THE SUPREME COURT

[RECORD NO.: 19/2021]

O'Donnell C.J.
MacMenamin J.
O'Malley J.
Baker J.
Woulfe J.

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JD

APPELLANT

AND

THE IRISH HUMAN RIGHTS & EQUALITY COMMISSION

AMICUS CURIAE

Judgment of Mr. Justice John MacMenamin dated the 24th day of October, 2022

Introduction

1. This appeal raises two issues. The first concerns the approach to be adopted by a trial judge when an application is made prior to the trial that a trial should not proceed, as to do so would be a breach of the rights of an accused to a trial in due course of law. The second issue concerns whether a person accused of an indictable offence is entitled to have his defence placed on record while being questioned by the gardai, and have such statement adduced by way of defence at trial.

2. The second issue was argued by way of an application to the trial judge in this case after the jury was empanelled but before the trial commenced. The trial judge acceded in part with the defence submissions. On the following day, when the jury return to court, the judge directed a verdict of not guilty be brought in on the indictable charge, but not the other summary charges which had been preferred against the appellant.

3. The respondent ("the DPP") took the view that the trial judge erred, both in the procedure he adopted, and in the substance of his ruling. She brought a 'without prejudice' appeal by way of case stated (as provided for under s. 34 of the Criminal Procedure Act, 1967, as amended) to the Court of Appeal. The Court of Appeal held that the trial judge had erred in both issues. The appellant now appeals against that decision.

The Context of the Argument

4. It is necessary, first, to set out some detail as to the legal context in which this appeal arises. In *DPP v. Gormley & White* [2014] 2 I.R. 591 ("*Gormley*"), this Court identified certain protections to be afforded to persons whilst being interviewed by An Garda Síochána. As well as the right to the presence of a lawyer, this Court also observed that such interviews, especially those subsequent to arrest, should be carried out with "basic fairness". The Court held that the right to a lawyer, and other entitlements which arose for consideration in that case, fell to be determined by reference to Article 38 of the Constitution. The focus of this appeal, therefore, is on the potential effect of pre-trial procedures on the fairness of any subsequent trial. This appeal is not concerned with a claimed freestanding right, but, rather, whether unfair procedures during an investigation may give rise to an infringement of the right to a trial in accordance with Article 38.

Issues

5. This judgment, first, considers the procedure adopted in the Circuit Court ("the procedural issue"). Secondly, it addresses the question as to whether the appellant did have an entitlement to respond to the evidence prior to the trial, and whether, absent such an opportunity, it could be said that he was denied a constitutional right to a trial in due course of law under Article 38 of the Constitution ("the substantive issue").

6. This apparently simple question does not lend itself to an entirely easy answer. It raises a number of other issues, not least as to the nature of the entitlement asserted. It also asks the question whether, in this case, an omission by An Garda Síochána to afford an opportunity to the appellant to respond would actually have rendered his trial on the indictable charge unfair to the extent of not being a trial in due course of law, and contrary to Article 38. It will be necessary, too, to consider whether, if an omission of this type was found to be *prima facie* unfair, it could nonetheless be capable of rectification or remedy before, or at, the trial.

7. In order to understand these two main issues, it is necessary to set out the factual circumstances in some detail. The questions of principle can be considered only in the light of these events and their consequences.

The Circumstances

8. According to the statements in the book of evidence, the following would have been the prosecution case in a trial. On the afternoon of the 15th December, 2016, two members of An Garda Síochána were on traffic duty in Edgeworthstown, County Longford. They recognised the appellant driving a car. They knew he did not have a driving licence, so activated the blue flashing lights on the patrol car, and set off in pursuit. In seeking to evade the pursuers, the appellant drove his car dangerously on several different occasions. Part of the intended prosecution testimony concerned what, on its face, was a very serious incident putting the lives of others at risk. The appellant then abandoned his car close to his home, and ran away. Members of his family obstructed pursuing Gardaí and prevented them from arresting him. His car was seized at that point for having no insurance, contrary to s.41 of the Road Traffic Act, 1961.

9. Four days later, on the 20th December, 2016, the appellant was apprehended by one of the two members of An Garda Síochána who had been involved in the pursuit. He was arrested, cautioned, and brought to Longford Garda Station. He was there charged with a number of offences under the Road Traffic Act, 1961 as amended. These included dangerous driving, contrary to s. 53; driving a mechanically propelled vehicle without a licence, contrary to s. 38(1); and using a mechanically propelled vehicle without insurance, contrary to ss. 56(1) and (3). When charged after caution he made no reply. Later that evening, whilst still detained in the Garda station, he was visited by a solicitor. It is important to note at this point that each of the offences with which he was charged was a summary offence in relation to which there is no power to detain an accused for the purpose of questioning.

10. On the 21st December, 2016, the appellant was brought in custody to Athlone District Court. The case was remanded. Subsequently, the Gardaí prepared a file to be sent to the DPP in accordance with s.8 of the Garda Síochána Act, 2005, and with the DPP's Guidelines for Prosecutors ("the Guidelines"). Part 7.4 of those Guidelines sets out a series of "reserved offences" which must go to the office of the DPP for a decision as to whether to proceed with a charge. Intentional or reckless endangerment is one such offence. (cf. Walsh, *Criminal Procedure*, 2nd Ed., 2016, Chapter 13:20 (h)) (See Guidelines 7.5 and 7.6). The Director decided that this charge should proceed, and accordingly sent instructions to that effect to the Gardaí.

11. The appellant later appeared before Cavan District Court on the 9th February, 2017. The summary charges were remanded. But the appellant was then also charged with the indictable offence of reckless endangerment. This offence carries a maximum penalty of seven years when tried on indictment. A person suspected of the offence may be detained for the purpose of investigation under the provisions of s.4 of the Criminal Justice Act 1984, as amended. That section provides that where a member of An Garda Síochána arrests a person without a warrant on suspicion of committing an offence, such person may be detained in a garda station for such period as is authorised by the Act. When such a person under suspicion arrives at the station, the member in charge must have reasonable grounds for believing that the person's detention was necessary for the proper investigation of an offence (s. 4 (2) (b) Criminal Justice Act, 1984, as amended). Where

such detention is authorised, the suspect may be interviewed as part of the investigation process, and any responses, whether to questions or to information put by the interviewers, must be recorded by them. However, the appellant was not detained under s.4 and was not questioned at any stage. He did not respond to the charge, having been cautioned in the usual way that he was not obliged to.

12. The phraseology of the endangerment charge was quite detailed, if a little disjointed. It was alleged that, at a named location, the appellant "*intentionally or recklessly engaged in conduct did drive on the wrong side of the road overtaking a van and nearly colliding head on with an oncoming vehicle in the presence of 2 children whom were standing on the footpath adjacent to this incident, which created a substantial risk of death or serious harm to another"* (sic). The case was further remanded and was later sent forward for trial on indictment in the Circuit Court.

The procedure adopted in the Circuit Criminal Court

13. The indictment contained both the indictable offence and the summary offences. All charges were listed for trial before Longford Circuit Court on 15th November, 2017. The case was called on and a jury was empanelled. It is obvious that judges are under constant pressure to deal with lengthy lists. But it must be said that what happened thereafter was a departure from the appropriate procedure. The approach was, rather, analogous to a "special plea in bar" which is not permitted in a situation such as that now described. The application before the Circuit Court was not a special plea, such as *autrefois acquit or autrefois convict* (See *Attorney General (O Maonaigh) v. Fitzgerald* [1964] I.R. 458.). Counsel applied to invoke the jurisdiction of the court to restrain the trial on the ground of fundamental unfairness.

14. The application was dealt with in the absence of the jury. The trial judge did not hear evidence. The matter proceeded on the basis of submissions by counsel. Counsel for the Director outlined the background circumstances to the judge, setting out the six charges on the indictment, which included one of reckless endangerment, four of dangerous driving, and one of driving with no insurance. He and counsel for the appellant then made legal submissions to the judge based on that outline.

