THE COURT OF APPEAL

Record Number: 201/2020

Edwards J.
Kennedy J.
Burns J.

BETWEEN/

AARON BRADY

APPELLANT

- AND -

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered on the 11th day of July 2024 by Mr. Justice John Edwards

1. This is an appeal against conviction. On 12 August 2020, the appellant was convicted by majority verdict of the capital murder of Detective Garda Adrian Donohue on 25 January 2013. The jury had earlier convicted the appellant by unanimous verdict of robbery at Lordship Credit Union on the same date.

2. The trial was due to commence before a jury at the start of the legal term in October 2019. However, disclosure issues, which took a significant amount of time to deal with and which the Court will return to later, delayed the commencement of the trial. Ultimately, a jury was sworn in the matter on 27 January 2020.

3. In late February 2020, the first Covid-19 case was confirmed in Ireland. On 27 March 2020, the first Covid-19 lockdown was announced which, amongst other matters, introduced severe personal restrictions on the movement and gathering of people. Only persons involved in the provision of essential services were permitted to attend their workplace. Travel into the jurisdiction from abroad was severely curtailed.

4. Physical court cases where the respective parties and their legal representatives appeared in person, all but came to a halt. A direction was issued by the President of the High Court

that criminal trials currently at hearing before the Central Criminal Court were to continue to completion. However, the commencement of all other criminal trials was halted until September 2020.

5. This trial, however, continued throughout the lockdown period until the jury returned a verdict in August 2020. Many of the issues raised by the appellant in this appeal arose because of the consequences of the Covid-19 lockdown both in this jurisdiction and in the United States of America.

Background

6. On 25 January 2013, Detective Garda Donohoe and Detective Garda Joe Ryan were providing an armed escort to a number of credit unions in the Cooley Peninsula. The weekly Friday night routine was that an armed garda escort was provided to four credit unions in the peninsula so that the deposits from their premises could be gathered together for onward safe transmission and lodgement with a bank in Dundalk. Lordship Credit Union was the last credit union to be collected from before the lodgement in Dundalk which meant that the takings from each of the other three credit unions were already gathered by the time of the collection at Lordship Credit Union.

7. On the night in question, the unmarked garda car in which the armed detectives were travelling, and a second car driven by a credit union employee, in which deposits totalling approximately €27,000 from the other three credit unions were being carried, drove into Lordship Credit Union at approximately 21.25. In accordance with the procedure for collection, on arrival of the garda escort, an employee from Lordship Credit Union emerged from the premises carrying the deposits from that credit union, totalling €7,000, and got into his car. As the convoy began to leave the premises, a vehicle pulled across the exit of the car park blocking their path. The person driving the second car thought that this was a dark grey four door Volkswagen Passat. (A vehicle consistent with a Passat was captured on CCTV travelling up a boreen adjacent to Lordship Credit Union at 20.50). As the vehicle pulled across the exit of the car park, four masked raiders emerged into the floodlit car park of the credit union, having climbed a wall to the rear of the car park. One of the raiders was carrying a shotgun and another was carrying a handgun. The two armed raiders ran to the unmarked garda car whilst another raider, who was carrying a hammer, ran to the car which the Lordship Credit Union employee was driving. The bag containing €7,000 was taken from this car after the window of the car was smashed with the hammer. The deposits from the other credit unions which were in the second car were not touched. It was noted that walkie talkies were used by the raiders.

8. Meanwhile, Detective Garda Donohue was shot at close range by one of the armed raiders having emerged from his car. He died at the scene. It was the respondent's case that this shooter was the appellant.

9. Having taken the Lordship Credit Union deposits, the four raiders made good their escape in the vehicle that was thought to be a Volkswagen Passat and drove in the Dundalk direction. It was the respondent's case that this vehicle was depicted on CCTV footage travelling past a primary school in South Armagh in convoy with a distinctive 5 series BMW, which the respondent asserted belonged to Jimmy Flynn, an associate of the appellant. A similar BMW was seen travelling at speed in the opposite direction a short time afterwards.

10. On 27 January 2013, a burnt-out Volkswagen Passat was found in South Armagh, a short distance away from the primary school.

11. It was the respondent's case that this burnt-out Volkswagen Passat was the vehicle which had been used at Lordship Credit Union. This vehicle had been stolen from Clogherhead on 23 January 2013. The respondent asserted that Jimmy Flynn's 5 series BMW was seen in the vicinity of where the Passat had been stolen on that night and further asserted that after the Passat was stolen, the BMW travelled in convoy with the stolen vehicle towards Dundalk. A car that was asserted to belong to Jimmy Flynn was seen returning to his residence at around 04.51 on that night.

The Case Against the Appellant

12. The case against the appellant was based on a number of strands of evidence, namely CCTV evidence; mobile phone evidence; and most significantly, utterances by the appellant to include lies told by him to An Garda Síochána and admissions made by the appellant to two civilian witnesses in the US.

13. An account given by the appellant to the investigating gardaí revealed that the appellant had spent the days leading up to the robbery at Lordship Credit Union at Jimmy Flynn's house, whom he indicated was a close friend of his. Jimmy Flynn's house is approximately 2km from Lordship Credit Union. Also, in the company of the appellant and Jimmy Flynn over these days, and for a substantial period on the day of the robbery, was another close friend, Brendan ("Benny") Treanor.

14. On the day of the robbery at Lordship Credit Union, Jimmy Flynn's distinctive 5 series BMW can be seen on CCTV footage passing Lordship Credit Union at 13.46 with the passenger window down. Other CCTV evidence was relied upon regarding the movements of Jimmy Flynn's distinctive BMW on the night the Volkswagen Passat was stolen and in the days leading up to the robbery at Lordship Credit Union.

15. Mobile phone evidence was also relied upon by the respondent to establish contact between the appellant, Jimmy Flynn, Benny Treanor and Eugene Flynn Jnr (Jimmy Flynn's brother) at relevant times prior to the events at Lordship Credit Union, and also to establish an unusual silence on the friends' phones over the time period when the robbery was occurring. Text communication between the appellant and his then girlfriend, Jessica King was also

relied upon, most particularly a text sent at 19.54 which stated:

> "*Jus have to load the lorry but it will only take an hour or 2.. This phone is gonna go dead il txt ya soon as am home and get it charged love you x*".

16. At 22.47 the appellant texted Jessica King from another number which was associated with him. The appellant was at Jessica King's house for several hours after this text before later going to Jimmy Flynn's house.

17. On the day after the robbery at Lordship Credit Union, having been stopped at a checkpoint, the appellant told one of the investigating gardaí that he had been driving around with Jimmy Flynn the previous day; they had eaten in Superbites between 16.00 and 17.00; he went to Jessica King's house from 19.00 until 3.00; and Jimmy Flynn collected him from there.

18. After this interaction at the checkpoint, the appellant and Jimmy Flynn engaged in intensive phone activity with other people. This included the appellant asking Jessica King to say he was with her at the time of the events at Lordship Credit Union. Jessica King gave a statement to the investigation team along these lines. However, she withdrew this statement a short time later with the knowledge and agreement of the appellant, following which, the appellant attended at Dundalk Garda Station on 5 and 6 February 2013 for the purpose of making a witness statement. In this account, he detailed his movements on 25 January 2013, which differed from his original account, by stating that Jimmy Flynn and himself had dropped Benny Treanor home around 20.00; they then went to Culloville (where the appellant resided) and sat in Jimmy Flynn's car at the side of the road; Jimmy Flynn dropped the appellant to another friend's house around 21.00 where he stayed until 22.30; and he then went to Jessica King's house. An "*off the record account*" was also provided by the appellant which was to the effect that he was involved in the laundering of diesel cubes in a yard in Culloville. He stated that on the night of the robbery, he was at that yard intending to engage in diesel laundering work. However, having spent 10 to 15 minutes trying unsuccessfully to start a forklift, he left the yard having been collected by Jimmy Flynn. Yet another account was provided by the appellant when he served an alibi notice on the respondent on 27 January 2020 which stated, inter alia:

> "*….I indicated to the Garda investigation team that I had attended at 155, Concession Road for the purposes of loading 'Diesel Waste Cubes', however as the forklift was not working, I left the site without having undertaken any loading of 'cubes'. This was not correct.*
> *On the evening of Friday 25th January 2013, I went to a yard situated at 155, Concession Road at around 8 o'clock or shortly thereafter. I went to this yard, with the sole intention of loading a large volume of 'Diesel Waste Cubes' onto the back of a 'curtain-sider' lorry, which was already on site, with the use of a forklift……."*

The process took approximately one hour and thirty minutes to two hours, due to rough terrain and poor lighting as well as the forklift cutting out occasionally, as a result of the poor weather conditions".

19. The appellant left this jurisdiction on 13 April 2013 and travelled to the US. At the time he left, he was awaiting sentence before Dundalk Circuit Court in respect of offences of criminal damage and the unauthorised use of a mechanically propelled vehicle. His failure to attend court for the sentence hearing resulted in a bench warrant issuing for his arrest.

20. The appellant made a life for himself in the US socialising in the Irish American scene. However, he remained a suspect in the investigation into the murder of Detective Garda Donohoe. An Garda Síochána made contact with their counterparts in the London office of Homeland Security Investigations ("HSI") and sought their assistance in the continuing investigation into the murder of Detective Garda Donohue. This assistance was forthcoming and led to a co-ordinated approach between HSI and An Garda Síochána in relation to the investigation which had now expanded to the US.

21. In May 2017, the appellant was arrested in the US by HSI for overstaying his visa. While he had married an American citizen and had acquired a US passport, he previously had been a visa overstayer. He was deported to Ireland and was subsequently arrested on foot of the bench warrant which was outstanding for him before Dundalk Circuit Court. He was arrested on suspicion of the capital murder of Detective Garda Donohoe on his arrival back to Ireland.

22. After the appellant's return to Ireland, An Garda Síochána sought to identify persons who had interacted with the appellant when he was in America and with whom he may have discussed his involvement in the murder of Detective Garda Donohoe. Their intention was to obtain a statement of evidence from any such person. The gardaí continued to interact with HSI in this regard. A list of persons who may have associated with the appellant and therefore might be of assistance was compiled. Many of these persons were visa overstayers also. Ultimately, six persons were proposed to be called by the respondent to give evidence against the appellant at trial. However, it transpired that only two of these persons materialised, namely Molly Staunton and Daniel Cahill. Each gave evidence relating to utterances made by the appellant regarding shooting a guard in Ireland.

23. Molly Staunton, an American citizen, was the girlfriend of a friend of the appellant (Tommy McGeary) and came in contact with the appellant in the apartment which the two men shared together with a third man. She stayed over at the apartment on a very regular basis. She gave an account of an occasion in the summer of 2016 when the appellant was in a distressed state and had stated that he had killed a cop in Ireland. In the course of cross-examination, Molly Staunton, resiled from this position and stated that the appellant had not said that he had killed a cop. However, in re-examination, after she was declared to be a hostile witness, Molly Staunton reverted to her original position. Due to the Covid-19 pandemic, Molly Staunton gave evidence from a private location which transpired to be the home of *"a*

boyfriend of some sort". Difficulties emerged with respect to the provision of that evidence which will be returned to later.

24. Daniel Cahill, an Irish citizen and visa overstayer in the US, was a bar man who came in contact with the appellant as a result of the appellant socialising in the licensed premises where he worked. He gave evidence of four conversations he had with the appellant between 2014 and 2015 relating to the shooting of a guard. The first occurred after the appellant had been assaulted by another person. Daniel Cahill went to the appellant's assistance after the assault and in the course of a conversation the appellant said that the person who assaulted him should have known better as he (the appellant) had shot a member of An Garda Síochána and it would be a stupid thing to retaliate or mess with him. The second conversation occurred within a year of the first conversation on an occasion when the appellant was drinking heavily in the bar. He made reference to a robbery having gone wrong and having shot a "*Garda Síochána*". The appellant told Daniel Cahill that this had occurred in a credit union or a post office. The third conversation occurred at a friend's apartment where in the course of a night's drinking and bravado conversation, the appellant said he had shot a guard. The final conversation occurred on the street when the appellant showed Daniel Cahill a newspaper article which included a picture of men at a sporting event accompanied by a headline about being on the run from shooting a police officer in Ireland and now living it up in New York. The appellant indicated to Daniel Cahill that this was him in the photograph and that it had been taken from his Facebook account.

25. Daniel Cahill gave a statement to An Garda Síochána in July 2019. The manner in which that statement came to be provided by him, in circumstances where he was a visa overstayer and cannabis and steroids had been found at his residence at the time the HSI approached him, were at issue in the trial. Two US Special Agents of HSI, Special Agents Wade and Katzke were involved in the interaction with Daniel Cahill which led to him providing a statement implicating the appellant in the murder of a guard. This aspect of the case will be returned to later. These Special Agents had been involved in assisting the garda investigation since the extension of the investigation to the US.

Disclosure Process

26. Significant disclosure emanating from the US was not disclosed to the defence until late September and into October 2019. The case was listed for trial on 7 October 2019, however, it did not commence due to the necessity to hold pre-trial disclosure hearings. The trial judge gave a ruling in relation to disclosure on 29 November 2019. Specifically in relation to the defence case and disclosure from the US, he said the following:

> "*The issues of concern that the Court can glean from its examination of all the documents is as follows; the possible coordinated arrest of individuals by the US authorities coordinated with the Garda Síochána of persons who had doubtful residential and work permit status in the USA of persons who had contact with Aaron*

Brady, the possible offer of any form of inducement such as protection of their residential status or work position or assistance with any practical difficulties that these people had, particularly in relation to any possible criminal investigation. (3) The possible offer of a particular type of S type visa for persons who cooperate in relation to the solving of crime. (4) Possible and proper contact by Garda Síochána officers when they are personally attending in the United States of America where there was persons in custody in the US (sic)*. This is particularly raised in relation to Marie McKenna. (5) A possible arrest of other persons in the US in respect of the investigation of the crime alleged against Mr Brady that has not come to light. Although the Court notes that in the documentation to date there have been substantial documentation furnished of a number of other persons who were approached who I have referred to as either reports* (sic) *were given as to the contact with them or they didn't wish to get involved.*

[…]

The Court has an important duty and an appropriate duty to ensure that good faith efforts are made to produce documents not in the power or control of the DPP and to ensure that the fair trial responsibilities of the Court are discharged. In that regard the Court does not consider it appropriate to direct any further disclosure hearing with directions to swear affidavits or direct cross-examination or direct that witnesses from the US be called. The appropriate way to deal with this is to seek further documentation from the US by a further request of mutual assistance setting out in a comprehensive and targeted way what further documentation is required and available. The ultimate arbiter of that matter will be this court. The matters which the Court considers appropriate are (1) identification of any other persons who were approached in respect of Aaron Brady other than those disclosed already, (2) any custody records in the United States of America of those who were detained, (3) in the document in the US authority's possession about coordination between them and the Garda Síochána to detain people, (4) any documentation between Ireland and the US authorities for anyone working on the investigation in relation to any offer of S visas or anything of that nature which would be considered an exchange for cooperation, (5) any documentation in respect of any waiver of criminal charges in the US in respect of persons who were contacted or interviewed about their contacts with Aaron Brady. The appropriate way to explain to the US authorities about the legal principles of disclosure in this jurisdiction is to annex a copy of this ruling to the request for mutual assistance".

27. The Court made a Mutual Legal Assistance Treaty ("MLAT") request to HSI seeking further information about HSI's dealings with the witnesses. The judge expressly acknowledged in his request that the MLAT request was targeted to elicit information in respect of any inducements that might have been on offer to persons arrested by HSI. The request also sought that Special Agent Wade and Special Agent Katzke, who had dealt with various visa

overstayers in the US who had provided statements against the appellant, appear as witnesses in the trial.

28. On 15 November 2019, the legal section of HSI wrote to their counterparts in Ireland (the Department of Justice) enclosing Letters of Scope dated 31 October 2019 addressed to Special Agents Katzke and Wade which severely limited the questions which they were permitted to answer in evidence. The details of the Letters of Scope and the specific restrictions imposed on the Special Agents should they be called to give evidence are set out later in this judgment.

29. When the Letters of Scope were sent to the Department of Justice by the US Department of Justice on 15 November 2019, "*a formal written response indicating that Irish authorities will comply with the conditions set forth in the letters*" was requested by 2 December. The letter also indicated that until a response was received, Special Agents Katzke and Wade could not be authorised to testify in the trial.

30. The respondent's response to the Letters of Scope on 27 May 2020 was in the following terms:

> "*The prosecution will advocate on behalf of the agents in respect of any privilege asserted by them on foot of the letters and will do all in its power to ensure compliance with the conditions set out and will seek to prevent any attempt to compel answers outside the scope of the letters*".

31. Very unfortunately, the Letters of Scope were not formally disclosed to the appellant's legal team until 10 April 2020. They had come to the attention of the respondent on 26 November 2019, as a result of Special Agent Katzke sharing his letter with the investigation team. There was a passing reference to the letters in Court on 10 December 2019 by counsel for the respondent.

Grounds of Appeal

32. By notice of appeal dated 22 October 2020, the appellant appealed against his conviction and sentence. The grounds of appeal which were proceeded with before the Court, together with a motion seeking to add an additional ground of appeal, will be set out in the order they were presented.

Ground 5 – That the trial judge erred in directing that the trial should proceed during the Covid-19 lockdown.

33. While there are a number of issues within this ground, in essence, counsel for the appellant says that while other trials continued during the Covid-19 lockdown, they were of short duration, whereas the extraordinary length of this trial placed an unbearable burden on everyone involved, leading to an unfair trial. Counsel argues that the judge ought to have discharged the jury.

Background

34. Arising from the Covid-19 pandemic, from 13 March 2020 measures were introduced by The Courts Service to scale back the work of the courts. The President of the High Court directed that any criminal trials at hearing should continue to finalisation.

35. In submissions before this Court, counsel for the appellant highlights the severe impact of Covid-19 on the community. By way of illustration, counsel vividly describes the roads as being completely and utterly deserted, something akin to a ghost town when driving through Dublin to the Criminal Courts of Justice throughout the trial.

36. On 16 March 2020, the trial judge addressed the evolving situation. He indicated that if the trial were to continue, the numbers in the courtroom had to be restricted, social distancing would have to be observed and that there were to be hospital levels of sanitation in the courtroom and jury room.

37. On 20 March, it was decided that the jury would not be called back until 21 April and that the Court would continue to sit in their absence and deal with other matters. The judge directed that an email be sent to the jury in the following terms:

> *"Dear jury member, I have been directed by the Honourable Mr. Justice White to write to you to update you on the progress of this trial and arrangements put in place in accordance with the government's directions on measures to combat the Coronavirus and to minimise public health risks. The Court is still dealing with matters in your absence which will not be finalised until Wednesday next, the 25th of March. The Court has been advised there will be at most three days' evidence then in the presence of the jury. In those circumstances, and as the Court is breaking for two weeks for Easter the matter has been put back to the 21st of April. The Court has made the following directions:*
> *Directed that appropriate social distancing is observed.*
> *Received assurance that hospital standard levels of hygiene are being maintained in the Court and jury areas.*
> *Put in place an arrangement where numbers are substantially reduced in Court 19 by arranging the availability of another court room for the public where the proceedings can be live streamed.*
> *Arranged for the jury on their return to be accommodated in two jury rooms with two jury minders so that social distancing can be observed.*
> *Arranged that the jury can be split between the jury box and a reserved place in the body of the Court to maintain social distancing of jurors.*
> *Transport arrangements are to be put in place*".

38. On 20 April, counsel for the appellant at trial made an application to discharge the jury on four bases: 1) the gravity of the charge; 2) that the jury had not heard any evidence for seven weeks and that it would be another one or two weeks before the trial would resume in the presence of the jury if the trial continued; and 3) the safety issues and other issues that attached to continuing a trial during Covid-19. The fourth basis is not relevant to this appeal.

The Email

39. Counsel for the appellant took particular issue with the 20 March email as they felt that the terms of the email implicitly gave the jury a level of comfort and reassurance which was beyond everyone's capacity to give. That the email served to influence the jury to continue with the trial, even if all the jury, or any single juror, did not wish to do so. Moreover, that no independent safety assessment had been conducted.

40. The Court refused this application. In relation to the submission regarding the 20 March email, the judge expressed that he felt this was unfair and made clear that there was no pressure from the Court for any juror to continue to serve.

Submissions of the Appellant

41. The appellant emphasises the fear felt by people during the early days of the Covid-19 lockdown when images of army trucks carrying bodies to makeshift morgues in Northern Italy featured on national news and there were reports of Irish hospitals buying industrial sized fridges to store bodies.

42. The appellant acknowledges that other trials continued during the lockdown, however, the appellant points out that these trials continued for periods of two or three days, up to ten days, until finalisation as opposed to three or four months as in the present case.

43. Reliance is placed on *People (DPP) v. Adach* [2012] IECCA 94 as follows:

> "*[O]ne may add what is quite evidently implied, namely that a jury must be free to consider its verdict uninfluenced by any form of improper pressure, whatever its source and whatever its nature might be. Promises and threats are but examples. Since circumstances may vary infinitely, it would neither be possible nor desirable to list all such factors that may be objectionable. What therefore can be said, is said at the general level; namely, that juries must be shielded from exposure to all matters considered offensive or injurious to their task. This therefore is the starting-point when considering the subject issue*".

44. In *Adach*, the Court of Criminal Appeal considered the effect of the prevailing economic situation on the jury's deliberations in circumstances where the trial judge, in advising the jury of the consequences of failing to reach a verdict, referred to the potential costs and stress to the complainant and the accused. The Court said:

"*That the condition of public finances in July 2010 were as stated, cannot be disputed. Indeed they may have been even worse than now. That it is reasonable to assume that one or more members of the jury, which comprises twelve members of society randomly chosen, may have been affected by this crisis, is utterly plausible*".

45. It is submitted that Covid-19 created an atmosphere of fear and uncertainty that was oppressive and inimical to a fair trial. Counsel for the appellant questions the appropriateness of people coming in to work in that environment, to determine the innocence or guilt of a person with respect to a matter of this gravity. Counsel says on a test of plausibility, that it is plausible that the jury were affected by the Covid crisis.

46. In relation to delay, the appellant submits that the jury had not heard any evidence in many weeks and that people were distracted by the pandemic. Moreover, that the issues at trial required continuous and undivided attention.

47. In relation to the gravity of the charge faced by the accused and the consequences attaching to a conviction, the case of *State (Healy) v. Donoghue* [1976] I.R. 325 was opened to the Court during this appeal. Counsel for the appellant says this case is authority for the proposition that in certain circumstances, justice can be a more exacting task master than in others and that the level of exactness will arise in direct proportion to the gravity of the matter.

48. In relation to the 20 March email, it is submitted that there was never an allegation of impropriety on the part of the trial judge but that the judge's email to the jury might have resulted in the jury feeling pressure to continue.

Submissions of the Respondent

49. The respondent submits that the trial judge properly dealt with the issue of Covid-19 when it arose, and that the submissions heard by the judge from counsel for the appellant at trial were of a largely speculative nature.

50. The respondent endorses the trial judge's approach to the serious and evolving situation and notes that he followed the prescriptive public health guidelines. It is pointed out that no public health issue arose during the balance of the trial and that in those circumstances, there was no good reason why the trial should not proceed.

51. Counsel for the respondent submits that the only appropriate test is whether or not the trial was unfair, and that there is no basis for any alternative test as suggested by counsel for the appellant. Counsel says most importantly, the jury indicated that they were happy to proceed, with all bar one of the jury indicating their willingness to proceed after the 20 March email.

52. In relation to delay, it is submitted that it is not unusual that juries are absent for long periods where there are lengthy *voir dires* and there was no unfairness visited upon the appellant by same.

53. In response to the appellant's reliance on *Healy*, counsel for the respondent says that there is no different standard to be applied to this case because it involves capital murder. Counsel repeats that the test is whether or not the appellant's trial was unfair.

54. In relation to the 20 March email, it is submitted that there is nothing to suggest that the jurors were coerced in any way.

Discussion and Determination

55. We will examine momentarily each of the three bases upon which the appellant applied for the jury to be discharged. It appears however, that issues one and two, in effect, feed into the primary ground which concerns proceeding during the worldwide pandemic.

56. Following application, the trial judge carefully and comprehensively addressed each of the issues raised. He engaged with the issues in some detail and considered the interval in the evidence in terms of the jury and the pandemic to be of a serious nature. He was of the view that the trial was not a complex one; conducted in modular format and where there had been a small number of controversial witnesses to that point in the trial. The appellant takes issue with *inter alia* the judge categorising the trial as non-complex.

57. The judge went on to state that he found the jury engaged and conscientious. He expressed himself conscious of the appellant's rights and found that the appellant's right to a fair trial was not affected by the gap in the proceedings.

58. Insofar as the application concerned Covid-19, the judge made it very clear that there was no pressure on any juror to continue to serve. It is apparent that the judge was in contact with The Courts Service concerning the safeguards to be put in place. He observed that he could not exclude the risk but could only minimise it. He did not take the view that an independent assessment would have the consequence of a different approach.

59. In assessing the discharge application, the judge cited O'Flaherty J. in *People* (*DPP) v. Kavanagh* (*ex tempore*, Court of Criminal Appeal, 7th July 1997) as follows:

> "*A jury should only be discharged for some happening or dereliction of a grave nature occurring in the course of a trial*".

60. He professed himself reluctant to discharge any jury, but equally was quite prepared to do so if the situation required a discharge. In the present case, the trial judge exercised his discretion in refusing to do so; he did not consider the appellant's trial rights to have been impacted so as to require a discharge.

61. The appellant takes issue with the ruling and considers that the judge erred in failing to discharge the jury for the three reasons stated.

62. At the outset, we say that the discharge of a jury is a measure of last resort, it is the nuclear option; however, that does not mean that an individual's constitutional right to a trial in due course of law is to be disrespected. On the contrary, it is the central focus of a trial judge's determination on such an application. Is the trial fair? Is the accused being denied his/her right to a fair trial? It is therefore the position, that this Court will pay considerable deference to the determination of a trial judge. This does not mean that the determination is not open to interrogation by this Court, which interrogation is conducted by a careful perusal of the transcript, the submissions made, the legal principles and attention to the detail.

The Gravity of the Offence

63. When considering the submission by counsel for the appellant that the gravity of the crime was a matter mandating special consideration, the trial judge referred to a case where Johnson J., presiding in the Special Criminal Court, in dealing with a submission that a particular principle only applied in a particular court, likened the argument to that of stating that Pythagoras' theorem only applied to large triangles and not to small triangles. We respectfully agree with that analogy, the rules of fairness and fair procedures apply to all trials regardless of the severity of the penalty to be imposed should an individual be convicted. We do not find this submission to be in any way persuasive.

The Interval When the Jury Were Absent Due to Legal Issues

64. The jury heard evidence until 4 March 2020 and returned to recommence hearing evidence on 6 May 2020. There is no doubt that juries are frequently asked to retire for periods while legal issues are being determined. That may not be ideal, but it must be borne in mind that while an accused is entitled to a fair trial, it is not a counsel of perfection. The trial was conducted in modular format, and at the point when the issue was raised, the trial judge was of the view that the trial was not a complex one and that a small number of controversial witnesses had given evidence at that stage. He reminded all concerned that his practice was to summarise the evidence of all witnesses, including direct examination and cross-examination of controversial witnesses.

65. There is no doubt that the trial judge was assiduous in considering the application made to him. To the forefront of his mind were the trial rights of the appellant and he was most conscientious in seeking to ensure that those rights were vindicated. In our view, and in giving due deference to the fact that the trial judge was the person who was present on the ground, so to speak, we are not persuaded that this aspect of the ground is made out.

66. Frequently, juries experience time periods when legal issues are conducted in their absence and return days or weeks later to continue to hear evidence. This may not be an ideal situation, but

in any lengthy trial, juries are reminded of the salient evidence by the judge in the charge. This judge was most diligent in his approach and indicated his intention to summarise the evidence for the jury. The fact of "*gaps*" in the jury's attendance at trial due to legal issues is not in and of itself a reason to discharge the jury.

Covid-19

67. Every court has an obligation to ensure a fair trial and protect an accused's constitutional right to a trial in due course of law. It appears to us that the nub of this ground relates to a concern that the jury may have felt under pressure or were consciously or subconsciously oppressed by virtue of the unprecedented worldwide pandemic and its terrible consequences. The consequences were not limited to the dreadful loss of lives, but also applied to the all-pervading fear in communities.

68. This sense of fear and oppression can only have been exacerbated, it is said, by the fact that the trial continued throughout the pandemic where other trials had come to a natural conclusion. The description of Dublin as a ghost town is a stark one and unfortunately, at the time, an accurate one. All this, it is argued, served to place an unbearable burden on everyone and can only have caused the jury to feel under severe pressure to continue with the trial.

69. One cannot lose sight of the legal test in such an application; that is whether the trial was rendered unfair to the extent that the jury ought to have been discharged. Factors which will feed into this consideration include 1) the safeguards put in place in accordance with public health guidelines, 2) the fact that the 12 jurors (apart from two additional jury members) were satisfied to continue with the trial and no member expressed any issue throughout the trial, and 3) the judge indicated his practice to summarise the evidence of all witnesses, which practice, of course, would apply whether the pandemic was continuing or not and whether there were or were not intervals when the jury were present or not.

70. The jury had received clear, concise and appropriate communication from the trial judge in the email of 20 March 2020. We do not see any issue in the judge directing that the jury be so informed. The alternative was to bring the jury into court which was, in the circumstances, unnecessary. On no reading of that email could it be said that it placed a juror under pressure to continue and no such concern was expressed to the trial judge by any juror.

71. In this case, the trial judge was absolutely satisfied that the jury were fully engaged with the evidence. He indicated that he had no difficulty if a juror did not wish to continue to serve.

72. We are not persuaded by the submission that there ought to have been an independent assessment to enable the court below to take an informed decision on whether to continue with the trial. The judge liaised with the Courts Service, the safeguards were set in place, we do not see how an independent assessment would have added to the situation.

73. The contention that the jury must have been oppressed is one founded on speculation. There is no doubt that the Covid-19 crisis was frightening and that the absence of people going about their daily business was surreal. However, the reality is that the jury were willing to attend and did not express a contrary position throughout the remainder of the trial.

74. Ultimately, on the bases considered separately or cumulatively, we are not persuaded that the judge erred in his determination to refuse to discharge the jury. He carefully applied his mind to each aspect of the application and was clearly concerned about the unprecedented public health crisis faced by all and its impact on the appellant's right to a fair trial. He ensured that safeguards were put in place to minimise the risk to all court users. In our view, the suggestion that the jury must have felt oppressed and pressurised to continue ignores two factors. First, the jury's satisfaction to continue and second, the judge's view that the safeguards operated to minimise risk. Allowing the trial to continue was in accordance with government and public health guidelines at the time and it was available to individual jurors to express their concerns regarding the pandemic and continuing with the trial. However, no juror did so and accordingly, this ground fails.

Ground 4 – That the trial judge erred in admitting into evidence a conversation between the appellant and Jessica King to the effect that the appellant had been involved in a burglary, and theft of a jeep years previously with Jimmy Flynn and Benny Treanor.

75. The appellant complains in this ground of appeal that the trial court erred in admitting into evidence a conversation between the appellant and Jessica King to the effect that the appellant had been involved in a burglary, and theft of a jeep, years previously with Jimmy Flynn and Benny Treanor.

Background

76. The background to the complaint is that objection was taken on day 21 of the trial, 25 February 2020, on various grounds, to a proposal by the respondent to lead evidence from the one-time girlfriend of the appellant, Jessica King, concerning a conversation she had had with the appellant. To put her account of this conversation in context, it is necessary to explain that in her statement in the Book of Evidence, Jessica King had first described an earlier conversation she had had with Shane Hanratty. She had related to gardaí that:

> *"It was about Aaron robbing and bad things that Aaron had done. I honestly can't remember. I remember being upset hearing all this. I remember crying at the end of the night. I was drunk".*

77. She had then continued:

> *"I remember ringing Aaron later on that night* […] *I confronted Aaron about the incident with him robbing the woman's jeep. I was still going out with Aaron* […]

> *He denied it first. I threatened him that I would break up with him if he didn't tell me the truth. Aaron admitted that it was true, that he was involved in it. He blamed the most of it on either Jimmy Flynn or Benny* [Treanor]*, I can't remember who. I'd near swear towards Benny. Aaron said that either Benny or Jimmy, I can't recall, went into the woman's house, lifted the keys from the counter and stole the black jeep. Aaron was driving the car but not the stolen jeep. He said they sold that jeep a week later. He mentioned something about down the country or far away. I am not sure if the jeep was stolen or sold down the country. I think he said some man down the country bought the jeep off them. Aaron said this incident happened long before he met up with me. He said everything he did was before he was going out with me, he said it was years ago. I would never tolerate that behaviour from him and he knew that".*

78. Counsel for the respondent indicated that he was only interested in adducing testimony from the witness before the jury relating to what the appellant had told her, and not evidence as to what she had been told by anybody else (i.e., Shane Hanratty). Amongst the objections to the admissibility of this proposed evidence was the suggestion that it was hearsay. The trial judge ruled against the appellant in that respect and held that it was not hearsay. The hearsay objection is not being revisited in the context of this appeal. However, a secondary basis on which the evidence was objected to was that it was evidence of prior misconduct by the appellant that ought to be excluded on the basis that it lacked probative value and was of considerable potential prejudicial effect.

79. In legal argument on day 22 of trial, 26 February 2020, counsel for the respondent sought to make clear to the trial court that he was seeking, in reliance on the principles in the Supreme Court case of *People (DPP) v. McNeill* [2011] 2 I.R. 669 to place the controversial material in question before the jury as relevant background evidence.

80. Counsel for the respondent opened the *McNeill* jurisprudence in detail to the trial judge, while also alluding to, and where necessary quoting from, the earlier cases of *People (AG) v. Kirwan* [1943] I.R. 279 and the decision of the Privy Council cited therein, i.e., *Makin v. Attorney General for New South Wales* [1894] A.C. 54. He conceded that the Supreme Court in *McNeill* had been very conscious to make it clear that misconduct evidence will not be appropriately admitted where it is only of slight probative value. Rather, he accepted, it must have serious probative value and be "*relevant and necessary*" before it can be properly admitted.

The Arguments at Trial

81. In the course of his submission, counsel for the respondent sought to engage with the facts of the case as established in evidence to that point, and he submitted:

> "[…] *as things currently stand, on the evidence that the jury have heard, it's quite clear this was a planned event. It didn't simply happen. It required quite an amount of planning in terms of the co-ordination of at least five persons' movements. It*

required planning in terms of the acquisition of various items. In particular of relevance to this matter is a car, which was used in the course of the robbery. In particular, as has been already referred to, it was used to physically block the exit from the credit union. It was used to make the getaway afterwards, and it obviously was burnt out. So the jury have heard all of that and they've heard that it was stolen two days previously, in the middle of the night, at a place called Clogherhead. This afternoon they have seen […] *video of a re-run of a car driving the probable routes on the night in question.* […] *what the prosecution intend to establish in evidence is that the BMW of Jimmy Flynn was behaving suspiciously on the night of the taking of that car; that Jimmy Flynn and his brother, and others, were out and about that particular night; that there was very intense phone contact that night involving the Flynns, both Flynns, Jimmy Flynn, Eugene Flynn, Aaron Brady and Benny* [Treanor]*; that there is very little traffic on the roads in or around the CCTV harvested by the gardaí from Termonfeckin to Clogherhead and back up, and including Castle Bellingham; that there is a car which the prosecution have an expert witness who they intend to adduce that he can identify as being a BMW 5 Series; that it travels in convoy with another car which the prosecution will be submitting is the stolen Passat - that, I think, our expert also identifies as being a Passat-shaped vehicle - and given that that was the car with the VIN number ultimately found burnt out and that it matched a description of a number of eyewitnesses at the scene in terms of it being a dark-coloured Passat that the getaway was staged in. That is very relevant material.*

The accused, in his account to the gardaí, and indeed from other evidence that has emerged, has himself in the company of Jimmy Flynn, really at all relevant times in this case. In particular, he is effectively living with Jimmy Flynn in the Flynn's house, in the days running up to the robbery and murder of Adrian Donohue. Jimmy Flynn is driving him about to various places. On the day of the robbery itself, Jimmy Flynn and Aaron Brady go and meet Benny [Treanor]*, they go to McCaugheys, as the jury heard today. They have lunch there. And the movements of that car thereafter, on the day, are significant. Aaron Brady places himself in that car coming back to Dunroamin House with Jimmy Flynn and with Benny* [Treanor] *in the afternoon after their lunch and after they perhaps stopped off somewhere at the side of the road. The significance of that, as the Court may recall I referred to in my opening, is that that car is identified effectively going to the petrol station on the Carlingford side of the credit union where Jimmy Flynn is visible buying two bottles of water. He goes back to the car and makes a gesture which indicates that there is somebody else in the car, though they're not visible, and that the car then drives past Lordship Credit Union and as it does so, the passenger-side window is down, even though it's lashing rain at this stage, and in the camera at the other end of the credit union, just as one gets to the Dundalk side, the passenger window has gone back up and the prosecution say that this is of significance.*

So in terms of the evidence, Aaron Brady and Jimmy Flynn are joined at the hip. Shortly after the drive-by in terms of timing, there'll be evidence that's already in, of a text that Aaron Brady sends to Jessica King, that, "I'm doing a little bit of work here". That's probably incidental. The main point is that Aaron Brady then places himself in Jimmy Flynn and Benny [Treanor's] *company, effectively from in or around half 12, the day of the robbery, all the way through until at least 20 past 7 in the evening, when Benny* [Treanor] *is picked up after signing on at Crossmaglen Police Station and there'll be evidence of the fact that he signed on there.*

Thereafter, things are unclear save that Aaron Brady, in a number of his accounts, has put himself in the company of Jimmy Flynn, being dropped off and picked up at various locations thereafter right up until they're seen by gardaí in the early hours of the morning. Aaron Brady isn't identified but Jimmy Flynn is, driving back to Dunroamin House at about 3 am in the morning.

