THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

Appeal No. 92/2015

Between

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

Respondent

V

William Moran

Appellant

JUDGMENT of the Court delivered on the 20th day of June 2018 by

Mr. Justice Hedigan

Background

1. The appellant was tried and convicted of murder before McCarthy J. and a jury in a trial which took 24 days in February and March 2015. The appellant was found guilty of murdering one Martin Brophy on a date unknown between 19th and 20th May 2012 in a building in Waterford known as the "Warehouse". The remains of Martin Brophy were found on Monday, 21st May 2012. He was last seen alive on the previous Saturday, 19th May. The building in which his remains were found was previously an educational facility. It had fallen into disuse and was known as a place where youngsters in the area tended to congregate. The remains were found alongside a metal locker. The locker and a concrete block found adjacent to the remains were bloodstained. The primary cause of death was significant acute craniocerebral traumatic injuries due to blunt force trauma inflicted on the head. The forensic pathologist retained by the State concluded that the trauma to the head would potentially or possibly have included kicking, stomping and the use of the adjacent concrete block.

2. The deceased was seen on CCTV entering the building on 19th May 2012 where his body was found on 21st May 2012. The appellant, along with another male and two females was seen entering the building on 19th May at 6 pm, just over an hour after the deceased entered it. The two females were seen leaving the building at about 8.50 pm on the same evening. The appellant and the other male were not seen leaving the building. Presumably they left by another entrance. The other male named Gavin Walsh who entered the warehouse with the appellant gave evidence that they were drinking there with the deceased and the two females who left. He said that an argument erupted between the appellant and the deceased in relation to the appellant's cousin, Ray Connolly. During the argument the appellant telephoned his cousin. The phone was put on loudspeaker and an argument was heard developing between the appellant and the deceased. The call was taken off loudspeaker and the appellant was heard saying to his cousin "I will do him for you, Ray." Gavin Walsh then described the appellant punching and kicking the deceased and using a concrete block. He said that he left the warehouse and was soon afterwards joined by the appellant who, in his presence, phoned Ray Connolly and said "Job done".

3. The appellant presented in Waterford Garda Station on 29th May and made a statement. In his statement he said he went to the warehouse with Gavin Walsh and the two girls and met the deceased. He said an argument erupted between the deceased and Walsh. He said the deceased got angry with him and Gavin Walsh. He said things calmed down and the girls left. He said he then went into another room and phoned his cousin. He said he returned to the room to see the deceased running at Mr Walsh. He said he pushed the deceased to the ground. He said that the deceased got off the floor and he kicked him in the face. He said he gave him a few more kicks and then Walsh began kicking him. He said he told Walsh to let him up and the deceased and Walsh began to fight. He said that the deceased was getting the better of Walsh and he intervened. He said that then Walsh "just laid into him". He said they left the building. He said Walsh left after him and he noticed blood on Walsh's hoodie which they later burned.

4. Evidence was given of a Facebook conversation on the 20th of May between Stephen Dundon and the appellant. During the course of that conversation the appellant admitted killing the deceased, saying that he *"beat him to death"* with a cinder block. The oral testimony of Mr Dundon was that he had a conversation with a person he then believed to be the appellant and that he gave permission to the Gardaí to access his account and that he signed the print-out of the conversation. Detective Garda Seamus Halpin gave evidence of accessing his Facebook account and obtaining screenshots.

5. Danielle Moran, the appellant's cousin, described having a Facebook conversation with him in which he referred to the deceased as "Skip" and said *"I beat him to death".* She gave oral testimony that she checked the conversation with the appellant days later to check if the person he said he beat was the same person he had since been questioned about by the Gardaí on suspicion of murder.

