bones. She was concerned about what she had found, to the extent that she made contact with the landowner. Together, they looked at the bones, thinking at first that they might be animal bones, but then they noticed what seemed to them to be a mandible or lower jawbone. At that point, they realised that what they were looking at were likely human bones. Contact was made with Gardaí, who came to the scene, and matters moved on from there.

3. The discovery by the dog walker came some days after items were discovered at the Vartry Reservoir, near Roundwood, County Wicklow; this proximity in time was entirely coincidental. On 10th September 2013, three friends with an interest in fishing, and linked to that, an interest in the reservoir, were in the area. The reservoir was unusually low; 2013 had been a particularly dry and warm summer, and the water was at a much lower level than would usually be the case. Their attention was drawn to something shiny that they saw in the water under a bridge. They had with them a tension strap, and with that, they raised articles from the water. At that stage, certain items, including an article of clothing, a length of rope, and some handcuffs were raised. Initially, the men put what they had retrieved on the bridge and went away. However, one of them, Mr. William Fegan, thought more about it and came

back the next day because he thought something might be awry. He gathered up the items, put them in a plastic bag and brought them to Roundwood Garda station, where he handed the find over to Garda James O'Donoghue. Garda O'Donoghue, who is to be highly commended for this, went back to the reservoir on a number of occasions over the following days to ascertain if he could see anything else. On 16th September, the conditions were more favourable, and he was able to reach in and pull further items out of the reservoir. He pulled out a set of keys and various other items, including a loyalty card for Dunnes Stores. Contact was made with Dunnes Stores and a representative there confirmed that the loyalty card had belonged to Ms. O'Hara. When Garda O'Donoghue entered Ms. O'Hara's details into the Garda PULSE system, it emerged that she was a missing person and had been so listed since August 2012.

4. The remains found at Killakee were almost entirely skeletal. The scene was visited by Dr. Michael Curtis, the deputy State Pathologist, and he subsequently carried out a post-mortem examination. However, in circumstances where all that was available to him were partial skeletal remains, he was unable to determine the cause of death.

5. Ms. O'Hara was 36 years of age at the time when she was last seen alive, which was on 22nd August 2012. Ms. O'Hara worked as a childcare worker in a school and also had another job, working part-time in a newsagent. She had lived at a number of addresses in south Dublin, moving in 2010 to an apartment at Belarmine Plaza, a modern development in Stepaside. Since her teenage years, she had experienced mental health difficulties, requiring psychiatric care and medication, including by hospitalisation on occasion. She was an inpatient at St. Edmundsbury Hospital in Lucan for some five or six weeks prior to her disappearance. She was discharged from there on the morning of 22nd August 2012. It may be noted that, during her time as a patient there, she was, to a considerable extent, in a position to come and go.

6. Following her discharge, Ms. O'Hara visited her local pharmacy; she had been given a prescription prior to leaving the hospital. She had also been in contact with her place of work at the newsagent. One of her reasons for being in contact with her work was to establish what hours she would be working in the period ahead. She had a particular reason for wanting to know her schedule as she had volunteered to assist at the Tall Ships Festival in Dublin. It was established that she made an arrangement with her father's partner – her mother had died in 2002 – to be collected on the morning of 23rd August 2012 to go into town to the Tall Ships Festival venue.

7. On the afternoon of 22nd August 2012, she was in touch with her father, and they went to visit her mother's grave in Shanganagh Cemetery. She parted from him at about 4.00pm, apparently to return to her own home, and one of her neighbours there saw her leaving at around 5.00pm in her car. A couple of days later, when she was reported missing, the car was located close to Shanganagh Cemetery.

8. After Ms. O'Hara went missing and Gardaí began to make enquiries in relation to a missing person, a jogger, who had been running in the park beside Shanganagh Cemetery, recognised her from a photograph and indicated he had spoken to her. He stated that Ms. O'Hara was looking for directions to a pedestrian railway bridge linking the park to the beach. The contact with the jogger was timed at being approximately 5.45pm on 22nd August 2012, and he was the last person confirmed to have seen Ms. O'Hara alive.

9. While Ms. O'Hara was listed as a missing person, little progress was made in that investigation until the events in September 2013. With the discovery of the remains at Killakee and the items at the Vartry reservoir, an extensive investigation commenced. Data was extracted from Ms. O'Hara's phone, the one that was in use in the period up to her disappearance, and also from an older phone belonging to her. Gardaí were assisted in that regard by the fact that it was her practice to back up her phone on her laptop. Also examined

were two phones that were found in the Vartry reservoir. On examination, which was possible notwithstanding that the phones had been submerged in water, it emerged that the two phones from the reservoir had been in communication with each other between 14th and 22nd August 2012. At trial, the prosecution sought to prove that during the period between March 2011 and August 2012, the two phones found in the Vartry reservoir, as well as other phones, were used by Ms. O'Hara and the appellant to contact each other. The different phones and how to distinguish between them will be set out in more detail below in the context of the grounds of appeal relating to the call data records.

10. The prosecution's interest was predominantly in text messages; there were some 2,620 text messages in all exchanged between the deceased, Ms. O'Hara, and another person through these phones. The prosecution contended that this other person was the appellant. The prosecution said that the text messages established not just the fact of communication between the two parties, but that they had a sexual relationship; it must be said, a very unusual sexual relationship, because it involved acts of stabbing perpetrated by the appellant on Ms. O'Hara. The text messages relied on by the prosecution also pointed to the fact that the user of the phone which was in touch with Ms. O'Hara had arranged to meet with her at Shanganagh Park on 22nd August 2012 for the purposes of taking her up the mountains to be stabbed or punished.

11. So far as the appellant is concerned, he was 39 years of age at the time of the disappearance of Ms. O'Hara. He is originally from Cork and was an architect working for a practice called A&D Wejchert in the Baggot Street area of Dublin. At the time, he was married, living with his wife and two children in Foxrock in Dublin. Of note is that a hobby in which he was much involved related to flying model airplanes. The prosecution contended that it could be established that the appellant was in touch with Ms. O'Hara, first using

another phone, and then subsequently using one of the two phones retrieved from the Vartry reservoir.

12. The prosecution case was that, as Ms. O'Hara's period of hospitalisation in July 2012 was coming to an end, the appellant began to put in place the various elements of a plan he was forming which involved using Ms. O'Hara for the purpose of attaining sexual satisfaction by stabbing a woman to death. In that regard, the Director points to a text of 16th August 2012, when it was asked, "If anything happened to you, who knows about me?", and a phone attributed to Ms. O'Hara responded that no one knew his name, and no one knew about him, really; what they knew is that she was into "BDSM" and that she met people. To this came the response, "Ok let's keep it that way." On the following day, 17th August 2012, there was a message which, on the prosecution case, was from the appellant to Ms. O'Hara, where he said, "Did a huge walk up the Dublin mountains yesterday plenty of lonely hill walkers out there just to find a route back with no cameras and I am sorted! Very excited". The prosecution contended that, in July 2011, the appellant had identified a methodology that bore significant similarity to the events in this case. It was said that he told her that he had thought of a number of ways of killing someone and said, "Second one, we go into woods, i take off ur clothes stab u bury u, leave ur clothes in ur car near the sea at night, looks like u drowned". A number of texts were exchanged between phones sought to be attributed to the appellant and the deceased on 20th, 21st and 22nd August 2012, the latter being the day on which the deceased was last seen alive. On 22nd August, the day of her disappearance, Ms. O'Hara sought a favour, asking, "Please dont mention killin for a while jus until I settle back to life. Please sir", to which the phone sought to be attributed to the appellant responded, "Fine. But tonights punishment will be like me pretending to do someone for real ok ?", and she responded, "Ok. Thank u sir." One text attributed by the prosecution to the appellant instructed, "park at shanganagh cemetery at 5.30 leave your iphone at home just bring [phone

attributed to deceased retrieved from Vartry reservoir] and keys." Finally, a phone attributed to the appellant texted a phone attributed to the deceased to look for the railway bridge.

13. In the course of the investigation, the appellant was arrested, and while detained, he was interviewed on a number of occasions. The interviews will be considered in greater detail, but at this stage, it might be noted that the appellant's approach was to decline to answer specific questions about the suspected murder of Ms. O'Hara. He was prepared to speak to Gardaí when engaged in what appeared to be more general conversation. The prosecution said that much of what the appellant said in the course of general conversation, and when responding to ostensibly innocuous questions, in fact proved to be of considerable evidential significance. Also, in the course of the interviews, late in the detention, the appellant did acknowledge that he had been in a relationship with Ms. O'Hara and that the relationship involved "BDSM". The prosecution further contended that, during the course of the interviews, the appellant told many demonstrable lies, and this supports their case that he was guilty as charged. However, it is the case that, whether he had any involvement in the death of Ms. O'Hara or not, he had powerful reasons to lie; he was, by his own admission, involved in an extramarital affair with a "BDSM" dimension.

The Admissibility of the Interviews

14. Under this theme, three topics had been raised in the written submissions as follows:

(i) the failure to provide sufficient information to the solicitor for the now appellant, then suspect;

(ii) the fact that the solicitor was not permitted to be present throughout interviews;

(iii) an issue relating to the fact that information was leaked to the media during the course of the detention.

So far as topic (ii) is concerned, in relation to the fact that the solicitor was not present throughout the interviews, this was the issue that featured most prominently in the trial court. However, in circumstances where, since the trial, the Supreme Court gave judgment in the case of *DPP v. Doyle* [2017] IESC 1, and the European Court of Human Rights gave judgment in *Doyle v. Ireland* (App. No 51979/17, judgment of 23rd May 2019), understandably, the issue has not been pursued at oral hearing.

Failure to Provide Sufficient Information

15. In relation to the complaint about failing to provide information to the solicitor, the background to this is that the appellant was arrested at his home at 7.08am on 17th October 2013 and brought to Blackrock Garda station. It was not in dispute at trial but that, in the course of the journey, Gardaí who were with the appellant impressed upon him that the situation was a serious one, and that it was imperative he should consult a solicitor and discuss the situation fully with that solicitor. The appellant indicated that he did not know a solicitor and could not afford one. It was explained to him that when he reached the Garda station, the Member-in-Charge there would be in a position to provide him with a solicitor; this is what happened. Gardaí made contact with Mr. Jonathan Dunphy, solicitor, and he arrived at Blackrock Garda station at approximately 8.20am. Thereafter, Mr. Dunphy's attention to his client's needs and interests was admirable in all respects. Upon the solicitor's arrival, it was initially explained to him that the appellant had been arrested on suspicion of the murder of Ms. O'Hara and that he had been detained pursuant to s. 4 of the Criminal Justice Act 1984.

16. It appears that Mr. Dunphy sought further information about the state of the investigation and that the arresting Garda, Detective Sergeant Peter Woods, told Mr. Dunphy that he "couldn't brief him at that time". Detective Sergeant Woods was cross-examined as to whether it was a case of would not or could not, and he accepted that it was both, explaining

that he wanted what he described as an "uncontaminated and reliable account" from the appellant, and that he was not going to provide the appellant's solicitor with information so that the appellant could in turn feed that information back to the investigator. He accepted he did not want the appellant to know what he, as an investigator, knew at that point. Thereafter, the appellant's solicitor sent a fax to Blackrock Garda station seeking "as a matter of urgency", "adequate and sufficient detail" as to what the investigation concerned beyond a murder investigation stemming from the discovery of the remains of Ms. O'Hara on 13th September 2013 at Killakee. The letter requested that the solicitor be informed in "adequate and sufficient detail" of the reason for the Garda suspicions.