So the fact that Jimmy Flynn is with Aaron Brady at relevant times, in our submission makes it relevant in terms of the nature of their relationship and in terms of the law, the prosecution case is that the relevant portion of the statement that we referred to yesterday from Jessica King is relevant to an issue which is for the jury to determine or, to use the words […] *of McNeill* […] *'Evidence which is relevant and necessary to a fact to be determined by the jury.'"*

82. Counsel for respondent referred with specificity to a quotation from the judgment of Hailsham L.J. in *R. v. Boardman* [1975] A.C. 421 (referenced by Fennelly J. in his dissenting judgment in the *McNeill* case) wherein it was said:

> "*It is perhaps helpful to remind oneself that what is not to be admitted is a chain of reasoning and not necessarily a state of facts. If the inadmissible chain of reasoning is the* ***only*** *purpose for which the evidence is adduced, as a matter of law the evidence itself is not admissible*". (Emphasis by Lord Hailsham)

He then offered the trial judge this assurance:

> "*In terms of this particular evidence, there can be no suggestion that it is sought to be admitted for that impermissible chain of reasoning. If that was the purpose, then the Court would have to determine that it should not in fact be admitted. It is admissible, we say, because of the state of facts that it recites".*

83. Moving then to address an anticipated contention by the defence that the prejudicial effect of the proposed evidence was potentially significant, and that the prejudice would greatly outweigh its probative value, counsel for the respondent stated:

"*But if we look at this particular case on these particular facts and where this jury is at in terms of Aaron Brady, what is the most, in terms of prejudicial effect, as opposed to the probative evidence that would be established, by Jessica King giving this account in evidence? It would be that on some occasion in the past Aaron Brady drove a car while two others, Jimmy Flynn and Benny* [Treanor]*, apparently were involved in what appears to be a burglary and the taking of a jeep from a woman's house. So just in terms of how this might prejudice Mr Brady, that is the height of it. Mr Brady is careful in the account, according to Jessica King, to in effect minimise his conduct and maybe that is true or maybe it's not true, but the point is her account really has him at most sitting in a car while others are doing something. But is this, as it were, going to bring the shutters of prejudice slamming down on Mr Brady? How can it? How can it when the jury have already had introduced to them, explicitly by the defence in this case, the fact that Mr Brady had, at that time, previous convictions, because he had pleaded guilty, of criminal damage and dangerous driving, for which he was awaiting sentence, for which he subsequently got a six-month sentence, and this was brought out in great detail by the defence, which was appealed by the prosecution and was increased to a two-year sentence with 12 months suspended subsequently. So they're told that about Mr Brady; he's actually served sentences for offences.*

Secondly, they're told he's involved in diesel laundering in terms of loading the truck on the night in question and that seems to be a central plank of the defence that has been put forward. And the third thing that is relevant is that a positive defence, if I can put it that way, and I say this colloquially rather than suggesting that there is any less onus on the prosecution to deal with it or any particular onus on the defence to prove it, but a positive defence of alibi has been asserted and put forward and cross-examined in this particular case. As against that, how can it be suggested that this reference to him being in a car when the other two were involved in taking a car could somehow prejudice him? But it is clearly relevant that Benny [Treanor] *and Jimmy Flynn, in terms of just his relationship with them, were in the company of Aaron Brady on a previous occasion when this in fact occurred. And it is also relevant then for the other reason* […] *that, according to Jessica King in that account, she is very clear that if Aaron Brady was involved in any criminality, in other words – sorry, if Aaron Brady had told her he was involved in any criminality, that she would have had nothing further to do with him, ergo the prosecution would say Aaron Brady had every reason to lie to Jessica King about what he was doing on the occasion. And that is very much germane to an issue that I suspect, and fully expect, the defence will rely on in this case at a particular time, which is that these text messages, they will hold them up as evidence of their alibi. And the suggestion will be made that this is – why would he lie? That this would absolutely – how could he have been thinking that he would have lied about what he was doing at the particular*

time and that he didn't lie, he was telling the truth. Whereas in fact, with this account from Jessica King, one can well see why Aaron Brady might not be telling her the truth in those text messages about what he was doing at the particular time".

84. The trial judge, having listened to this, sought to summarise his understanding of the position, so as to be sure he was correct in it. Addressing counsel for the respondent he asked:

> *"So you're saying* […] *the relevant and necessary evidence is that there was a previous criminal association with Jimmy Flynn and Benny* [Treanor] *and the fact that Mr Brady wanted to make sure that Ms King saw him in a good light or he was minimising it and that if she thought he was engaged in criminal activity other than diesel laundering that she would have nothing to do with him; is that what you say is relevant and necessary?"*

85. Counsel for the respondent replied in the affirmative.

86. Counsel for the appellant responded by opposing the application, contending in doing so that the controversial evidence was not probative of a fact in issue, that its prejudicial value outweighed any probative value, and that it was evidence of bad character and misconduct that should simply not be admitted. The point was made that it referred to an event that had occurred years earlier, and that the circumstances of this event were vague. It was submitted that Jimmy Flynn and Benny Treanor's wrongdoing could not be used to show that the appellant was more likely to have committed the offence for which he was being tried.

87. In rejoinder, counsel for the respondent stated that it was not a question of trying to fix the appellant with responsibility for the actions of Jimmy Flynn and Benny Treanor. The appellant had been driving the car by means of which the three men had travelled to the location from which the jeep was stolen. He was not the driver of the jeep once it had been stolen. However, he was part and party to what had gone on. Further, it was reasonable to anticipate that the appellant would rely on text messages that had passed from him to Jessica King to bolster their alibi that the appellant had been involved in activity associated with diesel laundering at the material time. Jessica King had stated "*I would never tolerate that behaviour* [i.e., involvement in burglary and theft of a jeep] *from him and he knew that*". That statement, the respondent contended, was relevant to the underlying credibility of the text messages.

The Trial Judge's Ruling

88. The trial judge gave a lengthy ruling on day 23 of the trial, 27 February 2020. He reviewed in great detail the judgments in the Supreme Court case of *McNeill*, noting that the evidence, the admissibility of which he was required to rule upon, was in the nature of misconduct evidence as described in Declan McGrath, *Evidence* (2nd edn., Round Hall 2015) at paragraph 9.35. It is clear to us from the trial judge's comprehensive review of the *McNeill* jurisprudence that he had a clear and accurate understanding of what *McNeill* decides. Having quoted at length from the judgments

of Denham J. (as she then was), and of O'Donnell J. (as he then was), the trial judge accurately isolated the following key principles from those judgments:

(i) In *People (A.G.) v. Kirwan* [1943] I.R. 279 O'Byrne J. had held that two propositions had been established (which Denham J. in *McNeill* was prepared to adopt and apply): (i) that evidence that the accused has committed offences other than that charged on the indictment preferred against him is never admissible for the purpose of leading the jury to hold that the accused is likely by reason of his criminal conduct or character to have committed the crime in respect of which he is being tried, and (ii) the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to some issue of fact which the jury is called upon to determine. Of importance is whether the evidence is relevant to some issue of fact which the jury was required to decide.

(ii) While a general rule of evidence excludes from admission, before a jury, evidence of alleged offences which are not charged on the indictment, the rule is not an absolute rule. Over the years the courts have established in common law that there are circumstances where evidence of other alleged offences may be admitted before a jury.

(iii) Background evidence in the context under consideration has a specific meaning. It is evidence which is relevant and necessary to a fact to be determined by the jury. For example, in a sexual abuse case, such as *McNeill*, it might be admitted to render comprehensible the relationship between the complainant and the accused. It might also relate to such issues as consent or the absence of a complaint over many years. However, the examples given were not exhaustive of the circumstances where background evidence may be admitted.

(iv) In such circumstances, even if the background evidence is of alleged criminal acts not charged in the indictment, such background evidence is not inadmissible and should not be excluded as such. Background evidence may be admitted to give a jury a relevant picture of the parties in the time prior to the offences charged.

(v) Background evidence may be admitted because if it were not admitted it would create an unreal situation. It arises in situations where if no background evidence was admitted, the evidence before the jury would be incomplete or incomprehensive. Background evidence is evidence which is so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible. Whether or not background evidence is to be admitted is a matter to be determined by the trial judge in all the circumstances of the case.

(vi) The fact that the evidence tends to show the commission of other crimes does not render it inadmissible. The test to be applied is that of "*relevancy and necessity*".

(vii) In considering whether background evidence may be admitted relevant considerations may include (i) consideration of whether the background evidence is relevant to the offence charged; (ii) consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible or coherent, or whether

without such background evidence, the evidence may be incomplete, incomprehensible or incoherent);(iii) consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself ground for excluding the evidence, and; (iv) consideration of whether the background evidence may be necessary to show the real relationship between relevant persons.

(viii) The test to be applied by the court is whether the background evidence is relevant and necessary. The test is not that it would merely be helpful to the prosecution to admit the evidence.

89. In the light of having identified those as being the relevant principles, the trial judge considered the two respective bases on which the respondent was contending that the evidence ought to be admitted, i.e., (1) in rebuttal of alibi evidence, and (2) to establish the nature of the relationship between the appellant, Jimmy Flynn and Benny Treanor.

90. Dealing first with the reliance on the proposed evidence as material tending to rebut the appellant's alibi that, at the material time, he was engaged in working in a lorry at a yard at 155 Concession Road in connection with diesel laundering activity. The trial judge ruled:

> *"Now, the position is, is that the concern of the prosecution which they have outlined to the Court is a concern on their part that texts which were exchanged between Ms King and Mr Brady will give comfort to the alibi evidence which Mr Brady intends to produce that he was working up in this yard in a lorry from between eight and half ten. And the position that the Court sees is that the rebuttal of this defence on the basis that Mr Brady was capable of lying to Ms King and that there was good reason for that is relevant and necessary evidence. And the Court is of the view that it both covers all matters, incomplete, incomprehensible and incoherent".*

91. In so ruling, the trial judge went on to emphasise that in leading the evidence in question the prosecution would be required to present their evidence in a fair way to the jury. However, provided that would be done, the trial court was satisfied that the evidence could be admitted as being relevant and necessary and as complying with the test in *McNeill*.

92. In his closing address to the jury, counsel for the respondent placed reliance on the conversation as showing that the appellant had every reason to lie to Jessica King when he texted her to say that he was diesel laundering on the night in question, arguing that his "*constructive false alibi*" was very substantially based upon this text message. We are satisfied that there was nothing unfair in his presenting the evidence in that way.

93. Moving then to the second basis on which the respondent had sought to justify the admission of the controversial evidence before the jury. In that regard the trial judge ruled:

> "*Now, it's clear from the evidence adduced before the jury to date that this robbery required a substantial degree of planning. That there was a number of people*

involved, and there was a close relationship on the day of the robbery and killing between Mr Brady and particularly Mr Flynn, and to a lesser extent, Mr [Treanor]*. And there's no doubt that the prosecution wish to make the case to the jury that Mr Flynn was involved, particularly Mr Flynn was involved in the planning of the robbery, the evidence to date before the jury in relation to Mr* [Treanor] *is less extensive. He was with him obviously for portions, a substantial portion of the day up to the time he signed on in Crossmaglen and was returned home.*

Now, I'm only dealing with the case the prosecution wish to make and my comments are only for that purpose. Now, obviously that evidence isn't incomprehensible, but it's certainly without the evidence in relation to -- or Ms King wishes to give, it is incomplete because out of Mr Brady's own words, which is alleged by Ms King, I don't know if it's true or not, he has indicated that he did have a relationship of a criminal nature with Mr Flynn and Mr Treanor, which clearly is inextricably linked up with the allegation by Mr -- by the prosecution, and by Mr Grehan on behalf of the prosecution, that that particular evidence is inextricably linked up with what matters the jury has to decide. And therefore, and I should stress that the wording in Ms Denham's judgment is, "incomplete or incomprehensible', it's not both. And certainly the evidence would be incomplete if the Court didn't allow that evidence. And the Court therefore decides that that is within the test that it's relevant, and necessary evidence, and comes within the test of McNeill".

94. In so ruling, the trial judge accepted that there was a possibility of prejudice to the appellant, but he equally accepted the prosecution's assurance that it was not their intention to introduce the controversial evidence for the purposes of suggesting propensity. He said that if the case went to the jury, there would be a responsibility on the prosecution to make clear the particular reason for which they had introduced the evidence; and he further accepted and acknowledged that, in such an event, there would be responsibility on him to issue a strong warning to the jury in relation to the risk of possible prejudice, and he was prepared to do so.

Submissions of the Appellant

95. Counsel for the appellant submits that the fallacy that lies at the heart of the trial court's decision to admit the evidence as potentially assisting the respondent in rebutting the appellant's alibi, is the implicit suggestion that but for Jessica King's ultimatum, the appellant would have said to Jessica King "*I am going to rob the staff at Lordship Credit Union*" but baulked, on the basis that if he had told her that, she might have finished up with him. Counsel suggests that this is ludicrous. If the appellant was going on a robbery, he was never going to tell Jessica King or anyone else. Every person who commits a crime has motive to lie. The respondent already had a basis for impugning the text. The appellant said he was diesel-laundering. The jury had to weigh this up. It is submitted that the so-called ultimatum added nothing to the nature of that deliberation and the contrary argument and finding by the trial judge was both artificial and contrived.

96. The point is further made that the appellant did not acknowledge during the phone call that if his girlfriend found out that he was committing crimes that she would finish the relationship. This was merely Jessica King's opinion on his state of mind. She had said "*I just knew*". Accordingly, Jessica King's opinion on the appellant's state of mind was not based on any conversation or admissions made by him. Moreover, at the time of the text message sent to Jessica King, the appellant had pleaded guilty to causing criminal damage to a garda car and the relationship had not terminated.

97. It is further submitted that the conversation on which the respondent was placing reliance had taken place at least eight months after the robbery and did not purport to speak to the appellant's state of mind prior to that time.

98. In relation to the admission of the evidence for the purpose of establishing the nature of the relationship between the appellant, Jimmy Flynn and Benny Treanor, it is submitted that the wider evidence in the case clearly established that the appellant and Jimmy Flynn were friends and close associates. It also established that the appellant was also regularly in the company of Benny Treanor. The three of them were part of a wider group that socialised together. It is submitted that the interaction was not only criminal in nature. A history of previous criminal association is not evidence unless one of the exceptions in *McNeill* is demonstrated. To characterise the friendship as a flag of convenience to commit crimes was not in accordance with the evidence.

99. The point is made that a single incident was mentioned in the conversation. The time and place and proximity of the robbery are unknown. The three men had probably been in each other's company hundreds of times since the alleged theft and, it was not alleged, nor could it be, that any crime had been committed. There was simply no basis for admitting the evidence. The prosecution case against the appellant was based on circumstantial evidence. There was no evidence at all that Benny Treanor was involved in the burglary at Clogherhead. The case against the appellant was coherent and complete without this evidence. It is submitted that the fact, if fact it be, that there was a one-off burglary at some undisclosed time and place does not mean that the prosecution case against the appellant was devoid of essential context.

100. It is submitted that the trial judge had misapplied the principles in *McNeill*. Background evidence could only be admitted if it was so closely and inextricably linked to the alleged offences and/or the relations between the relevant persons so as to form part of the body of evidence to render it coherent and comprehensible. It is submitted that Benny Treanor was only in the case on the day of the murder and robbery at the Lordship Credit Union. The trial court admitted evidence of the theft of a car years earlier as background evidence to a credit union robbery and murder of a serving member of An Garda Síochána. It is submitted that the required close and inextricable link to the alleged offences and/or the relations between relevant persons were simply not present.

101. While the respondent had suggested that the controversial evidence showed that the appellant was capable of lying and had a good reason to do so, it is submitted to this Court that the trial judge's ruling that the evidence was necessary as background evidence to give a complete and full picture was manifestly incorrect. We were referred to the cases of *R. v. Campbell* [2005] EWCA Crim 248 and *R. v. Pettman* (Unreported, English and Welsh Court of Appeal, 2 May 1985), the latter case having been cited by Denham J. (as she then was) in her judgment in *McNeill*. It is not necessary to review them in this judgment. The purpose of referencing them was ostensibly to contrast the position in those cases with the position in the present case. It is sufficient to say that in the case of *Campbell* the admission of misconduct evidence was held to be justified on the basis that it illuminated a relevant relationship, established a motive and tended to rebut the defence of the defendant. In the *Pettman* case it was suggested that a connection between the offences was established on the evidence, raising a real question upon which the jury had to decide. It is suggested that in the present case, it was nothing as clear-cut as in the *Campbell* case, nor was there any nexus between the two offences other than that they were similar crimes, unlike in the *Pettman* case. It is suggested that the mere fact that there was evidence that two similar crimes had been committed was insufficient to trigger the test in *McNeill*.

Submissions of the Respondent

102. In replying submissions on behalf of the respondent it was made clear that the respondent does not accept that Benny Treanor was only in the case on the day of the murder and robbery at Lordship Credit Union and that there is no evidence at all that Benny Treanor was involved in the burglary at Clogherhead.

103. The respondent submits that the crimes committed at Lordship Credit Union required extensive preparation and planning; that the association of the appellant, Jimmy Flynn and Benny Treanor on 25 January 2013 was not innocent or friendly, but was for the purposes of planning and organising the robbery, with firearms, that they would later commit and included a *"drive by"* reconnaissance exercise at Lordship Credit Union; that the relationship between Jessica King and the appellant was such that he had good reason not to tell her what he had planned for that evening; and that therefore, the appellant's messages claiming he was to engage in diesel laundering were not reliable evidence.

104. It is submitted that, against that background, the evidence of Jessica King on this issue was therefore relevant. It was relevant to assist with other evidence to rebut the claims of innocent association; to assist with other evidence to undermine the reliability of text messages in relation to diesel laundering; and to assist with other evidence to undermine the appellant's third and most recently formulated account of his movements.

105. It is suggested that to have deprived the jury of this information would have been to render the evidence in relation to the relationship between critical parties (i.e., both the appellant and the other raiders and the appellant and Jessica King) incomplete.

Discussion and Determination

106. We are not disposed to uphold this ground of appeal. The trial judge had received detailed submissions with respect to both the law and the evidence. It is clear from his detailed ruling that he had a proper appreciation of the *McNeill* jurisprudence and that he correctly applied it. Insofar as he made findings of fact, they are findings that were open to him on the evidence. We are satisfied that he was justified in admitting the evidence in controversy both on the basis that it tended to rebut an alibi relied upon by the appellant and also on the basis that its admission was relevant and necessary to provide a complete picture with respect to the relationship between the appellant, Jimmy Flynn and Benny Treanor, and also the relationship between the appellant and Jessica King.

107. We consider that the evidence was properly admitted and accordingly ground 4 is dismissed.

Ground 6 – That the trial judge erred in refusing to discharge the jury as a consequence of the cross-examination of the appellant's former Solicitor, Mr Danny McNamee.

Background

108. On 20 July 2020, counsel for the appellant at trial applied to have the appellant's former solicitor, Danny McNamee, give evidence in respect of a conversation he had with the appellant in February 2013 regarding his whereabouts on the night of the murder of Detective Garda Donohoe, 25 January 2013, to rebut an allegation of recent fabrication. The judge permitted the evidence. The manner of the cross-examination is the subject of this ground where questions were asked of the witness regarding his representation of other persons, most particularly, Jimmy Flynn, Benny Treanor and Colin Hoey. The examination gave rise to an application for the jury to be discharged, the application was refused. The judge directed the jury that some of the cross-examination regarding the solicitor acting for other parties was left somewhat up in the air. He stated that the witness acted to the highest professional standards at all times in discharging his professional duties and that the prosecution fully accepted that.

109. The application was renewed the following day on foot of a perusal of the transcript of the evidence. That application was refused. It is said by the appellant that the cross-examination was toxic and unfair and gave rise to negative connotations, creating prejudice. The submissions are elaborated upon hereunder, both in the discussion section and the précis of the submissions.

Submissions of the Appellant

110. It is the appellant's position that the cross-examination was toxic and unfair and the judge's direction to the jury did not cure this unfairness. It is said that the cross-examination was unusual and that the underlying premise, as explained by the respondent, was never established in evidence and was unclear to the jury. It is said that the judge did not assess whether the cross-examination was capable of creating prejudice.

111. Counsel for the appellant describes the questions put to the solicitor as odd and pregnant with innuendo. It is submitted that the term "*common thread*" had a negative connotation; that Danny McNamee was too close to, or a go-to person for, persons of interest in the investigation.

112. It is submitted that it is not legally possible for a judge to make a finding that "*Mr McNamee acted to the highest professional standards*". Reliance in this regard is placed on *People (DPP) v. Slattery* (Unreported, Court of Criminal Appeal, 4 February 2004):

> "*A judge can certainly comment in a fashion which may be helpful to the jury in making up its mind but should not present them with his or her own resolution of the facts*".

113. Prof. Thomas O'Malley in his book, *The Criminal Process* (Round Hall, 2009) at paragraph 14-74 is relied on as follows: "[…] *the ultimate concern of an appeal court will be to decide if certain questions, in addition to being irrelevant, were also so charged with innuendo as to have created the risk of an unfair trial*". It is submitted that the innuendo here is bristling.

Submissions of the Respondent

114. The respondent emphasises the fact that no objection was taken by counsel for the appellant to the cross-examination while it was being pursued or after the luncheon adjournment and prior to its resumption, nor was there any attempt by counsel to re-examine the witness on this issue.

115. It is repeated that no issue was made about the witness's credibility and that the height of the cross-examination was that it established that the witness had advised other persons identified by the appellant in his own statement.

116. Counsel for the respondent points out that the trial judge did not just direct the jury that it was his view that there was no issue in relation to the credibility of the witness, but he made it clear that the respondent was not suggesting any issue and that that is of some note.

117. It is submitted that the use of particular words or phrases is part of the cut and thrust of cross-examination and there is nothing in the phrase "*the common thread*" that generates the innuendo that counsel for the appellant is stating.

Discussion and Determination

118. To understand the basis for this ground, the chronology of events is important; Danny McNamee gave evidence that on 5 February 2013, the appellant told him he was fuel laundering on the night of 25 January 2013. Shortly thereafter, he drove the appellant to the garda station for a voluntary interview. The appellant gave a contrary account to the gardaí for fear he would be prosecuted for laundering diesel. Following reassurance that the gardaí were only concerned with the offence they were investigating, the appellant told gardaí, in an "*off the record*" conversation, that on 25 January 2013 he was dropped to a yard near Jessica King's house by

Jimmy Flynn for the purpose of laundering diesel, that he was there for **10 to 15 minutes** but could not get the forklift to start and so he left.

119. A notice of alibi was served on 27 January 2020. By that time, the Book of Evidence and disclosure had been served. The salient portion of the alibi notice states:

> "*….I indicated to the Garda investigation team that I had attended at 155, Concession Road for the purposes of loading 'Diesel Waste Cubes', however as the forklift was not working, I left the site without having undertaken any loading of 'cubes'. This was not correct.*
> *On the evening of Friday 25th January 2013, I went to a yard situated at 155, Concession Road at around 8 o'clock or shortly thereafter. I went to this yard, with the sole intention of loading a large volume of 'Diesel Waste Cubes' onto the back of a 'curtain-sider' lorry, which was already on site, with the use of a forklift…….*".

120. He proceeds to describe the loading process and then says in the alibi notice:

> "*The process took approximately one hour and thirty minutes to two hours, due to rough terrain and poor lighting as well as the forklift cutting out occasionally, as a result of the poor weather conditions*".

121. The appellant gave evidence at trial. In cross-examination, it was suggested to him that the content of his alibi was new, in particular, the portion highlighted above concerning the time allegedly spent in the yard; 10-15 minutes as opposed to 1 ½ - 2 hours. In essence, that the above was a recent fabrication on the appellant having seen the Book of Evidence and the disclosure materials.

122. Counsel for the appellant sought to redress the situation in re-examination and to introduce the conversation of 5 February 2013 between the appellant and Danny McNamee regarding the loading of diesel cubes. Properly, this was not permitted by the trial judge on the basis of the rule against self-corroboration, and no complaint is made in this regard.

123. Counsel for the appellant then sought to call Danny McNamee to rebut the allegation of recent fabrication.

124. The questions asked during cross-examination are the foundation of this ground of appeal.

Relevant Portions of Evidence

Direct Evidence

> "*A. Not really. Just that he was involved in the process of diesel laundering and that he had been loading cubes.*

Q. Anything else?

A. Not so far as I can remember, no".

125. The "*off the record*" account of the appellant's movements on the date of the murder as recounted by him on 5 February 2013, was read before the jury. The relevant portion is as follows:

> "[…] *He stated that he was involved in the laundering of diesel near Cullaville close to where his girlfriend Jessica resided. It was near an abandoned house where fireworks used to be sold from[…] After this turn into the left. The yard is there. There's a forklift in it. Jessica's house is about 500 metres away. He stated that he was in the yard for about 10 or 15 minutes. He stated that he was dropped at this yard by Jimmy Flynn*".

Cross-examination

"*Q.* […] *And Mr O'Higgins read out there the off the record account that Mr Brady gave to the gardai?*

A. Yes.

Q. In your presence?

A. Yes.

Q. And I take it that accorded with what Mr Brady had told you previously?

A. Well, what he told me was that he was loading cubes

Q. Yes.

A. What's in the statement seems to be that he was making preparations to load cubes as opposed to loading them.

Q. Well, did that strike you at the time?

A. It did but I didn't….to be honest I didn't place all that huge amount of importance on it. I had, in the corridor with the officers, indicated to them that he was on the Concession Road involved in fuel laundering activities.

Q. Which what is he says in the off the record statement?

A. Yes.

Q. For a brief period of time, 10 to 15 minutes?

A. Yes but again can I say I didn't go into any particular detail with Mr Brady prior—

Q. I understand.

A. –to his witness statement in relation to –

Q. But you were there when he told the gardai—

A. Yes.

Q. –that it was for 10 to 15 minutes?

A. Yes.

Q. And that didn't strike you as being different to what he had already indicated to you?

A. It didn't.

Q. It didn't, all right. That's fine. Mr McNamee, Mr Brady went on then to give an account of his movements in the formal statement that you were present for; isn't that right?

A. He gave -- yes, he did. He did.

Q. He did. And took matters up from when I think he indicated a Jimmy Flynn had collected him; isn't that right?

A. That's correct.

Q. Do you know who Jimmy Flynn is?

A. I do indeed.

Q. Do you represent Jimmy Flynn as well?

A. I don't. I have represented Jimmy Flynn in the past but I don't

Q. Yes. No, I understand that's the position. All right. And he goes on then to say that Jimmy Flynn drops him at the house of Colin Hoey?

A. Yes.

[…]

Q. Have you represented him as well?

A. I haven't represented him in any court cases. We do, on occasion, represent his father.

Q. Well, did you advise him in the context of this case?

A. I did.

Q. In terms of making statements?

A. I did, yes.

Q. All right. And Jimmy Flynn also?

A. Yes.

Q. And how about another person that's mentioned in Mr Brady's statements, Benny Treanor?

A. Yes.

Q. Did you advise him?

A. I did indeed.

Q. In the context of this investigation; is that right?

A. Yes. I think Jimmy Flynn and Benny Treanor and Colin Hoey made witness statements.

Q. Yes.

A. Either to the gardaí or to the PSNI.

Q. But you are the common thread?

A. Yes, yes.

Q. Yes. As well as Mr Brady?

A. Yes. Well, I would represent myself, my firm and one other firm would represent most people in relation to customs affairs in the general area.

[…]

Q. And it's you personally who represented all of these other persons, not your firm?

A. Well, I have represented them all. Other people in my firm have also represented them.

Q. I appreciate that but you personally have dealt with Benny Treanor, Colin Hoey and Jimmy Flynn?

A. Yes, I personally have dealt with them.

Q. In the context of this investigation?

A. In the context of this investigation, yes.

Q. And other people more at the periphery perhaps as well, Charlene O'Callaghan?

A. Yes.

Q. And I am not sure about Aine McGivern?

A. No. Well, I am not sure either.

Q. She was the girlfriend of Eugene Flynn junior?

A. Yes. I know who she is. I am not sure if I attended the garda station with her though.

Q. Yes. And you know who Eugene Flynn junior is?

A. Yes. I know their parents. I know –"

The First Application to Discharge the Jury on this Issue

126. Cross-examination concluded without objection. There was no re-examination. Counsel for the appellant then sought clarification from counsel for the respondent as to why questions were asked about the fact that advices were given by Danny McNamee to the appellant, Jimmy Flynn, Eugene Flynn Jnr, Aine McGivern, Benny Treanor and Colin Hoey.

127. Counsel for the respondent replied that it was not to undermine the credibility of the witness but that these questions were relevant to a fact in issue: the appellant's whereabouts at relevant times on the night of Detective Garda Donohoe's murder. Counsel stated:

> "*It just so happens they are persons that populate Mr Brady's statement but in the context of the witness having advised Mr Brady to tell the truth, it may be relevant in terms of the fact that he was dealing with other witnesses around the same incident*".

128. Counsel for the appellant indicated that he did not have any idea as to what constituted the fact in issue and submitted to the trial judge that the questions asked were without basis and prejudicial to the appellant. Further clarification was sought of the respondent.

129. Following this, counsel for the appellant set out his two concerns; first, that the fact that Benny Treanor, Jimmy Flynn and Colin Hoey shared a common solicitor in circumstances where the jury did not know of the content of their statements or anything about the statements, did not demonstrate of any logical connection and that there was nothing which could be drawn from the fact that Danny McNamee acted for the other individuals which could lead the jury to conclude that the appellant was less likely to be telling the truth.

130. The second concern was that the cross-examination was grossly offensive where the jury were left entirely in the dark as to its purpose and leaving a situation pregnant with innuendo and one which did not place either the appellant or Danny McNamee in a good light.

131. Counsel for the respondent again stated that the prosecution were casting absolutely no aspersions whatsoever on Danny McNamee and indeed that was repeated at the oral hearing of this appeal.

132. Counsel for the respondent replied at trial to counsel for the appellant's concerns and stated that the fact in issue pointed out by the prosecution was not, as suggested by counsel for the appellant, relevant to whether the appellant's movements were more or less likely to be true, as the appellant had told the trial court that what he had said about his movements, were in fact lies. The appellant had made it very clear that he had given a brand new account at trial. counsel stated that he was pointing out that Danny McNamee acted for a number of other people and insofar as an inference could be drawn, it was that no conflict existed or else he could not have acted.

133. Counsel for the appellant applied to discharge the jury as follows:

> "[…] *in my respectful submission you have now been offered a completely different explanation. It started out by saying Aaron Brady had given an account of his movements and the jury were entitled to think less of Aaron Brady for giving an account of those movements by virtue of the fact he had acted for three other people. That didn't actually make a lot of sense to me but some of what Mr Grehan is saying is ever so slowly beginning to permeate for me at least because he says obviously there's no conflict of interest in acting for these people. Now, if the position be, as Mr Grehan has stated it to be, and to be so obvious, that there was no conflict for acting for all of these people, and I am accepting that that is his state of knowledge, that he is not in a position to advance any contrary view but if it be the case that it was obvious there was no conflict of interest in my respectful submission to put it up before the jury that he was acting for them and leave the jury in some doubt, in considerable doubt in my submission, as to the purpose of this cross examination, it is to have the jury sitting in there saying this fellow is acting for all of them in circumstances where the DPP's counsel has, on the record, said there is no basis for in any way suggesting there's a conflict of interest and yet he has put that up and the only basis upon which it can be put up in my respectful submission is that it implicitly ought not to have happened and that the jury need to know that he acted for all of these people because it's somehow or other relevant to some matter that they have to decide and in my respectful submission it's improper and it's the worst form of cross examination because there isn't even something put in respect of which the witness can rebut and it is just the juxtaposition of all these people lumped together and in my respectful submission this is a matter that is*

incapable of being cured. It is a significant factor for an important witness on behalf of the defence and I am asking the Court to discharge the jury.
MR GREHAN: The point is not about conflict of interest. It is about that there was no conflict in accounts that would give rise to a conflict of interest. That's why it's relevant".

134. The judge refused to discharge the jury as follows:

"*Well, I am not discharging the jury. I mean a question was asked. The defence have an issue about it. Mr Grehan has made clear that there's no issue as to the credibility of Mr McNamee and I am certainly quite happy to deal with it--to make clear with the jury, if that's the position, I have no difficulty with that and the questions have been asked and Mr O'Higgins has expressed his view on them. It's quite clear that there's no issue with the credibility of Mr McNamee and the Court can make that quite clear to the jury.*
MR O'HIGGINS: I am obliged for that, Judge. Thank you. As I say, Judge, if we have a little bit of time with our client and his father and there is matters we need to discuss".

135. The jury returned and the judge directed them in the following terms:

"*I just want to deal with one aspect of Mr McNamee's evidence just before I go any further. Just some questions were put in cross examination by Mr Grehan on behalf of the Director of Public Prosecutions to Mr McNamee about acting for other people who gave witness statements in this investigation which was left somewhat up in the air. As is clear from his evidence Mr McNamee acted to the highest professional standards at all times in discharging his professional duties and the prosecution fully accepts that*".

The Second Application to Discharge the Jury on this Issue

136. The following day, having had the opportunity to review the transcript overnight, counsel for the appellant renewed their application for a discharge, this time placing emphasis on counsel for the respondent's suggestion to the witness that he was "*the common thread*" between persons of interest in the case. The relevant portions of the application are set out hereunder:

"*MR O'HIGGINS: As I say Mr Grehan indicated it went to facts in issue, namely Mr Brady's account of his movements which was untrue. He went on to say that Mr McNamee clearly had no conflict of interest with respect to the statements that he took from the personnel named by him and it is a fact that a number of those witnesses agree with Aaron Brady's account and agree with Aaron Brady's untrue account. Now, the first thing that must be said is that information was elicited for the purposes of understanding the motive for the crossexamination. Much of it,*

perhaps the vast majority of it, is not before the jury and I accept that fully but I am highlighting it because it indicates the seed in my respectful submission which was being planted. Now, that Mr McNamee took statements from various people in my respectful submission is neither here nor there and even the fact of putting that to the witness is something that may well be quite survivable from any complaint that could arise. It shouldn't happen in my respectful submission but if it were just simply drawing the jury's attention to the fact that there was a solicitor who took the statements from the various people, that would be undesirable and could give rise to an innuendo but the real difficulty, Judge, is if I could just draw you to the transcript".

137. Counsel for the appellant then directed the judge to the cross-examination eliciting that Danny McNamee acted for the various persons. Following which, he made the following submission:

"*But the problem, Judge, in my respectful submission, the biggest problem is, after saying that they had made statements either to the gardaí or the PSNI, Mr Grehan says,* ***"But you are the common thread?"*** *and the witness answered "Yes". Now, my difficulty, Judge, is this. A thread is something that runs through something and in my respectful submission if a solicitor takes a statement from five or six people, the duty he owes to his client in respect of advising those individuals, it is a hermetically sealed Chinese wall between one person and another and what is suggested here in my respectful submission is that* ***Mr McNamee is a common thread running through the statements, the taking of those statements and in my respectful submission that is not actually a passive role. It is more in keeping in my respectful submission with some form of an agenda and in my respectful submission there is a very real danger that the jury will consider the fact that this person represented all those people, that he was the common thread, and we know underlying the common thread is a challenge to the credibility of Mr Brady by reference to the common thread, that they would see Mr McNamee as not being impartial or objective and far too close and in actual fact being active in the whole process in respect of which, by his professional standing, he has to be entirely objective and separate with respect to all the other people's interests.***

Now, Judge, you did draw the jury's attention to the fact that the reality of the situation is that Mr McNamee is a person of the highest reputation and the prosecution accept that and, do not misunderstand, we are very grateful for that intervention and we acknowledge it cannot do us harm, if I might put it like that, and it is welcomed by the defence but the difficulty in my respectful submission is that, notwithstanding the expression of that opinion, the jury must assess the witness on the evidence given and on the totality of the case and nobody can hand

them a view of the witness in respect of which they are bound and it's the nature of a jury that they have to independently form their own view of any witnesses and it is in light of all that, Judge, we had said yesterday that this bell can't be unrung and notwithstanding the efforts which the Court has made, for which we are deeply appreciative and grateful and acknowledge are of benefit, in my respectful submission they just can't go far enough and this problem remains unresolved in my respectful submission".

138. The judge addressed the issue at some length rehearsing the matter from the time of counsel for the appellant's re-examination of the appellant. He referred to the first application to discharge the jury and in that respect stated:

> "*So, the Court at that -because Mr McNamee was not a witness as to truth but as to consistency, the Court was dealing, as it saw itself, with the credibility of Mr McNamee and if there was possible -coattrailing by the prosecution in trying to impugn Mr McNamee's reputation. Now, when the matter was argued to and fro between Mr Grehan and Mr O'Higgins at some length, Mr Grehan denied that that was the situation and he accepted fully that he had no issue with Mr McNamee's credibility-.*
>
> *Now, the Court actually dealt with this particularly carefully. It put a lot of thought into the direction to the jury because it said first of all, "Some questions were put in crossexamination by Mr Grehan on behalf of the Director of Public Prosecutions to Mr McNamee about acting for other people who gave witness statements in this investigation which was left somewhat up in the air." Now, that was something deliberately picked by the Court because Mr Grehan had denied that there was any coattrailing or that he was dealing with the credibility of Mr McNamee and the Court went further to make a finding that the Court found that Mr McNamee had acted to the highest professional standards. "As is clear from his evidence Mr McNamee acted to the highest professional standards at all times in discharging his professional duties and the prosecution fully accepts that."*
> *Now, the prosecution is that I don't know what reference there was made to Mr Hoey. I mean at this stage what's I have heard so much in the absence of the jury and in the presence of the jury but I will check it but these people have not given evidence. Their evidence is not testimony before the Court and no issue as to fact arises as to Mr McNamee's issue. He is giving evidence as to consistency to rebut recent fabrication and the Court forcefully dealt with any issue of credibility or any attempt to impugn his reputation and the Court, in my view, dealt with the matter appropriately and fairly at the appropriate time and dealt with it appropriately before the jury".*

139. Thus, the application was refused.

Conclusion

140. In essence, the submission made is that the cross-examination had a grossly prejudicial effect and deprived the appellant of a fair trial. It is said that there was a failure by the respondent to identify the significance of the line of questioning, leaving it very much up in the air and not open to a response by the witness. Furthermore, that the series of questions put to the witness were without any relevance to any issue in the case and must have caused the jury's antenna to twitch as to what the questioning was in fact all about. It is said that the questioning implied of some negative connotations on the part of the solicitor leaving a situation of such unfairness that the jury ought to have been discharged.