6. David Fennell, the head of the Mutual Assistance and Extradition Division of the Department of Justice and Equality, gave evidence that he was authorised to act on behalf of the Minister in relation to the workings of the Ireland/US Treaty on Mutual Assistance by virtue of Schedule 14 to the Criminal Justice (Mutual Assistance) Act 2008 (hereafter the 2008 Act). Mr Fennell gave evidence of the working of the treaty and that in 2014 the Irish and US authorities agreed on a further wording for the certificates thereunder having regard to the manner of evidence being produced by internet service providers. The certificate appended to the treaty only allowed certification of evidence which was produced using human intervention. A new form of certificate was therefore agreed between the State parties which allowed for certification of evidence stored automatically in purely electronic form. These draft certificates were exhibited. Mr Fennell was cross examined in relation to the negotiations which brought about the further agreed form of certificate between the Department of Justice and Equality of Ireland, the Director of Public Prosecutions and the United States Department of Justice.

7. Superintendent Matt Nyland gave evidence as head of the Mutual Assistance Section in An Garda Síochána. He had responsibility for being the sole point of contact with the Department of Justice. He received a request from Gardaí in Waterford following which he drafted a request which was signed by the DPP and submitted to the Department of Justice for onward transmission to the US

Department of Justice. This request sought Facebook data in relation to the appellant, Stephen Dundon, Gavin Walsh and Ray Connolly. On foot of this request, he received a disc which he forwarded to investigators in Waterford.

8. Superintendent Nyland gave evidence of receiving a further, more expansive request from the Office of the DPP which was furnished to the Department of Justice and Equality for onward transmission to the US Department of Justice. This request asked for statements to be given as to the functioning of the computer system that produced the evidence. A reply was received with a certificate from one Sheila Mifsud of Facebook and was accompanied by a CD. This was in the new form of certificate as negotiated between the Irish and US authorities.

9. Laura Flannery, an executive officer in the Department of Justice and Equality, gave evidence of having received a certificate of Sheila Mifsud in January 2015. The certificate is notarised and dated 22nd December 2014. It refers to the records of the appellant, Stephen Dundon, Gavin Walsh and Ray Connolly. She received it from the US Department of Justice and transmitted it to the Gardaí. In the course of her evidence, Ms Flannery produced a letter from Lynn Holliday of the US Department of Justice which accompanied the certificate and the Facebook records. The letter was headed "Re: Request from Ireland for assistance in the matter of Martin Brophy". In the body of the letter, Ms Holliday referred to the enclosed records and stated *"These records were initially provided to your office on December 26th 2012, in response to your government's request for assistance in the above matter, pursuant to the treaty between the Government of the United States and the Government of Ireland on Mutual Legal Assistance in Criminal Matters."*

10. Detective Garda Seamus Halpin gave evidence of receiving the discs following both mutual assistance requests. Sergeant Paul Johnstone gave evidence of extracting the Facebook data. The account of the appellant set out matching biographical data and included that the account was verified using the same mobile number as that given by the appellant to the Gardaí. IP addresses were matched to Ireland. There was a photo in which the account holder had tagged himself. The records also matched the print-out from the account of Mr Dundon in relation to the content of the conversation between them.

11. Detective Sergeant Donal Donoghue gave evidence of the appellant giving him the same mobile phone number in interview as used to verify the Facebook account. Elsewhere in the interview, the conversation with Mr Dundon was put to the appellant who accepted that the messages came from his account but claimed that his account was hacked and that he did not have that conversation. However, the only other person who would have had knowledge or details relating to the death of Mr Brophy at that time was Gavin Walsh. The appellant told Gardaí that Gavin Walsh did not have access to his password.

12. The Facebook evidence consisted of two strands of real evidence; the screenshots of the conversation between the appellant and Stephen Dundon and the digital record of the Facebook account of the appellant produced pursuant to the mutual assistance request.