17. Mr. Dunphy's position was that he was not being given enough information so as to be in a position to advise the appellant effectively. It would seem that he communicated this to the appellant, because, in the interview room, the appellant took the position, when asked questions about the murder, that he would respond by saying, as paraphrased by Senior Counsel for the appellant, "I'm saying nothing because my solicitor has told me to say nothing because you won't give information".

18. In the course of interviews, particularly the first interview, the arresting Garda and lead interviewer, having ascertained on the record that the suspect had spoken to a solicitor in relation to the arrest, addressed the importance of providing the solicitor with full instructions, making the point that he wanted to explain that the solicitor could not give advice if he was not in receipt of instructions.

19. In refusing to exclude the interviews, the judge provided a detailed ruling which merits quotation:

> "I do not accept that there was anything untoward or improper in the stance adopted by Sergeant Woods. Equally, I also accept that Mr Dunphy did his absolute level best for his client in attempting to elicit the parameters of the evidence in possession of An

Garda Síochána at that time. However, in my view, there was no obligation on Sergeant Woods to provide this information unless he wished to do so, for the good reason that he expressed in evidence, that he was entitled to replies, if replies were forthcoming from [the appellant], which were unfiltered by any previous knowledge of the topic under discussion, whether provided by his solicitor or otherwise, all of this of course being conditional on the interviewee ultimately opting to respond to any questions put to him.

Furthermore, I also accept the point made by [Senior Counsel for the prosecution] that the absence of prior knowledge or information in the context of a reply given in interview can be very important in confirming the veracity or otherwise of any such replies. Consequently, I do not accept that any legal advice proffered by Mr Dunphy between half 8 and 5 past 9 that morning was rendered illusory by the absence of such details. In my view, the dominant purpose of initial legal advice is to provide the client with an outline of the procedures applicable to his detention and to advise him as to his rights and his options as a person detained in custody. Presumably such advice also extends to advice as to the privilege against self-incrimination. It is for the client to act on that advice based on his own calculation as to where his best interests lie and I lay particular emphasis on the next aspect, also based on the knowledge which is peculiarly available only to the suspect in relation to the matter for which he has been arrested. It is the application of legal advice to the client's knowledge, that represents the formula which is required for rendering legal advice meaningful. Advice is meaningful only as it operates on the brain and the state of knowledge of the recipient of that advice. In my view, meaning is not derived in this context from information held by the police, although I can readily understand a desire on the part of the suspect to know the directions from which the police might be intending to

approach. However, such a concern demonstrates to me one thing at least and that is that the suspect who has this concern has fully engaged with the situation in which he finds himself and is aware that questioning is likely to take place in relation to the matter for which he has been arrested and it is also clear that he understands very well what is going to happen next and he is certainly not a person, and I'm using a quote from Hardiman J, who is unable to give a proper account of himself. There's no aspect of the evidence that suggests to me that [the appellant] could be fairly regarded as falling into that category.

[The appellant] chose to tell the gardaí, although not obliged to do so, that he had made a decision not to comment on particular categories of questions. However, without the slightest degree of prompting or compulsion he was quite prepared to answer other questions. In my view, there can be no view of the evidence that suggests he was improperly influenced by the police in any way in relation to any of these decisions, either taking them in the first place or deciding to depart from them thereafter. That is one of the reasons why a suspect clearly needs to be informed for the reasons as to his arrest, so as to best enable him to calculate what he knows or what he does not know in relation to topics that might arise for questioning whilst in detention. No doubt, a solicitor in the circumstances described may also advise the client as to how any of these rights should be exercised if so requested by the client, but in so doing I imagine that a solicitor or a legal adviser will give evidence or give advice, should I say, which is contingent upon and tempered by the fact that the extent and veracity of the information and instructions provided for the purpose of such advice will obviously condition advice as to how options might be exercised because I think that it would be prudent to take the approach that one might not necessarily be receiving either the whole or the partial truth when one is asked to say which way

rights should be exercised, ultimately which way rights should be exercised is a matter for the recipient of the legal advice. There's nothing at all wrong with a legal adviser, on request, providing guidance and direction as to how rights might be exercised, but of course, as I've pointed out, the quality of such advice is contingent on the input prior to such advice being rendered.

. . .

I'd like to focus in on what actually happened in the case. I think Mr Dunphy had every right to be annoyed with Sergeant Woods because the media were undoubtedly getting something that he, [the appellant's] solicitor, was not getting and I can understand Mr Dunphy's frustration in that respect but I take the view that the guards are not entitled to tip their hand -- or not obliged to tip their hand to solicitors or anybody else about how they propose to go about the limited time they have for conducting interviews and investigation. They're not obliged to do that at all as a blanket proposition, and indeed, weren't obliged to do it in this case because I accept that Sergeant Woods had the very proper consideration that he did not want [the appellant] being influenced in any way by any outside material, whether through the solicitor or otherwise by -- in any answers that he may provide, that that information, if it came from [the appellant] at all, should come in an unfiltered and uncoloured sort of manner and indeed Sergeant Woods was, I think, upset and visibly so by the fact that his carefully constructed plan was being undermined by others close to the investigation.

. . .

[The appellant] was able to tell Mr Dunphy that as soon as the interview ended, if that was his wish because they had another consultation immediately thereafter and Mr Dunphy would have been entirely within his rights to bring [the appellant's] -- to

bring to [the appellant's] attention the media material that he had so carefully gathered up during the morning and he would have been quite entitled to bring that to [the appellant's] attention, thereby to some extent undermining Sergeant Woods' plan but so be it, Sergeant Woods was being undermined by other people in the guards, not by anybody other than that.

. . .

It follows, therefore, that I hold that the detention was lawful and that subject to editing the fruits thereof are admissible in evidence."

20. In the course of written submissions, the appellant stresses that it is not contended that the Gardaí are required to "tip their hand of all information in their power". The appellant says that the approach taken by Gardaí on this occasion was such as to render the right of access to legal advice nugatory or largely nugatory.

21. It is the nature of any interview or cross-examination that the person asking the questions would not want to show their hand. In this case, the solicitor was in a position to offer advice in relation to the procedures that would be followed, the options open to the appellant and the advantages, or otherwise, of following particular courses. There was extensive contact between detainee and solicitor during the course of the detention. Questions raised by Gardaí and issues pursued by them during the course of the interviews set out clearly their line of enquiry, and indeed disclosed the extent of preparation engaged in by Gardaí before the arrest.

22. In our view, the trial judge's approach to this issue cannot be criticised, and we are not prepared to uphold this ground of appeal; a ground, it might be noted in passing, on which the appellant was content to rely on written submissions and which was not addressed in oral argument to the Court.

Leaking of Information to the Media

23. While this issue of leaking to the media is raised as a sub-theme in the written submissions, it did not feature during the course of the oral appeal hearing. The issue was raised in circumstances where the media was able to report in some detail in relation to the detention of the appellant while the detention was ongoing. It is also the case that, during the course of his detention, particularly in the course of the early interviews, the appellant was expressing anxieties about the impact that being linked to such a high-profile investigation would have on his family and professional life. It is the case that the media was able to report in some detail in relation to the detention of the appellant while the detention was ongoing. The identity of the individual or individuals providing information to the media has not been established, but it is clear from various interventions by the trial judge that it was a "working assumption" that the leaking of information to the media must have come from a member or members of An Garda Síochána. The appellant says that the furnishing of information and the briefing of the media was "not only contemptible in itself", but that its significance is enhanced when it is contrasted with the refusal of Gardaí to furnish information that was requested by the solicitor for the appellant.

24. While we can readily understand why the leaking of information must have been a source of annoyance and irritation to the appellant's legal advisers, we regard the suggestion that it should impact on the admissibility of the memoranda of interviews as strained. The reports to which objection is taken appeared at a time that the suspect was in Garda custody. There was no suggestion that he was accessing media reports, though he was, it seems, aware of the fact that the arrest and detention of a suspect was receiving media attention. The exclusion of memoranda of interviews as a means of marking disapproval of the media briefing would, in our view, be disproportionate and quite unjustified.

Decision

25. In summary, our position is that we are not prepared to uphold the grounds of appeal relating to the admissibility of the memoranda of interviews.

Prejudice in the Trial

26. Three issues are raised under this theme: (i) an issue as to the admission of prejudicial videos; (ii) an issue as to adverse interventions by the trial judge; and, (iii) an issue as to the extent of media publicity surrounding the trial. The point is made on behalf of the appellant that even if any of the three themes on their own were not sufficient to render the trial unsatisfactory, that regard must be had to the cumulative effect of the three areas of concern.

Admission of Videos

27. The issue about prejudicial videos arises in circumstances where, during the course of the trial, nine video clips were played which showed the appellant engaged in sexual intercourse with aspects of "BDSM". Three of the videos involved the appellant and the deceased. It does not appear to have been in dispute between the parties that the material was relevant. However, the appellant argued that the showing of the videos would be overly powerful and would be likely to cause a reaction among jurors. It was submitted on behalf of the appellant that it would be "extraordinarily difficult" for any jury to approach the evidence in issue without having a visceral reaction to it and that the presumption of innocence would not survive once the jury observed the videoclips. Thus, it was said that showing the videos meant that the prejudicial effect of that evidence outweighed its probative value. It was suggested that this was particularly so when there was available a more appropriate way of providing the jury with access to the evidence, which would be by way of commentary or narrative from Detective Sergeant Woods.

28. On behalf of the prosecution, it was said that any commentary would not and could not adequately capture what was revealed by the sound and images themselves. The Director points out that, in the course of interviews, the suspect appeared to indicate that he had little sexual interest in the infliction of pain or injury, and in particular, the infliction of pain or injury by stabbing, but that the videos proved the contrary.

29. It seems to us that the judge was acutely aware of the jurisdiction to exclude even admissible evidence if its prejudicial effect exceeds its probative value. In this case, he considered the narrative that was available from Detective Sergeant Woods and also viewed the videos before ruling on the matter. Having done so, the judge concluded that the probative value of the videos was substantial, so substantial that its probative value outweighed its prejudicial effect. We are not in a position to disagree. We are mindful of the old adage that a picture is worth a thousand words, and it is the case that the videos represented the best evidence available, and any commentary or narrative was inevitably very much second best.

The Reaction of the Trial Judge

30. While the topic heading in the written submissions is "Adverse commentary by the learned trial Judge", it appears that what is in issue is not anything that the trial judge said, but what may have been conveyed by his facial expression and body language. The issue now raised on appeal has its origin in an application by counsel for the appellant on 12th March 2015, Day 37 of the trial. Counsel raised an issue of concern from the previous day. Counsel's concern was that, at a point when Ms. Sarah Skedd, a crime and policing analyst, was giving evidence, at one point, the trial judge looked in the direction of the appellant, glared at him, shook his head, looked at a document in front of him, and then turned to glare at the appellant again. In making the application, counsel indicated that there had been some concern about the fact that during some of the more difficult parts of the evidence, the judge

had made various facial expressions, but he added that the evidence was difficult and that nobody could be expected to not react, to which the judge responded, “I’m not a cipher, as I say”.

