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Supreme Court of Ireland Decisions

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Judgment

Title:	Director of Public Prosecutions -v- Doyle
Neutral Citation:	[2017] IESC 1
Supreme Court Record Number:	40/2015
Court of Appeal Record Number:	50/2012
Date of Delivery:	18/01/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., O'Donnell Donal J., McKechnie J., MacMenamin J., Laffoy J., Charleton J., O'Malley J.
Judgment by:	Denham C.J.
Status:	Approved
Result:	Appeal dismissed

Judgments by	Link to Judgment	Concurring	Dissenting
Denham C.J.	Link		McKechnie J.
O'Donnell Donal J.	Link		
MacMenamin J.	Link		
Charleton J.	Link	Laffoy J	
O'Malley J.	Link		
McKechnie J.	Link		

Judgment | Information Note

THE SUPREME COURT

Appeal No. 40/2015

Denham C.J.
O'Donnell J.
McKechnie J.

MacMenamin J.
Laffoy J.
Charleton J.
O'Malley J.

Between/

The People (at the suit of the Director of Public Prosecutions)

Prosecutor/Respondent

and

Barry Doyle

Accused/Appellant

Judgment delivered on the 18th day of January, 2017 by Denham C.J.

1. Barry Doyle, the accused/appellant, referred to as "the appellant", was granted leave to appeal to this Court from the decision of the Court of Appeal of the 8th June, 2015: [2015] IESCDET 45. The Director of Public Prosecutions, the prosecutor/respondent, is referred to as "the DPP".

2. The issues upon which leave to appeal was granted were:-

> (i) Whether or not the appellant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present, prior to and during the 15th interview with the Garda Síochána, during which admissions were alleged to have been made. This raises the question of whether the right to have a solicitor present during questioning is a matter of right of the detained person, or a matter of concession by the Garda Síochána.
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> I shall refer to this issue as "the presence of a solicitor" issue.
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> (ii) Whether the appellant, in all the circumstances, including that he was convicted in the Central Criminal Court on the 15th February, 2012, and the decision of the Supreme Court in *DPP v. Damache* was delivered on the 23rd February, 2012, can rely on that decision on his appeal.
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> I shall refer to this issue as "the Damache" issue.
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> (iii) Whether the matters set out in the appellant's application under the heading "Relevant facts considered not to be in dispute", or any of them, constituted threats or inducements made to the appellant and calculated to extract a confession from him. This is a matter not decided by the Court of trial or the Court of Appeal. Secondly, if they do constitute such threats or inducements, whether their effect had "dissipated" or "worn off" by the time of the admissions relied upon by the State, as held by the trial judge; and whether or not there was any evidence on which it could have been determined that the effect of the said threats or inducements (if any) had "dissipated" or "worn off" by the time of the alleged admissions.
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> I shall refer to this as "the threats and inducement" issues.

Factual Background

3. The factual background was stated in the judgment of the President of the Court of

Appeal, delivered on the 8th June, 2015. Commencing at paragraph 7, Ryan P. held:-

> "7. Two teams of two Gardaí each carried out the interrogation of the appellant. It was slow going at first because he was unwilling to engage with his interviewers. Their efforts were directed in the first instance at getting him to talk to them about himself and his relationships, including those with his children and with Victoria Gunnery. He was reluctant to engage with them but the Gardaí persisted. Mr. Doyle had brief consultations with a solicitor. All of the interviews were video-recorded.
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> 8. The appellant's attitude changed at interview 15, which began at 19.42 on 26th February 2009. In the previous interview that concluded at 18.35, Mr. Doyle had asked to see his solicitor Mr. O'Donnell and the Gardaí told him that he was on his way. In due course, the solicitor arrived and spoke to his client. The solicitor then approached the Gardaí with an offer. Mr. Doyle would say that he killed Shane Geoghegan if the Gardaí agreed to release Victoria Gunnery. The deal on offer was that he would answer one question only, to confirm that he had killed the deceased. The Gardaí rejected the offer. They said that they wanted Mr. Doyle to tell the truth, that answering one question would not be satisfactory in any case because it would not enable the Gardaí to find out if he was telling the truth and there could be no deal because that would be an inducement which would make any admission inadmissible in court. Mr. O'Donnell returned to his client and had a further brief consultation.
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> 9. Then interview 15 began, but it was interrupted after a few minutes by a phone call from the solicitor who wanted to speak with his client, which then happened. Thereafter, the interview recommenced. Mr. Doyle now answered the questions put to him regarding his role and confirmed that he was the person who shot Shane Geoghegan. He gave details of how he had waited for his victim, having been driven there by another person whom he did not name. He described the shooting, how it happened first on the green in front of the houses, how the gun jammed and he cleared it by ejecting the bullets, how he then resumed the pursuit by going around to the back of the house where he shot Mr. Geoghegan a number of times including once in the head from short range.
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> 10. The Gardaí asked Mr. Doyle to draw them a map of the scene and he obliged, using writing materials the Gardaí provided. He showed the points that were relevant including where the car had been parked and which way it was facing, the direction that Mr. Geoghegan had come from, where he Mr. Doyle shot Mr. Geoghegan the first time, where he ejected the bullets to clear the gun mechanism and where he had gone round to the back of the house and finished off his victim. This information was important, as the prosecution alleged, because it included facts that the Gardaí did not know or were mistaken about.
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> 11. At the termination of interview 15, after the tape was sealed, the Gardaí asked Mr. Doyle about his feelings for the Geoghegan family and he said he was sorry for them and in a gesture of sympathy he took off the rosary beads that he was wearing round his neck and said to give it to Shane Geoghegan's mother."

Presence of a Solicitor

4. The right of access to legal advisers is well established in our jurisprudence. In The *People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336, the Court of Criminal Appeal held that a person in detention:

> "has got a right of reasonable access to his legal advisers and that a refusal of a request to give such reasonable access would render his detention illegal."

5. The right of access to a solicitor, when requested by or on behalf of a person in detention, was recognised as being a constitutional right by Finlay C.J. in *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73, where he stated:-

> "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.
>
> Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give."

6. Thus, it was recognised over twenty years ago that there is a constitutional right of reasonable access to a solicitor.

7. The constitutional right is grounded in Article 38.1 of the Constitution, which provides that:

> "No person shall be tried on any criminal charge save in due course of law."

8. The protection of a trial in due course of law is not confined to the trial in court but applies also to pre-trial detention and questioning. However, not all rights which are guaranteed for the courtroom apply to pre-trial detention and questioning. For example, the solicitor of an accused is not permitted to have regular updates and running accounts of the progress of an investigation: *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

9. The concept of basic fairness of process applies from the time of arrest. In *DPP v Gormley and DPP v White* [2014] IESC 17, [2014] 2 I.R. 591, Clarke J. described this as:

> "…[T]he requirement that persons only be tried in due course of law therefore requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in *State (Healy) v Donoghue* applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis. … it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States."

10. *DPP v Gormley and DPP v White* confirmed an entitlement to have reasonable access to legal advice prior to the conduct of any interrogation.

11. Further, in *DPP v Gormley and DPP v White*, opinions were given as to possible

future development of the law. Thus, Hardiman J. stated (in a judgment concurring with Clarke J.):-

> "[12] In my view, the most salient and practically important feature of Mr. Justice Clarke's judgment is the citation from the judgment of the Supreme Court of the United Kingdom in *Cadder v. Her Majesty's Advocates* [2010] UKSC 43. There, at para. 48, Lord Hope, having summarised the principal features of the European Convention on Human Rights jurisprudence concluded that:
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> > "the contracting States are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to a lawyer before he is subjected to police questioning."
>
> [13] I believe that the law in Ireland is identical, as to the need to organise [our system] to take account of detained persons' rights.
>
> [17] It is, at least *prima facie*, a matter for the legislature and the State to provide for the time and manner of a person's arrest and the circumstances of his or her detention. But it is now essential that these matters should be regulated, and if necessary the mode of regulation altered, in order to vindicate the right to legal advice."

12. In other words, while the right of access to a solicitor before questioning was once again affirmed, Hardiman J. pointed out that there needed to be regulation by the Legislature and the State in the area.

13. In *Gormley* the issue as to whether a detained person is entitled to a general right to have a lawyer present during an interrogation did not arise. Consequently, any statements on such issue are *obiter dicta*.

14. In this case the appellant had access to his lawyer just before the key interview. Also, at the solicitor's request, the interview was interrupted to enable access by the solicitor to the appellant.

15. Consequently, it is clear that the appellant requested access to a solicitor and obtained access to a solicitor. He had access to legal advice. He had access to the solicitor before the important Interview 15, and he had access, at the solicitor's request, during that interview, when the solicitor phoned in and sought to speak to the appellant as Interview 15 was underway. The interview was interrupted to enable the appellant to speak to his solicitor. There was no request to have the legal adviser present during the interview.

16. I am satisfied that the constitutional right of access to legal advice was met by the attendance of the appellant with his solicitor prior to Interview 15, and indeed by the telephone call from his solicitor which interrupted Interview 15.

17. The constitutional right is a right of access to a lawyer. The right is one of access to a lawyer, not of the presence of a lawyer during an interview.

18. I am satisfied that the appellant's constitutional rights were met in the circumstances of this case.

European Convention on Human Rights
19. As to Convention rights, I am satisfied that they also were met. *Salduz v. Turkey* (2009) 49 EHRR 19 and *Dayanan v. Turkey* (App. No. 7377/03) were opened to the Court. I have already quoted Hardiman J. in *DPP v Gormley and DPP v White*.

Presence of a Solicitor issue
20. As to the first issue, the presence of a solicitor: the appellant consulted with his solicitor prior to the 15th interview. He also received a telephone call from his solicitor during the 15th interview. Thus, his constitutional right of access to legal advice was met. The appellant, in the circumstances of this case, was not entitled to have a solicitor present during the interview.

21. It is an important factor that since the decision in *Gormley*, the State has introduced a Code of Practice on Access to a Solicitor by Persons in Garda Custody, which permits the presence of a solicitor during interview, if necessary. Also, of importance is the fact that interviews are video-taped.

The Damache issue
22. As to the second issue, the Damache issue, I agree with the judgment of Charleton J.

The threats and inducement issues
23. As to the third issue, the threats and inducement issues, I agree with the judgment of Charleton J.

24. Consequently, I would dismiss the appeal.

Judgment of Mr. Justice O'Donnell delivered the 18th of January 2017

1 I hesitate to add further observations on the issue of entitlement to the presence of a lawyer when a substantial majority of the Court is agreed as to the result, but where a range of different views have been expressed by my colleagues as to the precise reasoning. Here, the fact is that although the accused/appellant had considerable access to a solicitor and advice and representation while in custody, he did not have a solicitor present during the entire period of his detention. Certain dicta, undoubtedly obiter, in *DPP v. Gormley & White* [2014] 2 I.R. 591 ("*Gormley*"), are relied on by the appellant as suggesting that a right to the presence of a solicitor during detention and questioning, is or may be, part of the guarantee of a fair trial on a criminal charge pursuant to Article 38 of the Constitution, and that accordingly, the statements made while in detention ought to have been excluded with the result that the conviction must be set aside and, presumably, a retrial ordered.

2 The position as I understand it is that Charleton J. for the majority of the Court concludes that the Constitution should be interpreted as requiring and guaranteeing access to a lawyer but that neither the Constitution nor the European Convention on Human Rights ("the Convention") require more, and in particular does not require presence of a lawyer during detention and questioning. MacMenamin J. holds that the Constitution does require that a lawyer be present for the full detention. However, he would hold that, insofar as the constitutional right goes, the decision of this Court in *DPP v. JC* [2015] IESC 31, it would have the effect that the evidence would not be excluded. As for the claim based on the Convention, he concludes that the overall test is the fairness of the trial, and that it has not been established that the trial here was unfair. O'Malley J., would reserve the question of the existence of a constitutional right but considers that even if so, there must be a causal connection between any breach of that right, and the statements sought to be admitted. In the admittedly unusual circumstances in this case, the degree of engagement by the solicitor was more significant and central than might have been the case if he or she was merely present, and accordingly, she concludes that no causal connection has been established so that the statements made were properly admitted. McKechnie J. addresses the inducement issue primarily but would also allow the appellant's appeal on the ground that presence of a lawyer during questioning is now constitutionally required. An important additional consideration is that at a practical level, matters have moved on since the decision in *Gormley*, and the State has introduced a code of practice permitting the attendance of a solicitor if necessary under the legal aid scheme, when a suspect is questioned by the gardaí.

3 It might be thought that there is little benefit therefore in considering further this issue since all questioning of suspects in detention since 2015 has presumably been conducted pursuant to the Code of Practice on Access to a Solicitor by Persons in Garda Custody. However, the matter is of relevance, and is indeed acute, in respect of those cases which are still live within the system, and in which statements were taken prior to the introduction of the Code of Practice where access to a solicitor was permitted, but a solicitor was not present during all of the detention. Furthermore, it becomes important to consider the basis of any entitlement to the presence of a lawyer post-2015. If such presence is constitutionally required, and if indeed it is part of the Article 38 guarantee of trial in due course of law, then further consequences might flow in the event that it was not available for any reason, and perhaps irrespective of whether evidence was obtained as a result. Moreover, questions remain as to the precise role of the solicitor during such detention. In my view it would only be productive of uncertainty and confusion to find that there is an entitlement to the presence of a lawyer without specifying exactly what is entailed in such presence. That may depend however on whether presence of the solicitor is something which is constitutionally required, and if so the precise constitutional basis. In any event, the issue also raises the difficult question discussed in the judgment of MacMenamin J. as to the consequences of a novel interpretation of the Constitution on existing cases. It is apparent therefore that issues are touched on in this case, which extend well beyond the outcome of the case, and accordingly I consider it necessary to set out my views.

4 *Gormley* was a case which explicitly raised the question of pursuing the questioning of a suspect or proceeding to take samples from him or her, in the period between the point at which a suspect had sought a solicitor's attendance, and the arrival of that solicitor at the garda station. This is clear from the questions certified in Mr. Gormley's case referred to at page 607 of the judgment of Clarke J.:

> "1 Does the *constitutional right of access* require the commencement of questioning of a detained suspect (who has requested a solicitor) be postponed for a reasonable period of time to enable the solicitor who was contacted an opportunity attend at the garda station?

> 2 Is the *constitutional right of access to legal advice* of a detained suspect vindicated where members of An Garda Síochána make contact with a solicitor requested by the suspect but do not thereafter postpone the commencement of questioning for a reasonable period of time in order to enable the named solicitor to actually attend at the garda station and advise the suspect?" (Emphasis added)

In Mr. White's case, the question referred to at page 607, was whether:

> "In circumstances where a person is in custody and has requested a solicitor, are members of An Garda Síochána, for the purpose of ensuring protection of rights of an accused, obliged not to take, or to cease if they have commenced taking, any forensic samples until such time as the person who has sought access to a solicitor, and that solicitor has indicated that he/she will attend, has had actual access *to that solicitor.*" (Emphasis added)

5 It is clear therefore that the case proceeded on the basis that there was a constitutional right of access to a solicitor while in custody: the only question was whether evidence obtained before that solicitor arrived, could be admissible in a trial. Accordingly, the case did not, and could not, raise the question of a more general right to presence of a solicitor during detention. Accordingly, the observations made by the Court on that issue are *obiter*.

6 The Court referred to international jurisprudence. In the well known and controversial case of *Miranda v. Arizona* [1966] 384 U.S. 436, a five to four majority of the United States Supreme Court held that the US Constitution required a bright-line rule that a defendant had a right to the presence of a lawyer (if necessary provided by the state) *during* questioning, and to be informed of his right. This decision has been heavily qualified in subsequent years in the US, most obviously by the relative facility with which a waiver of the so called Miranda rights can be found. Significantly in 2011, the Supreme Court of Canada rejected the argument that *Miranda* should be "transplanted in Canadian soil": *R v. Sinclair* [2011] 3 S.C.R. 3.

7 The issue has been touched in the jurisprudence of the European Court of Human Rights. The leading decision is that of *Salduz v. Turkey* (2009) 49 EHRR 19. Mr. Salduz was 17 years of age, and was interrogated in the absence of his lawyer. The Grand Chamber held that this was a violation of his rights. Paragraph 3 of the Convention was a guarantee of fair trial, but could extend to the period before trial, and when the person was being questioned. The overall test was whether the proceedings were fair. In *Salduz*, the Court used language relating to the "benefit from the assistance of a lawyer … at the initial stages of police interrogation". Subsequently at paragraph 54, it referred to "early access to a lawyer", and "access to legal advice [as] a fundamental safeguard against ill-treatment". At paragraph 55 the judgment, the Court concluded that Article 6.1 required as a rule "access to a lawyer should be provided as and from the first interrogation of a suspect". Subsequently in *Dayanan v. Turkey* (App. No. 7377/03), the Court concluded at paragraph 32 that the fairness of proceedings required that:

> "an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."

8 Given the fact that the jurisprudence of the ECtHR has to date largely been developed in the context of civil law systems with early supervision of investigation by a magistrate, it cannot be said that it has been definitively determined that the Convention requires a

bright-line rule that in a common law system, an accused person must have not just access to, but the assurance of the presence of, a lawyer during any detention. This is particularly so because, until now, the Convention jurisprudence has not adopted any absolute rule that evidence obtained in breach of a Convention right must be inadmissible, but rather has applied a test of considering the overall fairness of the proceedings.

9 In *Cadder v. Her Majesty's Advocate* [2010] UKSC 43, the United Kingdom Supreme Court did consider the application of the Convention and held that the Scots law of criminal investigation which did not permit access to a lawyer, was incompatible with the Convention. The judgment used the language of access and presence interchangeably, but it is clear that the case was not directed to the precise issue raised before this Court. Indeed since the decision in *Cadder* did not specify an absolute rule of presence during the entire period, it might perhaps be thought to require access and advice only. The issue did not arise, and is unlikely to do so now because the changes to the detention system adopted in the UK in the aftermath of the decision appear to provide for the presence of a lawyer during detention and questioning.

10 In *Gormley*, Clarke J. referred to the developing jurisprudence of this Court in relation to the right to be assisted by a lawyer in criminal proceedings. In particular, he referred to the well known statements in *McGee v. The Attorney General* [1974] IR 284, at p.319, where Walsh J. stated that:

> "It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts"

Significantly this passage was quoted with approval by O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325, at p.347, where the Court held that legal aid in criminal proceedings involving a risk of imprisonment was now a constitutional requirement. The Constitution, O'Higgins C.J. said:

> "[falls] to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or acceptable with regard to these virtues at the time of its enactment".

Accordingly, the Court in Gormley concluded that:

> "it is now necessary to interpret the "due course of law" provisions of Bunreacht na hÉireann as encompassing the asserted right to access to a lawyer prior to interrogation or the taking of forensic samples". (Emphasis added). (p.628 per Clarke J.)

In particular the Court concluded that the Article 38 guarantee of a criminal trial in due course of law was capable of having an application prior to the commencement of the trial proper, and was engaged at the point at which the coercive power of the State in the form of an arrest was exercised against a suspect. In that regard, i.e. the engagement of fair trial rights at the questioning stage, the Irish position was the same as that understood to be acknowledged by the ECtHR and by the Supreme Court of the United States. In relation to the specific issue which arises in the present proceedings, the Court observed:

> "[T]he question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present." (p.633 per Clarke J.)

11 I recognise the reasons why the Court in *Gormley* considered that it might be the case

that the Constitution could be held to require a bright-line rule of presence of a lawyer. Neatness, clarity and simplicity are powerful practical reasons for a clear bright-line rule. However, there are also strong reasons for caution in that regard. First, the obligation to decide cases on the issues and arguments addressed and in relation to the precise factual circumstances necessarily raised, means that courts must decide cases on their own facts and arguments, rather than on the expression of views by other courts, however considered. Second, for the reasons already addressed, it cannot in my view be said that the ECtHR has adopted a bright-line rule demanding the exclusion of evidence obtained in a common law system where an accused makes a voluntary statement after having had access to an advice from a lawyer. The legal argument for adopting an absolute rule of presence of a lawyer as a matter of constitutional principle, rather than pragmatism or even enlightened administration, rests almost entirely therefore on the decision in *Miranda*.

12 While undoubtedly such a rule was adopted in 1966 in the United States in *Miranda*, that occurred in the context of a significantly different criminal justice system to that which applies now in Ireland, and little enthusiasm has been shown here in later years for adopting some of the subsequent developments in the US criminal justice system. It is often forgotten that most of the major developments in the jurisprudence of the Warren Court occurred in the overarching context of that Court's concerns with the central issue of race. In a federal system much criminal law (and indeed much civil law) is state law, and just as significantly, is enforced and adjudicated upon, at state level. That was a matter of obvious concern in the segregated United States of the early 1960s. The decision appears to rests as much if not more on policy than principle. Indeed and rather ironically, when the majority judgment did refer to case law, it approved the Scots law on admissibility, a system that fell foul of the Convention in *Cadder*, which is perhaps a warning against too ready reliance on foreign case law. The majority judgment in *Miranda* also focussed on interrogation practices in the US which, without any undue self-congratulation, are certainly not the norm in Ireland. The judgment made it clear that the rule was introduced as a preventative measure, and that if changes were made to the process of arrest and questioning, the rule might be adjusted. Certainly most of the justifications offered for the rule in *Miranda* would require reconsideration in context of the regime now applicable in Ireland. A lawyer's presence is no longer necessary as an independent witness of events during questioning. It is also doubtful that it can be said that function of a lawyer is to provide moral support or indeed that anything in lawyers' training qualifies them for such a role. Indeed the function of a lawyer is to provide legal advice, which was available, and provided, here.

13 The question posed most starkly now, is whether, when there is a fully accurate record of police questioning and the suspect's response, a judicial finding that a statement is made voluntarily, and access to and advice from a lawyer, it is nevertheless necessary to exclude the statement from evidence at a trial, because the accused did not have a lawyer present at all stages during his detention was not told (and in this case could not have been told) that he was entitled to have one? As already noted the Supreme Court of Canada was not persuaded to adopt the same approach. Although *Miranda* was perhaps one of the best know decisions of the US Supreme Court in the 20th century, and although the question of admissibility of statements made in police custody has been the subject of numerous cases in this jurisdiction since *Miranda*, it has not been adopted in Irish jurisprudence, or it appears in the jurisprudence of any other common law country, in the 50 years since it was decided. Whatever merit *Miranda* had in the context in which it was decided, and leaving to one side the significant subsequent qualification of the decision in both law and practice in the US, I would be slow to adopt it unhesitatingly in what is now a very different factual and legal context. Neither its own reasoning nor its subsequent treatment suggests that *Miranda* can be regarded as dispositive of the issue whether the Irish Constitution should now be interpreted to require the presence of a lawyer at all times during a detention.

14 It must be remembered that it was held by the trial judge here, having heard all the relevant evidence and having reviewed the videos of the interviews, that the confession here was voluntary, beyond reasonable doubt. Furthermore, it is apparent from the conclusions of both MacMenamin and O'Malley JJ. that the admission of the statement in evidence is not, and was not, unfair. Third, it must be recognised that if a single bright-line rule is adopted by this Court, it would have the potential to exclude key evidence in the shape of statements voluntarily given, with the benefit of legal advice, in circumstances otherwise beyond criticism. Whatever its virtue in terms of neatness, this is the unavoidable price of a single bright-line rule. If it does not exclude evidence which otherwise would be admitted, it would be of no effect or benefit. I do not doubt that if the Court considered that this was the only way to ensure fairness in garda questioning, that it could and would adopt such a rule. I also recognise in particular the strength of the matters adverted to in the judgment of O'Malley J. in relation to the complex provisions which are now available for the drawing of inferences from refusals or failure to answer questions, and I also recognise the reality that it may in due course be simply easier and neater to provide for presence by a lawyer as the best guarantee that such provisions are operated properly and fairly. Finally, the introduction of the Code of Practice of 2015 on Access to a Solicitor by Persons in Garda Custody is of course a significant practical step, which may in due course render this debate redundant. However, I would for my part stop short at this point of finding that in addition to the video taping of interviews, the access to and advice from a lawyer (provided if necessary by the State), and the requirement that only statements found to be voluntary beyond reasonable doubt be admitted in evidence, the Constitution nevertheless requires and perhaps has always required, the presence of a lawyer at all times during questioning, as a condition of admissibility of any evidence obtained.

15 Furthermore, as O'Malley J. points out, the consequences of a finding that Article 38 is engaged after arrest and during any questioning has not been fully elaborated upon, and I am reluctant to unhesitatingly accept this analysis. It may be that it means no more than that a trial at which evidence was adduced which had been obtained in circumstances which the Constitution condemns, would not be a trial in due course of law. That may also suggest that any breach of the requirement is not itself fatal but must be judged in the context of the trial as a whole. However, if it means that Article 38 guarantee of trial in due course of law applies in its full force after arrest and to detention in a garda station long before a trial, and perhaps even if no trial ensues, then a number of difficult questions arise. A trial in due course of law under Article 38 normally requires an impartial judge, and, in the case of non-minor offences, a jury. Obviously these features are not required at arrest and interview. Other less dramatic issues arise. In particular, is the solicitor permitted only to observe the questioning and to offer advice or may he or she participate, ask questions, and demand disclosure of the information available to the investigating gardaí as they undoubtedly would at a trial? If Article 38 is engaged and breached because a lawyer was not present, would that fact alone require that the trial be prohibited even if no evidence emerged from, or was sought to be adduced, as a result of, the interview? It is true that in *Miranda v. Arizona* [1966] 384 U.S. 436 (and *Escobedo v. Illinois* (1964) 378 U.S. 478 which preceded it) it was held that fair trial rights applied at the arrest stage but as one distinguished commentator observed, that required radical (and I think dubious) textual surgery. See: Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 Cal. L Rev 929, at p. 946. The approach may have been adopted in the ECtHR of finding that a person was charged, and thus entitled to a lawyer, at a point prior to any formal charge, but that fits more easily in the civil law system, and is not a basis for reading Article 38 of the Constitution as engaged on arrest, particularly since it is not necessary to do so. I should add that I do not doubt that constitutional rights are engaged at the stage of arrest and questioning, and again that Article 38 applies at trial and may require the exclusion of evidence if it is considered that any trial at which such evidence was adduced would be unfair, but I respectfully question however the analysis that Article 38 applies directly, and with full

force, at the arrest stage.

16 I accept that many of these difficulties, and the particular difficulty posed in this case, might perhaps be addressed by the application of the decision of this Court in *DPP v. JC*, as suggested by MacMenamin J. However, that matter was not argued in this Court and it is in any event not self-evident that it would apply. In *JC*, the accused was not entitled to take advantage of the decision in *Damache v. DPP & ors* [2012] 2 I.R. 266, to exclude evidence obtained under a search which was valid according to the law at the time at which it was carried out. It did not however suggest that the plaintiff in *Damache* was not entitled to the benefit of the decision in his favour. If the application of the principle in *JC* would automatically neutralise any innovation in the constitutional law relating to evidence, then there would be no incentive to raise such issues. This is the first case which squarely raises the question of whether the Constitution requires not just access to, but presence of, a lawyer. If that is the true position, it is not self-evident why the appellant in this case should be deprived of the benefit of a successful argument establishing that right. I also agree with O'Malley J. that a causal connection should be established between a breach of a constitutional requirement and the evidence sought to be admitted, but if there is a constitutional bright-line rule requiring presence, I would have thought that principle required that the prosecution demonstrate that the evidence was obtained irrespective of the breach, or would perhaps have been obtained in any event if the rule had been adhered to.

17 The argument in this case also raises a very difficult and related issue as to the capacity of this Court to limit the effect of any ruling it should make. It is self-evident from the decision in *Gormley* that if this Court were to hold that the Constitution required the presence of a lawyer not merely access to a lawyer, it could only do so in application of the dicta in *McGee* and *State (Healy) v. Donoghue* that the Constitution must be applied in changing circumstances, and because it is, in the language of the well-worn metaphors, a living tree and a document which speaks in the present tense. As it was put in *Gormley* itself, the necessary conclusion would be that the Constitution now requires such a rule with however the necessary implication that it did not do so until now and interviews held when there was access afforded to a solicitor, even if a solicitor was not present for all of the interview, were lawful, and more importantly, constitutional. What then is the logic of maintaining that the Constitution (or its interpretation) can develop and change but that the new rule must nevertheless be held to have applied apply since 1937, and probably (since Article 38 in this regard follows closely from Article 70 of the Free State Constitution) since 1922? However, if the new rule of a constitutional right to presence of a solicitor is held not to have applied until some point, how is that point to be identified? Is it from the date of the decision in *Gormley*, the date of the interviews in this case, or the date of this judgment? If such a line is to be drawn, does it include or exclude this case? These are very complex issues, of fundamental importance in relation to the scope and limits of judicial review, which have been much debated in other jurisdictions, in both case law and scholarly analysis and a variety of interpretive solutions have been discussed. This matter has not been much discussed in this jurisdiction beyond the veery general statements in *Mc Gee* and *State (Healy) v Donoghue* referred to above, and was not addressed in argument in this case, and I would not consider it appropriate to address it without such argument. Even then it would not be desirable to offer any views on the issue unless it was unambiguously required by the particular circumstances of the case. In this case, such a point could only be reached, if the Court was first persuaded that the Constitution required the exclusion at a trial of a statement made by an accused person which had been demonstrated to have been made voluntarily, and after access to and advice from a lawyer. While I can see many arguments at a practical level for a simple rule, I am not persuaded that the Constitution requires such an approach, and accordingly I agree in this respect with the judgment of Mr. Justice Charleton.

18 Finally, I should say recognise the force of the analysis offered by McKechnie J. on the

question of inducement. I also accept that the function of an appellate court is to provide a real and searching scrutiny of the reasoning of trial judges. However, if it is permissible to draw together a number of fragments from interviews spread over time and then collected together in a portion of a submission, in order to discount the findings of a trial judge who not only heard and observed witnesses (which we did not) and who viewed the tapes of the full interviews (which again we did not, and were not invited to), and further make inferences as to the content of communications between client and solicitor, then little if anything would remain of the important division of functions between trial courts and appellate courts. I also consider that the law relating to inducements referred to by McKechnie J. should be reconsidered in the context of a general review of the law relating to detention and questioning in the light of a number of developments already discussed. Should it really be the case that any comment however "slight and trivial," can be treated as an inducement and result in the exclusion of a statement that is recorded and available to the trial court, voluntary, and made with the benefit of legal advice? It is obvious that developments in the law in this area are not always consistent, and at times point in different directions. It is surely important to recognise on the one hand that the law now provides for extended periods of detention and that there are now a variety of complex statutory provisions that permit the gardaí to pose questions on the basis that inferences may be drawn from a failure or refusal to respond, and on the other hand, that detention is subject to a high degree of regulation and, importantly, that all interviews are now recorded. This is a world unrecognisable to anyone familiar with criminal law and procedure when the rules on inducements were developed. It is desirable in my view that stock should be taken of all the developments in the law and technology , and fresh consideration given to what constitutional fairness or public policy requires in that context at each stage of the process. I would however dismiss the present appeal.

Judgment of Mr. Justice John MacMenamin dated the 18th day of January, 2017

1. Having been convicted of murder after a 22 day trial in the Central Criminal Court, the appellant, Barry Doyle was sentenced to the mandatory term of life imprisonment on the 15th February, 2012. That verdict and sentence was upheld by the Court of Appeal in a judgment (Ryan P.) on the 8th June, 2015 (Unreported, [2015] IECA 109). Subsequently, the applicant applied to this Court to be granted leave to appeal. That application was granted, in order to deal with three issues of general public importance, which, in the interests of justice, should be determined by this Court.

2. It must be said at the very outset that Shane Geoghegan, who was killed on the 9th November, 2008, was an entirely innocent man, well-known, highly respected, and well liked in his own community. He had the misfortune to be mistaken for someone else, in a gangland feud which had caused significant loss of life. These facts do not absolve the Court from the duty of engaging in a detached and objective analysis of the issues which now arise.

The Issues

3. The issues raised in this appeal are as follows:

> *"(i) Whether or not the applicant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present prior to, and during, the 15th interview with An Garda Siochana, during which admissions were alleged to have been made. This raises the question as to whether the right to have a solicitor present during questioning is a matter of right of the detained person, or matter of concession by An Garda Siochana.*
>
> *(ii) Whether the applicant, in all the circumstances, including that he was convicted in the Central Criminal Court on the 15th February, 2012, and*

> *the decision of the Supreme Court in DPP v. Damache was delivered on 23rd February, 2012, can rely on that decision on (his) appeal?*
>
> *(iii) Whether the matters set out in the applicant's application, under the heading "relevant facts considered not to be dispute", or any of them, constituted threats or inducements to the applicant, and calculated to extract a confession from him. This is a matter not decided by the court of trial, or the Court of Appeal. Secondly, if they do constitute such threats or inducements, whether their effect had "dissipated", or "worn off", by the time of the admissions relied on by the State, as held by the trial judge, and whether or not there was any evidence on which it could have been determined that the effect of these threats, or inducements, (if any), had "dissipated", or "worn off", by the time of the alleged admissions."*

4. It is necessary to state at the outset that this trial occurred in the year 2012. Thus, the law, as it was considered by the trial court, was the law as it then stood.

Findings of Fact and Inferences

5. One of the main areas for consideration in this appeal must be the judge's ruling in the *voir dire*. That *voir dire* took up 11 days in the lengthy trial. Consideration of each of the three points makes it unavoidable that matters of fact arising at the trial be analysed, and also the judge's inferences from those facts. These considerations arise particularly in the case of the first and third issues.

6. The issues of fact-finding and inference drawing were dealt with by the Court of Criminal Appeal in *The People v. Madden* [1977] I.R. 336. But the principles outlined there were later refined by this Court in *Hay v. O'Grady* [1992] 1 I.R. 210. Relying on statements of the law in *The People v. Madden* [1977] I.R. 336, counsel for the appellant submitted that this Court was in as good a position to draw inferences from facts as the trial judge, and should do so in support of the case he advanced.

7. However, in *Hay v. O'Grady* [1992] 1 I.R. 210 at 217, McCarthy J. observed that:

> *"3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in "Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken [1899] 2 I.R. 1, cited by O'Higgins C.J. in The People (Director of Public Prosecutions) v. Madden [1977] I.R. 336 at p.339).* ***I do not accept that this is always necessarily so.*** *It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be* ***slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge.*** *In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge. …"* (Emphasis added)

8. These principles emphasise, first, the critical role of a trial judge, as fact finder, and make clear that an appeal court should be "*slow*" to substitute its own inferences, where the trial judge's conclusions are based on oral evidence, and where he or she had the opportunity to assess the credibility of witnesses. Counsel for the appellant relied on a number of extracts taken from transcripts of the garda interviews with the appellant after he was arrested, which were part of the evidence at trial. Counsel submitted that this Court should find that the trial judge had erred in admitting confession evidence, and that this Court should draw other inferences. But, the judge's findings and inferences were based on real evidence, including video evidence of the interviews. This allowed the trial

court to observe how the garda interviews of the appellant were conducted, and his demeanour, conduct and disposition. This video evidence was analysed piece by piece in the *voir dire*. Prosecution and defence counsel examined and cross-examined the garda witnesses, having regard to what transpired. The judge himself viewed a total of 20 hours of the video evidence. Parts of that evidence went to the jury. This Court has not had the same advantage as the trial judge, and certainly has not seen, or been invited to view, the full range of the interviews which were available at the trial. The three issues raised are now considered in turn.

Issue (1) Access to a Solicitor

9. The facts regarding the arrest of the applicant, and the arrest of his former partner, Victoria Gunnery, are also set out in the judgments of my colleagues Charleton J. and O'Malley J., and do not require repetition. I focus here on the specific evidence pertaining to Issue (1) identified earlier (at par 3 supra), that is, the right of access to a solicitor, or lawyer, generally.

10. On the early morning of the 24th February, 2009 the appellant was arrested, and brought to Bruff Garda Station in County Limerick for questioning. The procedure required by the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 were observed. The appellant was given notice as to his rights.

11. At the very outset, it is to be emphasised that this procedure included advice as to the appellant's right of access to a solicitor. He availed of this right. His solicitor, Ms. Sarah Ryan, was notified of his arrival at the Garda Station, in accordance with the appellant's request, at 8.01 a.m. The appellant was not questioned before he spoke to his solicitor. Ms. Ryan telephoned the station at 9.55 a.m. The appellant had a brief consultation with her by telephone. This consultation took place before the appellant's first interview with the police. In fact, no admissions were made then, or until 26th February, 2009, in any of the interviews. This is considered later.

12. As to the first contact, there is no evidence that there was any limitation placed on the duration of this telephone call. No such submission is made. The call itself was short. The appellant was then interviewed by the gardai. He made no admission. Immediately afterwards, another solicitor, Michael O'Donnell, acting on behalf of the first named solicitor, Ms. Sarah Ryan, attended the garda station at 11 a.m. During that day, a series of garda interviews took place. The appellant made no admissions. On the following day, the 25th February, 2009, the appellant was brought to Limerick District Court for the purpose of an application to extend the period of his detention. Mr. O'Donnell, the solicitor, was present in court, and again consulted with his client. The appellant did not make any admissions, or confessions, on either the 24th or 25th February, 2009.

13. Shortly after 4 p.m. on the 26th February, 2009, the appellant was again being interviewed, in what is now identified as 'Interview 14'. The appellant asked to see his solicitor again. There was a delay because the solicitor was uncontactable. The appellant then had a short phone conversation with Mr. O'Donnell. The interview then resumed, and the appellant continued to be questioned. At a later point during the interview, the appellant indicated he had not had sufficient time to speak to his solicitor, and wanted to speak to him further. However, garda questioning continued for a further hour before that interview ended. The appellant did not make any admissions of guilt during any part of that interview. Counsel for the appellant lays emphasis on the fact that his client did, however, say words during the interview to the effect that he would answer questions put to him after he had spoken to his solicitor. It is said his will had been broken down. The interviews included discussion of the position of the appellant's former partner, Victoria Gunnery, who had also been arrested. The circumstances of her arrest are set out in O'Malley J.'s judgment.

14. At 18.52 on the 26th February, 2009, Mr. Michael O'Donnell, the appellant's solicitor, arrived at the Garda Station. He again consulted with his client. Mr. O'Donnell next had a conversation with Detective Garda Hanley, and Detective Garda Philips. He then held a further consultation with his client. This took approximately 10 minutes. Mr. O'Donnell, the solicitor, had a further discussion with the two gardai. There was then a further shorter consultation between himself and the appellant.

15. A full account of the garda memorandum recording what occurred is set out in the judgments of my colleagues. I refer, in particular, to the detailed analysis of O'Malley J. on what transpired. Mr. O'Donnell is reported as saying, at one point, that the appellant would not admit to murder, and that he would advise his client to say nothing, and that he should let "*you*", that is, the gardaí, do the work.

Interview 15

16. The interaction between Mr. O'Donnell and the gardai finished at 19.17 p.m. Mr. O'Donnell left the station. Interview 15 commenced. At the outset of this interview, at 19.43 p.m., the appellant was asked, as he had been on every previous occasion, whether he understood the caution as to his right to silence. He confirmed that he did. He confirmed that he had just held a lengthy consultation with his solicitor. In response to questions which were put immediately after the interview began, the appellant then confirmed that on the night of Saturday, the 8th, to Sunday, the 9th November, 2008, he had been present at Clonmore, Kiltaire, Limerick City, in a navy Renault Espace. At that point, interview 15 was interrupted, because a Garda Cowan came into the interview room to inform the appellant that his solicitor was on the phone, and wished to speak to him. The appellant then had a further telephone conversation with his solicitor, and the interview resumed at 19.57 p.m.

The Admission

17. The appellant was then asked whether he had been involved in the murder of Shane Geoghegan. He then replied "*I shot him*". He was then asked "*Is that the truth Barry*". He responded "*Yeah*". He described seeing "*someone*" walking across the housing estate in Limerick. He admitted that he held a gun, shot the victim, and then chased him behind a house where he shot him again. The appellant was asked at interview who he had shot, and he identified Shane Geoghegan as being the victim.

Conduct after the Admission

18. But subsequent to these admissions, the appellant was more guarded in what he said. He was asked whether Mr. Geoghegan, the victim, was his intended target. He responded "*No comment*". When asked whether he had meant to kill Mr. Geoghegan, he answered "*No comment*". When asked did the victim say anything to him, the appellant said that Shane Geoghegan, prior to his death, had said "*Please stop*". The appellant refused to disclose who was with him that night. He did describe to the gardai what clothing he himself had been wearing, and the fact that these clothes were later burnt. He admitted firing a total of seven to eight shots altogether. The appellant pointed out, on a map, the point on the road in the housing estate where he first short Shane Geoghegan; the point where he had chased him around the back of a house in the housing estate; and where thereafter he shot him twice in the head. Later, the appellant told the interviewing gardai that the gun he was using had jammed. He said that he tried to shoot, and "*it didn't click*", on two or three occasions. He admitted that he had been lying in earlier interviews, when he said that he had no involvement in the killing. When he was asked whether there was anything else he wanted to say, he said "*Sorry*". The appellant signed this statement. All of the interviews were recorded on videotape. Charleton J.'s judgment sets out other salient points as to what transpired.

