THE COURT OF APPEAL

[227/18]

[228/18]

[223/18]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DAVID BYRNE

APPELLANT

AND

MARK FARRELLY

APPELLANT

AND

NIALL BYRNE

APPELLANT

JUDGMENT of the Court delivered on the 20th day of April 2020 by Birmingham P.

1. On 21st May 2018, after a trial in the Dublin Circuit Criminal Court which had lasted 64 days to that point, each of the appellants was convicted in relation to counts relating to a tiger kidnapping-style incident that had occurred on 13th and 14th March 2005. Mr. Mark Farrelly and Mr. David Byrne were convicted on four counts of false imprisonment and one count of robbery of cash in the sum of €2.28m. The appellant, Niall Byrne, was convicted of the offence of robbery, with the jury unable to agree in relation to the remaining counts.

2. The trial concerned the false imprisonment of four members of one family, the Richardson family from Raheny, and the subsequent theft of €2.28m in cash from a Securicor van driven by one of the family members, Securicor employee Paul Richardson.

3. On 13th March 2005, a number of men forced entry into the Richardson family home. They falsely imprisoned the family with the intention of forcing Paul Richardson, in the

face of threats of harm to his family, to perform certain acts in his capacity as an employee of Securicor in order to facilitate the robbery. Paul Richardson's wife, Marie, and their two teenage sons, Ian and Kevin, were taken from their family home and brought to Cloonwood, County Wicklow, where they were kept overnight, while Paul Richardson was kept at the family home. On the following morning, on 14th March 2005, Paul Richardson reported for work, and acting under duress and in accordance with instructions, facilitated the dropping off of the €2.28m in cash as the car park of the Anglers Rest Public House in the Strawberry Beds, Dublin. The three other members of the Richardson family were left tied up in Cloonwood, but at one stage, managed to release themselves and to obtain assistance.

4. This tiger kidnapping has given rise to lengthy and complex legal proceedings. As those proceedings have some relevance to arguments that were advanced in the course of this appeal, it may be helpful to outline that history.

5. In Trinity term 2009, Jason Kavanagh, Mark Farrelly, Christopher Corcoran and David Byrne and Niall Byrne stood trial with Judge Hunt, as he then was, presiding. Mr. Kavanagh, Mr. Farrelly and Mr. Corcoran were convicted and the jury disagreed in respect of David Byrne and Niall Byrne. In Michaelmas 2011, David Byrne and Niall Byrne stood trial with Judge Patrick McCartan presiding. In both cases, the jury disagreed. In Trinity 2012, the appeals of Jason Kavanagh, Mark Farrelly, and Christopher Corcoran were before the Court of Criminal Appeal. Their appeals were allowed, essentially on Damache grounds. In Trinity term 2013, applications by David Byrne and Niall Byrne to prohibit their further prosecutions came before the High Court (Hogan J). Mr. David Byrne was refused an order of prohibition, but such an order was granted to Mr. Niall Byrne. Michaelmas 2013 saw the third jury trial, this time with Judge Martin Nolan presiding. Four men stood trial, one of whom, Mr. AC, was acquitted. Mr. Jason Kavanagh was convicted and there were disagreements in the case of Mark Farrelly and Christopher Corcoran. The fourth jury trial took place in Hillary term 2015, with Judge Mary Ellen Ring presiding. Mark Farrelly and Christopher Corcoran were both acquitted by direction of the trial judge. In Michaelmas 2015, the Supreme Court ruled that David Byrne and Niall Byrne could be retried. In June 2016, the Court of Appeal upheld an appeal brought by the DPP against the acquittal by direction of the trial judge of Mark Farrelly and Christopher Corcoran and ordered a retrial. A further jury trial, the fifth, took place in Hillary term 2018, with Judge Melanie Greally presiding. This trial saw Mark Farrelly, David Byrne, Niall Byrne, and Christopher Corcoran convicted. It is the outcome of this trial which gives rise to the present appeal. Each of the appellants now seek to appeal conviction and sentence. This judgment deals with the conviction aspect of the appeal.

6. To complete this historical overview, it is necessary to refer to two Supreme Court decisions which have impinged in a significant way on the progress of these proceedings. On 23rd February 2012, the Supreme Court delivered judgment in the case of Damache v. DPP [2012] 2 IR 266. and on 15th April 2015, the Supreme Court gave judgment in the case of DPP v. JC [2017] 1 IR 417.

7. It should be noted that the prosecution case, in the trial now under consideration, was heavily-reliant on mobile phone traffic evidence. Indeed, mobile phone evidence has been of central significance throughout the history of the proceedings outlined above. This evidence will be considered in more detail in due course, but it is sufficient at this stage to note its central significance. While there were other aspects of the prosecution's case, the mobile phone evidence was at its core. Similarly, the telephone evidence has been of central significance in the context of this appeal.

8. So far as the appellant, Mark Farrelly, is concerned, the grounds of appeal on which he relies are as follows:

Ground A

(i) That the judge, having ruled that the requests for mobile phone records relating to the applicant, were made in breach of his constitutional right to privacy, erred in law and in fact in ruling that evidence obtained by the prosecution in this manner was nonetheless admissible in evidence;

(ii) That the judge erred in admitting into evidence cell data records obtained by An Garda Síochána under the Postal and Telecommunications Act 1983 (as substituted and amended by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993;

(iii) That the trial judge, having found that the applicant's constitutional and European rights had been breached by the manner in which his mobile phone records were obtained, failed to have adequate regard to the applicant's right to privacy by ruling that the mobile phone records were admissible as evidence against the applicant;

Ground B

(iv) That the trial judge erred in holding that call data records and the names associated with particular phone numbers were a form of real evidence and were admissible as real evidence in circumstances where there was evidence of manual inputting of information;

Ground C

(v) That the judge erred in law and in fact in admitting documentary evidence relating to cell site analysis;

(vi) That the judge erred in law in admitting the location of Vodafone cell masts when there was no evidence of the coverage area of those cell masts;

(vii) That the judge erred in admitting information on subscriber details associated with specific mobile phone numbers;

Ground D

(viii) That the judge erred in law in admitting evidence obtained during a search of No. 23, Moatview Court, Dublin 15, which was evidence obtained on foot of a search warrant that had been issued under section 29 of the Offences Against the State Act;

Ground E

(ix) That the judge erred in law in ruling that the arrest and detention of the applicant was lawful;

Ground F

(x) That the judge erred in law and in fact in ruling that the XRY analysis of mobile phone handsets and SIM cards seized during the investigation of the offences was admissible as evidence against the applicant and further erred in ruling that the XRY analysis constituted admissible circumstantial evidence;

Ground G

(xi) That the judge erred in law in refusing to discharge the jury when requested to do so;

(xii) That the judge erred in law and in fact in refusing the application for a directed verdict of not guilty;

(xiii) That the judge erred in law and in fact by ruling that any issues in relation to an exhibit labelled GOB24 (a yellow reflective workman's jacket), including issues in relation to lack of continuity are matters which could be dealt with by way of the judge's charge and did not require the discharge of the jury; and

Ground H

(xiv) That the judge erred in granting the prosecution leave to cross-examine a prosecution witness, Keith Farrelly (a brother of the appellant) and erred in allowing the prosecution cross-examine this witness in an unfair manner.