31. The manner in which the issue arose is slightly surprising. As counsel acknowledged during the course of the application, much of the evidence that the court had heard was “more difficult”, and it would be hard for anyone to remain totally impassive. However, the evidence being dealt with at the time which precipitated the application appeared to have been fairly routine, involving the production of a map. From the transcript, there followed what would seem to have been somewhat tense exchanges between counsel and the judge, with the judge speaking in terms of bringing “the scrum down”, and counsel pressing for a withdrawal of any suggestion that in making the application he was seeking a tactical advantage. The judge pointed out that he was entitled to go quite far when charging a jury in terms of content and said that shaking his head or having an expression were human qualities. He was not proposing to discharge the jury, which was the application that was being made to him.

32. At various stages in the trial, the judge was at pains to point out to the jury that it was for them to decide the case and that they had to do so on the evidence and only on the evidence. This point was made, as is usual, in the course of the judge’s charge to the jury, but also at the outset of the trial, when the jury was addressed by the judge before counsel for the prosecution opened the case.

33. While it is desirable that a judge should maintain a poker face, if possible, that will sometimes not be possible. This was a case where it must have been very difficult to avoid some displays of emotion. In our view, the single criticism that is made arising from the evidence of the analyst, Ms. Skedd, falls very far short of what would be required before a trial would be condemned as unsatisfactory.

Media

34. There is no doubt that this was a trial which attracted an unusual degree of media attention. At the start of the trial, counsel on behalf of the appellant brought to the court's attention a number of news reports that had appeared in various publications, including the "Irish Daily Star", "The Journal" and the "Irish Times", all of which referred to the fact that the appellant was in custody, with the Irish Times referencing the fact – and it is a fact – that the appellant had been refused bail by the Supreme Court. It is fair to say that the application was in the nature of putting down a marker, and there was no associated request to discharge the jury and to adjourn the trial. Counsel on behalf of the appellant has made the point that when a client is in custody, there would be a marked reluctance to make an application which might result in the trial being put back for a significant period of time, with the suspect's detention thus extended.

35. On 22nd January, Day 2 of the trial, there was a further application in relation to a website run by a Mr. Micha Kat. Mr. Kat expressed the views that the appellant was not guilty, and that the killer of Ms. O'Hara was a member of the Gardaí. However, he made reference to matters that had occurred in the absence of the jury. Mr. Kat was brought before the court, and he gave an undertaking to pause his website. This episode caused the judge to give a trenchant warning about the importance of maintaining proper standards, and in particular, of not reporting matters that occurred in the absence of the jury. The judge made clear that he was doing so in circumstances where, apart from professional journalists who were present, there were a number of other people without a professional journalism background following the trial, who might not be fully *au fait* with what was and what was not permitted.

36. A further matter of concern was raised on 9th February, Day 14 of the trial, arising from the "Sunday Times" of the previous day, which had published a photograph of the

appellant who appeared to be flanked by two prison officers. The Sunday Times appeared before the court through a solicitor and offered an unreserved apology and agreed to pay a sum of money to charity.

37. The appellant has also drawn attention to the fact that, on 26th March, Day 46 of the trial, the foreman of the jury raised a query as to whether he should have been named in the course of a newspaper report. The appellant suggests that the fact of this enquiry by the jury foreman indicates that jurors were engaging with external sources, in the sense of media reports. Undoubtedly, that is a possibility, though we are inclined to think it unlikely that jurors who were following long days of evidence in court would want to read media reports of what they had heard at first hand. We think it more likely that the foreman of the jury was approached by an acquaintance who had seen the newspaper reference and had identified that someone he knew was acting as foreman of the jury in the very high-profile murder case that was receiving such attention.

38. We have already referred to the fact that the judge was at pains to stress to the jury that they should not be influenced by media reports. We see no basis for any suggestion that the media reports undermined the fairness of the trial. There was no application for a discharge of the jury at any stage. We do not think that that is explained simply by reason of the fact that the appellant was in custody. Rather, we are of the view that there was no basis for any such application.

Decision

39. In summary, we have not been persuaded that any of the issues raised under the theme of "Prejudice in the Trial", whether in isolation or when considered on a cumulative basis, rendered the trial unfair. For that reason, we reject these grounds of appeal.

Failure to Direct an Acquittal

40. At the close of the prosecution case, there was an application on behalf of the defence for a directed verdict of not guilty. Slightly unusually, the application was made on the basis of the first leg of *R v. Galbraith* [1981] 2 All ER 1060, *i.e.*, a contention that there was no evidence that the crime alleged against the appellant had been committed by him; as distinct from the more usual situation of an application by reference to the second limb, where the contention is that such evidence as there is, is of a tenuous character, suffering from inherent weakness or vagueness or inconsistency with other evidence. Here, the submission was a net one, a contention that there was an obligation on the part of the prosecution to prove causation, and that they had failed to prove that Ms. O'Hara had been the subject of an unlawful killing and had been murdered. Before the trial court and again before this Court, it has been said that the possibility of death by suicide remained live and had not been excluded beyond reasonable doubt.

41. The appellant placed emphasis on the dissenting judgment of McLachlin J., as she then was, in the case of *R v. Charemski*, [1998] 1 SCR 679. That was a case that concerned an appeal to the Canadian Supreme Court from a directed verdict of acquittal, which had been based on the trial judge's finding that the prosecution had failed to adduce evidence with respect to one of the essential elements of the crime of murder: causation. Unlike her colleagues who were in the majority, McLachlin J. was of the view that the evidence of two Crown pathologists provided two other reasonable explanations for the death: natural causes and suicide. Thus, she felt that the evidence was incapable of supporting an inference beyond reasonable doubt that the death was wrongful.

42. In the trial court, attention was drawn to a decision of the Court of Criminal Appeal in *DPP v. Michael Murphy* (Unreported, Court of Criminal Appeal, 5th May 2005). The case involved what the prosecution contended was the murder of a young German tourist. In that

case, the deceased's body had lain in a wooded area for a considerable period, and during that period, scavenging animals interfered with the body, to an extent that the State Pathologist could not say how the deceased had met her death. Significant circumstantial evidence was established against the accused in that case, but the appellant says that what differentiates that case from this one was that there were certain admissions. He says that absent the admissions, this case is not brought beyond the level of probability.

43. For her part, the Director says that the application is misconceived and arises from confusion between causation, in the context of an ingredient of murder, and the cause of death normally as established by a pathologist. If there is to be a conviction, and if the matter is to be considered by a jury, what is required is that the prosecution adduce evidence which could satisfy a jury to the standard of proof beyond reasonable doubt that the accused is the author of the deceased's death. However, it is not necessary in every case that the precise mechanism of death is known. In ruling on the application, the trial judge observed as follows:

> "At the close of the prosecution case [Senior Counsel for the defence] made an application on behalf of [the appellant] that the matter be withdrawn from the consideration of the jury on the basis that the prosecution had failed to satisfy the first limb of the *Galbraith* test by failing to produce any or any acceptable evidence that [the appellant] had caused the death of Ms. O'Hara on the 22nd of August 2012 and that, as a consequence, there was no evidence that any offence was committed by him in relation to Ms. O'Hara on that date. It is absolutely correct to say that there's no direct evidence whatsoever of the cause of her death. Nothing in the examination of her remains attributes her death to any particular cause. The prosecution case, as put by [Senior Counsel for the prosecution] in opening to the jury some weeks ago, is that Ms. O'Hara was stabbed to death by [the appellant] in the pursuit of sexual

gratification and it is therefore incumbent on the prosecution to produce evidence upon which a jury could conclude that she met her death in this way.

Ordinarily, questions of causation are a matter of fact for the jury but the submission made by [Senior Counsel for the defence] in this case is that there is simply no material upon which the jury could make a finding adverse to [the appellant] in this respect. In this case, therefore, in the absence of any direct evidence of stabbing, the prosecution must be able to point to factual material justifying the jury reaching a conclusion that Ms. O'Hara died in the manner alleged by them. It is also accepted by me that proof of the physical cause of a killing is a separate cause from proof of the necessary accompanying intention to kill or cause serious injury. However, I also agree with [Senior Counsel for the prosecution's] observation that either proposition may be proved by reference to the same body of factual material. In other words, a statement that a certain course of conduct will be followed is capable not only of proving that such conduct, if it subsequently took place, was intentional but is also capable of being probative of the fact that such a course of conduct actually took place.

. . .

Therefore, I am satisfied that the evidence produced by the prosecution in this case is open, and open very clearly, to the interpretation that [the appellant] was not simply engaging in fantasy but was actually expressing his state of mind and proposed -- proposing a specific and detailed course of conduct which was subsequently executed by him precisely in the manner that he had so lovingly and so carefully described on so many occasions."

44. It is our view that causation, just like other ingredients of an offence, can be proved by circumstantial evidence and the drawing of inferences. In this case, the trial judge

observed that "it would be an affront to common sense to say that there is no basis upon which causation could be inferred by the jury."

45. In our view, the judge was entitled to conclude that the state of the evidence at the close of the prosecution case was such that a properly directed jury could conclude that Ms. O'Hara had not met her death as a result of natural causes or as a result of suicide, but rather, that she had been the victim of a homicide. In these circumstances, we must dismiss this ground of appeal.

Call Data Records

46. This theme covers grounds (v) and (vi):

> (v) The learned trial judge erred in admitting into evidence call data records in relation to the mobile phone of the appellant and other mobile phones attributed to him in circumstances where the statutory regime governing the retention and access to such records was in breach of the appellant's rights pursuant to Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ("the Charter") and equivalent constitutional and [European Convention of Human Rights] rights.
>
> (vi) The learned trial judge erred in the manner in which he approached the decision of the [Court of Justice of the EU (CJEU)] in the case of Joined Cases C-293/12 & C-594/12, *Digital Rights Ireland*, 8th April 2014 ("*Digital Rights Ireland*"). In particular the learned trial judge erred in disputing the logic underlying same and substituting his own views in circumstances where he was bound by the decision.

47. In this case, there were essentially two elements to the phone evidence:

(a) The contents of text messages, some 2,620 such messages, taken from the mobile handsets themselves and from computer backups of the phones.

(b) Data from records retained by mobile telephone companies for billing purposes and in accordance with the Communication (Retention of Data) Act 2011 ("the 2011 Act").

48. At the outset, it is convenient to try and identify what this issue is about and what it is not about.

The Phones

49. Five phones have featured in this case. The prosecution sought to attribute three of the phones to the appellant and two to the deceased. It will be necessary to distinguish between these phones. We will assign letters to them for clarity in the context of this section of the judgment. Details of the phones are as follows:

Phone A: 087-2100407. The subscriber of this phone was A&D Wejchert, and it was allocated to the appellant by his place of work. It was seized from him at the time of his arrest, and he asserted ownership of it in the course of detention. This phone was referred to as the "work" phone at trial.

Phone B: 083-1103474. It was established that this phone was purchased at the 3 store in Grafton Street, Dublin, on 25th March 2011. The prosecution pointed to three aspects of this purchase which it was said allowed the purchaser to be identified as the appellant: (1) the recorded purchaser was "Goroon Caisholm", and it was established that the appellant had an acquaintance with a similar name, Gordon Chisholm, who was a previous employee of A&D Wejchert; (2) the phone number provided in the context of the purchase was the work phone number of the appellant (*i.e.*, the number of phone A, above), but with one digit swapped, by changing the prefix from 087 to 086; and, (3) an address that was provided – Oaklawn, Clerihan, Tipperary – matched or almost matched the address of the sister of the appellant, being 4, Oak Park, Ballyclerihan, Clonmel, County Tipperary. The prosecution sought to attribute this

phone to the appellant as a result of these three similarities. At trial, this phone was referred to as the "green" phone, a reference to the fact that it was green on a colour-coded chart in accompanying documentation presented to the jury by analyst Ms. Skedd.