Treatment while in Custody

19. After interview 15, the appellant was asked, on a number of occasions, how he felt.

He responded that he felt alright. In a later interview, he accepted that the gardai had treated him "*fairly*" in custody, and that he had no complaints. His solicitor made no complaint as to the manner in which his client had been treated. At no stage was it claimed that the appellant had been put under psychological pressure. No request for a doctor was made. There is no suggestion that, at any point during his period in custody, the appellant was physically ill-treated. In the light of the case now advanced, it is also particularly noteworthy that neither the appellant, nor his solicitor, asked that the lawyer be present for any of the interviews, or throughout all of the interviews. The extent and range of his access to a solicitor has been outlined earlier.

The Exclusionary Rule

20. Prior to a description of the trial, it will be helpful briefly to describe the evolution of the law of evidence on admission of statements made in garda custody. The law in this jurisdiction on access to a lawyer by persons in custody has evolved considerably over the years. In *The People (DPP) v. Healy* [1990] 2 I.R. 73 (at page 81), this Court recognised the right of reasonable access to a solicitor as being of constitutional origin. The right in question is one which arises under Article 38.1 of the Constitution, that is, the right to trial in due course of law. This right implicitly contains recognition of the right to silence, and protection against self-incrimination in criminal proceedings. Access to legal advice is an adjunct to these rights.

21. In *The People (DPP) v. Buck* [2002] 2 IR 268, this Court considered the situation when, if a suspect requested access to a solicitor, the gardai had the right to continue questioning prior to a solicitor's arrival in the station. The issue considered there was whether questioning in the interim period, but prior to the solicitor's arrival, constituted a "*deliberate and conscious*" violation of constitutional rights, which would render any inculpatory statement inadmissible. Speaking on behalf of this Court, Keane C.J. rejected the proposition that, in such circumstances, there should be a "*rigid exclusionary rule*" (p. 281), which would treat inculpatory statements made in such circumstances as being inadmissible. He held that the court must have regard to the circumstances prevailing at the time (p. 281). Any determination of admissibility, he held, should be dealt with by the trial judge. Keane C.J. accepted that gardai might continue to question a suspect after access had been requested, provided the gardai had engaged in a *bona fide* effort to contact the solicitor, and thereby to facilitate a consultation (at p.281). In fact, neither *Buck*, nor any of the other authorities cited, assist the appellant, for reasons now explained.

The Question of Causation

22. The established jurisprudence makes clear that, to be excluded, an inculpatory statement must have been obtained "*as a consequence of the breach of the accused's right of pre-trial access to a lawyer*" (see the authorities cited earlier). In *Buck* this Court was satisfied that, as there had been no deliberate and conscious breach of the appellant's right of access to a lawyer, and although the continuation of the questioning by the gardai between the time of request and arrival had crossed a threshold into unlawful detention, no causative link had been established between the breach in question, and the incriminating statements made after the suspect's consultation with a solicitor. A consequence of the decision in *Buck*, established later in *DPP v. Gormley & White* [2014] 2 I.R. 591 ("*Gormley*"), will be considered later.

23. In *The People v. O'Brien* [2005] 2 IR 206, this Court confirmed that, in the event of a denial of access to a lawyer, the constitutional rights of an accused person were restored once he was granted access to a solicitor, and that an inculpatory statement which was made thereafter, was admissible in evidence, unless elicited by the use of material obtained during questioning whilst the constitutional right of access to a solicitor had been breached. In *O'Brien*, McCracken J. at p. 211, par 13, speaking for this Court, approved Keane C.J.'s obiter observations in *The People (DPP) v. Buck* [2002] 2 IR 268 at

283, to the effect that it was necessary to establish a "*causative link*" between any breach of an accused's constitutional rights, arising from the questioning before the solicitor arrived, and the making of incriminating statements. (See also, Finlay C.J. on this "*vital issue*" in *People (DPP) v. Healy* [1990] 2 I.R. 73, at 81).

Presence of Lawyer at Interview

24. It is also necessary to consider the question of access to legal advice during (in the sense of "*throughout*") interviews. The issue was considered by this Court in *Lavery v. Member in Charge Carrickmacross Garda Station* [1999] 2 IR 390. There the issue was, whether, having regarding to the limitations on the right to silence introduced by statute, (the Offences Against the State Act, 1939, as amended), a person detained under that Act, was entitled to have the presence of a solicitor during all questioning. O'Flaherty J., at p. 396, speaking for this Court, rejected the proposition that a suspect was entitled to have a solicitor present throughout garda interviews. He held it was not open to a suspect, or his solicitor, to prescribe the manner in which interviews might be conducted, or where. Thus far, therefore, the judgment has set out the law as it stood at the time of the trial.

The Trial

25. As already outlined, the trial had a duration of 22 days before a judge and jury. Almost half of that trial involved a painstaking analysis of the interviews in a *voir dire*, in the absence of the jury. This involved the judge himself viewing all of the interviews, some 20 hours in total. A videotape of the interviews was shown, and the gardai were examined and cross-examined thereon. Other elements of the prosecution case are set out later in this judgment. Having heard the evidence, and viewed the videos, and heard submissions from counsel, the trial judge (Sheehan J.) ruled on what he had heard and observed. He ruled that the confession evidence might be admitted into evidence before the jury.

26. There are a number of points which might be noted at this stage. Mr. O'Donnell, the solicitor who consulted with the appellant, was not called to give evidence, though a garda memorandum of what transpired between the lawyer and the interviewing gardai became part of the prosecution case. My colleagues describe this interaction with the gardai in their judgments. It is noteworthy that the appellant himself did not testify at the *voir dire*. He was not under an obligation to do so. The judge's ruling is set out in more detail in the judgment delivered by Charleton J.

27. In summary, the judge held that the appellant had had access to a solicitor on a number of occasions, and at the times when he requested it. He observed that the appellant had had two consultations with his solicitor while in Bruff Garda Station, prior to making admissions in interview 15, and that he had also been represented by that solicitor in court, when an application was made to extend his detention. He held that the gardai were entitled to continue interviewing the appellant in interview 14, even though he had complained that a telephone conversation was not a proper consultation, and when the solicitor's arrival at the garda station was expected within an hour. It requires to be reiterated that the appellant did not make any admissions during that interview. The trial judge was satisfied that there had been no breach of the appellant's constitutional right to legal advice. Applying the principles as found in *Buck* and *O'Brien*, the judge found there was no causative link between what occurred in Interview 14 and later, as by then the appellant had consulted with his solicitor.

28. The judge made a number of findings of fact on the question of the appellant's character, conduct and demeanour during the interviews. He held that the appellant appeared to be physically and mentally strong throughout. He stated that the appellant engaged with gardai when he chose to do so, and refused to answer questions when he

did not wish to do so. He described the appellant's background. He had worked for a construction company as a block layer and played Gaelic football. He also outlined that, at the time of his arrest, the appellant was living in basic accommodation in Limerick City wearing a bulletproof vest. The Court also noted that a few months earlier when asked by members of An Garda Síochána where he had been the previous night (that is the night of the murder), he had responded by saying 'Fuck off'.

29. The judge held that the interviews had been conducted in a careful, patient and structured way, where the results of the garda investigation were gradually revealed to the appellant, and the appellant first began to engage with Detective Garda Hogan in a limited way, essentially as a result of appeals to his humanity. It must be said the gardai laid very considerable emphasis on the fact that Victoria Gunnery, who was in detention, was herself suffering hardship, and that the child who Victoria Gunnery had with the appellant would have no one to care for it. This included at least one statement that the appellant's lack of confession was causing Ms. Gunnery to be detained, and to be away from her child, and that this was the appellant's fault. The circumstances are outlined in O'Malley J.'s judgment. The gardai also laid much emphasis on the fact that Shane Geoghegan, an entirely innocent man, had been shot. Ultimately, the appellant told the gardai about his involvement with the death of Shane Geoghegan.

The Judge's Decision on Admissibility at the Trial

30. The judge held that the gardai had conducted themselves in a manner which was, at all times, professional, courteous and involved no oppression. He held the appellant was in full control of himself throughout the interviews, and that he had made the admissions which he did because he chose to do so, and on the basis that he engaged with gardai only when he wished to do so. The trial judge rejected the submission advanced by counsel for the defence that there had been a breach of fundamental fairness. There, the judge was referring to the principle outlined in the judgment of this Court in *The People v. Shaw* [1982] 1 I.R. 1, where Griffin J., speaking for this Court, identified the main overarching question, in ascertaining whether a statement should be admitted in evidence, as being whether the statement had been obtained by means which were unfair, oppressive or as a result of a police stratagem. The statement in *Shaw* emphasised that the onus was on the prosecution to establish, beyond reasonable doubt, that the statement was voluntary, and that a court must look to the substance of the standards of fairness, rather than mere technical compliance.

31. Having referred to that passage in *Shaw*, the trial judge directed himself to the principle that he must be astute to ensure that, although a statement may be technically voluntary, it should, nonetheless, be excluded, if by reason of the circumstances in which it was obtained, it fell below the required standards of fairness. He held that there had been no breach of the requirements of fundamental fairness, and held that the confessions were admissible.

32. It is important to point out that the interview process was a simple one, in the sense that the prosecution did not place any reliance upon inferences to be drawn from the silence or conduct of the accused person. This was not a situation where, at trial, reliance was placed on a failure to mention particular facts, on a failure or refusal to account for objects or marks, or a failure to account for his presence at a particular place; all of which, now, may give rise to inferences which may be drawn by a trial court. (See s.18, 19A Criminal Justice Act, 1984, as amended)

Corroboration Evidence

33. The evidence before the Central Criminal Court was by no means confined to the video evidence in the interviews. Additionally, there was ballistic evidence, and testimony relating to the stolen getaway car, which had been stolen a considerable time before the murder, and concealed in a car park in a nearby block of flats. There was evidence of

April Collins, who at the time of the murder was the girlfriend of Gerard Dundon. She gave evidence that, on the day before the murder, she had been present in a house on Hyde Road in Limerick when another member of the Dundon family, John Dundon, had ordered the appellant to kill a man named John McNamara with a firearm. April Collins testified she was also present at a meeting in a pub carpark on the outskirts of Limerick on the morning after the murder of Shane Geoghegan, with John Dundon, the appellant, and Gerard Dundon, when John Dundon discovered that Barry Doyle had, in fact, murdered the 'wrong man', that is, the unfortunate victim, Shane Geoghegan, and confronted Barry Doyle with this fact. To this the appellant's response was that it was "*him*", that is to say, the intended victim, and not Shane Geoghegan.

34. There was also evidence of Victoria Gunnery, the former partner of Mr. Doyle. One part of her evidence was to the effect that during her interviews whilst in custody, she had indicated that their child was due to attend a medical appointment in Dublin on the day she was arrested, and had told the appellant this. Independently of this, the appellant had told his interviewers about this appointment. However, the evidence of Ms. Deirdre Devlin, an administrator worker in the hospital in question, was to the effect that no such appointment had been made for that day. This evidence was admitted for the purposes of determining whether or not the issue had been an operative factor in the appellant's thinking when he made the confession.

35. But the evidence of Ms. Gunnery went much further: it included descriptions of a number of conversations with the appellant, subsequent to the murder, from which the jury were entitled to infer that the appellant tacitly accepted that he had committed the crime.

The Judgment of the Court of Appeal

36. The judgment of the Court of Appeal (Ryan P., Birmingham J., Edwards J.) is an extremely full and detailed one. The court considered each of the 27 grounds of appeal which were raised by counsel for the appellant. These issues concerned admissions by the appellant, evidential matters in respect of the two witnesses mentioned above, criticisms of the judge's charge to the jury, questions regarding material that had been furnished to the jury, and a legal issue arising out of the decision of this Court in the case of *Damache v. DPP* [2012] IESC 11, [2012] 2 I.R. 266, a decision which was delivered subsequent to the trial. The court ruled that the Central Criminal Court judge had acted correctly. It rejected the suggestion that there had been a breach of constitutional rights in the obtaining of the statement, or the proposition that the confession had been involuntary, made as a result of threats, inducements or oppression, or that the admission had been made as a result of breaches of the accused's constitutional right to access to legal advice, or that they had been made as a result of breaches of the requirement of fundamental fairness. I return to other issues later in this judgment.

The Appellant's Case to this Court on the Three Issues Certified

Access to a Solicitor

37. Relying on Article 38.1 of the Constitution, counsel for the appellant submits to this Court that the appellant's access to a solicitor, both throughout the period of his custody, and specifically prior to, and during, the critical interview, that is, Interview 15, on the evening of the 26th February, 2009, was so restricted that it did not constitute "*reasonable access*"; that the degree of access was insufficient to offset the inequality generated by the interview process; that the appellant was relatively young and inexperienced; that he was interrogated by experienced police officers, who used a series of identifiable techniques and methods to heighten the inequality between the parties, and thereby encourage a confession. The case is made that the confession evidence should not have been admitted. It is said that the appellant had a right to have a solicitor present throughout the garda interviews. In making these submissions, counsel sought,

in particular, to rely on the recent decision of this Court *in The People (DPP) v. Gormley & White* [2014] IESC 17, [2014] 2 I.R. 591 ("*Gormley*"); the United Kingdom authority of *Cadder v. H.M. Advocate (Scotland)* [2010] UKSC 43, [2010] 1 WLR 2601; *Salduz v. Turkey* 36391/02 [2008] ECHR 1542 (27 November 2008) ; *The People (DPP) v. Conroy* [1986] I.R. 460; and *The People (DPP) v Buck* [2002] 2 IR 268. Counsel submits that this Court should now apply principles regarding access to a lawyer during interviews in detention, which he said were identified by the ECtHR in *Salduz*, and also those enunciated by the Supreme Court of the United States in *Miranda v. Arizona*, (1966) 384 U.S. 443. The thrust of counsel's submission is that this Court should not follow its own previous judgment in *Lavery* (cited earlier at par 24). Additionally, counsel asks the Court to infer causal links between what happened throughout the interviews, and, in particular, between Interview 14 and Interview 14, he submits the former should be linked to Interview 15. He suggests that the appellant's will was broken down during questioning.

No Causal Link Established

38. While counsel invites this Court to make the inferences which are contrary to those drawn by the trial judge, such contentions must be seen, in the light of the authorities cited earlier, and against the appellant's own remarks about his fair treatment, and the absence of any complaint by Mr. O'Donnell. There was, in fact, no *evidence* to suggest that the appellant's will had been sapped, in a manner that was unlawful. There is no doubt that in Interview 14 questioning continued beyond the point where the appellant said that he wanted a proper consultation with his solicitor. What is more important is that there was nothing elicited in Interview 14 which carried through to Interview 15. The appellant's remark in Interview 14, that he would answer questions after he spoke to his solicitor, is a very frail, and untenable, basis for inferring that his position was by then, or thereafter, "*irretrievably prejudiced*".

39. Moreover, as pointed out in the authorities cited in the earlier part of this judgment, specifically *Hay v. O'Grady*, an appeal court should be particularly slow to draw inferences in circumstances where it has not been invited to see the videos, which the trial judge did, or any excerpts from the videos. The court of trial made specific findings on the appellant's strength of mind, and on the limited number of occasions that he had, actually, answered questions put to him by the gardai. The judge described the previous encounter with the gardai as indicating a certain fortitude of mind which had not been undermined.

Gormley

40. In order to understand the next limb of the appellant's submission, it is necessary to now analyse the decision of this Court in *Gormley*. In *Gormley*, this Court had to consider, among other issues, the applicable law where important investigative steps had actually taken place before access to a solicitor had occurred, but vitally, *after* the accused had requested to have a solicitor present. Mr. Gormley was interviewed by gardai, having been arrested. He gave the names of two solicitors who he wished to have advising him. The very fact of that timely request was a key point in the judgment delivered by this Court. Efforts were made to contact both solicitors. One of the solicitors told the gardai, by telephone, that he would attend the Garda Station shortly after 4 p.m. Despite this knowledge, the appellant was interviewed by the gardai before then, at which time he made a number of inculpatory statements. The solicitor arrived at 4.48 p.m., and consulted with Mr. Gormley. The inculpatory statements were admitted at the trial. On appeal, this Court held that the trial judge had erred in admitting the evidence. The Court held that there had been an unlawful denial of access to a solicitor, and that consequently the subsequent trial of the appellant, Gormley, had not been in accordance with Article 38.1 of the Constitution. That Article requires that any trial shall be in due course of law.

41. In the course of his judgment in *Gormley* [2014] 2 I.R. 591, Clarke J. pointed out at

p. 628-629, for a unanimous court (Hardiman J. in a concurring judgment):

> *"[82] …, I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods and, indeed, in certain circumstances, may be exposed to a requirement, under penal sanction, to provide forensic samples. It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only be tried in due course of law, therefore, requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in State (Healy) v. Donoghue applies from the time of arrest of a suspect.* ***The precise consequences of such a requirement do, of course, require careful and detailed analysis. It does not, necessarily, follow that all of the rights which someone may have at trial (in the sense of the conduct of a full hearing of the criminal charge before a judge with or without a jury) apply at each stage of the process leading up to such a trial. However, it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law.*** *In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States. …"* (Emphasis added)

42. These observations are now relied on as being the basis of a further extension of the right of the suspect to have access to a lawyer throughout an interrogation. Relying on *Gormley* and *Salduz*, and the decision of the Supreme Court of the United States in *Miranda*, counsel for the defence submits that the appellant had a right to have his solicitor present throughout the interviews.

43. It seems to me that these submissions cannot succeed in the instant case. It is true that, after the judgment in *Gormley*, the Department of Justice issued a guidance note to members of An Garda Siochana, indicating that lawyers might be present throughout interviews. This is to be welcomed, and it is also, now, a reality.

44. But the primary question which falls for consideration in this case is whether it can be said that there was a "*deliberate and conscious*" denial of a constitutional right, at the time (2009), when such an asserted 'right' had not then been recognised by the courts. It is important to point out that, in *Gormley*, the appellant had, at the very outset, asked for a solicitor, and yet the gardai continued to interview. It was on that factual basis that the exclusionary rule was brought to bear in that case. Thus, although the analysis was viewed under the rubric of Article 38 of the Constitution, the ratio of *Gormley* is, in fact, consistent with the established jurisprudence.

45. It is true that, since the Act of 1984, (referred to earlier), inferences may be drawn from conduct during interview, of the type outlined earlier in this judgment. (see paragraph 32 supra). As long back as the O'Briain Report in 1978 (Report of the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of an Garda Síochána), there were views that solicitors should be entitled to be present at garda interviews. It must be recognised that part of this Court's jurisprudence is that the Constitution is a living document, and regard should be had to "*prevailing norms*" in the

identification and evaluation of rights of an individual (see the judgment of Walsh J. in *McGee v. Attorney General* [1974] IR 284, at 319, and O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325, at page 350, which are referred to in *Gormley* at p. 627, par 78 and p. 628, par 79 respectively). It is also to be noted that the European Union has issued a Directive (2013/48/EU of the 22nd October, 2013) concerning the right of access to a lawyer in pre-trial detention. Although not binding on Ireland because of a derogation, this document, too, contains a range of protections and values intended to further protect the rights of suspects who are under interrogation, though it does not address the precise consequences which should arise if there is a breach of the right of access, or advice; nor does it specifically say what is entailed, in the sense of whether and to what extent a lawyer's presence is required during and/or throughout all interviews.

46. But what I think is imperative to bear in mind, is that *here* (subject to the point made regarding the immaterial Interview 14), the appellant was granted access to a solicitor at the outset of his custody, during his custody, prior to the relevant interview, and even during that interview. His limited confession was that he accepted that he had killed Shane Geoghegan. Unavoidably, the appellant must face the fact that the logic of what is sought to be applied here is a *retrospective* recognition and application of a then unrecognised constitutional right to have a lawyer present throughout interviews.

47. This proposition has fatal flaws. First, it was not the law at the relevant time. It was not the law, even after the judgment of this Court in *Gormley*, though it might be seen as a possible logical consequence of that judgment. There is no evidence that the absence of a lawyer at the relevant time was a causative factor in the appellant making his confession. The fact that Mr. O'Donnell did not testify does not allow this Court to draw any inferences of what 'might have been'. There is no suggestion that Mr. O'Donnell did not testify as a result of unavailability. The Court can only conclude on the evidence, therefore, that the appellant made a deliberate choice. In fact, he was recorded on video as saying "*it was my choice to admit what I did*" in Interview 17. This is to be seen in the context of an earlier statement in Interview 16, where he said "*I shot him. I'm going to get what I deserve"*. The question, therefore, which arises is whether observations of this Court in *Gormley* should be "*retrofitted*" to this case, in circumstances where *Gormley* was decidedly not the law at the time of the arrest or detention, or at the time of trial. As already pointed out, *Gormley* does not, in fact, go so far as to say that, in *all* circumstances, there must be a right to a lawyer throughout interviews. Furthermore, it is necessary to emphasise that this was not a case where any inferences were sought to be drawn from a suspect's silence or conduct at interview to be used subsequently at trial. The logical frailty does not end there. Because this is an appeal within a criminal process, in order for the appellant to succeed, the Court must find that there was a "*deliberate and conscious*" denial of the appellant's constitutional rights.

48. There, I would hold, the proposition becomes entirely unsustainable. How, on the basis of all the established jurisprudence, can it be argued that there was a *deliberate* and *conscious* violation of a right then unrecognised, either under the Constitution, or, as I seek to explain later, under the *Salduz* judgment, or any of its successors? The proposition stands logic on its head. It is based on an unsustainable premise which must inevitably lead to a flawed conclusion. "*Deliberate and conscious*" necessitates awareness, and the deliberate ignoring of an established right.

49. This primary conclusion is fortified by the judgments of this Court in a subsequent authority. Subsequent to the trial, the exclusionary rule was again considered by this Court in *The People (at the suit of the Director of Public Prosecutions) v. JC*, a judgment delivered on the 15th April, 2015 (Denham C.J., Murray J., Hardiman J., O'Donnell J., McKechnie J., Clarke J., MacMenamin J.). There, this court had to consider the question of admissibility of evidence which might have been obtained in breach of constitutional

rights. The exclusionary rule, now identified in *JC* in the judgment of Clarke J at par 5.10, is that:

> *"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 and state of mind not only of the individual who actually gathered the evidence concerned but also of any other senior official or officials within the investigating or enforcement authority concerned who are 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."* (paragraph 5.10) (Emphasis added)

50. But Clarke J., speaking for the majority, then went on to consider the following situation:

> *"5.11 Next, it seems to me to follow that, where evidence is taken in circumstances of unconstitutionality, but where the prosecution establishes that same was not conscious and deliberate in the sense already identified, the evidence should be admitted* ***if the prosecution can also establish that the unconstitutionality concerned arose out of circumstances of inadvertence or by reason of developments in the law which occurred after the time when the relevant evidence was gathered."*** (Emphasis added)

51. While the law may be in a state of development, it does not go so far as the appellant contends. It cannot be logically contended that this confession was taken in "*deliberate and conscious*" violation of a constitutional right. While the evidence at the trial was, of course, tested in accordance with the then case law, it is not possible to identify any deliberate or conscious violation to which a causative link can be attached. It might be said that, if retrospectivity is looked for, then it must cut both ways, with the consequence that the appellant cannot show any deliberate rights-violation, but also where there have been subsequent "*developments*" in the law (see the passage from *Gormley* quoted earlier). It is evident that the appellant seeks to rely on such a development when this was out-ruled in Clarke J.'s judgment in *Gormley* (see above). The appeal cannot succeed on this constitutional submission.

52. In all the circumstances, and the developments in the law and procedures since *Lavery*, I would now be prepared to recognise such a right under Article 38.1 in future cases, but that is quite a different matter from the retrospective application the appellant seeks.

***Salduz v Turkey* 36391/02 [2008] ECHR 1542 (27 November 2008)**

53. It is well established that our courts give recognition to Convention jurisprudence, as expressed in the case law of the ECtHR. With this in mind, it is next necessary to consider in more detail the judgment of the Court of Human Rights in *Salduz*. Notably, the Court has only been referred to that judgment of the court, and not to any other of the very many judgments which were delivered subsequent to that time. (See, for example, *Navone v. Monaco*, Application No. 62880 [2013] ECHR 1032 (24 October 2013); *Dayana v. Turkey* 7377/03 [2009] ECHR 2278 (13 October 2009), *Brennan v. U.K* 39846/98 [2001] ECHR 596 (16 October 2001). See also the case of *Borg v. Malta*, 37537/13 [2016] ECHR 53 (12 Jan. 2016) for the wide margin of discretion given to national courts regarding the retrospective application of *Salduz*.

54. *Salduz* was very different from the instant case. In *Salduz*, a vulnerable 16 year old

applicant, was taken into custody by police officers. He was beaten and insulted while in custody. The Turkish Code of Criminal Procedures stipulated that, for juveniles, legal assistance was obligatory. That right was not vindicated. In those circumstances, the European Court of Human Rights held that Article 6(1) ECHR required that, *as a rule*, access to a solicitor should be provided, *as and from the first interrogation of a suspect* by the police, unless it was demonstrated, in the light of the particular circumstances of each case, that there were compelling reasons to restrict that right. The juvenile applicant did not have access to a lawyer at that time, or prior to the time he made statements to the police, the public prosecutor and the investigating judge. No justification for denying him access to a lawyer was given, other than that this was provided for on a systematic basis by the relevant legal provisions. In *Salduz*, the European Court of Human Rights held at par 55 that:

> *"Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police,"*

Referencing this to the overall trial process under Article 6, the court went on to hold:

> *"The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation* ***without access to a lawyer*** *are used for a conviction."* (Emphasis added) (paragraph 55)

55. The distinctions with the instant case are clear, where, to reiterate, from the very outset, the appellant was granted such access and advice, and continued to have access to a lawyer up to, and including, the time of the confession. To my mind, therefore, the facts of *Salduz* are very distinct. There is no evidence that the appellant's confession was brought about as a result of the appellant's age, conduct, or vulnerability, unlike the distinct situation in *Cadder*, cited earlier. It was open to the defence to adduce such evidence, if there was such. There is no suggestion that his physical or mental wellbeing was put at risk.

56. There is no doubt, that under ECtHR jurisprudence, the guarantees provided for under Article 6 ECHR are applicable, at minimum, from the moment that a criminal *charge* exists, or perhaps even earlier. A court must be particularly astute to deal with situations where the issues facing a vulnerable accused may be amplified by increasingly complex legislation on criminal procedure with regard to gathering and using evidence. But none of these considerations arise here, as they did in *Salduz*, or succeeding cases.

57. But, the appellant's submission is misconceived for a further reason. As the Court of Human Rights has explained on many occasions, it is not its role to determine, as a matter of principle, whether particular types of evidence, including evidence obtained unlawfully in terms of domestic law, may be admissible. As the ECtHR has explained, the question to be answered is whether the proceedings *as a whole*, including the way in which the evidence was obtained, were fair. It must be acknowledged that prompt access to a lawyer is a vital protection for the vulnerability of suspects in police custody. But that, precisely, was the right which was extended to the appellant in this case. There is no suggestion that the right of access was delayed on the appellant's arrest. This is not a case where the prosecution is forced to submit there were compelling reasons for some restriction on right of access. In fact, *Salduz* does not establish a 'bright line' rule precluding *any* use of statements made without legal advice (insofar as that could be said to arise here), where there was interrogation without access to a lawyer. (See, generally, the judgments of the ECtHR, recently summarised in *Ibrahim & Others v. United Kingdom*, Application 5041/08, 50571/08, 50573/08 and 403521/08, delivered 13th September, 2016).

58. While it might be said that the *Miranda* jurisprudence of the United States originally created a strict bright line exclusionary rule, this is not the position under Convention jurisprudence (nor, indeed, in subsequent United States Supreme Court jurisprudence: See *Connecticut v. Barrett*, 479 U.S. 523 [1987]; *Oregon v. Bradshaw*, 462 US 1039

[1983]). The test under Article 6 is, as I would understand it, rather, a two-stage one, wherein the Court should examine whether there were compelling reasons for a restriction on access or advice, and whether such a restriction impacted on the overall fairness of trial proceedings. The first consideration does not arise. As to the second step there are a number of tests subsequently for ascertaining whether the proceedings were fair. (See *Ibrahim*, pronounced after the hearing of this case). There is nothing in the instant case to suggest that the evidence which was obtained was unreliable or inaccurate. It was corroborated. It cannot be said that there has been a violation of any other Convention article. There is no suggestion that the appellant actually retracted his statement. Perhaps the most graphic image emerging from the transcripts is the fact that, at interview, the appellant apparently wore a set of rosary beads around his neck, and after having confessed, later gave these rosary beads to the gardai to be given to Shane Geoghegan's mother. The appellant was convicted by a jury, after the jury had been fully charged regarding the standard and onus of proof in criminal case, that is to say, beyond reasonable doubt. There was no procedural unfairness in the procedure of the trial. As a matter of fact, the appellant in this case had not been charged at the time it is said there was a denial of access to a lawyer. Insofar as ECHR jurisprudence is concerned, a question might arise as to when Article 6 rights are actually triggered. (See the judgment of Judge Mahoney in *Ibrahim*, cited earlier at paragraph 55).

59. For the reasons which are outlined earlier, it cannot now be successfully argued that the position of the appellant was "*irretrievably prejudiced*". What is in question here is, of course, an *ex post facto* analysis of the conduct of the trial court, and the appeal, and how the evidence was treated. But throughout, the appellant had the opportunity to challenge the authenticity of the evidence, and oppose its use. The exclusionary rule, as it stood, was applied. There was substantial other evidence which supported, and corroborated, the confession. In fact, that corroborative evidence would, in itself, have been sufficient to convict the appellant.

60. I would hold, therefore, this Convention argument on the confession cannot succeed either. I am not persuaded that the right of a lawyer's presence throughout all interviews is recognised in ECtHR jurisprudence, either in 2009, or now. Thus, such a right cannot be relied on by the appellant, nor is it cognisable in our law.

61. I turn then to the second question regarding the judgment of this Court in *Damache v. DPP.*

Damache v. DPP

62. In *Damache v. DPP* [2012] IESC 11, [2012] 2 I.R. 266 this Court decided that a warrant signed by a member of An Garda Siochana, who was part of an investigating team, and issued pursuant to s.29(1) of the Offences Against the State Act, 1939 [OASA], used to enter a suspect's home was repugnant to the Constitution.

63. Here, the appellant was arrested during a search of his home at 106 Hyde Road, Limerick, carried out on foot of a warrant issued by Superintendent McMahon, who was in overall charge of the investigation.

64. At the outset, it is important to note that during the trial, counsel for the appellant took no issue in relation to the warrant. The prosecution stated to the trial court that there was no issue with the lawfulness of the warrant. This was not contested.

65. The appellant's case before this Court, it must be said, is surprising. It is said that the prosecution did not bring to the trial judge's attention the fact that the DPP, as the respondent in *Damache*, was awaiting the outcome of a determination by the Supreme Court on the constitutionality of a s.29 warrant obtained in similar circumstances to those

in this case.

66. It is true that this Court delivered its decision in *Damache* on the 23rd February, 2012, eight days after the trial had concluded, but before the appellant's notice of appeal had been filed. The unconstitutionality of the arrest warrant was included as a ground of appeal in the appellant's notice of appeal before filing. Before the Court of Appeal, it was submitted, that the warrant issued by the Superintendent had been unlawful, and that the appellant's arrest, and subsequent detention, were consequently unlawful. The trial court had proceeded on the basis that the arrest and detention were lawful. The evidence and framework of the case proceeded on that basis. The Court of Appeal held that the appellant was precluded from making an argument, as it had not raised the issue at all during the trial.

67. This is not a situation where the appellant, either at the trial, or in collateral proceedings, had sought to challenge the constitutionality of s.29 of the 1939 Act on any grounds (see the decision of this Court in *Connolly v. The DPP* [2015] IESC 40). Moreover, it is to be borne in mind that an adverse ruling at a trial on the lawfulness of the arrest, following a challenge to the search warrant, would not necessarily have had the consequence of rendering the confession of the appellant inadmissible (see *The People (DPP) v. JC* [2015] IESC 31). Because the issues of the lawfulness of the search, and the arrest of the appellant, were not raised at trial, there was no detailed evidence as to the state of mind of the prosecution witnesses as to the arrest, or subsequent procedures. Having regard to the adversarial nature of the trial process, to raise the point *ex post facto* inevitably creates unfairness, and would be to constitute an injustice (*The People (DPP) v. Cronin (No. 2)* [2006] IESC 9, [2006] 4 IR 329). Evidence as to the circumstances of the arrest and the state of mind of the gardai could have been addressed at trial. It was not. Each side proceeded, in good faith, on the basis of the law then in being at the time of the trial. I would reject this ground also.

68. I now turn to the third question.

Inducement

69. Was the confession, then, brought about by inducements? The defence case is that there were inducements, and that these inducements, even if not specific, were implied. It is said that the implication was that if there was a confession, Victoria Gunnery would be released. The trial judge held that, even if these had been offered, their effect had been dissipated. This was a factual determination. (See *Hay v. O'Grady*, cited earlier). Counsel for the appellant submits that there was no ruling from either the trial court, or the Court of Appeal, on what he submits is an antecedent question as to whether, in fact, inducements had been offered. Counsel invites this Court to conclude that, if the trial judge had found the remarks at interview, now referred to in Charleton J.'s judgment, objectively capable of amounting to a threat, or a promise, it would follow that the confessions must then be excluded from the jury, unless the prosecution had negatived, beyond reasonable doubt, that the accused subjectively understood the inducements, and also negatived, beyond reasonable doubt, that his confession was as a result of the threat or promise (see *The People v. McCann* [1998] 4 I.R. 397, referred to below).

The Law

70. As the law stands, the threshold for inducements is a low one. The United Kingdom courts have held in the past that even the most general threats, or slight inducements, would taint a confession (see *R v. Smith* [1959] 2 QB 35, Lord Parker L.C.J.). As will be seen, my view of the legal principles involved coincide with those of O'Malley J. in her judgment.

71. The classical statement of what amounts to inducement in our law was set out by O'Flaherty J. in *The People v. McCann* [1998] 4 I.R. 397. It is a trifold test. O'Flaherty J.

held at page 411:

> *"As regards what constitutes an inducement, the test would appear to be (a) were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or promise? (b) Did the accused subjectively understand them as such? (c) Was his confession in fact the result of the threat or promise?"*

72. Other authorities show the courts will carefully scrutinise inducements regarding consequences to family members, or close associates (see *The People v. Hoey* [1987] 1 I.R. 637). In this context, counsel for the appellant refers to a number of passages in the interviews which, it is submitted, constitute an implied inducement relating to Victoria Gunnery's detention.

73. In summary, the inducements may be summarised as being to the effect that Victoria Gunnery was in custody for the same offence as the appellant, and was suffering hardship and deprivation having done nothing wrong. It was said their child was also suffering hardship; that the appellant had failed as a father; he should come clean and tell the truth; that unless he confessed he would not get to see the child or his children by another relationship, and that in return for his confession, Ms. Gunnery, who was being detained, would be released.

The Appellant's Case

74. It is unnecessary to again rehearse the events which occurred in the latter part of Interview 14 up to the time of the confession.

75. There is no doubt that, in the course of the many interviews, the appellant was also asked to think of Ms. Gunnery, their child, and the deceased's family. His volunteering of rosary beads has been set out earlier. This unusual and bizarre gesture merits some consideration, in the context of the "*inducement*" controversy. It certainly would provide support for the judge's conclusion that what actually actuated the confession were appeals to the appellant's humanity.

76. The case made by counsel for the appellant is that, it was the hope of release for Ms. Gunnery that constituted the inducement. As set out earlier, in fact, the position with regard to the appellant's relationship with Ms. Gunnery, and with his child, was by no means ideal. Their child, Demi Leigh, had been born in May, 2007. The appellant spent the first Christmas away from the child in Spain. He then moved to Limerick for unspecified personal reasons in 2008, although he was not taking up work, and in moving to Limerick he took himself away from his girlfriend and his children. In 2009, shortly before his arrest, he had been in Dublin for a week, or thereabouts, and had spent the time in a hotel drinking with friends, without visiting his children at all. In the short period prior to his arrest, there had been an extraordinary degree of exchanged text messages between the appellant and his former girlfriend. An exchange of over 100 text messages in one day could lead to a number of different interpretations about the state of the relationship between the appellant and his former partner. It is unnecessary to go through the evidence on the doubtful medical appointment for one of the children.

77. But, the trial judge had seen 20 hours of the video tapes of the interviews. One can only again comment that this gave him a unique vantage point from which to analyse the totality of the evidence. This Court, rather, was invited, in the absence of the surely influential video evidence, to consider only the transcripts of the interviews, and particularly a number of selected passages therefrom. The appellant did not testify in the *voir dire*. This is not, in any sense, to suggest that there was an onus upon him to do so at the trial, but rather to point out this fact in the context of the legal and evidential tests that arise in considering the second and third strands of the three "*McCann*" criteria

([1998] 4 I.R. 397 at 411). Relevant, too, is the fact that the trial judge had the opportunity of assessing each of the garda witnesses who testified in the *voir dire* regarding the circumstances of the interviews. It is to be noted that the appellant did not ask, after the confession, whether Ms. Gunnery would be released.

Strand 1 of *McCann*

78. It is now said that the three criteria identified in *McCann* were not directly addressed at the trial, or by the Court of Appeal. Here, what is important to bear in mind is that the learned trial judge ruled, as a fact, that the effect of certain statements made by members of An Garda Siochana had "*dissipated*" by the time the confession was made. This came after his extensive survey of the video evidence. It is difficult to conclude that such a word as dissipation could convey anything other than that there *had actually* been inducements in the first place. I infer that the Court of Appeal held to similar effect. For the avoidance of any doubt, I would infer, therefore, that the judge held, (and I would interpret his finding as such), to the effect that the words complained of did constitute inducements. At least by implication, the words used by members of An Garda Siochana, objectively viewed, would be capable of amounting to a threat, or a promise. I would conclude, therefore, that the 'first strand' of *McCann*, is satisfied. The words used, seen objectively, were capable of amounting to a threat, or a promise.

79. It is necessary to consider the second and third elements in more detail. Counsel for the appellant now submits that, had the trial judge found that the remarks were objectively capable of amounting to a threat, or a promise, it would follow that the confessions must then be excluded from the jury, unless the prosecution had proved beyond reasonable doubt that the appellant's confessions were not obtained as a result of those threats or promises. Here he cites Strand 3, which poses the question, was the appellant's confession, in fact, the result of the threat or promise? Counsel contends, it is impossible to carry out an examination of Strands 2 and 3 in *McCann*, until it is decided whether the remarks constituted a threat, or a promise, and that if the trial judge had found that the remarks made were capable of amounting to a threat, it would have been "*impossible*" for him to be satisfied that the effects of these promises had dissipated, or were not acted upon immediately, in the absence of actual evidence of dissipation or motivation. Counsel further submits that the trial judge assumed, or inferred, dissipation from the appellant's consultation with Mr. O'Donnell, his solicitor, after interview 14, rather than from actual evidence of dissipation.

80. It is then necessary to look next at Strand 2 of *McCann*, that is, (b) in the terms set out by O'Flaherty J. ([1998] 4 I.R. 397 at 411)

Strand 2 of *McCann*

81. Did the accused *subjectively* understand the inducements? The question to be determined by the judge, which arises here, is on whom does the evidential onus lie, as to subjective understanding? There was, of course, the evidence of Mr. O'Donnell's attempted brokering of a deal that Victoria Gunnery be released. But this cannot be seen in isolation from the evidence that the gardai explicitly rejected the offer. This is set out in the memo referred to in my colleagues' judgments in more detail. The garda testimony was that to accept the offer would be, necessarily, to render any statement made by way of confession made by the appellant inadmissible in court. The issue of "*subjective effect*" is canvassed. It is undoubtedly true that there were a number of garda questions and statements in the interviews - and statements from the appellant expressing concern regarding his former partner, and their child. But against that, there were a range of other statements and conduct constituting *prima facie* evidence in favour of the prosecution case, which suggested an entirely different motivation, that is, regret for the crime. This was most graphically illustrated by the appellant's gesture with the rosary beads.

82. Clearly, one cannot suggest that there was an onus on the appellant to testify as to his subjective state of mind. There was no such duty. The duty, at all times, lay upon the prosecution to prove each element of the case beyond reasonable doubt. But, once there was *prima facie* evidence which made out the prosecutions case, one cannot avoid the fact that it was open to the defence to call the appellant at the *voir dire*, or even to call Mr. O'Donnell. Neither course of action was adopted, undoubtedly for good reason. Instead, there was a significant body of evidence which the trial judge considered was enough for him to conclude that the second strand subjective test in *McCann* had not been made out. There was no evidence as to the appellant's 'subjective understanding', or as to whether the inducements were understood as such by him. This is in circumstances where there were a range of other factors at play, including the appeal to the appellant's sense of humanity and regret that the innocent victim was not the intended victim of the murder. This was, again, the video evidence of what the appellant said and did throughout the interviews, and, moreover, the very selective form of confession which he did make. Can it be said there was any evidence which would assist the appellant, on what is essentially a subjective test? I think not. We are again asked to draw different inferences from the trial judge. *Hay v. O'Grady* [1992] 1 I.R. 210 governs the position. I would not be prepared to do so, on the basis of the evidence sought to be relied on.