The remaining grounds set out in Mark Farrelly's Notice of Appeal relate to the sentence appeal which is not the subject of the current judgment.

9. In the case of the appellant, David Byrne, the grounds of appeal advanced by the appellant were as follows:

(i) That the judge erred in law in admitting into evidence cell data records obtained by An Garda Síochána under the Postal and Telecommunications Act 1983 (as substituted and amended by the Interception of Postal Packets and Telecommunications Messages (Regulation Act 1993) after the coming into force of Part VII of the Criminal Justice (Terrorist Offences) Act 2005;

(ii) That the judge erred in considering that the failure of An Garda Síochána to use the 2005 Act constituted inadvertence within the meaning of the decision of the Supreme Court in DPP v JC [2017] 1 IR 417;

That the judge erred in considering that it was unclear under Irish law whether or not privacy rights attached to cell data records and/or in considering that any breach by An Garda Síochána was not a conscious or deliberate breach of the privacy rights of the applicant.;

(iii) That the judge erred in holding that call data records were a form of real evidence, as opposed to documentary hearsay evidence, and were admissible as real evidence in circumstances where there was evidence of manual inputting of the cell identification numbers;

(iv) That the trial judge erred in admitting documentary evidence relevant to cell site analysis under the provisions of the Criminal Evidence Act 1992;

(v) That the judge erred in admitting into evidence contact lists and text messages obtained on foot of an XRY analysis of mobile phones on the grounds that it constituted circumstantial evidence of an association between individuals, and was not hearsay, either by way of a direct or implied assertion; and

(vi) That the judge erred in admitting the statement of a witness, Samantha Ellis, pursuant to section 16 of the Criminal Justice Act 2006. In particular, the judge erred in considering that the statement of Ms. Ellis satisfied tests of reliability and necessity as provided for under section 16 of the 2006 Act.

10. In the case of Niall Byrne, the written submissions indicated that nine grounds were being advanced on the appellant's behalf in the appeal, these being:

(i) That the judge, having ruled that the requests for mobile phone records relating to the appellant were made in breach of his constitutional and European rights to privacy, that the evidence obtained by the prosecution in this manner was nonetheless admitted in evidence;

(ii) That the judge, having found that the requests for mobile phone records was made in breach of his constitutional and European rights to privacy, erred in law and in fact by failing to require the prosecution to establish that the evidence obtained on foot of the breaches of the appellant's constitutional rights was, in fact, cogent and probative against the appellant when considering their admissibility in law;

(iii) That the judge erred in admitting into evidence call data records obtained by An Garda Síochána under the Postal and Telecommunications Act 1983, as substituted and amended by the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993;

(iv) That the judge erred in law and in fact in admitting the documentary evidence relevant to cell site analysis;

(v) That the judge erred in law in admitting the location of Vodafone cell masts where there was no evidence of the coverage area of those cell masts;

(vi) That the trial judge, having ruled that the arrest of the appellant was unlawful, and absent any application to exclude any specific piece of evidence as a result of the unlawful arrest, erred in law and in fact in ruling that the appellant could not elicit

evidence that arose as a result of his unlawful arrest; and [This ground was expressly abandoned on instructions during the course of the appeal hearing.]

(vii) That the judge erred in law in admitting evidence retrieved during a search of No. 27A, Lansdowne Valley Apartments and from a vehicle Reg. No. YIL 4676, which was evidence obtained on foot of a search warrant issued under section 29 of the Offences Against the State Act.

11. It will be evident that there is very significant overlap between the grounds which each of the appellants seek to argue. The grounds that are common to the appellants might be grouped as follows:

(i) An issue relating to the procedures followed by An Garda Síochána in seeking to access mobile telephone records and the judge's decision to admit the evidence that was obtained, notwithstanding her view that the wrong procedure had been followed and that, thus, the evidence was unconstitutionally obtained;

(ii) Issues relating to the admissibility of the cell data records obtained by An Garda Síochána following requests to service providers;

(iii) Issues relating to XRY analysis of handsets and SIM cards; and

(iv) Issues arising from the decision of the trial judge to admit evidence obtained in the course of searches of a number of premises which were conducted under warrants that had been issued in accordance with the provisions of section 29 of the Offences Against the State Act 1939.

12. There remain, then, a number of grounds that are referable to one or other of the appellants, such as the decision to allow the prosecution cross-examine a particular witness, Keith Farrelly, as a hostile witness, and the issue in relation to the yellow work jacket that relates to Mark Farrelly, and the issue relating to the invocation of s. 16 of the Criminal Justice Act 2006, in the case of the witness, Samantha Ellis, in relation to the appellant, David Byrne.

13. For the sake of convenience, we will first consider each of the issues that are common to a number of appellants.

The Garda Requests for Access to Records

14. A *voir dire* in relation to this issue took place on 6th and 7th February 2018, Day 6 and Day 7 of the trial. During the course of that voir dire, Assistant Commissioner, Michael McAndrew, who had held the rank of Detective Chief Superintendent in 2005, and was at that time attached to the Security and Intelligence Section of the Gardaí, gave evidence, as did Chief Superintendent John O'Brien, who was attached to the Liaison Protection Section of An Garda Síochána at Garda Headquarters at the time. The senior Gardaí indicated that they had made the requests for records in accordance with the provisions of s. 98 of the Postal and Telecommunications Services Act 1983, as inserted by section 13(2)(2A)(b) of the Interception of Postal Packages and Telecommunications Messages

Regulation Act 1993. Submissions were made on behalf of the appellants that the statutes under which the Gardaí said they were operating did not provide specific authority for the disclosure of telephone records on foot of requests by Gardaí. It was submitted that the Gardaí should have utilised sections 63 and 64 of the Criminal Justice (Terrorist Offences) Act 2005, which had been enacted on 8th March 2005. Both senior Garda officers stated that they were unaware of the enactment of the Criminal Justice (Terrorist Offences) Act 2005.

15. It is convenient to set out the terms of the legislation that was under debate. Section 98 of the Postal and Telecommunications Services Act 1983 provides as follows:

"98.—(1) A person who—

(a) intercepts or attempts to intercept, or
(b) authorises, suffers or permits another person to intercept, or
(c) does anything that will enable him or another person to intercept,

telecommunications messages being transmitted by the company or who discloses the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message shall be guilty of an offence.

(2) Subsection (1) shall not apply to any person who is acting—

(a)(i) for the purpose of an investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act, 1951 (which refers to telecommunications messages of an obscene, menacing or similar character) on the complaint of a person claiming to have received such a message, or

(ii) in pursuance of a direction issued by the Minister under section 110, or
(iii) under other lawful authority, or

(b) in the course of and to the extent required by his operating duties or duties for or in connection with the installation or maintenance of a line, apparatus or equipment for the transmission of telecommunications messages by the company.

(3)(a) The company may, with the consent of the Minister, make regulations to carry out the intentions of this section in so far as concerns members of its staff.

(b) The Minister, after consultation with the company, may direct the company to make regulations under paragraph (a) or to amend or revoke regulations made under that paragraph and the company shall comply with that direction.

(c) A person who contravenes any regulation under this subsection shall be guilty of an offence.