Phone C: 086-3311207. This is a phone that was attributed to Ms. O'Hara, and she was the subscriber. This phone was left in the apartment of the deceased on the night she disappeared; there was an earlier phone recovered which had used the same SIM card and phone number. It was the practice of the deceased to back up this phone and the earlier phone on her laptop. It is said that this phone can be attributed to the deceased.

Phone D: 086-1759076. This is one of the two phones retrieved from the Vartry reservoir. It is a prepaid non-registered phone which had been purchased on 30th November 2011 at the O2 store on Grafton Street. This was referred to during the trial as the "Master" phone as it was saved under "Mstr". It is contended by the prosecution that this phone can be attributed to the appellant.

Phone E: 086-1759151. This is the second phone retrieved from the Varty reservoir. It, too, is a prepaid non-registered phone, which was also purchased on 30th November 2011 at the O2 store on Grafton Street. At trial, this was referred to as the "Slave" phone as it was saved under "Slv". It is contended by the prosecution that this phone can be attributed to the deceased.

50. While the Notice of Appeal, at ground (v), had referred to the fact that the judge had erred in admitting into evidence call data records in relation to the mobile phone of the appellant and other mobile phones attributed to him, it was made clear in the course of the oral hearing that the issues raised were confined to the appellant's work phone, phone A. It should be recalled that there were two elements to the phone evidence in this case: (i) the

content of text messages taken from the mobile handsets themselves, or from computer backups of the phones; and (ii) data from records retained by mobile telephone companies for billing purposes in accordance with the 2011 Act. At this stage, no admissibility issue arises in relation to (i), the text message category, and the issue is with (ii) the call data records only, which, it is said, ought not to have been admitted into evidence.

51. At this stage of the judgment, we wish to show how telephone evidence featured at trial, where necessary differentiating between text messages and call data records. We would point out that phone evidence is potentially relevant at two different stages – at the stage at which Gardaí are identifying a suspect, and then the point at which a suspect is charged and evidence is provided as to guilt at trial. There are markedly different views on the part of the parties as to the significance of the call data records linked to phone A/the work phone.

52. The appellant says that call data records formed a central and integral part of the prosecution case. At the heart of the prosecution case, he says, was the need to attribute to the appellant telephones that had been in communication with the deceased. This was achieved to a significant extent by the ability to point to the correlation between phone A/the work phone, and the other two phones of interest which it was sought to attribute to the appellant: phone B/the green phone; and phone D/the Master phone. The Director, while not disputing – nor could she – that call data records played a part in the trial, argues that the role played was relatively marginal and was dwarfed in significance by the text message evidence. The appellant responds to any suggestion that the call data records linked to phone A/the work phone were of limited significance and can be isolated and pushed to the margins of relevance by saying that what is involved is an attempt to unscramble the omelette that was the prosecution case. Sticking with food metaphors, the prosecution position might be seen as a contention that, in the particular circumstances of this case, the call data records linked to phone A/the work phone represented the icing on the cake.

Identifying a Suspect

53. This was a case where the evidence would be relevant at both stages: relevant to the identification of a suspect, and relevant at trial in going some distance towards proving the guilt of the appellant.

54. In relation to the identification of a suspect, there were three routes to this end. First of all, there was traditional detective work from the investigation team based in Blackrock Garda station. In broad terms, this involved following up on issues which were dealt with in the exchange of text messages to see whether that could lead to the identification of the phone user. The second route involved call data records. This saw a focus on the coincidence of the movements of phone A/the work phone and phones which it was sought to attribute to the appellant; in particular, with regard to phone B/the green phone. The third area was Garda intelligence. Chief Superintendent Diarmuid O'Sullivan of Dun Laoghaire Garda station was central to this aspect. As a result of intelligence available to Gardaí, Chief Superintendent O'Sullivan, accompanied by a colleague, attended at the home of the appellant on an occasion when a bin collection was scheduled and removed items from the bin with a view to obtaining a DNA sample.

Text Messages

55. The prosecution had access to over 2,600 text messages that were exchanged between the deceased and another person. These text messages were accessed on a variety of physical devices, including Ms. O'Hara's iPhone with number 086-331207, her computer, where it was her practice to back up information from her phone (the phone itself and the backups encompass phone C), and the two phones and SIM cards retrieved from the Vartry reservoir in September 2013, *i.e.*, phone D/the Master phone and phone E/the Slave phone. The text messages ran from March 2011 until 22nd August 2012, when the person in communication with Ms. O'Hara made arrangements to meet her. The prosecution contended that the

messages were relevant at two levels. Firstly, they provided a route to identifying the author of the texts, the person in communication with Ms. O'Hara, as the appellant. They then established that the author intended to kill, planned to kill, and gave effect to his intentions.

56. On 28th March 2011, a message was sent from phone C/Ms. O'Hara's iPhone to phone B/the green phone asking, "Any news on baby sir?", which drew the response from phone B/the green phone, "Not yet. Has to happen this week. Any time now. When are you free next?". On 30th March 2011, phone C/Ms. O'Hara's iPhone, sent the following message to phone B/the green phone "Went well today sir. I take it you are now a daddy again!! Thanks for last night sir. Really needed it!!!", which drew the following response from phone B/the green phone, "Yes, beautiful baby girl [name]. Glad u enjoyed the other night many more sessions like it to come! See u sometime over the weekend!" It is the case that at this point in time, the appellant became the father of a baby girl of the same name as appeared in the text. Less distinctive, but of interest, was a message sent the following day, 1st April 2011, from phone B/the green phone to phone C/Ms. O'Hara's iPhone, "Back at work today. Dont worry about marks, sudocreme at night, put arnica on in morning. We will get u polo necks like mine". At trial, there was evidence that the appellant habitually wore polo necks. On 4th April 2011, the following exchange occurred. Phone C/Ms. O'Hara's iPhone sent the following message to phone B/the green phone, "Do you want to collect your keys tonite?", which drew the response "I have committee meeting tonight, will get them next time im over". Garda enquiries established, and there was subsequently evidence at trial, that there was a flying club committee meeting that night attended by the appellant.

57. The following exchange took place on 18th April 2011: the message, "When sir? I am busy this week." was sent from phone C/Ms. O'Hara's iPhone, which drew the response from phone B/the green phone, "We will see, my car is out of action" to which phone C/Ms. O'Hara's iPhone responded "Ah no your baby sir!! Is it broken." Phone B/the green phone

responded with "Yes needs thousands to fix it. Think about good place for me to do stabbing." On 21st April 2011, there was a further message in relation to the car. On that occasion, the user of phone B/the green phone sent the following message to phone C/Ms.O'Hara's iPhone, "No. Using her car. 4K to get it fixed." There was evidence at trial that, at this time, the appellant faced a substantial bill, just short of €4,000, for car repairs. A message of 24th May 2011 from phone B/the green phone to phone C/Ms. O'Hara's iPhone said "Getting my car back Friday and can give u money. How much do u need?". At trial, there was an invoice for completed work on the car.

58. On 26th April 2011, an exchange in relation to tattoos commenced with a text from phone B/the green phone to phone C/Ms. O'Hara's iPhone, "Yes. We must get you tattooed". Two days later, on 28th April, this question of tattoos was pursued when the user of phone B/the green phone texted, "Morning. I have sent off email enquiries to a couple of good discrete tattoo parlours". At trial, there was evidence of a quote in relation to tattoos being sent to the email of the appellant. The user of phone B/the green phone followed up with "Got a guy who will do the tattoo in a private room for us €100 a bargain".

59. On 5th May 2011, phone B/the green phone texted phone C/Ms. O'Hara's iPhone "Taking thursday and friday off next week and week after." There was evidence at trial that the appellant took annual leave on those days over the following two weeks.

60. On 25th May 2011, a message was sent from phone B/the green phone to phone C/Ms. O'Hara's iPhone saying "Good. Looking forward to getting new bike tomorrow to try and lose weight. Must get fit for the murder". Again, there was evidence that the appellant purchased a bike on that occasion. Later, there would be a reference to the fact that cycling the bike cut down on the length of his commute by ten minutes. This was something the appellant spoke about in the course of his first interview while in detention. This was dealt

with in a text message of 27th May from phone B/the green phone: "Good, got my new bike and cycled in, 10 minutes faster than driving".

61. Significantly, on 2nd June 2011, phone B/the green phone texted phone C/Ms. O'Hara's iPhone saying "Morning slave. Good news, family will be away for last week of june and first week of july so i can stay over and chain u". At trial, this situation in relation to family movements was confirmed by the wife of the appellant.

62. One of the most significant exchanges took place on 13th June 2011. On that occasion, phone C/Ms. O'Hara's iPhone texted phone B/the green phone saying "Morning sir. How was your weekend?", receiving the response "Terrible. 15per cent paycut and came 5th in flying", and the message back "Sir. Welcome to reality!!", "Sir fifth is good.", "Sir where were you flying?", with the response "Wiclow". At trial, the jury heard evidence that the appellant had competed in a model aircraft flying competition in Wicklow and had finished fifth. The court also heard that a substantial salary cut was imposed upon the appellant, though not 15%. However, although the pay cut imposed in gross terms was approximately 11%, there was evidence that an earlier pay cut, which was nominally one of 10%, impacted on the appellant to the extent of 15%.

63. On 29th June 2011, phone C/Ms. O'Hara's iPhone texted phone B/the green phone "Are you around tonite Sir?", followed up a few minutes later with "Sorry sir. I forgot. Polish ambassador". Again, there was evidence at trial of the appellant attending an event hosted by the Polish Ambassador. The question of links with Poland was a subject that was discussed during the appellant's first interview in detention, with the appellant referring to the fact that it was his practice to attend business "mixers" hosted by the Polish Embassy.

64. On 15th July 2011, an exchange is relevant to the intentions of the user of phone B/the green phone, as distinct from establishing the identity of that user. Phone B/the green phone texted phone C/Ms. O'Hara's iPhone, "Im having lots of thoughts about killing u", which

received the response “Why sir?”, which then received the response “Because i want to kill someone and also i want to hurt u as a punishment. I have thought of 3 ways i could do it”. Phone C/Ms. O’Hara’s iPhone responded, “Ok what are they sir?”. The second method identified is of interest in the context of what would happen. The message sent at 09.45.13am by phone B/the green phone was, “Second one, we go into woods, i take off ur clothes stab u bury u, leave ur clothes in ur car near sea at night, looks like u drowned”, to which phone C/Ms. O’Hara’s iPhone responded, “Ok sounds feasible”.

65. On 15th November 2011, there was a significant exchange of texts, which began with phone C/Ms. O’Hara’s iPhone texting, “Sir any chance you get an 086 phone sim I get free texts ?”. To this, phone B/the green phone responded “I will get one on payday, good idea. Off to poland today and wont have phone so chat at weekend”. At trial, there was evidence that the appellant did go to Poland at this stage, but also evidence that 30th November 2011 was payday. On that day, two phones, prepaid non-registered phones, were purchased at the O2 store in Grafton Street – these were phone D/the Master phone, and phone E/the Slave phone.