141. The first and obvious point to be made is that the respondent was fully entitled to cross-examine the witness. The witness had been called to rebut an allegation of recent fabrication, that is that the appellant had in his notice of alibi placed the time he said he had spent at the yard in question, laundering diesel cubes at 1 ½ to 2 hours as opposed to 10-15 minutes. The latter time frame was that which he offered to the gardaí in the "*off the record*" conversation on 5 February 2013. The alibi was served late in the day at a time when, quite obviously, the appellant had had sight of the Book of Evidence and the disclosure materials and so the respondent examined him on this.

142. In order to rebut the recent fabrication contention, counsel for the appellant sought to call Danny McNamee regarding his conversation with the appellant prior to making his witness statement to the gardaí in February 2013 as such evidence was inadmissible if elicited through the appellant, offending as it would, the rule against narrative.

143. There is no doubt, on reading the transcript of the evidence, that Danny McNamee's evidence did not set out that the time frame was anything other than that of 10-15 minutes.

144. The concern raised by the appellant as to the cross-examination stemmed from the questions asked concerning Danny McNamee representing other individuals who also made witness statements as part of the investigation, specifically, it is fair to say, Jimmy Flynn, Benny Treanor and Colin Hoey.

145. The respondent was asked to explain the reasons underpinning this aspect of the cross-examination and sought to do so.

146. It must be said that there was no onus on the respondent to explain why such cross-examination took place. However, that as may be, explanation was given, with counsel for the respondent indicating what is stated earlier in this portion of the judgment. Counsel indicated that the appellant spoke of the above-mentioned persons in his statement to the gardaí regarding his movements on the night of the murder. The respondent noted that those persons populated the statement and, that in the context of Danny McNamee having advised the appellant to tell the

truth, the respondent was of the view that it was relevant that Danny McNamee was also dealing with other witnesses regarding the same incident. Counsel indicated that the point was not one of conflict of interest on the part of the solicitor, but that there was no conflict in the accounts of the witnesses that would give rise to a conflict of interest.

147. It must also be said that when the examination was taking place, no objection was raised by counsel for the appellant. Counsel explains that this was not done, as in effect to do so, would serve to underline an issue in the presence of the jury. Moreover, he was waiting for, as he termed it, "*the QED*", but none came. However, it remains the position that no objection was raised at the point when the impugned questioning commenced or throughout. Nor did any re-examination take place. It was only at the point when the cross-examination concluded that counsel for the appellant sought some time to consider matters and then raised the concerns on behalf of the appellant. Those concerns are set out at some length earlier in this section of the judgment.

148. The critical part of Danny McNamee's cross-examination from the respondent's perspective, relates to the time the appellant said he spent loading diesel cubes, which was 10-15 minutes in the "*off the record*" statement. He also agreed that that did not strike him as being different to what the appellant had already indicated to him. Therefore, while Danny McNamee had been called to rebut the allegation of recent fabrication as asserted by the respondent on foot of the alibi notice, he did not give this evidence.

149. The respondent had no issue with the credibility of the witness and when asked to explain himself, counsel for the respondent's first response was to say as much.

150. It is quite clear from a reading of the transcript, and from submissions made in the court below and before this Court, that counsel for the appellant had very serious concerns regarding the cross-examination. It was felt the questions were loaded in such a way, that while not stating any matter outright, were of such a nature as to imply of negative connotations.

151. This was emphasised in the renewed application to discharge the jury the following morning. Whilst concerns were expressed regarding aspects of the cross-examination, it was stated that certain questions might, in effect, survive an application. However, counsel for the appellant was of the view, that drawing the jury's attention to the fact that the solicitor took statements from the various people was undesirable and could give rise to innuendo, but the emphasis was really placed on certain words used in cross-examination, namely, that Danny McNamee was "*the common thread*", that is, common to the individuals mentioned and the appellant.

152. We do not see the cross-examination as giving rise to the kind of prejudice said by the appellant. The fact that Danny McNamee acted as solicitor for individuals who made witness statements or who were referenced in the trial does not raise the innuendo of a negative kind of the type to give rise to such prejudice that the option of last resort, that is to discharge the jury, is engaged.

153. The appellant mentioned the people concerned in his statement to the gardaí in terms of his movements on the relevant date. The appellant introduced those persons into the case. Danny McNamee was the solicitor who was common to all parties. The use of the words "*common thread*" can have no meaning other than that. It was not something of sufficient significance to give rise to a discharge of the jury.

154. Having considered the cross-examination, we are not of the view that the questions asked undermined the fairness of the trial. The questions asked may be contrasted with those asked of the accused in *People (DPP) v. D.O'S.* [2006] 2 I.L.R.M. 61 at page 66 where the cross-examination was found to be *"replete with impermissible innuendos as to the accused's profile or disposition*". The examination was so prejudicial that the conviction was quashed. The questions asked in this case cannot be said to be prejudicial or indeed to have placed the witness in a bad light.

155. In our view, the judge's comments to the jury following the first application to discharge the jury were careful and measured. He highlighted that the respondent's questions were left somewhat up in the air insofar as they addressed his acting for other persons who gave statements and that the witness was a person who acted to the highest professional standard and that this was fully accepted by the respondent.

156. It simply cannot be said that such a comment was anything other than of assistance to counsel for the appellant, confirming to the jury that the questions were somewhat nebulous and that no aspersions could be cast on Danny McNamee. We are not persuaded that the judge erred in refusing both applications to discharge the jury.

157. Consequently, this ground fails.

Ground 9 – That the trial court erred in admitting into evidence (i) mobile phone handsets seized during the search of properties the subject matter of a voir dire; (ii) data extracted from the said handsets for the purposes of identifying users of certain other handsets; (iii) hearsay contained in the data which was admitted for the purposes of identifying users of certain handsets; (iv) evidence of top-ups in respect of credit purchased for mobile phone handsets.

Attribution of Users to Numbers

158. On 29 April 2013, gardaí searched the house of Grainne Treanor, the sister of Benny Treanor, on foot of a search warrant which had been issued by a District Court Judge grounded on a sworn information from a detective sergeant who averred that he reasonably suspected that evidence relating to the events at Lordship Credit Union was to be found at the address, to include mobile phones. The search warrant issued in respect of this property granted authority to seize mobile phones located at the premises. Other persons, apart from Grainne Treanor, were present in her house when it was searched, resulting in four mobile phones being seized

from the house which were subsequently labelled as JH2, JH3, JH6 and JH7. None of these phones belonged to the appellant. Unsurprisingly, neither the search warrant nor the search was challenged by the appellant at trial.

159. The phones were forensically examined resulting in the following information being extracted from the handsets:

(i) JH2 had the telephone number 0876018761 saved as "*Benny*";

(ii) JH3 had the same number saved as "*Brendan*" and contained a text message sent from this number which was sent on Christmas Day 2012 saying "*Happy Christmas to you Paddy and de boy's...let me no wat day to call".*

(iii) JH6 had this same number saved as "*Brendan*". Two text messages were extracted from JH6 which had been sent to 0876018761 ("*Brendan*"), one on 3 June 2012 wishing the recipient "*Happy Birthday*", and another on Christmas Day 2012 which read "*same to you and Charlene*".

(iv) The handset labelled JH7 had the number 0876108761 saved as "*Benny*".

160. The birth certificate of Brendan Treanor was adduced in evidence which established his date of birth as 3 June 1988.

161. Detective Inspector Phillips gave evidence of his knowledge that Benny Treanor was in a relationship with Charlene O'Callaghan in early 2013. The appellant's voluntary statement confirmed this to be the case.

162. Aine McGivern's car was searched on foot of a search warrant relating to a separate investigation into stolen parts for motor vehicles. The gardaí suspected that the car, which she claimed ownership of, and which was located at a commercial premises, was fitted with stolen parts. The gardaí seized the car on foot of the search warrant which gave them authority so to do, and within the car was Aine McGivern's mobile phone. An examination of the phone revealed that 0873638970 was saved as "*Eugene New*". Text messages to and from this number revealed a relationship between "*Eugene New*" and Aine McGivern. Evidence was given by Sergeant Karen Coughlan of her knowledge that Aine McGivern was in a relationship with Eugene Flynn Jnr in early 2013.

163. Other evidence was called in the case to include a '999' call made from 0873638970 with the caller indicating he was Eugene Flynn Jnr of Dunroamin House, together with evidence of interactions with Eugene Flynn Jnr after the '999' call when he provided this number as his. The ruling of the trial judge in relation to the '999' call evidence is not the subject of this appeal.

Submissions of the Appellant

164. The appellant objected to the evidence from the seized phones being admitted before the jury on the basis that it was hearsay evidence as the respondent was seeking to establish that the

number 0876018761 was attributable to Benny Treanor because it was recorded as such in the handsets seized from Grainne Treanor's house, and the number 0873638970 was attributable to Eugene Flynn Jnr because it was recorded as such in Aine McGivern's phone.

165. The appellant also sought to challenge both of the searches conducted giving rise to the seizure of the phones relying on *People (DPP) v. Quirke* [2023] 1 I.L.R.M. 225.

Submissions of the Respondent

166. The respondent argued that the purpose for the introduction of this material before the jury was not to establish the truth of what was recorded on the handsets, namely that Benny Treanor and Eugene Flynn Jnr were the respective users of these two numbers simply because they were recorded as such on the handsets. Rather, the information recorded on the handsets was introduced to establish that someone with carriage of those handsets recorded that information which when considered cumulatively could result in the jury drawing the inevitable inference that the identified numbers were linked to Benny Treanor and Eugene Flynn Jnr. The respondent also argued that the searches conducted were lawful but that even if this were not the case, the trial judge retained a discretion to admit the evidence.

Discussion and Determination

167. A challenge was not raised to the search at Grainne Treanor's house at trial. In addition, the search warrant issued in respect of Grainne Treanor's house specifically gave authority to An Garda Síochána to seize mobile phones. The evidence at issue was seized from third parties and not from the appellant. Accordingly, a breach of the constitutional rights of the appellant did not arise, with the issue instead being one of an asserted illegality, in respect of which the trial judge retained a discretion as to whether to admit the evidence.

168. The trial judge determined that as this evidence was not introduced to establish the truth of its contents, but rather *"to support the material that the prosecution relies on, as proof of the attribution of these phones"* this evidence was admissible as to fact and was not hearsay evidence.

169. In *People (DPP) v. O'Mahony* [2016] IECA 111, Birmingham J. (as he then was) referred to the different purposes for introducing into evidence information contained within a document, but more importantly, he explained that the purpose for the introduction of the evidence dictated whether that information was admissible. He stated at paragraph 46 of his judgment:

> "*However, a document is also a medium of communication and if its potential evidential value lies not in its physical appearance or characteristics, but rather in its content, i.e, in the information that it contains and communicates, then it may be used either as original evidence or as testimonial evidence. This is because content may be of evidential value in one of two ways. The mere fact that the document has certain content, whether or not it is true, may sometimes be probative*

and relevant in and of itself. If the intention of the party adducing the document is simply to demonstrate that the document has certain content, but that party is not seeking to rely on the truth of that content, then it is correctly to be characterised as constituting original evidence. However, if the document is adduced for the purpose of relying both on the existence of its content and the truth of its content, then it is properly to be characterised as constituting testimonial evidence".

170. In the instant matter, the respondent was not seeking to introduce this information to establish that the information was true. Rather, the information was being introduced as circumstantial evidence of these numbers being linked to Benny Treanor and to Eugene Flynn Jnr. In light of that distinction, the evidence was not hearsay evidence but rather was original evidence adduced to establish an association between these persons and the identified numbers which the jury could accept or reject.

171. With respect to each of the searches conducted, both were on foot of warrants from the District Court and neither concerned the appellant. The height of the argument which the appellant could raise with respect to either of these searches is that an illegality arose. The trial judge determined that the appellant did not have *locus standi* to challenge these searches. While that may not have been accurate, nothing has been brought to our attention to establish that these searches or the seizure of the phones on foot of the searches was illegal. Accordingly, the trial judge did not err in admitting this original evidence into evidence to be considered by the jury not as truth of its content but rather as circumstantial evidence aimed at connecting the named persons with the identified numbers.

Documentary Evidence

172. This portion of ground 9 was not argued before us. However, neither was there an indication that it was being abandoned. Accordingly, we will address the issue raised having regard to the written submissions filed.

173. Subscriber details in relation to 0873638970 and 0861659101 were sought from Vodafone. The result of this enquiry was that 0873638970 was registered to Eugene Flynn Jnr and 0861659101 was registered to Charlene O' Callaghan. Jim Faughnan from Vodafone gave evidence that he retrieved this information from the computer systems of Vodafone by inputting these numbers into the database. The respondent sought to adduce the documentary evidence relating to these details, which consisted of a letter to An Garda Síochána setting out the information generated as a result of Jim Faughnan's enquiry, pursuant to s. 5 of the Criminal Evidence Act 1992 ("the 1992 Act").

174. An application was also made for the last five top-ups in respect of mobile phone number 0876018761. A letter was received from Vodafone detailing the last six top-ups, the importance of which was that when linked with CCTV evidence which had been gathered, the inference could be drawn that Benny Treanor was linked to this number. Again, Jim Faughnan gave evidence

that he obtained this information from the computer systems of Vodafone by inputting the relevant phone number into the database and thereupon provided this information in letter form to An Garda Síochána. The respondent sought to adduce this documentary evidence pursuant to s. 5 of the 1992 Act.

175. Jim Faughnan gave evidence that these records were retained and maintained for billing purposes and customer queries and were collected and maintained in the ordinary course of Vodafone's business.

Submissions of the Parties

176. The appellant submits that the documents which were sought to be admitted into evidence were not covered by s. 5 of the 1992 Act as it was not the actual printout of the information emanating from Vodafone's database but rather a recitation of the information retrieved from the database. This, it is submitted, was hearsay. The respondent submits that the documents which were generated by Jim Faughnan came within the terms of s. 5 of the 1992 Act such that the information contained within the documents was admissible in evidence to prove its truth.

Discussion and Determination

177. Section 5 of the 1992 Act provides, *inter alia*:

> "*(1) Subject to this Part, information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information—*
>
> *(a) was compiled in the ordinary course of a business,*
>
> *(b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and*
>
> *(c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.*
>
> *(2) Subsection (1) shall apply whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he is identifiable) through whom it was supplied received it in the ordinary course of a business*".

178. The trial judge determined the issue in the following manner in his ruling of 2 April 2020:

> "*When seeking subscriber details, it would be preferable and more in keeping with the act that the actual extract from the Vodafone computer is the document referred to rather than a subsequent letter from the T.L.U* [i.e., Telecommunications Liaison

Unit]. *The court notes the definition of document in the Act which states "Document includes". The documents from TLU includes information retrieved in accordance with s. 5 of the 1992 Act. The court is satisfied from the evidence of Mr. Faughnan that they are documents within the parameters of Section 5 of the 1992 act, and there is no impediment pursuant to Sect 8 to their admission.*

These documents are, therefore, admissible to prove the facts of their contents including the letter from Vodafone of the 7th February 2013 setting out the top-ups for 187-6018761".

179. The Court agrees with the view of the trial judge in relation to this issue. The business records maintained by Vodafone established the names of the subscribers as indicated and the last top ups in respect of a specific number. The fact that the information so maintained was communicated to An Garda Síochána in a letter rather than providing the documents which relate to same does not result in that evidence becoming inadmissible. The fact remains that this information was generated in the normal course of business of Vodafone. The outcome of the searches conducted by Jim Faughnan of the Vodafone database were recorded in documentary form with respect to which, he gave evidence.

180. The trial judge did not err in permitting this evidence to be adduced in this manner.

181. Accordingly, this ground of appeal fails.

Ground 10 – That the trial court further erred in admitting into evidence call data records of mobile phone handsets supplied by network providers pursuant to s. 6 of the Communications (Retention of Data) Act 2011, and s. 8 of the Data Protection Act 1988.

182. A vast array of call data records were sought by the investigating team in January and February 2013 relating to numerous mobile phone numbers, to include three numbers associated with the appellant, all of which were objected to by the appellant. The Court does not intend to set out the various requests as the objection raised by the appellant related to all of the call data records obtained on a general basis.

Submissions of the Appellant

183. The appellant sought to rely on the difficulties which emerged for the domestic legislation arising from the European Court of Justice ("CJEU") decisions in C-293/12 *Digital Rights Ireland Ltd* and C-203/15 and C-698 *Tele2 Sverige & Watson* to the effect that relevant provisions of the Communications (Retention of Data) Act 2011 ("the 2011 Act") was incompatible with EU law. On that basis, the evidence garnered should not have been admitted into evidence, it is submitted.

Submissions of the Respondent

184. The respondent submits that the call data records were obtained in accordance with the legislation in being at the relevant time which was presumptively constitutional when they were obtained. As a result, any illegality arose from a subsequent legal development and not from any deliberate and conscious breach of the appellant's rights, which had the effect of the evidence not being automatically rendered inadmissible. Accordingly, the trial judge had a discretion to admit the evidence pursuant to *People (DPP) v. J.C.* [2017] 1 I.R. 417, which discretion he correctly exercised.

Discussion and Determination

185. The trial judge drew attention to the fact that all of the requests for the call data records at issue were made by Chief Superintendent Peter Kirwan before these decisions of the CJEU were handed down. He determined that "*the appropriate way to approach this matter is by the application of the test on the exclusionary principles of evidence as set out in the decision of" People (DPP) v. J.C.* [2017] 1 I.R. 417. The appellant argued that the fact that the *Digital Rights* and *Tele2* judgments came after the requests for call data records were made is not the appropriate benchmark as the State were aware that the legislation was under challenge since 2005. The trial judge determined the matter in the following manner:

> "*This court does not consider the initiation of proceedings in the Digital Rights case in 2005 or McKechnie J's decision in 2009 as a ground for visiting on the prosecution in this criminal trial a delay since April 2014 of solving this issue. In all EU directives on digital rights going back to 1995 there has been a reservation for the investigation of crime. The application of the exclusionary principles of evidence is a practice unique to the common law countries, and the court has already held that this is the appropriate way to deal with the issue of the admissibility of the call data records.*
>
> *Those principles envisage a situation where a Garda officer has decided on foot of legislation or parts thereof which subsequently is deemed to be unconstitutional or illegal. The court is able to determine those issues by considering carefully if the accused's constitutional rights to privacy have been compromised, if an illegality has occurred which would render the evidence sought to be admitted by the prosecution inadmissible and also to deal with the fair trial rights of the accused. In conclusion the court does not hold that the appropriate interpretation of the law is that the mobile phone metadata is automatically excluded because of the obvious infirmities of the 2011 legislation*".

186. The trial judge then proceeded to determine whether to admit the call data records relating to the three numbers linked to the appellant having regard to the appellant's asserted privacy rights. The trial judged determined:

"*There is cogent evidence that these records are relevant and are prima facie admissible.*

In examining their impact on the privacy rights of the accused, in the Courts estimation the records are of minimal impact. The Court accepts that the surrender of Jessica Kings phone was voluntary, and these records are compelled but a contrast is merited. By his own actions in giving inaccurate information to Sergeant Moroney on the 26th January, the accused brought about a more intrusive invasion of his privacy. The concern in respect of the exclusionary principles is that these records were extracted from total medadata held by a service provider which breached EU law, and there are therefore serious doubts about the constitutionality of the 2011 act. At the time of the extraction of the data the legal decisions impugning the legislation were not delivered. The Garda Siochana acted in good faith at the time of the extraction of the records. They were following definite lines of enquiry for good reason. In the light of the accused's inaccurate account of his movements on the night of the crimes and the association of the accused with Mr Treanor and the Flynn brothers in the immediate days before the crimes, it was a rational decision to seek data about their movements which could be assisted by mobile phone metadata.

The right to privacy is not an absolute right. An invasion of privacy can arise when an individual becomes a person of interest or a suspect in illegal activity. In the courts view where the investigation is one of serious crime and there are rational and obvious reasons for the intrusion on the right to privacy it is justified, and this Court accordingly admits the mobile phone data for consideration and evaluation by the jury".

187. Since the verdict in this case, the law with respect to the 2011 Act has further clarified as a result of the CJEU decision in C-120/40 *G.D. v. The Commissioner of An Garda Siochana,* and the Supreme Court's declaration of invalidity in respect of the relevant provisions of the 2011 Act arising from the CJEU's determination.

188. The recent decision of the Supreme Court in *People (DPP) v. Smyth* [2024] IESC 23, is dispositive of the issue raised by the appellant. The Court determined that although the relevant provisions of the 2011 Act were incompatible with EU law, evidence garnered on foot of the Act could be admissible in a criminal trial pursuant to the principles enunciated in *People (DPP) v. J.C*. In determining whether the evidence at issue should have been admitted at trial pursuant to *People (DPP) v. J.C.*, Collins J., delivering the majority decision of the Court stated at paragraphs 166, 190, 197 and 198 of his judgment:

"*166. The exclusionary rule formulated in JC is not an absolute rule of exclusion. It does not follow from the fact that evidence has been obtained in circumstances of unconstitutionality that it must be excluded. That is, in essence, because (i) the issue of admissibility of evidence is a separate issue, following on from but also distinct from the issue of the lawfulness of the circumstances in which the evidence is obtained and (ii) the issue of admissibility engages compelling interests in addition to (and potentially in opposition to) the interests of the accused. It follows from JC that the effective protection of constitutional rights does not require the exclusion of unconstitutionally obtained evidence in all or nearly all cases. That, it seems to me, is the fundamental tenet of JC.*

[…]

190. Assessed objectively, JC compels the conclusion that the breach of the Charter here was not "deliberate and conscious" in the JC sense. The 2011 Act was on the statute-book when the data at issue in this appeal was retained and accessed (between June and December 2017). By analogy with JC itself (where the search warrant had been issued pursuant to a statutory provision that was subsequently struck down in Damache), the illegality here arose as a result of a "subsequent legal development", namely the combined effect of the CJEU's judgment in GD and the declaration subsequently granted by this Court when the proceedings came back before it.

[…]

197. The evidence at issue here was not obtained in conscious or reckless breach of the Charter. The question being addressed here is not whether, if the JC test for admissibility is not met, the circumstances are such that the court can or should decide to admit the evidence anyway; rather, it is whether, even if the conditions for admissibility set out in JC are satisfied - as in my view they are satisfied here - the court should nonetheless exercise a discretion to exclude the evidence.

198. Nor, in my view, would it bring the administration of justice into disrepute or undermine the integrity of the court to admit the evidence here. In his judgment in JC, O' Donnell J accepted that there may be circumstances in which the admission of unconstitutionally obtained evidence could bring the administration of justice into disrepute. But, as he also emphasised, the exclusion of reliable evidence is apt to impair the truth finding function of the administration of justice and to bring it into disrepute. The Canadian jurisprudence provides useful guidance in this context. Section 24(2) of the Canadian Charter of Rights and Freedoms provides that evidence obtained in breach of the Charter shall be excluded if, in all the circumstances, its admission would bring the administration of justice into disrepute. I have already referred to the test articulated in R v Grant, which was applied in R v Spencer [2014] 2 SCR 212. R v Grant was also discussed in JC and Quirke (No 2). Making all due allowance for the nature of the unlawfulness here and its impact on

the interests of Mr Smyth and Mr McAreavey, it appears to me that the community's interest in the adjudication of the case against them on its merits weighed decisively in favour of the admission of the evidence and it is the exclusion of that evidence rather than its admission that would bring the administration of justice into disrepute. The considerations I have mentioned above – including the nature and probative value of the evidence, the fact that it was gathered in accordance with the 2011 Act, the view taken by this Court in Dwyer of the lawfulness of the retention regime created by the Act, the gravity of the crime being investigated and the limited and targeted nature of the access obtained - are all significant factors in this context".

189. The reasoning of the Supreme Court demonstrates that the trial judge in the instant case correctly determined that despite the fact that the relevant provisions of the 2011 Act were incompatible with EU law, the evidence was admissible pursuant to *People (DPP) v. J.C*.

190. The trial judge did not err in admitting these records and accordingly, this ground of appeal fails.

Ground 11 – That the trial court erred in admitting into evidence CCTV footage in circumstances where the footage had been generated unlawfully or was beyond what was permitted.

191. The respondent sought to introduce into evidence CCTV footage which had been garnered from various locations in the course of the garda investigation. This included an isolated piece of footage from the Ballymascanlon Service Station on 19 December 2012 and four separate montages of CCTV footage which related to:

Montage 1: CCTV footage relating to the investigation of the theft of the Volkswagon Passat from Clogherhead on 23 January 2013;

Montage 2: CCTV footage of the appellant and James Flynn on 24 January 2013 at Superbites in Crossmaglen, County Antrim;

Montage 3 part 1: CCTV footage from the early hours of the morning of 25 January 2013 relating to the movements of the appellant disclosed by him to the investigating gardaí in his voluntary statement to the investigation team.

Montage 3 part 2: CCTV footage from the area of Lordship Credit Union relating to 25 January 2013 to include the robbery and CCTV footage relating to the route of the getaway car.

192. The appellant put the respondent on full proof in respect of all of the CCTV footage, except that which emanated from Lordship Credit Union, Crossmaglen Police Station and footage emanating from CCTV cameras operated by An Garda Síochána.

Submissions of the Appellant

193. The appellant argued against the admission of this evidence on the basis that its provenance and reliability had not been established in accordance with *People (DPP) v. A.McD.* [2016] 3 I.R. 123. It was also submitted that the CCTV footage had been illegally obtained as a result of non-compliance with the Data Protection Acts 1988-2003, thereby breaching the appellant's constitutional right to privacy, and that it therefore had been wrongfully admitted into evidence.

Submissions of the Respondent

194. The respondent submitted that the claims asserted on behalf of the appellant were asserted in a vacuum, where it had not been identified whose rights were breached by the recording or downloading of the CCTV footage and that it was impermissible for the appellant to rely on the privacy rights of unknown third parties. Further, the respondent submitted that on the few occasions where there are identifiable humans seen on the CCTV, those instances occur in public places where citizens do not have a reasonable expectation of privacy.

195. The respondent accepted that the provenance and authenticity of CCTV evidence must be proven but asserted that what is required will depend on the circumstances of the individual case, and thereafter the weight, credibility and value of significance are matters for the jury. The respondent submitted that there was ample evidence available to the trial judge to permit him to admit the CCTV into evidence.

Discussion and Determination

196. The appellant had a specific complaint with respect to CCTV footage emanating from Flanagan's Amusements being admitted into evidence on the basis that the footage had been downloaded by the owner of the premises who was now not available to give evidence at trial. The appellant also had a specific objection to CCTV footage from the neighbouring premises to Flanagan's Amusements, namely Sharkey's Bar and Corr's Pharmacy, being admitted into evidence on the basis of the discrepancies existing wespect to timing.

197. The trial judge determined to admit this CCTV footage on the basis that the jury could be satisfied that the footage emanated from Flanagan's Amusements having regard to what was depicted in the footage in terms of the location captured, and having regard to a van depicted in the footage which displayed a Flanagan's Amusements logo. The trial judge was further of the view that the jury could also rely on CCTV footage taken from neighbouring premises in making this determination. The appellant argued that the CCTV footage from the neighbouring premises could not be relied upon because of time discrepancies which were apparent in all three extracts of CCTV footage. The appellant submitted before this Court that the trial judge erred in admitting this evidence as the provenance and reliability of the footage had not been established as required in *People (DPP) v. A.McD.*

198. In *People (DPP) v. A.McD.*, McKechnie J., delivering the judgment of the Supreme Court, stated at paragraphs 58-60 of his judgment:

> "*[58] The finding that this type of evidence should be regarded as real evidence should not in any way be read as suggesting that the admissibility of such footage can never be challenged; far from it. It is not the case that CCTV evidence should, without exception, go to the jury. The essential point decided by this judgment is simply that the actual footage recorded by a CCTV system is not hearsay and therefore is not open to objection on that ground; however, all other sustainable grounds of objection continue to apply.*
>
> *[59] Depending on circumstances there are many matters capable of giving rise to concern regarding such evidence, including any discontinuity in the recording, parts being unintelligible or indecipherable, or segments being of substandard quality, either visually or audibly. The potential for manipulation, editing or tampering may or may not give rise to issues. In addition, it seems evident that a person operating the parameters by which the camera records (e.g. by switching it on and off, the tracking of a particular object or person, its directional focus, etc.), although not altering the content of the footage which is actually recorded, can play a significant role in determining what evidence is produced, what evidence could have been produced and what is excluded.*
>
> *[60] Like all pieces of evidence, CCTV footage must be proved in an appropriate way and to the required standard. I do not accept that some notion of judicial notice, or any similar type of approach, plays any part in satisfying this requirement, nor do I believe that there exists any type of presumption to the effect that security systems operate as designed or function as intended (see para. 27, supra). In the established phraseology, the evidence should prove the provenance and authenticity of the footage; the recording must be intelligible and of sufficient quality, and must also be relevant and have probative value. In addition, the party seeking to adduce such evidence must be able to account for its history from the moment of its recording until its production in court, this to exclude the possibility that it may have been interfered with (Reg. v. Robson [1972] 1 W.L.R. 651)*".

199. In the instant case, a frailty existed in relation to the provenance of the downloaded CCTV footage asserted to be from Flanagan's Amusements, and its history from the moment of its recording until it was handed over to An Garda Síochána. However, as explained in *People (DPP) v. A.McD.*, the purpose of requiring proof in this regard, is to exclude the possibility of interference with the downloaded footage. Other evidence, however, may assist with respect to the determination of the question as to whether the authenticity and reliability of the CCTV footage has been properly established.

200. In the instant matter, what was depicted on the Flanagan's Amusements CCTV footage was of course relevant to establish its location. However, the CCTV footage from the neighbouring premises was also relevant to establish the approximate timing of the Flanagan's Amusements CCTV footage and its consistency with this other CCTV footage. While the timing of the Flanagan's CCTV was not established, this was a matter which could be determined by reference to the neighbouring CCTV and what was depicted therein, namely a distinctive BMW 5 series passing by the locations of the Flanagan's Amusements CCTV which was depicted in the CCTV footage from all three premises.

201. The Court is of the view that the trial judge did not err in determining that the authenticity and reliability of the CCTV footage from Flanagan's Amusements and the neighbouring premises, namely Sharkey's Bar and Corr's Pharmacy, was established such that it was appropriate for the footage to be admitted into evidence, subject to the general privacy objection taken by the appellant to the CCTV evidence, as a whole.

202. The appellant also objected to the admission of the CCTV evidence as a whole, on the basis that it had been garnered in breach of the Data Protection Acts 1988-2003 and the appellant's constitutional right to privacy.

203. The trial judge determined the matter in the following manner:

> *"The procurement of CCTV evidence was for investigation of serious offences which are the subject of this trial. The Garda Síochána had a duty set out in legal precedent…to seek out and preserve CCTV evidence. It was an obligation on their part, and the investigating officers could have been subject to criticism if that process had not taken place. Some of the CCTV footage was sought to verify the account of movements provided by the accused in the pursuit of their investigations* [...]
>
> *Most of the footage is not personal data within the meaning of the Act which is data relating to a living individual who can be identified either from the data or from the data in conjunction with other information that is in or is likely to come into the possession of the data controller. Most extracts relate to the movement of motor vehicles on the public roadway. The only individuals identified in the footage are the accused, Jimmy Flynn, Eugene Flynn and Liam Crozier. The footage which identifies the accused is from a restaurant Superbites in Crossmaglen and a bookmaker, Boyle Sports in Castleblaney. The accused could not have any expectation of privacy whatsoever in visiting those premises.*
>
> *The Court is not dealing with the general application of data protection law in a vacuum, but with the exclusionary principles which it must apply in the course of a*

criminal trial which focus on the constitutional rights of the accused, any illegality on the part of the investigating officers or any unfairness to him of the CCTV evidence being admitted.

Demonstrably that is not the case, there has been no breach of the accused's constitutional right to privacy. An Garda Síochána investigators did not act illegally and there is no unfairness to the accused, admitting all the CCTV evidence".

204. Recent case law from this Court has determined that separate to the issue of whether there has been a breach of the Data Protection Acts, CCTV footage from public spaces is generally admissible in a criminal trial. (See *People (DPP) v. Thompson* [2024] IECA 22; *People (DPP) v. Dunbar* [2024] IECA 85; *People (DPP) v. Anghel* [2024] IECA 90; and *People (DPP) v. Harrington* [2024] IECA 153).

205. *People (DPP) v. Anghel* provides a comprehensive summary of the Court's view in relation to this issue where Edwards J. stated at paragraphs 152 – 156 of the Court's judgment:

"***152.*** *We have no hesitation in rejecting the ground of appeal complaining about the admission of the CCTV evidence for breach of the appellant's right to privacy. The arguments advanced by the respondent are in our view unassailable. We would hold that view even if there had been no developments in the law in this area since the hearing of this appeal. However, since this appeal was heard there have been two decisions of this Court which we consider to be directly in point. We allude to this Court's decisions in The People (DPP) v Dunbar [2024] IECA 85, and in The People (DPP) v Thompson [2024] IECA 22. In both of these cases legitimate efforts were made by gardaÍ acting in the course of their duty to track and gather evidence concerning the movements of a murder suspect through public spaces, that had been captured in a non-targeted manner on privately owned CCTV equipment.*

153. In the Dunbar case, we said with respect to such evidence (at paras 146 - 148):

"146. As this case demonstrates, many business premises and private dwellings are now equipped with CCTV cameras. That this is the situation is universally known. It would be impossible to frequent public areas without becoming aware of it. Over and above that, many vehicles are equipped with dash-cameras, and a high proportion of people are equipped with devices that allow them to take photographs or to record matters of interest. The comment that there can be no general expectation of privacy in a public place is not an unqualified one. While individuals may have no realistic expectation that their presence in a public place will not become public, they

may well have an expectation that, in general, private, intimate, or sensitive conversations would not be recorded, certainly absent special circumstances or an appropriate authority.

147. That one's presence in a public place may be recorded works to the advantage and disadvantage of individuals. If the individual recorded as being at a particular location is someone who is or has been or is about to become involved in criminal activity, that may be to the disadvantage of that individual, in one sense. In other cases, it may advantage an individual. In this case, there was a witness, AB, who, as the trial judge pointed out, was pleased that footage existed. The material available included footage showing him going in and out of his own home. On the part of the appellant, there was a suggestion that AB was involved in the killing or was present at the killing, but the availability of CCTV footage provided this witness with valuable cover.

148. In this case, the CCTV footage that was entered in evidence at trial was accessed as a result of requests to householders and businesses by gardaí, but it must be noted that there is nothing to suggest that the appellant was identified by any of the householders who provided the CCTV footage, or that any of those who made footage available might have identified the appellant as a data subject".

154. There were also objections to other CCTV evidence in the Dunbar case which are not pertinent to the present case. However, in concluding the section of its judgment dealing cumulatively with the various challenges to the CCTV evidence in that case, we further remarked:

"153. Overall, we are of the view that the challenge to the admissibility of the CCTV footage was not made out. It is, quite simply, misconceived. There was evidence there capable of being accessed which was highly relevant. In a particular case, it could advance the investigation, identify a suspect, and thereafter, provide relevant evidence at trial. In another case, the evidence might exonerate a suspect; indeed, in the present case, it has assisted a witness in rebutting unfounded allegations made against him. Consider what the situation would be if gardaí did not access evidence which had the potential to advance an investigation and contribute significantly to proving the guilt of a perpetrator, but which also had the capacity to exonerate a

suspect who was innocent; how would the actions of the gardaí be regarded; could failure to access the material be regarded as anything other than a grave dereliction of duty?

154. We have no hesitation in dismissing this ground of appeal, and we would hope that in the future valuable court time would not be taken up with such unmeritorious arguments".

155. In the Thompson case, we said:

"We are inclined to agree with the trial court that there was no breach of the appellant's right to privacy at all, and that individuals walking down a public street, driving a car on the public road, or even eating a meal in a restaurant open to the public do not, in this day and age, have a reasonable expectation that their movements will be immune from CCTV observation, certainly in a situation where no individual is being targeted for the purpose of gathering information and where the camera is simply gathering random information about persons or vehicles in the location. That being so, it was not necessary for the trial court to consider the principles applicable to the exclusionary rule (as discussed J.C., and more recently in Quirke).

90. If such an exercise had been required, significant factors in the balance would undoubtedly be that the degree of any privacy intrusion was minimal, that it arose from the conduct of private individuals (failing to register their systems with the Data Protection Commission) and not from any conduct on the part of the State or its agents, and that the evidence was collected by the Garda Siochána in the context of a specific murder investigation. As the Director submitted, the situation is akin to that in People (DPP) v. Gold where the Court upheld the decision of the trial court to admit evidence where the voice recording in question was created without any State involvement and where there was no suggestion that the State was complicit in unconstitutional actions taken by a private party to introduce evidence. However, in view of our agreement with the trial court that the appellant's constitutional right to privacy was not violated by the CCTV recordings of him in public places, it is not necessary to consider the 'balancing' exercise in this case.

91. Accordingly, this ground of appeal is refused".

> *156. In the present case there was nothing about the appellant's presence in Dublin city centre, or on the Luas, or in Tallaght, or in any of the other places in which he was captured on CCTV, to suggest that he could have had a reasonable expectation, by virtue of being engaged in something private, intimate or sensitive in a public place, that he would not be recorded, on a non-targeted basis, while, for example, just walking down the street, standing on a station or travelling on a tram. We are completely satisfied that he had no expectation of privacy in the circumstances of this case, and that once he became a person of interest in connection with the investigation into the death of Mr. Bob it was both appropriate and justified that An Garda Síochána should seek to track and gather evidence with respect to his movements to the extent that they may have been serendipitously captured on CCTV systems which were not specifically targeting him. We have no hesitation in dismissing this aspect of the challenge to the admissibility of the CCTV evidence*".

206. In the instant case, the CCTV footage relating to the appellant depicts him at Superbites and at a betting shop. This was information which the appellant had already provided to An Garda Síochána when providing an account to them of his movements on the day in question. Accordingly, aside from the fact that he could not have had an expectation of privacy at these public locations, particularly as he was not engaged in any intimate or sensitive act, he in any event had informed the investigating gardaí of his presence at these locations. A breach of his right to privacy does not therefore arise.

207. As a breach of the appellant's constitutional right to privacy did not arise in this matter, the height of the argument which the appellant could rely on was that an illegality arose in terms of the requirements of the Data Protection Acts. The trial judge approached this matter on the basis of this asserted illegality and the exclusionary principles applicable. Within his discretion, he determined to admit the evidence. Having regard to the previously expressed view of this Court in relation to evidence of this nature, we are of the view that he did not err in this determination and accordingly, this ground of appeal fails.