Strand 3 of *McCann*

83. The third strand of *McCann* is also of critical importance. Was the confession, in fact, the result of the threat or promise? Again, one proceeds on the hypothesis that both the trial judge, and the Court of Appeal, did accept, inferentially, that there had been inducements. But, even proceeding on that hypothesis, as advanced by counsel for the appellant, there is a further difficulty. Again, it concerns the *subjective effect of inducements*. In fact, a very considerable period of time elapsed between the last of the inducements, and the confession. This time was interrupted by consultations with the solicitor, and by the telephone conversation which interrupted Interview 15. The judge was able to assess the issue contextually. In truth, there was no factual evidence available to the judge which would have allowed him to come to a conclusion in favour of the appellant. The test of subjective effect must be more than mere assertion by counsel. Without in any way displacing the onus and standard of proof, there must be some evidential material as to 'effect' upon which a judge might act. This might emerge from video evidence of the interview, or words at the interview. The Court was not directed to such evidence. The question of dissipation is one of fact. It was a matter within the province of the trial judge to determine, on the basis of the real evidence before him. His findings were based on real evidence. I do not think they can be disturbed. This ground also must fail.

Conclusion

84. The appellant's conviction was based upon a confession of his guilt, supported by significant independent evidence. This included a description by the appellant of what happened at the scene of the crime examination of matters unknown to the gardai, and ballistic evidence. The conviction was supported by independent testimony from Ms. Gunnery, to whom he (the appellant) made inculpatory remarks outside the confines of a garda station. It was corroborated by evidence from Ms. April Collins, who was present both when the order was given to the appellant to commit the murder, and the following day when the appellant was challenged as to whether or not he had shot the right man, and when he asserted, incorrectly, that he had. The voluntary nature of the confession was proved to the satisfaction of the trial judge based upon a detailed review of all the evidence, including 20 hours of interview process. There is no basis, under the law, upon which it can be contended that the evidence was inadmissible, or that the trial herein was an unfair one. The appeal herein seeks to extend a legal principle to a situation where it can have no application, and for which there is no evidential support. The second, *Damache* point, is unsustainable. As to the question of inducements, the trial judge was

entitled to reach the conclusions that the effect of inducements made by the gardai had dissipated when the appellant confessed, in circumstances where there was sufficient evidence before him to allow that finding of fact.

85. I would dismiss the appeal therefore.

Judgment of Mr Justice Peter Charleton of Wednesday the 18th of January 2017

1. On 15th February 2012, after a 22 day trial, the appellant Barry Doyle was convicted by a jury in the Central Criminal Court of the murder of Shane Geoghegan at Clonmore, Dooradoyle in the city of Limerick, at around 01:00 hours on Sunday 9th November 2008. The intended victim of the crime, herein called CD, had apparently been a person in dispute with the criminal gang with which Barry Doyle was associated. Because Shane Geoghegan fitted the very general description of the build and clothing of Barry Doyle's intended target and because he was in the place indicated at the time predicted for the killing by the crime boss who ordered the outrage, he was shot on the street with a Glock handgun, wounded, pursued into the back garden of a semi-detached house and then shot dead. The late Shane Geoghegan had nothing to do with criminal gangs or criminal activity. He was simply a young man returning to his residence.

2. A key component of the prosecution case was a confession statement made by Barry Doyle while in garda custody following his arrest pursuant to s. 4(3) of the Criminal Law Act 1997 on 24th February 2009. The circumstances of the interview, which was the 15th during his time in custody, are claimed by Barry Doyle to render the confession inadmissible as, he alleges, the confession came about in consequence of an inducement. While the particular circumstances surrounding the confession at issue will be examined in detail later in this judgment, the pivotal issue is the arrest of Victoria Gunnery, Barry Doyle's former girlfriend and mother of their young daughter. She was arrested at the same time as Barry Doyle. An issue was raised by the defence at his trial that this arrest was used to unfairly induce him to confess to the murder when he otherwise would have remained silent. Part of the supporting evidence for the inducement urged by the defence, curiously, was that Michael O'Donnell, the solicitor for Barry Doyle, had approached the gardaí with an off the record offer that he would confess to the murder of Shane Geoghegan if the gardaí agreed in turn to release Victoria Gunnery. This offer was rejected on the basis that the gardaí wanted Barry Doyle to "tell the truth" and that a confession in such circumstances would not be admissible in evidence. According to the response of the interviewing detectives, his merely stating that he had committed the murder would not enable them to ascertain if he was either telling the truth or lying and such a laconic admission would not enable the release of Victoria Gunnery.

3. Sheehan J was the trial judge. He heard all the relevant evidence at a trial within a trial in the absence of the jury, except for that of Barry Doyle who exercised his right not to testify and of the solicitor Michael O'Donnell who was not called by the defence, despite their right to waive solicitor-client privilege. He also viewed every video recording of all of the interviews. Sheehan J held the confession admissible in law. Carney J was the trial judge in an earlier inconclusive trial. Carney J also had admitted the confession. At the trial from which this is an appeal, the jury found the confession of Barry Doyle sufficiently reliable together with the other evidence to decide that the prosecution had proved the murder charge beyond reasonable doubt. The Court of Appeal rejected the appeal of Barry Doyle, on some 27 grounds argued, in a written judgment of the court, Ryan P, Birmingham and Edwards JJ, dated 8th June 2015; [2015] IECA 109. This Court, by a determination issued on 28th October 2015, allowed an appeal under Article 34.5.3º of the Constitution on the following issues:

> (i) Whether or not the applicant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present, prior to and

during the 15th interview with the Garda Síochána, during which admissions were alleged to have been made. This raises the question of whether the right to have a solicitor present during questioning is a matter of right of the detained person, or a matter of concession by the Garda Síochána.

(ii) Whether the applicant, in all the circumstances, including that he was convicted in the Central Criminal Court on the 15th February, 2012, and the decision of the Supreme Court in *DPP v. Damache* was delivered on the 23rd February, 2012, can rely on that decision on his appeal.

(iii) Whether the matters set out in the applicant's application under the heading "Relevant facts considered not to be in dispute", or any of them, constituted threats or inducements made to the applicant and calculated to extract a confession from him. This is a matter not decided by the court of trial or the Court of Appeal. Secondly, if they do constitute such threats or inducements, whether their effect had "dissipated" or "worn off" by the time of the admissions relied upon by the State, as held by the trial judge; and whether or not there was any evidence on which it could have been determined that the effect of the said threats or inducements (if any) had "dissipated" or "worn off" by the time of the alleged admissions.

4. On the confession, the Court of Appeal held at paras. 40-41 of its judgment that the trial judge was in the best position to adjudicate on the issue of the confession, that "[g]reat weight must therefore be given to his assessment that there was no inducement or threat". It was further decided that "even if there was something to satisfy the [test for an inducement], and that it operated on the appellant, it was dissipated by the intervention of the appellant's solicitor." The Court of Appeal also concluded that their "consideration of the transcripts of the interviews affords factual support for the finding made by the trial judge."

5. One of the complaints made on this appeal is that the trial judge did not rule whether there had been any inducement. Since the reliability of the confession is partly to be adjudicated by reference to any other evidence supporting it, Sheehan J's ruling and the confession statement should be set out.

Confession ruling at trial

6. Neither Barry Doyle nor his solicitor gave evidence at his trial, not before the jury or in the absence of the jury during the trial within a trial as to the admissibility of his confession statement. While the accused has a right not to give evidence, it is more than peculiar that his solicitor allowed the court of trial to simply draw inferences from surrounding circumstances. In particular, there was no direct evidence from the solicitor as to what he did or what assurances he would have been able to give. Any privilege in that regard is that of the client and may be waived by him. If it is not waived, there is no warrant for an assumption that a solicitor whose presence is mandated in assistance to the arrested person either did not do his job at all or did it incompetently. The opposite inference naturally arises, unless clearly displaced. That is done most properly by evidence. The confession statement itself came in the aftermath of the approach to the gardaí made by Barry Doyle's solicitor Michael O'Donnell. That happened between interviews 14 and 15. That encounter was written up some hours later by Garda Mark Phillips. This was the only available evidence of the encounter. While it was used as a basis for cross-examination by counsel for Barry Doyle, there was no challenge to its accuracy and Michael O'Donnell did not give evidence. That memo, presented with slight grammatical amendments, reads:

> After a consultation Michael O'Donnell requested to speak to members who went to interview room. O'Donnell started by saying conversation was off record and did not want a memo to be taken of same. Stated that Barry Doyle would admit to killing Shane Geoghegan if his girlfriend, Victoria Gunnery, was released. I stated that there was no way this was possible, that he would have to tell the truth about what happened, and once he told the truth about what had happened we would have no reason to detain Victoria Gunnery any further. Michael O'Donnell stated that he would only answer one question, that he had committed the murder, and answer no more. I said this would not suffice, as we had to know he was telling the truth and not just saying it to get VG released. Michael O'Donnell said 'sure cant you arrest her again?' I said that Barry Doyle had to admit to what he had done in an interview and that his girlfriend would not be released before any interview. Michael O'Donnell said he would go back to Barry Doyle and tell him this. There was then a further consultation in the cell. After approximately 10 minutes, returned to interview room, Michael O'Donnell again said that Barry Doyle would not admit to anything prior to his girlfriend being released. I said to Michael O'Donnell 'that is an inducement' and there was no possible way that would happen. That any admission would not be upheld in any court if that were to happen. Michael O'Donnell said 'sure wouldn't you have it on the cameras?' Mark Phillips said that didn't matter. Michael O'Donnell said 'well he will not admit to it. I have told him to say nothing, to get you to do the work'. I then said to Michael O'Donnell that Barry Doyle had to tell the truth about what had happened. Michael O'Donnell said 'I think you have a bit more work to do'. Michael O'Donnell again had legal consultation with prisoner. It lasted approximately 4 - 5 minutes. Michael O'Donnell left the station.

7. On the 11th day of the trial, having considered the evidence of all of the relevant interviewing garda officers and custody officers and the custody record, and having viewed the 20 hours of video-recorded interviews with Barry Doyle, Sheehan J ruled as follows:

> The defence object to the prosecution proposal to call evidence of various admissions made by Barry Doyle in the course of interviews that took place while he was in custody at Bruff Garda Station. The defence contend that these admissions are inadmissible and rely on three grounds.
>
> 1) That the admissions were made involuntarily as a result of a combination of threats, inducements and oppression.
>
> 2) That the admissions were made as a result of breaches of the accused's constitutional right of access to legal advice.
>
> 3) The admissions were made as a result of breaches of the requirement of fundamental fairness.
>
> In considering these submissions, the Court has had the benefit of oral and written submissions by the defence and by the prosecution as well as booklets of authorities furnished by each side. The Court has heard evidence from Detective Garda Hogan, Detective Garda Hanley and Detective Sergeant Philips, who were the principal questioners, as well as evidence from Detective Inspector Crowe who was heavily involved in managing the investigation and inter alia insuring that the law regarding custody extensions was complied with. Garda Cowen, who gave evidence regarding the custody record. Detective Garda Clayton, who was involved in the questioning of Victoria Gunnery and her transfer to Limerick. The

Court also heard from Garda Amanda O'Callaghan who told the Court that it was not garda practice to allow solicitors to be present at custody interviews and the Court also heard the statement of a medical secretary Deirdre Devlin which was read to the Court and which stated that the child of Victoria Gunnery and Barry Doyle had no appointment in February 2009 at the Children's Hospital in Crumlin.

The Court also had the benefit of viewing well over 20 hours of recorded interviews, being the first 16 interviews, as well as an agreed transcript of all the interviews.

The onus of proof in respect of admissibility is on the prosecution and if confessions are to be admitted in evidence the Court must be satisfied beyond a reasonable doubt that it is proper to do so.

In considering the question of inducement the Court is guided by the decision of the Court of Criminal Appeal in the McCann case and also bears in mind the judgment in *R v. Rennie*, particularly pages 69 and 70 of that judgment. This court proposes to adopt the rationale put forward by O'Flaherty J in the McCann case and does not propose to follow the judgment of the Canadian Supreme Court in Spencer. The Court has also considered the judgment in the Hoey and Pringle cases, insofar as they relate to inducement.

Regarding oppression, the Court has been guided primarily by the McNally and Pringle judgments. The Court also bears in mind the decision of the Supreme Court in the Shaw case. I will deal first with the question of legal access.

With regard to the question of legal access Barry Doyle had two consultations with his solicitor while he was in Bruff Garda Station prior to making admissions and he was also represented by that solicitor in court when an application was made to extend his detention. The Court does not consider the length of time that either consultation lasted to be relevant in the context of this case. The Court also holds that the Gardaí were entitled to continue interviewing Barry Doyle in interview 15 when he had complained that a short telephone conversation with his solicitor was not a proper consultation and when his solicitor's arrival at the garda station was expected within an hour. The Court is satisfied that there was no breach of Barry Doyle's constitutional right to legal advice.

In considering the question of oppression the Court observed Barry Doyle in video recordings over a period of in excess of 20 hours and holds that he appeared to be physically and mentally strong throughout. He engaged with the Gardaí when he chose to do so and refused to answer questions when he did not wish to do so. The Court notes that he had worked for a construction company as a block layer and played Gaelic football. The Court also notes that at the time of his arrest he was living in basic accommodation in Limerick wearing a bulletproof vest. The Court also notes that a few months earlier when asked by a member of An Garda Síochána where he had been the previous night he responded by saying ‘F - off’.

With regard to the questioning by Detective Garda Hogan, Detective Sergeant Philips and Detective Garda Hanley, and indeed Detective Garda Whelan, the Court finds that the interviews were conducted in a careful, patient and structured way in which some of the results of the garda

investigation were gradually revealed to Barry Doyle. The Court also holds that Barry Doyle first began to engage with Detective Garda Hogan in a limited way, essentially as a result of Detective Garda Hogan's appeal to Barry Doyle's humanity. This engagement was built on by Detective Sergeant Philips and Detective Garda Hanley and ultimately the accused told the Gardaí about his involvement in the death of Shane Geoghegan.

The Court holds that the interviews conducted by Detective Garda Hogan and Detective Garda Whelan and the interviews conducted by Detective Sergeant Philips and Detective Garda Hanley were at all times professional and courteous and involved no oppression. The Court also holds that Barry Doyle was in full control of himself throughout the interviews and holds that he made the admissions that he did because he chose to do so.

With regard to the question as to whether some of the promptings by the Gardaí to Barry Doyle to the effect that he should tell the truth and not keep Victoria Gunnery away any longer from their child, the question arises as to whether this, or any other related promptings made prior to interview 15 and relating to the release of Victoria Gunnery, could amount to an inducement. The first thing to be said is that these remarks must be viewed in the overall context of all that had taken place, which included the various responses of Barry Doyle regarding the death of his brother, the responses regarding his own family, his children by a previous relationship to his relationship with Victoria Gunnery, as well as read or taken in the context of the limited answers he had given about living in Limerick and the fact that he had conceded to Detective Garda Hogan that being in custody on suspicion of the murder of Shane Geoghegan was the lowest point in his life. The context also includes the gradual unfolding of the evidence in the case to him and the context further includes numerous appeals to him to tell the truth.

Notwithstanding the context in which they occurred, and bearing in mind the judgment of Lord Lane in the *Rennie* case, even if these promptings could possibly amount to an inducement when objectively viewed they were not immediately acted on and their affect, whatever it may have been, was dissipated by the consultation Barry Doyle had with his solicitor and his solicitor's interaction with Detective Garda Hanley and Detective Sergeant Philips. This broke any possible causative link and it is highly relevant that the solicitor told the detectives that Barry Doyle would not admit to the offence and that they would have a bit more work to do.

The Court holds that when Barry Doyle came to make his admissions in interview 15 he made them voluntarily. Accordingly, the Court holds that the admissions were made not as a result of oppression and were not made as a result of any threat or inducement.

Finally, the Court has considered the objection made by the defence that the admissions were made as a result of a breach of fundamental fairness. The Court has considered all the objections in the round and bears in mind, in particular, what Griffin J said in the *People v. Shaw* at page 61, and I quote: "Secondly, even if a statement is held to have been voluntarily obtained in the sense indicated, it may nevertheless be inadmissible for another reason. Because our system of law is accusatorial and not inquisitorial, and because (as has been stated in a number of decisions of this Court) our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial

> should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or of the circumstances in which it was obtained, it falls below the required standards of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum of essential standards must be observed in the administration of justice."
>
> The Court holds that there is no breach of the requirements of fundamental fairness and accordingly holds that the confessions made by Barry Doyle are admissible in evidence

Whereas on this appeal, the prosecution have also sought to also reference the first trial, on 14th March 2011, that has been in the context of a ruling there by Carney J. Trials change as to their content and the impact of particular evidence. The ruling of Carney J can have no impact on this appeal.

The text of the confession

8. The reliability of confession statement is a question of fact for the jury. One of the factors that should be foremost in the minds of the jury is as to whether what the prosecution present as a voluntary admission of guilt contains inaccuracies or, on the other hand, whether it contains details that were not mentioned by the interviewing officers, or were not known to them, and which turn out to have been supported by external evidence; the facts on the ground. While, these are matters of fact for the jury such factual support is also of importance on the appellate reviewing of the soundness of a conviction. Here, there is considerable support. The particular interview at which admissions were initially made is interview number 15. Interview number 14 took place on 26th February between 17:32 hours and 18:35 hours. During the course of it Barry Doyle asked for a solicitor. He indicated that he had not yet spoken to his solicitor Michael O'Donnell properly. At 18:52 hours that particular solicitor arrived and consulted with Barry Doyle. The solicitor then spoke to detective gardaí Bernie Hanley and Mark Phillips. The garda memorandum of this encounter is set out at paragraph 6 above. This was followed by another 10 minute consultation between Barry Doyle and his solicitor. There was then a further brief conversation between the solicitor and those gardaí. There then followed a further consultation between Barry Doyle and his solicitor lasting less than 5 minutes. He returned to the interview room. After being cautioned that he was not obliged to say anything unless he wished to do so, but that whatever he did say would be taken down in writing and may be given in evidence, Barry Doyle indicated that he understood the caution and he then had a meal. Interview 15 commenced at 19:43. Barry Doyle immediately admitted that he was in Clonmore housing estate on the 8th November 2008 as a front seat passenger in a Renault Espace car. At 19:46 hours, the member in charge entered the room and told Barry Doyle that his solicitor wished to speak to him. He left and spoke on the telephone to the solicitor, this call taking 3 minutes. After returning to the room Barry Doyle was asked by the detectives, "Barry were you involved in the murder of Shane Geoghegan?" to which he replied "Yeah, I shot him". The following extract consolidates both questions and answers during the course of the resulting confession statement, but leaving out those questions put to which there were no answers, and reads:

> [Asked what he had said before he left the interview room] I shot him. Yes. Seen someone walking across the estate. I held a gun, shot him, and chased him and shot him again. I got out of the car. I shot at him. He ran. I chased him around the back of the house. I shot again. [Who did you shoot?]Shane Geoghegan. [Was he your intended target?] No comment.

[Asked how long he was in Kilteragh Estate] I don't know…about two hours [Asked what he was wearing] Black top, denim bottoms. [Asked where the clothes are] Burnt. [Asked how many shots he fired as "we have to know that you're telling the truth"] I'm not going to admit to murder if I didn't do. Seven or eight. [Asked did he feel better telling the truth] It doesn't take back what I did. [Asked what time he arrived in the housing estate] I don't know it was dark. [Asked was he sitting in the front passenger seat waiting] Yep. [Asked where the Renault Espace car was parked] Just through the wall, in the car parking space. At the corner. Wall is there. [Asked where victim was when he began shooting.] Halfway across the road. [Asked where Shane Geoghegan went] Ran around the house, I couldn't see him. [Asked if he found Shane Geoghegan by following the heavy breathing] Yeah. [Asked where Shane Geoghegan was in the garden] Around, up against the wall. [And how many times did you shoot him when he got to the back garden?] Twice. [Where did you shoot him?] In the head. [Asked if the victim said anything] Please stop. [Where did you run?] Back to the car. [Asked what seat he got into] Passenger. [Asked if he was the only person in the car who got out to shoot at Shane Geoghegan] Yeah. [Asked what happened when he got into the car] Drove off. [Asked if he had hit the victim prior to shooting him in the head in the back garden] I think so. He was holding his side. Can't think [which side]. [Asked when the victim first saw him] The first time I shot him. [Asked did he say anything to him] No he just turned and ran. [Asked how many shots he fired initially] I can't think. I just left off a few and went after him again. [Asked whether he fired more shots while running after the victim but before going into the back garden] Maybe one or two. I can't remember. [Asked did the gun work while he was firing it] Jammed. Just tried shooting and it didn't click. I pulled it back. 2 or 3 times. [Asked where he was standing when this happened] On the road. [Asked how many times he shot the victim] Twice that I know. [Asked did you see anyone else in the estate] No. [Asked about other cars] One of them. [Asked was this the first time he had fired any gun] Yeah. [Asked if he knew or had ever met the victim before] No. [Asked was he sorry] Yes. [Asked how he felt afterwards] Dunno. [Asked did he feel sick afterwards] I was. My head was all over the place. [Asked if he had told his girlfriend about the murder] I don't want to involve her. [Asked when he turned his mobile phone off] Haven't a clue. [Asked when he turned his mobile phone back on] Next day or something. I can't honestly remember. [Asked if he had taken any drink or drugs before murdering Shane Geoghegan] No. [Asked did you know the Renault Espace was stolen] Yeah. [Asked if he knew where it was parked between being stolen and the night of the murder] No. [Asked why in earlier interviews he had denied involvement in the murder] I was thinking of my family. [Asked was he lying earlier on in denying involvement] Yeah. [Asked how far down the road the house where the murder occurred was] Let me think. I can't think. [Asked was the victim standing when he was shot] Sort of leaning. Against the wall like. [Barry Doyle is asked to demonstrate this and then asked which side he was leaning on] Left side. I think I'm not too sure. [Asked what he was he was leaning up against] Wall. Wall of the house down the side.[Asked what else he could see] Didn't even look. Just ran in.. I think there was bins there. Can't remember. [How close did you get to him?] From here to you. [Asked was the victim facing him] Yeah. [Asked if he saw where he shot the victim] Just shot him in the head. [Asked did you see where exactly in the head he shot him and whether he saw him fall] No. No. [Asked was he moving when he ran away] Don't know. [Asked what he was wearing] He had his jacket up like that. [Asked did he see any facial hair] Couldn't really see it was dark. [Barry Doyle then alternately answers that he had not been in the estate before and that he was the only person in the car with a gun and that Shane Geoghegan did not have a

> gun. Finally he is asked if he is sorry for what happened] Yeah. Sorry I did it. I'm just sorry I did it [Asked if he would do it again] No. [After a memorandum of the interview is completed, Barry Doyle signs it.]

Support in other evidence

9. In the early 1990s, a recurring argument in criminal trials was whether a confession to gardaí should be put before a jury only if accompanied by a corroboration warning. That issue was eventually resolved by this Court. The proposition that a corroboration warning should be given to a jury in relation to confession evidence was rejected by the majority of this Court in *The People (DPP) v Quilligan and O'Reilly (No. 3)* [1993] 2 IR 305. Nonetheless, in that case, an unsupported but extremely detailed confession to a brutal murder of an elderly man in County Cork, Mr Willis, and the effective ruination of his brother's life, resulted in a clarification of the proper direction which a trial judge should give a jury, without requiring any specific form of words. That ruling was given in the context of the safeguards then in place, which as will be later detailed were much less than now. Whether there is external support for a confession as an accurate and truthful document in implicating the accused was regarded by this Court as important. It remains so. In the judgment of Finlay CJ for the majority, the role of the jury in analysing the confession in the context both of allegations made by the accused tending to demonstrate involuntariness, and of other evidence that may suggest involuntariness, was emphasised at 333-4:

> Where, as has occurred in this case, the issue with regard to the admissibility of statements turns largely on allegations of threats, assault, inducement or harassment, or of what is described as the "planting" of statements, then, the function of the jury is, I am satisfied, as follows.
>
> It must be clearly directed by the trial judge to have regard to all the evidence which is before it, including all the evidence suggesting that the statement has been obtained by any of the unlawful methods which I have mentioned above for the purpose of ascertaining whether they are satisfied beyond a reasonable doubt that the confession or incriminating statement made by the accused is true and is a sufficient proof of his guilt.
>
> A jury is not bound by a finding of fact made by a trial judge in the course of his ruling on the admissibility of a statement such as, for example, a rejection by him of an allegation that a member of the Garda Síochána assaulted the accused whilst in his custody and thus obtained the statement from him. It must be made clear, whether by specific warning or by a positive direction to a jury that their function in having to be satisfied beyond a reasonable doubt as to the truth of a voluntary statement admitted into evidence before them necessarily involves an examination by them of allegations of any description which are relevant to the question as to whether the statement was truly voluntarily given or not. It should be made clear to them that if they have a reasonable doubt as to whether a statement was truly voluntarily given that that would form a very solid ground for also entertaining a reasonable doubt as to whether it was true.

10. In dissenting, holding that there should be a warning requirement in the case of an uncorroborated confession, McCarthy J also emphasised that the jury should look at external facts to determine whether any admission of guilt was to be accepted as reliable. At 344 he stated:

> There is no difficulty as to the direction as to corroboration itself - this may be found in a variety of other evidence, including, as in this case, the fact

> that a significant detail in the admission was born out by subsequent discovery at the instance of the person in detention. Corroboration does not depend upon the evidence of other gardaí, one should look elsewhere. … [Once a statement has been admitted by the trial judge into evidence, that], however, does not in any sense preclude the jury, when evaluating the admission, from looking for support or corroborative evidence in a material particular from outside the admission itself.

Fundamental to any analysis of fact is to consider which facts are obvious, or as a matter of plain reality beyond argument, and then to consider the disputed facts in the light of all of the other relevant evidence. While the corroboration warning requirement for statements of admission in custody has never been introduced as a rule of Irish law, and while the time when this point arose was one where the safeguards required by law were much less, it has always been significant in relying on a confession whether what an accused said fitted in harmony with other known facts and whether other evidence linked the accused to the commission of the crime. That analysis is central to the decision as to whether the prosecution case has been proven. Hence it is important, in looking at Barry Doyle's admissions, to analyse whether evidence on the ground backs up what he said as to his involvement in the crime. A confession statement which is materially contradicted by the reality of facts to which it refers is one thing; a confession statement that is supported in its narrative by the reality of what occurred is another. Where a confession details facts which are unknown but later investigated and found to be correct, a serious indication is given of inherent reliability.

11. There were a number of elements of support for the confession as an accurate incrimination by Barry Doyle of himself. Firstly, in closing the case, counsel for the prosecution emphasised the accuracy of the map drawn by Barry Doyle during interview 15 from the point of view of the Garda forensic examination of the scene. Secondly, there was the evidence of Victoria Gunnery. Whether the evidence of Victoria Gunnery at the trial was of assistance was a matter left to the jury. While she gave evidence of conversations with Barry Doyle which could support his admission of guilt, on cross examination she put a different interpretation on matters. Thirdly, a woman from Limerick also gave evidence of knowing the gang leader who had ordered the murder, as she had known a relative of his. Part of her testimony, with names redacted where necessary, detailed how the murder was ordered by the gang leader AB. It reads as follows:

> The discussion was [AB] was talking, he was telling them that he had everything sussed out about [CD the intended victim] and that he said, "it's time to make the move" and he said, "I've everything sorted" and then EF said to AB, "you don't have anything sorted". He goes, "I do". He said, "I have the gun and the car ready, everything is there to go", and he was explaining … what he [CD the intended victim] looked like to Barry Doyle. … And Barry was just listening to him and he said to Barry, "the gun is there, you kill him" and he said to EF and to GH, "and one of ye are driving the car and that's it"… I knew over where AB was talking about. I didn't know exactly he's from Doorstep, like, but I knew it was around the roundabout area there by Crescent Shopping Centre.

12. This witness described staying in the Hilton Hotel with her then boyfriend. She testified that she remembered the morning after the murder of Shane Geoghegan. She recalled driving with the gang leader AB to a rendezvous in the Limerick suburbs and meeting Barry Doyle and another man who were in a separate car. Consolidated, that part of her evidence reads:

> AB was on the phone, he had another boy on the phone … He asked Barry [Doyle] to describe what kind of man was it that he killed. … and Barry described him and Barry was saying "it's him, I know it's him". [The gang

> leader AB was] very angry and violent. … AB asked him was it [CD the intended victim], he said it was. He said "I'm sure it was him." … He says that he was big, the way that AB described him. [Asked where AB and Barry Doyle said they were going] just said they were going to Dublin. They drove towards that way anyway but they didn't go the whole way, they turned back … to Limerick.

The witness does not resile from this evidence in cross-examination. While questions as to motive and family were put to her, no alternative instructions from Barry Doyle were put to her as to either the meetings or as to the conversations. That evidence was highly incriminating of Barry Doyle.

13. The fourth piece of support to which the jury were entitled to have regard was forensic. Detective Garda Mark Collendar, a ballistics expert from the Garda Síochána technical bureau, gave evidence as to what was found at the scene of the murder. He said that a number of discharged and undischarged live rounds of 9mm calibre ammunition were found in the area. The live rounds had both "an extractor and ejector mark and chamber marks which would be firearm generated marks which would be imparted onto them from being in or cycled through a semi-automatic pistol". He described these rounds as having been "ejected manually" and said that they "bore the markings of a Glock semiautomatic pistol." He also describes the process of expelling live rounds. He described the impression that a firing pin would leave when it strikes the primer on the round. He related the particulars of a burnt-out Renault Espace car found in the area. While the detail in relation to the car would have been public knowledge, the fact that the gun had jammed and that the killer had used the ejection of 2 bullets to unblock this Glock pistol was not known to the gardaí prior to the confession statement of Barry Doyle. That, in any event, was the case made on this point by the prosecution.

Admissibility of confessions

14. The maxim *nemo tenere prodere se ipsum*, that nobody is required to act as a witness against themselves, is the foundational authority for the judiciary's control of such confessions to crime as are regarded as untrustworthy. Over centuries, it has been on this principle that all rules governing confessions have been based. These have ranged from rules against torture in late medieval times, to a requirement that confessions be the rational product of a free mind in the 18th century, to the requirement of note taking in the early 20th century, to the mandatory provision of legal advice to suspects closer to our time, to video recording as of the present era. It is right to be on guard for, as Alexander Solzhenitsyn remarked in Gulag Archipelago (London, 1973, p 99): "Indeed, the actual boundaries of human equilibrium are very narrow, and it is not really necessary to use a rack or hot coals to drive the average human being out of his mind." More recently the danger of suggestion to overcome resistance has also been examined. While safeguards against compelled confession are numerous, and at times highly detailed, the underlying principles have remained constant: the reception into evidence of what is both reliable and fairly taken is the weft running through the case law while the rejection of coercion makes up the web. Voluntariness is the legal shorthand for the process of adjudication by a judge to determine whether a confession has proceeded from a coerced mind or from a free one. Through sustained and unremitting pressure, torture, or sometimes through suggestion, a person may make a decision to give way and accept that police suspicions as to their involvement are correct. Such a confession could not be a reliable basis for a finding of guilt. Some such admissions are merely an acceptance, a "Yes, I did it". In some admissions, such details as are provided have in fact been gradually supplied to the suspect over several police interviews. Some may be detailed and supply particulars unknown to the investigators. Voluntariness is a matter for the judge alone in the absence of the jury while reliability is a matter for the jury where the

confession is admitted into evidence. In the context of all of the evidence and its interrelationship, the jury will decide if the prosecution have proved their case. There is a constant guard by the judiciary against coerced confessions because that kind of unreliable admission may possibly be mistakenly seen by the jury as the acceptance of the validity of the entire prosecution case. A genuine admission of guilt to discreditable conduct is, on the other hand, so contrary to human vanity that where circumstances suggest that it is the product of a free will, there may be the highest degree of trust reposed in it. On its own, an admission of guilt is enough to convict. As was put by Nares J and Eyre B as early as 1783 in *R v Warickshall* 1 Leach 263, 168 ER 234:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is submitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected.

Cave J put the fundamental test of voluntariness thus in *R v Thompson* [1893] 2 QB 12:

By … law … to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous.

15. Sometimes the analysis in appellate rulings on confession statements may focus on the issue as to whether the circumstances in which an admission was taken were such as to force a prisoner into a position in which he would be likely to make an untruthful answer; *R v Brown* [1903] 68 JP 15. It is useful to return to the state of the law as of Irish independence. Archbold puts the test as of 1922 as being: "to exclude a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have had such an effect on the mind of the defendant as to induce him to confess"; Archbold - *Pleading, Evidence and Practice in Criminal Cases,* 26th ed., (London, 1922) at 387. Temporal issues are also of importance since the same authority at 389 states:

> The only proper questions are, whether the inducement held out to the prisoner was calculated to make his confession an untrue one, and whether the inducement continued to operate at the moment of the confession; if not, it will be admissible.

16. Ultimately, a reading of all the relevant authorities resolves the question of voluntariness as: can a confession be regarded as a decision freely arrived at by the suspect who has voluntarily admitted as much of his guilt as he or she chooses. It may be a subsidiary question for the jury as to the weight to be given to an admission as to whether he or she has given sufficient detail to indicate the reliability of what is said. This has nothing to do with expecting a total unfolding of everything a prisoner knows. If a prisoner is required to confess, it is not voluntary. If a prisoner is required to confess all that he knows, then he or she will have had no choice. Part of the indicia of reliability may be that the person admitting to guilt in police interviewers makes a free choice as to how much is to be revealed. A confession is consequently not to be regarded as unreliable because accomplices, or those inspiring the crime, are not named. This has particular resonance as to the later interviews with Barry Doyle after the confession statement quoted in para. 8 above from interview 15. He would not say who else was involved. That was a choice he was held be the trial judge to have been free to make. In our system, the enquiry is into personal guilt. It is entirely focused on what the suspect has done not, as in the Spanish Inquisition or as in Soviet interrogation, on rooting out paranoid

conspiracies or the naming of heretics or wreckers. Once a challenge to a confession statement is raised by the accused, the circumstances of its taking are to be scrutinised by the trial judge to determine its admissibility before it may be admitted as evidence before a jury. While experience before Irish juries far from supports the supposition that a mere admission that is lacking in detail and is unsupported by other evidence of the accused's guilt automatically yields a conviction, as with the original motivation for other rules of evidence, judges are suspicious. Thus, historically, there has been seen to be a danger that too much weight will be attached to an admission and that the mere presence of a confession statement will leave a jury feeling that the scrutiny of any other evidence tending to indicate the guilt of the accused or suggesting his exoneration need not be closely examined; *R v Baldry* (1852) 169 ER 568. As a response to crime within the community, there is tension between the feeling that it may be unfair to convict a person solely on the basis of a confession and, on the other hand, the need to equip the guardians of the peace with the legal authority to make searching enquiries. What is not to be tolerated, on any right-thinking view of what constitutes reliable evidence against those facing serious criminal charges, is any secret process by which coercion is brought to bear on suspects so that they cease to be able to make rational choices in response to allegations. The leading Irish cases support that proposition and are set out instructively in Liz Heffernan - *Evidence in Criminal Trials*, (Dublin Bloomsbury, 2014) and JSR Cole - *Irish Cases on Evidence*, (Dublin, 1972).

17. Wigmore considered that the notion "that confessions should be guarded against and discouraged is not a benefit to the innocent, but a detriment." His view, as expressed at para. 866 of his *A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada,* 3rd edition, (Boston, 1940), was that an innocent person should be enabled by a mere question from the police to make an explanation at the earliest moment and that this would be "often the best means for him of securing a speedy vindication." While this is correct as far as it goes, absent statutory intervention, the circumstances in law where people are compelled to give information as to their own criminal conduct are rare. An accused has, however, the invaluable right of giving evidence both at a trial within a trial, with a view to allowing the judge to adjudicate on the impact of any coercion complained of on that particular individual, and to contest by evidence the reliability of any confession statement admitted before a jury. This includes the right to contest the circumstances of any admission by cross-examination, as opposed to through the evidence of the accused, but this must be squarely based upon the instructions of the accused. Wigmore, at para. 851 of the same work, was also of the view that every "guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested." He speaks of the "nervous pressure of guilt" and proceeds to describe it as being "enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes the pressure is relieved; and the deep sense of relief makes confession a satisfaction." Experience of ideological murders - those committed from adherence to absolute values and demanding a cowardly and inhuman resort to violence against opponents - suggests that in this area of criminal conduct such a view is inapplicable. When it comes to dealing with those involved in criminal gangs, experience has shown that loyalty to the group and surrender of authority to a leader, will also militate against persons relieving themselves of the burden of guilt, although perhaps less strongly. Even where there is a confession in those circumstances, it may be likely to be personal and not to name other names. Thus, circumstances limit the extent to which the guilty person will confess and how far the confession will reveal pertinent details. Another danger is that the accused, through bitterness, will name those who were not involved or raise the level of participation of those who were. Hence, as matter of law, a confession statement of A, though naming B, C and D, is admissible only against A. An accomplice who is first sentenced may of course later give evidence, but subject to the relevant safeguard, a corroboration warning; *People (DPP) v John Gilligan* [2006] 1 IR 107.

18. The ultimate test is whether the confession came as a result of a decision by a rational mind that has freely exercised a choice to admit guilt. Given the profusion of case law on this issue, the summation of multiple decisions into a workable test by Griffin J in *The People (DPP) v Shaw* [1982] IR 1 at 60-61 is welcome:

> The circumstances which will make a statement inadmissible for lack of voluntariness are so varied that it would be impossible to enumerate or categorize them fully. It is sufficient to say that the decided cases show that a statement will be excluded as being involuntary if it was wrung from its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods which have in common the result or the risk that what is tendered as a voluntary statement is not the natural emanation of a rational intellect and a free will.

Safeguards surrounding confessions

19. The judicial caution in the admission of confessions is not simply because most statements by arrested persons admitting to a crime have historically been regarded with caution due to having been taken in what was once seen as the confines of a secret process within a police station, but by reason of the very pressure which arrest itself brings to bear on the suspect. As Hayes J put the matter in *R v Johnson* (1864) LR 2 CCR 15 at 24:

> It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears.

With this in mind, there has developed an accretion of safeguards designed to ensure that there can be, firstly, proper and accurate scrutiny of what has actually happened within the confines of police interrogation and, secondly, a degree of balance which militates against the isolation in confinement of suspects so that their increasing vulnerability has as a counterweight proper treatment, legal advice and access to family. These developments have occurred through judicial action and by legislative intervention. These safeguards have been developed for the benefit of the entire community and are to be abided by and not by-passed through excuses as to the unavailability of legal advice prior to admissions or the unavailability of video recording equipment.

20. With each development of the law, the process by which a confession is taken from a suspect has become more amenable to exact examination. It is important not to slip back into the attitude of a prior era where all a court had was the somewhat weighted contest between the testimony of multiple police officers and the denial of the suspect. The modern system is far from the situation where juries could determine the reliability of the prosecution case only through attempting to gaze through a glass darkly at what may have secretly happened to a person under pressure in a police station. Since we have moved through legislation and judicial scrutiny into an era of transparency, nothing less than the methods through which there is now accountability is acceptable. As times changed so did the challenges posed by accused to the admissibility in evidence of confession statements. There was a time, within the last decades, when a common argument advanced against the admission of a confession statement was that the statement was a so-called planted verbal; in other words that the accused had said nothing or said something innocuous but that the interviewing officers had made up an admission of guilt. There was also a time before that, but within living memory, when the

issue as to admissibility tended to focus on allegations of brutality or of secretly hiding an arrested suspect away from legal advice and from the calming attentions of visits from those nearest to them. In the time following that, they were followed by allegations of unremitting pressure. One by one, these kinds of allegation have disappeared. This is because safeguards have been put in place. They are to be kept in place. In *Dunne v Clinton* [1930] IR 366, it was affirmed that it was impermissible to detain and question suspects to a criminal offence without bringing them before a Peace Commissioner or court and formally charging them as soon as reasonably possible. The use of the time between arrest and the mandatory bringing of a prisoner before a Peace Commissioner or court could, however, be used to question him or her. Section 30 of the Offences Against the State Act 1939 mandates the arrest of anyone suspected of a scheduled offence. Of relevance here are firearms offences, and of those with information in relation to such an offence. With the Emergency Powers Act 1976, such powers of questioning were amplified as to the length of time a person could be kept in custody. With the reference of that Bill to this Court by the President under Article 26.1.1º, *In re the Emergency Powers Bill 1976* [1977] IR 159 at 173, O' Higgins CJ declared that rights to liberty were curtailed by arrest but he also declared that arrest implied appropriate safeguards:

> While it is not necessary to embark upon an exploration of all the incidents or characteristics which may not accompany the arrest and custody of a person under that section, it is nevertheless desirable, in view of the submissions made to the Court, to state that the section is not to be read as an abnegation of the arrested person's rights (constitutional or otherwise) in respect of matters such as the right of communication, the right to have legal and medical assistance, and the right of access to the Courts. If the section were used in breach of such rights the High Court might grant an order for release under the provisions for habeas corpus contained in the Constitution. It is not necessary for the Court to attempt to give an exhaustive list of the matters which would render a detention under the section illegal or unconstitutional.