13. The respondent helpfully set out the following chronology in relation to the Facebook evidence:

> June 2012 Gardaí in Waterford request Superintendent Nyland to obtain Facebook records.
>
> 12th October 2012 A search warrant issued by a US District Court was served in Facebook in relation to the request.
>
> January 2013 Gardaí in Waterford received material from Facebook via mutual assistance in relation to the appellant, Stephen Dundon, Gavin Walsh and Ray Connolly accompanied by a certificate of a Svetlana Shetnenko.
>
> 24th April 2013 Detective Garda Seamus Halpin spoke with Danielle Moran who confirmed her Facebook conversation with the appellant.
>
> January 2014 Detective Garda Seamus Halpin made a fresh mutual assistance request in relation to providing witnesses in respect of the disc previously provided.
>
> 17th February 2014 The appellant's case was listed for trial but was adjourned as there were outstanding disclosure issues.
>
> September 2014 Irish and US authorities agreed pursuant to Article 8(5) of the Treaty to another form of certificate which allowed for certification of documents created by internet companies.
>
> 22nd December 2014 Sheila Mifsud of Facebook created a certificate in this agreed form in relation to the records.
>
> 2nd February 2015 The certificate of Sheila Mifsud and a new disc was received by Detective Garda Seamus Halpin.

14. The case at trial centred around a conflict in the evidence given by the chief State witness Gavin Walsh and the account offered by the appellant to the Gardaí in interview in particular his voluntary statement made on 29th May 2012. The appellant and Gavin Walsh had previously been friends. Both were observed entering the disused building on the afternoon of 19th May 2012. Each were subsequently identified as suspects in the case and were the subject of arrest, detention and interview. Each conceded their presence in the warehouse on 19th May, that they were in company with the deceased and that an incident or incidents of violence did occur. Neither however accepted responsibility for the murder of the deceased. Each directly or indirectly blamed the other in that regard.

15. Gavin Walsh claimed that there was bad blood between the deceased and a cousin of the appellant, Ray Connolly. The appellant, he said, was in telephone contact with Ray Connolly from the warehouse and was requested by Ray Connolly to give the deceased a beating. Mr Walsh stated that he refused to participate and claimed that he did not touch or lay a hand on the deceased. He claims that the appellant attacked the deceased from behind, grabbing him and dragging him onto the ground. There he started kicking and striking the deceased in his head. There was, he said, no reaction from the deceased by reason of the fact that he was too drunk. On Mr Walsh's version, the appellant persisted in the attack notwithstanding Mr Walsh's efforts to have him desist.

16. The appellant in his voluntary statement made to the Gardaí on 29th May 2012 said that the aggression had come from the deceased and was originally directed to Gavin Walsh. He stated he went to another part of the warehouse to ring his cousin Ray Connolly. When he returned, the deceased and Gavin Walsh started fighting. He claims he intervened to push the deceased away. He admitted that he hit him a few kicks to include the kick in the face. He stated that Gavin Walsh then became involved and started kicking the deceased. The deceased got up and continued fighting with Gavin Walsh. The appellant claimed that he intervened in circumstances where the deceased was getting the better of Gavin Walsh. He saw Walsh repeatedly kicking the deceased. He and Gavin Walsh then left but the appellant having realised that he had forgotten his phone, the two returned to the room where the

deceased was. The appellant says that he could see that he was still moving. He said he couldn't find his phone and left the building. He waited for Mr Walsh outside for a few minutes. When Mr Walsh arrived, the appellant noticed there was blood all over the back of his white hoodie, sleeves and a good bit on the front. He said in subsequent interview that the deceased was alive when he left him and that he did not murder him.

17. In the circumstances of this evidential contradiction, the State's case turned substantially on evidence derived from Facebook and telephone records. The appellant took issue with the admissibility of both categories of evidence. The objection was the subject of separate voir dire undertaken during the course of the trial. The objections were not sustained and the appellant in general terms appeals the conviction on the basis that the learned trial judge in his rulings and/or determination of the issues arising in those *voir dire* and in allowing the State to lead the evidence in question before the jury acted in error. Although in written submissions certain matters were raised in relation to 13 notices of additional evidence and the opening by the prosecution referring to statements subsequently ruled inadmissible, those matters were not raised in the notice of appeal nor pursued at the appeal itself. The appeal is concerned solely with the evidence of Facebook records and telephone records.