(4)(a) The Minister may make regulations prohibiting the provision or operation of overhearing facilities in relation to any apparatus (including private branch telephone exchanges) connected to the network of the company otherwise than in accordance with such conditions as he considers to be reasonable and prescribes in the regulations.

(b) A person who contravenes any regulation under this subsection shall be guilty of an offence.

(5) In this section, 'interception' means listening to, or recording by any means, or acquiring the substance or purport of, any telecommunications message without the agreement of the person on whose behalf that message is transmitted by the company and of the person intended by him to receive that message."

It will be apparent that this section relates to interceptions which were made a criminal offence, subject to exceptions. On its face, it does not appear to have any application to cell data records. Given that mobile phones were not widely available in 1983, that is hardly surpri sing.

16. Section 13 of the Interception of Postal Packets and Telecommunications (Regulation) Act 1993 provides as follows:

"(1) The reference in subsection (2) of section 98 of the Act of 1983 to subsection (1) of that section shall be deemed to include a reference to section 45 of the Telegraph Act, 1863, the second paragraph of section 11 of the Post Office (Protection) Act, 1884, and subsection (5) (inserted by subsection (3) of this section) of the said section 98.

(2) The following subsections are hereby inserted after subsection (2) of section 98 of the Act of 1983:

'(2A) A person employed by the company who discloses to any person any information concerning the use made of telecommunications services provided for any other person by the company shall be guilty of an offence unless the disclosure is made—

(a) at the request or with the consent of that other person,
(b) for the prevention or detection of crime or for the purpose of any criminal proceedings,
(c) in the interests of the security of the State,
(d) in pursuance of an order of a court,
(e) for the purpose of civil proceedings in any court, or
(f) to another person to whom he is required, in the course of his duty as such employee, to make such disclosure.

(2B) A request by a member of the Garda Síochána to a person employed by the company to make a disclosure in accordance with the provisions of

subsection (2A) shall be in writing and be signed by a member of the Garda Síochána not below the rank of Chief Superintendent.

. . . .

(6) In this section 'intercept' means listen to, or record by any means, in the course of its transmission, a telecommunications message but does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording, and cognate words shall be construed accordingly.".

17. Again, there is no specific reference to mobile phones, but the reference is to information concerning the use made of telecommunication services and so potentially captured the sort of information which the Gardaí sought to access in this case. The section contemplates the Gardaí making requests and stipulates how the request should be made i.e. in writing, signed by an officer not below the rank of Chief Superintendent, but it does not impose an obligation to retain the data on anyone, nor does it impose an obligation to comply with the request. It was, however, the method employed during the twelve years between 1993 and 2005, and did not seem to generate any controversy. Had the tiger kidnapping which is at the centre of this trial and this appeal occurred in January 2005, and requests been made by Gardaí in the immediate aftermath thereof, it is likely there would have been little if any controversy. However, the events did not occur in January, but rather, on 13th and 14th March, which requires consideration of the significance of the Criminal Justice (Terrorist Offences) Act 2005, it having been enacted on 8th March 2005.

18. The 2005 Act changed the landscape very radically. At issue, are sections 63 and 64. Subsection 63(1) so far as material provides:

"(1) Subject to subsections (2) and (4), the Garda Commissioner may request a service provider to retain, for a period of 3 years, traffic data or location data or both for the purposes of—

(a) the prevention, detection, investigation or prosecution of crime (including but not limited to terrorist offences), or
(b) the safeguarding of the security of the State.

(2) The data retention request must be made in writing.

(3) Traffic data and location data that are in the possession of a service provider on the passing of this Act and that were retained by the service provider for the purposes specified in subsection (1) are deemed to have been the subject of a data retention request, but only if the 3-year retention period for the data has not elapsed before the passing of this Act.

64.—(1)Subject to subsection (7), a service provider shall not access data retained in accordance with section 63 (5), except—

(a) at the request and with the consent of the person to whom the data relate,
(b) for the purpose of complying with a disclosure request under subsection (2) or (3) of this section,
(c) in accordance with a court order,
(d) for the purpose of civil proceedings in any court, or
(e) as may be authorised by the Data Protection Commissioner.

(2) If a member of the Garda Síochána not below the rank of chief superintendent is satisfied that access to any data retained by a service provider in accordance with section 63(5) is required for the purposes for which the data were retained, that member may request the service provider to disclose the data to the member.

(6) A service provider shall comply with a disclosure request made to the service provider."

19. The Circuit Court judge, having summarised the submissions of the now appellants, commented as follows:

> "I am satisfied that the insertion by the 1993 Act of s. 2(a) and s. 2(b) provided the necessary statutory authority to officers not below the rank of Chief Superintendent to make requests for mobile phone data. It is not insignificant that the practice of issuing requests under the 1983 Act continued over a 12-year period without judicial reproach. However, I am persuaded that the 1983 Act, as amended, was not enacted with mobile phone data in mind and I accept that its use was something of a makeshift method of accessing mobile phone records in the absence of legislation specifically addressing the retention of and access to mobile phone data. I am satisfied, further, that the two Chief Superintendents did not engage in a rubberstamping exercise in issuing the requests and that each request was individually assessed and the necessity for the request considered. I am not persuaded that the 1983 Act was repealed by implication by the 2005 Act, as a repeal of the Act would be referenced to and an amendment to the 1983 Act within the 2005 Act itself. Its repeal is also incompatible with the argument made that the 1983 Act was never intended to deal with mobile phone data in the first instance. The regime provided for in the 2005 Act incorporates some additional procedural safeguards to those present in the 1983 Act, but procedurally, it is not dissimilar to the procedure followed by Chief Superintendent O'Brien and Chief Superintendent McAndrew. However, in the final analysis, I have concluded that once the legislation was enacted to regulate the retention of and access to mobile phone records, the Gardaí did not have the option of invoking the former, less regulated procedure, and I accept that the incorporation of s. 63(3) negates the argument made that the provisions of 2005 could not apply to data retained prior to the issuing of a request under subsection (1). Therefore, I have concluded that in seeking access to mobile phone data, the two Chief Superintendents were obliged to apply the provisions of the 2005 Act from the date of its enactment, and that data which was requested under s. 98 of the 1983 Act, after 8th March 2005, which is alleged to related to the accused, was requested without lawful authority and constituted an infringement of

their constitutional right to privacy insofar as the requests pertained to third party, that evidence was legally obtained."