66. On 23rd June 2012, there was a significant exchange of texts relating to a proposed meeting at the apartment of Ms. O’Hara. At 6.57.59pm, phone B/the green phone texted “Ok 2 mins. Will ring 97”, a reference to the apartment number of the appellant. CCTV footage shows the appellant arriving at the apartment at this stage.

67. There was a further series of text exchanges on 15th August 2012 at 1.31.44pm, phone D/the Master phone texted phone E/the Slave phone, “Ok see you later cant wait.” Later that evening, at 7.36.19pm, phone D/the Master phone texted phone E/the Slave phone, “Ok let me know when inside x”. Again, there is CCTV footage of the appellant at the Belarmine apartments.

68. On 16th August 2012, there was a further exchange of texts when phone D/the Master phone texted phone E/the Slave phone, enquiring, "If anything happened to you , who knows about me?", with the response "No one knows ur name and nobody knows about u really. They know im into bsm and that i meet people.", with the response from phone D/the Master phone, "Ok lets keep it that way. If i ever bump into your neighbour and asked who i am im your brother david ok ?".

69. On 17th August 2012, phone D/the Master phone texted phone E/the Slave phone, "Did a huge walk up the Dublin mountains yesterday plenty of lonely hillwalkers out there just to find a route back with no cameras and i am sorted ! Very excited".

70. On 21st August 2012, there were a series of texts with references to the fact that Ms. O'Hara will be the subject of outdoor punishment. At one point, phone E/the Slave phone, asked, "So what time do u want me from tomorrow sir?", to which the response was "5.30". At 5.00pm, phone D/the Master phone texted, "I am heading out to the spot now to double check".

71. On 22nd August 2012, the day that Ms. O'Hara disappeared, phone E/the Slave phone sent a text to phone D/the Master phone, "Sir. Can i ask a favour?", "Please dont mention killin 4 a while jus until i settle back to life. Please sir." Phone D/the Master phone responded "Fine. But tonights punishment will be like me pretending to do someone for real ok ?", which phone E/the Slave phone responded with "Ok. Thank u sir." At 12.50.14pm, phone D/the Master phone texted, "I want you to park at shanganagh cemetery at 5.30 leave your iphone at home just bring slave phone [phone E] and keys. You will get further instructions there".

72. In later texts, Ms. O'Hara, *via* phone E/the Slave phone, was enquiring whether the recycling centre in Shanganagh closes. The prosecution pointed to this as indicating a

complete absence of any intention to commit suicide, but rather, displaying an intention to make further use of the car

73. There were further texts exchanged between phone D/the Master phone and phone E/the Slave phone between 5.37.44pm and 6.00.58pm, with Ms. O'Hara indicating *via* phone E/the Slave phone that she was in the area, but lost, and being told to look for the railway footbridge, and finally, being instructed by phone D/the Master phone at 6.00.58pm to "Go down to the shore and wait".

74. The text messages, while not the subject of controversy in relation to admissibility, provide very powerful support for the view that phone B/the green phone and phone D/the Master phone can safely be attributed to the appellant. The user of phone B/the green phone referred to the fact that his daughter, whom he names, was born on 31st March 2011. The appellant's daughter was born then and given the name that appears in the text messages. The appellant has an interest in flying model airplanes; the user of phone B/the green phone has an interest in flying. On a particular weekend, the appellant finished fifth in a model aircraft flying competition in Wicklow; the user of phone B/the green phone refers to finishing fifth. That same weekend, the user of phone B/the green phone referred to experiencing a pay cut; the appellant suffered a pay cut that weekend. The user of phone B/the green phone referred to purchasing a bicycle and cycling to work and cutting his commute by ten minutes in the process; in the course of interview when detained, the appellant commented that he finds cycling cuts his commute by ten minutes. The user of phone B/the green phone incurred significant expense for car repairs; this is also a fate that befell the appellant. There is the linkage between the fact that the user of phone B/the green phone indicated that he was pursuing enquiries about tattoo parlours, and the appellant receiving a quote from a tattoo parlour. Finally, there are the texts when the user of phone B/the green phone and phone

D/the Master phone indicated that he is about to arrive at the apartment, and at just that time, the appellant is visible on CCTV footage at the Belarmine apartments.

75. Counsel on behalf of the Director is adamant that, even if the data records aspect of the evidence was excluded, that there would still be more than enough evidence, overwhelming evidence, to both establish that: (i) the phones should be attributed to the appellant; and, (ii) the intention of the user of phone B/the green phone and phone D/the Master phone intended to kill Ms. O'Hara and gave effect to that intention.

76. However, it is the case that call data records played some role. In the course of submissions, the Director has sought to identify the areas of interest by reference to the closing speech by counsel for the prosecution. It is appropriate to consider the contents of the closing speech.

77. In closing, counsel commented:

> "[The appellant's] work phone [phone A] connecting with a cell in Bandon and the green phone [phone B] through a cell in Kinsale shortly afterwards."

The prosecution interest in the fact that the appellant was in Cork on this occasion arises from a text of 2nd April 2012, which records that the user of phone B/the green phone sent a text to phone C/Ms. O'Hara's iPhone saying, "In cork for day tomorrow but can see u in morning or evening". The Director points to the fact that there was other evidence available to the same effect; work records from A&D Wejchert showed the appellant as being on annual leave that day, and there was evidence of the appellant's vehicle, of registration number 00MH11127, travelling initially southbound on the M7 and M8, and then returning later that day.

78. The prosecution's closing speech referred to the fact that on 23rd June 2012, phone A/the work phone and phone B/the green phone connected to a cell at Johnny Fox's public house. Then, it was noted that during the time when the appellant was in Belarmine, phone A/the work phone was there connecting to cells at Belarmine Plaza. This is linked to text

messages sent on that day, which included messages making arrangements to meet that evening, culminating in a message sent at 6.57.59pm from phone B/the green phone to phone C/Ms. O'Hara's iPhone saying "Ok 2 mins. Will ring 97", a reference to apartment 97, Belarmine Plaza.

79. From the appellant's perspective, the evidence adduced and referred to during the course of closing in relation to 21st December 2011 is particularly significant, as 21st December was chosen as a typical working day of the appellant, with phone A/the work phone and phone D/the Master phone connecting to cells at Fitzwilliam and ESB, both of which were linked to his place of work on Baggot Street. Then, phone D/the Master phone connected to a cell in Howth Harbour at around 12.55pm. Likewise, phone A/the work phone connected to a cell at Howth Yacht Club before both phones returned to the city centre area. The closing also focused on phone movements on 3rd and 4th July 2012, which saw phone D/the Master phone connecting in Parnell Street and phone A/the work phone connecting to a cell in the same area, Eircom Telephone House. The prosecution interest was sparked further by the fact that, on 3rd July 2012, phone D/the Master phone was topped up in Cathal Brugha Street. The significance of this was increased by the fact that it was one of the rare occasions when the appellant was recorded as going north of the Liffey.

80. However, the Director points to the fact that there was other evidence at trial to the same effect as this evidence. This included a work colleague who was away that week asking the appellant to represent the firm at an An Bord Pleanála oral hearing. That he did so was confirmed by work records from his employers and also by a planning consultant who was at the hearing. In his closing speech, counsel for the prosecution referred to the fact that, on 4th July 2012, the two phones had connected to the network through cells in Galway. However, the Director points to the fact that toll company records established that the appellant had travelled to Galway that day, and the client of the practice was in a position to identify her

land in photographs taken on 4th July 2012, which were saved on the appellant's work computer. Counsel referred to phone activity the following day, 5th July, when phone A/the work phone was connecting to Dorrians Hotel cell site in Ballyshannon. Phone D/the Master phone was tracked on the route back to Dublin. There was other evidence in the case relating to the visit to Ballyshannon; Mrs. Dorrian, hotelier, confirmed the appellant's stay there, and there was also toll evidence.

81. Counsel referred to the fact that the appellant was tracked as being at a model aircraft event in Tipperary close to Limerick Junction. At the relevant time, phone D/the Master phone was connecting to a cell site at Limerick Junction. It may be noted that there was evidence from flying personnel, including photographic evidence, that the appellant was at the event in Tipperary. In the course of detention, in the course of the first interview, the appellant spoke about attending organised events and competitions around the country, including events in Tipperary and Bandon in Cork.

Legal Landscape

82. At this stage, we intend to provide an outline of the legal landscape and the events surrounding the issues as to admissibility of evidence which arose at trial and arise again on appeal. We embark on this exercise with a reminder that the last sighting of Ms. O'Hara alive was on 22nd August 2012, and that her remains were discovered on 13th September 2013.

83. On 3rd October 2013, in accordance with s. 6 of the 2011 Act, Gardaí sought access to call data records for phone A/the work phone in respect of the period 1st June to 23rd August 2012, and 23rd August to 30th November 2012. On the following day, there was a further request in respect of the same phone – phone A/the work phone – in respect of the periods 7th October to 31st December 2011, 1st January to 31st March 2012, and 1st April to 31st May 2012. In broad terms, therefore, Gardaí sought and obtained access to the appellant's call data

records for the period 7th October 2011 (being just short of two years prior to the date of the request) up to 30th November 2012.

84. On 18th October 2013, the appellant was charged with murder and remanded in custody. He was unsuccessful in seeking bail.

85. On 5th May 2010, in the course of the proceedings in *Digital Rights Ireland Ltd v. Minister for Communications*, where a plenary summons had issued on 11th August 2006, McKechnie J. ([2010] IEHC 221) decided to make a reference to the CJEU as to whether Directive 2006/24/EC of 15th March 2006 ("the Data Retention Directive") was compatible with EU law.

86. On 8th April 2014, the CJEU gave judgment in *Digital Rights Ireland.*

87. It is noteworthy that data access requests in this case were made pursuant to, and complied in all respects with, an Act of the Oireachtas. That Act enjoyed a presumption of constitutionality, but it is of note that the legislation had been enacted arising out of membership obligations of the EU pursuant to a Directive. Moreover, the validity and the legal basis of the Data Retention Directive had been confirmed by the CJEU in annulment proceedings commenced by the State, (Case C-301/06, *Ireland v. Parliament and Council*, 10th February 2009) and subsequently, there were infringement proceedings against the State, instituted by the Commission, with the CJEU concluding that the State had failed in its obligation of membership by not enacting a law implementing the Directive at the time (Case C-202/09, *Commission v. Ireland*, 26th November 2009).

88. In the aftermath of delivery of the judgment in *Digital Rights Ireland*, commencing in late August 2014, solicitors for the appellant entered into correspondence with solicitors for the prosecution, enquiring as to whether it was the intention of the Director to rely on the appellant's call data records which had been obtained by Gardaí from service providers. The

intention of the Director to so rely was communicated by the chief prosecution solicitor on 12th December 2014.

89. The appellant's trial commenced on 20th January 2015. Contemporaneously with this, the appellant commenced civil proceedings seeking declarations of incompatibility with the Charter in respect of relevant provisions of the 2011 Act. In the course of trial, the appellant argued for the exclusion of the call data records evidence.

90. On 15th April 2015, about three weeks after the appellant had been convicted, the Supreme Court delivered judgment in *DPP v. JC* [2017] 1 IR 417. We will address the significance of this below.