The submissions of the appellant
18. In relation to the Facebook evidence; the appellant submits that;

(i) the form of authentication was deficient because it was obtained by means of the new form agreed between the Irish and US authorities;

(ii) this new form was devised at the initiative of the DPP who was a party to the prosecution. This was in violation of the separation of powers and fundamental fairness;

(iii) there was no admissible evidence as to the function and/or operation of the Computer system that generated the records;

(iv) the function and operation of the computer system should not have been proved by a certificate;

(v) the said certificate was in any event not properly proved;

(vi) there was no evidence as to the making of a response to the request for assistance;

(vii) the judge erred in holding that there was no obligation to prove the making of a request;

(viii) there was no proof that the CD upon which the Facebook records were contained was the same as that referred to in the certificate of authentication relied upon;

(ix) it was an error to admit records obtained from Facebook as an item of real evidence;

(x) it was an error to admit Facebook material as records mechanically generated without human intervention when there was in fact human intervention in creating or generating these records;

(xi) it was an error to admit into evidence communications had between the accused and third parties on Facebook in the absence of adequate or any evidence from those third parties;

(xii) it was an error to admit the appellant's confessions made on Facebook in the absence of proof of his authorship.

In regard to the telephone call data records as evidence, the appellant argues that the learned trial judge was in error in;

(i) admitting the same without proof from the person who extracted the data;

(ii) admitting the same without evidence as to the function and operation of the computer system that generated the records;

(iii) failing to call the Meteor employee to prove the evidence admitted as a business record concerning information on SIM cards or swap of same;

(iv) treating that record as a business record;

(v) admitting the password-protected content of the SIM card in the absence of admissible evidence as to the basis on which the password had been obtained;

(vi) the means of obtaining the same were unconstitutional/unlawful;

(vii) ruling the Data Protection Act 1988 could be relied upon to obtain data not covered under the Communications (Retention of Data) Act 2011;

(viii) failing to rule on the hearsay objection raised to the admissibility of the SIM card content.

The submissions of the respondent
19. The new form of authentication in respect of the Facebook evidence is provided for under the terms of the 2008 Act. Section 94 thereof provides that the Ireland / US Treaty has the force of law in the State and a trial court has judicial notice of the contents of the Treaty.

20. Article 8(5) of the Treaty provides as follows;

"Evidence produced in the territory of the requested party pursuant to this Article or which is the subject of testimony taken under this Article may be authenticated by an attestation, including, in the case of business records, authentication in the manner indicated in forms A1 or A2, as applicable, appended to this Treaty … Records

authenticated by forms A1 or A2… shall be admissible in evidence in the requesting party. Documentary information produced pursuant to this Article may also be authenticated pursuant to such other form or manner as may be prescribed from time to time by either central authority."

21. Given the nature of the evidence being authenticated this was done in the manner agreed between the Department of Justice and Equality of Ireland and the United States Department of Justice. This was in accordance with Article 8(5) which allows authentication in a manner prescribed subsequent to the promulgation of the Treaty.

22. Under s. 102(1) of the 2008 act, the request for the material, the warrant of the US court and the letter from the US Department of Justice enclosing the records, are admissible in an Irish Court;

"(1) In any proceedings a document purporting –

(a) to be –

(i) a request or a supporting or related document,

(ii) an order made or warrant issued by a court, tribunal or authority in a designated state,

(iii) a record of the making or issue of such an order or warrant, or

(iv) a record of the date and mode of service of a document in a designated state,

and

(b) to be signed by or on behalf of the court or tribunal concerned or an authority appearing to be competent to do so,

is admissible without further proof as evidence of the matters mentioned in the document."

23. The respondent submits that once the certificate actually furnished with the records was found to come within the terms of Article 8.5 of the Treaty it was, by the very terms of that provision, admissible in evidence.

24. Section 94(3) provides as follows:

"(3) For the purpose of giving full effect to the Treaty, the relevant provisions of this Act relating to requests for mutual legal assistance between the State and member states… have also effect, subject to the Treaty, in relation to requests for mutual legal assistance between the State and the United States of America, where necessary for that purpose and with the necessary modifications…"

By virtue of this provision, the respondent was entitled to rely upon the provisions of s. 102 of the 2008 Act in seeking to enter into evidence documentation relevant to the request for mutual assistance.