21. This remains the law. A breach of liberty, such as deliberately continuing to take a confession statement beyond the lawful time for arrest, at that time consequently resulted in the exclusion of that evidence; *The People (DPP) v Madden* [1977] IR 336. That case was decided according to the law as it then stood. The Criminal Justice Act 1984 was designed to remove the rule that persons arrested were regarded as being at the beginning of their imprisonment and that questioning was merely tolerated up to the time they could first appear for charging before a judicial authority. That Act brought in powers of arrest for questioning on serious offences, those carrying 5 or more years imprisonment and, following the 1978 Ó Briain Report, provided for a system whereby that arrest should be subject to safeguards, including, as later provided by Statutory Instrument, the checking by a custody officer of arrest validity and the keeping of exact records as to the manner in which a suspect was being interviewed, requiring that the arrested person be given breaks, meals, notice as to rights, that the prisoner should not be questioned beyond midnight except where that was requested, and for humane treatment generally. The details of this were filled in though subsidiary legislation; the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (S.I. No. 119/1987).

22. Nonetheless, allegations of coerced confessions continued to be made after the commencement of those safeguards. In the modern era the pen has been replaced by video recording. The electronic recording of interviews was provided for by section 27 of the Act of 1984. This is such a case. The era of the automatic recording by video of interviews with suspects took a considerable time to arrive as a present reality. In *Quilligan and O' Reilly*, O'Flaherty J, concurring in the majority decision that a corroboration warning was not appropriate for confessions, considered that recording of interviews would be the best means whereby proper protection could be given to the

accused. At 357 he referred to this as being "as likely to be of benefit to the gardaí as it is to the accused" and "a much better way to ensure that a just verdict is reached than the introduction of a corroboration warning requirement." While the fifth report of the Morris Tribunal noted in 2006, all of 22 years later, that the use of video recording was not a prerequisite to the admissibility of a confession, by that stage the Court of Criminal Appeal showed signs of losing patience. In *The People (D.P.P.) v. Connolly* [2003] 2 IR 1 at 18 Hardiman J stated:

> The courts have been very patient, perhaps excessively patient, with delays in this regard. The time cannot be remote when we will hear a submission that, absent extraordinary circumstances (by which we do not mean that a particular garda station has no audio-visual machinery or that the audio-visual room was being painted), it is unacceptable to tender in evidence a statement which has not been so recorded.

The Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997 (S.I. No. 74/1997) had by that stage been enacted, after a delay of 13 years, but the availability of facilities was at first limited to district headquarters, though by now it has become more widely available. It is now used and ought to be used for serious criminal cases. It should also be born in mind that the reasoning of having electronic recording applies to all admissions. Safeguards are rendered meaningless if courts do not apply them. This was case where the appropriate procedures were followed, as they must be. Thus, the era in which the confession statement of Barry Doyle was recorded has a measure of safeguards beyond anything previously contemplated. What Sheehan J was dealing with here was a set of circumstances where the judge can weigh every word spoken and every reaction of the prisoner with a view to considering whether the prosecution has proven that the inculpatory statement in question was voluntary. That is what the interaction of the judicial and legislative approach to this matter has demanded and that is a circumstance designed on behalf of the Irish people to enable the proper scrutiny of contested confessions.

Role of the trial judge

23. In *The People (DPP) v Madden* [1977] IR 336 at 339-340 the Court of Criminal Appeal followed the judgment of Holmes LJ delivered in the Court of Appeal in the *SS Gairloch* [1899] 2 IR 1 at 18 as follows:

> When a judge after trying a case upon viva voce evidence comes to a conclusion regarding a specific and definite matter of fact, his findings ought not to be reversed by a court that has not the same opportunity of seeing and hearing the witnesses unless it is so clearly against the weight of the testimony as to amount to a manifest defeat of justice.

24. The primacy of the trial judge as the assessor of fact is emphasised in many other judgments; see for instance *The People (DPP) v Shaw* [1982] IR 1. It may be argued that with the ready availability of video recordings in the course of police interviews, that this role has changed and that somehow an appellate court has been put in as good a position as the trial judge. This is not so. The boundaries to an appeal remain the same in criminal cases as the jurisdiction exercised in civil matters; *Hay v O'Grady* [1992] 1 IR 210. Furthermore, the cases cited in the foregoing paragraph were the basis of the decision by Sheehan J to admit this confession as voluntary. He heard the gardaí giving evidence and heard and saw their reaction to cross-examination. It might also have helped him to hear from the accused and from his then solicitor but decisions as to the maintaining or withholding of privilege are matters for the accused, as is the decision as to who is to give evidence. Such decisions are made, no doubt, for good reason. On appeal, a judge cannot

be in as good a position to decide facts and, as a matter of law, is not. Despite video-recordings of interviews, an appellate court has available merely the text of the cross-examination of garda witnesses as to the allegations of the accused. Those will be searched as to the instructions behind questions where, as in this case, the accused chooses not to give evidence. In the *Shaw* and *Madden* cases, the issue on appeal regarding the voluntariness of the confessions in dispute was resolved by reference to the availability of evidence upon which such findings could be made. Indeed, the second and oft-quoted principle enunciated by McCarthy J at 217 in *Hay v O'Grady* has not been argued on this appeal to be either incorrect or inapplicable:

> If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.

25. As to inferences, the decision in *Hay v O'Grady* places the primacy of findings obtained from live witnesses with the trial court, though acknowledges that an appellate court "is in as good a position as the trial judge" where circumstantial evidence is involved. This Court on appeal has had no opportunity to hear or see any witness on this issue. The trial judge was the only person in that unique position. Sheehan J also had the duty to decide on the issue of whether this confession resulted from an inducement or was, instead "the natural emanation of a rational intellect and a free will"; Shaw, quoted above para. 18 from Griffin J at 60-61. Essentially, three points have been argued on voluntariness: firstly, that Sheehan J applied an incorrect test for dealing with inducements; secondly, that the memo recording the meeting with the solicitor prior to the crucial admissions is incapable of any other construction than that there is an inducement; and, finally, that the text of the interview and of prior and subsequent interviews demonstrate that the inducement was operative and cannot have passed. The separate judgment of McKechnie J involves a re-analysis of the facts and arrives at a different conclusion to Sheehan J.

26. No incorrect legal test was applied by Sheehan J. The operative part of his ruling specifically references all of the relevant decided cases and in particular the decision of the Court of Criminal Appeal in *The People (DPP) v McCann* [1998] 4 IR 397. This had not only been opened to the trial judge but had been discussed in argument and counter argument as to the admissibility of the confession. The three part test set out in that case emphasises that the effect which any action of the interviewers may have had on the particular mental disposition of an accused cannot be ruled out. In emphasising the individual nature of the person under questioning, the particular disposition of each person is to be kept to the front in ruling on this issue. The *McCann* test rightly sets out three questions:

> (a) Were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or inducement?
>
> (b) Did the accused subjectively understand them as such?
>
> (c) Was his confession in fact the result of a threat or promise?

27. The separate judgment of McKechnie J correctly emphasises the sequence of these questions. The approach of the trial judge in that regard seems to start at the second question. The appropriate start is the first. As a matter of prudence, even if ruling no on the first question, it assists appellate courts to also make findings of fact where appropriate on the other two. But the sequence should be maintained. It was specifically the text of *McCann* which is referenced by Sheehan J and any alternate authority was rejected in his ruling. Furthermore, part of the test is whether, if an inducement cannot be completely ruled out, the inducement continued to operate at the moment of the confession; that is the issue of whether a confession resulted from that inducement. That

requires a subjective analysis, as the test in *McCann* states. Here, the ruling of Sheehan J referenced in particular *The People (DPP) v Pringle* (1981) 2 Frewen 57, which at 82 contains a description of the individual characteristics of the person being questioned; in that case "a man of 42 years of age, in good health, who for some years prior to his arrest had been a fisherman in the Galway area… not unused to conditions of physical hardship."

28. The operative inducement on this appeal is said to be evidenced from the exchange between the solicitor for Barry Doyle and the interviewing gardaí in respect of interview 15. In this regard, it is to be presumed that a solicitor knows the law and that part of the advice that was available to Barry Doyle in the several consultations which he had with his solicitor just before interview 15 was that neither his detention nor the detention of his ex-girlfriend Victoria Gunnery was capable of being extended indefinitely, 72 hours being the maximum period of detention allowable under section 30 of the Offences Against the State Act 1939, as amended. The interviewing gardaí were confronted with the legal representative for Barry Doyle offering a false and insecure basis for any confession. What is significant is that this was rejected out of hand. The argument advanced on behalf of Barry Doyle is that even if the gardaí rejected this offer, the fact remained that they left open the position that, should Barry Doyle provide a confession statement, Victoria Gunnery would be released was enough to constitute an inducement. It is worth recalling the precise words in which the memo recorded this fact. It is a fair inference, and certainly not one that can be dismissed as a remote possibility, that his solicitor repeated the words of the gardaí to Barry Doyle as the 15th interview that was about to commence. Those words were: "once he told the truth about what had happened we would have no reason to detain Victoria Gunnery any further."

29. In the context of various forms of detention for police enquiries, be it under s. 30 of the Offences Against the State Act 1939 or the ordinary form of detention under the Criminal Justice Act 1984, the argument often made by the prosecution as to why a detention was continued lawfully once a confession statement was made by the arrested person has been that facts needed to be checked. In other words, it is often said: we could not charge or release the suspect because in light of his statement there were other facts to be checked up on and we may have needed to come back to him having done that. Even if Barry Doyle had made an admission, from whatever motive, it would not have been unreasonable to continue to detain him and to check with whoever had relevant information as to facts mentioned therein for the purpose of cross-referencing such incidents as were relevant to both. In the case of Victoria Gunnery this may not have taken long. Even still, the information from the gardaí on this point may, therefore, have been inaccurate. The question then becomes whether this was the motivation for Barry Doyle in making the statement.

30. It is to be noted that at the trial, the defence claimed that Barry Doyle was oppressed into making the confession. The defence also said that the confession was made in consequence of an inducement. Despite the subjective nature of the effect of the test on a prisoner, as elucidated by the Court of Criminal Appeal in *McCann*, the evidence most prominent in the notable absence of evidence from the accused was that of the video recordings. Sheehan J after viewing some 20 hours of these, found as a fact that Barry Doyle "appeared to be physically and mentally strong throughout." Furthermore, the trial judge regarded his interactions with the gardaí as a matter of choice. His background was also of importance in this analysis: what he worked at and the conditions that he was prepared to put up with in his day-to-day life. All of this is relevant as well to the mental toughness that faced the questions posed as to his involvement in the context of the safeguards as to legal counsel, custody supervision, visits, rest and complete recording of interviews. Ultimately, the question is as to the motivation of an arrested person for making the statement. On the criminal standard of proof, in other words rejecting the possibility that there was an operative inducement at the time of the confession, Sheehan J held that it was not in consequence of the references to his former girlfriend and mother

of his child. Instead, the trial judge held that the statement emanated from remorse. The primary finding of fact here was that the statement was taken in the context of the gradual unfolding of the evidence against him by gardaí acting in a professional and courteous way and that the statement resulted from remorse at what he did and not from any inducement.

31. The test in law for the review of facts remains whether there was evidence to support such a finding. Any appellate analysis is required by law to be so confined. As McCarthy J stated in *Hay v O'Grady*, the role of an appellate court is not to count which aspects of the evidence, pointing one way or the other, amount to a majority. There was evidence from Victoria Gunnery, which was put to Barry Doyle in interview 10, on 25th February between 22:38 hours and 23:35 hours. This centred on the use of a phone and the hours within which the phone had been turned off. Here, the relevance was when he was about stalking the victim, as it turned out the wrong man. The reading of her statement to Barry Doyle was in accordance with a modern interpretation of rule 8 of the Judges' Rules; as it is never sought in consequence of reading a statement to one prisoner to thereby implicate through that prisoner's response the original maker of the statement. It was put to Barry Doyle that despite the fact that she had done nothing, he had placed her in jeopardy. Reference is made to her having "the same food as you and no visits", but in fact she had visits from her father, her mother and another individual. It is put to him as well that failure to tell the truth could harm his relationship with the mother of his children. This was because, as it was put to him, he had "shown no remorse." A confession made from remorse may indicate that no inducement is operative. It was said to him that the only way to move forward was to admit his involvement. An offer is made to him that if he tells the truth that the gardaí will go and tell her that he has told the truth. He was asked: "Can you do that for your own kids?"

32. It was argued on this appeal on behalf of Barry Doyle that it was sinister that Victoria Gunnery was brought to Limerick on the following day for the purpose of extending her detention. Part of the problem with the challenge to this interview was that a vast number of points were raised. On the papers lodged, it does not appear that the trial judge was specifically asked to rule on this; rather it seems that it was used as a rhetorical device on this appeal. Interview number 11, which took place next day between 09:03 hours and 11:12 hours, centred on statements taken by the gardaí tending to show the origin of the plot to murder a person who was mistaken as the eventual victim. A particular statement was put as to the murder of the intended victim CD and the brutality of the person apparently ordering this; the gang leader AB. Interview 13 took place between 15:02 hours and 16:13 hours. The relevance of Victoria Gunnery arose in this interview as questions were put by the gardaí to Barry Doyle as to why his phone had been off on the relevant night when she apparently tried to telephone or text him and vice-versa. It was put to him that she was not lying about this important fact, especially as she is "sitting in a Garda cell or a Garda interview now." There is a specific reference to her in the following terms:

> You brought her into it. You brought her into it, you know? We don't want to see her in custody. We don't want to see anybody up in custody to be quite honest with you. We've got other things to be doing. But when you go out and kill a man, an innocent man, who had done nothing, absolutely nothing… everyone is involved. And you brought Vicky right into the centre of it and she's in the centre of it. How many times did you use her phone to contact [named person associated with the gang leader]?

Shortly afterwards it was put to him that he told her "that you were involved in the murder of Shane Geoghegan". He indicates: "She has no reason to lie." He then indicates that he's not answering any more questions. It is put to him that she is in for the "same offence that you're in for … the same incident", and that "she's being interviewed in

relation to that investigation". Whereas the latter is correct, the former is not since the relevant power of arrest under s. 30 of the Act of 1939 extends to anyone with information about a scheduled offence. Not many make that distinction, however. It is argued on behalf of Barry Doyle that a reference to his statement that he did not "want Vicky involved in this" which is answered both by the gardaí saying "it's on the tip of your tongue" and asking "are you going to fix it and tell the truth?" indicates a clear inducement. In the course of the same interaction, it must also be remembered, it was said by the gardaí:

> Think a bit harder. Think a bit harder and do the right thing Barry. Do the right thing. Don't keep Vicky away from the young one as long, longer than she has to be. Tell the truth. Tell the truth Barry. For the sake of your child. Do the right thing.

33. Barry Doyle then indicates that he wishes to see his solicitor, who is then contacted. Interview 14 took place between 17:32 hours and 18:35 hours on the same day. In the course of that there is what the prosecution claim is a strong indication, that the arrest of Victoria Gunnery was put into its proper context and, furthermore, that there was no operative inducement. At one point the interviewing gardaí address Barry Doyle and say:

> Vicky's arrest is a small thing. Vicky will be let out when we've no reason to detain her, okay? If we've no grounds to detain her she'll be let out. So that's a small thing; not to you maybe, but it's a small thing. But this man is dead because you came down here. Do you know what I mean? Look, the man is dead because you come down here. Do you agree with that?

Barry Doyle then indicates that he has nothing more to say that he wants to see his solicitor. He is then urged to tell the truth and he says: "I'll answer your questions after I speak to my solicitor." This is important as he then had independent legal advice from the solicitor he had chosen. The interviewing Gardaí make reference to Rosary beads which he was wearing around his neck which apparently he received after his brother's death. A further reference was also made to Victoria Gunnery:

> Well, I tell you, I'll tell you before, yeah, I'll tell you, right, Vicky is all right. … The truth has to be told. Vicky is all right okay? Vicky is all right, Vicky is being well looked after, okay, and you're being well looked after. … She's being better looked after than you, right? … She's being looked after, okay? All right, you don't need to worry.

34. Further interviews, after interview 15, centre on the other persons involved in the conspiracy to kill CD, the intended victim of the crime. It is significant that in those interviews, Barry Doyle makes a definite choice not to name the gang leader AB or anyone else involved in the conspiracy to murder. This choice is made no matter how the question is put. On this appeal, emphasis was laid upon interview 20 which took place on 27th February between 15:44 hours and 18:15 hours. On being questioned, Barry Doyle there indicated that when he was involved in the murder that the gun jammed and that he responded by pulling back the relevant lever and ejecting bullets. He resolutely refuses to name anyone else involved. References are made to the fact that after interview 15, when he confessed, he took off the Rosary beads mentioned in interview 14 as being around his neck and handed them to the interviewing detectives with a view to giving the memento of his deceased brother to the Geoghegan family as a mark of his remorse. He was also asked by the gardaí asked to show his remorse by bringing the other people involved in the murder "to justice". He indicates that he has exercised "my choice" in relation to admitting to the murder and says: "I've took on my own responsibility." He also says: "My girlfriend was arrested down the station. If I had known she was down there I would have said it that day, on the Tuesday." Asked if that was "the only reason that you admitted to the murder of Shane Geoghegan", he said:

> I've admitted to it because I didn't … I didn't want people involved in it that weren't. That hasn't, because it's not Vicky's fault too that … She has a kid from me, like, you know what I mean? She shouldn't have been … She shouldn't have been brought into it, you know what I mean?

35. It should be remembered that the gardaí at all times were strongly making the case that because of his actions in committing the murder, several other innocent people had become involved in the investigation. This included the family of the murder victim and it also included those close to Barry Doyle, namely his ex-girlfriend and their child. In the final analysis, an exercise such as this demonstrates that there was potential evidence whereby a decision could be made that the operative factor in relation to the confession was remorse for what had happened in the context of a build up of evidence revealed piecemeal to Barry Doyle which demonstrated what the gardaí knew. There are also strong indications, as found by Sheehan J, that as a prisoner Barry Doyle exercised an entitlement to speak or to refuse to speak both absolutely, by saying nothing, and by choosing to admit only his own involvement and to shun any statement that might involve his gang leader AB or anyone else involved in the conspiracy to murder. That choice did not waver throughout all of the interviews up to interview 22, after which his detention ended. At any stage, Barry Doyle could have disavowed what he had told the gardaí as to his having committed the murder. There was plenty of opportunity. He chose not to do so. At no stage did Barry Doyle indicate that there was never any interaction in relation to phone calls and texts on the night of the murder with Victoria Gunnery. This is an indication that his statement was not made with a view to shielding her from any potential responsibility or with a view to indicating that she did not have any relevant information. Finally, the gesture in presenting the Rosary beads constitutes another piece of relevant information from which the trial judge could make the decision that he did.

36. An overall analysis demonstrates that there was material upon which the decision of Sheehan J could responsibly be made. On the authorities, therefore, the decision cannot be disturbed. Finally, it might be commented that in the light of the safeguards that now prevail, most especially the availability of all the relevant video recordings, the ultimate test as to whether a statement was made in consequence of an inducement or whether it was "the natural emanation of a rational intellect and free will" has been demonstrated as the appropriate test as to whether at a particular time any particular statement was or was not voluntary.

Legal advice

37. In *The People (DPP) v Pringle*, it was held by O'Higgins CJ at 94-95 that it was not possible to infer a constitutional right to have a lawyer present during custodial questioning. His judgment noted that while the freedom from self-incrimination contained in the Fifth Amendment of the United States Constitution led the US Supreme Court to infer such a right in *Miranda v State of Arizona* 384 US 436 (1966), there was no similar provision against self-incrimination in the Irish Constitution and thus it was not possible to infer such a right in this jurisdiction. *Lavery v Member in Charge*, *Carrickmacross Garda Station* [1999] 2 IR 390 is another instance where this Court reached the same conclusion. The Court of Criminal Appeal on this appeal rejected an argument on behalf of Barry Doyle that his confession statement was inadmissible by reason of no legal representative being with him during questioning. Thus, following precedent, the Court of Criminal Appeal ruled that an accused is not entitled to the presence of a lawyer during custodial questioning. Counsel for Barry Doyle argue on this appeal that he had not only a right to consult with a solicitor while in custody for questioning but that this right extended to having a lawyer present during each interview. This argument is made in the written submissions for Barry Doyle in the particular context of references to his ex-

girlfriend:

> The trial Court and the Court of Appeal, failed to recognise the illegality and unfairness involved in conducting interviews in such a manner. Had a solicitor been present he would not have permitted the interviews to be so conducted. In this case, the analysis of the interviews illustrates that the exclusion of the solicitor from the interview process led to the creation of an inequality between the parties, to the creation of inappropriate pressures, a degradation of the right to silence and consequently a manifest unfairness and disregard of his constitutional entitlement to due process of law. [Barry Doyle's] right to reasonable access to legal advice during the detention stage was not provided for adequately by the nugatory access that the Appellant had to his solicitor from his arrest until interview 15 (the details of which are set out above). Immediately prior to his request to see his solicitor on the 26/2/09, the total time with access to his solicitor was approximately 13 minutes, only nine of which were in person. This corresponded to a period of detention spanning approximately 60 hours with almost 20 hours of interviews. The only detail in respect of the allegations given to the Appellant's solicitor was the nature of the alleged offence. No pre-interview information or other disclosure was provided to him by the Gardaí such as the nature of the evidence against his client. On the facts of this case the Appellant was denied "reasonable assess" to his solicitor

38. The prosecution argue on this appeal that the right to legal counsel when arrested for questioning is one of reasonable access. Further, they argue that Barry Doyle had precisely that right to legal advice. Counsel for the Director of Public Prosecutions contends that he exercised it without hindrance in the context of his arrest and questioning. Summarising their argument in the written submissions, it is urged that the following is the position:

> The appellant had repeated access to his solicitor when and for as long as he liked. Every request for access to his solicitor was complied with. On one occasion an interview proceeded after a short two-minute telephone conversation and in circumstances where the appellant told the interviewing gardaí that he required further time with his solicitor. He did not, however, make any admissions in that interview and efforts were being made to secure the attendance of his solicitor. His solicitor attended shortly afterwards and the appellant had approximately 20 minutes of consultation with the solicitor at that time.

39. Barry Doyle was arrested in the early morning of 24th February 2009, arriving at Bruff Garda Station before 08:00 hours. A solicitor was notified of his arrival shortly after he had been informed of his rights. She telephoned about 2 hours later and there was a brief telephone conversation with Barry Doyle. Another solicitor attended the station one hour later and consulted in person with him for 9 minutes. The following day, in the context of a District Court application to extend his detention, his solicitor was notified. The next day, during interview 13 at 16:04 hours, Barry Doyle requested to again see his solicitor. Interviews were not continued because of difficulties contacting the particular solicitor who was caught up in court cases in Newcastle West. At 17:13 hours, there was a telephone conversation with the solicitor but Barry Doyle hung up after 2 minutes, telling the member in charge of the garda station that he had finished. Interview 14, between 17:32 hours and 18:35 hours, commenced with Barry Doyle acknowledging that he had spoken to his solicitor. No further requests were made. It may be reasonably inferred that the short telephone conversation included a request for the solicitor to attend, since at 18:52 the solicitor arrived at the garda station. According to the custody record, there was a consultation in person for 10 minutes. Then the solicitor came to the interviewing gardaí and the interchange is noted at para. 6 hereof. There followed

another consultation in person for 10 minutes. This was briefly interrupted for another conversation between the gardaí and the solicitor and the consultation then resumed and continued over 4 minutes or so. At the commencement of interview 15, Barry Doyle admitted that he had been in the front seat of the Renault Espace car suspected to be linked to the murder. The solicitor then called on the telephone and the interview was interrupted while Barry Doyle spoke to the solicitor in the privacy of a room in the station over 3 minutes.

40. As noted above, for decades it has been part of the rights of a person arrested on suspicion of having committed a crime that he or she has access to legal advice; *In re the Emergency Powers Bill 1976.* That right has been regarded as a counterbalance to a situation where the arrest of a person, constitutionally presumed to be innocent, puts the weight of State resources against the vulnerability of the arrested person. That right applies from the moment of arrest. It applies upon arrest and it applies while a person is being brought to a garda station and it applies before they are handed in the station the standard notice as to their rights. Heretofore, the law has been that admissions made during that period of unlawful detention were inadmissible in evidence; *The People (DPP) v. Healy* [1990] 2 IR 73, confirming the decision in *Madden*, and noting that another person could request legal advice for a detained person and that as soon as the solicitor arrived the arrested person had a right to be told of their arrival immediately. No comment is made on the current situation in the light of this Courts decisions in *The People (DPP) v. Cash* [2010] IR 609 and *The People (DPP) v JC* [2015] IESC 31. Once the absence of legal advice is remedied, the detention becomes lawful again and does not render any subsequent admission unlawful, provided that any such subsequent admission is not obtained on foot of information given during the period of time in which the rights of the accused were breached; *The People (DPP) v. O'Brien* [2005] 2 IR 206. Since the decision of the Court of Criminal Appeal in *Madden*, this entitlement to legal advice has been described as that of a right of reasonable access to a solicitor. What is reasonable must depend on the circumstances, the nature of the case and the nature of any power being exercised by the investigating gardaí. A situation of questioning in the ordinary way may be different to the invocation of a power from which an inference may be drawn in the context of a refusal to answer. To deny access to legal advice would render the detention illegal. What was reasonable, at one time, was to be construed by having regard to all the circumstances, in particular the time at which access was requested and the availability of the legal advisor or advisors sought. The courts were then also of the view that there was no obligation to provide legal advice when no such request was made. In order to exercise certain rights - the right of access to a solicitor clearly being one - awareness of those rights is necessary. The notice of rights under the Custody Regulations, however, spells out that right. Even still, the right does not just apply from then. It applies by reason of the arrest for investigative purposes. Hence, it is operative once there is such an arrest. A notice of rights is required to be read to a person upon arrival in a garda station. None of the above-mentioned cases dealt with the situation which sometimes occurs where, instead of arrest, a person walks into a garda station with the express purpose of confessing to a crime. Such a person would not necessarily be an involuntary arrestee subject to police questioning. Indeed in *Miranda v State of Arizona* 384 U.S. 436 at 478 (1966), the majority decision given by Warren CJ indicates that there "is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime". There, a distinction was drawn between voluntary statements, and volunteered statements. The validity and nature of such distinction is not for decision today. That, in any event, might, if acknowledged in due course, be a rare exception to the application of the right from the moment of arrest.

41. In *The People (Director of Public Prosecutions) v Buck* [2002] 2 IR 268, the issue was, once a request for legal advice is made by a detained person, what degree of effort is required by the gardaí to make such advice available. Constitutional standards of fairness would require the exclusion of a statement of admission unless the gardaí make genuine efforts to comply with a request for legal counsel. Keane J, speaking for the Court of

Criminal Appeal, stated at 281:

> Assuming that, in the present case, the trial judge was entitled to conclude that the arrest and detention of the defendant was lawful and did not constitute a *mala fide* attempt to ensure that he was without legal advice while he was being interrogated and that the Gardaí made *bona fide* attempts to secure the presence of a solicitor when the defendant requested them to do so, it would follow that there was in this case no deliberate and conscious breach of his constitutional right of reasonable access to a solicitor and, on that assumption, his detention remained lawful. It would also seem to me that, where a person being detained under a statutory provision asks for a solicitor to be present and the Gardaí made *bona fide* attempts to comply with that request, the admissibility of any incriminating statement made by the person concerned before the arrival of the solicitor should be decided by the trial judge as a matter of discretion in the light of the common law principles to which I have referred, based on considerations of fairness to the accused and public policy.

42. In *The People (DPP) v Gormley* [2009] IECCA 86, the accused was arrested on Sunday but efforts to have a solicitor attend questioning proved fruitless. The Court of Criminal Appeal held that once genuine efforts were made, there was no need to hold up the commencement of interviews. At that time, there was no basis of 'awaiting a solicitor' in the Custody Regulations for suspending the duration of a lawful arrest for questioning. Finnegan J stated:

> Where the detained person requests access to a solicitor the Gardaí are under a duty to make bona fide attempts to give effect to the request and a failure to do so will constitute a breach of the suspect's constitutional right of access and render his detention unlawful. However, so long as reasonable efforts are being made to contact the solicitor there is no prohibition on the Gardaí proceeding to question him: *The People (Director of Public Prosecutions) v Buck*. Difficulties can, of course, arise where arrest is effected over a weekend when access to a solicitor may be difficult to arrange. In the present case there can be no suggestion having regard to the time at which the offence was committed and the arrest made, that there was any deliberate attempt to make it difficult for the applicant to have access to a solicitor. Indeed in this case, having regard to the circumstance that it was a Sunday afternoon, the Gardaí used diligence and resourcefulness in locating the solicitor nominated by the applicant.

43. That and another case were joined in the appeal to this Court, *The People (DPP) v Gormley, The People (DPP) v White* [2014] IESC 17. The common issue was whether the gardaí were entitled to continue the questioning of a detainee or to take forensic samples from them during the period of time after a request for legal advice had been made, but before the solicitor in question had arrived at the garda station. It is only two years since the judgment of Clarke J in that case, traversing the European Court of Human Rights and other decisions internationally, Hardiman J having given a separate judgment. It is thus pointless to reiterate that analysis. What is of importance is that there is no decision of the European Court of Human Rights stating that there must be a solicitor in the room during the time when a person is being questioned by police in relation to a crime. There is ample authority to support the requirement for legal advice from the time of arrest for questioning; *Salduz v Turkey* (2008) 49 EHRR 421, *Panovits v Cyprus* (Application 4268/04 (First Section) 11th December 2008), *Murray v United Kingdom* (1996) 22 EHRR 29. This right of an arrested person to legal advice, as noted in *Gormley and White* at para. 9.14 of the judgment of Clarke J, is of "high legal value" and any exceptions to it are to be recognised only in wholly exceptional circumstances, such as ones involving a

pressing and compelling need to protect other major constitutional rights such as that of a victim in peril. Exceptions related to transport or to the availability of an appropriate independent legal advisor are not acknowledged. It is an aspect of fair procedures, as Griffin J noted in *Shaw*, and as earlier authorities referenced arrest as "the beginning of imprisonment" a failure to render legal assistance would breach the pre-trial safeguards inherent in Article 38.1 of the Constitution. In *Cadder v HM Advocate* [2010] UKSC 43, the issue was the Scottish procedure of questioning upon arrest without the benefit of any legal advice. The right to be respected, according to the Supreme Court of the United Kingdom, was of advice. Hence, "unless in the particular circumstances of the case there are compelling reasons for restricting the right", a person being questioned under arrest has the right of "access to advice from a lawyer before he is subjected to police questioning." This does not apply to questions put outside that context, for instance to pre-detention investigations; *Ambrose v HM Advocate* [2011] UKSC 43, and see the judgment of Clarke J in the *Gormley and White* case at paragraph 6.0 onwards.

44. There, this Court did not assert that there was a right to have a solicitor present during questioning as this did not arise on the facts of the case, though the Court did note that such a right exists in the decisions of the United States Supreme Court; see Clarke J at 9.10. If there had been the breach of such a right, then in accordance with *Madden*, the very nature of the legality of the detention would change. The fundamental requirement of basic fairness applies from the time of arrest; per Griffin J in Shaw at 61, which was cited by Sheehan J in his ruling on admissibility quoted above at paragraph 7. The investigative stage must be distinguished from the process after arrest where a person is deprived of freedom in a context which is "intimately connected with a potential criminal trial"; *Gormley and White* per Clarke J. at paragraph 8.8. Therefore, it does not necessarily follow that the rights which are typical of and fundamental to the fairness of a criminal trial under Article 38.1 of the Constitution, most especially that of representation by an advocate, apply. Investigation is to be distinguished from questioning under arrest. Arrest and questioning are different to the process of trial. While there is a fundamental requirement of basic fairness which applies from the time of arrest, that requirement of fairness may be met by safeguards other than the presence of a legally trained, or semi-trained, person at police interviews. The taking of samples, which of their nature are static in nature and uninfluenced by the mental state of the arrested person, is again different and does not require advice to be given from a lawyer prior to these being taken; Clarke J at paragraph 8.8 in *Gormley and White* and see *Saunders v United Kingdom* (1996) 23 EHRR 313. Regulation 18 of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 provides for the voluntary submission of fingerprints and as to intimate body samples though not non-intimate samples; see section 2 of the Criminal Justice (Forensic Evidence) Act 1990. Conditions of custody must, of course, be reasonable otherwise, as Hardiman J noted at para. 7 of his judgment in *Gormley and White*, the result may be to undermine the resolution of an arrested person to wait for legal advice. Hardiman J also stated at paragraph 10 of the same judgment that while in that case there had only been asserted the right to have a lawyer's advice before questioning begins, it would not be long before someone else asserted a right to legal advice in custody on a broader basis. That is the assertion here. Partly, that assertion is based on current practice since *Gormley and White* was decided. That practice arose from an interpretation of that case by the Director of Public Prosecutions whereby a solicitor is admitted to interviews with an accused. A practice is not, however, of assistance in interpreting the interplay of the rights of victims to fairly access the criminal justice system, the duty of the Executive to investigate crime and the right of the accused to such fairness of treatment as supports the elimination of wrongful conviction.

45. In the United States of America, the Supreme Court decision in *Miranda v State of Arizona* requires the presence of a lawyer prior to and during questioning. Again, the relevant decisions and subsequent application *of* Miranda are noted in Clarke J's judgment in *Gormley and White*. That US decision has been the main authority urged by counsel for

Barry Doyle. As a persuasive authority it carries weight but it is not to be unthinkingly followed. The circumstances, the background and the relevant safeguards in that place in the US at that time and those now applying in this jurisdiction are entirely different.

46. It is now 50 years since that decision. Central to its reasoning was the determination of the Supreme Court not to allow the 5th Amendment rights against self-incrimination to be undermined by police brutality or their substitution by psychological terrorising or 3rd degree methods of interrogation. Several times, the judgment of the majority given by Warren CJ references the grip which the police have over the mind of a person upon arresting an individual and bringing him to a state of non-communication with the outside world within the secrecy of an interrogation room; a state from which he can have no resort to the reassuring presence of family or to proper advice from a lawyer as to his rights. It is clear from reading the entire text of the *Miranda* judgement that what is at issue is the inability of the courts to discover the nature of the methods used in the extraction of a confession and that this arose from the secretive nature of interrogation, the lack of any balance against whatever lies might be told by the police, their expertise in undermining any wavering determination by an arrestee against incriminating himself, the widespread use of trickery and methods of questioning which were inherently designed to affirm police suspicions as opposed to seeking the truth. Modern psychological research indicates the inherent dangers of such approach, whereby completely innocent people can, through suggestibility and depending upon their individual levels of suggestibility, be led to accept that they committed a crime the details of which have been conveniently supplied over the course of an interrogation with a view to being regurgitated in a confession statement; Gisli Gudjonsson - The Psychology of Interrogations and Confessions: A Handbook (London, 2003), see particularly chapters 1, 3, 5, 6, 8, 9 and 18.

47. Warren CJ in *Miranda* speaks of his concern with police brutality and references an important 1961 report affirming its continuing presence. He states that brutality and coercion while "undoubtedly the exception now… they are sufficiently widespread to be the object of concern." He stressed that the modern practice of "in-custody interrogation is psychologically rather than physically oriented." Quoting from then current manuals for the instruction of police, he instances instructions designed to create an atmosphere which "suggests the invincibility of the forces of the law", positing the "guilt of the subject … as a fact", undermining those under interrogation by reference to the unhappy childhood or unsuccessful love life of the suspect, casting blame "on the victim or on society", as being "tactics … designed to put the subject in a psychological state where his story is but an elaboration of what the police already know - that he is guilty." Other techniques instanced or quoted by him include the creation of "an oppressive atmosphere of dogged persistence"; "interrogating steadily and without relent, leaving the subject no prospect of surcease"; continuing an interrogation "for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination" and the Mutt and Jeff act of good-cop bad-cop. Another technique from that era included placing a suspect on a line-up in relation to a variety of unconnected offences and making a show of fictitious witnesses identifying him for a host of random crimes, so that it becomes a relief to confess to the crime for which he has been arrested. In each of the joined cases in *Miranda*, Warren CJ refers to each of the defendants as having been "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." In none of the cases, he says, "did the officers undertake to afford appropriate safeguards at the outset of the interrogation to ensure that the statements were truly the product of free choice."

48. In contrast to the situation described are the safeguards applicable from the moment of arrest in this jurisdiction that have been closely and carefully constructed over decades of experience. In contract too is the direct applicability of such rights. The most fundamental problem in adjudicating the admissibility and reliability of a confession to police is that interrogations used to take place in secrecy. That is no longer so. This

completely undermines the rationale put forward by counsel for Barry Doyle whereby this Court is asked to unthinkingly apply a ruling backed by circumstances which existed two generations ago and designed to lance a poisoned boil of secret compulsion which is utterly foreign to modern police methods. Transparency is the hallmark of the exercise which Sheehan J and Carney J were able to engage in by viewing all of the relevant videos, amounting to over 20 hours, and which cast interviewing techniques under a form of scrutiny which is close to being as contemporary to the events as technology allows. Fundamental to the rationale of the majority judgment in *Miranda* is the absence in 1966 America of precisely what has been achieved through an accretion of protections in the Ireland of today. Warren CJ rationalised his decision thus:

> The presence of counsel at the interrogation may serve several significant subsidiary functions, as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present, the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police, and that the statement is rightly reported by the prosecution at trial.

49. This authority is cogently reasoned and is no doubt persuasive as to its particular time and context. However, the factual, rights-based and legal context is different in this case. It must also be remembered that there is a practice in this jurisdiction of informing people as to their rights both orally and in writing, having a custody officer whose duty it is to ensure that questioning is carried on fairly and for a reasonable time only, not at night unless the suspect requests this, and that an arrested person has access to legal advice before any questioning begins. But, those rights to be meaningful must be consistently applied. Otherwise, the State might find itself in a *Miranda* environment. They were applied here. Any issues as to brutality, psychological pressure, the crafty planting through suggestive questioning of every detail of the crime prior to any admission in the mind of the arrestee so that the confession statement becomes apparently trustworthy, unfairness or the coercion of the suggestible are visible and susceptible to judicial scrutiny as a result of the presence of video-recording in interview rooms.

50. It cannot therefore be concluded that it is a necessary part of the right to a trial in due course of law under Article 38.1 of the Constitution that a lawyer should be present for the interviewing of a suspect in garda custody.

Damache point

51. It is also argued on behalf of Barry Doyle that the arrest of a suspect at his home in circumstances where the search warrant used to gain entry was legally invalid results in the arrested person's custody becoming unlawful and any resulting evidence inadmissible. Any such submission, however, has to be nuanced in relation to the decision of this Court in *The People (DPP) v. JC* [2015] IESC 31. Exploring, for the moment, the basis of the point without reference to any discretion as to the admission of evidence, the following is relevant. Barry Doyle was arrested at his residence in Limerick for the murder of Shane Geoghegan on foot of a warrant issued under s. 29(1) of the Offences Against the State Act 1939, as inserted by section 5 of the Criminal Law Act 1976. At that time, this enabled a Superintendent of An Garda Síochána to issue a legally enforceable order to search premises where there was a suspicion, which general law requires to be reasonably based, that evidence in relation to the commission of a scheduled offence, in this case the possession of firearms, might be found there. This search warrant had been signed by Superintendent Mahon who was in overall charge of the investigation. On the

morning of the search and arrest, the gardaí were conducting a series of searches in relation to the investigation, one of which was Barry Doyle's dwelling. In the absence of any evidence on this point, as of this time it would be difficult to infer that the gardaí acted otherwise than in good faith, believing that the warrant they had was valid and effective. In prior cases of garda arrest of suspects in their own home, what had been of importance had been the nature of the entry thereto: was there consent, for instance if the suspect invited them in, or was there a lack of protest, which might not amount to consent. In the *Gormley* decision, the Court of Appeal held that for gardaí to go to the accused's home and to request entry, having asked to "come in and speak to you for a few minutes" to which the answer was "Come in Séamus", amounted to an entry on consent and that the resulting arrest was lawful. No issue was raised as to the lawfulness or otherwise of the entry at trial in this case. We do not know if the gardaí had the chance to consider knocking on the door and requesting entry after identifying themselves. If that happened, or not, the court of trial was not informed. It is impossible, thus, to predict both the nature of the evidence and the result of any argument. *Director of Public Prosecutions v Gaffney* [1987] IR 173 is authority for the proposition that in the absence of consent, an entry by gardaí for the purpose of arrest may be a violation of Article 40.5 of the Constitution. There the gardaí had been refused entry twice to a house and on the particular occasion. It was held that there could be no presumption that a lack of an express refusal amounted to an invitation. In view of the fact that the gardaí had twice been refused entry there could be no presumption that there was an invitation to enter either as a matter of fact or law merely because there was no express refusal. Walsh J held at 180 that in the particular circumstances, "the absence of an express refusal or of an express order to leave cannot be construed as an implied invitation or permission to enter".