15. In applying to have all the charges dismissed, counsel for the appellant submitted that the procedure adopted by the gardaí breached the principles of *audi alteram partem*. He argued that his client should have been arrested, detained and questioned so that there would be a memorandum of interview to be put before the jury at the trial. He submitted that the appellant was now in a position where, to give his version of events, he would have to give evidence, and that, as a result, a trial in due course of law could not take place on *any* of the charges. I pause to point out that, later, the appellant's case was refined to focus solely on the endangerment charge.

16. Counsel for the prosecution referred to the fact that the appellant had made no reply when charged with the summary offences and had been brought before the District Court on those charges. Dangerous driving was not an offence for which he could have been

detained and questioned. He had also had an opportunity to respond when charged with reckless endangerment but had not done so.

The Trial Judge's Reasoning

17. The Circuit judge acceded in part to the defence submission. He held that the endangerment charge should be dismissed, but that the other charges should proceed. He based his conclusion on the view that the absence of an interview memorandum was an "insurmountable hurdle" to a jury trial, as the appellant, an accused person, was being forced to give evidence in order to put his defence forward. In the course of legal argument, the judge observed he had never come across a case involving an indictable offence that went to a jury trial, where the accused had not been arrested and given an opportunity to respond to the allegations. He considered that a situation such as that described was not in accordance with "due process". It is apparent from his remarks, and from what he later told the jury when explaining his course of action, that he believed the process of arrest and interview to be legally required in the case of an indictable offence.

18. It is useful to pause to identify a number of issues at this point. The appellant did not, in fact, ever give any "version of events". He has not done so at any time since the Circuit Court. It is unclear, therefore, upon what basis the judge concluded that the appellant would be "coerced to give evidence", if he was to put his defence forward. It is also unclear if the defence would have been such that it could only have been successfully made if the appellant had actually given evidence.

19. It was at all times open to counsel for the defence to place the prosecution on proof of its case, and to raise such points as might be available without his client ever having to testify. Additionally, there is the question as to whether, on the case as argued, there was actually a real, rather than a theoretical, defence. A narrow defence might have been available based on absence of intent, *or mens rea*, since endangerment requires proof that an accused *intentionally or recklessly* created a substantial risk of death or harm to another.

20. It is also worth bearing in mind that the appellant pleaded guilty to sample dangerous driving charges the following day, and that evidence of the full facts was given for the purposes of sentencing. The dangerous driving charges related to specific places, where the appellant drove on the wrong side of the road, despite the presence of vehicles and pedestrians. The endangerment offence related to one particular incident where the appellant nearly collided with an oncoming vehicle at a specified location where there were two children standing on the footpath. The simple fact is that there are sometimes cases where there is no available defence, and where the evidence is very strong.

21. This case cannot, therefore, be determined on a hypothesis of what "*might have been*", especially in the absence of evidence as to what the appellant's defence would, actually, have been. The argument was that he was deprived of an opportunity to have a defence based on a memorandum or statement setting out his account begs the question as to what might have been in such memorandum or statement. That question remains

unanswered. It goes to the issue as to whether the appellant had truly engaged with the issues in the case, a point discussed later.

The Court of Appeal

22. The Director took the view that the trial judge had erred in dismissing the endangerment charge. She applied for a case stated pursuant to s.34 of the Criminal Justice Act, 1967, without prejudice to the verdict of not guilty. This posed the following question:

> *"Was the learned trial judge correct in law in directing the jury to return a verdict of not guilty on Count 3 of the indictment [i.e., the endangerment charge] in circumstances where the investigation did not indicate the accused being interviewed?"*

23. The Court of Appeal delivered a succinct judgment on the 22nd January 2021. It held that what had taken place in the Circuit Court was an irregular approach to what is now often referred to as a "*PO'C*-type"; or "quasi-*PO'C* type application" (*DPP v. PO'C* [2006] 3 I.R. 238, hereinafter "*PO'C*"), the court held that the defence application should not have been made by way of "pre-emptive strike" before any evidence had been heard, but, instead, should have been heard in the course of the trial. However, as the prosecution had not raised an objection to the procedure, and as there had been no discussion or debate with the trial judge on that approach, the court concluded it would not be appropriate to decide the appeal on a simple procedural or technical ground. But the court nonetheless made clear it would not want it to be thought that, by refraining from deciding the matter on that point alone, it was countenancing the approach which had been adopted in the Circuit Court.

24. On the substantive issue, the court observed that the case involved an unusual sequence of events. It involved the pursuit of a suspect, but not his immediate apprehension. He had subsequently been arrested and charged with the summary offences four days later. Then, several weeks afterwards, the additional indictable charge had been preferred. In holding the trial judge had taken an incorrect approach in dismissing the endangerment charge, the court observed:–

> *"… It was open to the accused to respond when charged and cautioned. It was open to him to submit an account of events at any stage, if he wished to do so, and to argue at trial for the admissibility of that account. It was also open to him to participate in the trial, and to put forward his version of events by way of cross-examination* ***and/or by giving evidence****"* (Emphasis added).

25. In so concluding, the court added the appellant had no entitlement to be arrested and detained, nor had he any entitlement to put forward a version of events which would be immune from challenge or interrogation in the trial.

26. The fact that the appellant's counsel applied to have *all* the counts in the indictment dismissed has an indirect bearing on the case made to this Court. His application in the Circuit Court was not simply confined to the indictable endangerment charge. But as the

Court of Appeal pointed out, it was the trial judge who, of his own motion, decided to differentiate between that charge, and the other, summary dangerous driving and no insurance charges. Before the Court of Appeal, the appellant's counsel did not seek to demur from the trial judge's ruling, making that distinction. Instead, counsel contended that there was a rational basis for requiring different and more stringent procedural requirements in a case involving the investigation of an indictable offence.

Application for Leave

27. The appellant applied for leave to appeal to this Court. He contended that the judgment of the Court of Appeal raised concerns as to the constitutional right of an accused to a fair hearing, fair procedures, and a trial in due course of law. The application for leave made the case that the offence of endangerment required proof of *mens rea*, and that an accused held a constitutional right to be given every opportunity to put forward a defence to the charges, which right derived from Article 38 of the Constitution.

28. The panel of this Court which granted leave (O'Donnell, MacMenamin, Woulfe JJ., [2021] IESCDET 73), observed that the issues raised in the application concerned issues of general public importance regarding the extent of the principle of fairness as laid out in *The State (Healy) v. Donoghue* [1976] I.R. 325, in the context of an accused's right to be informed in detail of the charges, to be interviewed, and to respond to allegations during an investigation.

I. Consideration of the Procedure Adopted in the Circuit Court

29. Any fair consideration of the transcript of the Circuit Court hearing reflects the fact that the judge was concerned to do justice and protect the rights of accused persons. But it must be said nevertheless that his approach in dealing with this significant legal issue was not in accordance with law.

The People (DPP) v. PO'C

30. The principle that applications of this type should be dealt with in *the course* of a trial is based on clear authority. It was not correct to deal with the question on untested material, divorced from the context of a trial.

31. In *PO'C*, a "delay case", Denham J. (as she then was) emphasised that, if it transpired that a trial, or a pre-trial process, would be unfair, a judge retained the jurisdiction to prevent the trial proceeding. But Denham J. also made clear that such applications and rulings were, generally, to be made in the course of a trial. She held that the jurisdiction to entertain such an application should not be invoked by way of a preliminary hearing prior to commencement of a trial (pp. 247-248).

PB v. DPP

32. This same approach is, by now, well-established. The issue was considered again in the High Court judgment of *P.B. v. DPP* [2013] IEHC 401 (O'Malley J.), which recorded the fact that, by the time of that judgment, trial judges were well accustomed to dealing with such issues in the course of a trial, and using such powers as were necessary to prevent injustice to accused persons. That jurisdiction was not restricted to simply giving warnings to a jury, but, in exceptional cases, could go so far as permitting a trial judge to withdraw

the case from the jury on the basis that the difficulties for the defence were such that it would not be just for the case to proceed. The judgment reaffirmed the point that, in the normal course of events, such rulings should be taken in the light of evidence as actually given, rather than being the subject of hypothesis or speculation in judicial review proceedings.