Ground 13 – That the trial court erred in permitting expert evidence to be given by Garda Gareth Kenna with respect to the CCTV evidence.

208. Garda Gareth Kenna gave evidence regarding a vehicle which was depicted in various pieces of CCTV footage which were then compiled into a CCTV montage. The respondent's case was that the vehicle depicted was the same vehicle throughout the CCTV montage, namely a dark 5 series BMW with a different tone roof. He gave evidence of the characteristics which he relied upon to express the opinion that this was the same vehicle throughout and pointed out these

characteristics in each piece of footage. The respondent's assertion was that this was Jimmy Flynn's vehicle.

209. In some pieces of this montage, it was accepted that the vehicle depicted was Jimmy Flynn's vehicle. The significance of that acceptance was that the jury were in a position to compare the footage of the vehicle accepted to be Jimmy Flynn's vehicle with the vehicle asserted to be Jimmy Flynn's vehicle.

Submissions of the Parties

210. Counsel for the appellant submitted that the evidence from Garda Kenna was inadmissible as he crossed the "*qualitative judgment*" line and expressed an opinion with respect to what the CCTV montage depicted which was within the sole province of the jury to determine.

211. Counsel for the respondent submitted that Garda Kenna had gone no further than was permitted pursuant to *People (DPP) v. O'Brien and Stewart* [2015] IECA 312 and simply pointed out to the jury the features which were visible on the footage to explain why he made the deductions which he did. It remained a matter for the jury to determine whether they could see these features and if they could, whether they could draw the same deduction.

Discussion and Determination

212. In *People (DPP) v. O'Brien and Stewart,* Edwards J., delivering the judgment of the Court, stated at paragraphs 102-105 of the judgment:

> "*102**.** It seems to this Court that in the circumstances of this case the evidence of Garda Jones, concerning what he observed on the video footage, and his perceptions or deductions based upon those observations, was properly admitted as an exception to, and notwithstanding, the general rule that lay witnesses may not express opinions as to a fact in issue. The trial judge had been rightly concerned to ensure that the witness did not cross any line in terms of what he characterised as a 'qualitative judgemental issue', and his ruling was careful and considered and, in this Court's view, unobjectionable* […]*.*
>
> [...]
>
> *104. […] [T]his Court considers that in circumstances where the jury was being introduced to a piece of real evidence that was in a form rendering it difficult for them to discern without some assistance and guidance that which was capable of being observed, and which might possibly provide a basis for inferences, it was within the limits of what was permissible for the Garda not just to point out that which was capable of being observed, but to go further and indicate his perception of the significance of the feature or features to which he was pointing. It seems to this Court that in the circumstances described, the observable facts and the*

suggested inferences were inextricably entwined and it would have been unreal to have expected the Garda to have confined himself to saying 'I draw your attention to the change in the shading, or the darkening, of the image of the door, and the appearance of this little white dot', without giving the jury any indication as to why he was doing so, and what significance he was attributing to those features. Garda Rice's testimony, to the extent that it indicated his view of the significance of that which he was pointing out, would have served to focus the jury in their enquiries, but would not, in the judgment of this Court, have served to usurp their function in the particular circumstances of this case […].

105. The jury would have had no reason to believe that Garda Rice was in a better position than they were to draw appropriate inferences from what was to be observed. However, Garda Rice was undoubtedly more used to viewing CCTV footage recorded from cameras utilising movement activation sensors than they were, and it was unobjectionable therefore that he should guide them as to what was capable of being observed, and as an integral part of that exercise suggest to them the possible significance of it so that they could then focus on the relevant evidence and make their own assessment of it. In circumstances where they were seeing the footage for themselves in court at the same time, and were having pointed out to them that which was capable of being observed, and which was said to justify the inference(s) then being invited, the jury were at full liberty, and indeed were fully equipped, to reject, if they saw fit, the Garda's perception of the observable facts as being unjustified […]".

213. In a ruling delivered on 27 April 2020 the trial judge determined:

"*Now, Garda Kenna does not purport to give expert witness evidence but he is a person of a particular type. He has particular experience. He, and it's clear from his evidence on many occasions now before the Court in this trial, and I have been familiar with him in fact in a previous complicated trial as well, he collates and views CCTV regularly. Sometimes CCTV evidence is good quality or lesser quality but he has a certain particular type of expertise in relation to that where he is not purporting to give expert opinion evidence but he is seeking to assist the jury, or if it's a judge on his own, in identifying matters which he is observing and may go a little bit further in relation to what his conclusions are.* [...] *So, in fact what I would call Garda Kenna's evidence really is more deduction rather than opinion in relation to the BMW. It is the inferences of particular instances by reference to a general law or principle which is the dictionary definition of deduction".*

214. The determination of whether the relevant vehicle was one and the same throughout the CCTV footage was a matter for the jury to determine. *People (DPP) v. O'Brien and Stewart* provides that a witness who studied the CCTV footage may assist the jury to understand what can be seen on the CCTV footage and can give evidence of deductions which can be made from what can be seen. However, it always remains a matter for the jury to determine themselves whether they can also see what has been asserted to be visible in the montage and whether they accept the deduction which has been suggested. This does not usurp the jury function but rather assists them to more easily interpret the CCTV montage which they do not have the luxury of examining for hours on end.

215. The trial judge did not err in permitting this evidence to be adduced before the jury and accordingly, this ground of appeal fails.

Ground 14 – That the trial court erred in permitting the jury to access materials in the form of cellebrite and excel sheets in such a manner that allowed the jury to manipulate the information contained therein so as to in effect conduct an investigation that had not been presented at trial.

Background

216. On the conclusion of the evidence, counsel for the respondent at trial sought to furnish the jury with Cellebrite and Excel spreadsheets with the call data records of persons of interest in the case.

217. Counsel for the appellant at trial objected on the ground that even if the Excel sheet was presented to the jury in "*read only*" format, the jury could manipulate the data contained therein. Counsel proffered a solution: the call data records could be printed and furnished in hardcopy.

218. The trial judge permitted the materials to be given to the jury in the Excel format and directed the jury in the following terms on 31 July 2020:

> "[…] *there's just one thing that I want to advise you about when you are working the Excel because you can manipulate the figures around a bit or the records around a bit and I just want you to do that within very strict parameters or change it yourself within very strict parameters and I hope there's a few of you in the jury that have computer--are computer literate because I think it will help*".

219. Following requisition by counsel for the appellant, the trial judge clarified as follows on 5 August 2020:

> "*Now, you have probably worked this out already,* [jury foreman] *and members of the jury, but just when I said to you about manipulating the phone data, I think you have to press yes to read only.*

FOREMAN: Yes.
JUDGE: So, I only want you to read only, do you know what I mean, rather than
FOREMAN: Yes.
JUDGE: -- play around with it. Yes. You understand?
FOREMAN: Yes".

Submissions of the Appellant

220. The appellant's position is that while the jury were warned to click "*read only*", the data in the Excel spreadsheet could still be manipulated. Reliance was placed on *People (DPP) v. O'Loughlin* [2018] IECA 25 where the appellant was convicted of murder in circumstances where the deceased was pushed down a rubbish chute in an apartment complex. One of the grounds of appeal successfully relied on by the appellant pertained to an exercise carried out by the jury on a site visit where one of their number threw a stone down the rubbish chute.

221. Counsel for the appellant emphasises the secrecy of jury deliberations and submits it could not or would not have been known if the jury interfered with the data in the Excel spreadsheet, moreover, that the judge's clarification was insufficient.

Submissions of the Respondent

222. It is the respondent's position that the trial judge advised the jury to open the Excel spreadsheet in "*read only*" format and the foreman advised the trial judge that they would do that.

223. Counsel for the respondent acknowledges that the spreadsheet was capable of being edited but questions why the jury would change the data when it is their role to come to a true verdict in accordance with the evidence.

Discussion and Determination

224. We are not persuaded by this argument. Whilst the judge's initial direction may have been somewhat nebulous, the direction following requisition was crystal clear. There is no reason to believe that the jury ignored the judge's direction. Nor is there any basis to believe that the jury did not understand the direction as the foreperson responded that the direction was understood.

225. Accordingly, this ground fails.

Ground 1 – That the omission by the respondent to disclose to the appellant Letters of Scope dated 31 October 2019 composed by the Office of the Principal Legal Advisor (OPLA), Government Information Law Division, US Department of Homeland Security which placed significant limitations on the evidence which Special Agents Wade and Katzke were willing to give, and more importantly, identified areas in which witnesses

were refusing to be cross-examined upon was a material non-disclosure process to the extent that it rendered the trial unfair.

Ground 1A – That the trial court erred in refusing to direct an oral hearing into Disclosure with respect to documentation in the possession of HSI.

226. These two complaints were addressed in reverse order at the oral hearing, and it is convenient to do likewise in this judgment.

Background

227. In the background to both complaints is the fact that, by virtue of the nature of the prosecution's case, and the evidence it was proposing to rely upon, there was unsurprisingly a requirement on the respondent to make extensive pre-trial disclosure as is required by law. In *People (DPP) v. Special Criminal Court and Paul Ward* [1999] 1 I.R. 60 at page 71, the obligations on the prosecution where disclosure is concerned (the so-called "*Ward principles*") were described in the following terms:

> "[…] *the prosecution must disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or providing a lead on evidence that goes to either of these two things*".

228. The duty of disclosure as stated in those general terms is, of course, subject to any issue of privilege that is required to be determined by the trial court.

229. Further, the onus on the prosecution to make disclosure of documentation in the possession of an overseas agency extends to making a good faith effort to obtain that material; and, subject to a trial court's overriding obligation to ensure that there is no real risk of an unfair trial, if a trial court is satisfied that the prosecution has done its utmost to ensure that principles acceptable to the Irish courts would be adopted (what Geoghegan J. described in *People (DPP) v. McKevitt* [2009] 1 I.R. 525 at p.539 as "*a shadow application of the Ward principles in this case by the overseas agency concerned*"), the prosecution's obligation will have been discharged.

230. Extensive disclosure was made by the respondent. In relation to obtaining material from parties outside of the jurisdiction and not amenable to the jurisdiction of the trial court, the respondent utilised the procedure of applying to a judge of the Central Criminal Court (as it happened, to White J., to whom the trial was ultimately assigned) for that court to make a MLAT request to the relevant overseas authorities. The trial court acceded to this application and made a MLAT request on 27 October 2019, which was duly responded to by those to whom the request was directed. In doing so, public interest and government privilege was claimed in respect of a substantial number of documents.

231. The appellant was not satisfied that the response which was received, and such disclosure as it provided, was adequate and extensive enough.

232. In particular, a controversy developed concerning the level of disclosure that had been made in respect of a subset of evidence to be adduced by the respondent, namely American witnesses dealing with contacts between the appellant and various persons in the US between April 2013 and May 2017. The controversy unfolded in the context of a pre-trial motion, brought by the defence on 6 November 2019, that was heard by the trial judge. Although we have not seen the Notice of Motion, we understand that while it may not have been couched in terms of being a motion for further and better disclosure (seemingly it had instead sought a stay to prevent the trial from proceeding as then scheduled, for alleged failure by the respondent to make proper disclosure), it was treated by the trial judge as being a motion for further and better disclosure. The trial judge heard detailed submissions from both sides on 13, 14, 18 and 20 November 2019, respectively, concerning whether further and better disclosure was required before giving a detailed ruling on the issues raised on 29 November 2019.

233. Central to the dispute between the parties was a defence contention that it was to be inferred that documentation beyond that which had been disclosed must exist, and ought to be disclosed, in the following circumstances. It was contended that it was clear from what had already been disclosed that An Garda Síochána had drawn up a list of persons of interest whom they believed had been interacting with the appellant in Boston and New York; that there was garda liaison in regard to that list with HSI in the US; that HSI confirmed to An Garda Síochána that the persons in question were illegally, or possibly illegally, in the US; that members of An Garda Síochána had travelled to the US; that HSI proceeded to arrest/detain persons on the list for alleged visa overstay; that persons so arrested/detained were advised that members of An Garda Síochána were present in the US and they were asked if they would be willing to meet with these gardaí to talk about their interactions with the appellant, and; that in some cases persons so arrested/detained were subjected to deportation orders. Counsel for the appellant submits to this Court that these procedures were unusual and open to abuse. He states that there were allegations of the making of threats and the proffering of inducements. It is submitted that those arrested/detained were in a vulnerable position.

234. The appellant pointed out to the trial judge that no document had been provided explaining the strategy for the arrests/detentions, prior to the persons concerned being asked to provide information to gardaí.

235. The point was made that, as gardaí and HSI were working together, there was a reasonable prospect that there were documents setting out this relationship. No such documentation had been disclosed.

236. It was complained that no documentation had been supplied concerning the actual immigration status of the persons concerned.

237. There was reason to believe that amongst those who had been arrested/detained was one Marie McKenna. No documentation had been disclosed in respect of her.

238. There was concern in relation to Daniel Cahill who was arrested and detained, that notwithstanding that he had been found in possession of drugs at the time of his arrest and detention, there had been a swift direction that he should not be charged with any offence in connection with that possession, yet there was a dearth of documentation in relation to that.

239. Arising from these concerns, it was submitted to the trial judge on the hearing of the motion that there should be an oral hearing at which evidence should be adduced and tested, such as had taken place in the *McKevitt* case, to enable the trial court to ascertain what further documents were available for disclosure, particularly by HSI. The trial judge refused that request and instead sent another MLAT request.

Ground 1A

240. In ground 1A the appellant contends in substance that the trial judge was wrong to refuse to conduct a *McKevitt* type oral hearing. To address that complaint, it is necessary to have regard to the detail of the trial judge's ruling.

The Trial Judge's Ruling

241. As a prelude to ruling on the issue on 29 November 2019 the trial judge stated that:

> "[…]*, the Court has read the three index books of disclosure on this issue furnished by the prosecution, the correspondence between the Chief Prosecution Solicitor and Neil Manley Solicitors, in particular letters of the 11th of November and 12th of November. It has considered the full timeline of disclosure and the documents already disclosed and the index of the American documents, a subindex, a schedule of visits by An Garda Síochána to the United States of America, the motion issued by the defence of the 6th of November 2019 which the Court has ruled on in relation to the stay of execution or stay in the trial itself and directed that it be treated as a motion for further and better disclosure, the affidavit and exhibits of Mr Manley of the 6th of November 2019. The Court heard detailed submissions on Wednesday the 13th of November, Thursday the 14th of November, Monday the 18th of November and Wednesday the 20th of November. The Court has considered the legal principles applying to disclosure with particular reference to the Supreme Court decision, the DPP v. McKevitt, [2009] 1 IR 525*".

242. In his ruling, the trial judge had this to say with respect to the trial court's function in the supervision of disclosure:

> "*The Court* […] *exercises a supervisory function to ensure it is completed in a timely manner and that fair procedures are there to ensure a fair trial for an accused person. The Court is entitled to regulate its own procedures within the parameters*

of its jurisdiction and the principles of disclosure as set out in the judgments of the Irish superior courts. It is fair to state that the principles that govern privilege and disclosure in a criminal trial follow those on the civil side with some exceptions. The Court is not generally dealing with disputed fact, issues of credibility or making adverse findings. That may arise in exceptional circumstances. Both a list court and a trial court, in exercising that supervisory function, can consider the disclosure documents furnished, letters seeking further disclosure and any replies and any submissions made on behalf of the Director and the defence. There is no requirement for witnesses to be called or matters to be put on affidavit. The Director and the defence are entitled to exercise their own discretion as to how they advance their particular concerns to the Court. The Court has jurisdiction, if necessary, to direct affidavits to be sworn and witnesses to be called but this court would, with the exception of issues of areas where privilege is claimed, consider that an exceptional discretion to be exercised cautiously. The Court will return to this matter in the context of the particular extent of disclosure in the disputed matters before the Court".

243. The trial judge went on to rule that:

> "*Responsibility of disclosure in this matter in relation to matters in Ireland are straightforward. The Director has a duty to disclose all relevant documentation in her power and control in respect of the Garda Síochána investigation into contacts Aaron Brady had in the United States of America from April 2013 to May 2013, subject to any issue of privilege to be determined to the Court. This would include any government to government agencies' contact, any contact police force to police force or Garda Síochána contact to the Department of Homeland Security. The Court has been informed by the prosecution that they have discharged this duty, that all relevant documents have been disclosed. The prosecution should check again if there is any documentation outstanding*".

244. The trial court then specified how it proposed to deal with claims of privilege in respect of the Irish material, before moving on to address the issues raised in respect of disclosure of material in the US and relating to the American witnesses. In doing so, the trial judge stated:

> "*Any comment I may make on the documentation is for the purposes of this ruling only. The description of events are those provided in the documentation. These events are in dispute. Aaron Brady, who became a person of interest in the investigation of the murder of Garda Adrian Donoghue* (sic) *in the course of his duty, left Ireland in April 2013 and went to the USA where he resided for a short period of time in the Boston area and then in New York. He was deported back to Ireland in May 2017. He was in employment in the US. The Garda Síochána initiated extensive investigations with the corporation of the Department of Homeland Security. Persons*

who were associated with Aaron Brady were interviewed and statements taken from some. Some of the persons interviewed had irregular immigrant status in the US. From the documentation the Court has considered, the gardaí investigation was carried out on a direct contact relationship between An Garda Síochána and the Department of Homeland Security and, if necessary, with the New York Police Department. There does not seem to have been any contact through government departments, such as the Department of Justice or Department of Foreign Affairs. According to the disclosure to date, requests for assistance was forwarded to Special Agent Matthew Katzke, an attaché in the Homeland Security Department and attached to the US Embassy in London. A separate schedule has been furnished to the Court at its requests of all visits made by members of An Garda Síochána to the US in respect of the investigation. The Court has also been informed, and it is clear from the disclosure to date, other persons of interest in this investigation had gone to the United States of America. So Aaron Brady was not the only focus of their investigations. The first visit was made on the 2nd of December 2013 and the last visits occurred from between the 15th of September 2019 and the 19th of September [20]19".

245. The trial judge then listed numerous gardaí who had travelled to the US and also what he characterised as "*a specific core of witnesses*". These were witnesses:

> "*who the court envisages at this stage will be called to give evidence; that is Christopher Morton, Molly Staunton, Tommy McGeary, Ronan Flynn, Anthony Maguire, Annette McCarthy, Matthew Flaherty, Liam Jennings. There is another person of interest, a Ms Marie McKenna, who does not seem to be directly connected with the investigations in relation to the person charged, Aaron Brady, but in relation to another suspect who is not before the courts*".

246. The trial judge then proceeded to set out the status of those particular witnesses insofar as it was disclosed in documentation he had reviewed and the method by means of which each was understood to have come across the appellant. He then continued:

> "*The Court has tried to engage with the defence about their concerns that there has been potential wide spread maladministration in the relationship between the Garda Síochána and the US Homeland Security and the New York Police Department. The Court is of the view that there is nothing wrong with direct law enforcement and law enforcement contact to law enforcement contact in another country to investigate serious criminal acts. The duty of the law enforcement officers is to respect the law of their own jurisdiction and that of the other jurisdiction as well with whom they are cooperating. There is nothing wrong with members of the police force from another country approaching individuals in another country with a view to seeking cooperation, either seeking a statement or other forms of cooperation, provided it is*

done in a manner which respects the law of the other jurisdiction and obviously as a matter of courtesy that the other jurisdiction are aware of what is going on.

The issues of concern that the Court can glean from its examination of all the documents is as follows; the possible coordinated arrest of individuals by the US authorities coordinated with the Garda Síochána of persons who had doubtful residential and work permit status in the USA of persons who had contact with Aaron Brady, the possible offer of any form of inducement such as protection of their residential status or work position or assistance with any practical difficulties that these people had, particularly in relation to any possible criminal investigation. (3) The possible offer of a particular type of S type visa for persons who cooperate in relation to the solving of crime. (4) Possible and proper contact by Garda Síochána officers when they are personally attending in the United States of America where there was persons in custody in the US. This is particularly raised in relation to Marie McKenna. (5) A possible arrest of other persons in the US in respect of the investigation of the crime alleged against Mr Brady that has not come to light. Although the Court notes that in the documentation to date there have been substantial documentation furnished of a number of other persons who were approached who I have referred to as either reports were given as to the contact with them or they didn't wish to get involved.

Now, in relation to the practical issue about treating the matter in a vacuum. The particular matter that the Court is dealing with now is entirely different from the factual situation in McKevitt. In this situation there were disparate people who had different types of contact with Aaron Brady over the period of time that they were in America. They were either associates of his or persons who he had chance encounters with. That is completely and totally distinct from a paid agent of the FBI in the British Security Services who was paid to infiltrate an illegal organisation, that person being paid to do so and with questionable background.

The Court has an important duty and an appropriate duty to ensure that good faith efforts are made to produce documents not in the power or control of the DPP and to ensure that the fair trial responsibilities of the Court are discharged. In that regard the Court does not consider it appropriate to direct any further disclosure hearing with directions to swear affidavits or direct cross examination or direct that witnesses from the US be called. The appropriate way to deal with this is to seek further documentation from the US by a further request of mutual assistance setting out in a comprehensive and targeted way what further documentation is required and available. The ultimate arbiter of that matter will be this court. The matters which the Court considers appropriate are (1) identification of any other persons who were approached in respect of Aaron Brady other than those disclosed already, (2) any custody records in the United States of America of those who were detained, (3) in

the document in the US authority's possession about coordination between them and the Garda Síochána to detain people, (4) any documentation between Ireland and the US authorities for anyone working on the investigation in relation to any offer of S visas or anything of that nature which would be considered an exchange for cooperation, (5) any documentation in respect of any waiver of criminal charges in the US in respect of persons who were contacted or interviewed about their contacts with Aaron Brady. The appropriate way to explain to the US authorities about the legal principles of disclosure in this jurisdiction is to annex a copy of this ruling to the request for mutual assistance. This court is very wary about straying into the Garda Síochána investigation of other suspects in the murder who are alleged to be in the United States of America. The focus of it should be in relation to the charges against Mr Brady. The Court will include in the request for mutual assistance the matters in relation to Marie McKenna, although it has reservations about that because it seems clear to the Court that she was arrested in connection with another suspect but the Court will allow that purely for the purpose of exploring the operational cooperation between the Garda Síochána and the US authorities. That is the ruling of the Court".

Submissions of the Appellant

247. Counsel for the appellant, in large measure, reiterates to this Court the submissions that had been made on behalf of his client to the court below. However, he seeks to highlight a subsequent development which he submits must be taken into account in assessing whether the trial judge erred in refusing to direct a *McKevitt* type inquiry, involving oral evidence, into whether there were documents, beyond those which had been disclosed, which ought to be disclosed. This subsequent development was the issuance by HSI of so-called 'Letters of Scope', restricting or severely limiting the type of questions which witnesses it had been asked to make available, specifically Special Agents Wade and Katzke, respectively, would be permitted to answer in evidence.

248. Counsel for the appellant suggested that there is reason to believe that some Irish State representatives were in possession of the Letters of Scope at the time that the trial judge gave his ruling on 29 November 2019. It appears to be accepted that they may already have been received by the Department of Justice at that stage, and also that Special Agent Katzke may have informally provided a counterpart in An Garda Síochána with a copy at that stage. However, it equally appears to be the case that a copy had not yet reached the respondent or her counsel through official channels. While the evidence is unclear as to when precisely counsel for the respondent became aware of their existence, counsel on behalf of the respondent had undoubtedly learned of them by 10 December 2019, as he specifically drew the defence team's attention to their existence on the record in court on that date. However, that was nearly two weeks after the trial judge had ruled. While we were, in effect, implicitly invited to speculate that he may have learned of their existence somewhat earlier, there is simply no evidence that he was aware of them at the time that the trial judge made his ruling. The height of the evidence

in that regard is counsel for the respondent's assurance to this Court, which we accept, that while it was possible that he had, by 29 November 2019, physically received the email which gardaí had received from Special Agent Katzke on a police-to-police basis with the text of his Letter of Scope attached, he had not read it at that stage.

249. Counsel for the appellant suggests that if the trial judge had been aware of the existence of the Letters of Scope, they would likely have, or ought to have, influenced his decision in regard to the appellant's application for a *McKevitt* type hearing. In suggesting this, counsel for the appellant acknowledges that later in the trial, the trial judge, who in the meantime had become aware of the existence of the Letters of Scope, specifically asserted that even if he had known of the existence of the Letters of Scope, it would not have affected his decision and ruling on 29 November 2019. Confronting this, counsel for the appellant argues that the only way this Court could be satisfied that that was a safe conclusion, and that the trial judge had not been in error in so concluding, would be if the trial judge had explained how he had "*squared that circle*". However, counsel for the appellant submits, the trial judge had not done so.

250. It is submitted by counsel for the appellant at the oral hearing of the appeal that his failure to do so was a significant problem. Counsel submits:

> "*We know what his decision was. We have no idea how that was reached. We have no idea how he was happy to exclude that further inquiries such as the really basic ones, had they been triggered, which inevitably they would have been triggered, and what the results of that were, and, not having any of that information, he can say we didn't need to do any of that, we didn't need to make any further inquiries. No matter what way it was going, I was satisfied that the process was adequate and didn't need any oral evidence.*
>
> *And indeed it should be noted that had the Americans come back and said we're sorry but take it or leave it, that's the extent of our cooperation, the Court would then have had to have heard submissions on what the effect of all that was.*
>
> *So, in terms of our submissions, we say that the documents that were disclosed were redacted, and no one knew how or why, and the Court noted that it was powerless to do anything about this. But these are -- this is about reassurance and safety nets, and for the Court simply to say there's absolutely nothing I can do about that, that, in my respectful submission, that doesn't go to determining the dispute that's between the parties and resolving it in a way which is fair to the parties. It's simply effectively a shrug of the shoulder and say I don't know anything about it, I can't do anything about it.*
>
> *The Court acknowledged the defence sought an oral hearing. It wouldn't have changed anything. We say the existence of the letters gave rise to a well-founded suspicion that documents were retained. [He f]ailed to engage in any analysis of the*

difficulties that have arisen. Instead the Court baldly pronounced that the letters had minimal or no effect. Not a single fact is cited to explain this finding. There's a reason for that. There are none. The judge did not determine whether it was reasonably possible that material was withheld. The same observation applied to the judge's concession to the good faith efforts that are applicable to the DPP and the US authorities and ultimately the Court exercising its supervisory function. No effort was made to establish what the actual position was. Conclusions have been reached without any evidential basis. The finding that the US authorities had cooperated with the process without acknowledging that it was offering only very limited cooperation in respect of witnesses giving evidence and without establishing what criteria were applying to make disclosure is meaningless. The judge was bound to ascertain what that position was".

Submissions of the Respondent

251. In reply, counsel for the respondent submits that the trial judge's ruling had been correct in law, and that it was one that was open to him in all the circumstances. Counsel submits that the suggestion that there had been an absence of good faith efforts by the respondent and co-operation from the US authorities was entirely at variance with the extensive disclosure furnished and witnesses made available from HSI in the US.

252. It was pointed out that Special Agent Katzke and Special Agent Wade were made available to give evidence in the trial at the request of the appellant. Ultimately, despite repeatedly referencing Special Agent Katzke and claiming him to be an essential witness, the appellant declined the opportunity to cross-examine him in front of the jury when they were not permitted to cross-examine him about the incomplete Belfast Airport recording made by Jimmy Flynn. Details of this recording will be returned to when dealing with ground 30.

253. Special Agent Wade was cross-examined but she was subject to restrictions imposed on her by her US Government employers. These restrictions outlined in the Letter of Scope reflected her government's choice, and not hers. The US authorities cooperated extensively with the investigation and the trial, and the myriad of documents disclosed made this clear. MLAT requests from the Court were complied with, and the US Authorities agreed to the disclosure of further information after a ruling by the trial judge.

254. Counsel further submits that an oral hearing was unnecessary. The Letters of Scope would not have altered the rulings the trial judge had already made as he made very clear. He had ordered various further materials to be disclosed and this was the subject of a MLAT request made by the trial judge.

255. The issue of the Letters of Scope and any necessary undertakings requested from the respondent only became a live issue later in the trial.

256. It is submitted that disclosure of material that assumes a relevance is an ongoing responsibility of the prosecution, but it is not limitless. It is also a process that was under the active supervision of the trial judge who delivered rulings and directed steps to be taken which were reasonable in the circumstances and which protected the fair trial rights of the appellant.

257. It is submitted by counsel for the respondent that the existence of the Letters of Scope and their contents in general were brought to the attention of the appellant on the record in court on 10 December 2019 in some detail. The appellant did not pursue any issue on the Letters of Scope at that time but had sought to make capital of them at a later stage in the trial and to suggest that the whole disclosure process was flawed as a result and that the only practical solution was for the jury to be discharged.

Discussion and Determination

258. We are not satisfied that an error of principle has been demonstrated in regard to how the trial judge dealt with the application for a *McKevitt* type hearing. We are satisfied that the trial judge fully familiarised himself with the law and that the decision he came to was one that was within the scope of his discretion on the information that was before him. He provided cogent reasons for his ruling, including materially distinguishing the circumstances of the *McKevitt* case from the circumstances of the present case, which we are satisfied were adequate to justify it.

259. It is significant that the trial judge opined later in the trial, when he had become aware of the Letters of Scope, that even if he had been aware of them, it would not have caused him to alter his ruling. The reason it is significant is that he was best placed to say what might or might not have influenced him in the circumstances of the case before him. He had the best overview of the case and of the relevant considerations. He is criticised for not giving reasons for the opinion ventured by him that knowledge of the Letters of Scope would not have changed his mind. In that regard, we do not accept that he gave no reasons. As we will see he gave short reasons, and we would contest that he was required to give anything more elaborate in the context in which his observation was offered. So, what was that context?

260. The observation was made in the course of a ruling by the trial judge on an application by the appellant, made mid-trial, for him to examine the adequacy of disclosure that had been made in the context of that part of the Garda investigation that had been conducted in the USA, particularly in light of the Letters of Scope; and of the effect of the Letters of Scope on future witnesses in the trial. An important background detail is that, while counsel for the respondent had alluded in open court on 10 December 2019 to the existence of the Letters of Scope they were not formally served on the appellant as part of the disclosure process until 10 April 2020, something about which the appellant's team were protesting vigorously. It was conceded by the respondent that this had occurred due to oversight and that the letters should have been given to the appellant either at the time they were alluded to on 10 December 2019 or shortly thereafter. However, the appellant's team were aware of their existence.

261. The issue as to the adequacy of the disclosure that had been made was ventilated at length during the trial on 7 May, 8 May, 11 May, 18 May and 19 May 2020, with the trial judge delivering his ruling on 26 May 2020.

262. In common with many other rulings in the course of this trial, it was a lengthy one. Following this Court's consideration of the transcript of the ruling we can say that the trial judge conducted a meticulous and most detailed review of the procedural history of the disclosure process in regard to this trial. In the course of that review, he stated the following:

> "*After a hearing on the 13th, 14th, 18th and 20th of November, the Court delivered a ruling on Friday the 29th of November 2019 on the issue of disclosure relating to American witnesses. The ruling dealt with the law and procedure. The Court considered the submissions of the defence and directed a request for mutual legal assistance in criminal matters and drafted it in the widest possible terms to take account of all of the concerns of the defence. The Court directed that the draft request be furnished to the defence for any submissions they wished to make. On the 2nd of December 2019 the Court reviewed the request as drafted and asked if the defence had been furnish with a copy and asked if they had made any suggested amendments. Ms Murphy, on behalf of the defence, indicated that there had been some which had been included in the request. The Court accepts that this was a procedure the defence had not advocated. They had requested a hearing in the same form as that conducted by the Special Criminal Court in the McKevitt case. The Court rejected that and set out its reasons in the ruling of the 20th of November 2019. The Court can state retrospectively that consideration of the letters of scope of the 31st of October 2019 would not have changed the procedural approach of the Court to the hearing. The Court strongly asserted its right to regulate the procedure of a disclosure hearing during the course of the trial or pretrial. The Court considered the procedure followed by the Special Criminal Court in the McKevitt case as an unusual exception which it was not prepared to follow. The Court accepts full responsibility for regulating that procedure and if the Court is legally incorrect so be it*".

263. For completeness, the trial judge ultimately ruled on the application then before him, insofar as it related to disclosure, as follows:

> "*The appropriate test is set out in DPP v. McKevitt [2008] IESC 51 and approved in the Court of Court of Criminal Appeal judgment DPP v. Sharon Collins [2011] IECCA 64, 19th of October 2011. It states at page 20, "The appropriate test in these circumstances is that in DPP v. McKevitt [2008] IESC 51 where it was held that where the credibility of a witness is an issue and there is documentary evidence relevant to his credibility in the possession of parties out of the jurisdiction the obligation of disclosure on the prosecution in a criminal trial is fulfilled when, in respect of such disclosure, the court is satisfied that all reasonable good faith efforts*

have been made to secure such documentation and that a high level of cooperation had been given by such parties in response to such efforts.

The Court concludes that the DPP and the Court, exercising its supervisory jurisdiction, has made reasonable good faith efforts to secure such documentation and that a high level of cooperation has been provided by the US authorities. The Court comes to the conclusion that the late disclosure of the letters of scope had a minimal impact, if any, on the disclosure process".

264. Accordingly, it is not correct for the appellant to have asserted that the trial judge gave no reasons for the opinion expressed by him that even if he had been aware of the Letters of Scope at the time of ruling on 29 November 2019, it would not have changed his ruling. He gave as his reasons that he had a right to regulate the procedure of a disclosure process during the course of a trial; that he had considered the procedure followed by the Special Criminal Court in the *McKevitt* case; and that, having done so, he regarded it as an unusual exception which he was not prepared to follow. In his original ruling of 29 November 2019 the trial judge had elaborated on why he regarded the *McKevitt* case as being distinguishable. We are completely satisfied that the trial judge did not err in so ruling. It was a decision open to him within his legitimate range of discretion. Moreover, he was, we are satisfied, meticulous in how he, in fact, supervised and managed the disclosure process.

265. In the circumstances we reject ground 1A.

Ground 1

266. Turning then to ground 1, this embraces a complaint that the omission to disclose to the appellant the Letters of Scope (which placed significant limitations on the evidence or potential evidence of Special Agents Wade and Katzke, and more importantly identified areas in which those witnesses were not permitted to answer questions in cross-examination), was a material non-disclosure which rendered the trial unfair.

267. In submissions to the trial court it was argued on behalf of the appellant that the Letter of Scope sent to both Special Agents should have been disclosed to the appellant in November 2019. It was submitted that had it been disclosed, it would have kick-started a number of lines of enquiry, including submissions by defence that the approach in the letter could not stand, and the trial judge would have had to adjudicate upon that submission. Effectively, by reason of this non-disclosure, it was argued, the trial court had been deprived of the opportunity of addressing its mind to issues that were germane.

268. The trial court was invited to draw what the appellant suggested was the inevitable conclusion that if the US Government was taking the view that the witnesses could not discuss matters relating to the immigration status of witnesses, of whom Daniel Cahill was one, it must follow that a request for any documentation dealing with that issue must suffer the same fate.

269. It was submitted that the omission to disclose the existence of the Letters of Scope had vitiated the pre-trial disclosure hearing.

270. The trial court was asked to consider: what were the remedies, if that be so? It was suggested that one remedy was to discharge the jury and go through the process again. An alternative was to prevent the respondent from calling any witness whose evidence was affected by the failure to put the Letters of Scope before the trial court. A third option was to simply ask HSI had they retained documentation with respect to any of the three witnesses.

271. It was submitted that the timescale involved in that exercise did not make the last option practicable.

272. It was submitted that an examination of the material that was disclosed under the initial MLAT request (in the light of the Letters of Scope was instructive. There were large redactions. No explanation had ever been provided on what these were, or to what they referred, or as to the rationale underpinning those redactions.

273. The document in respect of Aaron Brady stated: "*HSI London* [...] *located and arrested Aaron Brady for the immigration violation in support of the An Garda Siochana murder investigation*".

274. It was submitted that the papers disclosed with regard to a Colleen McCann, a girlfriend of Jimmy Flynn, noted that she had provided false statements on her immigration benefits applications. Once her immigration benefits (i.e., her entitlement to stay in the US) had expired she had been removed from the US jurisdiction. This was said to be a good illustration of how a witness who was not co-operating was forcibly ejected from the jurisdiction because she had overstayed her visa and was an "*illegal*".

275. It was submitted that two other persons were in similar positions. The appellant's submissions referenced the case of a Ronan Flynn, who was thought to have also lied about his prior criminal arrest history but nevertheless remained in the US. Like Daniel Cahill, Colleen McCann had married a US citizen, Jimmy Flynn. The act of marriage did not prevent her from being deported. In the response to the MLAT request, no file had been disclosed with regard to Daniel Cahill. No explanation had been provided as to why this was so.

276. In response to the appellant's submissions to the trial judge, counsel for the respondent had emphasised that the appellant had been made aware of the existence of the Letters of Scope, albeit that they had not received a copy of them, on 10 December 2019, and the appellant had not pursued the issue. Counsel for the respondent pointed to the *de facto* high level of co-operation that had been received from the US authorities. As far as remedies were concerned, restarting the MLAT process was said to be not feasible. Counsel for the respondent made the point that the entitlement is to a fair trial, not to a perfect trial. He suggested that the appellant was being opportunistic in seizing on the Letters of Scope to argue that the disclosure process had been flawed, when in fact it had not been flawed. The Letters of Scope had been correctly

represented on 10 December as an employer laying down conditions in relation to what its employees could state with a view to protecting the interests of the employer.

277. As has already been rehearsed in the context of addressing ground 1A, the trial judge concluded, for the reasons stated by him, that the late disclosure of the Letters of Scope had a minimal impact, if any, on the disclosure process.

Submissions of the Appellant

278. Counsel for the appellant submits that the trial judge had acknowledged that the defence had sought an oral hearing. It had been the defence case that the same prohibition contained in the Letters of Scope applied to documents. In those circumstances, the trial court was obliged to consider what would have happened if an oral hearing had taken place, but the trial court did not consider it.

279. Further, the trial judge stated that knowledge of what was contained in the Letters of Scope would not have changed his approach to the issue, save that in hindsight the trial judge would have asked the authorities to explain if documentation was withheld. It is submitted that the existence of the Letters of Scope could only give rise to a well-founded suspicion that documents were retained. Further, it is contended that insofar as the trial judge had been prepared to acknowledge that if he had known of the Letters of Scope, he would have made further enquiries, this was of monumental significance. However, the trial court had not asked itself what were said to be the obvious questions, i.e., was there a deficit in the trial because that line of enquiry was not made? And further, how was a deficit of that type to be excluded?