52. One can have no idea what the situation might have been here. At best, it is speculation. At trial, the legitimacy of the warrant was not challenged by counsel for Barry Doyle. The circumstances of entry into the dwelling of Barry Doyle were not explored beyond the bare fact of entry on a warrant recited. The trial court had proceeded on the basis that the arrest and detention were lawful, as no issue with the warrant was raised at trial. This had been expressly stated by Tom O'Connell SC as lead counsel for the prosecution, to which no demur had been taken by counsel for Barry Doyle either at that point or at any stage in the evidence. The decision of this Court in *DPP v Damache* [2012] 2 IR 266 was delivered on 23rd February 2012, a week after the trial of Barry Doyle had concluded. The result of *Damache* was a declaration that s. 29(1) of the Offences Against the State Act 1939 was unconstitutional. The point now put at issue was thereafter pleaded by Barry Doyle, in the absence of any exploration of evidence, in the notice of appeal to the Court of Criminal Appeal. The Damache case concerned a superintendent who signed a warrant to search a person's home. Denham J referred to the action of issuing a search warrant as "an administrative act" but one which "must be exercised judicially". As appears also to be the situation here in this case, the issuing officer was not independent of the investigation. Following that decision, legislation has made the issuing of such warrants a function of the judiciary. On the appeal to the Court of Appeal in this case, [2015] IECA 109, the issue of the lawfulness of the search warrant was raised. The Court of Appeal rejected the claim that the search was unconstitutional, following the decision in *The People (DPP) v Patchell* [2014] IECCA 6. The Court of Criminal Appeal held that Barry Doyle had not raised the issue of unlawfulness of his arrest and detention during the course of his trial and as a result was unable to do so there. The Court did not refer to the issue raised in *Damache* but rather focused on the fact that the issue was not raised during trial.

53. On this appeal, the prosecution rely on the judgment of McKechnie J in *Patchell.* Counsel for the prosecution also claim that, should the arrest and detention of Barry Doyle be found unconstitutional, this would not render the later admissions inadmissible as they would come under the rule of *DPP v JC.* In the *Patchell* case, the appellant had made an application to amend his notice of appeal by adding the additional ground which

would have allowed him to rely on the decision in *Damache*. This was also an arrest following entry under the same section of the Act of 1939. It was argued that the warrant issued by the superintendent was unconstitutional and, as such, so was the arrest, detention and subsequent admissions of the suspect while in garda custody; similar to the arguments put forth by Barry Doyle. The Court of Criminal Appeal refused the application on the grounds that the issue had not been previously raised in any way and that the accused at trial had engaged in conduct that disentitled him to raise the issue, that is a concession made during the course of his trial to the effect that no issue was being taken with the validity of the warrant or the lawfulness of the arrest. Giving judgment for the Court of Criminal Appeal, McKechnie J stated that:

> …where an appellant, during the currency of his trial, adopts a certain course of action or engages in a particular course of conduct or otherwise evidences a clear intention of pursuing a definite strategy, and does so, he will not thereafter be permitted to resile from such a position and, for self advantage, to act in a manner entirely inconsistent with his previous actions.

54. During the course of Barry Doyle's trial it is clear that he maintained, or at the very least acquiesced in, the position that the warrant was lawful, as were the actions that followed; namely his arrest, detention and subsequent admissions to the gardaí. This constituted an acknowledgment that the actions of the gardaí were, at the time, valid. To entertain the argument that the warrant, arrest, detention and admissions are now unlawful would be unjust. While traditionally there is no confession and avoidance at criminal trial as to the elements of an offence, this has been changed by legislation whereby admissions can formally or informally be made by the defence as to particular witness statements or as to the admission of particular facts; see particularly sections 21 and 22 of the Criminal Justice Act 1984. Apart from that, it must also be clearly acknowledged there is a reality to the complexity of modern trials requiring the participation of both prosecution and defence. It had always been the case over centuries that if, for instance, there had been an issue as to the admissibility of the results of a search that, at the least, counsel for the defence would notify the prosecution that an issue will arise so that there would be no mention of such evidence in an opening statement to the jury. Similarly, that principle must also apply with any question as to the legality of detention or as to the voluntariness of a confession. Perhaps it is enough for counsel for the defence to state that it is required that the prosecution prove the legality of a search or of an arrest. Then, it is at least clear that some kind of a point arises. Argument subsequent to evidence in the absence of the jury would clearly elucidate what is being driven at. That kind of elucidation of a point is the least that a fair trial entails. Without a point being raised and argued to by counsel for the accused, there could be no sensible basis for a judicial ruling. One might also then ask: what is being appealed? And on what basis?

55. To enable points to be left in abeyance for possible consideration on appeal would be to undermine the fairness of procedures that a criminal trial encompasses under Article 38.1 of the Constitution. As stated by Kearns J in *The People (DPP) v Cronin (No 2)* [2006] 4 IR 329 at 346, an appellate court is concerned "with a review of the trial and the rulings made therein and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner." In *The People (DPP) v Cunningham* [2013] 2 IR 631 and *The People (DPP) v Kavanagh* [2012] IECCA 65, the Court of Criminal Appeal set out the limited legal circumstances in which an appeal under the Damache ruling may be allowed; that the matter was raised at trial and the appellant has taken no steps to suggest he has acquiesced or waived the point, or the proceedings against the defendant have not yet been finalised. On this appeal by Barry Doyle, it is evident that he does not meet any of these conditions. The issue was not raised before the trial court and the proceedings have been finalised against him. The point has therefore passed. There must be finality to a trial and its conclusion; *A v*

Governor of Arbour Hill Prison [2006] 4 IR 88.

Result

56. The final outcome is that there is no basis for overturning this conviction.
JUDGMENT of Ms. Justice O'Malley delivered the 18th day of January 2017.

Introduction
1. The facts of this case are fully set out in the judgments of MacMenamin and Charleton JJ. and will not be repeated here save where necessary. I agree with their conclusion as to the appropriate result in this appeal, and with their views as to the correct approach to the argument based on *Damache v. The Director of Public Prosecutions* [2012] IESC 11, [2012] 2 I.R. 266. However, I differ somewhat from them in relation to the question of the implications of the right to access to legal advice, which in this case is closely related to the question whether the admissions made by the appellant were the product of an inducement or threat. On the evidence I agree with MacMenamin J. that the appellant has failed to establish any causative link between his admissions and the alleged breach of a putative constitutional right to have a solicitor present during interview. In my view that is sufficient to dispose of the argument in this case, although I consider that the issue may properly arise for consideration in another case.

2. The appellant relies on the decision of this Court in *The People (Director of Public Prosecutions) v. Gormley* and *The People (Director of Public Prosecutions) v. White* [2014] IESC 17, [2014] 2 I.R. 591 for the proposition that the right to a trial in due course of law, as protected by Article 38.1 of the Constitution, requires that a person in Garda custody be given reasonable access to legal advice. It is submitted that in the circumstances of this case his access to a solicitor was, as a matter of fact, so restricted and perfunctory that it did not amount to *"reasonable access*". It is further argued that the principle established in *Gormley,* that there is a constitutional right to have access to legal advice prior to the commencement of questioning, should be extended to encompass an explicit right to have a solicitor present during the questioning.

3. The argument is that, because the appellant's solicitor was not present at the interviews, there was an unfair inequality between the suspect and the gardaí. The right to reasonable access to legal advice is said to have at its heart the protection of the privilege against self-incrimination. It is submitted that, in the absence of a solicitor during the interviews, the interrogators were free to raise matters of little or no relevance to the investigation in order to pressurise the appellant and to undermine his right to silence. Looking at the evidence in the case, it is submitted that there were many remarks made by gardaí that *"would not have been permitted"* if a solicitor had been there. The appellant maintains that certain of these remarks amounted to threats or inducements calculated to extract a confession from him. There is a further issue in this respect as to whether the effect of the threats or inducements (if they are found to be such) could properly be considered to have *"dissipated"* or *"worn off"* by the time of the making of the admissions relied upon by the prosecution.

4. The relevance of the matters in question turns, for the most part, on the situation of Ms. Victoria Gunnery. Ms. Gunnery was described as the appellant's *"ex girlfriend"* and was the mother of his youngest child. This child was approximately one year old at the time. The appellant's representatives have laid stress upon the relationship between Ms. Gunnery and the appellant, while the prosecution have been anxious to downplay its strength at the relevant time. The trial judge found that there was in fact a continuing relationship. It is in my view unnecessary to consider further the evidence in relation to the matter since one of the central features of the case is that the appellant made an offer, through his solicitor, to confess to murder in return for Ms. Gunnery's release from

garda custody.

The arrest and detention of Ms. Gunnery

5. At around the same time as the arrest of the appellant in the early hours of the 24th February, 2009, Ms. Gunnery was arrested in Dublin pursuant to the power of arrest conferred by s. 30 of the Offences Against the State Act, 1939 in respect of persons who are suspected of being in possession of information relating to the commission or intended commission of an offence under the Act or a scheduled offence. It is in my view important to point out that this is not the same as arrest *for the offence of withholding* information, which is a statutory offence created by s. 9 of the Offences Against the State (Amendment) Act, 1998. Thus, a person in Ms. Gunnery's position is not arrested on foot of suspicion of having committed an offence, but on the basis that she or he is believed to have information relating to an offence.

6. Neither the Act of 1939 nor the subsequent amendments dealing with the s. 30 regime, including those dealing with the procedures for the extension of detention, make any express distinction between the two types of arrest. One difficulty that arises is that there is no express limitation on the length of detention permitted for a person in Ms. Gunnery's position by reference to the progress of an investigation, as there is in respect of the suspect held in extended detention. There appears to be no decision of the Superior Courts dealing with any issue arising from an arrest for possession of information. It is worth noting that the Committee that reviewed the Offences Against the State Acts (Dublin, 2002) considered that the power to arrest on this ground was unconstitutional and probably incompatible with the European Convention on Human Rights. However, for the purposes of this case it must be assumed that the power is valid and permitted by the Constitution.

7. It is accepted by the appellant that Ms. Gunnery's arrest and detention were legitimate. From what can be gleaned from the portions of transcript made available to the Court, it appears that she was undoubtedly in possession of relevant information. Ultimately she gave evidence in the trial that the appellant had used her phone for purposes related to the murder; that he had said things to her that could be construed as amounting to admissions of his role in it; and that she was present at a conversation, after the murder, between the appellant and the person alleged to have instigated it.

8. On the morning of the 26th February, 2009, Ms. Gunnery was brought to Limerick where an extension of her detention was granted in the District Court, pursuant to the relevant statutory provision. The appellant argues that it was unnecessary to bring her to Limerick for that purpose and asks the Court to infer that the gardaí intended to bring about an improper *"confrontation"* between Ms. Gunnery and the appellant, with a view to pressurising him. As no such meeting took place, and as there is no evidence to support the proposition that it was planned, I do not propose to discuss the issue further. The basis for the extension order appears to have been evidence adduced in the District Court by the gardaí that she had, during the previous evening, given certain information which they wanted to investigate further.

The arrest and detention of the appellant

9. Also on the 24th February, 2009, the appellant was arrested in Limerick at 7.15 a.m. under the provisions of s.4(3) of the Criminal Law Act, 1997, on suspicion of having committed the arrestable offence of murder with a firearm. He was brought to Bruff Garda Station, arriving there at 7.40 a.m. Shortly afterwards he was detained pursuant to the provisions of s. 50 of the Criminal Justice Act, 2007, which permits an initial period of detention of six hours but may involve extended detention for up to seven days. He was given the information required by the custody regulations and a notice of his rights which,

of course, included reference to his right to see a solicitor. It was noted in the custody record that there was no evidence of drugs or alcohol and no visible sign of injury. The appellant said that he was not suffering from any illness and was not on any medication.

10. At 8.00 a.m. the appellant requested that Ms. Sarah Ryan, solicitor, be contacted on his behalf. Contact was made immediately and Ms. Ryan said that she would call back in half an hour. The appellant was then placed in a cell.

11. At 9.55 a.m. the appellant received a telephone call from Ms. Ryan and spoke with her for three minutes. He then had his photograph, fingerprints and buccal swabs taken. An interview commenced at 10.08 a.m. At 11:00 a.m. a Mr. Michael O'Donnell, solicitor, arrived at the station on behalf of Ms. Ryan. The interview was terminated and the appellant consulted with Mr. O'Donnell for about nine minutes. No admissions had been made at that stage.

12. The appellant was questioned extensively over the first two days of his detention, during which time he made no admissions. The evidence was that he was checked regularly by the member in charge of the station and that, while he had occasional requests, he had no complaints. His detention was extended from time to time in accordance with the legislation and nothing turns on that. He saw, or spoke on the phone to, his solicitor for what were undoubtedly short periods of time. It is common case that the total time involved was about thirteen minutes before the evening of the 26th February, 2009. However, it is also agreed that, with one exception dealt with below, he was given access to his solicitor when he requested it. There is no suggestion that he wanted the consultations to continue for longer periods or that he was pressurised to curtail them.

13. At the tenth interview, which took place late in the evening of the 25th February, 2009, the appellant was informed by the gardaí that Ms. Gunnery was under arrest. Certain particulars were put to him as to what she had been telling the gardaí who were questioning her. At various times during this and succeeding interviews reference was made by the gardaí to her position. The complaints now made in respect of what they said focus mainly on the following suggestions, which are described by his counsel as *"calculated references to his relationship and responsibilities":*

• That Ms. Gunnery had done nothing wrong but was being detained and suffering hardship because of the appellant;

• That she was in custody because he would not confess, and that she would be released when there was no further reason to detain her;

• That she was having no visitors (this was not correct);

• That their child had been deprived of her mother because of him; and

• That his failure to tell the truth was causing and would continue to cause difficulties for his family.

14. It is also complained that the gardaí commented adversely on his invocation of the right to silence.

15. The appellant made no admissions during any of these interviews. It is accepted by counsel that it was appropriate for the gardaí to put to the appellant the information that had been given by Ms. Gunnery, and that this would in itself have conveyed to him the fact that she was in custody, but it is submitted that in addition they set about deliberate

psychological bullying by referring to her conditions of detention.

16. At about 5.15 p.m. on the 26th February the appellant had a two minute consultation with Mr. O'Donnell on the telephone. Interview No. 14 commenced at 5.32 p.m. In the initial stages the gardaí were asking about the number of the mobile phone that the appellant had had at the time of the murder, and whether Ms. Gunnery would have contacted him on that number. The appellant said that he wanted to speak to his solicitor. The initial response of the gardaí was to remind him that he had just spoken to Mr. O'Donnell, to which the appellant replied that he had not spoken to him *"properly".* His request was repeated later in the interview, when the gardaí told him that the solicitor was on his way. The interview continued, and reference was again made by the gardaí to the position of Ms. Gunnery and the child. The appellant did not make any admissions but at a certain stage said that he would answer questions after he had spoken to his solicitor. The interview ended at 6.35 p.m.

17. It is contended on behalf of the appellant that the gardaí should not have continued questioning him after the request to see Mr. O'Donnell, and that the statement by the appellant that he would answer questions when he had seen him demonstrated that he was *"irretrievably prejudiced".*

18. Shortly after the end of that interview the appellant's solicitor Mr. O'Donnell came to the station to speak to his client. There was a consultation for what may have been 10 minutes. At that point the solicitor asked to speak "off the record" to Detective Sergeant Philips and Detective Garda Hanley. A conversation then took place between Mr. O'Donnell and the gardaí in the interview room. A memorandum of this conversation was written up later that night by the detective garda. It was stressed in evidence by the gardaí that this document was an *aide memoire* rather than a verbatim record of questions and answers. However, it is important to note that it has not been queried or challenged by the defence in any respect. The note reads in full as follows:

> *"After a consultation M O'D requested to speak to members who went to interview room. O'Donnell started by saying conversation was off record. And did not want a memo to be taken of same, stated that Barry Doyle would admit to killing Shane Geoghegan if his girlfriend, Victoria Gunnery, was released. I stated that there was no way this was possible, we wanted him to tell the truth about what happened, and once he told the truth about what had happened we would have no reason to detain Victoria Gunnery any further. M O'D stated that he would only answer one question, that he had committed the murder and no more. I said this would not suffice, as we had to know he was telling the truth and not just saying it to get VG released. M O'D said 'sure cant you just arrest her again?' MP said that Barry Doyle had to admit what he had done in an interview and that his girlfriend would not be released before any interview. M O'D said he would go back to BD and tell him this. There was then a further consultation in the cell. After approximately 10 minutes, returned to interview room, M O'D again said that B D would not admit to anything prior to his girlfriend being released. I said to M O'D 'that is an inducement' and there was no possible way that would happen, that any admission would not be upheld in any court if that were to happen. M O'D said 'sure wouldn't you have it on the cameras?' M P said that didn't matter. MO'D said 'well he will not admit to it. I have told him to say nothing, to get you to do the work.' I again said to M O'D that B D had to tell the truth about what had happened. M O'D said 'I think you have a bit more work to do. M O'D again had legal consultation with prisoner. It lasted 4 - 5 minutes. MO'D left station."*

19. In cross-examination Detective Sergeant Phillips said that the phrase "*once he told*

the truth about what had happened we would have no reason to detain Victoria Gunnery any further" required clarification. He said that what the gardaí were doing was explaining the reality of the situation to Mr. O'Donnell. There was no way that they could agree to his proposal. However, Ms. Gunnery had been arrested for having information that she had been given by the appellant, and the appellant knew that. If he told the truth about his own actions to gardaí, there was "a very strong possibility" that there would be no grounds to detain her any further. It was stressed in evidence that the gardaí were not asking Mr. O'Donnell to pass anything on to his client.

20. When asked about the line

> *"I said that Barry Doyle had to admit to what he had done in an interview and that his girlfriend would not be released before any interview"*

D/Sergeant Phillips said that he had no knowledge of Ms. Gunnery's detention; that she could, for all he knew, have already been released at that stage and that what was intended to be conveyed was that she would not be released as part of the proposed arrangement. Again, he emphasised that the memo was not a verbatim account of the conversation.

21. D/Garda Hanley agreed with the proposition that he and D/Sergeant Phillips were saying that it was not possible that Ms. Gunnery could be released before the appellant made a statement; but that if he made a statement and told the truth there would be no reason to detain her. He further agreed that he needed to be satisfied that the appellant was telling the truth, and not making admissions simply to bring about Ms. Gunnery's release.

22. The next interview (No.15) started at 7.42 p.m. After about five minutes it was interrupted so that the appellant could take a phone call from Mr. O'Donnell. The interview resumed at 7.51 p.m. and at this stage the appellant admitted to having carried out the murder. After the conclusion of the interview, the appellant gave the gardaí a set of rosary beads that he had been wearing around his neck, with a request that they be given to the mother of Shane Geoghegan.

23. Victoria Gunnery was released from custody at 9:00 p.m. that evening. The evidence of Detective Inspector Crowe was that by that stage she had given a truthful and accurate account of her knowledge of the murder. After her release she returned to the garda station and made a witness statement.

24. In subsequent interviews the appellant continued to admit his own guilt and added some confirmatory details. He did not provide any information about the involvement of any other person.

The *voir dire*

25. A *voir dire* was held on the admissibility of the inculpatory statements. For this purpose the trial judge heard the evidence of eight garda witnesses and viewed over 20 hours of videos showing the first 16 interviews.

26. The appellant did not give evidence himself and Mr. O'Donnell was not called on his behalf. In submissions, counsel made the case for exclusion on three grounds including the contention that the admissions were involuntary as being the product of threats, inducements and oppression. It was submitted that the threat and inducement were the two sides of the same coin - the inducement being that Ms. Gunnery would be released and the threat being that her detention would be continued.

27. The trial judge found that there had been no breach of the right of access to a solicitor. He further ruled that there had been no oppression and that the interviews had been conducted professionally and courteously. His own view was that the admissions

were made because the gardaí had succeeded, after a "careful, patient and structured" interview process, in appealing to the appellant's humanity. The appellant had made the admissions because he chose to do so.

28. The trial judge did not make an express finding as to whether the words spoken by the gardaí about Ms. Gunnery's situation were capable of amounting to an inducement or threat. His first comment on this aspect was that the remarks about her had to be viewed in the overall context of all that had taken place. This included things that the appellant had already said about family matters and his own situation. It also included the gradual unfolding to him of the evidence in the possession of the gardaí and their numerous appeals to him to tell the truth. The trial judge continued:

> *"Notwithstanding the context in which they occurred, and bearing in mind the judgment of Lord Lane in the Rennie case, even if these promptings could possibly amount to an inducement when objectively viewed they were not immediately acted on and their effect, whatever it may have been, was dissipated by the consultation Barry Doyle had with his solicitor and his solicitor's interaction with Detective Garda Hanley and Detective Sergeant Philips. This broke any possible causal link and it is highly relevant that the solicitor told the detectives that Barry Doyle would not admit to the offence and that they would have a bit more work to do. The Court holds that that when Barry Doyle came to make his admissions in interview 15 he made them voluntarily. Accordingly the Court holds that the admissions were made not as a result of oppression and were not made as a result of any threat or inducement."*

Discussion of the ruling on the threat/inducement issue

29. The ruling of the trial judge is criticised on behalf of the appellant because, inter alia, he did not make an express finding as to whether there had or had not been words capable of amounting to a threat or inducement, or whether the words had been subjectively understood as such, before moving on to rule that any such threat or inducement had been dissipated. It is submitted that this, in itself, renders the conviction unsafe. I agree that it would be preferable if he had done so. However, I do not believe that the failure to spell out his findings is fatal to the validity of the ruling. It must be borne in mind that mid-trial rulings on issues, even if the trial judge can consider the matter overnight, may not always reach the standards of clarity that a reserved judgment aspires to. The overall finding is perfectly clear.

30. It seems to me that in the first instance the gardaí acted perfectly appropriately in rejecting out of hand the proposal made by the appellant's solicitor on his behalf. To enter into a bargain of this nature would have been highly improper and would indeed, as they said at the time, have rendered any subsequent admissions vulnerable to the charge that they had been obtained by the inducement that Ms. Gunnery would be released. However, what is to be made of the converse proposition - that Ms. Gunnery would not be released until the appellant confessed in interview? That was also at least potentially improper, insofar as it gave the impression that the duration of Ms. Gunnery's detention was dependent solely on the appellant's choice of action.

31. It is perhaps a problem that will arise from time to time because of the vaguely-worded nature of the provision creating the power of arrest for possession of information. Where the garda belief is that the detained individual has received relevant incriminatory information directly from the suspect, it may well be factually true to say that there will be no further purpose to be served by detaining that individual if the suspect confesses. However, great care must be taken not to present this as being a threat to detain **until** a confession is made by the suspect. Assuming that this power of arrest is not unconstitutional, it must never be used as a form of hostage-taking for the purpose of

pressurising the actual suspect in the case.

32. It is accepted that the appropriate test for threats and inducements is that set out in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. McCann* [1998] 4 I.R. 397, where that court adopted the three-strand analysis proposed in Phipson on Evidence, 13th ed., (Sweet & Maxwell, 1982). The questions to be considered by the trial court are as follows:

> *(a) Were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or promise?*
>
> *(b) Did the accused subjectively understand them as such?*
>
> *(c) Was his confession in fact the result of the threat or promise?*

33. The appellant relies upon the commentary on this test in McGrath, Evidence, 2nd ed., (Dublin, 2014) where, having noted that the first part of the test is objective while the second and third are subjective, the author states that

> *"In practice, there are likely to be very few instances in which a statement, which is objectively capable of amounting to an inducement, will not be regarded by an accused as such."*

34. It may be noted that this is followed by the observation that it is possible to envisage circumstances where the suspect knows that the promise or threat cannot be fulfilled.

35. In my view this commentary on the McCann principles must be seen as descriptive rather than as an elaboration of the content of the test. It is an observation referring to the obvious fact that in most cases cause and effect may be readily inferred where there is evidence that a statement was made, which is held to be capable of amounting to an inducement, and that the statement was followed by an admission. However, each case will turn on its own facts and the picture presented by the evidence in this case is far from such a clear-cut situation.

36. It is perhaps a statement of the obvious that when a person is arrested and subjected to extended detention there may well be unfortunate consequences for other people closely associated with the suspect. Quite apart from the use of s.30 of the Offences Against the State Act, 1939 to arrest persons who may be in possession of information, there will often be practical difficulties and psychological distress caused to family members. It does not seem to me to be illegitimate for the gardaí to bring this fact to the attention of the suspect. In the circumstances of this case it is difficult to see how the appellant could have been shielded from the knowledge that Ms. Gunnery had been arrested and was being detained, and that the child was therefore without her parents. The issue is whether an illegitimate use was made of that situation.

37. It is certainly possible to form an objective view that the comments made by the gardaí, as recorded by them in the note set out above, were capable of amounting to a threat to keep Ms. Gunnery in detention until the appellant confessed. However, in attempting to ascertain whether the appellant understood the statement to be a threat (or an inducement, on the argument that the implication was that she would be released if he did confess), and whether he made his confession as a result, one is confronted with the fact that the entirety of the crucial discussion between himself and the gardaí was carried out through his solicitor. Neither the appellant nor his solicitor gave evidence, with the result that there was no direct evidence as to his subjective understanding of the situation. This course of action was, of course, the appellant's entitlement and privilege. It cannot be held against him, in the sense that it cannot of itself give rise to any adverse inferences. However, this does not mean that there are no consequences in terms of the

decision to be made by the court determining the issue.

38. The finder of fact, be it a jury or, as in the case of a *voir dire* of this sort, a judge, must of course apply the presumption of innocence and have regard to the burden and standard of proof. In so doing the finders of fact are entitled to draw such inferences from the prosecution evidence as are rationally available, subject to the principle that where two views are open the inferences favourable to the accused must be accepted. That is because, as was made clear by Hardiman J. in *The People (Director of Public Prosecutions) v. Reid* [2004] 1 IR 392, the fact that two views are possible means that the prosecution has not proved its case on the issue beyond reasonable doubt.

39. The inference drawn by the trial judge in this case was that the effect of any inducement or threat had been dissipated by the consultation with the solicitor. Was that an inference he was entitled to draw?

40. The rationale for the Constitutional right of access to a solicitor was explained by the Supreme Court in *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73 in the following terms at p. 81:

> *"The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators."*

41. A central part of the role of the solicitor attending at a garda station is, therefore, to ensure that prisoners receive proper advice as to their rights in relation to matters that arise in the course of the detention, especially where those matters might tend to undermine the freedom of the suspect's decision to speak or not to speak. I think that, in the absence of any evidence pointing to the contrary, it must be open to a trial court to proceed on the assumption that a solicitor attending a prisoner performed that role, and that the legal advice given was in fact proper and correct.

42. In the instant case, where the solicitor spoke to the gardaí on behalf of the appellant, it must be presumed that he reported back to him their flat refusal to agree to the release of Ms. Gunnery on his terms. In the absence of any evidence from either Mr. O'Donnell or the appellant there is no other rational inference to be drawn. It is true that one cannot speculate as to whether he reported the conversation in summary or word for word, but in the circumstances any belief that the appellant may have had that the gardaí would release Ms. Gunnery in return for a confession must have been displaced. Mr. O'Donnell's final remarks to the gardaí, to the effect that he had advised the appellant to say nothing, make it abundantly clear that the appellant had again been advised of his right not to incriminate himself.

43. It is also relevant to emphasise that no complaint was made at any stage of the interview process by either the appellant or his solicitor. There was no indication that either of them felt at the time that the appellant was being subjected to undue psychological pressure or indeed that there was any unfair tactic on the part of the gardai.

44. There being no contrary evidence as to the belief or understanding of the appellant in relation to the effect of the statement by the gardaí, I consider that the trial judge was therefore entitled to hold that any threat or inducement had dissipated by reason of the

appellant's access to his solicitor at the relevant time, and to hold further that the admissions were made for reasons other than threats, inducement or oppression. His findings as to those reasons were rationally grounded on his view of the interview videos and the way that the interviews progressed over the course of the detention.

The right of access to legal advice

45. In *Gormley* and *White* the existence of the right of reasonable access to a solicitor was not in dispute. The central issue in each case was one of timing - was the suspect entitled, under the concept of fairness identified in *State (Healy) v. Donoghue* [1976] 1 I.R. 325, to the benefit of legal advice before the commencement of interrogation (Mr. Gormley) or the taking of forensic samples (Mr. White)? The issue arose in Mr. Gormley's case because he was questioned and made admissions after he had made a request to see a solicitor but before the solicitor's arrival. On the facts of the case there had been no delay on the part of either the gardaí or the solicitor in securing the attendance of the latter.

46. The judgment reviews the authorities in this jurisdiction from *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 to *The People (Director of Public Prosecutions) v. Creed* [2009] IECCA 95.

47. Clarke J. at para. 2.11 noted that the jurisprudence of the European Court of Human Rights indicated that the protection of the right against self-incrimination was breached

> *"…where a person makes an incriminating statement which forms a substantial part of the evidence leading to their conviction in circumstances where the relevant person does not have the benefit of legal advice at the time in question and where they have not waived any entitlement to legal advice."*

48. Particular attention was paid to the judgment of the Grand Chamber of the ECtHR in *Salduz v. Turkey* (2009) 49 EHRR 19. In that judgment it was noted that Article 6 of the Convention (the guarantee of a fair trial) may be relevant to pre-trial procedures; that the right to be effectively defended by a lawyer, although not absolute, was one of the fundamental features of a fair trial; that national laws might attach consequences to the attitude of an accused at the interrogation stage that could be decisive at the trial stage and that Article 6 would therefore normally require that the accused be allowed to benefit from the assistance of a lawyer at that stage.

49. The ECtHR observed in *Salduz* that the accused could, at the investigation stage, find himself in a particularly vulnerable position. It was noted that legislation on criminal procedure was tending to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. The Court said (at paragraph 54):

> *"In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (Jalloh v. Germany [GC], no. 54810/00, § 100, ECHR 2006 IX, and Kolu v. Turkey, no. 35811/97, § 51, 2 August 2005). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see, mutatis mutandi, Jalloh, cited above…). In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

> *(CPT)…, in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.*

Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently *"practical and effective"*… Article 6.1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6… The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

50. Clarke J. referred to later cases before the ECtHR as confirming these principles and cited in particular *Panovits v. Cyprus* (Application no. 4268/04 (First Section) 11th December 2008), where a breach was found in circumstances where a minor had not been informed of his right to consult a lawyer free of charge, and *Dayanan v. Turkey* (Application 7377/03 (Second Section) 13th October 2009) where the court said at para. 32:

> *"Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."*

51. Reference was also made to the application of Convention principles by the *United Kingdom Supreme Court in Cadder v. Her Majesty's Advocate* [2010] UKSC 43, where it was held that a detained person was entitled, in the absence of compelling reasons, to legal advice before questioning. However, the same court subsequently ruled (in *Her Majesty's Advocate v. P* [2011] UKSC 44) that use of the fruits of questioning conducted in the absence of access to a lawyer did not necessarily amount to a violation of Article 6.

52. Clarke J. then went on to consider the jurisprudence of other common law jurisdictions. He expressed the view that the law of the United States of America, as laid down in the seminal case of *Miranda v. State of Arizona* 384 U.S. 436 (1966), went the furthest in terms of requiring the presence of a lawyer both prior to and during questioning. There was however a clear international view that there was, at a minimum, an obligation on investigating police in most circumstances to refrain from interrogation in the period after a request for a lawyer and before the arrival of that lawyer.

53. It is worth mentioning at this point that the earlier Irish cases on this issue, such as Madden, all seem to have proceeded on the basis that wrongful denial of access to a solicitor would render the suspect's detention unlawful. The result of a finding to this effect was in those days, pursuant to the principles set out in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110, that evidence gathered during the relevant time was inadmissible in the trial. This gave rise to situations such as that in *The People (Director of Public Prosecutions) v. Buck* [2002] 2 IR 268, where a court might find that the detention of a person could alternate between lawfulness and illegality, as access was granted or denied. However, the case made in *Gormley* and *White l*ocated the right of access to legal advice within the right to a fair trial as guaranteed by Article 38(1), with the argument being that reliance on evidence obtained in breach of the right was in itself

directly unconstitutional as resulting in an unfair trial. Clarke J. noted that acceptance of this argument would amount to a significant development in the Irish jurisprudence. Such a development was, the Court considered, permissible in the light of the consistent view of this Court that the Constitution is a living document which requires to be interpreted from time to time.

54. In considering whether it was appropriate to regard the investigative stage of a case in this jurisdiction as forming part of a *"trial in due course of law"*, the judgment takes account of the differences between procedures in this State and those followed in many civil law jurisdictions. However, Clarke J. came to the conclusion that the differences were not such as to exclude from the concept a formal investigation directly involving an arrested suspect.

> *"… I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available. Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods and, indeed, in certain circumstances, may be exposed to a requirement, under penal sanction, to provide forensic samples. It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only be tried in due course of law, therefore, requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in State (Healy) v. Donoghue applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis. It does not, necessarily, follow that all of the rights which someone may have at trial (in the sense of the conduct of a full hearing of the criminal charge before a judge with or without a jury) apply at each stage of the process leading up to such a trial. However, it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States."*

55. The judgment went on to hold that the constitutional right to a trial in due course of law therefore implied an entitlement not to be questioned after access to a lawyer was requested and before such access was obtained. There were many reasons why access might be required at an early stage - for example the suspect might need to put in place enquiries which might assist in the building of a defence; or there might be a need for advice on the legality of the detention. However, the most urgent aspect would be the need for advice on the immediate events that occur when a person is arrested, including interrogation by the gardaí. Thus, where significant reliance was placed, in the trial, on admissions made in the course of questioning which occurred in the absence of legal advice in breach of the suspect's entitlements, the trial was necessarily an unfair one.

56. It was emphasised that the right to legal advice before interrogation *was "an important constitutional entitlement of high legal value*", and that if any exceptions were to be recognised, it would be necessary to show *"wholly exceptional circumstances involving a pressing and compelling need to protect other major constitutional rights such as the right to life*". It was also emphasised that the right is one designed to provide support for the right against self-incrimination, amongst other rights including the right to

a fair trial.

57. The facts in the case of Mr. White were distinguished from those relating to Mr. Gormley. It was held that the taking of forensic samples in a minimally intrusive way, where this was otherwise authorised by law, did not affect his fair trial rights.

58. It is worth mentioning the observation by Clarke J. that the issue in Mr. Gormley's case could not reasonably be said to have taken the authorities by surprise. The decision in *Salduz* had been delivered in 2009, and in 2011 the Court of Criminal Appeal had (in *The Director of Public Prosecutions v. Ryan* [2011] IECCA 6) specifically drawn attention to the potential interaction between the obligations of the State under the Convention and the practice in relation to questioning as it then existed. That Court had referred to the frequency with which garda interviewing practices had resulted in admissions being ruled inadmissible because of breach of the suspect's right of access to a lawyer. It was now necessary for the State to organise itself in a manner sufficient to allow questioning to take place in conformity with the Constitution and with the jurisprudence of the ECtHR.

59. The judgments in *Gormley* and *White* were delivered in March 2014. In May 2014 it was announced that henceforth solicitors would be permitted to attend during interviews in Garda stations. Such attendance is now covered by the Criminal Legal Aid scheme. A Code of Practice, published by An Garda Síochána in April 2015, states expressly that it is based on the advice of the Director of Public Prosecutions to the Garda Commissioner following the Supreme Court decision.

Ibrahim and Others v. The United Kingdom (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, [GC] 13th September 2016)

60. In this case, decided after the hearing of the appeal in the instant case and therefore not debated in it, the ECtHR was concerned with the permissibility of restrictions, imposed for purposes associated with public safety, on the right of access to a lawyer prior to interrogation. A week after the terrorist bombings in London in July 2005 that had caused over fifty deaths and hundreds of injuries, there were a number of what appeared to have been attempts to detonate explosive devices on public transport in the city. Three of the applicants were arrested in relation to these incidents. They were subjected to *"safety interviews"* before being permitted to consult with lawyers. This type of interview was expressly provided for under the relevant legislation, for the purpose of discovering whether the detainees were aware of any immediate danger to public safety. The fourth applicant had been in the process of making a witness statement when the interviewing officers formed the suspicion that he had in fact been culpably involved with the other men. Notwithstanding this suspicion, the officers were instructed to continue taking the statement without cautioning him as to his right not to incriminate himself. He was arrested after completion of the statement.

61. The ECtHR confirmed that for the purposes of Article 6.1 and 6.3 of the Convention a *"criminal charge"* exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of suspicion against him.

62. Under the heading "*General approach to Article 6 in its criminal aspect*" the Court noted that the right to a fair trial is unqualified, but said that the primary concern was the overall fairness of the proceedings. The minimum rights guaranteed by Article 6.3 exemplify the requirements of a fair trial in respect of typical procedural situations and can be viewed as specific aspects of the concept in a criminal case.

> *"251. … However, those minimum rights are not aims in themselves: their*

intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings a whole..."

63. The Court considered that there was scope for access to legal advice to be delayed for "*compelling reasons*". It went on to address the consequence of a finding in a particular case that there were no such reasons and ruled that this would not lead, in itself, to a finding of a violation of Article 6 but that it meant that a *"very strict scrutiny*" of the fairness assessment was required.

64. Under the heading *"The privilege against self-incrimination*" the court said (at paragraphs 266 - 267):

> *"266. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused...The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6...*
>
> *267. It is important to recognise that the privilege against self-incrimination does not protect against the making of an incriminating statement per se but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected…"*

65. However, the court said (at paragraph 269) that the right not to incriminate oneself is not absolute. The degree of compulsion applied will be incompatible with Article 6 *"where it destroys the very essence of the privilege against self-incrimination"*. Not all compulsion would have this effect. The crucial issue in this context is the use to which the evidence obtained under compulsion is put in the course of the trial.

66. At paragraph 273 the court stated that in principle there could be no justification for a failure to notify a suspect of the privilege against self-incrimination and the right to silence. Immediate access to a lawyer is likely to prevent unfairness arising from a failure on the part of the police to give such notification. If access is delayed, and the suspect is not officially notified of his or her rights, then in the absence of compelling reasons for delaying access it will be difficult for the prosecution to rebut the presumption of unfairness.

67. Under the heading *"relevant factors for the fairness assessment"* the court expressed the view that it would often be artificial to try to categorise a case as one that should be viewed from the perspective of one Article 6 right or another. It then set out a *"non-exhaustive*" list of factors to be considered when assessing the impact of a pre-trial procedural failing on the overall fairness of the proceedings.

Discussion on the right to legal advice

68. I have noted above that the analysis of the right to access to a solicitor in *Gormley* appears to have shifted focus from the lawfulness of the accused's detention to the effect on the right to a fair trial as guaranteed by Article 38(1). Although the consequences of this apparent shift have yet to be fully debated, my view broadly speaking is that it is the correct approach. Since the primary purpose of the detention of a suspect is the proper

investigation of the offence, with the ultimate objective of adducing admissible evidence in a trial, it makes sense to consider it as part of the trial process and to scrutinise events in detention for their impact on the fairness of that process. An analysis that has compelled trial courts to find that the detention of the accused moved from being lawful, to unlawful, and back again is one that can lead to unnecessary confusion. It also has the effect that all evidence, of any nature, that is gathered during detention subsequently held to be unlawful is potentially inadmissible. The *Gormley* analysis can more easily distinguish between issues where the advice of a solicitor is relevant (such as the voluntary making of a statement) and issues where the detainee does not, as a matter of law, have a choice, and the results do not depend on his subjective will (such as the taking of photographs or fingerprints). However, the full impact on the previous approach to the issue is not yet clear.

69. There is, I think, some strength in the argument that the thinking of this Court in *Gormley* and *White*, as supported by reference to *Salduz* and to the jurisprudence of other common law jurisdictions, could logically lead to a reconsideration of the decision in *Lavery v. Member in Charge*, Carrickmacross Garda Station [1999] 2 IR 390 and to a ruling that the right to a fair trial implies a constitutional right to the presence of a solicitor during questioning. The question of any *"public safety"* limitations on such a right does not yet arise for consideration. It might be observed that the State has anticipated that this situation could come about and has provided for it by establishing the scheme now in existence.

70. My own view would be that this is an issue that might soon come to the fore in the context of one or more of the many legislative provisions that now provide for the drawing of inferences from failure to answer questions. There are at this stage half a dozen separate enactments permitting adverse inferences to be drawn from the exercise of the right to silence under garda questioning, the most far-reaching being the possibility that inferences will be drawn at trial from a failure to mention at interview any fact relied upon in the trial.

71. However, I do not believe that the instant case is an appropriate one in which to reach a definitive view on the matter and would prefer to reserve my position on it. In the circumstances of the case I do not feel it appropriate to address the issue on the basis of whether or not a breach of an acknowledged right of this nature could be excused by reference to *The People (Director of Public Prosecutions) v. J.C.* [2015] IESC 31 (which, obviously, was not canvassed in the trial); or alternatively whether the right could be held to have been waived in the circumstances of the case (in the absence of any evidence of a knowing and deliberate waiver). Rather, I consider that the question of the existence of such a right does not truly arise on the admittedly unusual facts of this case.

72. Largely, this is because of the unusually central role, discussed above, taken by Mr. O'Donnell in the events immediately preceding the admissions. Prior to that, it is true that the appellant did not see his solicitor for any great length of time. However, it is also clear that he was aware of his right to see him; that he saw him when he wanted to, for as long as he wanted; and that he was under no pressure to relinquish or curtail his right of access. It is also clear that while he answered some questions in some interviews he did not incriminate himself prior to Interview No.15.