25. As to the role of the DPP in agreeing the new form for proving the Facebook evidence, the respondent submits that whilst the DPP did have a role to play, in reality the agreement reached was between the two central authorities i.e. the Department of Justice in Ireland and the Department of Justice in the United States. The DPP who was prosecuting the case, would naturally be involved in ensuring the proofs were properly in order. Whenever it became clear that a particular type of evidence required a particular form of proof, it is quite appropriate for the DPP to ensure that there is such proof in a manner appropriate in an Irish court. The requirement for proof may change during the course of any trial. An investigation does not crystallise when it begins. It may evolve throughout its entire course including during the trial. By way of example, the respondent submits that statutory provision exists allowing for service of additional evidence up to and during a trial. Such provision is deployed on a daily basis. No separation of powers issue arises.

26. As to the telephone call data records as evidence; evidence was given of the seizure of a mobile phone during a search of the appellant's home. Evidence was given of an XRY analysis of the SIM card on that phone. Evidence of the seizure of a separate SIM card taken from the appellant was also given. This latter SIM card was found to contain a contact number for Raymond Connolly. Evidence was given of an application for call data in relation to phone number 085-7889841, the phone number used by the appellant from 19th - 25th May 2012. A further request was made as to whether any other SIM cards were attached to that number. Further requests were made in relation to number 086-2266221 suspected of being Mr Connolly's number and the SIM card found in the phone seized in the appellant's home. Evidence was given of the receipt of e-mail requests seeking telephone evidence under the Communications (Retention of Data) Act 2011. Detective Chief Superintendent Peter Kirwan was satisfied the requests were in furtherance of a criminal investigation. He forwarded those requests to the service providers. He also received a request for information under the Data Protection Act in relation to SIM swaps for number 085-7889841. Evidence was further given by Maureen King from Meteor as to the functioning of the Meteor system and as to how call records are generated for billing purposes automatically. Her evidence was that records showed that phone number 085-7889841 was registered to a Mark Moran with an address in Waterford. She identified records that were forwarded in relation to that number as well as 086-2266221 pursuant to the requests. This material was extracted under her supervision. She gave evidence that both SIM cards were associated with 085-7889841. She gave evidence that on 23rd May 2012 at 16.09 that number was swapped from SIM 1355 (found on the appellant) to SIM 6922 (found in his phone when it was seized in his home). Evidence was given of the conduct of XRY analysis. The analysis was of SIM 1355 found on the appellant when he was arrested on 25th May 2012. The PUK code was used. The analysis showed this SIM was attributable to 085-7889841. Ray Connolly was stored in the contacts list therein as 086-2266221. Gavin Walsh was also in this contacts list. A chart was compiled using the call data and XRY data showing calls to and from the appellant's 085-7889841 number to and from Gavin Walsh and Ray Connolly. This included a number of calls to Ray Connolly on 19th May between 18.17 and 23.39. There were further calls to Ray Connolly. At the time the IMEI number for the calls showed that they were made on a phone other than the one seized by the Gardaí at the appellant's house. The significance of this was that despite the assertion of the appellant that he had lost his phone at the warehouse, he continued to make calls using the same device (IMEI) up to the afternoon of 22nd May.

27. As to the provenance of the call data and evidence of the proper functioning of the Meteor system, Ms King was asked if she was satisfied that it was working effectively. She replied that it was. She said that she had no reason to believe that it was not. While she stated that the data had originally been accessed by a member of her team, she confirmed that she had personally validated the

data provided to the Gardaí before giving evidence. The respondent submits that this was sufficient for the purposes of establishing the provenance and authenticity of the records. The respondent submits that the learned trial judge's ruling that this evidence was of a fully automatic system, divorced from human intervention and that it was operating properly at the time was justified on the evidence given. The respondent relies upon the judgment of Birmingham J. in DPP v. C.C. [2016] IECA 263 and notes the passage cited by him in his judgment of the House of Lords' decision by Griffith L.J. at p. 387 of the judgment in *R. v. Shephard* [1993] AC 380.