The People (DPP) v. CC

33. The judgment of this Court in *The People (at the suit of the Director of Public Prosecutions) v. CC* [2019] IESC 94 ("*CC*") re-emphasised the point. In that case, there was a considerable elapse of time. The defence application hinged on the contention that a witness who might have given evidence helpful to the accused was no longer available. Counsel for the appellant applied to have the trial halted. He contended that the absence of the deceased witness would render the trial unfair. This Court set out the appropriate procedure to be adopted in such a case, one where a third party witness had died before being interviewed, or being available to give evidence.

34. Delivering judgment in this Court, O'Donnell J. (as he then was) referred to the House of Lords' decision in *Connelly v. DPP* [1964] A.C. 1254, the jurisprudence that followed, and academic commentary on the subject (para. 8). All made clear that, at a trial, a judge retained an inherent jurisdiction to prevent injustice by abuse of process or oppression. However, the judgment in *CC* laid particular emphasis on the point that applications to invoke such jurisdiction should take place in the trial itself, and that judges should exercise their jurisdiction fully and conscientiously, and be prepared to withdraw cases based on the consideration of whether the occurrence impacted the ability to proceed with a trial in due course of law.

35. The test was not whether the judge would himself or herself consider that a guilty verdict was inappropriate, but, rather, the distinct question of whether any verdict of guilt, if it was arrived at, could be considered to have been achieved by a process which was unfair. Thus, a trial judge was not asked to "second guess" or anticipate the verdict of the jury, but, rather, to ask whether the *process* met the standard required to permit a jury to deliver its verdict fairly; recognising that few trials are perfect reproductions of all the evidence that could possibly exist. (See, to the same effect, O'Malley J.'s judgment also in *CC*, para. 45.)

36. Albeit in a minority as to the order to be made in *CC*, Clarke C.J. spoke for the entire Court when he pointed out that the principle of ensuring that matters were dealt with in context meant that it followed that it was unlikely that it would be appropriate to entertain an application to hold a trial on the grounds of prejudice caused by delay, without a court having heard some, if not all, of the evidence. As he observed, the point of leaving the issue to the trial courts is that the trial judge can understand in detail the case being made by the prosecution as the evidence unfolds, and therefore can assess the question of unfairness from a practical rather than theoretical perspective (para. 5.17).

The Proper Approach

37. It is useful to set out precisely what Clarke C.J. said:

> *"… the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.*
>
> *9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.*
>
> *9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. …"*

38. The decision in *CC* also makes clear that, while an appellate court must recognise that a trial court has particular advantages in making such an assessment, a judge making such a determination must be alive to the fact that such decisions may be subject to appeal, and, therefore, should seek to clearly set out the considerations leading to the conclusion that it had not been just to permit the trial to proceed.

Application to this Case

39. *CC* was a "missing witness" case. The judgment outlined the steps to be adopted in a case where it is alleged there was a "lost opportunity" for evidence to be obtained. In the present case, the circumstances were, of course, somewhat different. But the same fundamental principles should have applied. The Circuit judge should have dealt with the issues during a *voir dire* process in the course of the trial, in which relevant evidence had already been heard.

40. But *CC* also lays down that an assessment must recognise the fundamental point that a decision to stop a trial requires something *truly exceptional*. Drawing now from *CC*, counsel for the defence in this case should have indicated to the judge his intention to make an application in the course of the trial, and the appellant should have been arraigned. The prosecution should then have opened the case to the jury. At an appropriate point thereafter, the judge should then have held the *voir dire*. Having heard the evidence, the court should then have considered whether a conviction on the endangerment charge could have been considered to have been achieved by a procedure in the investigation which would be considered unfair, recognising that few trials are

perfect reproductions of all the evidence that could possibly exist, but also having regard to whether the process met the standard required to permit a jury to deliver its verdict fairly.

41. By way of adaptation from *CC*, the judge could have approached the matter on a step-by-step basis, having regard to: (a) the nature of the prosecution case; (b) the evidence actually adduced in the *voir dire* which, in this context, would include any evidence offered about the nature of the defence; (c) the extent and effect of the omission to seek or expressly invite a response from the appellant in the context of the rights to which the appellant was entitled; (d) the effect of such omission, if that position continued; and (e) whether, even at a late stage, the absence of an opportunity to furnish a reply was capable of remedy, either by affording the appellant an entitlement to respond to the endangerment charge in some out-of-court procedure, or alternatively by the judge in charging the jury.

42. With this first issue as background, it is necessary to turn to the substantive issue: that is, whether, accepting the "theoretical" basis upon which the case had evolved, did the appellant hold a right derived from Article 38 of the Constitution, in the form now contended for?

II. The Substantive Issue

The Appellant's Case

43. The reference to missing evidence in *CC* provides a convenient starting point for discussion of the more substantive point. In this Court, as well as raising "fair procedure" issues, counsel for the appellant also submitted that the way in which the appellant was charged on the endangerment count had the consequence that potentially useful "evidence", in the form of an unsworn statement had been "lost", when such material could have been made available to a jury. Here, I refer back to the issues posed earlier. What *material* could actually have been made available to the jury, and in what sense was it unavailable? It is not a criticism of counsel to say this question was never satisfactorily answered.

44. It is also not unfair to observe that, on its way through the courts, the case has undergone something of an evolution. At the outset, it is apparent the prosecution was under a misapprehension of the potential scope of the appeal. The Director was concerned that the appeal might, potentially, raise wider issues, perhaps suggesting that her office might actually have a role in the direction and investigation of offences, or that the Director might have had a duty to ensure that a person in the appellant's position had an entitlement to respond to the details of an arrestable charge. Those concerns were allayed. No such case was made by the appellant.

45. A further point emerged in submissions. It is not disputed that when Gardaí are now conducting interviews regarding indictable offences, it is the practice to outline the full nature of the available evidence to the person interviewed, and afford an opportunity to respond. This is of benefit to all parties, insofar as it both assists the proper investigation

of the offence, and provides a chance for the suspect to, where possible, establish his or her innocence, or at least to put his or her account on the record.

46. Counsel for the appellant submitted that the entitlement to be questioned, and thereby be provided with an opportunity to respond, is a two-pronged *constitutional right* derived from Article 38. It consisted, first, of a duty upon the Gardaí to set out, in detail, the extent of the evidence available, or "gathered", and, second as a correlative, a duty to afford a suspect or accused an opportunity to respond to what was revealed. Counsel submitted that, as a matter of fair procedures, this right commenced at the investigation stage, and not simply in a court of trial. He contended the right was derived by reference to the principle of *audi alteram partem*.

47. But this argument also requires the Court to address a further question. This is, how far, and in what circumstances, could the Article 38 right to a *trial* in due course of law "reach back" into the investigation stage of a prosecution? In *Gormley*, this Court described the duty of investigators as being one of "basic fairness". In this appeal, as well as relying on the "lost evidence" jurisprudence, counsel submitted that the issue also fell to be viewed having regard to the constitutionally enshrined rights to silence and protection against self-incrimination. He contended that it followed from these fundamental protections, that an accused person could not be placed in a situation where those rights might be compromised by having to testify in order for his account to be placed before a jury.

48. Counsel acknowledged that, insofar as it arose, the problem *could* have been addressed by the judge sitting in the District Court in Cavan adjourning the hearing before him, so as to allow the appellant to respond when charged with reckless endangerment. He submitted that it would have been appropriate, at that point, to record his client's reaction to the charge in the course of an interview, which potentially could have been adduced as part of the prosecution case at the trial. Alternatively, he accepted that his client might have been invited to later attend the garda station voluntarily, and there, in the presence of a solicitor, respond to any questions put to him in relation to the endangerment charge. But counsel rejected any suggestion that it might ever have been necessary for his client, as an accused person, to, in effect, "assist" the prosecution by providing information to the Director in determining whether or not a particular indictable charge should be preferred.