73. I do not accept the contention that the statement by the appellant (in Interview No. 14) that he would answer questions when he saw his solicitor demonstrates that he was *"irretrievably prejudiced"* by the garda decision to continue asking questions despite the request for the solicitor. I cannot see that it should be interpreted as a decision to incriminate himself - he committed himself to nothing, and certainly not to admitting guilt. There is no evidence that his will was overborne to any extent, still less to the

extent that a consultation could not assist him.

74. The actual admissions came about in the circumstances discussed above. The role of the solicitor was, in fact, far more central than would be envisaged where a lawyer is present in the interview room - the gardaí and the appellant were actually communicating through him, rather than directly with each other. He had complete privacy to advise his client while carrying on the discussion with the gardaí and also a greater degree of control than would be normal over what was said on behalf of the client and how it was presented. For the reasons already discussed, therefore I consider that not only was the trial judge entitled to conclude that the admissions were the result of a fully voluntary decision by the appellant, but that there is nothing to indicate that the exercise of the right now contended for would have altered the situation in any material respect.

75. In those circumstances I would dismiss the appeal.

JUDGMENT of Mr. Justice William McKechnie delivered on the 18th day of January, 2017.

Introduction:

1. In the early hours of the morning of the 9th November, 2008, Mr. Shane Geoghegan was murdered at Clonmore, Kilteragh, Dooradoyle, a housing estate on the south-western outskirts of Limerick City. The murder occurred as Mr. Geoghegan, who lived with his girlfriend at No. 2 Clonmore, was walking home through the estate from a friend's house nearby. He was first shot and wounded as he crossed a green area. He was then pursued as he attempted to escape by fleeing into the back garden of No. 38 Clonmore; there he was shot repeatedly, including a gunshot wound to the head. This resulted in his death.

2. Mr. Geoghegan was a well-liked, respected and upstanding member of the community. He had no connection to organized crime anywhere, including that which was then endemic in the Limerick underworld. His murder was a case of mistaken identity. The intended victim, who lived locally, was apparently linked to a rival gang which was involved in a long-running and violent dispute with criminal associates of the appellant. Mr. Geoghegan's shocking murder provoked fully understandable public outrage. The resulting garda investigation, in terms of resources and manpower, was intensive.

3. On the 15th February, 2012, Mr. Barry Doyle ("the accused" or "the appellant") was unanimously convicted by a jury of the murder of Mr. Geoghegan. He received the mandatory sentence of life imprisonment. The trial lasted 22 days, which was evenly split between a ***voir dire*** and the evidential hearing. The matters of law determined by the judge in the absence of the jury have in large part been re-agitated in both the Court of Appeal and, by leave, in this Court. This is my judgment on such issues.

4. As part of the background it will be helpful at the outset to extract from the extensive and wide-ranging Notice of Appeal, containing some 27 grounds, those issues which were ruled upon during the course of the trial. Those relate to certain admissions made by the appellant, evidential matters in respect of two witnesses, criticisms of the judge's charge and the material that was furnished to the jury. In addition, there was a further issue arising out of the judgment of the Supreme Court in ***Damache v. DPP*** [2012] 2 I.R. 266 ("***Damache***"), which was decided after the appellant's trial. The Court of Appeal (Ryan P., Birmingham and Edwards JJ.), in a comprehensive judgment delivered by the President on the 8th June, 2015 (2015 IECA 109), concluded that none of the grounds so advanced could succeed. It held that the trial was satisfactory and that the conviction of Mr. Doyle was safe. That Court's decision in respect of each issue of continuing relevance

to this appeal is set out in the corresponding section of this judgment.

The Issues on This Appeal:

5. As provided for by the Thirty-third Amendment to the Constitution and the Court of Appeal Act 2014, the appellant sought a further appeal to this Court. He was granted permission to do so on three matters, each of which was acknowledged to be of general public importance ([2015] IESCDET 45). Whilst the precise questions on which leave was granted are set out later in this judgment, a short description of each at this point helps the narrative:-

> i. Whether the appellant's confession was brought about by a threat and/or an inducement and, if so, whether the threat/inducement had dissipated;
>
> ii. Whether the appellant was entitled to have a solicitor present during interrogation by the police; and,
>
> iii. Whether the appellant can rely on the decision in ***DPP v. Damache***.

The issues raised were presented to the Court in that order in the parties' written submissions, and thus will likewise be addressed in this judgment.

Background and Procedural History:

Mr. Doyle's Arrest, Detention and Confession:

6. At 07:15 on the 24th February, 2009, the accused was arrested pursuant to section 4(3) of the Criminal Law Act 1997 during a search of his residence at 106 Hyde Road, Limerick. This search was carried out on foot of a warrant issued under section 29 of the Offences Against the State Act 1939 by Superintendent Anne Marie McMahon, who was in overall charge of the investigation into Mr. Geoghegan's murder. Ms. Victoria Gunnery, the appellant's former girlfriend and mother of one of his children, was also arrested around this time on the basis that she possessed information relevant to the crime (paras. 18-21, ***infra***).

7. Overall, Mr. Doyle was continuously detained until 14:31 on the 28th February, 2009, following which later that day he was charged with murder. During the detention period, which was extended from time to time in accordance with section 50 of the Criminal Law Act 2007, he was interviewed a total of 23 times. Ms. Gunnery was released without charge at 21:00 on the 26th February, 2009.

8. Subsequent to his arrest, the appellant was brought to Bruff Garda Station, where, upon his detention, he was read his notice of rights. At 08:00 he requested to speak with a solicitor, Ms. Sarah Ryan, and was notified that she would call him back in half an hour. He had a brief telephone conversation with her of approximately two minutes duration at 09:55. The first garda interview commenced a short time later at 10:12. A solicitor, Mr. Michael O'Donnell, on behalf of Ms. Ryan, arrived at the station at 11:00 and the first interview then concluded at 11:03. After a nine minute consultation with Mr. O'Donnell from approximately 11:05 to 11:14, Mr. Doyle was interviewed a further five times on the 24th February, with the final interview concluding at 23:42. On each occasion he declined

to sign the memorandum of interview.

9. On the 25th February, 2009, the appellant was interviewed on four more occasions. Again he declined to sign the memorandum of any session. That evening he was taken to Limerick District Court for the purposes of an application to further extend his detention. Mr. O'Donnell was in attendance when the period was extended for a further 72 hours. Mr. Doyle was then returned to Bruff Garda Station, where the final interview of that day, and the tenth interview overall, took place between 22:38 and 23:35. At around the same time, but before 23:00, Ms. Gunnery, in her ninth interview with the gardaí, provided information about contacts with the appellant on the 8th and 9th November, 2008. The signed memorandum of this interview was referred to during the last mentioned interview with the appellant; this was the first occasion on which he was told that Ms. Gunnery too had been arrested and was being detained.

10. On the 26th February, 2009, the appellant was interviewed a further six times (Interviews 11-16 overall). The most important interviews for the purposes of this appeal are those numbered 14 and 15, although the preceding three also have particular relevance as it is submitted on Mr. Doyle's behalf that the confessions which were ultimately obtained were the product of threats and/or inducements made to him over the course of all such interviews. The particular comments said to constitute these threats or inducements are set out in full below (para. 27, ***infra***). In summary, the argument in this regard is that the gardaí said, or at least led him to believe, that Ms. Gunnery would not be released from detention until such time as he had confessed to the murder of Mr. Geoghegan. He thus claims that the confessions subsequently made were involuntary and should not have been admitted at trial.

11. In light of the central importance attaching to the interviews held on the 26th February, 2009, it is worth setting out in detail the precise sequence of events which occurred that day. The appellant was interviewed from 09:03 to 11:12 (Interview 11), from 12:22 to 13:43 (Interview 12) and from 15:02 to 16:13 (Interview 13). Several of the alleged inducements/threats were made during Interview 13. At 16:04 he indicated that he wished to see his solicitor. A number of unsuccessful attempts were made to contact Mr. O'Donnell on his mobile phone: he was in court at the time. Ultimately his office was contacted and his secretary undertook to inform him of Mr. Doyle's request. The appellant was told of this situation at 16:31, and at 17:13 was taken from his cell for a telephone consultation with Mr. O'Donnell; this lasted approximately two minutes.

12. Interview 14 commenced at 17:32. The investigating members at this point were Detective Gardaí Phillips and Hanley. Some of the comments which are alleged to have constituted threats or inducements were made during this interview. At the outset Mr. Doyle confirmed that he had spoken with his solicitor and that he had no further requests at that time, but he later stated that he wanted to speak to his solicitor again as he had not spoken to him properly. The interview continued. He again asked to speak with his solicitor; again the interview continued and he was then told his solicitor was on his way. He had no complaints when the Member in Charge visited the interview room at 18:30. Interview 14 was suspended at 18:35.

13. Mr. O'Donnell arrived at the Garda Station at 18:52 and left again at 19:17. A number of significant events occurred during this period - the precise timeframe of each rather surprisingly was not noted, but approximate estimates were given in oral evidence. It appears that Mr. O'Donnell had a ten minute consultation with the appellant, after which he spoke to Detective Gardaí Phillips and Hanley. That was followed by another ten minute consultation between solicitor and client, after which Mr. O'Donnell again spoke to the Detective Gardaí. He then had a final five minute consultation with Mr. Doyle and left the station.

14. Late at night on the 26th February, 2009, or perhaps in the early hours of the morning of the 27th, Detective Gardaí Phillips and Hanley prepared what was referred to at trial as an ***aide memoire*** or memorandum detailing the events above described. The ***aide memoire***, which is headed "Meeting with Michael O'Donnell Solicitor on Thursday 26th February 2009", was read to the trial court during the ***voir dire.*** It is worth setting out in full:

> "Met at station. Explained about consultation with a client to be done in the sight but outside hearing of members. Consultation in cell. After consultation Michael O'Donnell requested to speak to members. Went to interview room. O'Donnell started by saying conversation was off record and did not want a memo to be taken of same. Stated that Barry Doyle would admit to killing Shane Geoghegan if his girlfriend, Victoria Gunnery, was released. I [Detective Garda Hanley] stated that there was no way this was possible, that he would have to tell the truth about what happened, and once he told the truth about what had happened we would have no reason to detain Victoria Gunnery any further. Michael O'Donnell stated that he would only answer one question, that he had committed the murder and answer no more. I said this would not suffice, as we had to know he was telling the truth and not just saying it to get Victoria Gunnery released. Michael O'Donnell said 'sure can't you arrest her again?' I said that Barry Doyle had to admit what he had done in an interview and that his girlfriend would not be released before any interview. Michael O'Donnell said he would go back to Barry Doyle and tell him this. Further consultation in the cell. After approximately 10 minutes, returned to interview room, Michael O'Donnell again said that Barry Doyle would not admit to anything prior to his girlfriend being released. I said to Michael O'Donnell 'that is an inducement' and there was no possible way that would happen, that any admission would not be upheld in any court if that were to happen. Michael O'Donnell said 'sure wouldn't you have it on the camera?' [Detective Garda] Mark Phillips said that didn't matter. Michael O'Donnell said 'well he will not admit to it. I have told him to say nothing, to get you to do the work.' I again said to Michael O'Donnell that Barry Doyle had to tell the truth about what had happened. Michael O'Donnell said 'I think you have a bit more work to do'. Michael O'Donnell again had legal consultation with prisoner, lasted approximately 4-5 minutes. Michael O'Donnell left the station."

15. Interview 15 was conducted by the same gardaí and commenced at 19:43. At the outset, the appellant admitted to being in Clonmore on the 8th November, 2008, as a front seat passenger in a motor vehicle thought to be involved in the crime. At 19:46 the interview was interrupted so that Mr. Doyle could take a phone call from his solicitor, which lasted about three minutes. The interview then resumed, whereupon the appellant made admissions in relation to the murder of Mr. Geoghegan. The appellant also drew and marked a sketch map of the scene of the murder. He signed the memorandum of interview and the interview ended at 21:05, at which point the video recording had been switched off. It therefore did not show that the appellant then took a set of rosary beads from around his neck and asked "will you give them to Shane Geoghegan's ma?" A further interview, Interview 16, was held between 22:09 and 23:29.

16. Five more interviews were conducted on the 27th February, 2009. The appellant had a two minute phone consultation with his solicitor prior to the first interview that day. During that interview, Interview 17 in total, the appellant confirmed his admissions from the previous night and referred to his act of handing over the rosary beads, as he did to

his killing of Shane Geoghegan. He had a personal consultation with his solicitor for about five minutes from approximately 15:27 that afternoon. In Interview 20 that night he marked an aerial map and photograph shown to him by the gardaí, and demonstrated how he had cleared undischarged rounds from the gun used by pulling back the slide. Mr. Doyle once again declined to sign any of the memoranda of the interviews conducted that day.

17. The appellant was interviewed twice on the 28th February, 2009, bringing the number of interviews to 23 in total. At 14:31, he was released from section 50 detention for the purposes of charge. After a brief consultation with his solicitor, at 15:15 the appellant was arrested and charged with murder. He was then taken to Limerick District Court.

Ms. Gunnery's Arrest, Detention & Questioning:

18. Before addressing what happened at trial, it is necessary to recount the situation in respect of Ms. Gunnery. As mentioned above, she was the appellant's former girlfriend and mother of his infant child. She was arrested around the same time as Mr. Doyle, pursuant to section 30 of the Offences Against the State Act 1939, which confers such a power in respect of persons whom a member of An Garda Síochána suspects of being in possession of information relating to the commission of a scheduled offence. In this instance, the relevant scheduled offence was possession of firearms with intent to endanger life on the evening of Mr. Geoghegan's murder.

19. In passing may I draw attention to the absolute peculiarities of this section of the 1939 Act: a person's liberty can be taken on suspicion of having information ***simpliciter,*** even though the basis for such arrest is not otherwise criminalised in our system. I consider the provisions questionable at least.

20. In any event, Ms. Gunnery was arrested at her home in Dublin at approximately 08:30 on the 24th February, 2009. Having been detained at Ballymun Garda Station, she was interviewed on four occasions on that date. Her detention was extended for 24 hours by Chief Superintendent Gerry Mahon at 08:10 on the 25th February, 2009; thereafter she was interviewed five times during the course of that day. In the last of these interviews, her ninth overall, Ms. Gunnery provided information to the gardaí about contacts she had had with the appellant on the 8th and 9th November, 2008.

21. Shortly after midnight, at 00:26 on the 26th February, 2009, she was taken to Limerick for the purpose of an application to extend her detention the following morning. The supposed basis for this transfer was an erroneous belief on behalf of the investigating gardaí that the proper court to which such an application should be made was Limerick District Court. How such a view could have been arrived at and then entertained is disturbing. In any event, her detention was extended by that court and she was then detained at Roxboro Road Garda Station in Limerick, where she was interviewed a further three times on the 26th February. Ms. Gunnery was released from custody at 21:00 that night, shortly before the conclusion of the 15th interview of the appellant but after he had confessed to the murder of Shane Geoghegan.

The Trial:

22. The prosecution of the appellant duly came on for hearing in the Central Criminal Court, with Sheehan J. presiding. This was a retrial following a previous disagreement by the jury. It lasted 22 days, with an equal portion of that consisting of a ***voir dire*** into the admissibility of the confessions made by the appellant. Over 20 hours of video recordings were played in court and the interviewing officers gave evidence in chief and were cross-

examined. Ultimately the learned judge was satisfied to admit the confessions; his ruling in this regard is dealt with at paras. 29-32, ***infra.***

23. The main pillars of the case against Mr. Doyle were (i) the admissions previously referred to, which were in part supported by other evidence, including ballistics evidence found at the scene and also evidence in relation to the stolen getaway car; (ii) the evidence of April Collins, former girlfriend of crime boss Gerard Dundon, who said that she was present when John Dundon ordered the appellant to kill the intended victim, and present again when John Dundon discovered that the wrong man had been murdered; and (iii) the evidence of Ms. Victoria Gunnery, who testified as to certain remarks made by the appellant which tended to implicate him in the murder.

24. On the 15th February, 2012, the verdict reached was unanimous; the decision of the Court of Appeal of the 8th June, 2015, was to dismiss the grounds of appeal in their entirety. That decision, or at least its substantive part, is traced through the rest of this judgment.

This Further Appeal:

Issue 1:
Whether the confession was procured by a threat(s) and/or an inducement(s) and, if so, whether the threat(s)/inducement(s) had dissipated by the relevant time

25. The first question which I propose to address was phrased as follows by this Court in granting leave:-

> "Whether the matters set out in the applicant's application under the heading 'Relevant facts considered not to be in dispute', or any of them, constituted threats or inducements made to the applicant and *calculated* to extract a confession from him. This is a matter not decided by the Court of Trial or the Court of Appeal. Secondly, if they do constitute such threats or inducements, whether their effect had 'dissipated' or 'worn off' by the time of the admissions relied upon by the State, as held by the trial judge; and thereby whether or not there was any evidence on which it could have been determined that the effect of the said threats or inducements (if any) had 'dissipated' or 'worn off' by the time of the alleged admissions." (Emphasis added: see para. 57, ***infra***)

There are therefore three aspects to this question, the last of which is critical to the issue of a causative link between any inducement and the confession.

26. It will be recalled (para. 9, ***supra***) that the appellant first learned of Ms. Gunnery's detention during Interview 10, the final interview held on the 25th February, 2009, the second day of his detention. On this first question the case made, which previously has been summarised at para. 10, ***supra***, is that certain comments made by the gardaí during this session and subsequently during Interviews 11, 12, 13 and 14, all held on the 26th February, 2009, amounted to threats or inducements intended to extract a confession from him. The essence of this argument is that the gardaí led him to believe that his former girlfriend, Ms. Gunnery, would not be released until he confessed to the murder of Mr. Geoghegan, with consequential hardship both for her and for their infant child so long as he refused to do so. Thus, it is claimed that the confessions were involuntary and on that basis should have been ruled to be inadmissible.

27. In his amended written submissions to this Court, Mr. Doyle has set out a comprehensive list of what he alleges are the inducements and/or threats put to him during Interviews 10-14. In order to preserve detail and context it is necessary to set these out in full:-

- "That Vicky Gunnery was in custody 'for the same offence' arising out of the 'same incident', namely the murder of Shane Geoghegan; [Interview 13, page 30 - '13.30']

- She was in custody the same amount of time as the defendant; [10.8]

- She had done nothing wrong [10.8];

- She was being detained because of the defendant [10.8];

- She was suffering hardship and deprivation [10.9] [14.16];

- Because of Victoria's detention their child was suffering hardship and was being deprived of its mother, which was the defendant's fault [10.9] [14.16];

- That unless he confessed his family difficulties were going to get worse [10.9] [10.11] [10.13];

- That the defendant was failing his daughter as a father by not confessing [10.8] [10.12];

- That he should 'come clean and tell the truth' for 'everybody's sake' [14.13];

- That he should 'do the right thing … tell the truth' and 'don't keep Vicky away from the young one longer than she has to be … for the sake of your child.' [13.32].

- That unless he confessed he'd never get to see the child again [10.12];

- That he would not get to see his other children (by a different mother - Anita) [10.11];

- Unless he confessed he was going to end up in hardship regarding his family [10.13];

- In return for a confession the Gardaí would put in a good word to Vicky Gunnery to help the defendant's position vis-à-vis his family [10.19].

- That Vicky's detention was not what the Gardaí wanted but caused by the defendant's lack of confession [13.20-21];

- That the Appellant's lack of confession was causing Vicky to be detained and away from her child and that if he confessed she would be released - so he should do the right thing [13.32];

> - That Vicky would be released when the Gardaí had no reason to detain her, i.e. when the defendant confessed [memo][14.18];
>
> - 'Do you see what you've brought your family and friends down to? Barry look at me. Do you see what you've brought your family and friends down to? Your child without their mother because of you, because of you. Your child has no mother for the last few days because of you.'[10.7]
>
> - 'Your ex girlfriend now, the mother of your child, is now in a station cell very similar to yours lying on a mattress very similar to yours, eating the same food as you and no visits and I tell you to take a mother away from her child like that, that's your fault; that's not our fault, that's your fault…'[10.7]"

The fact that these statements were made has not been and could not be disputed.

28. Evidently, the series of events described at paras. 11 to 16, ***supra***, are of central importance to this ground of appeal. These matters span from Interview 10 on the night of the 25th February, 2009, to the appellant's confession in Interview 15 conducted on the following night.

The Trial Judge's Ruling:

29. On this ground of objection, as above noted (para. 22, ***supra***), Sheehan J. conducted an extensive inquiry, viewing many hours of video recordings, listening to the interviewing officers giving evidence and being cross-examined, and carefully considering both written and oral submissions on the point. He concluded as follows.

30. As regards the question of inducement, the trial judge was guided by the decision in ***People (DPP) v. McCann*** [1998] 4 I.R. 397 ("***McCann"***) and also had regard to the judgment in ***R v. Rennie*** [1982] 1 WLR 64 ("***Rennie***"). In addition, he considered ***People (DPP) v. Pringle*** (1981) 2 Frewen 57 ("***Pringle***") and ***People v. Hoey*** [1987] 1 I.R. 637 ("***Hoey***") but declined to follow the judgment of the Canadian Supreme Court in ***R v. Spencer*** [2007] SCC 11.

31. Sheehan J. first noted that any alleged inducements prior to Interview 15 must be seen in the overall context of everything that had taken place. This included the gradual unfolding of the evidence and the appeals to the prisoner to tell the truth. The learned judge considered that "even if these promptings could possibly amount to an inducement when objectively viewed they were not immediately acted on and their effect, whatever it may have been, was dissipated by the consultation [between the appellant and his solicitor] and the solicitor's interaction [with the gardaí]." In his view, therefore, these matters broke any possible causative link, a conclusion also influenced by the fact that the solicitor told the gardaí that the appellant would not admit to the offence. Overall the trial judge was satisfied that the admissions were voluntary and not made as a result of a threat or inducement.

32. As regards oppression, the court was guided primarily by ***People (DPP) v. McNally*** (1981) 2 Frewen 43 and ***Pringle***, and also took account of ***DPP v. Shaw*** [1982] I.R. 1 ("***DPP v. Shaw***"). The learned judge noted that he had watched the videos and that Barry Doyle appeared mentally and physically strong throughout. He noted factors which suggested that the appellant would not be easily amenable to oppression: that he worked as a block layer, that he played Gaelic football, that he slept wearing a bulletproof vest and that he had previously told a garda officer to "fuck off". Sheehan J. was satisfied that

the appellant engaged with the gardaí when he chose to and refused when he chose to. He found that the interviews were "conducted in a careful, patient and structured way", that the gardaí were "at all times professional and courteous" and that there was no oppression involved. The learned judge further found that the appellant first began to engage with the gardaí in a limited way because of the appeals to his humanity. Sheehan J. found that Barry Doyle was in full control of himself throughout and that he made the admissions because he chose to. He therefore found that the confessions were not the result of oppression, nor were they the result of a breach of fundamental fairness. Whilst the question of oppression as such was not part of the grounds of appeal to this Court, nonetheless the trial judge's ruling on this point is relevant for other reasons, in particular its bearing on the issue of the dissipation of any inducement.

The Judgment of the Court of Appeal:

33. The Court of Appeal accepted that the law on inducements, which involves a three-pronged test, is laid out in ***McCann*** and ***Rennie*** (see para. 53 ***infra***).

34. The Court held that it was clear from his ruling that the trial judge found that there was no evidence of inducement, and that even if there had been, the same had been dissipated by, ***inter alia***, a combination of the visit by Mr. O'Donnell to his client and the offer which the solicitor made to the gardaí, which was unambiguously rejected. Both of these matters excluded the possibility of the third ***McCann*** element being present. In this context it stated that an appellate court will be extremely reluctant to overturn a trial judge's view where his assessment depended on seeing witnesses and observing their demeanour whilst being questioned. The Court furthermore rejected the view that the solicitor's offer represented the implementation of the ***McCann*** triad and held that the whole transaction refuted any argument based on inducement.

35. The Court further found that the argument based on what it described as "selected statements and comments" was not made out. No threats were uttered, nor was any explicit inducement offered. Any inducement would therefore have to be inferred, and the Court once again highlighted the superior position of the trial judge in this regard. The trial judge found that the appellant opened up because of the gardaí's appeal to his morality and better nature, and there was evidence to support this. Mr. Doyle was now trying to draw inferences which were not justified by an examination of the transcripts. The Court also found it significant that the admissions were limited to the appellant's own role in the murder, which showed his capacity for judgement and the fact that his will was not overborne. Further, it emphasised that he furnished considerable detail to illustrate what had happened and where. It also stated that the inducement theory falls down when one considers that the appellant did not demand confirmation of his ex-girlfriend's release after Interview 15.

36. In conclusion, the Court of Appeal was satisfied that there was evidence to support the judge's rejection of the inducement or threat theory. In this regard, the interaction between Mr. O'Donnell and the gardaí was decisive in disproving the inducement hypothesis. Thus the Court held that the trial judge was entitled to find that the admissions were not brought about by inducement or threat and that the trial judge's interpretation of the interviews was correct.

Submissions of the Appellant:

37. The appellant submits that even the most gentle threat or slight inducement will taint a confession (***R v. Smith*** [1959] 2 Q.B. 35; ***R v. Zaveckas*** [1970] 1 All E.R. 413). For example, in ***Hoey*** a threat to visit the family home and to interrogate members of a

suspect's family with a view of getting one of them to take responsibility for a firearm led to the exclusion of a confession. The appellant also refers to ***Pringle***, on which see para. 77, ***infra.*** There were many other such examples, but these will suffice to make the point.

38. The appellant claims that certain comments by the gardaí, set out at para. 27, ***supra,*** put psychological pressure on him to confess for the sake of his ex-girlfriend and child: he did so as he was offered a ***quid pro quo*** whereby a confession would secure her release. The gardaí pressed on with questioning in Interview 14 for an hour after he had requested to speak to his solicitor. Further pressure was put on the appellant during this time and although he made no admissions, the thrust of the remainder of the interview was to persuade him to surrender his right to silence and to confess. In this regard the ***aide memoire*** fully supports the concerns which Mr. Doyle had for Ms. Gunnery and the fact that there was a deal on the table.

39. The appellant submits that the effect on him of the disclosure of Ms. Gunnery's detention was evident, in that the gardaí clearly recognised that it had upset him. He expressed concern for Ms. Gunnery and his child and eventually said "I'll answer your questions after I speak to my solicitor." It is submitted that the content of the ***aide memoire*** discussed above illustrates the appellant's concern for Ms. Gunnery generated by the preceding interviews. It is submitted that the memorandum clearly establishes a relationship between the confession and her release; the only contention was the order in which this was to occur. It is further submitted that the appellant was induced by the remarks of the gardaí in Interviews 1-14 into making admissions in the interviews that followed - the appellant points out that he made his confession almost as soon as Interview 15 commenced.

40. The appellant accepts that the correct test is that laid down in ***McCann*** but at the core of his submission on this point is the argument that the trial judge incorrectly applied the test. It is stated that his failure to address the first strand renders the conviction unsafe, as this question merited rigorous determination. If the trial judge had found the words objectively capable of constituting a promise or threat, then the confessions would have to have been excluded unless the prosecution proved beyond reasonable doubt that they were not understood as an inducement (strand two) or were not a result of the promise/threat (strand three). It is submitted that strands two and three of ***McCann*** cannot be examined until the first prong is determined. Instead the trial judge just assumed dissipation from Mr. Doyle's consultation with his lawyer between Interviews 14 and 15. This was entirely unjustified, as can be seen, for example, from the appellant's ongoing concern for his ex-girlfriend and his child, which was expressed in subsequent interviews (16, 20 and 21) long after the consultation with his solicitor.

41. Finally, it is submitted that an appellate court is in as good a position as a court of trial to determine the first strand of ***McCann.*** This depends neither on the intention of the maker nor the understanding of the recipient. The appellant thus argues that the Court of Appeal failed to engage in an isolated analysis of this strand and was unduly deferential to the trial judge. Indeed, the more basic complaint is that the trial judge did not determine this issue at all, but rather having skipped over the second strand went straight to the final point of the test. Therefore, there were multiple errors in what should have been a sequential application of ***McCann*** and this Court is asked to correct or remedy those.

Submissions of the Respondent:

42. The DPP submits that the appellant is simply trying to re-argue the issue of admissibility once again, which is not permissible. Once the absence of a causal link was

found to exist there was no basis for contesting admissibility, and as a result there is no purpose in separately analysing strands 1 and 2 of ***McCann***, an issue which is now moot. In any event, the Court of Appeal reviewed the transcripts and found the trial judge's decision to be correct.

43. It is further submitted that the trial judge considered all of the evidence, having viewed over 20 hours of recordings and having had the benefit of observing the witnesses first-hand. This aspect of the trial lasted nine days, at the end of which extensive submissions were made. It is said that one cannot focus on isolated extracts from the interviews, for to do so is divorced of context. The trial judge had the totality of the circumstances in his vision and both his conclusions and overall ruling are correct.

44. The respondent submits that Ms. Gunnery's arrest was legitimate, and was lawfully carried out pursuant to section 30 of the Offences Against the State Act 1939 on the basis of a suspicion that she possessed information relating to a scheduled offence. During her initial interview she began to give relevant information, and whilst in custody in Limerick gave a full witness statement. She gave evidence at trial that could have been construed as incriminatory of the appellant. Defence counsel conceded that there had been no issue with extending her detention. Thus there can be no suggestion that she was wrongly arrested solely for the purpose of putting pressure on the appellant to confess. It is further submitted that the appellant and Ms Gunnery were not on good terms at the relevant time.

45. The respondent also submits that there was no error of law. A court must have some evidential basis to conclude that the words used were understood as an inducement and that the confession was made as a result. In this sense there is an evidential burden on the defence. The respondent maintains that there has been no evidence of either issue. Indeed, in one interview the appellant said that "it was my choice to admit what I did." Furthermore, per ***McCann,*** interrogation necessarily entails more than gentle questioning, and gardaí are entitled to persist with such questioning. As in ***McCann***, the appellant here had access to legal advice, regular refreshment and a chance to sleep. In ***Rennie*** it was stated that the person best able to get the flavour of the circumstances in which a confession was made is the trial judge; where he properly applies the law, deference is owed to his determination on the voluntariness of the confession. Here the trial judge observed the recordings and heard the witnesses. The appellant concedes that there was no oppression. It is therefore submitted that the trial judge did not commit any error of law.

46. The DPP submits that there is no causative link between any alleged inducement and the confession. A key feature of this "unusual" case is that this is not a case where the gardaí offered an inducement; rather, the appellant offered the gardaí a confession as an inducement to secure Ms Gunnery's release. This was explicitly rejected, leaving the appellant in no doubt that there was no inducement on offer to him. It is submitted that the gardaí properly recoiled from what they regarded as a ploy to lure them into giving an inducement which would have invalidated the confession. The respondent also points out that the appellant spoke to his solicitor for approximately 25 minutes before Interview 15 commenced, and again during the interview.

47. Finally, it is submitted that there were other aspects of the interviews which supported the ruling of the trial judge. These included the fact that the appellant omitted references to any accomplices; that he said it was his choice to admit to the murder; that he indicated in Interview 15 that he was feeling alright; and that he accepted in Interview 20 that he had been treated fairly in custody. The appellant's submission that he made reference to the pressure continuing to play on his mind in later interviews is taken out of context. The fact that he gave his rosary beads to the gardaí supports the contention that the interviewing officers had played to his conscience. Furthermore, it is submitted that

the significance of his relationship with Ms. Gunnery was not what is now contended by the appellant, and that she had never visited him in Limerick, nor did he see her on occasion when he was in Dublin.

48. The respondent concludes that the trial judge was uniquely well placed to come to a conclusion on these factual matters, and was justified in concluding that the confession made during Interview 15 was voluntary and not the result of oppression or a threat or inducement. Enquiries as to voluntariness are especially fact sensitive and the trial judge conducted a very thorough enquiry and applied the correct legal principles in his adjudication of those facts.

Decision:

49. It is unclear from his ruling what precise findings were made by the trial judge on this issue: did he hold that objectively the disputed questioning amounted to a threat or an inducement, and did he hold that Barry Doyle himself so viewed the impugned remarks? On one reading he must have done so, as otherwise the causative issue would not have arisen. On the other hand, however, the learned judge may have assumed or simply proceeded on the basis that such could be regarded as having been established without so holding or finding, as in any event, in his view, any possible effect on voluntariness had ceased by the time of the confessions. It is difficult to know which is the case. I make this point not for the sake of it, but for some important reasons which I will outline in a moment. He did, however, clearly set out his reasons on the dissipation point.

50. This of course is an appeal not directly from the decision of the trial judge, but rather from the Court of Appeal. Whilst the findings of that Court are above set out (paras. 33-36, ***supra***), it is useful to refer to them again in the briefest of terms. The Court, in its review of the judge's ruling, found in the first instance that he had entirely rejected the inducement complaint but that in any event he had also held that even if a threat or promise had been made, the same had no legal effect on the confessions. As there was evidence to support these findings, the conclusion so reached could not be disturbed.

51. The Court then offered its own assessment on this issue, but in the process deferred significantly to the ruling as made: this by reason of the trial judge's preferential position. It did however state, first, that the existence of any threat or inducement had to be inferred, as there was no express evidence to that end. Secondly, the Court of Appeal was satisfied that there was evidence to support the view that it was the prisoner's sense of morality and better nature that caused him to confess, and not any other reason. Finally, on the overall question, the Court was also satisfied that the solicitor's interaction with the gardaí was decisive in disproving the inducement hypothesis.

52. Assuming that what is above stated, when read in conjunction with the fuller description previously given, is a reasonable summary of both the trial judge's ruling on this issue and the Court of Appeal's review of that ruling, as I am satisfied it is, I am left in a position of some uncertainty as to what precisely was decided by the learned trial judge, and what precisely was accepted or rejected at the first appellate level.

The Law on Inducements: People (DPP) v. McCann [1998] 4 I.R. 397 ("McCann")

53. ***McCann*** not only set out what the law is, but also how it should be applied. At p. 411 of the Report, the Court of Criminal Appeal, in quoting ***Phipson on Evidence*** (13th Ed.) at para 2.20, said:-

> "As regards what constitutes an inducement, the test would appear to be (a) were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or promise? (b) Did the accused subjectively understand them as such? (c) Was his confession in fact the result of the threat or promise?"

It is not in dispute but that this is the correct test in determining whether a confession was produced by a threat or an inducement. It is also accepted that gardaí are evidently persons in authority. What is at issue is the application and implementation of that test. In this regard this Court is asked to pronounce upon the mechanics or sequencing of the three prongs of the test, and also on the evidence that may be required to satisfy each constituent element thereof.

54. Perhaps rather surprisingly, given its centrality to any inducement challenge, the ***McCann*** triad does not appear to have been the subject of any great level of scrutiny in any reported judgment since it was pronounced in 1998. Evidently, in the intervening period it must have been frequently applied, one assumes without objection, whenever this type of issue was in play. Nonetheless, in light of the importance of garda questioning and interrogation to modern criminal investigation and evidence gathering practices in this jurisdiction, it is necessary that the proper method of applying the test should be clarified.

55. By way of introduction to this issue, it is worth setting out briefly some of the background on the law relating to induced confessions. At the core of this matter is the rule that only a voluntary confession is admissible, with the onus, to the criminal standard, being on the prosecution for this purpose (***DPP v. Boylan*** [1991] 1 I.R. 477). Whilst the evolution of the rationale underpinning this concept need not overly concern us, nonetheless, it is of interest to note that whilst once resting at the door of reliability, it is now - and has been for more than 50 years - generally founded upon the principle that no one should be compelled to incriminate himself (***People (Attorney General) v. O'Brien*** [1965] I.R. 142, per Walsh J. at p. 166). It is principally for this reason that the accuracy of a confession in terms of detail no longer carries the weight which it formerly did (see para. 35, ***supra)***. A further basis for the rule, sometimes cited, is that related to the reputation and integrity of the criminal justice system, an aspect of which is to discourage or deter police interrogation practices designed to obtain a confession at all costs (see generally McGrath, ***Evidence,*** 2nd Ed., (Dublin, 2014) at paras. 8-98 to 8-111).

56. In a review of a series of cases stretching from ***The Queen v. Johnson*** 15 Ir. C.L.R. 60, to ***The People (Attorney General) v. Manning*** 89 I.L.T.R. 155, the Court of Criminal Appeal in ***The People (Attorney General) v. Galvin*** [1964] I.R. 325 examined each of these decisions so as to deduce from them what the established position was regarding threats or inducements. The Court's conclusion can be summarised as follows:-

> (i) that answers given, statements made and confessions obtained must be ruled inadmissible unless made voluntarily, that is, without the influence of "hope of advantage or fear of prejudice", or, as now more commonly expressed, without threat or inducement, excited or held out by a person in authority;
>
> (ii) that in the absence of a causative link or temporal connection between inducement and confession, the latter will not be excluded solely because of some antecedent but ineffectual promise or threat; and, thirdly,
>
> (iii) that even if the challenge should not be sustained, the Court still retains a discretion whether to admit or reject such a confession.

57. In fact Kenny J. could have added to this review the classic formulation of voluntariness as set out by FitzGibbon J. in the first reported decision of the recently defunct Court of Criminal Appeal, ***State v. Treanor*** [1924] 2 I.R. 193 at p. 208:

> "A confession made to any person under the influence of a promise or threat held out by a person in authority, ***calculated*** to induce the confession, is inadmissible, unless it be clearly proved to the satisfaction of the Judge, whose duty it is to decide the question, that the promise or threat did not operate upon the mind of the accused, and that the confession was voluntary notwithstanding, and that the accused was not influenced to make it by the previous promise or threat." (Emphasis added)

Subject to two observations, first, that evidently the standard of proof is beyond reasonable doubt, and, second, that the intention or motive of the person making the statement is irrelevant (***Hoey,*** per Henchy J. at p. 652), the above passage nonetheless illustrates that the general principle is a long-established and deeply-rooted one in this jurisdiction; indeed, it is quite clear that the rule far predates even that judgment.

58. At a general level, the voluntariness test has expanded in scope over time such that now it encompasses not just induced confessions, but also confessions obtained by reason of objectionable events or circumstances, such as persistent or incessant questioning, the frequency and duration of interviews, the nature, wording or intensity of the questions, the treatment of the prisoner whilst in custody, or through disregard of some personal infirmity which materially affects the rationality of that person's intellect and free will. The classic generalised statement in this regard is the judgment of Griffin J. in ***DPP v. Shaw*** at pp. 60-61. Although the appellant originally argued on these broader concepts of oppression and unfairness at both trial level and also in the Court of Appeal, his submission to this Court is much narrower and is solely focused on the inducement issue.

59. Sometimes in the literature and jurisprudence one will see references to "an inducement or threat" - indeed, even the point of appeal for this Court was so framed (para. 25, ***supra***). However, I am satisfied on balance that the latter is really a subset of the former, and that an inducement should be considered as an umbrella term encompassing both promises and threats; thus an inducement may take the form of either the carrot or the stick.

60. The case law illustrates that any distinction which may exist between either description is of no relevance to the general application of the test. In any event, as the facts of this case illustrate, it can sometimes be difficult to differentiate between threats and promises, or suggestions, questions, or offers (***Hoey,*** Walsh J. at p. 649), and in fact such expressions may sometimes be rolled up as one, or travel in tandem with each other. Therefore, in this judgment, unless otherwise made clear, I will use the word "inducement" as covering both threats and promises; in addition, I will treat the word as having the same meaning as the phrase "improper inducement", where that might be used.

Application of the *McCann* test:

61. In my view, it is of the first importance that a trial court should approach this issue in the sequential order which ***McCann*** ordains. The individual elements of the test should not be judicially collapsed or even inadvertently subconsciously merged.

62. The first step in the process, therefore, is to decide whether the words used, objectively viewed, are capable of amounting to a threat or promise. If not so capable, the inquiry is at its end. If, however, the contrary is the case, it is then necessary to

proceed to the second limb: has the accused subjectively understood them as such? Again, if this is not the situation, this ground of challenge cannot succeed. If the second limb is also satisfied, the trial judge should then proceed to the final question and determine the existence or absence of a causal link between the inducement and the confession so obtained. Where the accused has raised and sufficiently engaged with the issue, the DPP must satisfy the court that one or more of such elements do not exist: if she does, the objection made should be rejected; otherwise the court must hold that the confession procured was inducement-related.

63. There are, in my opinion, substantial reasons for this approach. First, it has the benefit of compelling the judge to look at each issue separately, and to consider within that issue the particular facet of the test which is in question. This approach should be repeated for each limb of the test so that a detailed and individual determination is made at each level. Such should have the immediate effect of sharply focusing the judge's attention on what evidence is available on that particular aspect and what findings or inferences might be open to him. It should help avoid the possibility of inadvertent movement between the strands and of the judge incorrectly assigning a particular piece of evidence to the wrong strand. In addition, it facilitates an increased consciousness of where the burden of proof is at all stages. Moreover, each characteristic of the test poses a different challenge and requires a different focus. It is notorious fact that where the correct question is addressed, it is far more likely that the correct answer and result will follow. All of these potential risks are avoidable and confusion can be averted if this sequential approach is adhered to. Further, I am satisfied that it is more analytical, objective and clinical in its approach, requirements which are entirely commensurate with the powerful impact which confessions are apt to have on convictions. If what I suggest is adhered to, one should see the application of the rule in its full force.