28. As to the SIM swap date, the respondent submits that the information in relation to the attribution of SIM cards was compiled in the ordinary course of business and not for the purposes of a criminal investigation. It reflected a business transaction to which Meteor was a party. Its subsequent transmission from the screen to another document did not alter the nature of the information. It is submitted that it is not therefore covered by the exception in s. 5(3)(c)(i) of the Criminal Evidence Act 1992 because it was not information compiled *"for the purpose of or in contemplation of criminal investigation or criminal proceedings within the meaning of s. 5(3)(c) of the Act".* It is a business record which can be and was proved by the oral testimony of Ms King who verified its contents. The learned trial judge had evidence before him upon which he could properly find that the evidence was the product of the computer and that the different documentary manner in which that evidence was produced to the Court made no difference to its admissibility. The human intervention in recording what was retrieved from the billing system was done under the supervision of Ms King of Meteor who gave evidence. The information was retrieved fully and without consideration by those working under her supervision and was recorded fully on the text box produced to the Court. The learned trial judge also had evidence upon which he could find that the information data in question was compiled in the ordinary course of business and not in contemplation of a criminal investigation. The respondent relies upon the judgment of Birmingham J. in *DPP v. Smith* [2006] IECA 154 at para. 10.

29. As to the XRY analysis; the respondent submits that there was no breach of privacy involved in obtaining the PUK code for the SIM card. The Communications (Retention of Data) Act 2011 is not engaged as s. 2 thereof expressly excludes from the scope of the Act *"the contents of communications transmitted by means of …. mobile telephony."* In any event, the information contained on the SIM card was outside the scope of the Act because it did not comprise data relating to communications between telephones. The SIM card was lawfully in the possession of the Gardaí and they were entitled to examine it. Disclosure of the PUK code by Meteor was not precluded by the Data Protection Act 1988 because it was for use in a criminal investigation. The PUK code was not covered by the Communications (Retention of Data) Act 2011. The respondent contends that the PUK code is to be regarded as like a key to the door of the house when the Gardaí have a search warrant.

30. As to the argument that the evidence from the SIM card contact lists of the number 086-2266221 being attributable to Ray Connolly is hearsay, the respondent submits that the data recovered from the card was, in the first instance, real evidence. Insofar as it amounted to hearsay, it constituted an exception to the hearsay rule in that, the saving of the contact number for Mr Connolly should be regarded as a statement against interest by the appellant.

The decision of the Court

31. In his written submissions the appellant raises aspects of prosecutorial conduct during the trial. Two of these were the service of thirteen notices of additional evidence and the reference by the prosecution in opening their case to a statement later ruled inadmissible. These two issues however are matters which were not raised in the notice of appeal nor were they pursued at the appeal hearing. The Court will therefore not address these issues.

32. The remaining aspect of prosecutorial conduct raised by the appellant was the involvement of the DPP in creating new arrangements with US authorities under the Ireland/US treaty whereby Facebook and mobile telephone records could be authenticated as a part of mutual assistance in criminal matters. The change was effected in September 2014 during the period when the trial had been adjourned. This changed method of proving Facebook records was initiated by Michael Brady of the DPP's office who was also involved in the prosecution of the case against the appellant.

33. Article 8(5) of the Treaty provides inter alia that:

> *"Documentary information produced pursuant to this Article may also be authenticated pursuant to such other form or manner as may be prescribed from time to time by either Central Authority."*

This provision envisages the kind of change that occurred in this case. The fact of Mr Brady's involvement does not give rise to any problem apparent to this Court. The matter was dealt with by the evidence of David Fennell, the head of the Mutual Assistance and Extradition Division of the Department of Justice and Equality. He gave evidence on March 3rd 2015 to the effect that the agreement in this regard was between the two central authorities. These were the departments of Justice in Ireland and in Washington respectively. He stated that inevitably there would be contact between the Department of Justice here and the DPP who is the prosecutor in the case. This, he said, was to ensure that whatever was eventually agreed would be appropriate and workable. The learned trial judge considered this process of consultation was demonstrative of care and prudence on the part of the Minister. We agree. Moreover the fact that the form of certificate changed after the case was listed for trial does not in our view give rise to any problem of admissibility. As submitted, the premise that the prosecution somehow crystallises at its beginning and cannot evolve has no basis in law. This is amply demonstrated by the statutory provision allowing for service of additional evidence up to and during the trial. The ground of appeal regarding prosecutorial conduct fails.