Following on the Court's ruling, the Court then heard further evidence from both Chief Superintendents and heard submissions on the issue of whether or not to admit the evidence of mobile phone data. These submissions focused on the impact of the Supreme Court decision in the case of DPP v. JC [2017] 1 IR 417. The trial judge ruled as follows:

> "I have a number of observations to make regarding the requests made in this case in the context of the balancing exercise which the Court is required to carry out. It has never been, nor could it be suggested, that collecting mobile phone data was not an important and justified element of the investigation of these offences. It is also noteworthy that the disclosure which was sought was targeted, in that it was restricted to a finite number of phone numbers within a timeframe relevant to the offences and the requests were issued on a phased basis. The actions of the Chief Superintendent in requesting the mobile phone data in this manner was therefore proportionate. Despite submissions to the contrary, evidence obtained on foot of the request was evidence which could have been lawfully obtained, had the correct legislation been invoked, and I am of the view, despite submissions to the contrary, that the procedure which was in fact adopted did not differ greatly in substance to what was required by the 2005 provision. As a consequence of the foregoing, the breach of the accused's privacy rights was, in substance, a very limited one. The Court has ruled that the two Chief Superintendents were obliged to apply the provisions of the 2005 Act from 8th March onwards. At the time of each of the requests, the Chief Superintendents were unaware of the enactment of the 2005 provisions and were operating a system which had been in place for 12 years under the 1983 Act. That regime, under the 1983 Act, was still on the statute books and had not been repealed, but had been superseded by the provisions of the 2005 Act. Three different judges of the Circuit Court have, in the past, decided that the Chief Superintendents could lawfully invoke the 1983 Act. This fact only serves to highlight that there was no legal certainty as to the presence of a clear requirement to invoke the 2005 provisions. The evidence has established no knowledge or awareness on the part of either Chief Superintendent of the unconstitutionality of issuing the requests under the 1983 Act, and I have previously stated that the procedure adopted by the officers had not, at that time, been the subject of any scrutiny in terms of constitutionality or implications for privacy rights. I have made a ruling which had, at its core, the decision of the European Court of Justice in the Digital Rights and Tele 2 decision from April 2014 and December 2016. However, in 2005, and indeed, to the present day, there is still no authoritative Irish decision that constitutional protection attaches to mobile phone data. There is, therefore, no evidence, nor could there ever be any evidence, of an awareness on the part of the two Chief Superintendents that the exercises in which they were engaged involved an infringement of privacy rights, which at some time in the future might be afforded constitutional protection. As a consequence, I find that the violation of the accused's right to privacy was not a conscious or deliberate one, it was therefore

proportionate. The Court must then consider the issue of inadvertence. The issue of inadvertence must be considered in a broader context than a simple assessment of the fact that the two senior officers were ignorant of the recently-enacted provision which I have ruled they should have applied. The circumstances in being in 2005 were such that there was, and continues to be, an absence of legal certainty as to whether or not the officers could lawfully invoke the 1983 procedure. There is still no binding authority on the issue. I have taken one view, my colleagues and former colleagues took the opposite view. Although one would have expected the officers to be aware of the enactment of the 2005 provisions, in the particular circumstances of this case, their use of the 1983 provisions could not be considered any premium on their ignorance when both regimes were in force. Had the 1983 Act been repealed, a very different conclusion would be open. In view of the overall legal context in which the requests were made, I have formed the view that the violation of constitutional rights involved in making the request under the 1983/1993 Acts was a limited breach of constitutional rights and amounted to inadvertence as contemplated by the JC test. I do not propose to speculate as to what conclusion Judge Ring might have reached on the constitutionality argument. Therefore, the argument regarding overall unfairness has not been made out. In view of the foregoing, I am exercising my discretion to admit the mobile phone in respect of each of the accused."

Discussion

20. In the course of this appeal, it has been argued that the information sought was obtained in reckless or gross disregard for the provision of the Constitution and for constitutional rights. Counsel for the appellant has also submitted that the judge was in error in concluding that the 1993 Act had provided a basis for accessing mobile phone records, albeit that Gardaí were obliged to follow the post-8th March 2005 procedure.

21. In a situation where the appeal has proceeded on the basis that the judge had concluded that an inappropriate procedure had been followed and that constitutional rights were thereby infringed, and that, therefore, the issue on appeal was whether it was open to the judge to nonetheless admit the evidence, we will approach this appeal accordingly. In a situation where the correctness or otherwise of her conclusion that the 1983/1993 Act procedure could no longer be invoked has not been the subject of full debate, we will express no concluded view on the issue, but will content ourselves by observing that we can fully see how other judges came to a different conclusion.

22. In the course of argument, it has been suggested that the judge's reliance on JC was misplaced and that JC should be seen as confined to search warrant cases. Attention is drawn to what O'Donnell J. had to say at para. 396 of JC:

> "[i]n general, it may be said that the area of legality, including unconstitutionally, obtained evidence arises most naturally either where evidence is sought to be introduced consequent upon the arrest or detention of an individual, or as here, consequent on the search of premises authorised by warrant or other authority. While these areas are closely related, and indeed, the present case is something of

> a hybrid case, in that the evidence sought to be excluded was obtained consequent on an arrest, itself considered invalid as a result of being carried out on premises to which entry was obtained by Gardaí on foot of an invalid warrant, it is, in my view, undesirable to treat them as completely interchangeable. Accordingly, I consider it appropriate to deal only with the area of search warrants, and while recognising that the principles established here are applicable to questions of evidence consequent upon arrest or detention, I would, nonetheless, prefer to withhold definitive determination of that issue until an appropriate case reaches this Court which would permit the Court to consider the arguments in a precise factual context, and moreover, perhaps also with the benefit of experience developed in the light of this decision."

In our view, the trial judge was correct to seek guidance from the principles enunciated in JC, even if there was some divergence in the factual situations, JC being a search warrant/arrest hybrid case, and the present case, one which involved seeking access to telephone records.

23. Being of the view, correctly to our mind, that she should be informed by the JC principles, it is clear that the trial judge approached the task of how to exercise her discretion with conspicuous care. In our view, her decision to exercise her discretion in favour of admitting the evidence and not excluding the evidence was one that was clearly open to her. Indeed, we would go further and say that the decision was clearly correct.

24. In this case, it is important to consider the exact nature of the error made by the Garda officers. They followed a procedure that had been in place for some twelve years, unaware, certainly on one view, that it had been superseded. As Chief Superintendents, they made a request for disclosure of information concerning the use made of telecommunication services. They did so for the purpose of detecting and investigating crime. They made their request in writing. In short, they acted in a manner contemplated by s. 98 of the Act of 1983, as amended by the 1993 Act. If there was error, it was limited.

25. We would not consider categorising what occurred as gross negligence or recklessness. We must also look at what the consequence of the error, if it was an error, actually was. There may be many cases where it is evident that the illegally or unconstitutionally obtained evidence has significantly advantaged the prosecution, and correspondingly, significantly disadvantaged the accused. If stolen property or other material of evidential significance is found in the course of a search of a premises when the searchers had absolutely no entitlement to be there, it is clear that the illegality/unconstitutionality has had a real impact. There would still be a balancing act to be undertaken, of course, but the fact that there has been a significant impact, would not be in doubt.

26. In this case, however, there were two pieces of legislation on the statute books which could be interpreted as permitting access to the records. The trial judge, in contrast to her three colleagues who had dealt with the matter at earlier stages, took the view that the Gardaí were obliged to proceed by one route and not the other. However, the

practical effect of that must be considered. It was not the case that the Gardaí were thereby enabled to access information and then put information before the Court to which would not otherwise have been entitled. This was not information of a character that could never or should never have been accessed. Rather, this was a case where the means of obtaining access to the said information and not the fact of access itself was problematic. Again, it seems to us that some regard has to be had to the nature of the offence under investigation. It involved a significant number of participants, operating at different locations. There were individuals forcing their way into the Richardson home in Raheny, individuals involved in removing Richardson family members from their home to Cloonwood and guarding or detaining the family members in Cloonwood. The number of participants in the offence was such that it was likely that there would have been a need for contact between them, apart from face-to-face contact. This would inevitably mean that conscientious and professional investigators would have a keen interest in pursuing the question of such communications.