280. It is further submitted that the trial judge had failed to engage in any analysis of the difficulties that had arisen from the Letters of Scope. Instead, the trial judge had baldly pronounced that the Letters of Scope had minimal or no effect on the process. It is again reiterated that not a single fact was cited to explain this finding. It is submitted there was a reason for that: namely, that there was no good explanation. The trial judge had failed to determine whether it was reasonably possible that material was withheld.

281. It is submitted that the same observations applied to what are described as "*the Judge's concessions to the good faith efforts that are applicable to the DPP, the US authorities and ultimately the Court exercising its supervisory function*". It is urged upon us that no effort was made to establish what the actual position was; that conclusions had been reached without any evidential basis; and, that the finding that the US authorities had co-operated with the process, without acknowledging that they were offering only very limited co-operation in respect of witnesses giving evidence and without establishing what criteria they were applying to making disclosure, was meaningless.

282. It is submitted that the trial judge was bound to ascertain what the actual position was if the case was to continue, but it is said that he had failed to do so. Moreover, that if that was not practical – and it is submitted that it was not – the trial judge ought to have discharged the jury

to allow the proper inquiries to be made. Alternatively, he should not have allowed any American witness to give evidence who had interacted with HSI.

Submissions of the Respondent

283. In reply, counsel for the respondent submits that, while it was accepted that the letters ought to have been formally disclosed earlier than they were, even though the appellant's legal team were aware of their existence as of 10 December 2019, the failure to make formal disclosure earlier than was done made no real difference to the process.

284. It is submitted that the trial judge dealt with the defence complaints appropriately. He was not bound to follow the precise process followed in the *McKevitt* case to deal with the specific issues that arose in that case.

Discussion and Determination

285. We are satisfied that the failure by the respondent to make formal disclosure of the Letters of Scope until 10 April 2020 did not render the appellant's trial unfair. The appellant's legal team were aware of the existence of the Letters of Scope from 10 December 2019. The trial did not get underway until approximately seven weeks later, on 27 January 2020. Although the appellant's legal team were made aware of the existence of the Letters of Scope on 10 December 2019, they did not pursue it at the time.

286. A great deal of time was taken up both in pre-trial applications, and in the course of the trial itself, with the issue of disclosure. The trial judge devoted enormous time and judicial resources to addressing the concerns of the appellant. He approached the matter with the greatest of care and conscientiousness, and he fully acquainted himself with the relevant legal principles. His decisions on the appropriate procedures to adopt were arrived at following careful consideration, and with a full appreciation of the concerns of the appellant. There is no basis to gainsay the trial judge's assertion on 26 May 2020 that even if he had been aware of the existence of the Letters of Scope, it would not have altered his decision to proceed in the way that he did. We explicitly reject the contentions that no effort was made to establish what the actual position was in regard to the possibility of the existence of other documents. The trial court's role was a supervisory one and the ruling of 26 May 2020 showcases the level of detail that was explored by the trial judge in regard to engagement between the Irish authorities and the US authorities on the issue of disclosure. There clearly were efforts by the trial judge to ascertain if other documents were potentially available to be disclosed. The mechanism deployed was through close supervision and the initial use and further use of the MLAT procedure.

287. We further reject the suggestion that conclusions had been reached without any evidential basis; and that the finding that the US authorities had co-operated with the process, without acknowledging that they were offering only very limited co-operation in respect of witnesses giving evidence and without establishing what criteria they were applying to making disclosure, was meaningless. The trial court had reviewed in detail the exchanges of emails between the Irish authorities and the relevant American authorities and had quoted them *in extenso*. It was

fully aware of the exact level of co-operation and in the trial judge's assessment there had been the required good faith and co-operation. The trial judge had tellingly added:

> "*Examining all the transcripts for references to the various disclosure matters has been a significant undertaking for the Court and thus it could have missed submissions but as far as the Court can see the only matters the defence returned to in relation to the material was the meeting between Agent Katzke and James Flynn and Colleen McCann at Belfast International Airport. At a subsequent hearing of the Court of the 20th of March 2020 Inspector Mark Phillips gave evidence and was crossexamined on same. The matter was revisited again on the 6th of April 2020 when Inspector Mark Phillips gave further evidence in relation to any notes retained by an agent accompanying Agent Katzke. At those hearings information was also sought on WhatsApp communications between Agent Katzke and Inspector Marry. The defence also sought a statement from Inspector Phillips as to the enquires that he had undertaken.*
>
> *Then the request for mutual assistance of the 3rd of March 2020 in respect of emails sent from US authorities to An Garda Síochána. The Court has dealt with this matter in its ruling yesterday of the 25th of May and has set out all the hearings and its conclusions. The Court notes all of the general disclosure provided by the prosecution to the defence, including the reports of Inspector Phillips. The Court also directed a schedule of An Garda Síochána visits to America to be prepared and an index to documentation re American witnesses was prepared. The Director prepared a full schedule of the emails passing between the parties which the Court reviewed and referred to in its ruling of the 25th and the DPP disclosed all the emails from An Garda Síochána to the American authorities which the Court has reviewed. The Court notes the direction of the Court of yesterday 25th is still under review by the DPP. However, the Court has stated it was satisfied with the cooperation provided by the American authorities, even though now there's a difficulty due to the legal conflict between the Ward principles and public interest privilege. This court is satisfied that all reasonable good faith efforts have been made to secure documentation in respect of the American aspect of the investigation. In hindsight the only matter the Court would have added to the request for mutual assistance would be to ask the US authorities if there was any documentation being withheld that it would be listed. The Court had no power or procurement over these documents or no control over any decision to redact material. The American authorities could have refused to hand over any material or refuse to answer any of the questions*".

288. We are satisfied that the decisions that the trial judge made were fully informed decisions that were open to him within the scope of his legitimate jurisdiction and range of discretion. We are further satisfied that the conclusions that he reached as to the good faith and co-operation of the relevant parties were justified on the material and evidence before him. It has not been

demonstrated to us that his conclusions with respect to the good faith of the efforts made by the respondent and the overseas authorities were flawed in any way. We are confident that the trial was not unfair on account of how the trial judge handled the disclosure process. While there may have been delayed formal disclosure of the Letters of Scope, we are satisfied that there was no material non-disclosure tending to vitiate the fairness of the trial.

289. Accordingly, we reject ground 1.

Ground 29 – That the trial court erred in refusing to allow the appellant to introduce into evidence a tape recording of a conversation between prime suspect Jimmy Flynn and Special Agent Katzke ('Katzke tape') in circumstances where the content of the taped portion of the recording was not in dispute.

290. The appellant sought to introduce into evidence in the course of Detective Inspector Marry's evidence, who had been, at times, the senior investigating officer of the investigation, a covertly taped conversation between Special Agent Katzke and Jimmy Flynn. The purpose of this application related to Daniel Cahill's evidence. The appellant asserted that the contents of the conversation displayed an attitude on the part of HSI to acquire evidence against the appellant by making inducements and/or intimidating visa overstayers with respect to their illegal status.

291. The covert recording related to events in June 2017. Special Agent Katzke, an assistant attache in the London office of HSI, travelled to Belfast airport and met Jimmy Flynn disembarking a flight from the US in the company of his wife. Special Agent Katzke and his partner had a conversation with Jimmy Flynn and his wife over a cup of coffee. This conversation was covertly taped by the Flynns. A recording of the tape was subsequently sent by the Flynns to Special Agent Katzke who forwarded it to the investigation team. It was acknowledged by Special Agent Katzke that he featured on this recording, although it was asserted that this was only a partial recording of the entire conversation.

292. The covert recording reflected Special Agent Katzke saying: "*I wanna know people who know Aaron Brady has admitted doing it and then I can… offer things once I have that… till I have that I can't offer anything".* With respect to Jimmy Flynn's brother, Eugene Flynn Jnr, who was legally in the US on a Green Card but at that time was on firearm charges before the US courts, Special Agent Katzke indicated that if he was found not guilty "*then I can't find anything wrong with his immigration paperwork…which believe me there are things wrong with his immigration paperwork… he's not getting removed but there is problems, so if nobody comes to say yes Eugene is willing to help I can't… he's going to be removed*". He indicated that the offer to Eugene was open now and would not last months. He stated: "*My goal is Aaron Brady… Aaron Brady goes away. You'll probably never see me again*".

293. Daniel Cahill was a visa overstayer. He had since married a US citizen, however he had not taken any steps to regularise his status since that event. On 25 and 29 July 2019, he was interviewed

by An Garda Síochána and provided a statement to them regarding utterances which had been made by the appellant to him or in his presence relating to the shooting of a guard in Ireland.

294. How Daniel Cahill came to be interviewed by An Garda Síochána was of interest to the appellant, it being suggested that it arose as a result of an inducement and/or pressure being brought to bear on Daniel Cahill by HSI arising from his illegal status.

295. The day Daniel Cahill provided his statement to An Garda Síochána commenced with 7/8 agents from HSI, to include Special Agents Wade and Katzke, arriving at his house early in the morning in the company of an Enforcement Removal Officer. The reason for the visit to Daniel Cahill's house related to the garda investigation into the Lordship Credit Union robbery and was to see if he would speak with the gardaí. The agents waited outside his house for an hour and a half anticipating that he would leave and they could speak with him. However, after this failed to materialise, they entered his house and conducted a search. Daniel Cahill was found hiding in his attic. Cannabis plants and steroids were found in the house. The fact that steroids were discovered was not disclosed to the defence and only became known when Special Agent Wade mentioned this at the conclusion of her evidence. Daniel Cahill was brought to Yonkers Police Station by Special Agents Wade and Katzke in relation to the illicit drugs found at his residence. However, by lunch time a direction was given that he was not to be prosecuted in respect of this find. Whilst in Yonkers Police Station, Daniel Cahill was interviewed by An Garda Síochána in relation to his knowledge of the appellant and provided the account of utterances made by the appellant referred to earlier.

296. In evidence, Daniel Cahill denied that he had been offered any inducement by HSI to provide his statement. He did indicate that after his first interview with gardaí on 25 July 2019, but before his second interview on 29 July 2019, he had discussions about his status with HSI and he was informed that he should push through his paperwork sooner rather than later and that that they were not able to help him if he did not commence the process. Special Agent Wade refused to comment on this evidence from Daniel Cahill relying on the Letter of Scope. However, she did indicate in the course of her evidence that she did not make any promises to him regarding his irregular status.

297. The appellant referred to disclosed material relating to other people in the US who had been identified as being of relevance to the investigation in terms of an involvement with the appellant, in support of the proposition that Daniel Cahill had been induced and/or pressurised to give a statement against the appellant. This material included the following:

a) An internal HSI email dated 19 July 2017, authored by Special Agent Katzke and to Detective Inspector Marry, which related to a friend of the appellant's, Tommy McGeary, who was another visa overstayer. The email stated "*if he cooperates provide McGeary status for testimony. It he does not cooperate place McGeary in deportation proceedings*";

b) A document relating to "*Redacted B*" who was recorded as saying to the investigating gardaí that he would say whatever it took to stay in the USA;
c) A letter received from an attorney acting on behalf of Anthony Maguire indicating that his client had nothing to offer the investigation and complaining of the duress that Maguire had been subjected to by An Garda Síochána;
d) Ronan Flynn made a statement relating to admissions made by the appellant of being involved in the murder of Detective Garda Donohoe. A bench warrant had issued for Ronan Flynn in Ireland in respect of an assault causing serious harm charge. On foot of an apology from Ronan Flynn being provided to Detective Inspector Marry, the injured party in the assault case indicated that he was withdrawing his complaint and did not wish for the case to proceed. The assertion of the appellant was that the statement against him by Ronan Flynn was related to the withdrawal of the assault complaint against Ronan Flynn which Detective Inspector Marry had been involved in.

298. The appellant submitted that the Katzke tape established the approach of HSI to the various witnesses who were overstayers, namely making inducements to them to get them to make a statement, but being intimidatory of what might occur if there was no co-operation. It was argued that the email, referred to above, was further evidence of such an approach. In relation to Daniel Cahill, the fact that an Enforcement Removal Officer was in the midst of the agents who arrived at his house was emphasised.

299. The respondent was opposed to the tape being introduced into evidence as Detective Inspector Marry was a stranger to the contents of the recording, although he had received a copy of it from Agent Katzke and knew that Agent Katzke accepted that he featured on the recording. Furthermore, it was argued that this was a collateral attack on the evidence of Daniel Cahill.

300. On 6 July 2020, the trial judge gave a detailed ruling refusing this application, the salient portions of which are as follows:

> "[…]*The defence wish to be exempted from the normal proof of this type of evidence.*
> […]
> *Inspector Marry was not present at the meeting on the 6th of June 2017 at Belfast International Airport. Mr Jimmy Flynn and Eugene Flynn junior are suspects for the armed robbery at Lordship Credit Union. Evidence has been adduced in the presence of the jury alleging that Jimmy Flynn and his brother Eugene were involved in the theft of a motor vehicle in the early hours of the morning of the 23rd of January 2013 at Clogherhead which the prosecution allege was used in the crimes. Both Flynn brothers, apart from making statements accounting for their own movements, did not make any other statements and will not be witnesses at the trial unless they are called by the defence.*

[…]

From the defence submissions it wishes to put in issue the following; did Inspector Marry know about Special Agent Katzke's intentions in advance? Was he told about it in the immediate aftermath of the meeting and was there any discussion about immunity for the Flynns if they agreed to give witness statements implicating the accused? Was the request of the tape in January 2018 the first time Inspector Marry spoke with Special Agent Katzke about his interaction with Jimmy Flynn and Colleen McCann? If that is not the case was Special Agent Katzke not acting as a Maverick which Inspector Marry was prepared to tolerate?

The background which the defence now wish to explore with retired Inspector Marry is evidence in the trial before the jury and intended evidence of witnesses who did not materialize about conversations the accused is alleged to have had with various individuals when he was residing in USA between 13th of April 2013 and 23rd of May 2017. The prosecution initially intended to call seven witnesses, three of whom, Ronan Flynn, Thomas McGeary and Daniel Cahill were young Irish men who entered the USA on visas which originally entitled them to stay in US for 90 days and did not entitle them to work while there. The defence either allege or have concerns that these witnesses were subject to undue pressure to give witness statements by way of collusion between An Garda Síochána and the Department of Homeland Security Special Agents using their questionable status as pressure or inducement that their status would be regularised if cooperation was forthcoming. Two of these witnesses did not give evidence.

Ronan Flynn made a statement on the 25th of October 2017 which it was video recorded. In addition to status, the defence wish to highlight that Mr Flynn had received significant assistance in having an extradition warrant in Ireland vacated. Mr Flynn was intimidated and there's prima facie evidence that the accused participated in or was an agent of this intimidation. His witness statement referred to conversations with the accused where it is alleged the accused told Mr Flynn about his involvement in the crimes, the subject of the trial.

Thomas McGeary made a voluntary statement on the 28th of November 2017 in a similar vein. He made a statement which was not video recorded. He had indicated that he did not wish to remain in US so any offer of status was, on the face of it, irrelevant. A warrant has been issued for his arrest for failing to appear to give evidence. He was the subject of a comment […] *in internal email of the 19th of July 2017 which was copied to retired Inspector Marry.*

The witnesses who gave evidence before the jury were Molly Staunton and Daniel Cahill. The issue of pressure or inducement did not apply to Molly Staunton as she is a native of New York and a US citizen. The only witness it can apply to is Daniel

Cahill who gave evidence on the 22nd, 23rd and 24th of June. His evidence and the taking of his statements are relevant to this application as the prosecution allege the reason the defence wish to adduce the tape in the crossexamination of Inspector Marry is for the purposes of launching a collateral attack on the credibility of that witness which it alleges is impermissible in law. The reason the defence has advanced for the introduction of the tape and its contents in a crossexamination of Inspector Marry is the conduct of the garda investigation in its interaction with the American authorities.

The Court has already stated that since the outset of both pretrial hearings in October 2019 and the commencement of the trial on the 27th of January 2020 the landscape in respect of the American witnesses has transformed substantially. Inspector Marry retired on the 18th of May 2018. Daniel Cahill made his statements on the 25th and 29th of July 2019 and one was read back to him on the 16th of September 2019. There is no suggestion that Inspector Marry had any interaction with Daniel Cahill so his evidence could only be of relevance in the conduct of the investigation and interaction with the American authorities up to the date of his retirement.

The Court already has had issues arising from the defence's crossexamination on the conduct of the garda investigation. The defence has insisted to date it wished to explore this on narrow ground, namely fuel laundering and the prosecution's alleged failure to investigate this, James Hanratty's involvement, either as an alleged fuel launderer and a suspect, and the selective use of the prosecution allegedly of telephone evidence. It has objected to any attempt by Inspector Marry to widen the issues, to rely on intelligence or other matters. The Court does not wish the jury to hear about the statements made by other witnesses who have not given evidence about their involvement with the accused in the US, particularly Mr Flynn and Tommy McGreary. Some of this evidence may assist the defence but other parts of it would not.

From the evidence to date, both in the presence and absence of the jury, the first interaction with Daniel Cahill and An Garda Síochána about the accused arose on a visit by members of An Garda Síochána to US in July 2019. The officers who attended were Inspector Mark Phillips, Detective Sergeant Paul Gill, Detective Garda Jim McGovern and Detective Garda Padraig O'Reilly. On a return visit in September 2019 Inspector Phillips, Detective Sergeant Gill and Detective Garda O'Reilly attended. Mr Cahill made his first statement at Yonkers Police Station on the 25th of July 2019. That interview was video recorded in full and the defence had access to it, as well as a transcript of it. Detective Sergeant Paul Gill and Detective Garda Padraig O'Reilly conducted that interview. The second interview took place on the 29th of July 2019. Detective Sergeant Gill and Detective Garda McGovern conducted

that interview. That interview was partially recorded through inadvertence. The meeting with Mr Cahill on the 16th of September 2019 was for reading over his previous statement of the 29th of July 2019, all of which had not been recorded.

In the cross-examination of Mr Cahill no allegation was made to him about the conduct of the members concerned, other than some inaccuracies in his statements. He maintained throughout his evidence that his contact with An Garda Síochána and his decision to be interviewed and give a statement was a voluntary decision. There was no suggestion of any pressure being applied to him or inducement offered to him by An Garda Síochána. Detective Garda McGovern, Sergeant Paul Gill and Inspector Mark Phillips gave sworn evidence in the absence of the jury in a voir dire when admissibility of parts of Mr Cahill's proposed evidence was challenged.

The defence and prosecution have the transcripts of the evidence of Daniel Cahill before the jury. It is important that his evidence is not quoted selectively. Throughout his evidence he maintained there was no offer made to him by officials from Homeland Security of status for testimony. The defence are quite entitled to highlight the circumstances of his detention, his behaviour and the possibility he was influenced by his own status to cooperate and the possibility of future assistance and also to highlight any conflicts in his testimony.

The law.
A tape recording is real evidence. Usually it should be authenticated. The trial judge has a discretion as to whether a jury can be provided with a transcript. It must be relevant to a fact or facts in issue in the trial, either directly or circumstantially. The Court has a discretion, even though not authenticated, to admit it if it is satisfied of its provenance. During this trial any time the defence challenged the admissibility of real evidence the prosecution had to prove its provenance and reliability by introducing evidence.

As to hearsay, the same rule applies as to the contents of a document. If it is introduced as to the truth of its contents it is hearsay. It is treated as an out of court statement. The hearsay rule only applies where it is tendered to prove the truth of a fact which is expressly asserted. The Court […] *has concern about the dual role or double relevance of statements introduced as to facts which are not relied on as to truth and facts which are relied on as to truth. The Court must make a judgment on this issue. Inspector Marry has no direct evidence to give on the facts in issue for this jury to determine. He was the officer in charge of the investigation at relevant times. He had no connection whatsoever with Daniel Cahill. The Court has no doubt that the real purpose of the introduction of the tape is to undermine the evidence of Daniel Cahill and for the jury to infer, that despite denials by Mr Cahill, that because of the previous behaviour of Agent Katzke he did offer Mr Cahill status for testimony. This is*

contrary to the sworn evidence of the witness who was crossexamined at length on the issue and the evidence to date of Special Agent Wade, although her testimony is incomplete. In effect its purpose would be a collateral attack on the credibility of Mr Cahill. The Court accordingly will not admit the tape or its contents in evidence".

301. The trial judge returned to this ruling on 13 July 2020, in the course of his ruling on a *P.O'C* application which the appellant had brought at the conclusion of the respondent's case, stating:

> "*The defence has raised this issue of the tape and its contents of the meeting of the 6th of June 2017 at Belfast International Airport again in the context of this application. The Court is concerned that the defence may have misunderstood the Court's ruling on collateral issues. It is important to understand that the ruling of the 6th of July was in the context of the crossexamination of retired Inspector Marry. There were four legal reasons why the tape and its contents were ruled out on this application. Admissibility of real evidence and whether in the context of this application authentication by the creator of the tape recording was a required oral proof rather than authentication by reference to the contents of the tape. Breach of the rule against hearsay as Inspector Marry was not present. The purpose of admissibility in respect of Inspector Marry only was collateral. The Court did not rule or say that the issue of the possible inducement of Mr Cahill itself was a collateral issue. That is not and never has been the Court's opinion. It was intended to use the tape to challenge before the jury the truth of Inspector Marry's evidence on a clearly collateral issue to him*".

Submissions of the Parties

302. Counsel for the appellant submits that this recording was extremely important, if not vital to the case which the appellant made. The reason the appellant wished to introduce it was twofold: firstly to have evidence before the jury showing how HSI were behaving so that the jury could infer that a similar approach was made to Daniel Cahill; and secondly to show the nature of the relationship between HSI and An Garda Síochána to thereby establish that HSI were acting in an unsanctioned, unauthorised and inappropriate manner. Counsel for the respondent submits that the trial judge was correct not to permit this tape to be put to Detective Inspector Marry as he was not in a position to address any question in relation to it.

Discussion and Determination

303. The Court is of the opinion that the trial judge did not err in refusing to permit Detective Inspector Marry be cross-examined in relation to this tape. The fact that the tape recording was not proved in evidence by the appellant, and was not a complete recording, is not without significance in terms of the decision as to whether the recording should be admitted into evidence, even though the respondent accepted that this was a recording of Agent Katzke. However, the principal reason why this recording should not be put to Detective Inspector Marry was that he was a stranger to the contents of this tape and could not have been in a position to answer any

questions about the recording. Whilst he had knowledge of the recording insofar as it had been forwarded to him by Special Agent Katzke, he was not in a position to speak to the contents of the tape or any of the words spoken as he was not present during this conversation. As indicated by the trial judge, this conversation was hearsay evidence. While the trial judge ruled that it was an issue in the trial how witnesses with visa difficulties came to give evidence, this does not mean that the rules of evidence should not be followed, or that anything touching on this issue could be put to a witness without reference to their ability to testify in relation to such an issue. Criminal trials are conducted in accordance with the rules of evidence and the rules of evidence mandate that a witness only be asked questions in relation to which they have direct knowledge. Detective Inspector Marry did not have any direct knowledge of the taped conversation.

304. Accordingly, the trial judge did not err in refusing that the tape be put to Detective Inspector Marry. This ground of appeal also fails.

Ground 30 – That the trial court erred in refusing to permit the Appellant cross-examine Special Agent Katzke on the contents of the '*Katzke tape*'.

305. On foot of a direction of the Court, the respondent decided to tender Special Agent Katzke in evidence. Prior to him being called, counsel for the appellant sought to establish whether Special Agent Katzke could be questioned about the tape which had been secretly recorded by the Flynns.

306. On 8 July 2020, the trial judge gave the following ruling in relation to this application:

> "*The Court accepts the submission from the defence that questions on crossexamination can be put on collateral issues which have potential relevance but that the defence are bound by the answers. This meeting on 6th of June 2017 is a collateral issue. It has no direct connection to the alleged conversations between Mr Cahill and the accused. It has a peripheral connection to the issue of Mr Cahill's credibility in view of his evidence and that of Special Agent Wade. In its application to the Court on 3rd of July the defence wished to put in issue before the jury the truth of retired Inspector Marry's evidence tendered twice in the absence of the jury that An Garda Síochána knew nothing about this meeting in advance, did not authorise it and were not told about it in its immediate aftermath. The truth of Inspector Marry's evidence in the voir dire was not challenged.*
>
> *The prosecution has submitted that the surreptitious recording of this meeting was incomplete. In the voir dire the defence made no attempt to call any evidence on the issue to rebut this. Jimmy Flynn or Eugene Flynn did not make any statements because of this meeting. They were both suspects for the armed robbery. The unchallenged evidence from Inspector Marry is that An Garda Síochána did make at least two attempts to engage with them to cooperate in the investigation. The Court has formed the view, based on the exchange of texts between Agent Katzke and*

a person who the Court presumes to be Jimmy Flynn, that this individual is unreliable. The connection between the meeting of the 6th of June 2017 and the circumstances of same compared to the official request of An Garda Síochána to speak to Daniel Cahill in New York in July 2019, his subsequent interviews and evidence before this court is so remote and so fraught with difficulty that it would be fundamentally unfair to the prosecution to allow it and the fair trial rights of the accused can be vindicated by permitting the issue of possible inducement of Mr Cahill to be aired before the jury in a different setting.

The defence has accepted, because of the circumstances surrounding Ronan Flynn, it will not crossexamine on this issue. The internal email of 19th of July 2017 was sent by Special Agent Katzke in the context of an impending official visit by An Garda Síochána to US to interview potential witnesses, one of whom was Tommy McGeary. It was disclosed to the defence by order of the Court based on its potential relevance. An Garda Síochána were on notice of it as it was copied to retired Inspector Marry. The email reflected prima facie an intent on the part of Agent Katzke. As he was present at the detention of Mr Cahill and as he was the author of the email and as it was disclosed, the defence is entitled to crossexamine the witness on it. The difficulty is that in respect of Mr McGreary this intention did not materialize. Having been detained by administrative arrest on the 28th of November 2017 in New York, he made a voluntary statement implicating the accused in the crimes the subject of this trial. A warrant was issued for his arrest by this court and his evidence has not been available to the Court.

A conflict arises here between the fair trial rights of the accused and unfairness to the prosecution as it will be circumscribed in rebuttal because of prejudice to the accused. In resolving that conflict as a matter of law the Court must vindicate the fair trial rights of the accused as a superior right and allow crossexamination on the email. That does not preclude the prosecution requesting permission from the Court to deal with it on reexamination. There can be no objection by the Court to the crossexamination of the witness on the events of the 25th and 29th of July 2019. Likewise there is no objection to crossexamination on the general relationship between An Garda Síochána and the Department of Homeland Security arising from this investigation, provided it does not trespass on the controversial areas already ruled out by the Court".

307. The trial judge returned to this ruling on 13 July 2020 when determining the *P.O'C* application which the appellant brought at the conclusion of the respondent's case stating:

"*In the ruling of the 8th of July 2020 the Court decided the restrictions on Agent Katzke's crossexamination on the tape for different reasons as is clear in that ruling, i.e. remoteness and fundamental unfairness to the prosecution in the context of the*

only relevant evidence it could relate to, the evidence of Mr Cahill. However, to vindicate the accused's rights the Court made clear the defence was entitled to crossexamine on the email of the 19th of July 2017 which was authored by Agent Katzke in respect of an intended witness who did give a statement which would have allowed the defence to highlight the issue of status for testimony. Even though Agent Katzke may have relied on the letter of scope to him, the email and its contents could have been put before the jury. The Court respects the right of the accused not to crossexamine any witness tendered. This court cannot see how its rulings of the 6th and 8th of July in those circumstances could in any way affected the fair trial rights of the accused".

Submissions of the Appellant

308. The appellant submits that the trial judge erred in this regard as he excluded extremely relevant information having found that the issue of inducement/intimidation was of relevance in the trial. Furthermore, it is argued that the trial judge's reasoning demonstrated a significant error of principle in that fairness to the prosecution was elevated above fairness to the defence which instead should be a paramount consideration.

Submissions of the Respondent

309. The respondent argues that the appellant failed to appreciate the significance of the trial judge's original ruling on this issue in that while the trial judge did not permit the introduction of the tape recording in the course of Special Agent Katzke's cross-examination, he did permit him to be questioned regarding the email he had authored relating to Tommy McGeary dated 19 July 2017 which in fact encapsulated the appellant's case to the same extent as the tape recording had. Also, questioning in relation to the events of 25 and 29 July 2019, when Daniel Cahill was interviewed and provided his statement of evidence to An Garda Síochána, was permitted as was exploration of the general relationship between the two police forces. Furthermore, it is argued that the position pertaining to Daniel Cahill was completely different to that pertaining to Jimmy Flynn and Eugene Flynn Jnr having regard to the fact that they were suspects for the Lordship Credit Union robbery; the length of time which had elapsed between these two events; the Flynns were not visa overstayers and had legal status within the US (although Eugene Flynn Jnr had a difficulty arising from a criminal complaint); and the fact that they were not giving evidence in the trial.

Discussion and Determination

310. The Court agrees with the submission of the respondent that it is of significance that the trial judge permitted the email relating to Tommy McGeary to be put to Special Agent Katzke and permitted questions in relation to the interaction between the two police forces to be raised with him. Special Agent Katzke, in the normal course, could also have been asked about his involvement and interaction with Daniel Cahill when Daniel Cahill was interviewed and provided his statement to An Garda Síochána.

311. With respect to the email relating to Tommy McGeary, the email, pithily sets out the approach of HSI to visa overstayers, but in reality encapsulates the approach of HSI which the appellant wished to have the jury's attention drawn to. Accordingly, evidence in support of the case being made by the appellant was capable of being placed before the jury separate to the covert recording, had the appellant chosen this course of action.

312. Counsel for the appellant complains that being permitted to adduce the email was of no benefit to the appellant as the fact that Tommy McGeary wanted to return to Ireland would be adduced by the respondent and the jury might infer that he had provided a statement against the appellant.

313. The Court is of the view that this complaint by the appellant does not fully address the rejection of the offer by the trial judge to permit questioning in relation to the email. Whilst Tommy McGeary's reaction to being approached by HSI was that he was happy to return to Ireland in any event, remembering that he had run into his own difficulties in the US with respect to an assault charge relating to Molly Staunton, his reaction to the approach does not nullify the general attitude of HSI which existed and is established by virtue of the email. The Court is not being critical of the appellant's cCunsel for not pursuing the email with Special Agent Katzke, as this was a tactical decision, informed by instructions. However, the Court does not accept the reason for the out of hand dismissal of the trial judge's offer in this regard. It has been impressed upon us how important this line of questioning was for the appellant's case. It seems to us that the outcome of the approach to Tommy McGeary is separate and distinct to the underlying nature of the approach to him, which could have been utilised by the appellant, regardless of the outcome. It also appears to us that the dismissal of utilising the email coupled with the explanation for so doing, demonstrates what the real desire of the appellant was in relation to this aspect of his case which was to make the case of inducement/intimidation by HSI devoid of a factual context, as Jimmy and Eugene Flynn Jnr would not be giving evidence.

314. Counsel for the respondent is also correct that there is a substantial difference between the situation pertaining to Daniel Cahill and the situation pertaining to the Flynns. The Flynns were suspects for the robbery of Lordship Credit Union, as opposed to a person who had no knowledge of the events at Lordship Credit Union apart from what it was asserted the appellant had said to him. While the Court does not condone in any way what is recorded as being said by Special Agent Katzke to Jimmy Flynn, this is a situation of a suspect for the robbery at Lordship Credit Union being spoken with. It cannot be said that the terms of that conversation transpose to a conversation with Daniel Cahill. There are also other differences arising such as the time which had elapsed between when the covert recording was made in June 2017 and when HSI had interaction with Daniel Cahill in July 2019; the difference in legal status existing between the Flynns and Daniel Cahill; and the factual situation pertaining in that Daniel Cahill spoke to An Garda Síochána within hours of his initial

interaction with HSI. Most significantly, Daniel Cahill gave evidence whereas Jimmy and Eugene Flynn Jnr would not.

315. The Court does not accept that the trial judge elevated fairness to the respondent above the fair trial rights of the appellant. In fact, the opposite is the case with the trial judge acknowledging that he "*must vindicate the fair trial rights of the accused as a superior right*" to the respondent's rights, whilst acknowledging that fairness to the prosecution is a consideration.

316. The Court is of the view that where the trial judge permitted evidence to be called before the jury that was potentially supportive of the appellant's proposition that inducements/intimidation were utilised to obtain statements, he did not err in disallowing the tape be introduced into evidence. As acknowledged by the trial judge, the situation pertaining to Daniel Cahill on the one hand and the Flynns on the other was very different. Adducing the covert recording was fraught with difficulty, as it opened the prospect of the respondent calling evidence to rebut the proposition seeking to be established by the appellant. The trial judge quite correctly did not want a side enquiry to be conducted with respect to the outcome of HSI's interaction with other proposed witnesses in the case. An avenue was opened to the appellant by the trial judge of introducing the McGeary email. That this was not utilised is a matter for the appellant, but this offer ensured that the appellant could pursue the case he wished to make, if he so chose.

317. Accordingly, the Court is of the opinion that the trial judge did not err in refusing to permit this tape to be put to Special Agent Katzke. This ground of appeal also fails.

Ground 26 – That the trial judge erred in determining that it was within the power of the Director of Public Prosecutions to enter into an agreement with a witness or witnesses, that said witness or witnesses would give a restricted form of testimony in respect of matters that were relevant and core to vital issues in dispute at trial, viz the credibility of Daniel Cahill, and would refuse to be cross-examined on such issues.

Background

318. The background to this complaint is as follows. A MLAT request was made by the prosecuting authorities in Ireland, via the Central Authority for Mutual Assistance in Ireland, to the US Department of Justice Criminal Division on 11 October 2019. Various forms of mutual assistance were sought at paragraphs 8.1 to 8.5, inclusive, of the document communicating the request. For the purposes of addressing this ground of appeal it is only necessary to refer to the assistance requested at paragraph 8.5 of that document. It stated:

> "*8.5 It is requested that the relevant United States law enforcement authorities would indicate if Special Agent Matthew Katzke and Special Agent Mary Anne Wade of the Department of Homeland Security would be available to attend our courts in*

Dublin to give evidence at the trial in relation to interaction between the witnesses/Homeland Security and/or An Garda Siochána during our investigations".

319. There was evidence that this was responded to by a letter sent by the US Department of Justice Criminal Division to the Central Authority for Mutual Assistance in Ireland on 15 November 2019. That letter stated:

> "*With respect to assistance No 8.5, we referred the request to the US Department of Homeland Security, Government Information Law Division, Office of the Principal Legal Advisor (OPLA). OPLA provided the attached written correspondence (two letters) which are commonly referred to as scope letters. Please provide these letters to Irish authorities for their review and asked them to provide a formal written response indicating that Irish authorities will comply with the conditions set forth in the letters. If Irish authorities have questions, concerns or other relevant issues regarding the conditions and/or other information in the letters please respond via email to me and* […] *describe the questions, concerns and/or issues in detail. We will provide the information to OPLA for further consideration. We kindly request that Irish authorities provide a written response by December 2nd 2019. Until we have received a response, HSI Assistant Attaché Katzke and Special Agent Wade will not be authorised to testify in the trial related to the above matter*".

320. Copies of the Letters of Scope sent to the Special Agents, both of which were in identical terms and dated 31 October 2019, were enclosed with the letter of 15 November 2019. These letters, which were on the shared letterhead of OPLA and ICE ('US Immigration and Customs Enforcement'), stated:

> "*Re: Request for legal assistance from Ireland: In the matter of Adrian Donohoe*
> *Dear* [relevant Agent]*,*
> *I have reviewed the request from Ireland for legal assistance in a foreign criminal matter, and specifically the request for your testimony in the above referenced case. The request asks you to testify at a criminal trial in Ireland, date unknown. It is my understanding that your expected testimony at the trial will relate to the investigation of the murder of Irish Detective Adrian Donohoe. You will allegedly be asked questions regarding the investigation and the interviews of six witnesses in New York.*
>
> *The Department of Homeland Security (DHS) regulations bar all employees of DHS or its components, of which ICE is one, from providing documents or oral or written testimony relating to information acquired while such persons were employed by DHS unless authorized to do so by the DHS Office of General Counsel or its designees. See C.F.R. § 5.44. The DHS Office of General Counsel has authorized ICE-OPLA to approve or deny requests for records or written or oral testimony, and*

upon receipt of a sufficiently detailed request that must include the nature and relevance of the official information sought, DHS or ICE will consider the appropriateness of the request to the proceedings at hand. Additionally, when considering such a request, DHS-ICE will consider whether such compliance would violate a statute, regulation, Executive Order, or agency policy. Likewise, DHS-ICE will not comply with the request when such compliance would reveal classified or confidential information, reveal agency deliberations, or potentially impede or prejudice an ongoing investigation.

Based on information provided and the foregoing factors, you are hereby authorized to give testimony in this matter. You are authorized to testify about the general information initially received by a source in 2017 regarding the murder of Detective Donohoe; however, you are not authorized to testify about the source. Your testimony is limited to that which is revealed in the Reports of Investigation (ROIs). You are also authorized to testify about the interviews of the six witnesses conducted in New York. This testimony is limited to the names of the witnesses interviewed, the location of the interviews, and the substance of the questions asked and answered during the interview. You are not authorized to provide an opinion, analysis, and/or conclusion regarding any legal immigration regulations or authorities, which includes 8 C.F.R § 212.5 Parole of aliens into the United States and state. Additionally, you are not authorized to testify about the immigration status of any of the witnesses. Moreover, you are not authorized to testify in this matter as an expert witness, provide opinion testimony, and you are further restricted from discussing any matters that may result in operational harm to the agency. You are required to limit the scope of your testimony to that which is specifically authorized by this letter and are not to answer any questions asked beyond the scope authorized herein.

Please be advised that you are not authorized to discuss any other information you have received in the course of your duties as an ICE employee, including ICE internal procedures, policies or programs. You may not discuss the existence of any ongoing investigations, or the existence or non-existence of information relating to this or any other matter in DHS databases or record systems. You are not authorized to testify to the identity of any other individuals who are the targets of any ongoing ICE criminal investigations. Furthermore, you are not authorized to testify about any law enforcement techniques that are not generally known to the public (to include, but not limited to investigations or investigative techniques, policy, or procedure) or anything else that would reveal the same. Lastly, you are not authorized to testify about any confidential ICE information. With respect to any and all of these restrictions, the agency is prepared to assert a law enforcement privilege.