49. Counsel submitted that ECtHR jurisprudence laid emphasis on the importance of such an interview as an essential part of "building the defence" for any trial. He referred this Court to references in *Gormley* to the well-known Strasbourg judgment in *Salduz v. Turkey*, Application No. 36391/02, [2009] 49 E.H.R.R. 19). He contended that it was incumbent on the Gardaí to seek out and preserve all evidence, including potential testimony in the form of a response to the charge, and that such an obligation derived from the unique role of the investigator to seek out and preserve all evidence having a potential bearing on guilt or innocence. (See *Braddish v. DPP* [2001] 3 I.R. 127; *Dunne v. DPP* [2002] 2 I.R. 305; as considered later in *Savage v. DPP* [2009] 1 I.R. 185, and *Wall v. DPP* [2013] 4 I.R. 309.) Counsel accepted that the entitlement asserted would arise only in the

context of indictable offences, where the requirement for fair procedures would be more stringent than in the case of summary offences.

The *Amicus Curiae* Application

50. Following the judgment of the Court of Appeal, the Irish Human Rights & Equality Commission ("IHREC" or "the Commission") formed the view that the observations of the Court of Appeal quoted earlier might be interpreted as potentially impinging on the right to silence and protection against self-incrimination. The Commission applied to be joined as an *amicus curiae*.

51. Senior counsel was later retained. He made a succinct case, contending that, in the circumstances, the appellant could, and should, have been invited to come to the garda station, and participate in a voluntary interview on the endangerment charge. If such a course had been adopted, this would have given the investigators the opportunity to set out the case, question the appellant, and allow him an opportunity to respond. But counsel acknowledged this was not a "red line issue", but rather, a procedure which ought to have been adopted in this instance. Importantly, counsel also pointed out that the ultimate constitutional test was not the existence or absence of such an interview, *per se*, but the more fundamental question as to whether or not a trial in due course of law could take place. A question also arose as to the extent it would have been necessary for the appellant to "engage with the case" in order to show how he had been prejudiced to the extent that a trial in due course of law could not take place.

The Director's Case

52. Before this Court, counsel for the Director submitted that the appellant did not hold a right of the type submitted. No such right could be identified as deriving from Article 38 of the Constitution. The true issue, which had not been addressed in the Circuit Court, was whether a *trial* on the endangerment charge would actually be one in due course of law. Counsel sought to illustrate an apparent paradox in the characterisation of the entitlement as a "constitutional right", by pointing out that "reckless endangerment" is, itself, a hybrid offence, triable summarily as well as on indictment. There would be no procedure scope for putting such a right into effect on a summary charge. Thus, even seen in isolation from any other point, this highlighted the difficulty in asserting a broadly applicable entitlement under the Constitution. He submitted that it was simply not possible to identify some "bright line" distinction between a procedure to be adopted in more serious offences, by contrast with those less serious, such as those initiated by summons, where the opportunity of a "right to respond" process might simply not arise at all. He contended this paradox ran counter to the very concept of a constitutional right. The key questions were whether there had been a failure to investigate or seek out evidence, and whether an irretrievable prejudice to the appellant's right of trial in due course of law had occurred as a consequence of the alleged failure. He submitted that this had not been shown. The appellant had not engaged with the case.

53. Counsel for the DPP agreed with counsel for IHREC that the law did not appear to allow for a re-arrest in the circumstances. This was because, once the Director had instructed the gardaí to prefer a charge of endangerment, it could not have been said that the arrest

and detention of the appellant was "necessary for the proper investigation" of that offence, the key requirement for a valid detention by the gardaí. But neither was there authority for the proposition that Article 38 impliedly guaranteed a right to place an unsworn version of events before a jury which would not be subject to cross-examination. He cited the High Court judgment of *McCormack v. Director of Public Prosecutions* [2008] 1 ILRM 49 (Charleton J.).

54. Counsel also referred the Court to Garda Síochána material setting out present best practice in interviews, in accordance with the Guidelines which are now applicable. He accepted that a right to further information for an accused would arise in the event that there was a "reclassification" – for example, if it was decided to prefer a more serious charge – or if, subsequent to a charge being preferred, a new factual scenario came to the attention of the investigators. It was not in dispute that, in this case, the appellant had not been given the garda statements or other evidence on the dangerous driving charges prior to being charged with endangerment, nor had any application been made for such statements in the District Court at that stage. Finally, counsel submitted the principle of *audi alteram partem* did not apply to decisions by the Director to prosecute a person (*Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260, pp. 290-295). Nor, he submitted, was it open for an accused to, in effect, "promote", or advocate, what might be prudent for the Director to do in any particular situation in the performance of a claimed legal and constitutional obligation.

III. Discussion

55. The circumstances surrounding the preferring of the endangerment charge were unusual by any standards. A situation where instructions to lay an indictable charge came subsequent to summary charges would seldom arise in practice, although the transcript of certain exchanges in the Circuit Court appear to indicate that it was not unknown. Second, and at risk of repetition, the inescapable fact is that, while the appellant was not given a specific opportunity to respond to the indictable charge (other than when the charge was formally put to him), the Court has no evidence of what he might have said if he had been questioned.

The Role of the Director

56. I take this opportunity of dealing with any misapprehensions as to the role of the Director. This can also be dealt with briefly. Section 3 of the Prosecution of Offences Act, 1974 provides that the Director is to perform all the functions formerly capable of being performed by the Attorney General in the prosecution of criminal matters. The prosecutorial function, therefore, includes taking decisions as to whether or not to prosecute on indictment, and subsequently, giving directions or supervising such prosecutions. For the avoidance of doubt, it can be said unequivocally that the role of the Director did not, in this case, and does not, generally, involve the investigation of crime, nor directing investigatory procedures. That is a function of An Garda Síochána (DPP Guidelines for Prosecutors (4th Ed., 2019), para. 7.1 and 7.2). The right of Gardaí to prosecute as common informers, in what is now a very limited number of cases, is governed by s.8 of the Garda Síochána Act, 2005. What is also clear is that, in the circumstances, it was the duty of the members of An Garda Síochána to obtain

instructions from the Director as to whether a reckless endangerment charge should be preferred.

The nature and origin of the entitlement contended for

57. But the case also raises the issue as to the *nature* of the entitlement contended for. It was said to fall within the realm of defence rights, many of ancient constitutional standing, such as the right to silence. Not infrequently, issues concerning what happens in an investigation tend to "crystallise" at the trial itself, when the prosecution seeks to rely on evidence obtained during the pre-trial proceedings, and the defence seeks the exclusion of such testimony.

58. The term "crystallise" is drawn from the ECtHR decision in *Beuze v. Belgium* (2019) 69 E.H.R.R. 1, para. 173. Although it arises here largely within a constitutional, rather than a Convention setting, the term is nonetheless helpful. It again focuses this case on where the ultimate issue must truly lie, that is, the fairness of the trial itself. Even on the assumption that the appellant was not afforded a right to respond, amongst the questions which also arise must be, first, if there had been fundamental unfairness, whether there would have been actually a practical remedy, and, second, whether, in the circumstances, the judge was actually justified in directing the dismissal of the endangerment charge.

The Rights of Accused Persons

59. Throughout this appeal, therefore, the question posed earlier remained: how *exactly* might the appellant's constitutional fair trial rights have been infringed by what occurred, if the trial had proceeded?

60. That said, the starting point must be the rights of accused persons in pre-trial custody. These are governed by constitutional principles, by common law, and by statute. Undoubtedly, some breaches of rights such as assaults or other physical mistreatment would be capable of giving rise to a free-standing cause of action on the part of the person concerned. However, in the context of appeals against conviction, or in prosecution appeals such as the instant case, the concern has always focussed on what the consequence of an established breach of right are for the *trial* of that person.