91. On 21st December 2016, the CJEU gave judgment in the case of Joined Cases C-203/15 & C-698/15 *Tele2 Sverige/Watson & Ors*, 21st December 2016, establishing the relevance of *Digital Rights Ireland* with regard to domestic legislation.

92. On 6th December 2018, the High Court (O'Connor J.) gave judgment in the case of *Dwyer v. Commissioner of An Garda Síochána & Ors* [2018] IEHC 685 and concluded that sections 3 and 6(1)(a) of the 2011 Act are incompatible with the Charter.

93. The decision in *Dwyer v. Commissioner of An Garda Síochána & Ors* was the subject of a so-called leapfrog appeal, and on 24th February 2020, the Supreme Court made a reference to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the EU.

94. In the following months, the CJEU gave judgment in Joined Cases C-511/18, C-512/18 & C-520/18, *La Quadrature du Net*, 6th October 2020, and further in Case C-746/18, *Prokuratuur*, 2nd March 2021. Last year, the CJEU gave its decision in the Supreme Court's reference, in Case C-140/20, *GD v. The Commissioner of An Garda Síochána*, 5th April 2022. In broad terms, it restated its previous position as well as the approach adopted by the Advocate General in the case.

95. The question of call data records and telephone evidence has arisen in a number of cases in the domestic courts, and we will make brief reference to some of these. However, it may be noted that the general approach of the appellant is to be critical of the Irish courts, saying that judges in Ireland have failed to "internalise" the jurisprudence of the CJEU in this area.

96. In *DPP v. Doherty* [2019] IECA 209 (Edwards J.), this Court considered an appeal concerning the admissibility of data gathered and retained by a telecommunications service provider and furnished to Gardaí in accordance with the provisions of the 2011 Act. The appellant complained of a breach of her unenumerated constitutional right to privacy, as well as her rights under Article 7 of the Charter. This Court upheld the decision of the trial Court, noting that the evidence concerned was not personal data, and that, as such, the appellant's privacy rights were not engaged. In the circumstances of the case, it was unnecessary to consider the application of the exclusionary rule. Given the arguments advanced in relation to admissibility in the context of this appeal, of interest are certain remarks of Edwards J., even if they appear to be *obiter dictum*. At para. 97, he said:

> " . . . we know of nothing in the law of Ireland to suggest that, where a court is concerned with the admissibility of evidence obtained in breach of a fundamental personal right guaranteed to an accused under an international instrument such as the Charter, or the [European Convention of Human Rights], but which is not directly mirrored in the Constitution of Ireland, such breaches are to be approached in the same way as breaches of rights guaranteed to the accused under the Irish Constitution, or that they engage the same exclusionary rules."

97. Commenting on the case in McGrath on Evidence, (Round Hall 2020, 3rd edn.) at para. 7-135, it is observed:

"Given the primacy of EU law, it is difficult to see how a less protective approach could be applied to rights protected under the Charter than to rights protected under the Constitution."

98. In *DPP v. McAreavey & Smyth* [2022] IECA 182, this Court (Birmingham P.) noted that it is for national courts to determine questions of admissibility of evidence gathered under the 2011 Act, and that this was recognised in the preliminary ruling of the CJEU in *GD*. In that case, the Court commented that the interference with privacy rights was "limited in the extreme". In that regard, it may be noted that the case was largely focused on the use of phones in and around the time of the attempted murder, including contact between the phones of the appellants at the time. The appellant says that what was involved in the present case cannot be seen as limited interference because comprehensive information concerning the private life and professional activities of the appellant over an extensive period of time had been accessed.

99. This attempt to sketch the legal landscape requires treatment of the decision of the Supreme Court delivered on 15th April 2015, some weeks after the appellant's trial had concluded with a conviction: the case of *JC*, which saw a significant evolution of the position in relation to the mandatory exclusion of evidence. One effect of the decision is to give rise to a change of approach on the part of the appellant between trial and the hearing of the appeal. At trial, the appellant had argued that evidence had been obtained against him as a result of unlawful interference with his privacy and data rights, and that, as a result, all that evidence should be excluded. In light of the Supreme Court decision in *JC*, the appellant has modified his position and he now accepts that it is not the case that the evidence would be automatically excluded, but rather that what is required is a retrial, *i.e.*, a further hearing at which the tests identified in *JC* would be applied.

100. Against the legal landscape that we have sought to sketch, the appellant says the issues which now arise for consideration are:

(i) whether a breach of the Charter is to be equated with a breach of the Constitution;

(ii) how the admissibility of evidence gathered on foot of a legal provision that is subsequently impugned is to be determined;

(iii) given that no *JC* test was applied at trial, what is to happen now.

101. Having posed the above questions, the appellant answers the first question in emphatic terms by saying that there can be no doubt about the fact that a breach of the Charter is to be equated with a breach of the Constitution, and that this is so by reason of the status of the Charter and the principles of equivalence and effectiveness under EU law. The appellant points out that on 1st December 2009, when the Treaty of Lisbon entered into force, the Charter became legally binding, binding on the institutions of the EU and also on national governments of Member States. By virtue of Article 7 of the Charter, all citizens of the EU enjoy a right of respect for private life and family, and, moreover, by virtue of Article 8 of the Charter, there is a specific right relating to the protection of personal data. Article 8 provides as follows:

> "1. Everyone has the right to the protection of personal data concerning him or her.
>
> 2. Such data may be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 3. Compliance with these rules shall be subject to control by an independent authority."

102. In the course of written submissions, the appellant appears to describe Article 8(3) as a "conspicuous and pointed addition to…ordinary privacy rights".

103. The appellant says that the effect of all of this is that it is not open to Irish courts to accord a lesser status to Charter rights than those accorded to rights under domestic law in the form of constitutional rights. The appellant says that a breach of a Charter right has to be regarded as being equivalent to a breach of a constitutional right. He then goes on to argue that, in domestic terms, this means that it has to be considered under the test in *JC* on the same basis as if it were a breach of a constitutional right. The appellant contends that the Court has to approach the declaration of Charter incompatibility as if it were a declaration of unconstitutionality.

104. The appellant goes on to address how a court should approach the question of admissibility in circumstances where an argument arises on foot of a declaration of unconstitutionality or incompatibility, treating unconstitutionality and incompatibility for this purpose as identical. The appellant refers to the test set out by Clarke J., as he then was, at para. 870 and subsequent paragraphs of his judgment in *JC*. While the paragraphs are well known and often cited, for ease of reference, we will set them out here:

> "[870] For the reasons which I have sought to analyse in section 5 of this judgment, it seems to me that the elements of the test to be applied to the question of exclusion of evidence taken in circumstances of illegality or unconstitutionality are those identified in that section of the judgment.
>
> [871] In summary, the elements of the test are as follows:-
>
> (i) the onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the

evidence was gathered and does not concern the integrity or probative value of the evidence concerned;

(ii) where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or

(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis;

(iii) any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt;

(iv) where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that

type generally or in putting in place policies concerning evidence gathering of the type concerned;

(v) where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments;

(vi) evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

[872] In my view, the application of that test should also be informed by the matters identified in sections 4 and 5 of this judgment. It is next necessary to consider the application of that test to the facts of this case."

105. Observations in (v) and (vi) in the above excerpt from *JC* have been the focus of particular attention during the course of the hearing. In particular, attention has been drawn to the sentence in (v): "Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments". It is accepted that, on one view, what occurred here was a difficulty that derived from subsequent legal developments, and so para. (v) would, as a minimum, offer support to arguments advanced in favour of admissibility. Para. (vi) comments that "evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due

to inadvertence of the absence of authority." The appellant attaches considerable significance to this paragraph because he says that this was a case where the evidence could never have been lawfully obtained.

106. The various decisions of the CJEU referred to earlier make clear that there were two areas of concern. First, the fact that there was no provision for a court or an appropriately constituted independent body to assess requests for access to data. That was a matter that could be dealt with by providing for applications for an authorisation to be made to a judge or by the establishment of an independent authority specifically to deal with such issues. The second area related to the universal nature of the obligation to retain data, that all phone users are subject to a form of surveillance, in the sense that data relating to their use was required to be retained. It is argued that this was something that could never have been done, and that, accordingly, para. (vi) is applicable.

107. The appellant says that powerful support for his position, in arguing for the exclusion of the evidence at any retrial, where the question of whether the evidence should be admitted or excluded was in issue, would be provided by para. (vi).

The Director's Position

108. As her starting position, the Director takes the view that, in this case, the text message evidence, the admissibility of which is not in controversy, would have far greater significance than the call data evidence which was of somewhat marginal significance. The Director says that, in the course of the investigation of a serious crime in 2013, Gardaí acted in accordance with the legislation, which was in force – legislation which enjoyed a presumption of constitutionality. She points out that the legislation in question had been enacted in order to give effect to the Data Retention Directive. As noted, following the adoption of the Data Retention Directive, Ireland had challenged the legal basis on which that Directive had been adopted by way of an action for annulment but failed in that challenge, *per Ireland v.*

Parliament and Council. There followed infringement proceedings in the course of which the CJEU took the view that Ireland had failed to fulfil its obligations under the Data Retention Directive by failing to adopt measures necessary to comply with the Directive within the prescribed time (*Commission v. Ireland*).

109. The Director says that the principle of equivalence requires that domestic procedural law must operate in the same way in respect of rights derived from domestic law as for those originating in the law of the EU. It is not in controversy that a breach of a domestic law does not render evidence automatically inadmissible. The Director says that, insofar as there is a discretion to be exercised in respect of the call data records accessed by Gardaí in the present case, that discretion could only ever have been exercised in one way. That is so whether the test to be applied is that identified in *JC* or that in *The People (Attorney General) v. O'Brien* [1965] IR 142. The Director points out that the trial judge, with considerable perspicacity, addressed the question of what the position would be if any illegality was to be established, and had been very firm in saying that, in that case, the appropriate course of action would be to admit the evidence as a matter of discretion.

110. Insofar as the appellant seeks what might be described as a *JC* hearing, the Director says that this is misconceived. The test for admissibility under *JC* would only arise if the accessing of the call data records amounted to a breach of the appellant's constitutional rights – and it has not been established, or even seriously suggested, that that has occurred – or if there was a violation of a rule of EU law which was required to be treated in Irish law as being equivalent to a violation of a constitutional right.

111. The Director says that the rule of EU law found to have been infringed by the 2011 Act was that provided for in a provision of a Directive – Article 15(1) of Directive 2002/58/EC of 12th July 2002 ("the e-Privacy Directive"). The Director contends that, since what is involved was a determination that the 2011 Act failed to comply with conditions laid

down in a Directive, this is analogous to a determination in domestic Irish law that a particular measure is *ultra vires* a statutory power. As such, it is not to be regarded as analogous to a determination of a breach of constitutional rights.

112. The Director goes on to argue that even if, contrary to her submissions, the Court was to decide that it ought to apply the *JC* test, the call data evidence was still properly admitted. She draws attention to the case of *DPP v. Behan* [2022] IESC 23. There, the Supreme Court was considering an appeal against conviction. Evidence relating to a glove bearing traces of firearm residue was found in the appellant's home on foot of a search warrant issued by a Detective Superintendent. The issue arose in circumstances where a District Officer for the area where the offence occurred had made contact with the Divisional Detective Superintendent. The validity of the warrant had been the subject of a *voir dire* at trial, on the basis that the Detective Superintendent was not independent of the investigation of the offence as required by s. 29 of the Offences Against the State Act 1939, as amended by the Criminal Justice (Search Warrants) Act 2012. The Supreme Court held that there had been a breach of the statutory requirements and that the Detective Superintendent could not be regarded as independent. The trial judge had taken a different view on that issue, and because of taking a different view, no balancing test of the type envisaged by *JC* had been undertaken.