64. The second reason for this suggested approach is that it facilitates a much better understanding of the issues from the perspective of an appellate court. It is unsatisfactory for such a court to have to infer from a ruling what was in the judge's mind on some one or more particular aspect of the test. If no clear finding on each element is made, it makes review much more difficult. It is also more transparent and will leave the parties in no doubt as to the basis of the decision.

65. The third reason is significant for the overall administration of justice and it relates to the interrogation of suspects while in custody. In such context, it surely must be of importance to know whether or not in the court's view this particular type of suggestion or that particular line of questioning falls foul of the first aspect of the ***McCann*** test. A decision one way or the other must be of benefit not only to members of the force involved in interrogation and their superiors, but also to the public generally. Such knowledge may well influence future behaviour.

66. This case provides a good illustration as to why the approach which I advocate should be and should become the normal and routine application of the test. Contrast what the trial judge said with the Court of Appeal's view of what he said. In his ruling, the trial judge stated that "[t]he first thing to be said is that these remarks must be viewed in the overall context of all that had taken place" but went on to say that:-

> "Notwithstanding the context in which they occurred … even if these promptings could possibly amount to an inducement when objectively viewed they were not immediately acted on and their effect, whatever it may have been, was dissipated by the consultation Barry Doyle had with his solicitor and his solicitor's interaction with Detective Garda Hanley and Detective Sergeant Philips. This broke any possible causative link…"

67. The Court of Appeal, in its own analysis of the transcript, stated that "[s]ome of the Garda comments are colloquial, to say the least, but there are no threats uttered. Neither is any explicit promise or inducement offered. It follows that any inducement or threat must be an implied one." On the question of an implied inducement, the Court endorsed the trial judge's approach, saying that "[g]reat weight must … be given to his assessment that there was no inducement or threat", and continued that "… it is clear that the judge did not think that there was any inducement but went on to hold that even if there was something to satisfy the first leg of ***McCann/Rennie***, and that it operated on the appellant, it was dissipated by the intervention of the appellant's solicitor".

68. With the greatest of respect, it does not seem so readily apparent to me that the trial judge in fact found that, objectively viewed, there was no inducement. Nor was it that obvious to at least one other member of the Court, with MacMenamin J. being expressly of opinion that the trial judge in fact found that the words complained of constituted an actual inducement in the first place. Whilst I believe that this is the better view of what occurred, nonetheless there remains the possibility that no definitive finding was reached on this, or indeed on the second aspect of the test. If that be the case, the same is perhaps understandable in that the learned judge may have felt that his conclusion on dissipation rendered the preceding questions largely academic. For the reasons given, I believe that such an approach was incorrect.

69. In advocating this stepped assessment I am not suggesting that each prong can be rigidly compartmentalised or that aspects of the evidence may not overlap. An overly refined approach may unnecessarily complicate the rule in its application. However, once the separation above-described is adhered to, the trial court should have no undue difficulty in implementing this type of analysis.

Applying McCann to this case:
The Most Material Evidence:

70. What then is the evidential scaffolding that this Court can confidently utilise so as to analyse this aspect of the case? The most important pieces of evidence in my view, which incidentally are not materially dependent on seeing or observing the witnesses or on the advantage of being the trial judge, are as follows:-

> (i) that during the last interview conducted between 22:38 and 23:35 on 25th February, 2009 (Interview 10), Mr. Doyle was informed by the gardaí for the first time that Victoria Gunnery, whose relationship and motherhood was known to them, had been arrested and detained;
>
> (ii) that during interviews conducted on the day following, the 26th February, (Interviews 11-14), the gardaí as part of their questioning made the statements and uttered the remarks which are outlined at para. 27, above;
>
> (iii) that Interview 14 ended at 18:35 that day; the prisoner's solicitor arrived at 18:52 and departed the station at 19:17 and the next interview, namely Interview 15, commenced at 19:43;
>
> (iv) that during Mr. O'Donnell's 25 minutes at the station, the following occurred:-

• a ten minute consultation was first had with the client;

• the solicitor then went off and spoke to the gardaí;

• the solicitor then returned for a further ten minute consultation;

• the solicitor again spoke with the gardaí; and, finally,

• after a further 4 - 5 minute consultation, he left the station.

These periods must be approximate, given the arrival and departure time of the solicitor.

(v) the details of the exchange between solicitor and gardaí are noted in the ***aide memoire*** (para. 14, ***supra***), the accuracy of which was not seriously challenged at trial; and

(vi) that pretty much immediately after Interview 15 had commenced, Mr. Doyle admitted to being in Clonmore on the night in question and a short time thereafter, following a further three minute telephone conversation with his solicitor, he admitted to the murder of Mr. Geoghegan.

First Prong

71. I am satisfied that an appellate court can of itself assess the first prong of the ***McCann*** test and to that extent, whilst always remaining conscious of the views of the trial judge, does not have to be nearly as deferential as might appear from the judgment of the Court of Appeal. Therefore, I should think that in the ordinary course of things, an appellate court is well placed to make an "objective" determination, on the basis of the ordinary and natural meaning of the words used, of whether the comments made were or were not capable of amounting to an inducement.

72. The judgment in ***DPP v. Hoey*** [1987] I.R. 637 ("***Hoey***") offers support for this view, even if it was a non-jury trial. In that case the Special Criminal Court had held that a certain question put by the gardaí was "the occasion" but not "the cause" of the admission, and accordingly that the confession was voluntary; the Court of Criminal Appeal, although agreeing as to outcome, took the view that the remarks had caused, or, as the Court put it, "induced" the confession. However, it granted a Certificate under section 29 of the Courts of justice Act 1924 on the question of whether it necessarily followed from this view that the question put to the appellant also constituted an "improper" inducement. The Supreme Court unanimously held, in each of the three separate judgments delivered, that the comments made (para. 75, ***infra***) had indeed amounted to such an improper inducement and had directly led to the confession. What this aspect of ***Hoey*** therefore illustrates is that an appellate court may arrive at a different conclusion than the trial court on the question of inducement or no inducement.

73. If words, in context, are to have any understandable meaning, how can what the investigating officers said to Mr. Doyle during Interviews 11-14 (see para. 27, ***supra***) be interpreted as anything other than that the following was the situation:

(i) that Victoria Gunnery was in custody for "the same offence"

> arising out of "the same situation" as he was, which could only mean that following her arrest and detention she was being interrogated for the murder of Shane Geoghegan. Mr. Doyle had no way of knowing that this was false;
>
> (ii) that in reality the gardaí knew that she was innocent; that her detention and interrogation was because of him and that he was responsible for the hardship and distress which such detention was causing, and also for the fact that their child was being deprived of her mother; and
>
> (iii) that there would no longer be any reason to detain her if he should tell the truth: if he should confess, she would then be released.

This is very much an incomplete survey of what previously has been set out, but it fairly and accurately represents the remarks as made.

74. The first question, then, is whether the words used were capable of amounting to an inducement. There are a great many decisions on what might constitute a threat in this context; the most obvious example would be a threat to do violence to the accused or a close family member. Any suggested inducement falls to be determined according to its own facts and the particular circumstances of the case. Even viewed objectively, what is an inducement in one situation may not necessarily be so in another. I am therefore of the opinion that cases dealing with direct threats of violence, or threats to the accused generally, are of little value in this situation. Even as between relatively similar inducements, a minor charge in circumstance may be such as to strip a comparison of its worth. Nonetheless, it is still at least somewhat instructive to briefly refer to the following cases.

75. In ***Hoey***, the accused was being questioned in relation to firearms and ammunition found in the bedroom of the home where he lived with his mother, his sister and other relatives. In the course of this questioning, during which for the most part he remained "intransigently silent as to his responsibility" (Henchy J. at p. 652), the following was put to him by the interviewing garda: "It must be somebody in the house. Will I have to get some member to go up to your family and find out from them if anybody at 78 Rossmore Avenue is going to take responsibility for the property?" In the very next exchange, the accused made a statement in which he admitted responsibility for the guns and ammunition.

76. The manner in which each court viewed the statement and dealt with its consequences is set out above, and need not be further repeated. What is of interest in the present context is the unanimous opinion of the Supreme Court that the obvious implication of what was said was that if Mr. Hoey refused to take responsibility, then his family members would be further interrogated to identify who would, whereas if he did confess, they would be left undisturbed and not further interviewed. This, in the Court's view, clearly amounted to an improper inducement which was causatively linked to the resulting admission, and thus that admission could not be said to have been voluntary.

77. Another example with some similarity to the instant case is ***DPP v. Boylan*** [1991] 1 I.R. 477, where, although decided on other grounds, McCarthy J. referred to an "allegation … of threat and if it were true, a very grave threat, that of going to the applicant's home and making life unpleasant for his wife and family." Quite evidently, if sustained the same would have amounted to an inducement. Finally, ***The People (DPP) v. Pringle*** (1981) 2 Frewen 57 has also been mentioned, where the interviewing gardaí told the accused that a lady with whom he had a "close relationship" had been questioned about the alleged crimes and the accused's involvement in them, that she might be

charged as an accessory, that "the situation looked bad" for her, and that she was in "a very bad state" and had been physically sick in the Garda Station. The accused was told that if he gave an account of his movements on the night in question, "the whole matter of Eva [the lady] being, at worst, charged, or, at least, having to give evidence wouldn't arise." The resulting admissions were held to be inducement related: the Special Criminal Court "viewed … with concern the nature of the statements made … and [was] satisfied that the effect thereof could and consequently must be regarded as constituting a threat or an inducement to the accused to make a statement." This conclusion was not disturbed by the Court of Criminal Appeal, although it endorsed the trial court's finding that the threat was dissipated by subsequent events (see para. 94, ***infra***).

78. Whilst I refer to these cases as illustrating the type of statement that amounts to an inducement, it is important to reiterate that each case is an individual one and must be assessed as such. What is clear, however, is that once the yardstick is met, even a slight or trivial threat, promise, offer etc. may constitute an inducement.

79. As appears, both ***Hoey*** and ***Boylan***, and to a lesser extent ***Pringle***, largely involved a single inducement: the instant situation is more complicated given that the remarks complained of were made during the course of several interviews. It should be stated, however, that even where the underlying interview process is conducted over a protracted period, this does not necessarily mean that each remark should be regarded as individually objectionable. That is not the case. I therefore wish to make clear that what is under consideration as constituting a potential inducement is the trade-off between release and confession. It is thus only where some other statements feed into this that they too are relevant.

80. It is impossible for me to conclude otherwise than that when objectively viewed such statements, in the context in which they were made, consisted of an offer or promise that in return for a confession, Victoria Gunnery would be released. It may be that one could also see what was said as a form of a threat, in that her detention would continue in the absence of a confession. Either way, I so conclude at the very first level of principle. If what was said in ***Hoey*** was considered unanimously by this Court to be an inducement, it must follow, in my view, that the impugned remarks in this case must likewise be so regarded.

Second Prong:

81. The murder of Shane Geoghegan was a horrendous act of cold-blooded criminality. There was a massive public outcry at its happening and the resulting garda investigation was intense. He was, as I have said previously, an utterly innocent victim. Any person found guilty of any murder would of course get a life sentence, but in the circumstances which I have described such a verdict could possibly have an added influence on the actual incarceration period of that sentence. All of these matters were either well known or most obvious. So why did Mr. Barry Doyle try and cut a deal? In so doing at a time when his interrogation had otherwise really produced nothing of value, why was he prepared to advance his own conviction, with the inevitable consequences of so doing? The ***aide memoire*** is strikingly informative, and, in my view, decisive on this point.

82. Before adverting to its terms, however, it is of some significance to note the exchange which Mr. Doyle was involved in towards the end of Interview 14, which clearly showed that he was concerned for the welfare of Ms. Gunnery and their child. As an example, he said:-

"I am just thinking about the baby …"

"Can I ring Vicky?"

"Was the door [of Vicky's home] put in?"

This I quote as an indication of Mr. Doyle's mindset just over an hour before the admission of murder was made. Therefore, whatever impact this and the preceding interviews (Interviews 11-13) may have had on Mr. Doyle occurred prior to the solicitor's arrival at the station, which is timed at 18:52. This critical fact seems to have been lost sight of with the concentration being almost exclusively on Interview 15. If the inducement theory is to hold, however, the earlier questioning is inextricably linked to the latter.

83. It is clear beyond doubt from the ***aide memoire*** that Mr. Doyle gave instructions to his solicitor as to what he hoped to achieve. In simple terms: "I will confess but I want Victoria Gunnery released first." Disregarding the timing point for a moment, one cannot in my view better an understanding of why the accused embarked upon this approach other than his belief that by confessing, Ms. Gunnery would in fact be released. It would be a major read down of the established circumstances to reject that what he perceived as being required to secure Ms. Gunnery's release was not uppermost in his mind when giving the instructions which he did to his solicitor. Although the trial judge and the Court of Appeal felt that he sought this deal because of appeals to his humanity and better nature, he was described in the same breath as a strong and robust person and no stranger to risk: he slept with a bullet proof vest. In any event, it is unclear how these matters could have affected the appellant's subjective understanding of what was said. This suggested explanation, in my view, is not plausible, and arguably not relevant on this point. Accordingly, as there is no other reason to be found in the evidence as to why he sought this deal, it follows that the impugned statements were understood by him as the making of an offer that in return for a confession, the release of Ms. Gunnery would occur. Therefore I am satisfied that strand No. 2 of ***McCann*** has been met.

84. In so holding, I am not in any way standing down the respect which an appellate court should give to the role of the trier of primary fact. Evidently, there may be circumstances where a transcript of comments made in the course of questioning does not fully convey the atmosphere of the interrogation room or the tenor of the questions being put; it is certainly conceivable that a particular tone or demeanour could turn an ostensibly innocent comment into something more sinister, or perhaps negate that which appears to be a threat but in reality was quite benign, but such circumstances do not overshadow the evidence upon which this conclusion is reached. Accordingly, I am satisfied at this point of the analysis, first, that certain of the remarks made by the investigating officers objectively amounted to threats or promises, and, secondly, that they were subjectively understood as such by the appellant. This then in turn leads to the third prong of the ***McCann*** test.

Third Prong:

85. This aspect of ***McCann*** centres on whether the confession was in fact the result of the inducement. Critical to this issue of causation is the question of dissipation - whether the effect of any inducement was broken or had worn off by the time the confession was made in Interview 15, which commenced at 19:43 on the 26th February, 2009. This, being the first admission point of guilt, is the critical juncture at which this issue must be judged. In examining this issue it is important to recall what was asked of this Court in the Determination granting leave on Issue No. 1, that being "…whether or not there was any evidence on which it could have been determined that the effect of the said threats or inducements (if any) had 'dissipated' or 'worn off' by the time of the alleged admissions". The focus of this aspect, therefore, is on an examination of the relevant evidence.

86. In the view of the trial judge, the Court of Appeal, and the majority of this Court, the interactions between the appellant and his solicitor, and his solicitor and the gardaí, between Interviews 14 and 15 are the critical factors which ground the conclusion that if there was an inducement, it had dissipated prior to the first admission, and its effects had ceased. It is said that this is evidenced by the transaction recorded in the ***aide memoire***. Inherent in this approach is the view that whatever ***quid pro quo***, so to speak, that Mr. Doyle may have thought existed, was firmly off the table following the gardaí's rejection of the conditional offer made to them on his behalf.

87. In support of this conclusion my colleagues above referred to have noted that the learned trial judge found, though not in his discussion on dissipation but rather when dealing with oppression, that the appellant had first begun to engage with the gardaí as a result of appeals to his humanity. He held that this engagement was built on by the investigating members and that ultimately the confessions could be traced to these appeals. To this, which it supported, the Court of Appeal added in his 'better nature'.

88. It must be recalled that neither Mr. O'Donnell nor the accused gave evidence. Those who did, by that fact alone, could not have nuanced what the documentation shows. Whilst acknowledging that the trial judge viewed the recordings and can thus be said to have seen the interaction between the accused and the gardaí during interviews, such an advantage did not extend to the interactions which are relied upon to justify the dissipation conclusion. No one has a live picture of the solicitor's engagement with the gardaí or what occurred between solicitor and client. What there is, is the ***aide memoire*** referable to the former, which also contains what Mr. O'Donnell told the gardaí of his conversation with his client. The trial judge was not, therefore, in any real sense in a better position than this Court to make a determination in respect of these critical intervening matters.

89. Against this background, I am of the opinion that the ***aide memoire*** admits of an entirely different conclusion than what my colleagues have held. In the knowledge of what transpired during Interview 14, including the detainee's statement that "I'll answer your questions after I speak to my solicitor", and working on the basis of the memorandum, the following appears to have been the situation. Mr. O'Donnell arrived at the station and consulted with Mr. Doyle. The solicitor then asked, one can only presume at the behest of the appellant, to speak to the garda officers and communicated the proposed trade: an admission in exchange for Ms Gunnery's prior release. As stated above, the fact of this exchange being floated at all is strongly suggestive of the fact that at the end of Interview 14, the appellant was under the impression that an inducement had been offered and that a ***quid pro quo*** could secure his ex-girlfriend's immediate release. Mr. O'Donnell was told that this would not happen, that only the truth would suffice, and that once that happened there would be no reason to detain Ms. Gunnery any longer. He told the members that the appellant would answer one question only, and was again told that this would not suffice. Mr. O'Donnell was then told that the appellant would have to admit to what he had done in an interview and that Ms. Gunnery would not be released before any such interview. The solicitor then returned to Barry Doyle and one can fairly assume communicated what was said to him.

90. Mr. O'Donnell then returned to the investigating gardaí and reiterated that Mr. Doyle would not say anything prior to Ms. Gunnery being released. He was told that this was an inducement and that there was no way it would happen as it would not be admissible. Mr. O'Donnell responded that he had instructed Mr. Doyle to say nothing and that he would not admit to the murder. Mr. O'Donnell was then told that "Barry Doyle had to tell the truth about what happened", and he replied that the gardaí had a bit more work to do. Following another short consultation, Mr. O'Donnell left the station. These are the established facts and are not in any way dependent on oral evidence, or on an individual

witness assessment.

91. It is not clear how anything in this transaction necessarily leads to the view that Mr. Doyle must have known that the ***quid pro quo*** was no longer an option. The content of the ***aide memoire*** does not in any way suggest that the gardaí sought to retract or otherwise to withdraw the previous comments, observations or suggestions made during Interviews 10-14. In fact the ***aide memoire*** reaffirms, in express terms, the continuing position of the gardaí; may I quote the following from it:-

> "I [interviewing garda] stated that there was no way this would happen, that he would have to tell the truth about what happened, and once he told the truth about what happened we would have no reason to detain Victoria Gunnery any further. … I said that Barry Doyle had to admit what he had done in an interview and that his girlfriend would not be released before any interview."

In other words, Ms. Gunnery would not be released before any confession was made, and the position previously stated remained as outlined. It would have been quite simple for the gardaí to have entirely disassociated Ms. Gunnery's release from the appellant's continuing detention and questioning. A statement to the effect that her ongoing detention was a matter entirely distinct and separate from his position, and that what he might say would have no influence on same, would have accomplished this. Whilst several opportunities arose to vouch such a statement, it is striking that the gardaí chose not to do so.

92. The interaction above mentioned leaves entirely open the possibility that the appellant believed that Ms. Gunnery's release was dependent upon a confession. Simply because the gardaí rejected the timing sequence, but instead rightly insisted that he tell the whole truth, does not negate the distinct possibility that he may well have believed that Ms. Gunnery would be detained so long as he did not confess. Once this possibility realistically exists, it is immaterial that a contrary possibility may also be found, as in all such situations the inference most favourable to the presumption of innocence must be given to the accused. Without more, therefore, it is difficult to say beyond a reasonable doubt that the underlying inducement was not still operative.

93. Indeed, what transpired next could well be read to suggest that the inducement did produce the confession. Presuming the ***aide memoire*** accurately reflects what Mr. O'Donnell had been telling the appellant, Mr. Doyle had been advised by his solicitor, very shortly before the confession, to say nothing; in other words, to exercise his right to silence. Nonetheless, at the very outset of Interview 15, he delivered up to his interviewers for the first time a valuable piece of information: he acknowledged his presence at Clonmore on the night of the murder. Then, following a brief telephone consultation, his admitted his responsibility for the murder, and went on to give a detailed description thereof. If the appellant had not understood there still to be an inducement, or if the inducement had dissipated, it must be asked, in the face of advice to remain silent, why would he have capitulated so immediately and so fully as he did at the outset of Interview 15? This is all the more curious given the serious nature of the crime, the public backlash at the killing of an innocent man, the likely impact which a confession would have on his trial, and the consequences for the appellant if convicted.

94. The only alternative suggestion which is being offered to explain why Mr. Doyle spoke when previously he had been silent is the gardaí's appeals to his humanity, morality and conscience, an explanation also advanced under the second limb of the ***McCann*** test (see para. 83, ***supra***). The trial judge and the Court of Appeal accepted this as the true cause of the appellant's confession, although such perhaps jars slightly with the trial judge's description of the appellant as a robust person and no stranger to risk. This reasoning in my view is simply not plausible; more significant, however, is the fact that subject to the

paragraph following, there is no evidence whatsoever to sustain such a finding. Such is in sharp contrast to the ***Pringle*** case, where the accused told the gardaí, before any admissions were made, that he knew that they could not legally do what they had threatened (para. 77, ***supra***). Furthermore, in his direct evidence he very much repeated the same point to the court. It is therefore not difficult to see how dissipation was evidentially established in that case.

95. The handing over of the rosary beads is pointed to as an evidential manifestation of the "morality/humanity" theory of the confession. The reason why this act was not captured by the recording is that such equipment had been turned off as Interview 15 had ended. It is therefore immediately obvious that this occurred after the confession had been made. Such an act is not in any way inconsistent with the inducement theory; having confessed to this awful murder, it is no surprise that a person would show remorse or contrition. The fact that they do so after confession is scarcely suggestive that it was their own conscience or innate humanity which led them to break their silence in the first instance. It would be quite a different matter if that event had occurred prior to the confession. It did not, however.

96. I also reject any contention that dissipation can be inferred from the fact that the appellant did not immediately confess following one or other of the inducing statements. There may be circumstances where a temporal interval between inducement and confession is, of itself, a basis to find that the former did not cause the latter. However, I do not think that this is such a case.

97. The alleged inducements were put to the appellant in Interviews 11 (09:03 - 11:12), 12 (12:22 - 13:43), 13 (15:02 - 16:13) and 14 (17:32 - 18:35). The confession was made during Interview 15, held from 19:43 to 21:05, and evidently was made close to the outset of that session. Given the nature of detention in a Garda Station, with its attendant pressures and inherent coercive force, I do not think that the passage of time from a continuous series of inducements made in the morning, afternoon and early evening of the 26th February, 2009, could of itself sustain a dissipation finding by approximately 20:00 that evening; nor, as outlined above, do I believe that it was cured by his access to legal advice. Indeed, as the above analysis shows, the interactions referred to in the ***aide memoire*** credibly support an interpretation that the inducements so made were reaffirmed immediately prior to Interview 15, during Mr. O'Donnell's visit to the station. I would therefore not infer dissipation from any temporal gap between inducement and confession.

98. Nor am I convinced that the fact of the appellant's confession being somewhat controlled, in that he spoke only of his own involvement and did not implicate others, is inconsistent with the argument that the confession was involuntary. The mere fact that a person does not blab freely and reveal all they know about a crime is, without more, wholly irrelevant on the causation point; it is entirely plausible that a person in the appellant's position might confess so as to avoid the punishment or gain the advantage held out to them by their interrogator, whilst at the same time being mindful of the perceived consequences of a fuller confession, not only for himself but also for another; in this instance, for example, for Ms. Gunnery upon her release.

99. Finally, there is perhaps more to be made of the fact that he did not inquire into whether Ms. Gunnery had in fact been released immediately following his confession, and if that had continued to be the situation it may indeed have been a weighty factor upon which appropriate inferences could be drawn. But that was not the situation. During Interview 16, which commenced at 22:09 that evening, the appellant stated "If I was thinking about myself, I wouldn't have told you that I did." He later asked the interviewing gardaí "Is Vicky still up there? [that is, in custody] Is she?", and either having obtained no response or one considered inadequate, he continued "I am saying

nothing if Vicky's still up there". Further relevant interventions on his part can be seen in later and subsequent interviews. Therefore, in my view, the fact that it was some two hours after the confession was made when he first inquired about Ms. Gunnery does not hold much significance on this particular point.

100. On this review, I must conclude that the DPP has not discharged the onus of proving beyond a reasonable doubt that the confessions were not procured by an inducement, be it offer or threat. Accordingly, as such were not made voluntarily, they were inadmissible and should have been ruled out. In these circumstances, whilst it remains a matter for the DPP, I am satisfied that this is an appropriate case for a retrial to take place.

101. Before leaving this first question, could I refer to para. 18 of the judgment of O'Donnell J., in which he criticises my assessment of the issues arising. His reading of this aspect of my judgment leads him to conclude that I have entirely abandoned ***Hay v. O'Grady*** [1992] 1 I.R. 210 and that, in effect, I have stood down the distinction between the role of the trial court and that of an appellate court. With the greatest of respect, this is a mischaracterisation of my script on this issue.

102. First, on each and every aspect of the inducement issue I have addressed this point: see paras. 71, 83, 84, 88 and 94. Secondly, the evidence which I have looked at on this matter is identified at para. 70, ***supra***, and is set out under six different headings, not one aspect of which is referable, in any true sense, to the demeanour of witnesses, memory recall or recollection, nor does the question of credibility come into play. All of the critical evidence given was, in essence, documentary based, the meaning of which does not depend on either being a trial judge or an appellate judge.

103. Furthermore, Prong 1 of ***McCann*** calls for an objective assessment. Prong 2, in the absence of any evidence from Mr. Doyle or perhaps from his solicitor, becomes an inferential issue. In any event, I would be keen to see where the trial judge made any finding of fact, either in a primary sense or at all, on either of those prongs. In fact I believe that the better view is that no findings were made by him on either of these issues.

104. With regard to the third limb, namely, dissipation, the most critical evidence was what occurred during Interviews 11-14, and Interview 15, as well as the ***aide memoire***. True, the trial judge felt that the confession resulted from pleas to Mr. Doyle's better nature and humanity; however, there is simply no evidence upon which a finding of primary fact could be made to this end, so the view of the learned judge could not rest on such basis. Notwithstanding this, it might be said that by viewing the tapes he had an advantage over this Court in finding as he did: even so, such conclusion leaves standing, side by side with it, the possibility which I have articulated above. If such is at least equally sustainable, as I am satisfied that it is, then the appellant is entitled to the benefit of it as I have identified in para. 92, ***supra.***

105. In these circumstances I am satisfied that I have remained faithful to ***Hay v. O'Grady***.

106. Finally, on this aspect of the case, I have not lost sight of this appalling murder. However, I am reminded of what Henchy J. said in ***Hoey*** at p. 651:-

> "The underlying principle would appear to be that, while it is a matter of public policy that those who have committed crimes should be apprehended, tried and convicted, the requirements of basic fairness, which necessarily underlie the administration of justice, demand that no accused person shall be convicted as a result of an incriminating statement made by him, unless the

> prosecution show beyond a reasonable doubt that the statement was voluntary, in the sense of representing the accused's own free will."

Issue 2:
Whether the appellant was entitled to have a solicitor present during interrogation by the gardaí

107. The second issue which arises on this appeal also relates to the interviews of the appellant while in Bruff Garda Station. The question posed for consideration by the Court was:-

> "Whether or not the applicant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present, prior to and during the 15th interview with the Garda Síochána, during which admissions were alleged to have been made. This raises the question of whether the right to have a solicitor present during questioning is a matter of right of the detained person, or a matter of concession by the Garda Síochána."

108. In essence, the appellant seeks to assert a constitutional entitlement to have a solicitor present during questioning by An Garda Síochána. It is accepted that the appellant did not ask for a solicitor to be present in the interview room and that any such request would have been rejected, as the prevailing position at the relevant time was that there was no right to have a solicitor present during interview.

The Trial Judge's Ruling:

109. The issue of whether there is an entitlement to the presence of a solicitor during police questioning does not appear from the trial judge's ruling on the admissibility of the confessions to have had much prominence in the court of trial, although the appellant did raise it. The trial judge held that the appellant had adequate access to legal advice. He noted that the appellant had two consultations with his solicitor while in the Garda Station prior to making the admissions, and that he was represented by his solicitor in court when the application was made to extend his detention. Sheehan J. did not consider the length of either consultation to be relevant. He also held that the gardaí were entitled to continue interviewing the applicant after he had complained that a short phone call with his solicitor was insufficient and when his solicitor was expected to arrive at the station within the hour. Thus there was no breach of Mr. Doyle's constitutional right to legal advice.

The Judgment of the Court of Appeal:

110. Equally, the Court of Appeal did not directly consider this issue in the same manner as this Court is mandated to do by virtue of the question upon which leave was granted. In fact it covered several matters which do not arise from that question. In any event, it considered the breach of the right of access to a solicitor in the context of oppression and fundamental fairness (***DPP v. Shaw***). It held that Mr. Doyle had access to his solicitor for as much time and on as many occasions as he or his solicitor requested. It thus found that there was no oppression.

111. Furthermore, the Court noted that the appellant's solicitor did not ask to be present during garda questioning. The Court acknowledged, however, that any such request would have been refused and stated that it was not the understanding at the time that a lawyer was entitled to be present. The Court thus held that this "does not make the detention of the appellant retrospectively unconstitutional on the basis of a hypothetical

refusal of a request that was not made." It found ***DPP v. Gormley; DPP v. White*** [2014] 2 I.R. 591 ("***Gormley and White***") to be of little relevance and considered the quoted European Court of Human Rights ("ECtHR") jurisprudence to be wholly distinguishable from the circumstances of the present case. The Court further held that it was by no means clear whether the presence of a solicitor would have been of any great assistance to the appellant as the same questions would still have been put to him. The right to silence does not imply a right not to be asked questions.

112. Overall the Court considered the key point to be the fact that the interviews were video recorded and most were viewed by the trial judge to ascertain what went on during the course of such interrogation. The Custody Regulations were complied with and there was access to a solicitor. Thus the Court of Appeal concluded that the appellant had not established that the trial judge was in error in the conclusions he reached, or that he had misapplied the law.

Submissions of the Appellant:

113. The appellant submits that his access to a solicitor, throughout his period of custody but specifically prior to and during the critical Interview 15, was so restricted and perfunctory that it did not constitute "reasonable access". At the heart of this requirement for reasonable access is the protection of the right not to self-incriminate. Access must be meaningful and here the appellant's solicitor was not given sufficient information to protect his client's rights. The only detail his solicitor was told regarding the allegations was the nature of the crime. It is further submitted that prior to his request for access on the 26th February, 2009, the appellant had had only 13 minutes of access to his solicitor, of which only nine were in person; this in the context of a 60-hour detention with 20 hours of interviews. The appellant also points out that his request to postpone the continuation of Interview 14 until he had had a proper consultation with his solicitor was ignored, and that further inducements, threats and pressure were applied over the remaining hour of that interview. It is submitted that such access as the appellant had with his solicitor was insufficient to offset the inequality between him and the experienced garda officers who interrogated him, and that the confession evidence should be excluded. This failure to ensure reasonable access resulted in a failure to ensure a trial in due course of law.

114. It is also submitted that Interview 14 was unlawful and constitutionally forbidden, and that the appellant's position was irretrievably prejudiced following this interview. Such prejudice was not cured by the subsequent consultation with his lawyer. The appellant stated "I'll answer your questions after I speak to my solicitor" during that interview, indicating that he had decided by that point to incriminate himself and to use his solicitor to broker the agreement.

115. In a related but in some ways distinct argument, and one which more directly addresses the point on which leave to appeal was granted, the appellant also contends that he had a right to have his solicitor present throughout the garda interviews. His underlying contention in this regard is that the presence of a solicitor in the interview room would have prevented the gardaí from pursuing certain lines of questioning which, it is suggested, reduced the appellant's capacity to withstand pressure. He thus says that the Court should depart from its previous judgment in ***Lavery v. Member in Charge, Carrickmacross GS*** [1999] 2 IR 390 ("***Lavery***"). Furthermore, since the decision in ***Gormley and White***, the Department of Justice has communicated with the Law Society indicating that defence solicitors may be present at interviews with suspects, but the appellant submits that this should be a constitutional right rather than a concession. The undisputed policy of the gardaí at the relevant time was to refuse to allow solicitors to be present during interrogation and thus the Court of Appeal was in error in considering that any refusal of access during interview was "hypothetical." The right should not be

dependent on a request being made and should be considered to have been denied unless the suspect was informed of his entitlement.

116. The appellant acknowledges that ***Gormley and White*** only establishes an entitlement to reasonable access to legal advice prior to interrogation, but argues that the entitlement to reasonable access also encompasses an entitlement to legal advice ***during*** garda interviews. It is submitted that many remarks made during the interview, ***inter alia*** concerning the appellant's ex-girlfriend and his children, would not have been permitted had a solicitor been present, and that such comments were intended only to increase the psychological pressure on the appellant to confess. Thus it is submitted that the absence of a lawyer in the room gave the interviewers a free hand to raise matters of no relevance to the investigation in order to undermine the appellant's right to silence. The appellant refers at length to ***Miranda v. Arizona*** 384 U.S. 436 (1966) ("***Miranda***"), which established the right to have counsel present during questioning in the US. It is submitted that many of the deceptive methods and stratagems of interrogation identified in ***Miranda*** were utilised against the appellant. Thus it is submitted that the exclusion of a solicitor from the interview process led to inequality between the parties, created inappropriate pressures, and resulted in manifest unfairness. The absence of a lawyer in the room meant a failure to redress the imbalance which existed between the appellant and his interviewers.

117. The appellant recognises that the ECtHR has not yet held that suspects in custody have an invariable right to the presence of a lawyer during questioning. However, he states that there are significant principles of general application in ***Magee v. UK*** (2001) 31 EHRR 35 ("***McGee***"), where it was held that denial of access to a lawyer for long periods is incompatible with the rights of the accused under Article 6. The appellant also refers at length to ***Salduz v. Turkey*** (2009) 49 EHRR 19 (Application no. 36391/02, judgment of the 27th November, 2008) ("***Salduz***"), another case where an admission was made without any access to a lawyer. The ECtHR in that case held that "access to a lawyer should be provided as from the first interrogation of a suspect by the police." This case was considered by the UK Supreme Court in ***Cadder v. HM Advocate*** [2010] UKSC 43 ("***Cadder***"), which noted that the ECtHR is determined to tighten up the approach to duress or pressure of any kind being applied to a suspect. The UK Supreme Court also noted that the ECtHR understands the privilege against self-incrimination to be primarily concerned with respecting a suspect's will to remain silent in the face of questioning.

Submissions of the Respondent:

118. The DPP submits that the appellant had substantial and unrestricted access to legal advice. It is pointed out that the appellant had repeated access to his solicitor when and for as long as he liked. It is acknowledged that the appellant requested more time during Interview 14 following a two minute telephone call, and that the interview proceeded regardless, but it is submitted that he did not make any admissions during this time and that he was given a 20 minute consultation before Interview 15. The respondent also submits that the question of having a solicitor present in interview does not arise. Reasonableness of access to a solicitor only arises where access is denied, restricted or limited in some way; where a suspect has had all the access he sought, the question does not arise at all. No complaint regarding access to a solicitor was made at any stage over the course of the investigation. ***Gormley and White*** is distinguished on the basis that in that case important investigative steps were taken between the request for access and the granting of access. As the appellant made no request for a lawyer to attend during questioning, and had access to a lawyer immediately before and during the relevant interview, it is submitted that the question of whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of the case - nor did it arise in ***Gormley and White***.

119. The respondent also submits that as a fundamental matter of basic fairness a solicitor was not required to be present during Interview 15. The fact that an accused is entitled to legal advice and representation throughout trial does not necessarily lead to a requirement for the presence of a lawyer in interview, as not all rights available at trial apply before trial. The appellant has submitted that the presence of a lawyer would have led to the interviews being conducted differently, but the appellant has in fact never complained about the conduct of the interviews, which were held by the trial judge to be professional and courteous. It is also submitted that the appellant had the opportunity to consult with his solicitor immediately prior to the confession and that the presence of the solicitor would have added nothing.

120. Furthermore, the learned trial judge was perfectly placed to assess the conduct of the interviews and to assess whether the appellant was in control throughout. The respondent submits that it is clear that the appellant's solicitor was fully apprised of the possibility of a confession and it appears that he advised the appellant not to confess. It is also pointed out that the appellant sought to use his solicitor to broker an unlawful deal with the gardaí. It is submitted that, in all the circumstances, no case has been made out that establishes any unfairness to the appellant from the absence of a solicitor at the fifteenth interview, or indeed at any other interview. The DPP additionally submits that even if the right to have a lawyer present during interview exists as a matter of Irish law, the appellant by his conduct waived that right or failed to invoke that right.

121. Furthermore, it is submitted that the authorities cited by the appellant do not support the extension of the right to legal advice in the manner contended by the appellant. The respondent refers to the ***Salduz*** case and submits that it requires only that a suspect should have legal advice, but not that a lawyer must be present during questioning. The respondent refers also to the ***Lavery*** decision, which is consistent with this position. The respondent submits that the ***Cadder*** decision also requires only access to a lawyer before questioning. Finally, in relation to ***Miranda***, it is submitted that the legal, factual and cultural context of that decision bear no relation to the regulation of custodial interrogation in modern Ireland. That judgment was concerned with the dangers of incommunicado interrogation, a consideration which simply does not apply in this jurisdiction. Finally, it is submitted that even if the confession was obtained in circumstances of unconstitutionality, the same was not conscious and deliberate but derived from inadvertence or subsequent legal developments; the confession should thus have been admitted in evidence in accordance with ***DPP v. J.C*** [2015] IESC 31.

Decision:

122. In Mr. Doyle's submission on this issue he makes two arguments in addressing both aspects of the question set out at para. 107, ***supra***: first, he says that he did not have reasonable access in accordance with the law as currently prescribed; and, secondly, as a related but distinct point, he asserts a right to have had a solicitor present with him during the interview process. His first complaint is based largely on a number of requests, which he made during Interview 14, to the effect that the previous contact he had had with his solicitor was inadequate and that he wished to see him again. Despite such requests, the interview continued; this, it must be said, was a less than desirable situation.

123. In a series of cases from ***The People (DPP) v. Madden*** [1977] I.R. 336 to ***The People (DPP) v. Creed*** [2009] IECCA 95, and indeed continuing to date, it was established that a person detained in custody for questioning has a right of reasonable access to a lawyer. The early case law was uncertain as to the precise status of such right and for the most part was preoccupied with what was "reasonable" in the circumstances, and whether or not a request for such access had to be made. The former issue was

conclusively determined in ***People (DPP) v. Healy*** [1990] 2 I.R. 73, with the majority of the Supreme Court finding that "the right of access to a lawyer must be deemed to be constitutional in its origin, and that to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give" (Finlay C.J., p. 81). Accordingly, its setting is undeniably within the constitutional framework.

124. Individual circumstances were considered in cases arising during the period which followed ***Healy***, which gave the courts an opportunity to tease out the scope and extent of such right, as well as the consequences of its breach or violation. Save for the latter point, it is unnecessary to further dwell on the case law, it being sufficient to simply remain conscious of this background. For present purposes, therefore, the Irish authority most decisively in play on the key point arising is the decision in ***DPP v. Gormley; DPP v. White*** [2014] 2 I.R. 591 ("***Gormley and White***").

125. Before looking at that case, however, I should say that I have found nothing to support Mr. Doyle's first line of argument and I am satisfied that the evidence falls significantly short of establishing any breach of the reasonable access right, as previously understood in the case law

126. In any event, the major debate was not on the first strand of the appellant's argument. The real point at issue, as outlined in the certified question, is whether, where reasonable access to advice has been afforded, a solicitor's attendance at the interview process is nevertheless one as of right, or is by concession. Whilst the existing domestic law is relevant as a significant footprint in this context, it does not and has not decided this particular issue. Moreover, much of the ECHR jurisprudence, including ***Salduz***, has as its backdrop the failure or refusal to provide or allow ***any*** access before interrogation leads to admissions. That is not the background to this case, where such advice was available and availed of.

127. Notwithstanding such, however, this ground of appeal raises squarely an issue which has been looming since at least the decision in ***Gormley and White***, if not indeed for significantly longer than that. Both judgments in that case adverted to the likelihood of this point coming before the Court before long. First, the brief facts of that case.

128. Mr. Gormley was convicted of attempted rape and received a sentence of six years imprisonment with five years post-release supervision. The essential evidence which secured his conviction was that contained in an admission which he had made whilst in custody following arrest and detention. Prior to any police interview he had requested access to a nominated solicitor, whom the gardaí attempted to contact. It was a Sunday, however, and it took some time. Whilst there was no question of a culpable delay, nonetheless the interrogation commenced prior to the solicitor's arrival and the inculpatory statement was obtained prior to any consultation between solicitor and client. He sought to have the confession excluded at trial and on appeal, but was unsuccessful in that regard.