61. The submissions to this Court referred to constitutional authorities, and almost proceeded as matters of first principle. Significantly, however, the main authorities referred to, and cited below, refer to the right of an accused person to a *trial* in due course of law. The judgment next considers the constitutional authorities relied on.

Fair Procedures

The State (Healy) v. Donoghue

62. *The State (Healy) v. Donoghue* [1976] I.R. 325 ("*Healy*") not only established a constitutional right to legal representation in the case of serious offences, but also reaffirmed indicia of fair procedures to be followed in *the course of* a criminal trial, primarily derived from Article 38 of the Constitution, to be seen in the light of the duties of the State to vindicate the rights of persons in its laws, insofar as practicable, under Article 40.3.1.

63. These constitutionally enshrined "fair procedure" entitlements mirror almost precisely those to be found in the Convention and ECtHR jurisprudence. Both *Healy*, and Strasbourg case law on Article 6(3) ECHR, set out that an accused person has the right to be adequately informed of the nature and substance of the accusation, to have the matter *tried* in the presence of an accused person *by an impartial and independent court or arbitrator*, to have *evidence* tested, and to be allowed to give *evidence* in defence. (Emphasis added). These rights originate from the very concept of a trial in due course of law.

64. But even the very process of identifying and emphasising some of these *fair trial rights* shows that the same full range cannot be applied at the investigation stage. It cannot be suggested that police investigations conducted in accordance with law must involve an "impartial and independent court or arbitrator". Nor can an accused person test evidence by cross-examination *at that point*. *Healy* states the requirements of the protection of a right to a lawyer in a trial are to be measured contextually in accordance with the seriousness of a charge, and potential consequences for an accused. These rights are the fundamental elements to a trial in due course of law.

Gormley

65. In *Gormley*, as well as dealing with the right of access to a lawyer, this Court held that Article 38(1) included a requirement that procedures during interrogation were to accord with basic fairness, and, critically, within that context, that a person accused be given every opportunity to answer the charges. The judgment in *Gormley* referred extensively to *Salduz*, cited earlier, where the ECtHR emphasised that Article 6(3) ECHR contains guarantees of certain minimum rights for persons *charged*. But, just as under Article 38, the primary Convention focus is on an evaluation of the overall fairness of criminal proceedings, even if certain aspects of trial rights may also be relevant to pre-trial investigations and proceedings. (See, for example, *Dvorski v. Croatia*, (2016) 63 E.H.R.R. 7.

66. It is self-evident that what occurs in an investigation could profoundly affect the fairness of a trial. Oppressive or overbearing conduct in questioning, giving rise to a coerced statement by an accused person, is one obvious example. So, too, would be the non-disclosure or suppression of relevant evidence tending to exonerate an accused. But the reason that the courts concern themselves with such conduct on the part of investigators is that such conduct is capable of affecting the fairness of a trial. This is evident from the words of Article 38.1 itself. It is a *trial* which must take place "in due course of law". The basic fairness of procedures issues, in this context, are not about *nemo iudex*, or *mala fides* conduct. The trial courts are not tasked with directly overseeing and disciplining gardaí but rather with ensuring fairness of procedures at a trial.

Salduz

67. The ECtHR opinions in *Salduz* carefully made the distinction made between investigation and trial procedures. The court in Strasbourg observed that Article 6(3), which guarantees procedural rights, *may be relevant before* a case is sent for trial, insofar *as the fairness of the trial* might be likely to be seriously prejudiced by an initial failure to

comply with its provisions during *the investigation stage* (para. 50, quoted in para. 55 of Clarke J.'s judgment in *Gormley*). Thus, national laws might 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"* (emphasis added, para. 52, *Salduz*). It was for that reason *Gormley* held an accused person should generally be allowed to benefit from the assistance of a lawyer at the initial stages of police interrogation.

Article 38

68. *Gormley* drew a distinction between the two stages of the interview process. Clarke J.'s judgment observed that, when a suspect is arrested, the coercive power of the State is exercised against him. This represented an important juncture in any potential criminal *process*, as, thereafter, a suspect was no longer someone simply being investigated in a process involving the gathering of whatever evidence as might be available, but, rather, had become a person under arrest, deprived of their liberty, and potentially subject to mandatory questioning for various periods.

69. The judgment stated that, when that situation arises, it was proper to regard the process *thereafter* as being "*intimately connected*" with a "*potential criminal trial*", rather than simply being a procedure at a "*pure investigative stage*". It was in that context – where there is a connection between the investigation and a subsequent trial – that the judgment made the observation that "*basic fairness of procedures*", as outlined in *Healy v. Donoghue*, should apply *from the time of arrest*. An observation in Gormley that ECtHR jurisprudence takes the view that parts of the investigation process form part of "*trial in due course of law*" must be read in its full context (para. 81 *et. seq.*).

70. It stands repetition, therefore, that *Gormley* dealt with the right to a *trial* in due course of law. In that judgment, this Court, as much as did the ECtHR in *Salduz*, recognised that not *all* "fair procedure" rights held by an accused person at a trial could apply at the investigation stage (para. 82). While the rights of suspects must, and would, be protected, a garda interview was not a "mini trial".

71. *Gormley* may have drawn some distinctions between the "*pure investigatory stage*", the "*post-arrest stage*", and the subsequent trial. The judgment held that a constitutional right to what is termed "*fair process*" commenced on arrest. But, in an investigation, the full range of fair trial procedures cannot apply. Under the common law system, a judge does not participate in the investigation. When an absence of basic fairness is alleged, a *trial court* may be put on inquiry as to what is said to have occurred in an investigation, and the consequences which might flow from evidence thereby obtained.

72. Basic fairness is an issue that can only be identified on a case by case basis. The issue must arise in the event that the constitutional right *to a trial* in due course of law is in question. As a matter of basic fairness, a suspect or person arrested is entitled to know the nature of the allegations or charges against him or her, and be given the opportunity to answer the charges. But a police investigation is not governed by the administrative law rules of *audi alteram partem*.

73. An investigation is not a process presided over by a decision-maker where each side may have a right to testify, to test the evidence of the other side, and to be examined and cross-examined. It is, rather, a significant step in a process where the full Article 38 rights will be applied *at the trial*, if a trial takes place. It cannot be said that such full fair procedure issues would arise in an investigation where the essential task is to *investigate*, not to engage in a judicial or quasi-judicial hearing. It cannot be said, either, that a right of the other side to be heard, could apply to an investigation which, of its nature, is an evolving process up to the point when a decision may be made to charge an accused person and, indeed, may continue to evolve thereafter. Rather, the entitlement to know the detail of what is alleged is to be seen as an important entitlement, *so as to ensure* that the defendant's full fair procedure rights can be vindicated at trial, such that it is in due course of law.

74. A person subject to a garda interview is entitled to a range of rights under the Constitution, judge-made law, and statute. A post-arrest interview must be basically fair. This will involve that an accused person should be given the opportunity to respond to the charges for the purpose of vindicating his defence rights at a trial. It may well be that an accused's immediate reaction to the allegations will be admissible evidence. The decision as to whether there will be a trial, and on what charges, is a matter for the Director. It has not been argued that any aspect of established pre-trial procedures in this State raises any issue under Article 6(3) ECHR.

McCormack v. The Judge of the Circuit Court

75. To a greater extent than might have been apparent at the hearing of the appeal, then, the appellant's case also raised the question as to the extent to which it can be said that the entitlement, as contended for, might result in a right to have any memo of interview adduced in evidence by the prosecution.

76. I note that, in *McCormack v. The Judge of the Circuit Court & The Director of Public Prosecutions* [2008] 1 ILRM 49, the applicant sought to make the case that, because of the allegedly chaotic nature of the garda interview, he had been deprived of a right to respond, setting out his account of events in an unsworn statement which might be adduced at the trial.