If you are questioned beyond the scope of this letter of authorization, please respectfully decline to respond, citing the limitations of your authority to testify. You may also ask to confer with an ICE attorney".

321. While the deadline specified in the letter of 15 November 2019 was not met for reasons which it is unnecessary to rehearse in detail, on 27 May 2020, it was ultimately communicated to OPLA on behalf of the respondent that:

> "*The prosecution will advocate on behalf of the Agents in respect of any privilege asserted by them on foot of the letters and will do all in its power to ensure compliance with the conditions set out and will seek to prevent any attempt to compel answers outside the scope of the letters*".

322. This response is said to represent the "*agreement*" referenced in ground 26.

323. As we have previously alluded to in addressing grounds 1 and 1A, the trial judge had given a detailed ruling on 26 May 2020 in response to a defence application that he should, *inter alia*, examine the effects of the Letters of Scope on future witnesses to be called in the trial. It should be stated that this was before the respondent had formally replied to OPLA. In the course of that ruling, the trial judge stated:

> "*The understanding of the Court from early in the trial was that Agent Katzke was not a witness in the book of evidence and the prosecution either did not wish to call him or had reserved their position, they were quite prepared to take steps to procure his attendance and tender him as a witness for the defence to crossexamine. The defence never wanted to call him a defence witness. Agent Wade is a witness in the book of evidence. The prosecution have stated that the prosecution only intended to call her to give formal evidence. The defence have a different view. They consider that she has relevant evidence to give in crossexamination in relation to events surrounding the administrative arrest of Mr Flynn, Mr McGeary and Mr Cahill. Her evidence is the subject of a mutual legal request in respect of video link evidence furnished to the American authorities on the 6th of April 2020.*
>
> *If Agent Katzke gives evidence in accordance with the understanding of the Court, he is a voluntary witness not under subpoena who is coming to court tendered by the prosecution to be crossexamined by the defence. The Court is not certain what the letter of the 15th of November 2019 refers to when it says the Irish authorities. The Court presumes it refers to the DPP rather than the Court or the defence. The Court cannot restrict the defence on any appropriate question they wish to put in crossexamination to the witnesses, subject to any objection by the prosecution. It has long been my practice as a trial judge never to question a witness in a criminal trial unless rarely to clarify any confusion that arises in an answer. If the DPP wishes to comply with the request set forth in the letter of 15th of November to bind the*

DPP, it is a matter for her, not the Court. The Court will consider the consequences of the letters of scope when the situation arises".

324. In written submissions to this Court on behalf of the appellant, the trial judge's said intimation that the trial court would consider the consequences when the postulated situation arose was somewhat disparagingly characterised as "*kicking the can down the road*".

325. Be that as it may, following the trial judge's detailed ruling on 26 May 2020, which covered much more than the issue the subject matter of this ground of appeal, and bearing in mind that at that stage the respondent had not yet replied to the US Department of Justice Criminal Division's letter of 15 November 2019, counsel for the respondent addressed the trial judge in regard to various courses of action which the respondent then proposed to take in light of different aspects of the rulings given, one of which was relevant to this issue. He stated:

> "[…] *the ruling that the Court has made poses a serious difficulty for the prosecution because the prosecution cannot agree to the two conditions which the American authorities require while at the same time abiding by the Court's direction in respect of the disclosure of the redacted part of the 19th of July 2017 email. So, what the prosecution are proposing to do is to write to the US Department of Justice enclosing a copy of your judgment and asking them in the light of that, and for other reasons, to reconsider the decision they made in respect of that and for that reason I want to be able to be as clear as I possibly can about the Court's ruling and in fairness the ruling is very clear. I just want to make sure that I am not overstating or understating anything. And we will also include in that letter the fact that the DPP accepts the conditions in respect of the scope letters and obviously it will be a matter for the Court and the defence down the line if some particular difficulty develops. But it seems to the prosecution that that's the only responsible reasonable good faith approach we can take to the ruling that the Court has made and we will have to await what comes back from that to see where we go next*".

326. The respondent then followed through on this insofar as there was communication of her acceptance of OPLA's conditions in respect of the Letters of Scope in the terms previously indicated.

327. What occurred next in the trial was that commencing on 27 May 2020, and continuing on 28 May 2020, counsel for the appellant raised an issue of concern in relation to how the letter of 15 November 2019 would be replied to. Commenting on that letter, he observed that the extent of the restrictions which were to be placed on the witnesses' testimony were unprecedented in his experience. He submitted that it was not normal, and that the proposed restrictions went way beyond any claim of privilege. He contended that what was being asserted was the imposition of conditions precedent, which, if not satisfied, would result in the witnesses in question not being made available. He referred to his understanding that the repondent was willing to agree to the proposed conditions and queried whether it was appropriate for the her to bind herself in

the form which the American authorities had demanded it. He took the trial judge through the detail of the Letters of Scope. He asked the trial judge to consider his argument that many of the matters that he highlighted in doing so did not fall naturally, or at all, into the category of the assertion of the claim of privilege. He submitted that for a prosecutor, who has special duties and special responsibilities to give the level of comfort which had been demanded, the letter of 15 November 2019 was a huge step involving a number of complexities. He submitted that the respondent had agreed to conditions which no witness had ever attempted, for good reasons, to impose on a party who wanted to call that person as a witness.

328. Counsel for the appellant went on to submit that the respondent had given the US authorities a blanket assurance that, if the defence tried to ask any questions of the type to which it had been indicated there would be objection, the respondent would back the US authorities' position to the hilt, and he suggested that that was simply not permissible. Counsel submitted to the trial judge that if a witness were to say, "*I am not answering that*", that the trial judge would be obliged to respond "*Well it's not as simple as that, you are a witness. You are under oath. You are here to answer all relevant questions and it is a matter for the court as to whether I can direct you to answer the question are not*". At this point the trial judge interjected and remarked to counsel that this was a very unusual submission for him to make in the context of a witness coming voluntarily from a foreign jurisdiction and not under subpoena. The trial judge queried whether the judge could in fact direct such a witness to answer a question. Counsel replied that if the witness had taken an oath to swear the truth, he was obliged to answer with the whole truth and nothing but the truth. Whether or not the trial court had coercive powers was not dependent on whether the witness was present on foot of a subpoena.

329. Counsel further submitted:

> "*If witnesses were allowed to shape our case was going in advance, that compromises the independence of the courts. If a party, like the Director of Public Prosecutions, who is, by necessity, a daily part of the equation in every criminal prosecution that's come to court, is going to allow witnesses to shape what testimony they will and won't give, that compromises the independence of the DPP and no matter what the ultimate aim for it is, they cannot in my respectful submission do things which compromise their independence*".

330. Counsel submitted that by agreeing to the controversial conditions the respondent had acted *ultra vires*, contrary to public policy, and was not legally entitled to do so. Implicit in this was a suggestion that his client's entitlement to a fair trial was being prejudiced and compromised by the fact that the prosecution was being presented at the suit of a prosecutor who was prepared to act *ultra vires*, contrary to public policy, and illegally. The Court was referred to various passages from the respondent's own guidelines to prosecutors which, in counsel's contention, tended to support his argument.

331. It should be stated that at no stage was any explicit application made to the trial court for some action to be taken. For example, there was no request that the jury should be discharged. Rather, the issue appears to have been raised in a nebulous way but clearly in the context of the trial judge's overriding duty to ensure that the accused would receive a fair trial.

332. Counsel for the respondent replied to the effect that the letter of 15 November 2019 was in direct response to an administrative request of the Director, via a request for mutual assistance of 11 October 2019 which was made in the case of the accused. The respondent was in agreement that she could not bind the defence or the trial court. The witnesses had not set the conditions but the witness's employer, a department of a sovereign foreign government, had done so, and it had directed those to the witnesses in the first place. The defence was not restricted in any questions it might wish to put to the witnesses. It was about what the witnesses could answer. The defence wanted the witnesses. The prosecution had responded to the request, made the arrangements, and could not see what other way it could have achieved that. It was submitted that a trial court does not normally have a function in deciding whether a witness is called are not. The acceptance by the respondent of the conditions in the letter was not a guarantee. The issue was theoretical as no witness had yet given evidence and no justiciable issue had arisen. The defence had not opened any law on the issue. Counsel submitted that the trial court's independence was not compromised in any way. It still had to provide the accused with a fair trial, and it had ample powers to do so. The respondent's position was that there was no inducement or coercion of witnesses and that the statements in controversy were made not to HSI agents but to officers of An Garda Síochána.

333. The trial judge addressed the issues that had been raised in a ruling on 2 June 2020. Having set forth the relevant background, he stated:

> "*The accused and Messrs Flynn, McGeary and Cahill were resident in the USA and subject to the immigration laws of that country when they resided there. US law was applicable to those administrative arrests. The court cannot control or interfere with the right of a sovereign foreign government, in respect of actions which occurred on its territory, to direct its employees who have been requested to give evidence in a foreign jurisdiction. Their employer, a sovereign foreign government, is entitled to exercise dominion over them in accordance with the laws of USA.*
>
> *The complexity of this issue is its effect on Irish law and the trial of the accused. The administrative arrests and post arrest interviews occurred in close time proximity stop the issue is what, if anything, operated in the minds of the witnesses when they gave accounts of the accused's conversations, if any, with them. There is conflict between the prosecution and the defence on this issue. There are different issues with each witness. Mr McGeary was deported but was still prepared to give a statement. There is a warrant issued by this court for his arrest. Mr Flynn has been intimidated. The court does not know if either Mr McGeary or Mr Flynn will give evidence. Mr Cowell gave a statement at a much later date in July 2019. The*

prosecution alleges his arrest was indifferent circumstances. The defence dispute that.

The defence is not restricted on any questions it may wish to put to the witnesses. This has already been stated in paragraph 28 of the ruling of 26th of May. The jury are entitled to consider the effects of the letters of scope and any qualification of answers to questions or refusal to answer questions and also any impact it may have on the witnesses who were affected, Messrs Flynn, McGeary and Cahill. The DPP has not compromised its independence or acted illegally, ultra vires or contrary to public policy by agreeing to be bound by the letters of scope. The DPP has not disadvantage the defence by agreeing to these conditions. The DPP has limited herself as to the questions that can be put, if any. There is nothing illegal about the intention of the DPP to put forward arguments to the court on behalf of a sovereign foreign government who cooperated with an investigation of crime committed in Ireland where a suspect was living in that foreign country and where evidence in respect of that crime was gathered. The impact of the letters of scope is in issue the court will have to deal with. The court has already stayed in his ruling of 26 May that it will deal with the consequences. It cannot deal with those consequences until that situation arises".

Submissions of the Parties

334. In both written and oral arguments made to the Court of Appeal, counsel for the appellant reiterates the case made by him to the trial judge that the respondent, in agreeing to the conditions set out by the American authorities, compromised her independence and acted illegally, *ultra vires*, and contrary to public policy. The respondent again, in replying submissions, contested that that is not so.

Discussion and Determination

335. We find no error in the approach adopted by the trial judge. It is correct to say that the trial court could not control or interfere with the right of a sovereign foreign government, in respect of actions which occurred in its territory, to give directions to its employees who had been requested to give evidence in a foreign jurisdiction as to what they may or may not address in their testimony. As the trial judge pointed out, their employer, as a sovereign foreign government, was entitled to exercise dominion over them in accordance with the laws of the USA.

336. We are satisfied that the respondent had not given any guarantee. All that she said was that she would do all in her power to ensure compliance with the conditions set out and that she would seek to prevent any attempt to compel answers outside the scope of the letters. At the end of the day, neither the appellant nor the trial court were bound by the respondent's commitment. The appellant's counsel were not restricted in any questions they might wish to put to a witness. If a witness was asked a question but was not inclined to answer, then applications of one sort or another might arise on either side of the case and would require to be determined by the trial

court. However, the trial court's independence was not compromised. The trial court quite correctly refused in its ruling to decide a moot issue. It said that it was not prepared to deal with any consequences or impact arising from the Letters of Scope until the situation had arisen.

337. There seems to us to have been a proper exercise of discretion on the part of the trial judge and we have been provided with no basis on which we would be justified in intervening on that account.

338. In the circumstances, we reject and dismiss ground 26.

Ground 7 – That the trial judge erred in rejecting the defence's application that the deportation to Ireland of Aaron Brady was a *de facto* extradition consequent to which the Appellant was denied certain protections as a matter of law and rendered his trial unfair.

Background

339. The evidence was that the appellant was a dual citizen of Northern Ireland and the Republic of Ireland. He had travelled to the US on a valid British passport. He had previously held an Irish passport. He contended under cross-examination that he had lost his Irish passport, and that having lost it, he had applied for a British passport. He accepted in evidence that he had travelled to the US on a 90-day visa, and he had overstayed following the expiry of that visa.

340. Before he left for the US, the appellant had been charged on indictment in Ireland with offences of criminal damage and the unauthorised use of a mechanically propelled vehicle in the context of an incident which had occurred in October 2011. He pleaded guilty before Dundalk Circuit Criminal Court to those matters and was remanded for sentencing to 23 April 2013. However, in advance of that date he travelled to the US and failed to turn up for his sentencing. This led to a bench warrant being issued for his arrest.

341. The appellant was on his way to work in New York on 18 May 2017 when he was intercepted by HSI agents and subjected to an administrative arrest for suspected visa overstay. He was questioned, in the course of which he was asked to produce his passport and he said that it was at his residence. He was escorted back to his home where Special Agent Wade took possession of the passport from the appellant's wife, who handed it over at the door. He was then taken in custody to a building in downtown Manhattan accompanied by a number of HSI agents, and on arrival there he was placed in a holding cell for a short period. He was then brought to an interview room where he was questioned by several Special Agents. Special Agent Katzke asked him about the murder of Detective Garda Donohoe and the proceedings were recorded on a camcorder. Following the interview, he was transferred to Hudson County Detention Centre. Having been detained there for some days he was put on a prison bus and brought to a building at Varick Street in Manhattan. He was processed there and informed that he was going to Ireland (that, in effect, he was being deported), and he signed a form there stating that he would not cause any trouble on the plane. The respondent maintained that in his dealings with HSI he had

agreed to be removed to his country of nationality, citizenship, or last residence, and had also confirmed that he was a dual citizen of the United Kingdom and of Ireland. In evidence given by him at the trial during a *voir dire*, the appellant stated that he only became aware for the first time that he was being deported to Ireland following his arrival in Varick Street. Further, he stated that while in Varick Street he had expressed a preference for being deported to the United Kingdom.

342. It emerged in disclosure that in the interval between his administrative arrest on 18 May and being brought from Hudson County Detention Centre to Varick Street some days later, the following correspondence was exchanged between members of An Garda Síochána and the Irish Consulate in New York. On 18 May Detective Garda James Doherty, acting on the instructions of Senior Investigating Officer Detective Inspector Marry, wrote to a Shane Cahill, an official at the Irish consulate in New York, in these terms:

> "*Shane, in relation to a request from the United States authorities regarding the repatriation of Aaron Brady to the Republic of Ireland, please find attached a copy of Aaron Brady's passport. There are a number of arrest warrants in existence here in Ireland for the arrest of Aaron Brady. These arrest warrants will be executed upon Aaron Brady's arrival in this jurisdiction. Gardaí are anxious to have these matters dealt with. Should you require any further information I can be contacted on the mobile number below*".

343. Shane Cahill replied to him by email as follows:

> "*Detective Garda Doherty, many thanks for this. We will turn around an emergency travel certificate on the back of this request. Can you advise who we will hand it over to? It can be ready for collection tomorrow morning. Are you at liberty to advise where Mr Brady is being detained? Best regards, Shane*".

344. Under cross-examination at the trial, Detective Garda Doherty agreed that the document in question was "*basically a temporary one journey passport that the consulate had authorised to issue*". He further accepted that the purpose of getting that document was to ensure that the appellant's return was to Ireland.

345. The appellant was taken from Varick Street to an airport where his mobile phone, passport and wallet were returned to him. He was then put on board an aeroplane bound for Dublin escorted by HSI agents. On his arrival in Dublin, he was arrested by members of An Garda Síochána in execution of the bench warrant that had been issued by Dundalk Circuit Criminal Court.

346. Counsel for the appellant argued before the court below, and has reiterated the same arguments before this Court, that the purported deportation of the appellant to Dublin was nothing more than a subterfuge to avoid having to extradite him from the United Kingdom to Ireland, a course of action which the Irish authorities would have had to pursue had the appellant been returned to the United Kingdom. If he had been returned to Ireland from the United Kingdom on foot of

a European arrest warrant to face sentencing for the criminal damage and unauthorised use offences to which he had pleaded guilty at Dundalk Circuit Court, it is said that he could have availed of the rule of specialty to resist being later prosecuted for the murder of Detective Garda Donohoe. The same would have been true if the State had sought his extradition directly from the UK, on foot of the Ireland/USA Extradition Treaty, in respect of the criminal damage and unauthorised use offences. While it was true that in both scenarios the consent of the requested state to the further prosecution of the appellant could have been sought, and might well have been given, the appellant had lost out on important judicial oversight and protections. It was emphasised by counsel for the appellant that between 2013 and 2017 no steps had been taken by the Irish State to have the appellant extradited for the criminal damage and unauthorised use offences. It was suggested that his purported deportation was a *de facto* extradition but one in which the Irish authorities were in no way bound by the rule of specialty or other restrictions arising either in the context of traditional extradition under the Ireland/USA Extradition Treaty or rendition under the European arrest warrant system. It was suggested that the appellant's fair trial rights had been undermined by the manner of his deportation. The procurement of the travel documents steered his deportation in a particular way, and this had worked to the appellant's disadvantage.

347. The trial court was asked to take (unspecified) action to ensure vindication of the accused's fair trial rights.

348. Responding to this, counsel for the respondent argued before the court below, and also reiterated to this Court, that this complaint is without foundation. He submitted that the appellant had not been extradited; rather, that he had been lawfully deported from the US and that if he had wished to challenge that deportation the place to do so was in the US. The gardaí had acted lawfully and properly in bringing the appellant before the Circuit Court to deal with the matter in respect of which a bench warrant had previously been issued. There was no right to be extradited, which was effectively what the appellant was claiming. Counsel submitted that no nexus had been established between the deportation and the appellant's subsequent arrest for the murder of Detective Garda Donohoe after he had completed his sentence on the Circuit Court matter. Any inhibition on questioning the appellant when he returned to this jurisdiction would only have operated if he had been extradited with respect to the offences connected with the Lordship Credit Union robbery and murder. However, at the time at which the appellant was deported, the respondent had not issued any direction with respect to charges arising from that robbery and the murder of Detective Garda Donohoe.

The Trial Judge's Ruling

349. The trial judge ruled on this aspect of the case on 30 April 2020, stating:

> "*The defence have submitted that the accused's fair trial rights have been undermined by the manner of the accused's deportation from the United States of America on the 23rd/24th of May 2017 and rely in particular on section 39 of the Extradition Act 1965 as amended, the rule of speciality as applied by the State. The*

facts are not in dispute, except one matter, where Mr Brady firstly stated that he had agreed to be deported back to Dublin but he then stated in evidence that he had objected and sought to be deported to the UK. For the purpose of this ruling, it does not cause a problem and the Court will accept that he made representations to be deported to the United Kingdom.

The accused was charged with offences in relation to a matter which occurred on the 2nd of October 2011 in Dundalk. It was a serious matter and the accused was returned for trial to Dundalk Circuit Court. He pleaded guilty to a number of offences on the 12th of October 2012 and was remanded on bail on various dates. On the 23rd of April 2013 he failed to appear and warrants were issued for his arrest from both the circuit and district courts. When returned for trial, summary matters were still in the district court, thus the reason for two warrants. The accused has accepted that he breached his bail and travelled to the United States of America. He accepted that he had travelled to the USA on a 90 day visa which expired on the 11th of July 2013. He was detained pursuant to immigration violation in New York on the 18th of May 2017 and signed a form where he wasn't contesting his removal from the United States of America. The form stated, "I wish to be removed from the United States to my country of nationality, citizenship or last residence." The accused had applied for and used an Irish passport which had expired. He had applied for a British passport and travelled to the USA on that passport.

The accused in February 2013 had become a suspect in respect of the charges before this court. The Garda Síochána, from 2015 onwards, had sought assistance from various police forces and agencies in the USA as three suspects, including the accused, were living in the USA.The Garda Síochána were aware of the accused's detention in the USA and of his impending deportation. They sought his removal to the Republic of Ireland and made arrangements with the Irish Consulate in New York to have a once off travel document which would facilitate the accused being deported to Dublin. On his return to Dublin he was arrested at Dublin airport on the 24th of May 2017 and brought to court in Dundalk. He was remanded in custody and ultimately was sentenced in respect of those crimes that he had pleaded guilty to. The accused accepted during his evidence that in the course of the finalisation of the matters for which warrants were issued in Dundalk, he had not raised any issue about the legality of his deportation back to Ireland as distinct from the UK.

From other evidence before this court, it is obvious that the investigation into the offences, the subject of this trial, had not concluded. As of the 24th of May 2017 extensive investigations were still continuing. On his release from prison on the 25th of February 2018, the accused was arrested pursuant to section 50 of the Criminal Justice Act 2007, detained and charged with these offences on the 4th of March 2018 and ultimately returned for trial to the Central Criminal Court.

No application was ever made for the accused's extradition from the USA during his period there from April 2013 to May 2017. No issue arises as his deportation. He was obviously arrested on foot of a valid bench warrant for his nonappearance to answer his bail on the 23rd of April 2017 The only issue is the decision of An Garda Síochána to seek that he be deported to Ireland. The decision as to which jurisdiction he was deported to was a matter for the US authorities. From the documentation examined, the Department of Homeland Security cited that he was a resident of the UK and a citizen of both the United Kingdom and Ireland. That is borne out by the accused as he accepted that he had both Irish and British passports. The Garda Síochána, on deportation, had a duty to execute the bench warrants. If the deportation had been to the United Kingdom, they would have had to seek to apply for a European arrest warrant and seek to enforce that in the UK and seek his removal back to Ireland to be dealt with by Dundalk Circuit Court. This was a more complex procedure. It was logical that the Garda Síochána would seek his removal to Ireland for the purposes of execution of the warrants. There was no subterfuge. There was no charge ready to be preferred against him on his return on these allegations before this court. Therefore, section 39 of the Extradition Act has no application. The accused's arrests and charge on these matters before this court are not in any way affected by the manner of his deportation or the fact that the Garda Síochána sought his deportation to this jurisdiction".

Discussion and Determination

350. We agree with counsel for the respondent's submission that this ground of appeal is entirely without foundation and that the trial judge's ruling in that regard is unassailable. He was entitled to find on the evidence that there was no subterfuge. The appellant was not a citizen of the US and he had overstayed his 90-day visa. *Prima facie* therefore, the US authorities were entitled to deport him. The trial judge was further entitled to find that, in circumstances where the appellant was a citizen of both the United Kingdom and of Ireland, it was a matter for the US authorities as to which jurisdiction he would be deported to. There was nothing improper or unreasonable about the Irish authorities making known their preference that he should be returned back to Ireland. There was no extradition request and as such no extradition; and that being so, the rule of specialty has no application in the circumstances of the case.

351. In the circumstances we must dismiss ground 7.

Ground 15 – That the trial court erred in permitting the respondent to lead evidence of Molly Staunton and Daniel Cahill, via a video link in the USA pursuant to s. 16 of the Criminal Evidence Act 1992, s. 29 of the Criminal Evidence Act, and or s. 67 of the Criminal Justice (Mutual Assistance Provisions) Act 2008.

352. In this ground of appeal the appellant complains that the trial judge erred in permitting the respondent to lead evidence of Molly Staunton and Daniel Cahill, via video link in the US pursuant to ss. 13 and 29 of the 1992 Act, or s. 67 of the Criminal Justice (Mutual Assistance) Act 2008 ("the 2008 Act").

353. At the outset in addressing this ground of appeal, an important point needs to be made, and it is this: although ground 15 references s. 67 of the 2008 Act, and although the permission given by the trial court would have permitted that provision to be used by the prosecution, it was ultimately not used in respect of the evidence of Molly Staunton and Daniel Cahill. Accordingly, insofar as the complaint made in ground 15 has any continuing potential relevance, it only has such relevance insofar as there was reliance by the prosecution, pursuant to the ruling complained of, on the relevant provisions of the 1992 Act.

Background

354. The appellant's trial took place in the throes of the Covid-19 pandemic. Central to the prosecution's case was their intention, initially at any rate, to adduce evidence from a number of witnesses based in the US. As the Covid-19 pandemic progressed, and as restrictions on travel and social interaction increased, it became apparent that there would be very significant difficulties in securing in-person testimony in the physical courtroom in Ireland from the potential witnesses in question. In those circumstances, it was necessary for the prosecution to contemplate alternative means of securing the testimony of those witnesses and in particular to explore the possibility of securing leave to have them testify by video link from the US.

355. The issue was first raised by counsel for the respondent on 20 March 2020, on which date he flagged to the trial court and to his opponent that he intended on making an application to adduce the evidence of the proposed American witnesses by way of video link. He indicated that he would talk to his opponent to see if some level of agreement could be achieved and if the list of witnesses could be narrowed. counsel for the appellant indicated that it was unlikely that the defence would be able to furnish any level of agreement, and that, on the contrary, it was likely that any such application would be opposed by them. There was no mention on 20 March 2020 of the precise mechanism then in contemplation by the prosecution, beyond an oblique reference by counsel for the respondent to his belief that a MLAT request would be required.

356. In the event, the respondent issued a Notice of Motion, seeking (i) an order under s. 13(1) (later amended by leave of the trial judge to include "*or s. 29*") of the 1992 Act permitting six named witnesses, including Molly Staunton and Daniel Cahill, to give evidence in the proceedings by live video link; and (ii) an order pursuant to s. 67(2) of the 2008 Act issuing a letter of request to the relevant authorities in the US requesting the provision of facilities in the US to enable the said six named witnesses to give evidence in the proceedings through a live video link. The application was grounded upon the affidavit of a Senior Prosecutor in the Office of the Director of Public Prosecutions, the specifics of which it is unnecessary to review.

357. The motion was heard on 31 March 2020, 2 April 2020, and 3 April 2020; and the trial judge gave his ruling on 6 April 2020.

Relevant Law

358. Section 13(1) of the 1992 Act (which appears in Part III of the Act, entitled "*Evidence in Certain Proceedings*") provides:

> "*13.—(1) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act, 1967) for a relevant offence a person other than the accused may give evidence, whether from within or outside the State, through a live television link—*
>
> *(a) if the person is under 18 years of age, unless the court sees good reason to the contrary,*
>
> *(b) in any other case, with the leave of the court*".

359. The expression "*a relevant offence*" is defined in s. 12 of the 1992 Act (which also appears in Part III of the Act). The definition provided, in the form in which the section was enacted at the time of the trial, states that it includes:

> "*(a) a sexual offence;*
>
> *(b) an offence involving violence or the threat of violence to a person;*
>
> *(c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998;*
>
> *(d) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008;*
>
> *(da) an offence under section 33, 38 or 39 of the Domestic Violence Act 2018;*
>
> *(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c), (d), or (da)*".

360. Section 29 of the 1992 Act (which appears in Part V of the Act, entitled "*Miscellaneous*"), in the form in which it was enacted at the time of the trial, and to the extent relevant, provided:

> "*29.—(1) Without prejudice to section 13(1)* […]*, in any criminal proceedings* […]*, a person other than the accused* […] *may, with the leave of the court, give evidence through a live television link.*
>
> *(2) Evidence given under subsection (1) shall be videorecorded.*
>
> *(3) Any person who while giving evidence pursuant to subsection (1) makes a statement material in the proceedings which he knows to be false or does not believe to be true shall, whatever his nationality, be guilty of perjury.*

(4) Proceedings for an offence under subsection (3) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State".

361. Section 67 of the 2008 Act (which appears in Part 5 (entitled "*Provision of Evidence*"), and Chapter 2 of that Act (grouped with ss. 68, 69 and 70, under the heading "*Evidence through Television Link*")), provides:

> "*67.— (1) This section applies where—*
>
> *(a) criminal proceedings have been instituted in the State against a person,*
>
> *(b) a witness in the proceedings is in a designated state, and*
>
> *(c) it is not desirable or practicable for the witness to give evidence in person.*
>
> *(2)Where this section applies, an application may be made by or on behalf of the Director of Public Prosecutions or the accused to a judge of the court of trial at a sitting of the court to issue a letter (a "letter of request") requesting the provision of facilities in the designated state concerned to enable the witness to give evidence in the proceedings through a live television link.*
>
> *(3) The judge may grant the application if satisfied that it is not desirable or practicable for the witness to give evidence in person.*
>
> *(4) The letter of request shall be accompanied by a document signed by the judge and stating—*
>
> *(a) the name, address and, if known, the nationality of the witness,*
>
> *(b) the court which is to hear the evidence,*
>
> *(c) the name of the judge conducting the hearing,*
>
> *(d) why it is not desirable or practicable for the witness to give evidence in person, and*
>
> *(e) the likely date of the hearing.*
>
> *(5)The request shall be sent to the Central Authority for transmission—*
>
> *(a) in urgent cases, to the court or tribunal specified in the request, or*
>
> *(b) in any other case, to any authority recognised by the state concerned as the appropriate authority for receiving such requests.*
>
> *(6) If the name of the judge conducting the hearing is not available at the time the letter of request is issued, it shall be sent to the Central Authority for such transmission as soon as it becomes available.*

(7) The accused shall be given an opportunity to cross-examine and re-examine the witness at the hearing.

(8) Evidence given through the live television link at the hearing shall be videorecorded.

(9) The videorecording of the evidence or, if the accused consents, an edited version of it, is admissible at the trial of the offence as evidence of any fact of which direct oral evidence would be admissible, unless the trial judge is of the opinion that to do so would not be in the interests of justice.

(10) The provisions of the relevant international instrument concerning a hearing through a live television link, in so far as they relate to a requesting state and are not incorporated in this section, have effect in the State, with the necessary modifications, in relation to a hearing under this section.

(11) A witness who makes a statement which is material in the proceedings and which he or she knows to be false or does not believe to be true is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both, or

(b) on conviction on indictment, to a fine not exceeding €10,000 or imprisonment for a term not exceeding 5 years or both.

(12) Proceedings for an offence under subsection (11) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State.

(13) In this section "videorecording" means any recording, on any medium, from which a moving image may be produced and includes the accompanying soundtrack, and cognate words shall be construed accordingly".

The Arguments at Trial

362. In opening his application to the Court, counsel for the respondent stated:

> "[…] *it's quite clear I would submit that the two issues are separate in the sense of one can get leave for a witness to give evidence by live television link under section 13 and that can be done in any manner of means in terms of there not being a need for necessarily a formal methodology put in place for how that actually happens in practice but the reason we have sought an order under (2)* [in the] *Notice of Motion is that in practical terms in order to utilize the appropriate facilities in the*

USA we need the assistance of the US authorities and that is provided for under the relevant section of the Criminal Justice (Mutual Assistance) Act of 2008".

363. The scheme of the 2008 Act was then opened in considerable detail to the trial judge, with the trial judge enquiring whether the facilitation envisaged would be under the supervision of a judge in the requested country and he was told that it would be. counsel for the respondent then again reiterated:

> "[…] *As I say we are looking for an order under section 13 but separate to that, in order to give efficacy to that order and to enable the proceedings to be properly conducted, we are requesting an order under section 67*".

364. At this point a draft letter of request, prepared by the prosecution, was submitted to the trial court and the trial court was taken through it, and the trial court was informed that, subject to the application and request being granted, it was hoped to take the witnesses' evidence remotely on 5 May 2020.

365. Counsel for the appellant replied at some length on 2 and 3 April 2020. The essence of his argument insofar as s. 13 of the 1992 Act was concerned is captured in the following passage from his submission to the Court on 3 April 2020:

> "[…] *could I very, very briefly reprise section 13 and our case with respect to section 13 so that you will be in a better position to understand our submission with respect to section 29. Obviously, Judge, the introduction of the video link was what I would call a dilution of the existing situation which demanded the witness appear in person and it was in my respectful submission a very carefully considered measure and before they were going to allow video links there were a number of gateway points that had to be negotiated. The first of those was that it was to be confined to particular offences, essentially sexual offences and offences involving violence. The rules were to be relaxed, the existing rules that is, with respect to these categories of offences. The relaxation was to permit the witness to give evidence through a video link and the act actually went as far as thinking about and providing for, in a case, that that video link would be either in the State or outside the State because section 13 expressly provides for both and when it comes down to it, as I say, it seems to me that the battle ground between the two parties is whether 13 (1) (b) means that if you qualify under -- if the offence is a qualifying offence, the State say if it's an adult you can have a video link effectively for any valid reason, whereas the accused says no, the reasoning is that the entire structure of the act and its provenance and so forth indicates it's to protect vulnerable witnesses and for under 18, 17 when enacted, that was presumptive but rebuttable and for over 18 there was an onus to explain why the video link facility should be allowed and that is the battle ground*".

366. Counsel for the appellant advanced an argument with respect to s. 29 of the 1992 Act, and s. 67 of the 2008 Act, that was in both instances broadly similar. His contention was that where the Oireachtas has enacted a special provision in legislation dealing with something, and there is then later legislation of more general application, the special provision remains in place unless there is an express provision in the later legislation spelling out that the earlier special provision was being abolished. His argument was that the Oireachtas in enacting s. 13 of the 1992 Act had enacted a special provision, providing for an exception to the then existing rule which demanded that a witness give their evidence in person in a physical courtroom, that was applicable only in respect of certain categories of offences. It was a special provision targeted at certain vulnerable witnesses. He submitted that s. 29 of the 1992 Act, which appears later in the scheme of the 1992 Act, is of wider and more general application, and that was also true in the case of s. 67 of the 2008 Act. Counsel for the appellant's argument was that as neither s. 29 of the 1992 Act nor s. 67 of the 2008 Act contain an express assertion that the special provision provided for in s. 13 was being abolished, the trial judge had to proceed on the basis that it remained the Oireachtas's intention that any dilution of the long-standing requirement that a witness should give their evidence in person in the physical courtroom where the trial was being conducted should be confined to those who qualified as members of the vulnerable class at which the legislation was being targeted. The later provisions should be given a purposive interpretation that reflected that understanding and they should not be interpreted as having granted, on an unrestricted basis, the much wider discretion being contended for by the prosecution. He suggested that if the trial court were to do otherwise it would be expanding its power and adopting a legislative role.

367. In support of his argument, and arguing by analogy, counsel for the appellant relied heavily on a decision of the Supreme Court in *Hutch v. Governor of Wheatfield Prison* (Unreported, Supreme Court, Finlay C.J., 17 November 1992). He concluded on this issue by submitting to the trial judge that:

> "*So, you do have a degree of latitude but in my respectful submission it is latitude that is on a tight rope and it's latitude that has to be exercised very sparingly*".

368. Counsel for the appellant further argued that the application should be refused on fair procedures grounds.

369. Finally, it was argued that the circumstances being advanced as necessitating the taking of evidence by remote link were temporary, and there were grounds for optimism that the restrictions that were in place would be relaxed before long.

370. In rejoinder, counsel for the respondent disputed that the relevant legislation required to be interpreted as counsel for the appellant had submitted. The point was made, *inter alia*, that s. 13(1)(b) of the 1992 Act extended the facility of video link in a trial for a violent or sexual offence to any witness with the leave of the court. The prosecution of the appellant for the murder of Detective Garda Donohoe was undoubtedly a trial for a violent offence. Section 29 of the 1992

Act specifically referenced giving evidence outside of the jurisdiction only, whereas s. 13 of the same Act covered a witness giving evidence both from within the jurisdiction and out of the jurisdiction. He submitted that:

> "*in my submission, provided the criteria are satisfied under section 13 (1), it doesn't matter whether you rely on that section or indeed section 29, albeit that section 29 specifically references only giving evidence outside the jurisdiction, whereas section 13 covers either situation, giving evidence from within or outside the jurisdiction*".

371. Counsel for the respondent further refuted in express terms any suggestion that, in adopting the interpretation of the legislation contended for by them, the trial court would be somehow expanding its power or playing a legislative role. He also addressed his opponent's argument with respect to s. 67 of the 2008 Act, but in circumstances where that provision was not ultimately availed of it is not necessary to review those submissions for the purposes of this judgment. Counsel for the respondent also argued that counsel for the appellant had failed to demonstrate in any concrete way how his client would be subject to an unfairness or how his rights would be prejudiced if the application were to be granted. He emphasised that while it was true that no guidance was given in ss. 13 or 29 of the 1992 Act concerning how the trial judge should exercise its discretion, the legislature had been content to leave it to the trial judge as to how best to exercise his or her discretion in the circumstances of a particular case, in recognition of the fact that every trial judge is under an obligation to have regard to an accused's right to a fair trial. In that context he referenced supporting dicta of Hamilton C.J. in *Donnelly v. Ireland* [1998] 1 I.R. 321, and of O'Neill J. in *D.O'D. v. DPP* [2010] 2 I.R. 605, and a discussion of both in the context of the giving of evidence by live video link in Declan McGrath, *Evidence (*2nd edn, Round Hall 2014) at paras 3-209 – 3.212.

The Trial Judge's Ruling

372. Delivering a 22-page ruling, following reservation of his decision over a weekend, the trial judge commenced by setting forth his appreciation that there were two distinct issues before the court which he identified as being: (i) the jurisdiction of the trial court to grant the order(s) sought, and (ii) if the trial court has jurisdiction, what criteria the trial court applies in the exercise of his discretion pursuant to those criteria.

373. He proceeded then to consider the first issue he had identified. He set forth at length his understanding of the relevant rules of statutory interpretation (which we regard as correct), before then proceeding to consider the actual legislative provisions in controversy. Having done so he stated:

> "*Now, sections 13 and 29 of the 1992 Act, and section 16 of the 2008 Act, are not obscure or ambiguous. They can be easily read and understood by confining one's self to reading each section. Now, I do qualify in my comments in relation to section 29 in the light of the amendment but they are not in conflict with each other and can be read harmoniously. The Court has jurisdiction, either pursuant to section 31*

or 29 of the 1992 Act, to grant the orders sought and give effect to that by an order pursuant to section 67 of the 2008 Act".