The Facebook evidence

34. Evidence was given as set out above of a conversation on Facebook on the 20th May 2012 between the appellant and Stephen Dundon in which the appellant boasted of beating the deceased to death with a cinder block. It was a graphic and horrifying account of the deceased's killing. Mr Dundon gave evidence confirming this conversation with the appellant. He gave the Gardaí permission to access his account and he signed a print-out of the conversation. Garda Halpin gave evidence of accessing Mr Dundon's Facebook account and obtaining screenshots. Danielle Moran, the appellant's cousin, gave evidence of another Facebook conversation in which he also boasted of having beaten the deceased to death.

35. David Fennell testified that in 2014 the Irish and US authorities agreed a new form of certification allowing certification for evidence stored automatically in purely electronic form. These draft certificates were exhibited. Previously the certificates only allowed for certification of evidence produced using human intervention.

36. Superintendent Matt Nyland, Head of Mutual Assistance Section in An Garda Síochána, testified that he received a request from Gardaí in Waterford seeking Facebook data in relation to the appellant, Stephen Dundon, Gavin Walsh and Ray Connolly. In response he subsequently received a disk which he forwarded to the investigators in Waterford. He later received and passed on a more expansive request for statements as to the functioning of the computer system that produced the evidence. In reply, a CD was dispatched accompanied by a certificate notarised and dated the 22nd December 2014 from Sheila Mifsud of Facebook. This certificate was in the new form as agreed in 2014. It was received on the 13th January 2015. It was upon this disk and supporting

certificate that the prosecution relied at trial.

37. The defence objections to the Facebook evidence are helpfully summarised in their written submissions as follows;

> (i) that the DPP should not be entitled to rely on the changed form of certificate;
>
> (ii) that the application of Article 8 of the Ireland/US Treaty had not been proven by the State;
>
> (iii) that the certificate of Sheila Mifsud did not operate so as to render the CD Rom admissible in evidence;
>
> (iv) that the material comprised on the disc constituted inadmissible hearsay

38. The new form of authentication in respect of the Facebook evidence is provided for under the terms of the 2008 Act. Section 94 thereof provides that the Ireland/US Treaty has the force of law in the State and the trial court has judicial notice of the contents of the Treaty. Article 8(5) of the Treaty provides for this updating by permitting for authentication in *"such other form or manner as may be prescribed from time to time by either central authority".* Section 102(1) of the 2008 Act provides explicitly for the admissibility of the certificate furnished with the records in this case which thus is evidence of the request for the material records, the warrant of the US court and the letter of the US Department of Justice. We consider the learned trial judge was correct in finding admissible all of the documentation furnished in response to the request for mutual assistance. It was thus up to the jury to consider the cogency of that evidence.

39. In relation to other issues canvassed by the appellant; the certificate of Ms Mifsud stated that the records were created and stored by a reliable and trustworthy computer system providing accurate results and that the information contained is automatically created and accurately captured from user-generated online communication within the operation of Facebook's business. It is a record that is automatically generated and the certificate authoritatively described the function and operation of the system. In our judgment these properly certified Facebook records were admissible as real evidence. As to the CD furnished being one and the same as that described in the certificate, we are satisfied that there was evidence of a correlation between the certificate and the data provided such as names and account reference numbers. Moreover, the evidence of Detective Garda Halpin, Superintendent Nyland and Ms Flannery of the Department of Justice confirmed that the CD produced in court was the same as that which accompanied the certificate. As to proof of the appellant's authorship of the Facebook messages, the presence of his name, personal details and validation using his phone number together with his admission that he had a Facebook page, provided ample evidence upon which a jury could decide whether or not the message came from the appellant. Thus, we reject all of the appellant's challenges to the Facebook evidence admitted in his trial.