77. Charleton J., then in the High Court, held that the duty of the Gardaí in an investigation was to act reasonably and practicably, and to attempt to gather such statements and items of evidence as might assist in a true judgment (para. 8). He held that it was a matter for An Garda Síochána, and not the courts, to determine what matters to put to a suspect, and that it was not the purpose of a police interview to enable an accused to make a case on video, with the result that a recording could be played as part of the prosecution case in front of a jury. Admissibility of such statements was, rather, a matter for the judge to determine on the individual facts of the case. In an *obiter* comment, Charleton J. observed that this might in some cases involve having to consider whether an entirely self-serving statement, which was repeated a number of times, would be admissible as an exception to the rule against self-corroboration.

78. What was said in *McCormack* regarding police interviews will, of course, be viewed in light of this Court's statements in *Gormley* as to an entitlement to basic fairness including an opportunity to respond to the charge, as well as the authority of the Court of Criminal Appeal judgment in *People (DPP) v. Clarke* [1994] 3 I.R. 289. But *McCormack* nonetheless affirms the principle that the question as to whether an unsworn statement by an accused should be adduced in evidence will be a matter for a trial judge to determine in accordance with constitutional fairness and the rules of evidence. In practice, exculpatory statements are admitted as a matter of routine, not least because they may, depending on the facts of the case, be of benefit to both sides. Not infrequently, for example, the prosecution at a trial may adduce an ostensibly exculpatory unsworn statement so as to show inconsistency with other accounts or evidence proffered by the defence, or otherwise implicate the accused.

79. But, at the same time, it must be acknowledged that it is possible to conceive of circumstances when, as a matter of constitutional fairness, statements or memoranda of what an accused had to say during the investigation or questioning would have to be adduced in evidence without there being a requirement for the accused to be coerced into the position of having to give evidence, and be exposed to cross-examination. In a particular case it might be necessary to consider whether an accused person had, in fact, been deprived of a choice as to whether or not to give evidence in the trial. However, that would depend on the facts of the case, and this Court has not been given any basis for finding that such a situation arose on the facts of the case under consideration. It is not necessary to give further consideration to the question of the classification of exculpatory or inculpatory statements. The issues do not arise for consideration in this case.

80. But the judgment in *McCormack* does raise a further significant point in the context of this case. Even *if* the appellant in this case had made a statement in response to the charge, the question of whether it would have been admitted in evidence would have been governed by the rules of evidence, to be applied by the trial judge. The consequence would be that what is now contended to be a constitutional right to have the accused's statements admitted in evidence, would nonetheless be subject to a ruling from the judge as to whether such statement would be admissible or inadmissible, dependent upon whether it was exculpatory, inculpatory or a mixed statement. Further, the weight to be attributed to any such statement would, of course, be a matter to be determined by the finders of fact, and would vary considerably depending on the circumstances in which it was made. This is an area of law which is highly fact-specific, and where it is better for courts not to consider hypothetical questions.

Lost Evidence

81. The appellant also, in part, rested his case on the "lost evidence" jurisprudence. It was contended that the failure to inform him fully regarding the nature of the charge, and afford him the opportunity to respond thereto, was to be seen within the realm of "lost potential evidence". The superficial attraction of this analogy is easy to see. But it begged questions raised earlier. There is a difference between *lost evidence*, and what was claimed here, that is, a *lost opportunity* to adduce material from a memorandum or

statement, the nature of which was unspecified but which the appellant contended should have been sought by the gardaí rather than proffered by him.

82. The case law in this area, as it evolved from *Braddish* onwards, shows such applications, now conducted by a trial judge, are also highly fact-sensitive exercises. Trials are not to be restrained on a remote, theoretical, or fanciful possibility (*Savage v. DPP* [2009] 1 I.R. 185). Other than the most straightforward type of case, the jurisprudence now establishes that it would require something "exceptional" for a judge to actually prohibit a trial. (*Byrne v. DPP (Garda Enright)* [2011] 1 I.R. 346, at 356.) The most significant determining factor will frequently be the proximity or centrality of the alleged lost evidence to the question of guilt or innocence of an accused (*Wall v. DPP* [2013] 4 I.R. 309).

83. But "lost evidence" cases are not only highly fact-sensitive. They also come with a "duty of engagement". An application to stop a trial on that ground requires an identification by the defendant of the evidence said to be lost or unavailable, and of its relevance to the central issues at the trial. Thus, it will not be open to the defence merely to assert that some tangential testimony or material is missing. Rather, it must be shown that, as a matter of likelihood, what was lost was material to the real issues in the case, such as the reliability of some aspect of the prosecution evidence. An accused person must, therefore, be able to show that the nature of the missing evidence is such that in its absence, due to the elapse of time or other reasons, a trial in due course of law cannot take place.

84. But, when applying these criteria to the present case, the appellant can be criticised for not complying with the requirement of engagement. This is especially notable in a case where he (and only he) was in a position to say precisely what the "lost evidence" was. When the matter was in the Circuit Court, he did not say what he would have said in reply to details of the charge. There is still no evidence as to what he would have said.

85. In theory, this point might be countered by the response that he was hardly in a position to provide this evidence, owing to the procedure adopted in the Circuit Court, and that the opportunity to engage by identifying exactly what evidence had been "lost" never truly arose. But that does not explain why there was not even an outline from counsel as to what the reply to the charge would have been, coupled with the submission made that he was now in the position of being forced to give evidence before the jury.

86. At no time since has there ever been an indication of what the appellant would, or might, have said. Because of what happened in the Circuit Court, his counsel framed the case in this Court on the basis that, as a consequence of the procedure adopted on the endangerment charge, his client was deprived of an *opportunity* to respond by making an exculpatory statement. He submitted that his client's right to silence was potentially compromised by the prosecution on that charge. But, in the absence of information as to *what* the evidence would have been, I think this is a *non sequitur*. It elides two separate things. To assert that the appellant was deprived of an "*opportunity*", in fact, begged the question as to what the word "opportunity" actually meant in the context of this case. Did it mean a missed charge? It also makes an assumption that a hypothetical memorandum

of what he might have said to the Gardaí would have been admissible at a trial. Arising from this are further questions. These are whether the appellant's right to silence was ever actually compromised, and whether the absence of an opportunity to respond, in fact, resulted in an infringement of Article 38 of the Constitution.

The Right to Silence under the Constitution

87. It is hardly necessary to emphasise the high constitutional status of the "disparate group of immunities" characterised under the heading of the "right to silence". (*R v. Director of the Serious Fraud Office ex-parte Smith* [1993] AC 1). The introductory passage in Costello J.'s judgment in *Heaney and McGuinness v. Ireland* ([1994] 3 I.R. 593) contains a full description of the status of these rights under the Constitution. (See also *Rock v. Ireland* [1997] 3 I.R. 484.) While, like fair procedures, the basic principles are well known, it bears re-emphasis that an accused person is not obliged to give evidence, nor required to adduce evidence on his own behalf, nor to be questioned against his will, and that such rights draw their antecedents from ancient times, which, more recently, have been held to be enshrined in Article 6 ECHR (*Funke v. France* (1993) 16 E.H.R.R. 297).

88. The judgment of this Court (Clarke C.J., O'Donnell J., Dunne J., Charleton J., O'Malley J.) in *The People (DPP) v. K.M.* [2018] 1 I.R. 810 delivered by O'Malley J., makes clear that, at a trial, even the very invocation of the right to silence must be protected.

89. For the purposes of this case, however, one further conclusion follows. Even if the appellant may not have been in a position to "engage" to the degree of saying what he might have said in any statement in response to the endangerment charge, it cannot be shown either that there was actually, or potentially, a denial of the right to a trial in due course of law. I acknowledge that what happens in an investigation could compromise the right to a fair trial, were it actually shown that an unfair investigation had the effect of compromising that constitutional right to a trial in due course of law. But, here, the trial judge's conclusion that the appellant's right to silence had been compromised was based on a misapprehension that the appellant had a right under Article 38 to have an unsworn statement made in garda custody and admitted in evidence. The judge further considered that the appellant's rights had been breached by the failure to ask him to make such a statement, thereby forcing him to testify in the trial.