374. The trial judge then went on to consider what criteria he ought to apply in exercising his discretion. The trial judge then proceeded to rehearse in précis the submissions that had been made to him by counsel on both sides. He then stated:

> "*First of all it is clear from both submissions that the fair trial rights of Mr Brady have to be respected and obviously the right to a fair trial is regarded as a superior right in Irish constitutional law. The second issue, and this came from Mr O'Higgins' submission, that there should be an objective assessment as to whether granting the application would enhance the prosecution situation and effectively reduce the defence's position to an extent that it effects the fair trial rights of the accused person. I have no difficulty incorporating that test into looking at the situation. The Court, in the final analysis, must conduct a balancing test. The submission of Mr O'Higgins that even if there's a theoretical possibility or a possibility that there's a fair trial issue is not actually the law on the issue but clearly the fair trial rights of the accused has to be uppermost in the mind of the Court when it deals with the issue. Again the Court has no difficulty in the submission of Mr O'Higgins that this is not a matter where the Court should remain inflexible and just apply Donnelly and that's it, that the Court has to give careful consideration to the circumstances of each case, analyse it in detail and come to a conclusion accordingly and I have absolutely no difficulty with that and in fact Mr Grehan echoes that when he is saying that the act doesn't set out any criteria but the Court --it is up to the Court itself to determine the issue having considered carefully all the issues which are involved*".

375. The trial judge said that he would consider whether the prosecution case would be enhanced, and the defence case hampered, if the trial court took the view that it was appropriate to grant the order. In making that assessment, the trial judge said that he would consider relevant aspects of the evidence but only for the purposes of ruling on the issue. He accepted in looking at the evidence to be given by the American witnesses that their testimony would potentially have significant implications both from the perspective of the prosecution and from that of the defence.

376. The trial judge indicated that he would not simply consider the fairness of a video link facility in isolation, but that he would look at that also in the context of the overall fairness of the trial. In that context, he considered various contentions proffered by the defence as to where potential unfairness might arise, quite apart from the narrower video link issue, and in particular a contention that, in the context of controversies over disclosure, that the defence had been forced by the trial court to effectively disclose their defence. The trial judge rejected that contention.

377. The trial judge then turned to consider the proposed evidence of the American witnesses. Addressing the situation of Molly Staunton, he said:

"*In respect of Molly Staunton, she made a statement on the 29th of August of 2017 to guards Padraig O'Reilly and Paul Gill and on the 1st of September 17 to Garda O'Reilly and Garda James Doherty. She is a US citizen who parents are Irish heritage and she was raised in the Bronx. She alleged that she met Thomas McGeary in January 2015 and there was answer* (sic) *counter in June/July 2015. There are certain internal conflicts on dates in the witness's evidence. She said that the once off encounter that she alleges that she had with Mr Brady which is of relevance to the prosecution in the evidence they wish to adduce occurred at 28 1st Street Yonkers and that it was a once off contact*".

378. In relation to Daniel Cahill, he stated:

"*Mr Daniel Cahill gave a statement on the 25th of July 2019. It was taken by Garda Padraig O'Reilly and Paul Gill and another one on the 29th of July 2019 by Detective Garda Jim McGovern and Paul Gill. Mr Cahill said that he was a barman in the Coachman's bar in Woodlawn in New York commencing in December 2013 and he met Mr Brady there with another friend, Mr Lennihan. He has encountered in his evidence two specific encounters. An encounter with Mr Brady in the context of a physical fight between Mr this is alleged between Mr Brady and Mr Farrell and then a few weeks later speaking to him in the early hours of the morning in the licensed premises and he put this time as the summertime of 2014*".

379. Having considered the position of these two witnesses, and other witnesses who were still potentially relevant at that stage, the trial judge observed:

"*the fundamental issue, and this has arisen in relation to the issue which is advanced by the defence, and they are quite entitled to do that, but from an objective prosecutor's point of view, he is looking at a situation where seven witnesses, including two who he is not seeking to bring on video link, over certain periods of time are alleging a certain pattern of behaviour. Some of those witnesses certainly there are issues in relation to inducement which the prosecution would have to deal with, particularly Mr Flynn and Mr Cahill who were arrested and Mr McGeary who was arrested but who was deported, but, it is only my assessment, that the prosecution would be keen to have those witnesses appear in person because it is significant evidence and it doesn't hold exactly to the pattern which the defence are alleging in relation to this matter or which they want to allege that there was some form of conspiracy between An Garda Síochána and particularly the role of Mr Katzke in relation to a particular agenda as to how these witnesses were approached and how their evidence was taken. So, the Court doesn't necessarily hold the view of Mr O'Higgins that the position of the prosecution is greatly enhanced or enhanced by the position of having these witnesses on video link as distinct from the defence being disadvantaged*".

380. The trial judge then went on to consider the implications of the Supreme Court's ruling in *Donnelly v. Ireland*, in which that court had held, *inter alia*, that the right of an accused to a fair trial did not include in all circumstances the right to physical confrontation of his accuser, and that consequently there was no such constitutional right. He considered the *Donnelly* case as reported in the Irish Reports in some detail, noting that Hamilton C.J. had said at p. 357 thereof that:

> "*The accused person's right to a fair trial is further protected by the fact that it is open to the court not to permit the giving of evidence by a young person through a live television link if the accused person establishes that 'there is good reason to the contrary' and that the leave of the court is required before any other person may give evidence in this manner. A judge considering either of these issues will be obliged to have regard to the accused person's right to a fair trial*".

381. The trial judge further referenced the following passage from the judgment of O'Neill J. in *D.O'D. v. DPP*, where he had stated at p. 612 of the report:

> "***[22]*** *Where the court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case, if evidence had to be given in the normal way, viva voce, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind. The fact that the giving of evidence viva voce would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors. In all cases of this nature the giving of evidence by the alleged victim will be very unpleasant and having to come to court is invariably difficult and inconvenient for most persons. Most witnesses have vital commitments which have to be adjusted to allow them to come to court. The real question is whether the circumstances of the witness are such that the requirement to give evidence viva voce is an insuperable obstacle to giving evidence in a manner that does justice to the prosecution case. The evidence must establish to the satisfaction of the court hearing the application under s 13 of the Act of 1992 that the probability is that the witness in question will be deterred from giving evidence at all or will, in all probability, be unable to do justice to their evidence if required to give it viva voce in the ordinary way. This is necessarily a high threshold, but I am satisfied that in order to strike a fair balance between the right of the accused person to a fair trial and the right of the public to prosecute offences of this kind, it must be so*".

382. The trial judge then considered the position of the individual proposed witnesses. With regard to Molly Staunton he noted that her contact with the appellant was said to have been a once-off contact in a context which was easily identified from the prosecution perspective. He accepted that the defence would want to analyse in some detail, whether that was in fact so. He continued:

> "*In respect of the particular issues in relation to any inducement offered to the witness, the Court objectively takes a view that it couldn't apply in relation to* […] *Ms Staunton's case, I could be wrong, but from this perspective that would be the view of the Court*".

383. He observed that issues relating to residency, or in relation to arrest in America did not arise in Molly Staunton's case, but that they did arise insofar as Daniel Cahill was concerned.

384. The trial judge further stated:

> "*Now, the Court is of the view that both in relation to crossexamination in relation to the contact that Mr Brady had with them and the issue in relation to whether these witnesses have an agenda in relation to inducement, I cannot see any particular difficulty in relation to the crossexamination of those witnesses by video link, other than what I would call the ethereal issue of the ability of senior counsel in the physical setting of the Court to maintain a degree of pressure on a witness but the Court has to be very careful in relation to that because the Supreme Court has already said that's not a constitutional right or a fair trial right of the accused person*".

385. The trial judge indicated that he accepted the evidence of a Senior Prosecutor in the Office of the Director of Public Prosecutions in her affidavit (referred to previously at paragraph 356) sworn on behalf of the respondent that the possibility of the witnesses in question travelling to Ireland from the US had become impracticable, if not impossible, for the foreseeable future. He considered that it was unlikely that the witnesses could travel to Ireland before 31 July 2020, and expressed the view that in those circumstances the prosecution had made out a very strong case that those witnesses would not be amenable to the court during the course of the trial (unless the prosecution was granted video link facilities). He concluded:

> "[…] *in all the circumstances I am of the view that the infirmities or difficulties which would arise for the prosecution are not such as to affect the fair trial rights of Mr Brady or impinge on his fundamental right to a fair trial or in any way impinge on those fair trial rights and in the circumstances the Court is prepared to accede to the order*".

Submissions of the Parties

386. In written submissions to the Court of Appeal it is argued on behalf of the appellant that while the trial judge had concluded that he did not necessarily hold that the respondent's position was

enhanced, no reason was advanced as to why this finding, which the submission characterises as "*equivocal*", was made. The submission points out that while there was reference to the pattern that was disclosed by the statements not being an exact match to the conspiracy alleged by the defence, no specifics were cited. It was submitted that an exact match was not the standard which the defence was required to reach.

387. It is further submitted that while the judge had conceded that counsel might find it more difficult to apply legitimate pressure on a witness via video link, this finding acknowledged that cross-examination by video link was less effective. However, there had been no attempt to quantify this.

388. The appellant's oral submissions to the Court of Appeal focus predominantly on the trial judge's ostensible acceptance of the argument that had been advanced by the respondent to the effect that the regime provided for by the combination of ss. 13 and 29 of the 1992 Act was a stand-alone regime, that could be invoked and operated independent of, and without reference to, s. 67 of the 2008 Act. In this context, it should be observed that while the prosecution's initial position was that they were relying upon the provisions of ss. 13 and 29 of the 1992 Act as founding the court's jurisdiction to allow the witnesses in question to give their evidence by video link, they were also seeking to utilise s. 67 to facilitate the logistics or practicalities of that.

389. It is convenient to mention at this point that, as it transpired, due to a deepening of the Covid-19 pandemic in the US, leading to increased rather than reduced restrictions during the relevant time frame, it proved impossible for the US authorities to provide the facilitation that the Irish authorities had been hoping to avail of when the prosecution's motion was moved and ruled upon. In those circumstances, the respondent would in due course adopt a fallback position, namely that while it would have been preferable if facilities could have been provided utilising s. 67 of the 2008 Act, it was not essential to be able to avail of such facilitation for ss. 13 and 29 of the 1992 Act to be utilised, providing the witnesses whose evidence it was desired to receive by way of video link were prepared to voluntarily co-operate with proposed alternative arrangements. Both Molly Staunton and Daniel Cahill were prepared to provide such voluntary co-operation. Accordingly, alternative arrangements were put in place for the taking of their evidence, but these were necessarily, and unavoidably, less formal, and less tightly controlled than would have been the case if s. 67 facilitation had been available. In particular, when their testimony was provided in the US by means of a video link, it was not supervised by a judge in that jurisdiction. Moreover, the powers that would theoretically have been available to a judge supervising the taking of such evidence to penalise a witness who gave false testimony or who refused to testify were not available to be used. Grounds 17, 18 and 19, which will be dealt with in the next section of this judgment, concern alleged deficiencies in the alternative arrangements that were put in place.

390. Returning to the arguments presented to this Court in support of ground 15, it was further argued by counsel for the appellant during the oral hearing of the appeal that by erroneously treating the regime provided for by s. 67 of the 2008 Act as one that was not required to be

adhered to, and by also treating the provisions of the 1992 Act as being freestanding and capable of being relied upon in the circumstances of this case without reference to the provisions of the 2008 Act, the trial judge had failed to ensure minimum trial rights for the appellant and had failed to protect the appellant from a real risk of an unfair trial.

391. Counsel for the respondent submits that the trial judge correctly determined that it was appropriate in this instance to use video link facilities as permitted by law, including for the evidence of Molly Staunton and Daniel Cahill. The trial judge had noted that logistical arrangements had been put in place to allow the witnesses to attend in person to give evidence; however, as a result of the pandemic caused by Covid-19, and for no other reason, it was impossible for any witness to travel to Ireland from America to give evidence for the foreseeable future. This highlighted, in counsel's submission, why it was entirely appropriate to use video link.

392. The prosecution's Notice of Motion for video link evidence in fact listed six witnesses: Molly Staunton, Christopher Morton, Ronan Flynn, Daniel Cahill, Anthony Maguire and Special Agent Wade. Christopher Morton's evidence was disallowed by the trial judge, and Anthony Maguire did not give evidence following contact made by his lawyer. The number of witnesses who claimed that the appellant had made admissions to them fell to just two, Molly Staunton and Daniel Cahill. Molly Staunton clearly did not fit the defence conspiracy argument. She had no visa to gain or deportation to avoid. It was accepted as being true that the respondent's position was clearly enhanced compared to if video link was not permitted to be used.

393. Counsel for the respondent further relied upon the fact that the trial judge made no finding that cross-examination by video link is less effective, nor, it was suggested, could he have done so in light of the previous Supreme Court jurisprudence. The speculative argument concerning the ethereal issue of counsel applying pressure on a witness in the physical setting of the court (which the trial judge noted was not a constitutional or fair trial right of an accused) was effectively dismissed in the ruling, and properly so, given the jurisprudence.

394. Counsel for the respondent disputes that the trial judge had erred in treating the regime provided for by s. 67 of the 2008 Act as not requiring adherence, and by also treating the provisions of the 1992 Act as being freestanding and capable of being relied upon in the circumstances of this case. In his submission, the 1992 Act is a stand-alone provision and that it was quite wrong to suggest that that Act was in some way amended by, or incorporated into, the 2008 Act. It is submitted that counsel for the appellant is incorrect in suggesting, as he had done at one point, that the 1992 Act does not have teeth, and counsel points to subsection 3 of s. 29 of the 1992 Act in illustration of his point.

Discussion and Determination

395. We are satisfied to uphold the trial judge's ruling on the motion to allow the American witnesses to give their evidence by video link pursuant to ss. 13 and/or 29 of the 1992 Act, to be facilitated (if possible) through a request made pursuant to s. 67 of the 2008 Act. The trial judge was

conspicuous in approaching the issue conscientiously and carefully. He afforded the motion a detailed and lengthy hearing and he gave great consideration to the arguments on both sides. He rigorously analysed the evidence in considering fair trial issues, and he carefully reviewed both statute law and the jurisprudence opened to him, and we are satisfied that he correctly appreciated it and duly applied it.

396. In particular, the trial judge further displayed great sensitivity to the need to vindicate the appellant's fair trial rights, and we are satisfied that he properly understood his role in that regard. He was conspicuous and rigorous in carefully analysing the potential implications for a fair trial of what was being proposed. He satisfied himself as to jurisdiction in the first instance, and then as to the criteria to be applied in considering whether he should exercise his discretion in favour of allowing video link evidence. We find nothing wrong in his approach or with the basis on which he exercised his discretion.

397. *Apropos* the contention made by counsel for the appellant that in treating the 1992 Act as providing standalone powers, separate from those provided for under the 2008 Act, the trial judge somehow exceeded his powers and engaged in judicial re-writing of legislation, we reject that.

398. The decision that he made on the motion was carefully weighed and we are satisfied that the decision made was a proper one, that it was in accordance with law, and fully within the trial judge's legitimate range of discretion.

399. In the circumstances we dismiss ground 15.

Ground 17 – That the trial judge erred in determining that the trial court had jurisdiction to permit the respondent to lead the evidence of Molly Staunton and Daniel Cahill in a manner other than provided for under the relevant statutory provisions, protocols and appropriate procedures.

Ground 18 – That the trial judge erred in allowing Molly Staunton to give evidence in an informal and unsupervised setting once it became clear that the respondent could not comply with the statutory provisions and protocols for the taking of such evidence.

Ground 19 – That the trial judge erred in initially allowing Daniel Cahill to give evidence unsupervised, and then contrary to what had been previously proscribed, under the auspices and control of Homeland Security in circumstances where Homeland Security had a vital and ongoing role in determining whether Daniel Cahill was permitted to remain in the USA after he had given his evidence and were thus not independent of him or perceived to be independent.

400. These three grounds may be grouped together.

401. It is convenient to deal first with the complaint that is the basis of grounds 17 and 18.

402. The issue unfolded at trial with counsel for the respondent flagging to both the trial court, and to the appellant, on 2 June 2020, that with regard to the proposed taking of testimony by video link from the American witnesses, there was a developing concern as to potential logistical difficulties that might impact on what was planned. He relayed that he did not have up to date information at that point, but was expecting to receive it imminently, and he sought leave to mention the matter again on the following day, which was granted.

403. On 3 June 2020, counsel for the respondent confirmed that he had received up-to-date information, which was to the effect that the American authorities to whom the trial court's MLAT request in regard to facilitation of the taking of evidence by video link from witnesses in the US had been directed, were not in a position to provide the requested facilitation in circumstances where courthouses and court offices in the relevant locations were closed, and court staff were not available to assist in the requested facilitation, due to lockdown measures associated with the ongoing Covid-19 pandemic. In addition, none of the appropriate officials, who in the normal course would be expected to serve subpoenas on the proposed witnesses concerned, were available to do that, for the same reason. Counsel for the respondent stated that in the circumstances:

> "*The application is to permit* […] *Molly Staunton, Daniel Cahill and Chris Morton to give their evidence in accordance with the order the Court made under the 1992 Criminal Justice Evidence Act but without resorting or without the assistance of the US authorities which the Court had requested pursuant to the Mutual Assistance Act, only in circumstances where, as things stand, that assistance is not available through circumstances beyond their control at the moment and where there is uncertainty as to when precisely it will become available and also on the basis that, absent any other legal issue being raised by the defence, we are now in a position to proceed to the US witnesses*".

404. In reply to a query from the trial judge as to the location from which it was proposed that the witnesses would give their evidence, counsel for the respondent stated, "*We would be suggesting that they give their evidence from their own homes*". Counsel then outlined that amongst logistical issues and practical arrangements then being considered, were: whether the witnesses would have access to laptops, whether they would be required to take an oath and/or affirm, whether there should be a neutral/blank background, whether they could give evidence from a quiet room in their home where they would not be interrupted, and whether there should be a requirement that there be no other person in the room with them while they were giving their evidence, amongst other possibilities. Counsel stated that the objective was, insofar as possible, to replicate the solemnity of the proceedings in a more formal setting. At a later stage it was suggested that the court might consider writing to the witnesses and setting out ground rules, a procedure that was ultimately adopted.

405. Counsel for the appellant was asked for his reaction to the prosecution's application and he requested time to give a considered response to it, and this was acceded to. The matter was adjourned to 4 June 2020. On that date, counsel for the appellant informed the trial court that the defence, having taken time to consider the application, were not in a position to consent to it, and he stated that he would have detailed submissions to make to the trial court as to why it should not grant the prosecution's application. The trial judge then indicated that he would hear detailed arguments on the application from counsel on both sides and he set aside the following day, 5 June 2020, for that purpose. This hearing duly took place. As the arguments on both sides were succinctly summarised by the trial judge in his subsequent ruling, and as it is proposed to quote *in extenso* from that ruling, it is not necessary to separately review the submissions that were summarised in this ruling.

The Trial Judge's Ruling

406. Having reserved his decision over a weekend, the trial judge gave his ruling on 8 June 2020. Having outlined the nature of the application, and the background to it, he continued:

> "*The defence object and Mr O'Higgins has made substantial submissions on the provisions of the Criminal Justice (Mutual Assistance) Act 2008 and the underlying conventions and treaties. The defence also object on fair procedure grounds. The essence of the defence's objections are 1. Where the foreign state is designated pursuant to the 2008 Act, the applicant and the requesting state must apply Part V of the Act to receive the video link evidence and cannot use sections 13 and/or section 29 of the 1992 Act to receive the evidence and this applies to witnesses who are prepared to voluntarily give evidence as well as witnesses where a subpoena is required. 2. By inference, the Court having made an order pursuant to section 67 (2) of the 2008 Act and issued a letter of request, it cannot sever that order from the orders that the Court made pursuant to sections 13 and 29 of the 1992 Act. 3. That the only way that the evidence can be received, other than by the request for mutual assistance, is by the consent of the DPP and the accused. 4. That the DPP, when it made the application by motion of 31st of March, should have anticipated that due to the nature of the COVID19 pandemic the letter of request could not be complied with. 5. That there will be a diminution of the fair trial rights of the accused because the witness is giving evidence in a much less formal way in their own homes rather than in a court room, will be unreliable and possibly untruthful. 6. That these witnesses are not formal or expert witnesses but controversial and the Court should not accede to the application.*
>
> *Mr Grehan on behalf of the DPP has submitted as follows: 1. The 2008 Act is not mandatory. There is nothing in its express terms that make it so. 2. Treaties are based on mutuality and cannot be made compulsory binding or mandatory. 3. The US Central Authority cannot comply with the letter of request, despite its best attempts and has suggested the alternative action envisaged by the Director. 4.*

Once the witnesses are prepared to voluntarily give evidence, there's nothing to prevent a request for assistance outside the remit of the 2008 Act and the treaty. 5. The Court will retain control over the evidence of the witnesses and can give directions to maintain the formality of the process. 6. There is no diminution of the fair trial rights of the accused and that the Court and jury are entitled to the benefit of these witnesses' evidence which is important probative evidence.

The Court will not set out in detail the provisions upon which Mr O'Higgins replies but which are enumerated in his detailed submission of the 5th of June but will refer to the conventions, treaties and sections referred to".

407. At this point, the trial judge referenced the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 June 1959 and the protocols thereto (which is set out in Schedule 8 of the 2008 Act), and in particular Article 9 of the second protocol relating to hearing by videoconference; the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union, done at Brussels on 29 May 2000 (which is set out in Schedule 1 of the 2008 Act), and in particular Article 10 thereof; and the Agreement on Mutual Legal Assistance between the European Union and the USA done at Washington DC on 25 June 2003 (which is set out in Schedule 13 of the 2008 Act) ("the EU-USA Treaty"), and in particular Articles 3(1)(c) and Article 6 thereof relating to videoconferencing.

408. The trial judge then continued.

"*The defence submit that Article 6 (5) where other means is referred to should have the meaning of gathering evidence by other means rather than another form of receiving evidence by video link. This is the same wording as Article 16 quater of the Irish- USA Treaty and the DPP contends for an alternative interpretation of this Article. The Treaty between the Government of Ireland and the Government of US on Mutual Assistance Criminal Matters done at Washington DC on the 18th of January 2001 as applied by the instrument contemplated by Article 3 (2) of the said agreement of 25th of June 2003 and done at Dublin on 14th of July 2005. Schedule, 14 of the 2008 Act. Articles 1 (1) (5), subsection (4), (7) and (16) quater were opened to the Court.*

Part V of the 2008 Act including the following sections: 62 (1), 62 (4), 64 (1), section 67, 68, 69, 70 and also section 2 (4) in the definitions section.

The Court has considered all these articles and sections carefully. The DPP relies on Article 16 quater of the Irish-USA Treaty. Mr Grehan submits that this clearly refers to other means for obtaining of testimony under either treaty or law".

409. It is appropriate to interject at this point, as events have somewhat overtaken this aspect of the trial judge's ruling. In that regard, Article 6(5) of the EU–USA Treaty provides:

> "*This article is without prejudice to the use of other means for obtaining of testimony in the requested State under applicable treaty or law*".

This wording is repeated verbatim in the Ireland-USA Treaty at Article 16(5) *quater*. While the appellant had argued at trial, as reflected in the passage just quoted from the trial judge's ruling, that Article 6(5) required to be interpreted as referring to other means for obtaining of testimony under a treaty or law applicable in the requested state, rather than under any applicable treaty or law, including that of the requesting state (as was contended by the prosecution), it was conceded by counsel for the appellant at the oral hearing of the appeal before this Court that the interpretation being contended for by the respondent was in fact correct.

410. The trial judge's ruling then continued:

> "*The Court in its ruling of the 6th of April decided that sections 13 and 29 of the 1992 Act permitted evidence to be called in a criminal trial from a witness outside the jurisdiction on video link. The Court decided in its ruling on the 8th of May on the proposed evidence of Messrs Wooller, Cass and Agent Katzke that sections 13 and 29 of the 1992 Act and section 67 of the 2008 Act were standalone provisions not dependent on each other. The Court in that ruling also decided that section 67 was a permissive section giving discretion to the DPP to apply pursuant to it. The Court also decided in considering granting leave it could take into consideration the absence of an application pursuant to section 67 of the 2008 Act and could refuse leave if that was not contemplated. There is no reference in the 2008 Act to the 1992 Act in a way that would contemplate that any application to receive video evidence from USA had to be pursuant to the provisions of the 2008 Act. Mutuality does not equate with mandatory application. The provisions of the 2008 Act relying on the treaty are available for use at the discretion of the prosecution and the accused. Either party is not obliged by the convention or treaty provisions or by the terms of the Act to rely only on a section 67 application to procure video link testimony from the witness. In the Court's considered opinion, applying the ordinary meaning of Article 16 (5) quater of the Irish-USA treaty, it contemplates other means for obtaining testimony available under law, not other forms of evidence.*
>
> *Pursuant to the provisions of section 13 and 29 of the 1992 Act, there is no legal restraint on a witness, other than the accused, giving evidence by video link from USA. The party seeking such evidence, either prosecution or defence, has no obligation to apply also pursuant to section 67 of the 2008 Act. Obviously if a witness is to be compelled to testify the application has to be made pursuant to section 67 of the 2008 Act. Because of the probative nature of the evidence to be offered by*

the witnesses, it was entirely right and proper that application was made to have this evidence tendered in a formal setting. That is not possible at present, with uncertainty also as to when it could happen. Section 67 is an application to the trial judge to issue a letter of request. If that request cannot be fulfilled the Court has legal entitlement to reconsider the matter and to consider alternative methods of procuring the evidence provided it is within the law and does not prejudice the fair trial rights of the accused. The accused's consent is not required. The discretion rests with the trial judge.

In its ruling of the 6th of April the Court stated now-, Mr O'Higgins in fact referred to a comment by the Court on the issue and Mr -Grehan mistakenly thought that Mr O'Higgins was referring to an extract from the relevant judgments [in] *White and Donnelly but that's not the case. It was a comment the Court made and I will just read it again. The Court stated in its ruling of the 6th of April 2020, 'I cannot see any particular difficulty in relation to the crossexamination of those witnesses by video link, other than what I would call the ethereal issue of the ability of senior counsel- in the physical setting of the Court to maintain a degree of pressure on a witness but the Court has to be very careful in relation to that because the Supreme Court has already said that it's not a constitutional right or a fair trial right of the accused person.' The Court then concluded its ruling of the 6th of April 2020 by saying, 'To the extent that the Court is faced with the jury in this particular trial having been advised that their term of service will end at the end of May 2020; and at the earliest this issue could be dealt with by these witnesses here in the Court's assessment in October 2020; so, the prosecution have made out a very strong reason why these witnesses should be called on video link and in all the circumstances I am of the view that the infirmities or difficulties that would arise for the defence are not such as to affect the fair trial rights of Mr Brady or impinge on his fundamental right to a fair trial or in any way impinge on those fair trial rights and in the circumstances the Court is prepared to accede to the order.'*
It is therefore not the evidence by video link that in any way prejudices the accused. The issue of concern is the lack of formality. It is the considered view of the Court that it is for the jury to assess if the reduction in formality affects the credibility or truthfulness of the witnesses. This court would much prefer if the testimony of these witnesses is tendered in a formal setting or at least if someone of some independent standing could be present. Both the DPP and the defence would prefer that course. That is not open to the Court at present or for the immediate foreseeable future. The diminution of the accused's rights in those circumstances is minimal and does not impinge on his fair trial rights. The alternative is to deny the prosecution important probative evidence which would, in the Court's opinion, be a disproportionate response. The Court will endeavour to impose as much formality as is possible in the circumstances. The prosecution should continue to seek implementation of the letter of request. The prosecution did underestimate the

difficulty of procuring these witnesses in a formal setting and the Court has had to deal with the consequences but in the Court's estimation, while undesirable, it has not affected the fairness of this trial".

Submissions of the Appellant

411. It is submitted on behalf of the appellant that where a court makes an order under s. 13 of the 1992 Act in respect of a witness that is physically present in the State, the provisions of the 2008 Act are not engaged. Conversely, the 2008 Act is engaged when a witness is present in a designated state, and it is not desirable or practical for the witness to come to Ireland.

412. It is further contended that the trial judge was incorrect to decide that the 2008 Act can be disapplied when the legislation, as here, was not able to cope with a global pandemic. Once the relevant qualifying criteria are satisfied, it is the law.

413. The Irish legislation does not provide for any alternative means. Section 29 of the 1992 Act allows a witness to give evidence by video link from outside the State. It is wholly silent as to how that evidence is to be received. It is said that the trial judge had read in a meaning to the Act which is not present.

414. It is further argued that the trial judge had strayed into legislating on an *ad hoc* basis and had accordingly lapsed into unconstitutionality.

Submissions of the Respondent

415. In submissions on behalf of the respondent, it is submitted that when, due to Covid-19, it became impossible to utilise the requested provisions of the 2008 Act, the suggestion of the appellant that the trial should be adjourned for some indefinite and unknown period or effectively abandoned was not the answer. The 2008 Act which provides for mutual assistance between the courts of different states imposes obligations on the requested state to facilitate the requested action. The request for the provision of video link facilities in a formal setting had been determined as being appropriate by the trial judge.

416. When it became apparent that video link facilities in a formal setting could no longer be provided after New York, in particular, went into lockdown due to Covid-19, other avenues had to be explored. This was not incompatible with the 2008 Act or the treaties underlying it and in fact is presupposed by the terms of Article 6(5). There has never been a prohibition on voluntary co-operation provided that it can be done within an appropriate legal framework. The 2008 Act is not mandatory in all circumstances. In this instance other means had to be explored.

417. The Court of Appeal is asked to note that orders had been made by the trial judge for the receipt of the relevant evidence by video link under ss. 13 and 29 of the 1992 Act. The appellant's counsel made submissions but did not have a veto, nor did they have to consent to the making of these Orders. It is submitted that the 1992 Act represents stand-alone legislation which does

not depend on the 2008 Act to be operable. Indeed, it operated for a long time before the 2008 Act came into operation. The 2008 Act did not amend the 1992 Act.

418. It is said that for the evidence of Molly Staunton and Daniel Cahill to be received, both witnesses had to co-operate with the process on a voluntary basis. Both Molly Staunton and Daniel Cahill agreed to do so. In these circumstances, the trial court permitted them to give their evidence by video link and sought to put safeguards in place. While it is accepted that this was a less than ideal scenario, it was preferable to either the adjournment of the trial for an indefinite and unknown period or the effective abandonment of the trial. Trials are organic and trial judges have to adapt to changes and circumstances but do so subject to ensuring at all times that the accused receives a fair trial. It is submitted that this is what the trial judge did here and was permitted to do under the relevant legislation. He was not bound, as the appellant contends, to operate only within the permitted provisions of the 2008 Act which could not be utilised due to the Covid-19 pandemic.

419. It is submitted that in relation to Molly Staunton, she was a voluntary witness who agreed to testify from her own apartment but who could not be supervised in so doing by reason of Covid-19 restrictions in New York. The trial judge gave directions which she agreed to abide with in terms of the circumstances in which she gave her evidence. The jury had to assess her evidence and were aware as to the circumstances in which she gave it and had to give whatever weight to it and those attendant circumstances as to them seemed appropriate.

Discussion and Determination - Grounds 17, 18 and the First Part of Ground 19

420. The Court has carefully considered the provisions of the 2008 Act, and in particular Part 6 on the "*Provision of Evidence*", and within that Chapter 2 thereof on the "*Taking of Evidence*". Both s. 62 relating to evidence of a person in a designated state (the US is a designated state) for use in this State, and s. 67 relating to evidence through a video link for use in this State are of central relevance. However, both of these provisions require to be interpreted having regard to the scheme of the 2008 Act as a whole, including the stated purpose of the legislation as reflected in the long title.

421. The 2008 Act is expressed to be an Act to enable effect to be given in the State to certain international agreements, or provisions of such agreements between the State and other states relating to mutual assistance in criminal matters; to repeal and reenact with amendments Part VII (International Co-operation) of the Criminal Justice Act 1994; and to provide for related matters.

422. Amongst the (relevant) international agreements to which the legislation applies, alternatively which are referenced in the legislation, are (i) the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union done at Brussels on 29 May 2000 (i.e., "the 2000 Convention") (see Schedule 1 to the Act); (ii) the Protocol to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union of 16 October 2001 (i.e.,"the 2001 Protocol") (see Schedule 2 to the Act); (iii) the European

Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959, (i.e., "the 1959 Convention") (see Schedule 8 to the Act) and two Protocols thereto (see Schedules 9 and 10 to the Ac); (iv) the Agreement on Mutual Legal Assistance between the European Union and the US, done at Washington D.C. on 25 June 2003 (i.e., "the EU-US Agreement") (see Schedule 13 to the Act); and the Treaty between the Government of Ireland and the Government of the United States of America on Mutual Assistance in Criminal Matters, done at Washington D.C. on 18 January 2001 (i.e., "the Ireland-US Treaty") (see Schedule 14 to the Act).

423. The Ireland-US Treaty is a bi-lateral treaty. However, the manner in which it is operated is impacted by the EU-US Agreement. Article 3 of the EU-US Agreement governs the scope of application of that agreement in relation to bilateral mutual legal assistance treaties with Member States. In that regard, Article 3(1)(c) provides:

> "*The European Union, pursuant to the Treaty on European Union, and the United States of America shall ensure that the provisions of this Agreement are applied in relation to bilateral mutual legal assistance treaties between the Member States and the United States of America, in force at the time of the entry into force of this Agreement, under the following terms:*
> [...]
> *(c) Article 6 shall be applied to authorise the taking of testimony of a person located in the requested State by use of video transmission technology between the requesting and requested States in addition to any authority already provided under bilateral treaty provisions;*"

424. Sub-articles 6(1) to 6(5) of the EU-US Agreement provide in turn:

> "*1. The Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State, to the extent such assistance is not currently available. To the extent not specifically set forth in this Article, the modalities governing such procedure shall be as provided under the applicable mutual legal assistance treaty in force between the States concerned, or the law of the requested State, as applicable.*
>
> *2. Unless otherwise agreed by the requesting and requested States, the requesting State shall bear the costs associated with establishing and servicing the video transmission. Other costs arising in the course of providing assistance (including costs associated with travel of participants in the requested State) shall be borne in accordance with the applicable provisions of the mutual legal assistance treaty in force between the States concerned, or where there is no such treaty, as agreed upon by the requesting and requested States.*

3. The requesting and requested States may consult in order to facilitate resolution of legal, technical or logistical issues that may arise in the execution of the request.

4. Without prejudice to any jurisdiction under the law of the requesting State, making an intentionally false statement or other misconduct of the witness or expert during the course of the video conference shall be punishable in the requested State in the same manner as if it had been committed in the course of its domestic proceedings.

5. This Article is without prejudice to the use of other means for obtaining of testimony in the requested State available under applicable treaty or law".

425. Article (1)(c) of the Ireland-US Treaty in turn provides:

"*As contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed 25 June 2003 (hereafter "the U.S.-EU Mutual Legal Assistance Agreement"), the Governments of the United States of America and Ireland acknowledge that, in accordance with the provisions of this Instrument, the U.S.-EU Mutual Legal Assistance Agreement is applied in relation to the bilateral Treaty between the Government of Ireland and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters signed 18 January 2001 (hereafter "the 2001 Mutual Legal Assistance Treaty") under the following terms:*
[...]
(c) Article 6 of the U.S.-EU Mutual Legal Assistance Agreement as set forth in Articles 6 and 16 quater of the Annex to this Instrument shall govern the taking of testimony of a person located in the requested Party by use of video transmission technology between the Requesting and Requested Parties, in addition to any authority already provided under the 2001 Mutual Legal Assistance Treaty;"

426. Article 16 *quater* of the Ireland- US Treaty mirrors closely Article 6 of the EU-US Agreement. Specifically, Article 16 (5) *quater* provides:

"*This Article is without prejudice to the use of other means for obtaining of testimony in the Requested Party available under applicable treaty or law*".

427. Section 94 of the 2008 Act provides (to the extent relevant) that:

"*(1) The Ireland - US Treaty has the force of law in its application in relation to the State.*
(2) Judicial notice shall be taken of the Treaty.

(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, including those relating to applications to courts or judges—

(a) to make orders to give effect to or enforce compliance with requests for such assistance, and

(b) to make, vary or discharge those orders,

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;"

428. It is appropriate at this point to set out the terms of s. 62 of the 2008 Act, which provides that:

"62.— (1) Where it appears to a judge at a sitting of any court that criminal proceedings have been instituted or a criminal investigation is taking place in the State, the judge may issue a letter (a "letter of request") requesting assistance in obtaining from a person in a designated state such evidence as is specified in the letter for use in the proceedings or investigation.

(2) Application for a letter of request may be made by the Director of Public Prosecutions or a person charged in any such proceedings that have been instituted.

(3) The letter of request shall be sent to the Central Authority for transmission to the appropriate authority.

(4) Notwithstanding subsections (1) to (3), where proceedings in respect of an offence have been instituted or a criminal investigation is taking place, the Director of Public Prosecutions may issue and transmit a letter of request directly to the appropriate authority.

(5) The letter of request shall include—

(a) a statement that the evidence is required for the purpose of criminal proceedings or a criminal investigation,

(b) a brief description of the conduct constituting the offence concerned, and

(c) any other available information that may assist the appropriate authority in complying with the request.

(6) Evidence obtained by virtue of this section shall not, without the consent of the appropriate authority, be used for any purpose other than that permitted by the relevant international instrument or specified in the letter of request.

(7) When any such evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it shall be returned to the appropriate authority unless the authority indicates that it need not be returned.

(8) A statement of the evidence of a witness—

(a) taken in accordance with a letter of request, and

(b) certified by or on behalf of the court, tribunal or authority by which it was taken to be an accurate statement of the evidence,

is admissible, without further proof, in proceedings relating to the offence concerned as evidence of any fact stated therein of which oral evidence would be so admissible.

(9) A court, when considering whether any evidence taken from a person pursuant to a letter of request should be excluded in the exercise of its discretion to exclude evidence otherwise admissible, shall, where appropriate, have regard to—

(a) whether the law of the state concerned allowed the person and any other party concerned, when the evidence was being taken, to be legally represented and cross-examined, and

(b) any other respects in which the taking of the evidence may have differed from the taking of comparable evidence in the State.