129. The factual situation of Mr. White was somewhat different. Like Mr. Gormley, he had requested access to his solicitor, who some thirty minutes after the initial contact telephoned back confirming that she was coming "immediately". Before her arrival, however, a blood sample, a buccal swab from the mouth and a hair sample were taken from Mr. White under the Criminal Justice (Forensic Evidence) Act 1990. Mr. White had no objection to this occurring. However, at trial and again on appeal he unsuccessfully sought to have such evidence excluded on the basis that it had been obtained prior to any consultation with his solicitor.

130. The commonality between both cases, which travelled in tandem to this Court, was

the argument that before any interrogation commences or any forensic samples are taken, it is a constitutional right of a suspect in custody to have the benefit of legal advice.

131. In the Court's judgment, delivered by Clarke J., a distinction was made between the nature of the evidence obtained in both cases. It was held that access to legal advice was classically designed to deal with a situation whereby an admission or confession would be obtained, which may not have been the case if such access had been provided; however, the situation in respect of forensic material was different, in that the results of any analytical sample could not differ regardless of whether legal advice was or was not received. Accordingly, the submission asserted on behalf of Mr. Gormley was accepted; that made on behalf of Mr. White was rejected. Other than outlining this conclusion, it is unnecessary to explore more fully the entirety of the judgments as delivered, it being sufficient to concentrate on what both Hardiman J. and Clarke J. had to say touching on the issue presently under consideration.

132. In his judgment, Clarke J. said:-

> "75 The first real question of principle [is] whether the entitlement to a trial in due course of law, guaranteed by Article 38.1 of Bunreacht na hÉireann, encompasses an entitlement to have access to legal advice prior to the conduct of any interrogation of a suspect arrested and/or prior to the taking of any forensic samples from such a suspect. If that proposition is accepted at the level of general principle then many more questions of detail would, of course, arise. Questions such as … the extent to which a lawyer is entitled to be present during the questioning … and, doubtless, many others would arise. By no means do all of those issues arise on the facts of these cases. …
> 82 However, I am persuaded that the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect represents an important juncture in any potential criminal process. Thereafter the suspect is no longer someone who is simply being investigated by the gathering of whatever evidence might be available … It seems to me that once the power of the State has been exercised against the suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage. It seems to me to follow that the requirement that persons only be tried in due course of law, therefore, requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in ***The State (Healy) v. Donoghue*** [1976] I.R. 325 applies from the time of arrest of a suspect … However, it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the European Court of Human Rights and by the Supreme Court of the United States.
> 93 … [T]he question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present." (Paragraph numbers as per the Irish Reports)

Likewise, Hardiman J., in his concurring judgment, noted that:

> "5 For many years now judicial and legal authorities have pointed to the likelihood that our system's option for the very widespread questioning of suspects who are held in custody for that purpose, was very likely to attract a right on the part of such suspects, not merely to be advised by lawyers before interrogation, but to have lawyers present at the interrogation, and enabled to intervene where appropriate. This has now come to pass in countries with similar judicial systems: see the developments surveyed by Mr. Justice Clarke, and also under the European Convention on Human Rights ("ECHR"), to which Ireland is a signatory and which it has incorporated to a limited extent in Irish law by the European Convention on Human Rights Act 2003.
>
> It is notable, however, that Mr. Gormley has not asserted that right to its full extent but has asserted only a right to have a lawyer to advise him, in custody, before the questioning starts. Manifestly, however, it will not be long before some person or other asserts a right to legal advice in custody on a broader basis. I say this in explicit terms in order that this may be considered by those whose duty it is to take account of potential developments."

133. Given the terms on which leave was granted to appeal to this Court, it would appear that this is the very case anticipated by the learned judges, at least in respect of whether there is a right to have a solicitor present during garda questioning. The DPP has argued, however, that the question of having a solicitor present in interview does not in fact arise on the facts of this case: this submission must be rejected for the several reasons set out in this part of the judgment dealing with the second issue.

Recent Domestic Developments:

134. At the outset I should mention some practical developments which have occurred in the interim and which, although not decisive from a legal and constitutional perspective, are nonetheless of high significance. In May, 2014, almost certainly in response to the ***Gormley and White*** judgment in March of that year, and perhaps in anticipation of the likely outcome of whatever case squarely raised the issue now under consideration, the DPP issued a direction to the Commissioner of An Garda Síochána to the effect that a request by a suspect detained in a Garda Station to have a solicitor present during interview should be acceded to. Following on from this, the Department of Justice issued a circular to the Law Society on the role of solicitors in Garda Stations, which was said to include, ***inter alia***, presence and participation during questioning.

135. In recognition of these developments, An Garda Síochána published, in April, 2015, its ***Code of Practice on Access to a Solicitor by Persons in Garda Custody***. It is striking to note the following from p. 8 of that document: "[i]n light of the judgment in ***Gormley*** it is necessary to allow a solicitor to be present at interview if requested by the suspect. Furthermore, the Director of Public Prosecutions has advised that all suspects detained in Garda stations for questioning be advised, in advance of any questioning, that they may request a solicitor to be present at interview." This passage introduces section 10 of the informal code, which provides for the presence of a solicitor during interviews. This section sets out such details as the seating arrangements of the solicitor, the role of solicitors during interviews and the circumstances in which a solicitor may be removed from an interview. In December, 2015, the Law Society issued its ***Guidance for Solicitors Providing Legal Services in Garda Stations***. In addition to setting out the

Society's view on the role of solicitors during interview, it also offers its perspective at pp. 13-15 on many of the other matters in the Garda ***Code of Practice***. Not surprisingly, given the competing interests at issue, the two guides take divergent views and approaches on certain issues. Whilst a common approach must still be finalised, nonetheless there has been no suggestion that these developments have had any adverse impact on the effectiveness of custodial interrogations.

136. Of course, such was not the practice at the time of Mr. Doyle's detention and questioning. It is also evidently clear that neither document has any legal effect in the context of which we speak, and that in reality they are akin to a practice direction from each body to its own members. Accordingly, the existing discretionary practice of allowing solicitors to sit in on interviews does not amount to any sort of recognition by the DPP or An Garda Síochána that this is a constitutional right or entitlement of a suspect whilst in garda custody; this is evident from the DPP's submissions on this issue. However, although this newly-established practice is not definitive in the legal analysis of whether such a right exists, nonetheless the shifts which I have described, being both potent and influential, are significant and should not be underestimated. Reality, as it now stands, must be faced up to.

137. By the same token, should the Court find that the right of a suspect to have a solicitor present during interview is grounded in the constitution, as a necessary requirement, ***inter alia,*** for a trial in due course of law and as a recognition of the privilege against self-incrimination, the fact that such developments have occurred does not of itself adequately safeguard this right; a mere concession by the gardaí, which may be granted or withheld at will, is no substitute for constitutional recognition of a right, if such be the case.

Miranda v. Arizona **382 U.S. 436:**

138. The appellant has quoted extensively from the majority judgment in this case which, when delivered, was indeed ground breaking and historic. It famously required the police to give specific warnings and/or information to a suspect as a condition of custodial interrogation. The one relevant to this case was expressed by Chief Justice Warren as follows:-

> "The need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

The Supreme Court, in the intervening period, has created several exceptions which in effect disapply the rule in certain circumstances; nonetheless, whilst the decision may have lost some of its energy, it still remains a viable and powerful source of suspect protection.

139. It is abundantly clear, however, from a reading of the majority's decision, that their opinion was primarily motivated by concerns regarding the then prevalent practice of incommunicado interrogation. When such methods were looked at in conjunction with the general conditions of detention then prevailing, and the documented instances of other highly objectionable police practices, the decision must be seen in the context of a particular legal, social and historical culture which is highly distant from that now - or indeed ever - existing in this jurisdiction.

140. I therefore reject any suggestion that the questions and comments put by the gardaí to Mr. Doyle can be likened to the more nefarious practices described in the ***Miranda*** **j**udgment. Whilst I have found that some of these comments amounted to improper

inducements, nonetheless, provided that oppression is avoided (***DPP v. Shaw***) and that the line between voluntariness and involuntariness is not crossed, this judgment should not be read as suggesting that robust questioning or strategic interviewing is impermissible. As indicated in ***McCann***, police interrogation is not and does not have to be a genteel encounter.

141. A further factor in distinguishing ***Miranda*** is that the incommunicado interviews at issue in that case were not subject to video or audio recording. The introduction of such practice in this jurisdiction is a welcome safeguard of the rights of a suspect during the interview process, and it also helps to ensure effective judicial oversight of that which occurs in the interview room. The time has long since passed that the Irish courts will overlook a failure to record an interview which is then sought to be used against the suspect at trial, save perhaps in the most extreme and urgent of excusing circumstances. In the absence of the protection which the recording of interviews provides, and in light of the other practices resorted to at the time, the presence of a lawyer was adjudged necessary.

European Court of Human Rights Case Law:

142. Of potentially much greater persuasive value is the contemporary jurisprudence of the European Court of Human Rights, which for both brevity and convenience can have as its starting point the case of ***Salduz v. Turkey*** (2008) 49 E.H.R.R. 421.

Salduz v. Turkey:

143. The appellant relies a good deal on this case in support of the proposition that there exists a right to have a solicitor present during questioning. For certain this is an oft-quoted decision when it comes to the parameters of the right to legal assistance under Article 6 of the European Convention on Human Rights ("the Convention"), the relevant provision of which is Article 6 § 3(c) thereof. This reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

144. The relevant paragraphs of the judgment, laying out the general framework of this right, are those at paras. 50-55. Although lengthy, these should be quoted, as the case reviewed a number of the Court's previous decisions, and in effect rationalised what the position then was:-

> "50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 thereof - may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions … As the Court has already held in its previous judgments, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of

> the concept of a fair trial in criminal proceedings contained in Article 6 § 1 …
> 51. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial …
>
> 52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, *Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.* However, this right has so far been considered capable of being subject to restrictions for good cause. …
>
> 53. These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards … which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. …
>
> 54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial … At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings … In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused … Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination …
> 55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above), Article 6 § 1 requires that, as a rule, *access to a lawyer should be provided as from the first interrogation of a suspect by the police*, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 … *The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction*." (Emphasis and ellipses are my own).

145. I accept the respondent's submission that these paragraphs do not establish a right to have a lawyer present during questioning. The emphasised passages illustrate that the right specifically at issue was one of access to a lawyer, so that legal assistance could be obtained, at a point prior to any interrogation of the suspect. As the facts of that case indicate, Mr. Salduz, who was 17 years old at the time, made confessions in

circumstances where he had not yet had any access to a lawyer whatsoever. It is apparent that this was the basis for the Court's finding that Article 6 § (3) (c) had been violated, rather than the fact that there was no lawyer present during questioning. The express language of the Court and the facts of the case do not permit any such principle to be deduced or clearly inferred therefrom. Thus while *Salduz* was rightly read as supporting Mr. Gormley's arguments in *Gormley and White*, it does not follow that it directly supports the additional safeguard being argued for by Mr. Doyle in this case. Equally, nothing in the comprehensive analysis of the *Sadluz* judgment by the UK Supreme Court in *Cadder v. HM Advocate* [2010] UKSC 43; 2011 S.C. (U.K.S.C.) 13 changes my reading of that judgment in this regard. That case is considered in greater detail below (paras. 159-160, *infra*). Finally, the decision in *McGee* does not advance the situation any further.

More Recent Jurisprudence from the Court:

146. *Salduz,* however, is far from the end of the line as far as the European Court's evolving interpretation of the right to legal assistance in Article 6 § (3) (c) is concerned. In *Dayanan v. Turkey* (Application no. 7377/03, Judgment of the 13th October, 2009), a judgment of the Second Section of the Court, it was held that:

> "30. In relation to the absence of legal assistance in police custody, the Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial …
> 31. The Court is of the view that the fairness of criminal proceedings under Article 6 of the Convention requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody pre-trial detention.
> 32. In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, *and not only while being questioned* … Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention." (Emphasis my own).

As the law in Turkey then stood, it was not legally possible to afford the applicant any legal assistance whilst in police custody; accordingly, the Court held that such a systemic restriction, of itself, constituted a violation of Article 6 of the Convention, notwithstanding the continued silence of Mr. Dayanan during this period.

147. In *Navone and others v. Monaco* (Application Nos. 62880/11, 62892/11 and 62899/11, Judgment of the 24th October, 2013), the First Section of the Court held, at paragraph 79, that:

> "79. La Cour souligne à ce titre qu'elle a plusieurs fois précisé que l'assistance d'un avocat durant la garde à vue doit notamment s'entendre, au sens de l'article 6 de la Convention, comme l'assistance « pendant les interrogatoires » *(Karabil c. Turquie*, no 5256/02, § 44, 16 juin 2009, *Ümit Aydin c. Turquie*, no 33735/02, §

> 47, 5 janvier 2010, et *Boz,* précité, § 34), et ce dès le premier interrogatoire (*Salduz,* précité, § 55, et *Brusco,* précité, § 54)."

I understand the reference to "pendant les interrogatoires" to meaning "during interrogations", and that the effect of the paragraph is that Article 6 requires the assistance of a lawyer during custodial interrogation.

148. In the case of *A.T. v. Luxembourg* (Application no. 30460/13, Judgment of the 9th April, 2015), the Fifth Section of the Court, having set out much the same general framework as in *Salduz* and *Dayanan*, stated that:

> "65. The Court has had occasion to reiterate that, first of all, a person "charged with a criminal offence" within the meaning of Article 6 of the Convention is *entitled to receive legal assistance* from the time he or she is taken into police custody or otherwise remanded in custody and, as the case may be, *during questioning by police or by an investigating judge* …" (Emphasis my own)

149. Finally, based on the available translation of the judgment in *Simons v. Belgium* (Application no. 71407/10, Judgment of the 28th August, 2015), the Court in that case referred to another decision in the French language, *Brusco v. France* (Application no. 1466/07, Judgment of the 14th October, 2010), stating that:

> "30. … In the *Brusco* judgment … the Court added that the right of a person in police custody to be assisted by a lawyer from the beginning of that measure, and during the interview itself, is all the more important where he or she has not been notified by the authorities of the right to remain silent."

150. I would summarise the main points as follows:

> (1) The basic purpose and intent of Article 6 is to ensure that a person obtains a fair trial before a competent Tribunal on any criminal charge. To that end such a person is entitled to have access to and avail of the services of a lawyer; in essence, he or she has the right to be "effectively defended" by a lawyer, which is a root pillar of safeguarding the fairness of trial.
>
> (2) Such a right, which must be functionally effective, is not restricted to the courtroom aspect of the trial. Its practical implementation commences as and from the point of incarceration and continues until the conclusion of the criminal process.
>
> (3) The underlying reason why access should commence as specified is that a detained person may be particularly vulnerable during the initial stages of the police questioning, and therefore legal assistance is necessary so as to prevent self-incrimination, in circumstances other than those resulting from the free and voluntary choice of the detained person.
>
> (4) Evidence which may be gathered during police interrogation is always important in determining the ultimate charge, and, if admissions or confessions are involved, can be such as to almost foreclose on any effective defence at the trial itself.
>
> (5) In addition, the case law displays an ever increasing willingness

to stretch the compass of protection to whatever is necessary to ensure the effective implementation of this principle. Thus, where appropriate, the lawyer should have the capacity to preserve, enhance and deal with each and every fundamental aspect of the intended and available defence. He or she should be in a position, without undue restriction, to discuss the case, to collect evidence favourable to his client, to prepare that client for questioning, to support the accused in distress and to check on the conditions of his detention. All such matters, and indeed many others, are inherent in such right.

(6) In the passages quoted at paras. 146-149, *supra,* it seems clear that the judgments have made express reference to a suspect's right to have a lawyer present during the interview process. Thus on one reading it could be said that this right has already been clearly established. However, I am not aware of any decision reflecting the particular facts of Mr. Doyle's situation (para. 126, *supra*) in which the Court has definitively declared the existence of such right.

(7) These rights can be waived.

Directive 2013/48/EU

151. Note should also be taken of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 'on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty'. Of course, as acknowledged at Recital 58, Ireland, like the United Kingdom, did not take part in the adoption of this Directive and therefore is not bound by it or subject to its application. Nonetheless, the Directive is of relevance insofar as it informs what the position of other EU Member States is or will soon be on this very question.

152. An essential aim of the Directive, per recital 12, is to lay down minimum rules, *inter alia,* concerning the right of access to a lawyer in criminal proceedings. It thereby seeks to promote the application of the Charter of Fundamental Rights of the EU, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the European Court of Human Rights. Of particular importance for the present case is Recital 25, which provides as follows:-

> "Member States should *ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police* or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law." (Emphasis added)

153. In order to reflect in a substantive and binding way the terms of this Recital, Article 3(3)(b) of the Directive provides as follows:-

> "3. The right of access to a lawyer shall entail the following:
>
> …
>
> (b) Member States shall ensure *that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned*. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned". (Emphasis added)

This measure had a transposition deadline of the 27th November, 2016

154. It is therefore apparent that Ireland may soon be in a somewhat incongruous position in the EU context if a right for a lawyer to be present during questioning is not recognised in this jurisdiction. This, of course, results from the government's decision, generally applicable in the area of freedom, security and justice, to participate in such matters only via an opt-in mechanism, which it has decided not to exercise in this case. In making this point I do not intend to reflect on its competence to so act. Respecting that position, as I do, it therefore seems to me that such a right should only be recognised in this jurisdiction if there is a compelling rationale within the Irish legal order for so holding. Irrespective of that rationale, however, the Directive illuminates the directional focus of other Member States, and offers further evidence of a prevailing trend amongst fellow members of the Union.

155. Also worth noting is a further point made in *A.T. v. Luxembourg*, discussed above, in which the European Court of Human Rights assessed whether there had been a violation of the right to consult with a lawyer prior to questioning. In so doing, it took account of Article 3(3)(a) of Directive 2013/48/EU, which addresses that very point. This is at least indicative, at a most general level, of the possibility of Article 3(3)(b) also being utilised in this way.

The Committee for the Prevention of Torture

156. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its 21st General Report (CPT/Inf (2011) 28), addressed the right of access to a lawyer as a means of preventing ill-treatment. In the course of its Report it stated, at para. 24, that:

> "The right of access to a lawyer should also include the right to have the lawyer present during any questioning conducted by the police and the lawyer should be able to intervene in the course of the questioning. Naturally, this should not prevent the police from immediately starting to question a detained person who has exercised his right of access to a lawyer, even before the lawyer arrives, if this is warranted by the extreme urgency of the matter in hand; nor should it rule out the replacement of a lawyer who impedes the proper conduct of an interrogation. That said, if such

> situations arise, the police should subsequently be accountable for their action."

157. It can fairly be presumed, and certainly hoped, that the particular evils which that Committee guards against are confined to history in the Irish context, at least insofar as police interrogation techniques are concerned. However, it should be noted that the Committee's recommendations and findings are addressed to all Member States equally. It is no answer to a failure to provide minimum safeguards for a State to say that the particular measure is unnecessary in its jurisdiction because of the unlikelihood of a violation of Article 3 of the Convention occurring during the course of police questioning. To the extent that the CPT acknowledges any exception, such is based on the exigency of the situation, rather than the availability of other safeguards, no matter how ostensibly adequate these may be.

The Position in the United Kingdom

158. In England and Wales, a detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed, unless a designated exception applies (para. 6.8 of the *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, Police and Criminal Evidence Act 1984 (PACE) - Code C). Guidance Note 6D to that Code of Practice provides, *inter alia*, that:

> "The solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice."

The position in Northern Ireland is very much the same under the *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Police & Criminal Evidence (Northern Ireland) Order 1989 - Code C) (see para. 6.7 thereof), with the revised Code applying as from the 1st June, 2015.

159. As regards UK case law, I do not believe that the decision in *Cadder v. HM Advocate*, referred to by each of the parties in their submissions, adds greatly to the precise point in issue. As mentioned above, it contains a thorough analysis of *Salduz* and some of the subsequent case law, as well as the implications for Contracting States of the recognition, at ECtHR level, of the right to consult a solicitor prior to questioning. However, the issue for consideration by the Court in *Cadder* was the prevailing situation in Scotland at the time, which permitted the reception into evidence of confessions made by a detainee during an interview by the police prior to him or her having had access to legal advice. Whilst it is also the case that such person did not have access to legal advice during questioning, the core point was more akin to the one raised in *Gormley and White* and *Salduz* than that currently under discussion. I therefore could not accept any view that by not declaring the existence of the right in issue in this case, the Court was by implication suggesting that such a right did not exist; that matter did not arise for consideration.

160. Against that limitation it is of particular interest to note that the *Cadder* judgment would seem to have spurred considerable developments on this front in Scotland and the position there, as of the passing of the Criminal Justice (Scotland) Act 2016, is that there is now a right to have a solicitor present while being interviewed by a constable about an offence which the constable has reasonable grounds to suspect the person of committing

(section 32(2)). This right can be waived, but otherwise the interview must not commence prior to the solicitor being present, subject to the usual 'exceptional circumstances' proviso.

Summary of Movement:
161. As appears from this brief and, let it be said, quite limited review of movement external to this jurisdiction, there has been a significant shift in the acknowledgment of this right across other diverse legal regimes. When the steps taken by the major domestic players, almost certainly in response to *Gormley and White* (March, 2014), are factored in, the current situation providing for the right or entitlement to have a lawyer present during interrogation has developed as follows:-

International

- The ECtHR jurisprudence, even from the starting point of *Salduz,* has moved considerably since then, including through the *Dayanan v. Turkey* (2009), *Navone v. Monaco* (2013), *A.T. v. Luxembourg* (2015) and *Simons v. Belgium* (2015) judgments;

- The CPT publishes its 21st General Report (2011);

- Directive 2013/48/EH is adopted (October, 2013);

- In the United Kingdom/Northern Ireland, the most recent PACE Code C applies as from June, 2014/June, 2015, respectively;

- In Scotland, the right to have a solicitor present during questioning is put on a statutory footing (2016).

National

- The DPP issues a direction advising the Commissioner of An Garda Síochána to permit the presence of solicitors during interview (May, 2014);

- The Department of Justice issues a circular to the Law Society (2014);

- The Commissioner publishes the Garda Code (April, 2015);

- The Law Society issues guidance for its members (December, 2015).

Conclusion
162. The prevailing situation under Irish law, however, and notwithstanding these developments, remains that as set out in *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390. In the course of his judgment, O'Flaherty J. stated that:-

> "Counsel for the State submitted to the High Court Judge that in effect what Mr. MacGuill was seeking was that the garda should give

> him regular updates and running accounts of the progress of their investigations and that this was going too far. I agree. *The solicitor is not entitled to be present at the interviews*. Neither was it open to the applicant, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where." (pp. 395-396 of the report) (Emphasis added)

This is a well-established position, and the undisputed policy of An Garda Síochána at the time of Mr. Doyle's arrest was to refuse any request for a solicitor to be present during interview. Indeed, it was conceded in evidence that had Mr. Doyle requested this, it would have been denied. So, between 1999 and 2014 both law and practice coincided; since *Gormley and White*, however, practice has led the way, without any undue disruption to the interrogation process, and in my view it is now time that the law keep pace with it. It would be a first, to my knowledge, if this progressive step was to be curtailed or reversed by case law.

163. For the reasons herein given, I have decided that the constitutional entitlement to a trial in due course of law entails the right of a person, detained in a Garda Station, to have a solicitor present during questioning if he or she so requests. This conclusion is based on a consideration of the events, factors and prevailing trends outlined in this judgment, as well as a firm belief that such a step is a necessary but proportionate one in furthering the protection or safeguards which such persons should enjoy during custodial detention. The time has now come for a clear acknowledgment that such a right exists and I so hold via the same constitutional route as was used by the Court in *Gormley and White* (see pp. 627-628 of the Report)

164. In addition, as with several other rights enjoyed by those subject to interrogation, it is an indispensable requirement of the effective use of such rights that those in control or in charge of a person's detention inform that person, in a timely and obvious way, of the existence of such a right. If the same should be exercised, then the rationale of the *Gormley and White* decision as applying to Mr. Gormley would follow.

165. Such a right exists in the United States, in England and Wales, in Scotland and in other EU Member States, at least by virtue of Union law in light of Directive 2013/48/EU, and represents the position of the Council of Europe as is clearly evident from the CPT Report mentioned above. Whilst this international trend cannot be overlooked, given its clear and widespread recognition that such an entitlement is a necessary further step for the protection of those being interrogated, nonetheless that of itself would not be a decisive reason for an Irish court to establish or declare the existence of such a right in this jurisdiction. This is for a number of reasons, including the variances which exist in the respective cultural, historical and legal landscapes of different countries, particularly those relative to pre-trial safeguards of suspected persons. These differences, which cannot easily be adjusted so as to provide for any direct comparison, may readily explain the discrepancies in approach which many countries have shown to this issue. Nonetheless, one cannot but be ever so mindful of the influence of this international backdrop in considering the underlying question.

166. There is of course one source, in part external, of particular relevance in the comparative analysis above mentioned, which is the jurisprudence of the European Court of Human Rights. For many years the Irish courts have accorded high persuasive value to the judgments of that Court, judicial notice of which must now be taken pursuant to section 4 of the European Convention on Human Rights Act 2003. As such, its case law is of considerable influence and importance to the point under consideration on this aspect of the appeal.

167. Whilst it appears that the point at issue has not been as precisely defined as above described (para. 126, *supra*), or ruled upon in that way (see summary at para. 150,

supra), nevertheless, I believe that on balance the existing case law of the ECtHR is already to the effect that the Convention does in fact require the presence of a lawyer during questioning. The judgments quoted at paras. 146-149, *supra*, and many others, all make express reference to the existence of such a right in clear-cut and deliberate terms. To the reservation that this position has not been definitively spelled out, I believe that if the settled and current trend of dealing with the availability of legal protection should continue, then it is more likely than not that the outcome of any case where the precise point was directly in issue would support the conclusion which I have arrived at. Of course this anticipation may be wrong, but, even if so, the existing state of jurisprudence is of such force in this regard that such of itself is highly influential in calling for such a right. I should add that I do not see how the establishment of such a right would be fitting in a civil law system but less so, or perhaps even not at all, in our common law system. Be that as it may, it is necessary to outline why in my view the criminal justice system in this jurisdiction should now have within in, at a constitutional level, the right as identified.

168. In our system, certainly since 1984, the investigation of crime involves the widespread arrest and detention of persons, many of whom may never be charged with the underlying or indeed any offence. Although this sits somewhat uncomfortably with the right to liberty and perhaps the presumption of innocence, it is nevertheless seen as a necessary requirement of the public interest in the detection of crime. Whilst this course has been adopted by the legislature and must be respected, so also must the legislature protect suspects' rights.

169. When first introduced, the maximum period of detention under the Criminal Justice Act 1984 was 12 hours, that being an initial period of 6 hours, subject to a further 6 hours being authorised by a garda officer not below the rank of superintendent in accordance with section 4(3)(b). Prior to this the Offences Against the State Act 1939 provided for a maximum period of detention of 48 hours under section 30, with the initial 24 hour detention being capable of a 24 hour extension. Otherwise than in respect of the offences covered by that Act, however, the 1984 Act was to precipitate a major change in the manner in which crimes are investigated in this state. Since then, a number of other pieces of legislation have been enacted which give rise to a power to detain a person for questioning; equally, the maximum periods of such detention have increased since 1984 also. Assuming the statutory requirements for extensions are satisfied in a given case, the maximum periods of detention are as follows: under the 1984 Act itself, it is now 24 hours (section 4(3)(bb), as inserted by section 9(c) of the Criminal Justice Act 2006); under the 1939 Act, the maximum is now 72 hours (section 30(4) as substituted by section 10 of the Offences Against the State (Amendment) Act 1998); section 42 of the Criminal Justice Act 1999 provides for up to of 24 hours detention; most strikingly, both the Criminal Justice (Drug Trafficking) Act 1996 and the Criminal Justice Act 2007 currently provide for that a person may be detained in a Garda Station for up to 168 hours, that is to say, 7 days (section 2 and section 50, respectively).

170. Thus, as the instant case partly demonstrates, a person can now be held in custody purely for interrogation purposes, that is, without charge, for days at a time, up to one full week. Again, as this case shows, during that period one can be interrogated multiple times, either by the same interviewing officers or by different teams. Such a process may commence relatively early in the morning, continue throughout the day and, as both Interviews 10 and 14 show, end only late in the evening. Whilst at all stages the individual in question has a constitutional right of reasonable access to his solicitor, there can be long periods where, for a variety of reasons, there is no contact between solicitor and client. It therefore must be asked why such *lacuna*, which can have most grave consequences for the person in question, should not be removed from interrogation practice.

171. For a great number of people this may be an entirely new experience, with the

surrounds of a police station, never mind the atmosphere of an interview room, presenting a daunting and frightening situation. Whilst hardened criminals may not be as affected, the preservation of their rights is no less important if the legitimacy of this aspect of the investigation of crime, conducted by an institution as critical as the gardaí, is to enjoy the widespread support which is so necessary even to sustain the very rule of law itself.

172. Both the substantive criminal law and its attendant procedural landscape have continued to grow ever more complex, with many of its provisions having a direct feed into the custodial interrogation part of the process. Examples which readily come to mind are the inference provisions of the Criminal Justice Act 1984, (sections 18 and 19), which have undergone substantial amendment in the Criminal Justice Act 2007 (sections 28 and 29). Section 18 refers to a person's failure or refusal to account for objects, substances or marks on his person, on his clothing or otherwise in his possession, or in any place where he or she might have been during a specified period, while section 19 relates to a person's failure or refusal to account for his presence at a particular place at or about a particular time. Indeed, section 30 of the 2007 Act also inserted a new section, section 19A, into the principal Act; section 19A may apply to a person who, during detention, has failed to mention a fact which subsequently he wishes to rely upon in his defence. One can add several other provisions with like or similar effect, such as section 2 of the Offences Against The State (Amendment) Act 1998, as amended, which applies to a person's failure to answer any question put to him which is material to the investigation.

173. In all situations where either one or more of these provisions are in play, inferences adverse to the accused may be drawn. Such may have potentially dramatic consequences at his trial, depending on the person's response, or non-response, as the case may be, to the questions asked. That being so, and given that the provisions are complex and difficult to operate from even a skilled practitioner's or an experienced garda member's perspective, it seems self-evident that the availability of ongoing legal advice may be of critical importance to the detained individual.

174. Whilst judicial overview is an important tool in this regard, it suffers by its very nature from an inherent weakness in that in its examination of an issue it can only react to abusive behaviour. It is incapable of achieving what is readily capable of prevention in the first instance. Thus the former prohibits, whereas the asserted right prevents, abuse.

175. This case is a good illustration of the point. The inducement issue is an attempt by Mr. Doyle, on a retrospective analysis of what took place, to have the confessions rendered inadmissible, whereas if a solicitor had been present, it is highly likely that in the first instance no offending offers or promises would have been made, thus eliminating even the possibility of raising such an argument. This would be entirely more desirable than that which is presently available.

176. No organ of the State should in any way be concerned with the practical implementation of rights vested in each individual at the highest level of our legal hierarchy, or have any objection to an authorised practice which has the effect of giving fuller expression to deep-rooted, long-established and cherished rights such as the right to silence and the right not to incriminate oneself, to mention but two. Equally so in respect of another longstanding and related rule, namely, that only confessions which are voluntary are admissible in evidence. How could legitimate objection be taken to a solicitor intervening during the interview process in a timely but not disruptive manner to remind his client, and indeed the interviewing team, of these constitutional rights? Any rule of law which, even in part, and certainly if in large measure, depends on a lessening or reducing of such rights in order to secure a conviction should have no place in our society. The State, with the armoury and array of resources at its disposal, should pride itself on only obtaining convictions where the preceding process has been conducted, and

the material evidence obtained, in full and due compliance with such rights.

177. The benefit of the recognition and realisation of such a right, of course, is that any resulting confession or admission will truly be reflective of a free will, and the product of a free choice. This is all the more important as interviewing techniques become more subtle and more psychologically orientated.

178. I do not believe that the present safeguards sufficiently address the inequality which now exists in the interview room and which can so threaten the rights being presently discussed. For certain there are other protective measures in place in this jurisdiction which differentiate the present Irish context from, say, the prevailing position in the United States pre-*Miranda*; I am referring, primarily, to the requirement of audio and video recording of interviews, and the resulting judicial scrutiny and oversight of the conduct of interrogating gardaí, even if such conduct is rarely - if ever - reviewed at a regulatory level. Even so, I am not convinced that this *ex post facto* supervision is an adequate surrogate for the presence of a solicitor at the interview itself.

179. The cardinal rule relating to the requirement of voluntariness of confessions is so deeply entrenched in this jurisdiction as to hardly merit restatement; it goes to the essence of the privilege against self-incrimination. Given the centrality that questioning has assumed in the evidence-gathering process, and in light of the critical importance routinely attached to confessions at trial, I take the view that stronger safeguards are necessary to fully vindicate the privilege against self-incrimination of the interviewed suspect. In light of the wide range of factors which potentially vitiate the voluntariness of an inculpatory statement - threats, promises, oppression, unfairness and more - often involving, as they do, a marginal judgement call either way on the point, I believe that what is herein asserted is an essential protection of that privilege. Regardless of the degree to which a solicitor takes part in the process, I am convinced that even a mere presence would have a telling impact on both the client's position and the conduct of the interrogation. Those who suggest otherwise fail to appreciate the chilling effect which detention and interview has on a great number of people. Lawyers experienced in criminal practice will readily vouch to the tension and highly-charged atmosphere of the interview process.

180. In the other judgments delivered by members of this Court, assessment of the practical consequences in this case of the absence of a solicitor from the interview has seemed to focus for the most part on Interview 15. When viewed through this lens, and bearing in mind that the appellant did have access to legal advice immediately prior to, and indeed during, that interview, it has been said that even to the extent that there may have been a breach of the right to have a solicitor attend at interviews, the same was not causatively linked to the ultimate confession. Indeed, it is hard to argue but that Mr. O'Donnell had more input, in terms of advising the appellant, in Interview 15 than he would have had if he had been in the room. This approach, however, presupposes that Interview 15 is the crucial interview in respect of which the impact of a solicitor's absence must be assessed.

181. From my perspective, this is not so: the critical interviews during which the presence of a solicitor would have made a difference are the preceding ones, Interviews 10-14. It was during this period that a solicitor could have made a practical impact by timely but not intrusive interventions. This is fully, or at least in part, borne out by the majority judgments which accept that the subject statements put to Mr. Doyle during these interviews were objectively capable of being viewed as inducements. Even if not satisfied on the other strands of *McCann*, surely the recognition that improper inducements had been held out in the first instance serves to illustrate the important role that a solicitor has to play, and the impact which his absence from the interview room may have. Whilst it is unnecessary to enter a full discourse on what precisely the solicitor's role may be, it

is noteworthy that both the Garda Code and the Law Society's *Guidance* each acknowledge a right to intervene or object when that fine line between robust interrogation and improper questioning has been crossed. In this regard, the fact that the trial judge found the interviews to have been conducted in a professional and courteous manner does not lead to the conclusion that the presence of a solicitor may not have made a meaningful difference. A solicitor can guard against more than outright intimidation or threats, and a polite and amiable interview laden with improper promises could be as destructive of the free will protected by the privilege against self-incrimination as an oppressive interrogation.

182. The admissibility of confessions has assumed an almost transcendent importance in many modern trials, this because of the sheer weight and probative value of such admissions, which are so frequently alleged to have been involuntarily made. In this regard, rather than having contentious, costly and time-consuming legal argument after the fact over whether this comment overbore the will of the suspect, or that question rendered the confession involuntary, the admissibility of these central pieces of evidence will be much more readily established where the highest protection has been afforded to the rights of the suspect during the interview process.

183. I therefore believe that in order to fully protect and vindicate the rights of a suspect, it is necessary that there be a solicitor present during garda interrogation. This is of such fundamental importance that, in my view, it is a requirement of the constitutional imperative that a criminal trial be conducted in due course of law.

184. It should be said that attendance at interview by the solicitor should not lead to the stymieing of evidence gathering in the course of criminal investigations. Robust and strategic questioning remains an integral part of that process and there should be no expectation that such presence will interfere with the effectiveness of this important function. Whilst his role at interview is to represent his client, it is not to obstruct the proper and lawful questioning of suspects. The framework in place since the enactment of the Criminal Justice Act 1984 has elevated detention and questioning to a position of prominence, which must be respected; so, whilst it is important that the same be conducted with full regard for the rights of the suspect, this is not to suggest that An Garda Síochána should be impeded in the carrying out of its duties.

185. The underlying question, set out at para. 107, *supra*, in essence asks this Court whether the sitting in on interview by a solicitor is a right or is a concession. That issue has been addressed and answered by what is above stated. The question, which it must be assumed was carefully worded and narrowly focused by the Court when granting leave, did not involve and does not require this Court to go any further than what I have said. In particular, it is no part of the Court's function to establish any sort of general framework within which such a right should be exercised, or otherwise to define the parameters of how to give full expression at a general level to such right.

186. There are several good reasons for this, starting with this Court's established jurisprudence of deciding only the issues before it. As experience has shown, subsequent cases may identify other issues related to or connected with what has previously been decided. If such should arise, particularly with any frequency, a body of case law will emerge over time covering perhaps many aspects of the exercise of the underlying right. It is only in this way that the courts can be involved in the incremental development or clarification of an issue such as that arising in this case.

187. In general, a breach of the right to have a solicitor present during questioning will almost inevitably attract consequences for the admissibility of the resulting evidence and/or impact on the dual requirement of a fair trial and one in due course of law. However, because a retrial has been ordered as a result of the first ground of appeal

addressed in this judgment, it is unnecessary to further explore these complex and difficult issues. I have therefore deliberately refrained from a high-level discussion on such matters, and likewise on issues such as waiver, estoppel or *locus standi* arising out of Barry Doyle's failure to request the solicitor's presence in this case. However, it must be said that I have grave reservations about *DPP v. J.C.* [2015] IESC 31 having any role in this regard: certainly I could not agree that Mr. Doyle should be deprived of the benefit of the establishment of such a right in his case and the consequences which might inure for him as a result. Whatever may be the position of others, a situation I expressly reserve my views on, I cannot see how *DPP v. J.C.* can be used to neutralise the appellant's personal position.

188. Whilst the right which I suggest exists has been solely attached to Article 38 of the Constitution, this is reflective of how the argument was presented and the submissions made. In so doing, I am not necessarily, nor indeed at all, to be taken as suggesting that the right may not be found in, nor its breach have consequences pursuant to, other constitutional provisions.

189. In this context some debate was had as to the precise time, point or event in the investigative process at which Article 38 rights apply. Where detention leads to interrogation which results in a confession, grounding the essential evidence upon which a conviction depends, there can in my opinion be no debate but that such rights apply; such is the case in Mr. Doyle's situation. Finally, I should say for the avoidance of doubt that, in the situation as described, the overall fairness of the proceedings as a whole has seriously been compromised (see *Ibrahim and Others v. The United Kingdom* (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09), Judgment of the 13th September 2016, at paras. 250 et seq.).

190. Accordingly, whilst I am satisfied to recognise the right in question, it is not for the courts to determine how best it should be given effect to, either in the general context in which it will apply, or in the individual situations in which it will be exercised. If such a course was thought desirable, then that perhaps may be a matter for intervention by the Oireachtas. If this was to take place, it is likely that it would entail a delicate balancing of many important considerations, reflecting, on the one hand, the desirability of effective law enforcement and the efficient functioning of the justice system and, on the other hand, the non-negotiable respect for and adherence to the rights of suspects. One would also expect that the precise role of the solicitor during interview would be looked at in a manner which, *inter alia*, facilitates his essential function of safeguarding his client's rights, but at the same time without affording him a free reign to impede the questioning process without good cause. Beyond that it is inappropriate to say more, as it is certainly not the courts' role to prescribe what responsibilities the solicitor may perform, just as it is not for An Garda Síochána or the Law Society to determine this point. Whether and in what way the legislature might intervene is of course a matter for it, at least in the first instance.

191. The recognition of such a right is of course of importance at a constitutional level, but its anticipated conception had been well flagged in *Gormley and White*. With commendable foreseeability, some of the main actors involved - in fact, two of the most critical - have already taken steps to facilitate its effective functioning at a practical level. Therefore, the further changes which may be required should not be unduly burdensome.

Issue 3:
Whether the appellant can rely on the decision in Damache

192. The final issue on which leave was granted was set out thus:

> "Whether the applicant, in all the circumstances, including that he was convicted in the Central Criminal Court on the 15th February, 2012, and the decision of the Supreme Court in *DPP v. Damache* was delivered on the 23rd February, 2012, can rely on that decision on his appeal."

193. On this issue I agree in general with the conclusion reached by the other members of the Court and would add only that I do not think that any fundamental injustice or unfairness arises out of holding that the appellant is not entitled to rely on the *Damache* decision. I would accordingly dismiss this ground of appeal.

Conclusion

194. I would allow the appeal on the inducement issue, and consequently I would set aside the conviction and order a retrial. On the second issue addressed in this judgment, regarding the right to have a solicitor present during interview, I would allow the appeal and make a declaration reflecting the existence of such right. On the third issue, namely, the *Damache* point, I would dismiss the appeal.