27. It is necessary to refer to a specific argument that was advanced on behalf of the appellant, Niall Byrne. On his behalf, it is said that the trial judge could not make a proper decision on how to exercise a discretion as to whether or not to admit impugned evidence without actually hearing that evidence and thus being in a position to know what its value was. The respondent rejects this contention and says that any suggestion that the judge must hear the evidence and be satisfied of its probative value beyond reasonable doubt as a pre-requisite to admissibility is misconceived, and that it constitutes a misinterpretation of the test laid out in DPP v. JC.

28. In the Court's view, the judge's focus at this stage would be primarily on the question of admissibility rather than probative value. When pressed by members of the Court that such a submission would seem to require the calling of a great number of witnesses, in effect, running the trial and requiring the judge to assign probative value to evidence, which would normally be the preserve of the jury, counsel modified his position and indicated that it would be sufficient that the trial court heard from the senior investigating officer as to what evidence was recovered and as to what the evidential significance of that evidence was. Such a suggestion scarcely seems a practical one and might well run counter to the hearsay rule. Insofar as what was being suggested was that the judge needed to know the evidential significance, there can be absolutely no doubt that by the time she had to rule on the telephone evidence, she was fully aware of its central significance. Indeed, nobody in Court could have been in any doubt about that after hearing the prosecution's opening statement.

Evidence Obtained on Foot of Section 29 Warrants

29. On 27th February 2018, Day 18 of the trial, the Court heard from retired Superintendent Nicholas Kenneally who had been based in Raheny Garda Station in March 2005, and had been one of the senior officers leading the investigation. He gave evidence that on 26th April 2005, he convened a conference involving several Detective Sergeants who had been involved in the investigation and decided to issue a number of warrants to search various premises. Over the following two days, 26th and 27th April 2005, he issued a

total of sixty-four warrants under s. 29 of the Offences Against the State Act 1939. In the context of the present appeal, what is of particular significance is that one of the warrants issued related to an address at No. 23 Moatview Court, Dublin 15. In the course of that search, a yellow fluorescent work jacket was seized.

30. One of the warrants issued by retired Superintendent Kenneally related to an address at No. 27A Lansdowne Valley Apartments, the home address of the appellant, Niall Byrne. A search was carried at that address, which also involved the search of a vehicle bearing Reg. No. YIL 4676. It will be recalled that the judgment in DPP v. Damache, in which the Supreme Court declared that s. 29(1) of the Offences Against the State Act 1939 (as inserted by s. 5 of the Criminal Law Act 1976) was repugnant to the Constitution, was handed down on 23rd February 2012. As we have seen, those convicted in the first trial arising from this crime, succeeded in an appeal before the Court of Criminal Appeal in 2012.

31. On 15th April 2015, in DPP v. JC, a majority of the Supreme Court readdressed the exclusionary rule, lay down a new test for determining the admissibility of illegally, or unconstitutionally obtained evidence. The test, as summarised in the headnote, was as follows:

> "(i) The onus rested on the prosecution to establish the admissibility of all evidence. The test set out was concerned with objections to the admissibility of evidence where the objection related solely to the circumstances in which the evidence was gathered and did not concern the integrity or probative value of the evidence taken.
>
> (ii) Where objection was taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remained on the prosecution to establish either:
>
> (a) That the evidence was not gathered in circumstances of unconstitutionality or
> (b) That if it was, it remained appropriate for the Court to nonetheless admit the evidence.
>
> The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances placed on the prosecution and obligation to explain the basis on which it was said that the evidence should, nonetheless, be admitted, and also to establish any facts necessary to justify such a basis.
>
> (iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.
>
> (iv) Where evidence was 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 that context, deliberate and conscious refer 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 required analysis of the conduct or state of mind, not only of the individual who actually gathered the evidence concerned, but also any other senior officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.

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

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

32. In this case, it is pointed out that the warrants were issued by a superintendent who was heavily involved in the investigation, indeed, one of the leaders of the investigation, so that there was no element of independent assessment whatsoever. However, in evidence, former Superintendent Kenneally said that his belief was that he was operating within the law of the land in issuing the warrants. In the course of her ruling on the issue, the trial judge quoted him to this effect:

> "[. . .] I have reached the following conclusions beyond reasonable doubt. A Superintendent in charge of the investigation, and due to his rank and his knowledge of the investigation, Superintendent Kenneally held a genuine and bona fide belief that he was entitled in law to issue the warrants under s. 29 of the Offences Against the State Act. The 2006 Court of Criminal Appeal decision in DPP v. Bernie confirmed that, as an investigator of the offence, he was not precluded from issuing the search warrant under s. 29. The procedure adopted by Superintendent Kenneally was a procedure which was widely adopted in cases involving schedule offences and s. 29, in its different forms, was operated by the Gardaí for upwards of 70 years without question.

I accept the evidence of Nicholas Kenneally that, in his capacity as Superintendent, he did not issue search warrants willy-nilly, and that he made a considered decision to issue the warrants in each instance. I also accept his evidence that he was unaware of the potential constitutional issues involved in relation to s. 29. At the time the warrants were issued, s. 29 enjoyed a presumption of constitutionality and its unconstitutionality only crystallised at the point at which it was declared unconstitutional in 2012.

I am satisfied, therefore, that there was no conscious or deliberate breach of constitutional rights in his actions in issuing the warrants. In accordance with JC, I must then address if the constitutionality concerned arose out of circumstances of inadvertence

or by reason of subsequent legal developments. It is not insignificant that the first serious misgivings about the use of s. 29 were expressed by Mr. Justice Morris in the Report of the Morris Tribunal. References in other judgments to possible difficulties were, at best, oblique. The report itself was published in 2006, the year after these warrants were issued. At para. 5.12 of the judgment of JC, Clarke J considered it illustrative to look at the facts of JC itself which concerned a s. 29 warrant and he stated:

> 'As a result of a subsequent decision of the Court, it became clear that a particular form of warrant was invalid. That legal fact was not known at the time of the evidence gathering at issue in this case. It is true that some doubts were expressed about the constitutional validity of the relevant measure, but it remained on the statute book and enjoyed the presumption of constitutionality. In what way would it encourage enforcement and investigation authorities to remain within the boundaries of their legal power if evidence is to be excluded by reference to legal decisions not taken at the time when the power in question was exercised?'

The inadvertence expressed by Nicholas Kenneally as to his state of knowledge at the time of issuing the warrants was not an unacceptable lack of knowledge appropriate to the task he was performing. I am also persuaded by the similarity of the arguments made in DPP v. Noel Smith in concluding that the breaches of constitutional rights in this case were a consequence of a combination of a combination of inadvertence and the subsequent decision of the Supreme Court in Damache."

The trial judge then proceeded to admit the evidence.

33. In the Court's view, given that what was in issue were warrants issued in late April 2005, seven years before the decision in Damache, it is inconceivable that any other conclusion could have been reached. There was no basis on which the officers of An Garda Síochána who issued the warrants and the members An Garda Síochána who executed the warrants would have had cause to believe that they were acting in a manner contrary to the law and the Constitution. The Court has not doubt that the grounds of appeal relating to the issuing of s. 29 warrants should be rejected.