90. I do not consider that there can be a "right" to be arrested and detained for questioning – a "right" to be lawfully deprived of one's liberty in order to be informed of the detailed information available to the investigators, and to be able to present one's version of events in response. I would agree with the view expressed by Charleton J. in *McCormack* that the purpose of a garda arrest and interview is not to enable the suspect to make a case for presentation to the jury. The purpose is investigative – the gardaí are still at the stage of seeking evidence, or information that may lead to the finding of admissible evidence. An arrest does not inevitably lead to a charge.

91. If, in the course of interview, the gardaí do not put details of the available information to the suspect for his or her response, it may be that the investigation will subsequently be shown to have been "improper" in the sense that there has not been a full investigation

and relevant evidence has not been sought or obtained. But if relevant evidence comes to light after a person has been charged, such evidence is not considered inadmissible, and the trial will not be deemed unfair, simply because the evidence was not put to the accused in interview.

92. It is, I think, helpful to consider how the existence of the right claimed would affect the law relating to alibi evidence, which is perhaps the best example of wholly exculpatory evidence. Could it be plausibly argued that there is a constitutional right to have an unsworn assertion of alibi put in as evidence of the truth of its contents, without any need for sworn supporting evidence? Such a right would, of course, radically alter the purpose of the statutory procedures for alibi notices – the notice of alibi could, itself, become the evidence of alibi, without any possibility of cross-examination. If this could be so, it would seem to follow, also, that the contents of any letter written by or on behalf of the accused to the gardaí or to the Director, making exculpatory assertions, would necessarily have to be admissible as evidence of the truth of those assertions. At this point, one seems to be very close to finding that the Constitution requires the prosecution case to be made by way of sworn evidence, subject to cross-examination, while entitling the defence to make its entire case by way of unsworn assertions.

ECtHR Jurisprudence

93. The appellant also submits that his Convention rights were compromised. Article 6 jurisprudence contains many observations on the right to silence and protection against self-incrimination. It is not necessary to explore the detail of cases such as *J.B. v. Switzerland* Application No. 31827/96, 3rd May 2001; *Quinn v. Ireland* Application No. 36887/97, 21st December 2000; *Jalloh v. Germany* (2007) 44 E.H.R.R. 32; *O'Halloran & Anor. v. United Kingdom* (2008) 46 E.H.R.R. 21; *Saunders v. The United Kingdom* (1997) 23 E.H.R.R. 313, or, (in the context of an overall "fair trial" test) *Beuze v. Belgium* cited earlier; *Ibrahim and Others v. the United Kingdom* (2015) 61 E.H.R.R. 9; and *Doyle v. Ireland* Application No. 51979/17, 18th January 2018).95.

94. *C v. Italy*, Application No. 10889/84, 11th May, 1988, deserves some mention. It was decided against a complex factual background, where the applicant had decided not to appear at a first instance trial, but had authorised his defence lawyers to represent him for all purposes. It is of interest in that there is a resonance with the passage in the Court of Appeal judgment which was a cause of concern to IHREC.

95. Against a complex procedural background, the Commission opined that the applicant had "*failed to exercise his right to appear at the hearing, which was recognised and guaranteed by Italian law, and to take advantage of the remedies available to him*". The investigation in question was purely preparatory in nature, and the final presentation of evidence took place in the presence of the parties in the course of the trial. In the course of its decision, the Commission stated "*… the applicant could have been questioned by the court, called witnesses, had them examined, produced any documents he considered relevant, and made any statements useful for his defence*". I refer to it simply because the wording is not dissimilar to that adopted by the Court of Appeal in this case.

Directive 2012/13 E.U. on the Right to Information in Criminal Proceedings

96. No party made any submission that the description of rights and duties laid down under the Constitution, and by law, raised any question of non-compliance, either with E.U. law, or the ECHR. The provisions of the Directive closely mirror the guarantees under the Convention and ECtHR jurisprudence, and do not require detailed analysis.

A Recent Report: Right to Silence and Related Rights

97. In the course of submissions, this Court was provided with a recent report entitled "*Right to Silence and Related Rights in Pre-trial Suspects Interrogation in the E.U.: Legal and empirical study promoting best practice*" (EmpRiSe Ireland, 28th June, 2021, E.U. Justice Programme, Daly, Muirhead, Dowd). This contains interesting research drawn from interviews from a cross-section of those involved in all aspects of the legal system in this State.

98. Among other matters, the report describes the evolution of a new Garda Síochána Interviewing Model ("GSIM"), which lays emphasis on a shift from a "confession seeking" approach to "information gathering" (p. 101). The report also comments that the GSIM can be described as a "late disclosure" model which is criticised by some defence solicitors, but, from the garda point of view, is aimed at encouraging suspects to volunteer information during interviews, and in a way which allows observations of suspects' spontaneous reactions. The report also makes the point that Gardaí, some of whom are now trained to a high level of interviewing skill, now themselves believe that they are under an obligation to put extant evidence to a defendant. (Chapter 6.4, p. 62). Again, however, it must be said that while this practice is to be commended because it is conducive to a proper investigation and because failure to disclose relevant information to a suspect might have consequences for, in particular, the admissibility of an interview having regard to the requirements of a fair trial, it does not support the proposition that there cannot be a fair trial in the absence of a structured interview process.

A Potential Resolution of the Issue before, or at trial

99. One final point remains. It is simply that, if it had been shown there had been unfairness, there was a resolution to the issue which might have been available before, or even at, the trial. The judgment in *Healy v. Donoghue* makes clear that the term "*due course of law*" means more than a mere technical compliance with the letter of the law. Rather, it conveys a trial is to be conducted in accordance with the concept of justice (cf. *Gormley*).

100. It is common case that one possible resolution of the issue would have been for the appellant to be invited to furnish a statement at a garda station. One could go further. If the Circuit Court judge had felt that there was clear identifiable unfairness, then, subject to all else being equal, or being made so, the appellant could, even at a late stage, have been given the opportunity to furnish a written response to the endangerment charge. Whether or not such memorandum of interview would have been admitted in evidence would remain a matter for the judge to determine, in accordance with the general principles outlined earlier. But equally, if it was thought there had actually been some unfairness or omission, the appellant might have volunteered to furnish some additional

matter if he felt there had been an omission. Seen in the abstract, a determination on admissibility might well have been relatively easy in this instance. The appellant had no "right" to be arrested for the purpose of allowing him to make a statement.

Conclusion

101. It is now possible to draw some of these various strands together. The Constitution identifies powers, duties, restraints, freedoms and rights. By definition, many of the constitutional rights derived from Article 38 must, necessarily, be capable of ready identification and application. This is not least because, if there has been a violation of that Article, then a trial in due course of law will not have taken place.

102. The thrust of the appellant's submissions does not lead to the conclusion for which he argues. The "right" is unspecific, and too amorphous to be capable of easy definition. If there was a real unfairness in the investigation, the problem could have been resolved by the judge.

103. The most obvious points throughout this appeal, raised earlier on a number of occasions, but to which I yet again return, is that the appellant was not, and could not have been, put under duress or compulsion to testify, or obliged to incriminate himself by giving evidence. Whether he chose to testify was entirely a matter for him. The constitutional rights and protections are essentially negative. An accused is *not* to be compelled to testify, or to self-incriminate. To repeat the earlier various observations on the rather theoretical basis of this appeal would be otiose. But the right which arises is that protected by Article 38.

104. The appellant has not shown how he was prejudiced in a manner that violated his constitutional rights to a trial in due course of law. There was no evidence as to what he would, or might, have said in response to the endangerment charge. This is in contrast to a lost evidence case, where an applicant to a trial judge would have to show the extent of the likely prejudice by identifying the potentially helpful nature of the unavailable evidence.