113. As appears from the judgment of the Court, the appellant, in effect, accepted that he could not make a direct argument to the effect that the trial judge should have excluded the evidence and that, rather, he made complaint of the fact that there had been a loss of an opportunity to argue in the trial, in the context of a *JC* inquiry, that it should have been excluded. It was clear that the actual manner in which the Detective Superintendent considered the question of issuing a warrant was not open to any real criticism. It was also clear that whatever issues there were about a warrant issued by the particular Detective Superintendent, that a valid warrant could easily have been obtained from any other

Superintendent in the Dublin area. Observations of O'Malley J. at para. 73 of her judgment are of significance. She said:

> ". . . It seems to me that a single fact is inescapable in this particularly unusual case – no other person, whether a member of the Garda Síochána or a judge, could have rationally declined to issue a search warrant in the circumstances as they pertained. The argument made by the appellant is that the evidence should be excluded because the wrong person was asked, but he has not explained how any other person might have assessed the matter differently."

114. The Director draws support from the approach of this Court in *McAreavey & Smyth*. It must be said that this would appear to be one of the cases that the appellant had in mind when he criticised Irish judges for failing to "internalise" the jurisprudence of the CJEU. Be that as it may, it must also be said that the phone records centrally in issue in that case related to the period before and after the attempted shooting in question and focused in particular on contact between the phones of the two appellants. Thus, it was not open to the appellants in that case to make the argument, as this appellant has done, that the phone records exposed details of their domestic, social and professional lives over a prolonged period.

115. The Director submits that the call data records constitute relevant and reliable evidence. If there was any illegality, then this arose from subsequent legal developments. There was no question here of any conscious or deliberate breach of rights. The Director is emphatic in asserting that, whatever test is to be applied, be that in *JC*, in *O'Brien*, or some modified test, that it is the situation that the discretion of the trial judge could only ever have been exercised one way.

Discussion

116. We begin our consideration of this section by asking ourselves how significant was the evidence that was in controversy, and we conclude that the question can be answered as

"not very significant at all". To state the obvious, and to repeat what has already been said, the only phone in issue is phone A/the work phone. The other two phones that the prosecution sought to attribute to the appellant – phone B/the green phone and phone D/the Master phone – he never accepted were his. However, even in relation to phone A/the work phone, reliance on call data records was limited. The phone was the property of, and certainly was registered to, his employer, A&D Wejchert. The registered owner of phone A/the work phone maintained extensive records in relation to its use which were available, though it has to be said that the records would not have extended to establishing the location of the phone on particular occasions.

117. At trial, the significance of phone A/the work phone was that it contributed to the ability to attribute phone B/the green phone and phone D/the Master phone to the appellant, but how extensive was that contribution? The answer to that question depends on two issues. First, insofar as reliance appeared to be placed on evidence relating to phone A/the work phone, was that the only evidence on the issue or was there other evidence to the same effect? Second, and there is a degree of overlap here, to what extent were the phones in issue – phone B/the green phone and phone D/the Master phone – capable of being attributed to the appellant without any reference whatsoever to phone A/the work phone?

118. We have already referred to the closing speech of counsel for the prosecution to show the reliance placed on phone A/the work phone. That reliance was limited, in almost all cases, to establishing a connection to a particular place of interest to the prosecution. At the risk of repetition, we will recap briefly on that exercise. Prosecution counsel referred to phone A/the work phone connecting with the cell in Bandon and phone B/the green phone connecting to a cell in Kinsale shortly afterwards on 3rd April 2012. The prosecution interest arises from the fact that a text from phone B/the green phone, sent on 2nd April, had made a reference to a daytrip to Cork the following day. It read, "In cork for day tomorrow but can see u in

morning or evening". Work records from the appellant's employer from 3rd April 2012 recorded him as being on holidays on that day and on annual leave. In addition, there was evidence of the appellant's vehicle, registration number 00MH1127, travelling southbound through the M7 and M8 and then returning on the same route later that day. Counsel made reference to the records relating to 23rd June 2012, and the fact that phone A/the work phone and phone B/the green phone connected to a cell at Johnny Fox's public house. Reference was also made to the fact that, when the appellant was in Belarmine, phone A/the work phone was there, and was connecting to cells at Belarmine Plaza. The interest arose from the fact that the text messages showed an arrangement being made to meet on 23rd June at the apartment of the deceased at 97, Belarmine Plaza. The text exchange saw phone B/the green phone sending the following message at 6.57.59pm, "Ok 2 mins. Will ring 97". However, undoubtedly, there was other evidence available in the form of CCTV footage which showed the appellant arriving at the apartment. Earlier, we referred to the evidence relating to 21st December 2011, where evidence was given of a typical day in the life of the appellant, the prosecution interest stemming from the fact that on a typical day, phone A/the work phone and phone D/the Master phone were moving together. This would appear to represent the high watermark of the appellant's case as the evidence was clearly dependent on the call data records. There was limited, if any, independent evidence to the same effect.

119. In his closing, counsel also referred to phone movements on 3rd and 4th July 2012, which saw phone D/the Master phone connecting to a site in the Parnell Street area in Dublin, and phone A/the work phone connecting to a cell in the same area, at Eircom Telephone House. The prosecution interest arises further from the fact that on 3rd July 2012, phone D/the Master phone was topped up in Cathal Brugha Street in Dublin. The interest was heightened by the fact that this was one of the rare occasions when the appellant appeared to have gone north of the river Liffey. However, there was abundant evidence of the appellant's

participation in an An Bord Pleanála hearing at the offices of An Bord Pleanála in Marlborough Street on that occasion.

120. Counsel made a reference to 4th July 2012, and the fact that the same two phones, phone A/the work phone and phone D/the Master phone, were recorded as connecting to cells in Galway. However, insofar as a visit to Galway was in issue, there was evidence to this effect by way of toll company records. There was also evidence from the client of the architect's practice, who identified her land in photographs which had been taken on 4th July 2012, and which had been saved on the work computer of the appellant. Counsel continued to track the phones, referring to the fact that on 5th July, the phones were connecting with a cell near Dorrians Hotel in Ballyshannon. Again, there was independent evidence in terms of toll records and also evidence from the hotelier. Counsel referred to movements on 7th and 8th July 2012. On 7th July, phone A/the work phone was connecting with the network through Bandon, and on 8th July, the appellant was at a model aircraft rally in Carron, County Tipperary, near Limerick Junction. Again, there was evidence, including photographic evidence, of the appellant's presence and participation in the Carron event.

121. Perhaps as significant as what counsel had to say was something not mentioned specifically by counsel, but referred to by the judge in his charge, in relation to the evidence of the movements of phone A/the work phone on the evening prior to August 22nd, which indicated activity at or near the M50, including the fact that at 6.26pm, phone A/the work phone connected to the network through a cell, one of two cells, at Edmondstown Golf Club. The interest in this is heightened by the content of the text, "I am heading out to the spot now to double check", sent on 21st August 2012 at 5.00pm from phone D/the Master phone to phone E/the Slave phone.

122. Counsel for the appellant was dismissive of the suggestion that the call data records were only of limited or marginal significance, dryly observing that, in any case, evidence that

puts an accused proximate to a crime scene, at a time reasonably proximate to the commission of the crime, will be of significance. Counsel for the appellant also makes the point that the phone evidence was significant, not just for what it recorded, but for what it did not record, in that the evidence relating to the phones over a prolonged period did not reveal any disconnect or discord between the appellant, as the user of phone A/the work phone, and the user of the phones sought to be attributed to him, *i.e.*, phone B/the green phone and phone D/the Master phone. We see these points as ones of substance and ones which are not to be ignored.

123. While there was evidence of parallel movements of the phone A/the work phone, phone B/the green phone, and phone D/the Master phone, such as to lead to a conclusion that there was a link between the phones and the phones had a common user, there was evidence to the same effect independent of the call data records that was as powerful and arguably more compelling. To recap once more, this included but was not limited to:

(i) the details provided at the time of purchase of the phone B/the green phone, including a phone number given diverging by only one digit from his own phone number (*i.e.*, the number associated with phone A/the work phone) the name recorded, or mis-recorded, closely resembling that of an acquaintance, the address provided being similar to the address of the appellant's sister;

(ii) text messages of 30th and 31st March 2011 in relation to the birth of the appellant's daughter, with particular reference to the name that was being given to the appellant's daughter;

(iii) text messages of 25th and 27th May 2011 in relation to the purchase of a new bike, including the effect that this had on the appellant's commute time, something he discussed while in Garda custody;

(iv) messages of 4th April 2011 in relation to a committee meeting corresponding with a meeting of the Shankill Flying Committee;

(v) text messages of 18th and 21st April and 24th May 2011 in relation to repairs to the appellant's car;

(vi) texts of 29th June 2011 in relation to a function at the Polish Embassy;

(vii) a text message of 5th May 2011 relating to taking time off the following week as well as the week after, for which there was evidence as to the appellant's annual leave;

(viii) text messages of 13th June 2011 relating to having had a terrible weekend with a 15% pay cut and having come fifth in a flying competition, in that there was evidence to support both statements of fact as emerged from those text messages;

(ix) evidence as to the appellant's family movements over the last week of June and first week of July 2011, as set out in texts of 2nd June 2011;

(x) texts around 28th April 2011 relating to tattoos, in respect of which there was significant independent evidence pointing to the appellant's interest in tattoos at that point;

(xi) a text sent from phone D/the Master phone to phone E/the Slave phone on 15th August 2012 in relation to arriving at the apartment of the deceased, for which there was CCTV footage of the appellant.

124. It is beyond question that the Gardaí in this case were blameless in the manner in which they conducted the investigation. There was no question of evidence being sought by way of a trick or underhand or duplicitous methods. Garda actions were in full compliance with the provisions of an Act of the Oireachtas. We also think it is of relevance that the Oireachtas was not at large in enacting the 2011 Act. The measure was enacted to give effect

to an obligation arising out of EU membership. It is of some interest that Ireland, along with Slovakia, took legal challenges against the Directive which had been approved by a qualified majority. Ireland's argument was that the purported reliance on Article 95 of the Treaty Establishing the European Community as the legal basis for the Directive was inappropriate and unjustifiable since measures based on Article 95 had to have as their "centre of gravity" the harmonisation of national laws in order to improve the functioning of the internal market, whereas the Directive concerned the fight against crime and was not intended to address defects in the internal market.

125. While it may be that the Director could have successfully mounted a prosecution without any reference to call data records, that is not what she did. The Director chose to introduce into the case call data records, and not just text records, where there was a simpler route to establishing admissibility, even though she must have known that in the case of call data records, she would face a significant legal challenge. To return to the food metaphors used earlier, it must be that she concluded that the icing significantly enhanced the cake.