Call Data Records

34. At the heart of the case was evidence in relation to mobile phone traffic. As a result of data accessed, the prosecution created a chart highlighting the interaction between phones of interest and the movement of phones as determined by cell sites used at various times by different phones. Call data records include the following information:

> Originating Phone Number;
>
> Receiving Phone Number;
>
> Time and Date of the Phone Call;
>
> Duration of the Phone Call;

Whether the Communication was an Audio Call or Text; and

Details of the Cell Site Mast used to Generate the Signal for the Call.

The clear and unchallenged evidence at trial was that the greater part of these records were produced by an automated process without any human intervention. However, the position in relation to cell site ID codes was different. Here, the prosecution accepted there was an element of human intervention in circumstances where the evidence adduced in respect of cell site ID codes was based on identification codes that were attributed to the relevant cell sites by service provider engineers in advance of the individual cell sites first becoming operative.

35. The appellants say that the cell ID constitutes hearsay evidence, and in the absence of an effective invocation of s. 5 of the Criminal Evidence Act 1992, should have been excluded as evidence. It is said that the process commenced with engineers manually inputting information and that those engineers were never called to give evidence at trial.

36. The appellants are prepared to contemplate that there might have been circumstances in which evidence in relation to cell ID codes would have been admissible, but they say before that could happen, or indeed even be considered, that it would be necessary that there would be strict compliance with the procedures provided by the Criminal Evidence Act 1992. The prosecution takes as their starting point that there was clear and unequivocal evidence adduced at trial that the cell data records, comprised of print-outs of numbers called and answered, dates, times and durations of the calls, were produced by an automated process without human intervention. Thus, the prosecution say that the trial judge was entitled to admit this evidence as it constituted real evidence. We are in no doubt that this is correct and we do not see this as the area of real contention. However, as we noted earlier, the situation in relation to cell site ID codes is different. There, the evidence established that there was a role played by engineers in initially assigning numbers, and that, therefore, there was human intervention. Indeed, the DPP acknowledges as much. Where the parties part company is as to the significance of the fact that a certificate, as contemplated by s. 6 of the Criminal Evidence 1992, was not produced. The appellants say that the absence of such a certificate ought to have been fatal. However, the respondent says that the conditions of admissibility were present. Specifically, the assignment of ID codes by engineers before cell sites became operative was quintessentially something occurring in the ordinary course of business. Counsel for the prosecution submits that notwithstanding the fact that there was no s. 6 certificate, that the trial judge was entitled to admit the evidence. The trial judge dealt with the matter as follows:

> "I have considered, in particular, whether the information provided by the witnesses was, as they stated, compiled in the ordinary course of business and not for the purpose of criminal investigations and whether the witnesses have the requisite personal knowledge to supply the information given in evidence, and I am satisfied that the evidence given is compliant with the provisions of s. 5."

37. In this case, the prosecution seems to have taken a conscious and deliberate decision not to go down the s. 6 certificate route. They took the view that witnesses were available who could be called and made available for cross-examination. It was felt that this was an easier route than producing and relying on a certificate which, as it was put, can sometimes cause more problems than it solves. This Court can see why, in the circumstances of this case, that view might be taken. While the assignment of a four-digit number to a particular site may have been in the distant past, the companies, as part of their business, continued to need to identify sites and continued on an ongoing day-to-day basis to utilise the numbers in question. In those circumstances, it seems to us that the trial judge's approach was correct, that it was indeed the case that much of the information came about without any human intervention that was entirely the result of an automate process. Insofar as there had been a degree of human intervention in the area of cell site IDs, the conclusion by the trial judge that the evidence was admissible pursuant to the Criminal Procedure Act is unimpeachable.

XRY Analysis

38. Certain phone handsets and SIM cards which were seized during the course of the investigation were subjected to XRY analysis. A number of the appellants contended that the information gleaned as a result of this exercise, contact lists and text messages on the phone, constituted hearsay evidence, and was inadmissible accordingly. The prosecution, for their part, maintained that the evidence was not hearsay, but rather original evidence that was admissible as constituting relevant circumstantial evidence. In the course of ruling on the issue, the judge commented:

> "[b]ased on the authorities I have considered, I am satisfied by the prosecution argument that the evidence in each instance is not intended to assert the truth or accuracy of the content, but is evidence of its presence on a particular handset or SIM card and an association between names or initials and numbers, and in the case of certain text messages, it is evidence of a possible association between persons, and in the case of David Byrne, it is evidence of an association with the nickname 'Mousey' . . . . in short, I find X or Y analysis constitutes admissible circumstantial evidence which can be considered in combination with other relevant circumstantial evidence in the case."

39. We find ourselves in agreement with the trial judge that the real question was not with the truth or accuracy of the contents, but rather with the presence of an entry in the mobile phone itself. The English Court of Appeal has, in recent times, heard an omnibus-style appeal of a number of cases, all involving the admissibility of text message communications. At para. 23 of judgment, referring to the factual matrix in one of the appeals, the Court stated:

> "[t]he Court was there not considering a communication at all, but rather the note for himself that a mobile telephone user makes when he enters in the memory of his telephone the number of a contact. This was in similar case to a private diary entry and has no purpose to cause anyone else to believe or not believe the truth of the entry – this is entirely for his own use and for that reason is not hearsay."

40. In summary, then, the position is that we have not been persuaded by any of the grounds argued that were common to the appellants, nor by any of the grounds that were specific to one or other of the appellants. We are not of the view that the trial was other than satisfactory and not of the view that the verdict was other than safe. The case mounted by the prosecution, while dependent on circumstantial evidence, was a compelling one, there was ample evidence to allow the jury reach the verdict that they did and we have no reason to doubt its correctness. We turn now to grounds that were specific to one or other of the appellants.

Grounds relating to Mark Farrelly

The Cross-Examination of Keith Farrelly

41. This issue arises from the fact that a statement of evidence was taken from Keith Farrelly, brother of the appellant, Mark Farrelly, on 27th April 2005. He gave evidence on 15th March 2018 indicating that he had not given the said statement voluntarily. The prosecution sought to have the statement of evidence that had been taken admitted pursuant to s. 16 of the Criminal Justice Act. So far as that application is concerned, the court below felt that there was insufficient evidence to support the reliability of the statement, and that therefore, the provisions of s. 16 of the Criminal Justice Act 2006 could not be invoked. However, having reviewed the evidence of Mr. Farrelly and the manner in which it was given, the trial judge was satisfied that his claim that he did not make his statement and only signed it under duress was untrue. As such, she granted the prosecution leave to cross-examine.

42. The cross-examination in question took place on Day 34 of the trial, 4th April, commencing at page five. The prosecution was interrupted on a number of occasions by objections from defence counsel who contended that the cross-examination underway went beyond the scope of what was permitted by the Attorney General v. Taylor [1974] IR 97 case. In the course of debate with defence counsel, the judge interjected, in our view, correctly, to say:

> "[w]hat you are saying, Mr. O'Loughlin, is, he [prosecution counsel] is confined to putting the contents of the statement to the witness and if he agrees with the content, well, then it is evidence in the case. If he still maintains that he cannot remember saying it, or that he does not commit himself – commit to it one way or another – then it is simply evidence that goes to his credibility in relation to what he says."