The telephone evidence

40. This evidence was introduced in order to corroborate Gavin Walsh's evidence that the appellant had phoned his cousin Raymond Connolly at or about the time of the killing and to discredit his claim that he had lost his mobile on the night of the killing. Evidence was given of the seizure of a pink Nokia mobile during the search of the appellant's home. The SIM card on that phone ended in 1355. A SIM card was taken from the appellant when he was arrested. It ended in 6922. Meteor records showed the communications from the appellant's telephone number throughout the period recorded. The unique IMEI number remained the same during this period. This evidence was relied upon by the State to show that the appellant had not in fact lost his mobile that night nor therefore had he returned to the warehouse seeking to find it. The records of telecommunication to his number showed communications with the telephone number of Raymond Connolly on the evening of the 19th May 2012. This supported the account given by Gavin Walsh of the events that night.

41. The appellant's objections to the telephone evidence are summarised at p. 20 of his submissions as follows:

> (i) The State failed to prove the provenance of the records nor led "appropriate authoritative" evidence with regard to the computer system by which the records were said to have been generated;
>
> (ii) The Meteor return in respect of the SIM card swap did not, as contended for by the State, constitute a business record within the meaning of the Criminal Evidence Act of 1992 nor was excluded from the exemption that applied in respect of such records and/or that the State had failed to prove the provenance of the same;
>
> (iii) The XRY examination of the SIM card number 1355 constituted a violation of the constitutionally protected rights of the appellant. The card was security protected by means of PIN and PUK codes. Those security details were obtained from Meteor and access to the SIM card and personal information therein contained was thereby achieved. The State failed to establish any or any clear legal basis for its entitlement to obtain that information from Meteor and acted unconstitutionally. The appellant also contended that the entry on the SIM card as regards Raymond Connolly constituted inadmissible hearsay.

42. The provenance of the telephone records was evidenced by Ms Maureen King of Meteor. She gave evidence to the effect that the Meteor system was operating properly at all relevant times. She stated she was 100 % satisfied with the accuracy of the records. She stated that although the data had been accessed by a member of her team she had personally validated the data given to the Gardaí. In his ruling on its admissibility, the learned trial judge considered the system produced records which are not the product of human intervention but a totally reliable mechanical process. On the authorities of *DPP v. Brian Meehan* [2006] IECCA 104*, DPP v. C.C.* [2016] IECA 263 and *R. v. Shephard* [1993] AC 380, it is established law that a recording produced mechanically without human intervention is admissible in evidence. It is real evidence which may be given by a witness familiar with the operation of the system who can testify that it is working properly. Thus we consider the learned trial judge was correct in his ruling on the admissibility of the Meteor telephone records.

43. As to whether the evidence of the Meteor records was admissible as business records, evidence in this regard was given by Ms. King of Meteor who verified the contents of these records. These records of calls are, as was pointed out by Birmingham J. (as he then was) in *DPP v. Smith* [2016] IECA 154, business records because companies like Meteor must make such records if they are to be able to bill people. Such records are not compiled for the purposes of a criminal investigation or criminal proceedings. They are compiled for business reasons and are essential to the viable operation of the companies in question. Thus the evidence was correctly admitted as a business record. Moreover the form of its presentation as evidence in court was correctly allowed by the learned trial judge. The information contained on the system was properly abstracted by her staff under Ms King's supervision. As she testified, it was faithfully recorded on the text box produced in court.

The XRY analysis

44. It is the Court's view that the PUK (Personal Unlocking Key) which is a security feature on most mobile phones protecting SIM card data and is unique to each SIM card, may indeed be regarded as like a key to a house. When the Gardaí are entitled to enter a house by virtue of a search warrant, it matters not from where the house key comes. The prosecution did not lead evidence of the actual PUK code. The evidence led was of the contents of the SIM card. S. 2 of the Communications (Retention of Data) Act 2011 expressly excludes the contents of communications transmitted by means of mobile telephony. Moreover any prohibition on disclosure of the code did not apply because it was for use in a criminal investigation. The learned trial judge's ruling was correct. The question that arose was whether what was sought was required for the purpose of the criminal investigation. He found it was and was clearly correct in that finding.

45. The Court rejects each of the challenges made to both the Facebook evidence and the telephone evidence. As it also rejects the complaints raised concerning the role of the DPP's office in the 2014 revision of authentication certificates, the appeal is dismissed.