126. In seeking to place any reliance on the call data records, she was doing so in circumstances that the decision of the CJEU in *Digital Rights Ireland* had been delivered at the time of trial. The response of the CJEU to the reference sent by the Supreme Court in the course of the leapfrog appeal in the plenary proceedings commenced by the appellant put beyond doubt that illegality attached to the retention of the data which was accessed by Gardaí. As to the nature of that illegality, we agree with the Director that at the heart of the decision in the plenary proceedings was a conclusion that the 2011 Act failed to comply with the conditions laid down in a Directive. The analogy to a determination in Irish law that a measure was *ultra vires* a statutory power seems to us helpful and appropriate. The terms of Articles 7 and 8 of the Charter are clear:

"Article 7

Respect for Private and Family Life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of Personal Data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority."

127. We are conscious of the fundamental requirement of EU law that the rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions, something required by the so-called principle of equivalence, and that exercising rights conferred by EU law must not be rendered impossible in practice or excessively difficult, *i.e.*, the so-called principle of effectiveness.

128. Addressing this issue involves consideration of what an analogous situation in domestic law might be, and linked with that, a determination of whether the illegality established should be approached on the basis of *O'Brien* or on the basis of *JC.* If seeking a right in domestic law to apply by analogy, the obvious place to look is the right to privacy, an unenumerated right first recognised in the case of *Kennedy v. Ireland* [1987] IR 587 (Hamilton P.). The right to privacy is not an unqualified right but is subject to the constitutional rights of others and the requirements of public order, public morality and common good.

129. It is worth noting here that, as *per* the successive CJEU judgments, the provision said to be infringed by the data retention and access regime at issue is Article 15(1) of the e-Privacy Directive, as follows:

> "Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union."

In *GD*, it was held, as it was held in earlier CJEU case law, that the applicable Irish regime was invalid in EU law on the basis of the above provision *read in light of* Articles 7, 8, 11, and 52(1) of the Charter. This is clear from the *dispositif* of *GD* in particular. If it was the case that the Charter was directly breached by the regime under the 2011 Act, perhaps a *JC* test would be appropriate to satisfy the requirements of equivalence and effectiveness. However, it cannot be said that, in EU terms, this situation approaches one that is analogous to unconstitutionality; this, *per* the CJEU, concerned an indirect breach of the Charter, and more particularly a breach of a provision of a Directive *read in light of* the Charter that cannot be considered as approaching a level of directness that would warrant the application of a *JC* test.

130. In those circumstances, it seems to us appropriate to approach the case on the basis that this was a situation of illegality, concerning information by way of call data records that ought not to have been retained which were retained and which were accessed without appropriate independent authorisation. On that basis, the test in *O'Brien* seems to us to be the applicable one.

Applying *O'Brien*

131. The seminal case of *O'Brien* arose out of a conviction for house breaking and stealing. The conviction was recorded in circumstances where evidence was recovered in the course of a search of a dwelling; 118, Captain's Road, Crumlin, Dublin, where the two accused, Gerard and Patrick O'Brien, resided. However, a search warrant that had been issued had referred not to "118, Captain's Road", but to "118, Cashel Road". The matter came before the Supreme Court on foot of a certificate under s. 29 of the Courts of Justice Act 1924. The principal judgment was that of Kingsmill Moore J., with whom Lavery and Budd JJ. agreed. There was also a judgment delivered by Walsh J. with which Ó Dálaigh C.J. recorded his agreement. The members of the Court agreed that the appeal should be dismissed and therefore the conviction upheld. Where they diverged was that Walsh J., in the course of his judgment, expressed the view that where evidence had been obtained by the State as a result of a deliberate and conscious violation of the constitutional (as opposed to the common law) rights of an accused person, it should be excluded save where there are "extraordinary excusing circumstances", and went on to mention what those might be. Kingsmill Moore J. agreed that, where there had been evidence obtained as a result of deliberate and conscious violation of constitutional rights by the State, the evidence should in general be excluded, and agreed that there may be certain extraordinary excusing circumstances which might warrant its admission, but he preferred not to attempt to enumerate any such circumstances by anticipation. He was firmly of the view that the case

was not one of deliberate and conscious violation, but of a purely accidental and unintentional infringement of the Constitution, and that in such cases, as Walsh J. had indicated, evidence normally should not be excluded.

132. The brief judgment of Lavery J. in *O'Brien* merits mention. He felt it necessary to say that, in his opinion, this was not a suitable case in which to consider the serious question of the admissibility of evidence obtained by illegal means. He went on to say that if a judge were to hold inadmissible the evidence in question in this case, or in any comparable case, his ruling would, in his opinion, "be wrong to the point of absurdity and would bring the administration of the law into well-deserved contempt." In our view, those brief but pointed remarks of Lavery J. are not without relevance in the context of the present case.

133. In our view, there is no doubt that the *O'Brien* test is the applicable test, and that the evidence was properly admitted. As we have already seen, the judge, while of the view that the evidence was not illegal, went on to consider how a discretion should be exercised if he was in fact required to exercise a discretion. In our view, a contrary ruling would, to borrow the language of Lavery J., be wrong to the point of absurdity and would bring the administration of the law into well-deserved contempt.

Applying *JC*

134. While we are of the view that the appropriate test is that provided for in *O'Brien*, we propose to address the situation that would apply under *JC*. We do so in circumstances where the appellant has argued that what was in issue here was a breach of a Charter right, and that a breach of a Charter right is to be equated with a breach of a constitutional right, thus mandating the application of the *JC* test.

135. As occurred in *Behan*, the appellant in this case does not now suggest that the evidence should automatically have been excluded, but rather, he says that he was denied the opportunity of a *JC* hearing, in circumstances where his trial and conviction took place before

the Supreme Court delivered judgment in *JC*. The appellant, when summarising the issues to be decided, identifies one of those as being what is to happen when there was no *JC* hearing, and answers the question he poses by saying there should be a retrial. The case has some common features with the case of *Behan*. There, because the trial judge took the view that the Divisional Detective Superintendent was independent at the time that he issued the warrant, he concluded that there was no illegality or unconstitutionality and therefore did not proceed to a *JC* inquiry. In the Supreme Court, O'Malley J. felt that the issue then was whether the decision of the trial judge that the warrant was valid and that a *JC* inquiry was therefore not necessary could be described as a fundamental error or a departure from the essential requirements of the law that resulted in a lost chance of an acquittal. She went on to comment, in a point with which few could disagree, that it will in many, if not most appeals, be difficult for an appellate court to be certain what might have transpired if a *JC* inquiry was conducted, since, by definition, it does not have the necessary evidence before it.

136. Against the background of that observation, O'Malley J. went on to consider what the position was. Analysing the situation, she felt that the view that the Divisional Detective Superintendent was independent, while mistaken, was certainly a tenable one. Second, she held that, while the identification of the Detective Superintendent as independent was erroneous, the actual manner in which the officer considered the question of the warrant was not open to any real criticism. Further, that it was inescapably the case that, in the unusual circumstances of the case, no other person, whether a member of An Garda Síochána or a judge, could have rationally declined to issue a search warrant in the circumstances as they pertained. In those circumstances, she was inclined to agree with the view of this Court that the error in the case was one that made no practical difference. She then went on to approach the case on the basis that a *JC* inquiry could, for some reason, have led to exclusion of

evidence. Reviewing the evidence, she felt that the appellant was left as the only possible raider and that the evidence against him was "more than sufficient for a conviction".

137. In our view, having regard to the circumstances in which the application for access to data was made in this case, the limited nature of the data accessed, merely being to put the appellant in particular locations on particular occasions, when, for the most part, there was other evidence in the case doing that, that test could end with only one result: the admission of the evidence. We are firmly of that view, notwithstanding the arguments of the appellant that the provision made for long-term blanket retention was something that could never have lawfully been provided for, and that therefore, a particular subparagraph of the judgment of Clarke J. was operable. We are fortified in our views that any consideration of the *JC* test would inevitably have led to the admission of the evidence by the approach actually taken by the trial judge, who, with considerable foresight, given that he was presiding over the trial before the judgment in *JC* was given, gave consideration to what the situation would be if he was called on to exercise a discretion.

The Proviso

138. There is a further aspect to which we make reference. We have considered the question of what the situation would be if, which is not the case, we had been persuaded to uphold any of the arguments advanced by the appellant in relation to call data records. Section 3(1) of the Criminal Procedure Act 1993 provides:

> "(1) On the hearing of an appeal against conviction of an offence the Court may—
>
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred)"

139. No doubt, the appellant's position is that this is a case where the Court should not exercise the power to affirm a conviction, notwithstanding that a point raised in argument

was being determined in his favour because a *JC* inquiry could lead to the exclusion of the call data records evidence. Judgments of the courts in relation to the proviso under s. 3(1)(a) (as this provision and its predecessor are generally referred to) are rare. One such case was *DPP v. Fitzpatrick & McConnell* [2013] 3 IR 656, where the proviso was considered in circumstances where the Court had concluded that one of the appellants had not been afforded a reasonable opportunity to consult with his solicitor before ss. 18 and 19 of the Criminal Justice Act 1984, permitting the drawing of adverse inferences, were invoked. O'Donnell J., as he then was, delivering the judgment of the Court of Criminal Appeal, commented:

> "The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of the appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed. However, it cannot be said here that the proceeding was fundamentally flawed. The significance of any inference to be drawn under s.18 may depend upon the particular facts of individual cases. Most often, as the section itself recognises, its main effect will be to provide corroboration where that is required either by a rule of law, or by the general practice of the courts in respect of particular offences. Here, however, there was no question of the evidence against the accused requiring corroboration either as a matter of law or practice. It was direct and compelling evidence of involvement in the preparation of bombs."

140. The question of the proviso was also in issue in the case of *DPP v. Sheehan* [2021] IESC 49. The case was a somewhat unusual one in that the Court of Appeal, having taken the view that the accused had exercised his right to conduct his own defence, but in circumstances where the trial had proceeded with legal representation, had decided to apply the proviso. The Supreme Court felt that the appellant had not been wrongly deprived of his right to represent himself, and so the question of the proviso on that issue did not arise. However, there was a second issue relating to the drawing of inferences pursuant to s. 18 of the Criminal Justice Act 1993. Issues were raised in respect of CCTV footage apparently showing the appellant holding what seemed to be a gun. In that regard, the Supreme Court was of the view that interviewing Gardaí were entitled to invoke the statutory provision. However, there was a second issue in relation to text messages found on a phone connected to the appellant. There, O'Malley J. was of the view that text messages did not come within the ambit of s. 18 since they were not objects or marks on an object. She was also of the view that the messages did not call for an explanation from the appellant since the meaning conveyed was clear. However, she was of the view that the conclusions she reached in relation to the invocation of the inference provisions in respect of the text messages should not lead to the quashing of the conviction. Taking the case as a whole, she was satisfied that the admission of the evidence did not deprive the appellant of a chance of an acquittal. She was satisfied that there had been no miscarriage of justice and that it was appropriate to apply s. 3 of the Criminal Procedure Act 1993, and accordingly, she dismissed the appeal.

141. In this case, we are quite satisfied that the admission of the very limited call data record evidence that was admitted could not conceivably be regarded as giving rise to a miscarriage of justice, and so, even if it was the situation that the view was reached that the call data records should not have been admitted, we would dismiss the appeal, being of the

view that there had been no miscarriage of justice here, and that there had been no lost chance of acquittal.

Decision

142. In summary, we have not been prepared to uphold any ground of appeal. We have not been persuaded that the trial was unfair or that the verdict was unsafe. Accordingly, the appeal is dismissed.