At this stage, counsel was cross-examining on the lines that information in the statement had either to have come from the witness or from the Gardaí, that if Mr. Farrelly said he had no recollection of the taking of the statement, then he was not in a position to disagree with what the Gardaí were saying. This caused the judge to say:

> "[w]ell, I think insofar as the current line of cross-examination is concerned, Mr. McGinn, you have taken it as far as you can permissibly go, and perhaps somewhat further. I think if he has maintained the position that he simply cannot remember what he said, I do not think that it is open to the jury, necessarily, to infer that

then what the Gardaí are saying must in fact be correct. So, I think at this point in time, the cross-examination should move into the contents of the statement itself."

Following a further intervention by defence counsel in the course of a debate in the absence of the jury, defence counsel submitted:

"I'm entitled to explore whether Mr. Farrelly is in a position to stand over it. If he says it is true, then the jury are entitled to rely on that."

The judge responded:

"[b]ut you are bound by his answer, Mr. McGinn. If he either says he cannot remember the actual fact in order to confirm whether or not it is true, or if he maintains that he cannot remember what he said, you are bound by that particular answer. You cannot seek, through persistence, to get confirmation of the factual situation. If he maintains that he doesn't know whether it's true, or if he maintains that it's untrue, you are left with that, and that is, I suppose, the weakness of a hostile witness situation as opposed to having a statement admitted that unless the witness has a change of heart and decides to confirm the content of the statement, you are left with simply a credibility issue in relation to the witness and absence of content in terms of any evidential value."

43. In the Court's view, the judge's understanding of the situation was clearly correct. However, it seems to us equally clear that prosecution counsel was entitled to engage in the exercise of establishing whether there were parts of the statement that the witness would stand over or whether there were parts of the statement that the witness could confirm. Much of the statement, at one level, was uncontroversial, providing details about his parents' names, information his siblings, where they lived, their domestic situation, where they worked, their phone numbers and so on. It was not a forlorn hope that the witness might be prepared to agree that some or all of the information recorded accorded with his present recollection. If that happened, counsel would have had some hope of obtaining the information that he was seeking. We do not believe that what happened was impermissible, nor do we believe that counsel flouted the rulings of the trial judge. Accordingly, we reject this ground of appeal.

The Yellow Work Jacket

44. The prosecution's case was that a jacket that had been in the jeep belonging to Tony Coffey which was stolen for use in the crime, it is suggested that it was in this same jeep that the Richardson family were driven to Wicklow, was renewed at the home of Mr. Mark Farrelly. DNA matching that of Mr. Coffey was retrieved from the jacket. At trial, submissions were made on behalf of Mr. Farrelly that the chain of evidence in respect of the particular yellow jacket, Exhibit GOB 24, was so inherently weak that the jury should not have been permitted to consider the evidence at trial, and instead, it ought to have been regarded as inadmissible. It was submitted that such were the frailties attaching to the evidence in relation to the jacket, that there should have been a directed verdict of not guilty, or alternatively, and at the very least, the jury should have been discharged.

The context of these submissions was that items of property belonging to Mr. Coffey which had been in the jeep were located on Dollymount Beach. Counsel for the defendant suggested that the jacket which the prosecution was contending was found in Mr. Farrelly's home, had in fact also been located on Dollymount Beach.

45. The judge ruled on the matter as follows:

> "I have listened carefully to the summary of the evidence in relation to the issue of the fluorescent jacket which has been made by Mr. O'Loughlin [Senior Counsel for Mark Farrelly] and the response of the prosecution and I am not disposed to either granting a direction or discharging the jury. They are matters quintessentially within the province of the jury. I will certainly be very careful to give a full account of the evidence in relation to the witnesses who are relevant to that particular part of the evidence and no doubt Mr. O'Loughlin will make appropriate submissions along the lines of those made to the Court, but in my view, there is evidence before the jury that GOB24 was, in fact, the jacket that was found in Mr. Farrelly's house and that it was contained within a particular evidence bag and singularly labelled GOB24, and there is evidence that Mr. Coffey identified it by reference to certain features and the issue of a mix-up and lack of continuity contributing to a reasonable doubt in that regard are matters which can be dealt with in my directions to the jury."

When charging the jury, the judge said:

> "[s]o, in relation, then, to the fluorescent jacket, which Garda Cleary says he found in Mark Farrelly's wardrobe and which Garda O'Boyle stated she put into a bag and labelled GOB24, you must scrutinise the evidence of Tony Coffey. You must have regard to what he said about the colour of the jacket which he identified to Gardaí, and the other jackets that he used for the purposes of his work. Similarly, scrutinise the evidence of Sergeant Byrne, Sergeant McKenna and Sergeant McArdle and consider whether there is any substance to the suggested mix-up of the jackets and that this jacket could in fact be one of the jackets found on Dollymount Strand. If you cannot exclude the possibility of a mix-up, beyond a reasonable doubt, you cannot rely on the jacket as evidence against Mr. Farrelly. Even if you are not inclined to believe that there was a mix-up, but it might reasonably be possible, you still cannot rely on the jacket as evidence against Mr. Farrelly. However, if, having considered all of the evidence, you are satisfied by the evidence of Tony Coffey that there was, in fact, only one yellow sleeveless jacket and that it was the one which was produced to him by the Gardaí, and if you are satisfied that it is one and the same jacket that was found by Garda Cleary and given to Garda O'Boyle and stored by her as GOB24, then it is evidence in the case which is supportive of Mark Farrelly's involvement in the commission of these offences, and it supports the correctness of the attribution of the grey phone to him."

46. In this case, there was firm and unequivocal evidence from Sergeant Padraig Cleary that he found a jacket, now labelled GOB24, in the wardrobe during the search of the home of the appellant. The Court had also firm and unequivocal evidence from Detective Garda Grace O'Brien who acted as Exhibits Officer for the search and was responsible for collating and recording items seized. In the Court's view, in a situation where there was clear evidence from Sergeant Cleary who found the jacket and from the relevant Exhibits Officer that the jacket in court was the same one found at the house, the Court is quite satisfied that the trial judge was correct in her view that these were quintessentially matters for the jury. Accordingly, the Court rejects this ground of appeal.

Grounds Relating to David Byrne

Witness Samantha Ellis

47. Samantha Ellis was the partner of the late Terence Dunleavy who was shot dead on 14th April 2005. She was questioned by Gardaí in relation to two phone calls that she received in the aftermath of her partner's death. These phone calls were thought to have been made by the appellant, David Byrne, also referred to as "Mousey" or "Gel Head".