105. Not only did the appellant fail to establish that the obligation asserted is to be seen as a constitutional right directly derived from Article 38 of the Constitution, it has not been shown that the effect of the omission would have imperilled his right to silence, or any other right to which he was entitled, either under law or the Constitution.

106. The entitlement claimed draws on procedures adopted at a police interview. The protection of the entitlement to *basic fairness* in an investigation, by contrast to the more easily identified right to the presence of a lawyer, would require a fact-based enquiry as to what actually occurred in an interview. Dependent on the outcome, such inquiry might lead to a variety of consequences, whether remedial – as discussed above – or capable of being dealt with by a judge charging the jury, *or* in an exceptional case, dismissal of the charge, for reasons which would have to be made clear in a judgment. If the issue was to be raised, the judge would have to be told first what was in issue. But the issue must be seen in its true constitutional context, that is, the right to a fair trial.

107. Police interviews are now recorded. What happened in an investigation can now be more easily determined. But the unresolved questions in this case as to nature, application and the consequence of the right in their application, necessarily also lead to the conclusion that the appellant has not shown that the omission of an opportunity to respond would lead to a trial which was not in due course of law.

108. The analogy with "lost evidence" jurisprudence is imperfect. It raises a question as to how a duty of *engagement* would be fulfilled in any individual case. At minimum, it would require identifying what evidence was lost. It would also raise the question of whether the judge could remedy the position.

109. As a matter of principle, to accept the appellant's argument, therefore, would be to elevate what should properly be seen as a reasonable and appropriate *procedural* step in the course of an interview on an indictable charge to be seen within the realm of *basic fairness*, to the status of a separate and free-standing Article 38-derived constitutional right, which, if not complied with, would have the effect of rendering a trial as unlawful. The misconception underlying the nature of the entitlement is in no way comparable to the direct effect of the denial of a right to a lawyer at interview, when requested, and to a subsequent trial in due course of law. As stated earlier, it is difficult to conceive of a constitutional right which, dependent on circumstances, might have such a wide range of potential consequences and indeed remedies.

110. It is not easy to discern either how such an entitlement would be capable of a broad application. The difficulty in the case of summary offences, and indictable offences triable summarily, has been touched on. That there would also be exceptions in the case of extradition of a suspect from abroad, or very old prosecutions, in certain categories of case, was not in dispute. It is also impossible to determine how such an entitlement could possibly be applied in cases where there is no statutory power to detain a person at a garda station.

111. Additionally, it could hardly be said that an omission to uphold the entitlement could be seen as an infringement of a *constitutional* right, leading to an unconstitutional trial, when, whether or not a memorandum of what is said at interview would actually be admissible, would ultimately hinge on the judge's decision as to whether or not to admit the statement in evidence at the trial. It is impossible to see how a constitutional right could reach an end point which would be subject to judicial determination as to whether or not a statement should be actually admitted, or would raise fundamental questions of fair procedures and nature justice.

112. Finally, it would, in any case, be necessary to consider engagement and the degree of prejudice. But it is hard to see why, in this instance, the Constitution should be seen as a one-way process. An accused person themselves can decide whether to furnish a statement soon after arrest. An accused person can decide whether to testify, or to avail of their constitutional right not to do so. Reliance on the right to silence in this case would not have compromised his counsel's right to cross-examine the prosecution witnesses to test their credibility.

113. Viewing the question as one of basic fairness has the consequence of allowing any relevant issue or alleged prejudice to be determined as it should be: that is, by the trial judge acting objectively and conscientiously on evidence, within the factual context of the case at hand.

Order

114. I would affirm the order made by the Court of Appeal. I would propose that the answer to the question in the case stated be answered in line with the reasons set out in this judgment. In brief, the answer to this case stated should be "no". While recognising that there will always be legitimate concerns on a fundamentally important constitutional issue such as the right to silence, I think the criticism of the Court of Appeal judgment was not warranted. If it had been deemed necessary in the interests of basic fairness, a ready resolution was available to the appellant himself who could have provided a statement on the endangerment charge. Perhaps, if recognising the importance of the values involved, the judgment under appeal had added the words "*subject always to the appellant's right to silence, and protection against self-incrimination*", to the words quoted earlier, there might have been less concern. I would propose hearing counsel in the event that any ancillary order is required.

Summary

115. This judgment, therefore, holds:

- That the procedure adopted by the Circuit Court judge in addressing the application to stop the trial was, on this occasion, not in accordance with law.

- That, in the event that the appellant had wished to raise an issue as to his entitlement to be questioned, and to respond on the indictable charge of reckless endangerment contrary to s.13 of the Non-Fatal Offences Act, 1977, the matter should have been raised in the course of the trial of the appellant, and not by way of preliminary application where there was no evidence adduced.

- That, if such issue does arise, it is the duty of the trial judge to consider an allegation of unfairness in an investigation giving rise to an unfair trial and to determine that issue on the evidence in a *voir dire*, and to determine the consequences, if any, which flow from such determination. But the scope of the inquiry is within the framework of the need to determine whether there is a real risk of trial which is not in due course of law which cannot be remedied.

- That the constitutionally guaranteed rights to silence and protection against self-incrimination are guaranteed under Article 38.1 of the Constitution.

- A person under investigation is entitled to fairness in the course of an investigation. In the event of finding that there was fundamental unfairness, the judge should make such orders or directions as are necessary to remedy the position. An order to stop the trial will arise only in a truly exceptional case.

116. The guarantee of a trial in due course of law contained in Article 38 of the Constitution is a robust guarantee that has received life and force from the decisions of these courts whether in a number of major decisions, or in rulings made during the course of trials, since it was first set out almost 100 years ago in Article 70 of the Irish Free State Constitution. The decision in this case emphasises that it is a right to be vindicated at the trial, and just as importantly, by the trial.

117. A trial is required to determine whether an accused person is guilty of the crime charged. If a judge, or where applicable, a jury, concludes that it cannot be fairly determined that the accused is guilty of the charge beyond any reasonable doubt, then the constitutional requirement of a trial in due course of law requires that the accused be acquitted. A trial in due course of law is a robust mechanism with well-developed procedures for the exclusion of evidence, the preclusion of certain lines of questioning or speeches or assertions, and provisions for warnings and rulings by the trial judge which are all designed to ensure the fairness of the process. There is a further overarching obligation on the judge to ensure that the trial is in accordance with the guarantee under Article 38.

118. It is important to understand that the decision in *Gormley and White*, upon which reliance was placed, was made in this context. That case arose in relation to the question of the admission of evidence in the course of a trial. It is not authority for a free-standing right to fair procedures in an investigation separate from the trial process. The landmark decision of this Court in *State (Healy) v. Donoghue* had decided that trial in due course of law required the assistance of a lawyer and the provision of such a lawyer if the accused was unable to pay for one. Building on that decision, *White and Gormley* decided that the process of taking a statement in Garda custody was so clearly connected to that trial process, that Article 38 must be held to apply outside the temporal confines of the trial itself, and to require that a person in custody have access to and the assistance of a lawyer before being questioned. That was an important decision which has led to a salutary change in official practice in respect of questioning in custody. The limits of the ruling were identified however, by the fact that in the same case it was held, that it was not required that a lawyer be present before an accused person was required to provide forensic samples. But the engine of that decision was the requirement of a fair trial under Art. 38. The issue in any such trial is the guilt or innocence of the accused. It is not a freestanding determination of the propriety of the procedures adopted by the investigating guards or the prosecuting authority. Those matters are relevant only insomuch as they affect the capacity of the Court to provide an Article 38 compliant trial. It is entirely possible for there to be unfairness, and even deliberate breach of constitutional rights in the course of an investigation, but where it is nevertheless possible to provide a fair trial, for example by the exclusion of any evidence obtained as a result of the breach. That is indeed why the procedures identified above such as exclusion of evidence, warnings and instructions to juries, and other steps, have been developed. This illustrates the fact that the rights guaranteed by Article 34, Article 38 and Article 40, are vindicated at, and by, the trial process.