48. When called as a witness, Ms. Ellis stated that she could not remember phone numbers, and as a result, was not in a position to give evidence. On behalf of the appellant, it was submitted at trial that the statements of Ms. Ellis should not be admitted pursuant to s. 16 of the Criminal Justice Act 2006, as the prosecution were seeking because the tests of necessity and reliability were not met. At trial, the judge ruled on the matter as follows:

> "[t]his ruling concerns an application to treat Samantha Ellis as a hostile witness and an associated application under s. 16 of the Criminal Justice Act 2006 to admit extracts of statements made by Ms. Ellis to Gardaí on 14th April, 17th April, 20th April and 20th July 2005, respectively. These statements were four of a total of seven statements made by Ms. Ellis in connection with an investigation primarily into the murder of her partner, Terry Dunleavy, on 14th April 2005. It is submitted by the prosecution that Ms. Ellis is effectively refusing to give evidence and that, having been given an opportunity to review her statements, her explanation that she is incapable of applying her mind to the facts she has previously provided, is not a credible one and she is simply not desirous of giving truthful evidence of these facts. I have reviewed the testimony given by Ms. Ellis and I am satisfied that she is not desirous of telling the truth. I reject her evidence that she cannot apply her mind to the facts in question, and as a consequence, I find that she is unwilling to tell the truth regarding important facts and she is effectively refusing to give evidence. I am, therefore, acceding to the application by the prosecution to treat Ms. Ellis as a hostile witness.
>
> Having found that Ms. Ellis is refusing to give evidence and because she is available for cross-examination in respect of each of the four statements, the requirements of s. 16(1)(a) have been satisfied.
>
> The Court must now consider whether the other preconditions for admissibility under s. 16 are satisfied. In relation to the requirement of s. 16(2)(a), Ms. Ellis has

confirmed in evidence that she made some statements to the Gardaí. The Court is further satisfied that oral evidence of many of the facts concerning would be admissible in the proceedings. The Court will return to this particular requirement at a later stage in this ruling.

The Court must be further satisfied that each of the four statements was made voluntarily and that each is reliable. In this regard, there is a distinction to be drawn between the statements. Ms. Ellis maintained, in respect of the first statement, that she was forced to go to the police station and was denied a chance to go to the hospital to see her partner. She maintains that she was under the influence of drugs after the incident and she cannot remember the conversations she had with Gardaí. I have reviewed the evidence of Sergeant Costello and that of Detective Garda McHugh, which to all intents and purposes, was uncontested, and I am satisfied that each of the statements made by Ms. Ellis was made voluntarily. She was not a suspect, she was not subject to any restrictions to her liberty and there is no suggestion that she was subject to any coercion, oppression or inducement to provide the information she provided. In relation to all four statements, I find that the statements were made voluntarily by Ms. Ellis.

In relation to the issue of reliability, two issues arise. The first relates to the circumstances under which the first statement, dated 14th April 2005, was taken. While the statement itself is a lucid account of events relating to the shooting, one can only assume that Ms. Ellis was in a state of great shock and distress when it was taken, but the only fact of relevance in that statement relates to a phone call from Mr. Dunleavy on the night of his death from his number, the 085 1589343 number, to Ms. Ellis on her number which was 085 7435090.

The second issue concerning reliability raised relates to inconsistencies between the statement made by Ms. Ellis on 17th April 2005 and that made on 20th April 2005 concerning phone calls received by Ms. Ellis on the phone of Terry Dunleavy in the immediate aftermath of the shooting. Other inconsistencies which were highlighted by Mr. Sammon, Senior Counsel for David Byrne, in his cross-examination of Sergeant Costello, and which were further amplified by Mr. Fitzgerald, Junior Counsel for David Byrne, in his submissions.

In response to cross-examination by Mr. Sammon, Sergeant Costello recalled that it was Ms. Ellis who initiated the taking of the statement in order to clear up matters and to provide additional information. This being in respect of the second of the two statements in question. It is apparent from the decision of this Court in DPP v. O'Brien & Stewart [2015] IECA 312, that inconsistency between versions of events is not necessarily an indicator of unreliability. In DPP v. O'Brien & Stewart, the Court of Appeal approved the findings of the trial court judge that the fact that the witness's story had evolved was, in reality, indicative of reliability. Therefore, in assessing reliability, the Court must look at the circumstances under which the statements were taken and whether the evidence is supported by other --

> In his submission to the Court, Mr. McGinn [Senior Counsel for the prosecution] has identified those other elements in the case which support the reliability of the statement. Each of the four statements contain a statutory declaration which was highlighted to Ms. Ellis by both Detective Garda McHugh and Sergeant Costello, and in each case, both the first and last page of the statements were signed by Ms. Ellis. Most persuasively, I am wholly satisfied that in making each of the four statements that Ms. Ellis understood the requirement to tell the truth. because she has acknowledged as much in evidence. Having considered all the elements of evidence relevant to reliability, I am satisfied that each of the statements is reliable.
>
> The next element which the Court must consider is whether the admission of the evidence in the statements is necessary. Mr. McGinn has highlighted the significance of the statements as providing a further essential link between David Byrne and "the mountain" phone as well as a link to the name "Mousey". He maintains that in a case which is based on circumstantial evidence, and which has culminated in a disagreement on previous occasions, every strand of circumstantial evidence must be regarded as being necessary. By contrast, Mr. Fitzgerald submits that the matters covered by the statements are already covered by the evidence given by Mr. Drumgoole and by evidence which the prosecution proposed to call from Mr. Feargal McCauley and other witnesses, and that the evidence was considerably short of being necessary, in the sense of being essential in a material and substantive respect.
>
> I have carefully reviewed the submissions made in respect of this element of the case and I am once more guided by the decision of Edwards J. in DPP v. O'Brien & Stewart which was also a case based on circumstantial evidence. In view of the serious credibility issues raised in connection with the evidence of Mr. Drumgoole, I am of the view, by analogy with the DPP v. O'Brien & Stewart case, that the stated evidence against Mr. Byrne is such that there is no evidence that the prosecution could safely or responsibly leave out. Therefore, it could not be said that any evidence which would strengthen a link between David Byrne and the mountain phone is unnecessary. Therefore, I have concluded that the admission of portions of the statement made by Samantha Ellis on 17th and 20th April 2005 are necessary, but I am not satisfied that any portion of the statements made on 14th April or 20th July 2005 is necessary."

A key issue at trial was the extent to which the prosecution could link the appellant, David Byrne, to the mountain phone or purple phone. The prosecution sought to do this in a number of ways. Footage was obtained from a service station shortly before the robbery which showed a phone being topped up. The prosecution contended that the person topping up the phone was David Byrne. However, a facial mapper stated that viewing the footage offered limited support for that proposition. Next, there was the evidence of Mr. Alan Drumgoole, but there were difficulties attached to his evidence. The defence sought that the evidence would be the subject of an accomplice warning and such a warning was

given. The prosecution also sought to draw a connection between the purple phone and two phones found in David Byrne's house and to suggest that there were indications that all three phones were owned and used by the same person. At trial and on the appeal, Mr. Fitzgerald finds himself on something of the horns of a dilemma. On the one hand, he wishes to argue that the entire corpus of prosecution evidence, including the statement of Ms. Ellis admitted under s. 16, does not sufficiently link David Byrne to the purple phone. On the other hand, he argues that the prosecution had sufficient evidence without Ms. Ellis, and that, therefore, her statement was not necessary.

In the Court's view, the analysis conducted by the trial judge was a careful one, as evidenced by the fact that she concluded that only two of four statements were necessary and the two remain unnecessary. Linking David Byrne to the mountain or purple phone beyond reasonable doubt was critical to the prosecution case. The trial judge's conclusion that the admission of the statement was necessary was, in our view, fully justified. Indeed, it is our view that the trial judge's decision on the application pursuant to s. 16 is unimpeachable.

49. For the reasons stated, the Court has not been persuaded of the merit of any of the grounds of appeal advanced by any or all of the appellant. We are satisfied that the convictions are safe and do not warrant interference by this Court. Accordingly, we dismiss the appeals.