(10) Nothing in this section prevents the Director of Public Prosecutions from issuing a letter of request for assistance in obtaining a statement of evidence or taking possession of material evidence in a designated state for the purposes of criminal proceedings or a criminal investigation where the witness or witnesses concerned will give evidence in those proceedings or any proceedings that may be instituted after the investigation.

(11) In this section, "appropriate authority", in relation to the place where the evidence is to be obtained, means—

(a) a court or tribunal specified in the letter of request and exercising jurisdiction in that place, or

(b) any other authority recognised by the government of the state concerned as the appropriate authority for receiving the letter".

429. Finally, it is also appropriate to set out the terms of s. 67 of the 2008 Act, which provides:

"*(1) This section applies where—*

(a) criminal proceedings have been instituted in the State against a person,

(b) a witness in the proceedings is in a designated state, and

(c) it is not desirable or possible for the witness to give evidence in person.

(2) Where this section applies, an application may be made by or on behalf of the Director of Public Prosecutions or the accused to a judge of the court of trial at a sitting of the court to issue a letter (a "letter of request") requesting the provision of facilities in the designated state concerned to enable the witness to give evidence in the proceedings through a live television link.

(3) The judge may grant the application if satisfied that it is not desirable or possible for the witness to give evidence in person.

(4) The letter of request shall be accompanied by a document signed by the judge and stating—

(a) the name, address and, if known, the nationality of the witness,

(b) the court which is to hear the evidence,

(c) the name of the judge conducting the hearing,

(d) why it is not desirable or possible for the witness to give evidence in person, and

(e) the likely date of the hearing.

(5) The request shall be sent to the Central Authority for transmission—

(a) in urgent cases, to the court or tribunal specified in the request, or

(b) in any other case, to any authority recognised by the state concerned as the appropriate authority for receiving such requests.

(6) If the name of the judge conducting the hearing is not available at the time the letter of request is issued, it shall be sent to the Central Authority for such transmission as soon as it becomes available.

(7) The accused shall be given an opportunity to cross-examine and re-examine the witness at the hearing.

(8) Evidence given through the live television link at the hearing shall be videorecorded.

(9) The videorecording of the evidence or, if the accused consents, an edited version of it, is admissible at the trial of the offence as evidence of any fact of which direct oral evidence would be admissible, unless the trial judge is of the opinion that to do so would not be in the interests of justice.

(10) The provisions of the relevant international instrument concerning a hearing through a live television link, in so far as they relate to a requesting state and are not incorporated in this section, have effect in the State, with the necessary modifications, in relation to a hearing under this section.

(11) A witness who makes a statement which is material in the proceedings and which he or she knows to be false or does not believe to be true is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both, or

(b) on conviction on indictment, to a fine not exceeding €10,000 or imprisonment for a term not exceeding 5 years or both.

(12) Proceedings for an offence under subsection (11) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State.

(13) In this section "videorecording" means any recording, on any medium, from which a moving image may be produced and includes the accompanying soundtrack, and cognate words shall be construed accordingly".

430. We think there can be little doubt but that following the enactment of the 2008 Act it was the intention of the Oireachtas that, insofar as possible, and as a matter of best practice, the taking of evidence by video link for the purposes of criminal proceedings in this jurisdiction, from persons located in States with which Ireland has entered into the mutual assistance agreements referenced in that Act, should be done pursuant to such agreements, not least because of the superior safeguards that they provide.

431. That having been said, the 1992 Act has not been repealed and the 2008 Act does not explicitly reference it. We reject any suggestion that the 2008 Act implicitly repealed, or required the disapplication of s. 29 of the 1992 Act. On the contrary, Article 6(5) of the EU-USA Treaty and Article 16 (5) *quater* of the Ireland-US Treaty expressly allow for the use of other means of obtaining testimony in the requested state available under applicable treaty or law. We are satisfied that s. 29 remains available to be used, both in cases to which the 2008 Act does not apply, and in cases to which it does apply but where, for reasons beyond anyone's control, it is not possible to avail of the procedures provided for in the 2008 Act and the underlying treaties. The evidence in this case is all one-way to the effect that the prosecuting authorities in this State had every intention of availing of the provisions of the 2008 Act, and would have done so, but for the rapid development of circumstances totally beyond their control which rendered that impossible. The imposition of a lockdown due to the Covid-19 pandemic in New York and in other parts of the US, which at the material time appeared to be open-ended, such that courthouses were closed, and court officials and law enforcement personnel were working only to a limited extent, if at all, and were largely confined to their homes, frustrated any possibility of availing of the optimum mechanism for obtaining the evidence that was required for the purposes of the trial in this State by video link, namely pursuant to a MLAT request made under the 2008 Act.

432. However, there was an alternative mechanism capable of being availed of, namely that under s. 29 of the 1992 Act. Prosecuting authorities in this jurisdiction opted to do precisely that with the co-operation of relevant persons in the US. The trial judge was cognisant that this was a choice that was forced upon them by circumstances beyond their control, and out of expediency. Nevertheless, the option of seeking to avail of s. 29 of the 1992 Act was one that was lawfully available, and we are satisfied that the trial judge was legitimately entitled to permit its use, once he was satisfied, which he was, that *ad hoc* arrangements could be put in place to ensure the solemnity and integrity of the procedure.

433. We find no error of principle in how the trial judge approached these controversies or in how he ruled. We therefore dismiss grounds 17 and 18, respectively.

Discussion and Determination - Ground 19

434. The complaint made in ground 19 is to the effect that it was inappropriate that Daniel Cahill should have been allowed to give evidence either unsupervised or under the auspices and control of HSI, in circumstances where HSI had a vital and ongoing role in determining whether Daniel Cahill was permitted to remain in the US after he had given his evidence and were thus not independent of him or perceived to be so independent.

435. We can deal with this matter quite shortly. While it was not possible to arrange for Daniel Cahill to give his evidence from a courthouse or similar facility under the supervision of the judge, he did ultimately give most of his evidence from a HSI facility in circumstances where it ultimately proved possible to arrange for that. However, there was absolutely no evidence that he was interfered with in any way in the giving of his evidence; that the locus from which he was required to give his evidence, and the mode of supervision employed while he was doing so, was coercive or oppressive of him in any way; that he was subjected to any undue pressure or influence; or that the solemnity and formality of the proceedings were compromised in any way that could have implications for the fairness of the appellant's trial. While the *ad hoc* arrangements may not have been ideal, and would possibly not have been adopted but for the exigencies of the situation arising from the Covid-19 pandemic lockdown, the fact that such arrangements were made and availed of does not represent an error *per se.* For this Court to be justified in interfering on that account, the appellant would have to engage with the evidence and demonstrate that, by virtue of the arrangements that were made, he was exposed to a real risk of an unfair trial. Absent evidence that Daniel Cahill was impeded in some way in giving truthful evidence by the fact that he was required to give it from a HSI facility, or by the fact that the video link facility was being supervised by HSI personnel, or that he was improperly influenced in some way by such personnel, or that the giving of his evidence was tainted or compromised by the circumstances in which it was required to be given, we have no basis for being concerned about the fairness of the appellant's trial. Quite simply, no such evidence has been adduced.

436. In the circumstances we reject ground 19.

Ground 21 – That the trial judge erred in permitting the respondent to treat Molly Staunton as a hostile witness.

Background

437. Molly Staunton was a prosecution witness, an American citizen and resident in the US. In 2016, Molly Staunton was in a relationship with Tommy McGeary who lived in an apartment in the US with the appellant and Ronan Flynn. She made a statement to An Garda Síochána as part of the investigation, which statement was video recorded. She stated that on a particular evening in July 2016, she was in the apartment shared by Tommy McGeary, Ronan Flynn and the appellant. Central to her proposed testimony was that the appellant came out of his bedroom in a distressed state regarding his life situation and his future (his girlfriend was pregnant) and said that he had "*killed/shot a cop*", "*murdered a cop*" in Ireland and that there were cops in Ireland looking for him.

438. Molly Staunton gave evidence via video link from New York due to the Covid-19 pandemic. It had been intended to call her in person. Other grounds relate to this aspect of the trial.

Evidence of Molly Staunton

439. On 11 June 2020, Molly Staunton gave her direct testimony. While the witness made reference to the appellant saying that he had murdered someone in Ireland, the respondent contended that she failed to refer to a number of specific references as in her statement. The respondent stated that she had failed to give evidence that the appellant said he "*killed a cop and that he had shot someone*". Other portions of Molly Staunton's statement were highlighted; such as that the appellant had said he was the most feared man in Ireland, that he shot someone a million times and could never come back to Ireland and that the guards were looking for him.

440. Counsel for the respondent at trial applied to treat the witness as hostile. Counsel for the appellant took the view that the application was premature and that the threshold to treat a witness as hostile had not been reached. Counsel for the appellant suggested that Molly Staunton be permitted to read her statement without being referred to specific passages. It was agreed that the witness would be permitted to review her statement and transcript of interview with An Garda Síochána. When the witness resumed her evidence in the absence of the jury, she gave the evidence the prosecution wanted to elicit; that is, that the appellant had said that he shot a guard in Ireland and that the guards from Ireland were looking for him.

441. The witness then gave evidence in the presence of the jury and stated that she was aware that the gardaí were investigating the murder of Detective Garda Donohoe and that "*he was a cop in Ireland*". On the central issue, she stated that the appellant had said that *"he had shot a cop in Ireland*" and that the guards from Ireland were looking for him.

442. Molly Staunton was then cross-examined by counsel for the appellant who elicited from the witness that the appellant had not admitted to shooting a garda but that he was in fear of

apprehension by An Garda Síochána because *they* were saying he had shot a Garda. Relevant portions of the cross-examination are as follows:

> *"Q. You reference him saying he shot a cop but then you say, 'or he shot someone' and then you say he shot this person a million times?*
> *A. Yes. He said he can never go back to Ireland; he is stuck here and he needs money".*

443. The cross-examination continued:

> *"Q. And I have to suggest to you that he didn't say that at all and that in fact what he was saying was that because the cop the police or the gardaí were looking for him for that, that's why he was upset?*
> *A. Yes. That was part of it. That was part of the reason he was upset.*
> *Q. But I am saying to you that he never made that admission to shooting a cop or even the word cop is not a word I'd suggest to you that Irish people would really use, that they refer to police as police or gardaí?*
> *A. No, it was definitely a cop. I can't --again it's -- I am not 100 % but I do recall it did -- I did not know -- I did not hear about this case but I did hear them say at some point it was a cop.*
> *Q. Okay. But is that the gardai were looking for him for that and that's why he was upset as opposed to him making an admission as to having been involved in it?*
> *A. Yes, he—I'm sorry, say that again?*
> *Q. He was upset because the gardaí were looking for him for that, he wasn't making an admission that he had done that?*
> *A. No".*

444. The examination continued:

> ***"Q.--- but I need you just to tell me what Aaron said and I am suggesting ---to you that the height of what Aaron said to you was or what Aaron said in your presence was that he was worried because the police were looking for him for this but he didn't make any admission to having done this, as in he didn't make an admission to shooting a policeman or a garda?***
> ***A. No, he did not.***
> ***Q. He didn't. So, when we are talking about words that came out of Aaron Brady's mouth, the words that came out of Aaron Brady's mouth were that he was upset that he was being sought by gardaí or by police for the shooting of a policeman or a cop or a garda?***
> ***A. Yes. That is correct".***

445. On 12 June 2020, on re-examination of the witness, counsel for the respondent applied to invoke s. 16 of the Criminal Justice Act 2006 ("the 2006 Act") in order to play portions of the

video of Molly Staunton's statement or alternatively, put the words in her statement to her line-by-line and ask her to confirm.

446. The witness in re-examination stated *inter alia*:

> *"Q. Yes. Ms. Staunton, you are not concerned with what he admitted to or what happened or anything like that, all I want you to tell us is what you heard him say, what words he said about what had happened that you told the gardai about on the 29th August on video?*
> *A. That he was concerned for his expecting child and that there was, yes, he was having issues in Ireland, there was cops looking for him, the house could be raided, he didn't know what to do with his child and he wanted to be a good father and he was deeply concerned about him not potentially being a good father to his son because he had cops looking for him. There was a situation in Ireland and that's it.*
> *Q. Well, is that it, Ms. Staunton?*
> *A. Yes, yes.*
> *Q. Is that what you told the gardai?*
> *A. Yes, that is what I told them*".

447. Following this, counsel for the respondent made the above application with which counsel for the appellant took issue. The appellant argued that s. 16 could not be invoked and the judge took time to consider the matter, before retiring to do so, the court commented that:

> "*Right. Well, look the Court is going to consider the matter. The one thing I want to make quite clear in relation, of course the Court has a view as to the assessment of the witness's evidence. The Court is listening carefully to the witness's evidence. It clearly was obvious to the Court, from the very initial direct examination of the witness yesterday, that she was becoming a reluctant witness in relation to the issues which were in her video statement and in her statement and she has clearly given, as I have pointed out on the transcript, contradictory evidence. This isn't a witness in a situation where there is genuine doubt about what exactly Mr Brady said. That's the Court's assessment. There has certainly been a problem here. Something has happened. I have no doubt about that. That's the assessment of the Court*
> *[...] The assessment of this Court is, and its clearly obvious to the Court, that this is a witness who has become a reluctant witness, effectively a hostile witness to the prosecution and the Court will have to consider the matter*".

448. The judge ultimately ruled that the s. 16 procedure did not apply. In so ruling he stated:

> "*The Court has definitively come to the conclusion that section 16 cannot deal with the difficult situation that has arisen here because the witness, Ms. Staunton, gave materially consistent evidence in her direct examination. She gave materially*

consistent evidence at the beginning of her cross – examination. She clearly stated that Mr Brady himself had stated these words without a doubt and she contradicted herself then in final questions put to her on cross – examination which are no doubt contradictory to evidence that she gave in direct examination and on cross – examination definitively of the view that section 16 doesn't apply to this matter. I haven't given any view to her being treated as a hostile witness and obviously on re-examination the prosecution are entitled to raise any issue with her where she has been impugned on cross-examination".

449. The respondent then again sought to have the witness treated as a hostile witness. The appellant argued that for the same reasons that the court had ruled the s. 16 procedure did not apply, the hostile witness procedure was not appropriate. The respondent relied on an extract from Prof. O'Malley's text, *The Criminal Process* (Round Hall, 2009) which appears at paragraph 14.81 as follows:

> "*Cross-examination is permitted only to the extent that the judge considers necessary for the purpose of doing justice. It has been said that such cross-examination is usually designed to achieve two things, though the first is more likely to materialise than the second. The first is to show that by reason of the witness's previous statement, his present testimony is not to be believed. The second is to attempt to get the witness to recant and adopt the truth of the previous statement".*

450. The court took the view that the witness had become hostile and permitted cross-examination of the witness by counsel for the respondent saying:

> "[…] *It seems clear to me, it is clear from the remarks the Court has already made in relation to the assessment of this witness and it is that particular sentence in 14.81, "The second is to attempt to get the witness to recant and adopt the truth of the previous statement" and I think obviously I will permit cross – examination of the witness. Obviously, the procedure of how a witness is to be treated as hostile has to be proceeded with first in the absence of the jury and we can then deal with the issue. I think, Mr Grehan, if you confine yourself to paragraph 14. 81, in other words your cross – examination isn't that large it's to deal – – – it is to deal with the particular issue that has arisen, yes*".

451. As part of the procedure, the witness was asked if she made a statement to the gardaí on 29 August 2017 and she accepted that she had done so.

452. Aspects of her statement were put to her, and the video recording of her statement was played in court. Again, the central issue focused on the witness's evidence that she had heard the appellant say he had killed a "*cop*" and she agreed this was so and that she would tell the jury that this was so.

453. However, on return before the jury, an unusual situation arose in that the witness was interrupted in her evidence by an unknown person in the apartment in the US shouting profanities, stating "*no more testimony*" and then closing the laptop.

454. The jury returned and again the witness did not give her evidence regarding the said admission. Consequently, the respondent sought to play the video recording of her statement, to which counsel for the appellant objected. The judge permitted the video to be played in the presence of the jury, excerpts were played relating to the evidence of the admission. Molly Staunton indicated that she stood by her statement and that the appellant had said that "*he killed a cop*".

455. She was cross-examined and said that she remembered it happening and she remembered telling the guards.

Submissions of the Appellant

456. The appellant's position is that the judge erred in permitting the respondent to treat Molly Staunton as a hostile witness in circumstances where her position had changed following cross-examination and the respondent sought unsuccessfully to bring her around, she did not display any of the characteristics of a hostile witness and the judge made a finding that she was a reluctant witness from the outset and had given contradictory evidence yet ruled that the s. 16 procedure did not apply.

457. Counsel for the appellant complains, in particular, that except for stating that Molly Staunton was becoming a reluctant witness, the trial court failed to set out a basis for the reason that it was declaring the witness as hostile. Counsel submits that to allow the hostile witness procedure to be adopted after cross-examination, set the carefully planned cross-examination at nought.

458. It is submitted that it was not appropriate for the witness to be treated as a hostile witness in circumstances where on cross-examination she resiled to some extent from what she had said in direct examination. Counsel questions why the hostile witness procedure is not adopted in every case where gains are made on cross-examination, if it is an appropriate mechanism to be utilised.

Submissions of the Respondent

459. It is the respondent's position that the fact that the judge ruled that the s. 16 procedure did not apply was not a bar to treating the witness as hostile, which he did for clear reasons which are readily apparent to this Court from the transcripts.

460. The witness, having said unequivocally that the appellant had said that he shot a cop in Ireland then agreed with a defence proposition that he stated he was merely being sought for this and had never actually admitted to doing such a thing. It is submitted that the two positions could not be the truth and the trial judge who had the opportunity of assessing the

witness over a number of hours and days correctly applied the law in determining that he would permit her to be treated as hostile.

461. Reliance is placed on the judge's comment of 12 June that:

> "*This isn't a witness in a situation where there is genuine doubt about what exactly Mr Brady said. That's the Court's assessment*".

462. Counsel for the respondent submits that the test for this Court in seeking to review the manner in which the judge exercised his discretion is whether he took into consideration an extraneous factor or an impermissible factor or failed to take into consideration a centrally important factor.

Discussion

463. The respondent sought to have the witness declared adverse. Such applications are governed by ss. 3, 4 and 5 of the Criminal Procedure Act 1865, commonly known as Denman's Act.

464. Section 3 of Denman's Act provides:

> "*A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement*".

465. A party cannot cross-examine their own witness and so where a witness gives an account which is entirely different from the expected one, a broad discretion is vested in the trial judge upon application to permit the witness to be cross-examined in order to prove that the witness made a statement on a prior occasion containing the relevant evidence. The procedure for this process is set out in the decision of *People (AG) v. Taylor* [1974] I.R. 97.

466. Section 3 of Denman's Act provides for the circumstances whereby a witness may be cross-examined by the calling party. It provides an exception to the rule that the prosecution may not cross-examine its own witness. The purpose is to undermine the witness' credibility, the prior statement is hearsay, it is not evidence. But where the witness upon cross-examination, gives the evidence sought, then that is evidence in the case.

467. The appellant accepts and accepted at trial, that an application to have the witness declared hostile could be brought at the re-examination stage and was not limited to direct examination. The issue is not a temporal one but related to the basis for the application. A

witness may be adverse if the judge determines that he or she is simply avoiding telling the truth.

468. Prof. Thomas O'Malley in his work, *The Criminal Process* (Round Hall, 2009) states at paragraph 14.77:

> "*A hostile witness has been defined as one "who is not desirous of telling the truth at the instance of the party calling him". The definition is important because a party may never discredit his own witness unless that witness is hostile. A witness, it has been said, should not be treated as hostile merely because he is unfavourable, or forgetful, or has given evidence contrary to what might have been expected of him. However, if it appears that a witness is being recalcitrant to the point of refusing to furnish information within his possession, exceptional steps may be needed to press for answers to questions that will elicit this information*".

Conclusion

469. There is no doubt in the present case that Molly Staunton was perfectly willing to answer all questions asked by either party. This Court has considered the transcripts of her evidence and the video recording of it.

470. However, it is also apparent that while she gave her evidence in direct examination in terms of her statement, there were aspects of that evidence which were not in accordance with it. She said that she heard the appellant say that "*he had murdered someone in Ireland and that he had to carry around that guilt of having murdered a cop in Ireland*". However, when pressed as to whether he said whom he had murdered, the witness said that he did not say. When asked as to whether he had said anything about the person he had murdered, she replied in the negative. She appeared to focus on the appellant's concerns that he was upset about having a child and not being there for his child and that he did not want to work in construction. She said that was all he said. The respondent at that point expressed concerns that she had failed to specify whether the appellant had elaborated on whom he had killed and how. She then read her statement by agreement. It is clear at that point that the respondent was certainly of the view that the witness was not giving evidence in accordance with her statement, notwithstanding that she was giving her evidence and engaging with the process.

471. She resumed her direct evidence and gave the evidence that the appellant had said that he was "*in fear of the cops coming to the apartment because he had shot a cop in Ireland and that he was worried that he did not have enough money to take care of his son that he was going to be having and that he was the most feared man in Ireland*".

472. In cross-examination, her evidence clearly altered as can be seen from the quotations from the transcript earlier in this judgment. She quite clearly stated that the admission was not made by the appellant, that his concern was more to do with the fact that he believed the

gardaí were looking for him in connection with the murder, not that he had made an admission to the murder. She agreed with the suggestion that the appellant was not making an admission to being involved in the murder and with the suggestion that he did not make an admission to shooting a policeman or a garda.

473. While it is submitted by the appellant that the judge was incorrect to find that aspects of Molly Staunton's evidence on cross-examination were completely contradictory, it is evident that she did in fact give contrary evidence, stating in direct evidence that the appellant had admitted to shooting a guard and stating in cross-examination that he did not make such an admission. There can be no doubt that she changed her position quite radically on cross-examination. The judge was entitled on the evidence in refusing the application under s. 16, to find that the witness gave materially consistent evidence in her direct evidence, materially consistent evidence at the beginning of her cross-examination, and that she contradicted herself in final questions put to her on cross-examination. She gave materially consistent evidence in her direct testimony and so the judge found that a prerequisite under the s. 16 procedure was not present.

474. Counsel for the appellant submits that to permit the respondent to cross-examine the witness during re-examination places the cross-examination at nought. It is clear from *R v. Powell* [1985] Crim. L.R. 592 that such an application may be made during re-examination:

> *"Secondly, it is stated in regard to the witness Mr Singh that the Judge was wrong to allow the prosecution to treat the witness as a hostile witness at a late stage in re-examination. Our attention has been drawn to the fact that in argument at the trial the prosecution accepted that when the witness was giving evidence in chief he had not exhibited any signs of hostility, but there is no rule which prevents an application to treat a witness as hostile being made at any time during his evidence. It depends on the facts, and although to make an application during re-examination may be a little unusual, it is a matter for the Judge's discretion, and we see no reason why that should be interfered with or should form the subject matter of any valid ground for complaint in this case".*

475. However, the point raised here is more one of fairness rather than procedural.

476. It is clearly a matter which is dependent on the circumstances in which the application arises. The circumstances here were unusual to say the least. The witness was giving evidence from another jurisdiction by video link without a person in authority present. It is apparent from her direct evidence that she displayed some reluctance as identified by the trial judge and as alluded to by counsel for the respondent. While that situation resolved in the concluding stages of direct evidence, she clearly and unequivocally, in the view of this Court, contradicted herself towards the latter stages of her cross-examination on the central issue of the admission.

477. The purpose of re-examination is to seek to "*rehabilitate the credibility of the witness and the veracity, reliability and accuracy of the evidence given by him or her if this has been impugned on cross-examination*" as stated in Declan McGrath's book *Evidence* (3rd edn, Round Hall 2020) at paragraph 3-172. It is apparent from the transcript that the witness was not desirous of telling the truth. The trial judge's view, from his remarks when proposing to consider the s. 16 application was that she was a reluctant witness. He made this observation in the context of stating that she was becoming reluctant in relation to the issues in her statement and the video recording of her statement. Significantly, he was of the view that this was not a situation where there was a genuine doubt about what the appellant had said to her. Thus, by implication, that she was not forgetful or of the belief that she was in error, but that she was not being truthful. He was satisfied that there had been a problem of some sort.

478. Whilst it is undoubtedly unusual that an application to treat a witness as hostile is made during re-examination, it is permissible and it is a matter entirely within the trial judge's discretion whether or not to grant such an application and is fact dependent. This Court will not interfere with the exercise of the trial judge's discretion where it is founded on the evidence as in the present case.

479. Insofar as the submission is made that there were no reasons given for the ruling, we do not find favour with that suggestion. The trial judge enumerated his assessment of the witness on two occasions in the context of the s. 16 application. When ruling on the within application, he specifically referred to those remarks. Those comments clearly point to a basis for acceding to the application; the judge found that there was not a genuine doubt about what the appellant had said to her. He permitted the cross-examination in order to have the witness "*adopt the truth of the previous statement*" and he confined the respondent to this.

480. Finally, the witness accepted that she made the statement and accepted the relevant portions in the jury's absence, however, on resuming in the jury's presence she did not give this evidence and excerpts were played from the video recording of the witness' statement. She then said that the appellant had stated that he had "*killed a cop*". The witness was then re-cross-examined.

481. Whilst the situation was unusual, the trial judge took great care in addressing it. The judge was within his discretion to find the witness adverse. She gave her evidence eventually in direct testimony and resiled from the central aspect in cross-examination and in re-examination. It was not a question of forgetfulness. Insofar as the question of fairness is concerned regarding the timing of the application, we are satisfied that the judge was correct in finding that the situation justified finding the indicia of hostility present and he duly confined the cross-examination to the central issue.

482. Accordingly, this ground fails.

Ground 20 (i-iii) The trial judge erred in refusing an application by the defence to discharge the jury in circumstances where;

(i) At points in her evidence, Molly Staunton's fear and anxiety was palpable.

(ii) Molly Staunton was seen over video link arguing in a hostile manner with an unknown male prior to giving evidence on 12 June 2020 in circumstances where the male appeared to be directing her testimony.

(iii) The unknown male intervened at the most critical point in Molly Staunton's testimony (and arguably the entire trial) and was initially heard off-camera threatening Molly Staunton uttering the words 'no more testimony' and immediately thereafter bringing her testimony to an angry and abrupt halt.

Ground 22 – The trial judge erred in determining that the deficiencies in respect of Molly Staunton's evidence could be cured by a warning to the jury.

Ground 23 – The trial judge erred in deciding to inform the jury by way of a summary of what had transpired in their absence in circumstances where the jury was confined to reaching a verdict only on the evidence.

Background

483. The trial judge, upon application, issued a letter of request to the US authorities pursuant to s. 67 of the 2008 Act requesting their assistance in the giving of evidence by witnesses in the US. Ultimately, this procedure could not be complied with due to the pandemic.

484. Witnesses agreed to give their evidence on a voluntary basis, including Molly Staunton, and the judge directed that a letter be furnished to the witnesses directing the circumstances in which the evidence was to be given, in circumstances where the evidence was going to be unsupervised. A letter was sent to Molly Staunton by email as follows:

> "*My name is [name redacted]. I am the prosecuting solicitor in the Director of Public Prosecution's office with responsibility for the trial of Aaron Brady. This case is at hearing before Mr Justice White and a jury. Mr Brady is accused of the murder of Detective Garda Adrian Donohoe and the robbery of Lordship Credit Union on the same occasion. The trial judge has directed that due to the current circumstances in New York, brought about by the COVID 19 pandemic, you can give your evidence via video link from your home. Your evidence is scheduled to commence this Thursday the 11th of June 2020 at 9 am New York time. You will need a*

computer/laptop with a camera and a good internet connection to enable you to testify. You will also require a phone number that we can contact you on in the event of any breakdown in the internet connection or for any other reason. In giving your evidence the trial judge has directed that you should do so from a quiet room on your own where you will not be interrupted or distracted. You should have an appropriate background behind you, blank if possible, and you should also dress as you would attending court in person. If you are going to take the oath to swear to tell the truth you will need the bible. If you are not taking the oath, you will be asked to affirm which is to make a solemn declaration to tell the truth in which case you do not require the bible. You should have anything else you might require such as a glass of water available to you. There may be interruptions in your evidence and if you need a break for any reason you can ask the judge for this at the time. Finally to assist you I am attaching copies of the statements you made to the gardaí dated the 29th of August 2017 and the 1st of September 2017 and also a transcript of the video of interview in which your first statement was taken. If you have any issues please revert to us or Garda Inspector Mark Phillips who has been liaising with you. Please note that you are not permitted to discuss the content of your statements in advance. Thank you sincerely for your cooperation in this matter and I will send you the details of the connection/link before Thursday".

Interruption 1

485. During Molly Staunton's examination-in-chief on 11 June 2020, her picture froze and she explained that her battery was dying and she was losing connection. The appellant submits that at this point, a whisper could be heard off camera. This Court has viewed the video recording of the interview and it is clear that a whisper can be heard, although its source is unknown. Despite reference in the submissions to counsel for the appellant having immediately sought assurances that the witness was alone, this is not apparent from the transcript or from the video recording. Direct examination continued after a short break to re-establish the connection after her technical difficulties. No issue was raised at the time, however, sometime thereafter, there is an interruption which occurs during cross-examination.

486. Something caught the witness's attention off screen, and she jumped out of her chair and out of the frame, saying, "*Oh sorry, sorry one second*".

487. She reappeared on screen and explained, "*Someone is coming into my apartment can I just ask them to leave please*".

488. The witness was afforded an opportunity to ask the person to leave and prior to the video link disconnecting, a male voice is heard saying that "*I'm not leaving anywhere. Fuck off*".

489. In submissions, it is suggested that the witness appeared petrified. It appears to us that, at this point, the witness certainly appeared distressed. She was granted time to deal with the

issue. Upon reconnecting, Molly Staunton is in a different room and she seems flustered. It is explained that she has moved rooms because the individual who arrived at the apartment was now in the room from which she was originally giving evidence. It is at this point, counsel for the appellant asks, "*And you're on your own in that room, are you?*", and the witness confirms that she is.

490. Prior to resuming with the jury, counsel for the appellant expressed their concerns in trenchant terms regarding the manner of taking the evidence and the fact that the witness was unsupervised. Reference was made at that point to hearing a whisper off camera at a time proximate to her battery causing problems. Counsel expressed the concern that this would impact negatively on the appellant.

491. In response, counsel for the respondent indicated that the witness had behaved responsibly and swiftly; she reacted to another's presence by informing the court immediately. Counsel did not accept that anyone was present prior to this. Counsel suggested that the court regulated the situation as best as it could, by a) ascertaining if the witness was in a position to proceed and b) ascertaining that the conditions were to the court's satisfaction.

492. The judge stated that he would make some enquiries of the witness to assess the situation. On reconnection, the following occurred:

> "*JUDGE:…..Ms. Staunton, it is important that there's nobody present with you there. Is that the position?*
> *WITNESS: Yes, sorry, my friend had come into the house, I wasn't aware that they were going to be coming in.*
> *JUDGE: You had no notice of it.*
> *WITNESS: I had no notice.*
> *JUDGE: And has the friend gone?*
> *WITNESS: They are in a separate room.*
> *JUDGE: Yes. But they are completely away from you, are they?*
> *WITNESS: Yes.*
> *JUDGE: Yes. Now, do you wish to proceed now this evening or – well, it is morning time with you but we can take the matter up again tomorrow.*
> *WITNESS: I can proceed now but whichever is best for you.*
> *JUDGE: Okay. And is the room secure now? There's nobody can come into the room; is that correct?*
> *WITNESS: Yes. The room is secure now.*
> *JUDGE: Yes.*
> *WITNESS: I apologise.*
> *JUDGE: And was anything else upsetting you other than the friend coming unannounced?*
> *WITNESS: No, nothing else was upsetting me. They came in unannounced and they didn't know what I was doing.*

JUDGE: Okay.
WITNESS: I wasn't aware that they were going to be coming in.
JUDGE: Right. If we go silent just for the moment please, yes. Ms Staunton, can't hear the Court; is that correct?
IT OPERATOR: Yes.
JUDGE: Yes. Do you want to say anything else, Ms Murphy?
MS MURPHY: I mean if the Court is satisfied there's not much I can do but there did seem – she seemed to be very, very concerned when the friend – she should be asked was she concerned for her safety or something. There did seem to be a concern on her part but it is a matter for the Court ultimately.
JUDGE: Well, I have asked her. I asked her what was upsetting her, it was the fact that her friend came unannounced. I mean the Court has already made clear that the Court would have much preferred if the testimony of the witness could be tendered in a more formal setting or if someone independent could be there but that's not the situation so the Court has to deal with it as best it can in the circumstances and, you know, it was an unusual situation earlier in the afternoon where, through no fault of the Court Service or the Court, the connection wasn't established properly but we will proceed with the time that we have now with the jury and we will take it from there".

493. The appellant submits that Molly Staunton was visibly shaken and upset. Quite properly no application was made to discharge the jury at this juncture.

494. The trial resumed and concluded for that day without interruption. In the absence of the jury, the judge informed the witness that she was not permitted to speak to anyone about her evidence and she indicated that she understood this. The judge also stressed that she was to make sure that nobody was present when the evidence resumed on 12 June.

Interruption 2

495. The following day, on 12 June, counsel for the respondent brought a matter to the trial court's attention; Molly Staunton had contacted Special Agent Katzke to tell him that Tommy McGeary had attempted to contact her via Snapchat. This information was relayed to Detective Inspector Phillips. The trial court enquired of Molly Staunton whether she had any concerns and she indicated that she did not. Prior to the recommencement of her evidence, a radio could be heard in the background. The trial court requested that the radio be turned off and the following took place:

"*JUDGE: … Is there a radio on where you are? Ms Staunton?*
WITNESS: Yes.
JUDGE: Was there a radio on where you are, no?
WITNESS: Yes. There is. I will turn it off now.
JUDGE: Yes, please do.

WITNESS: ... you have to turn this off. You got to ... turn it you got to turn it off. Can you hurry, they just said it

UNKNOWN SPEAKER: Get the fuck back in the room.

WITNESS: Please just hurry.

UNKNOWN SPEAKER: ....

WITNESS: Please I am begging you, this is a murder case, will you just leave please? I can't focus.

UNKNOWN SPEAKER: I don't give a fuck. You need to fucking ...

WITNESS: You just want to terrorise me, don't you?

UNKNOWN SPEAKER: ...terrorise you ... can't hear ...

JUDGE: Sorry, is there somebody else there?

WITNESS: Hello? Sorry?

JUDGE: Is there somebody else there?

WITNESS: Yes, there is. I am asking them to leave.

JUDGE: Yes.

WITNESS: Okay. The judge has said you have to leave, they don't want anyone outside the room. Seamus, they are asking

UNKNOWN SPEAKER: ...call another [boy].

WITNESS: Seamus, you have to

UNKNOWN SPEAKER: ...

WITNESS: You have to leave. They ... they want ... no, you can't do ... this is a ... I am asking you politely, you have to leave, I am politely asking you. I am politely asking you. Thank you. I will make [up] to you.

UNKNOWN SPEAKER: ...

WITNESS: Okay.

UNKNOWN SPEAKER: ...

WITNESS: Okay.

UNKNOWN SPEAKER: Swear on it.

WITNESS: I swear.

UNKNOWN SPEAKER: ...

WITNESS: Fine. You want to listen to it then?

UNKNOWN SPEAKER: ...

WITNESS: Are you going to listen to it? And I am going to be more focused on you.

UNKNOWN SPEAKER: You need to

WITNESS: The judge asked me to make you leave, Seamus. No, I

UNKNOWN SPEAKER: No, he didn't ....

WITNESS: ... please leave.

JUDGE: I will just cut off the link for the moment there and you need to get, Inspector

MR GREHAN: Yes. If we could just wait until she comes back. I just want to be sure she's okay.

JUDGE: Okay.

UNKNOWN SPEAKER: Tell them what you're supposed to tell them.
JUDGE: Ms Staunton, can you come back to the
WITNESS: I am not telling them
UNKNOWN SPEAKER: Tell them what you're supposed to tell them.
WITNESS: This is ...
JUDGE: Can I ask you, Ms Staunton, who was that that was there?
WITNESS: That was my friend. They have left.
JUDGE: That was a friend of yours?
WITNESS: Yes.
JUDGE: It was a male, was it?
WITNESS: What?
JUDGE: Was it a man who was there?
WITNESS: Yes.
JUDGE: And was he causing difficulty for you?
WITNESS: No.
JUDGE: Okay. Are you okay to proceed?
WITNESS: Yes, I am.
JUDGE: Do you want to say anything, Ms Murphy?
MS F MURPHY: I think everybody is a little bit concerned.
MR GREHAN: Well I think, Ms Staunton, should be advised that 911 can be contacted to have an officer at her place if that is necessary.
JUDGE: Do you need a police officer present at the property?
WITNESS: No, there is not.
JUDGE: Do you need a police officer called to be at the property?
WITNESS: No, I do not.
JUDGE: Okay".

496. Counsel for the appellant sought some time in the light of the above and expressed their concern about the conversation that had occurred, in particular, that the unknown male had said "*Tell them what you're supposed to tell them*". It was highlighted that the witness had been asked by the judge not to discuss her evidence with anyone as she was under cross-examination and secondly, that she was asked to ensure that nobody be in her presence when evidence resumed.

497. It is submitted on behalf of the appellant that the witness was noticeably anxious and strongly resistant to the idea that police be dispatched to her location.

498. Counsel for the appellant reiterated the absence of regulation of her evidence and asked that some enquiry be made in respect of the judge's requests the previous evening and the fact that someone appeared to be talking to her about her evidence.

499. Counsel for the respondent expressed their concerns for the safety of the witness but indicated that her wish not to have the police called should be respected. Counsel submitted

that there was no basis to conclude that she had discussed her evidence with anyone. Counsel referred to her conversation with Special Agent Katzke from which it could be said that the witness was well aware that she was not to discuss her evidence with anyone.

500. The judge made further enquiries of the witness as follows:

> "*JUDGE: Yes. Ms Staunton, I just want to make any an enquiry, since yesterday have you discussed any of your evidence with anybody? You heard my directions yesterday.*
> *WITNESS: No, I have not.*
> *JUDGE: You have not discussed your evidence with anybody?*
> *WITNESS: No*".

501. The evidence resumed in the presence of the jury with counsel for the appellant indicating that her examination had concluded. Counsel for the respondent then commenced re-examination of the witness.

Interruption 3

502. During the course of re-examination, an application was made to treat the witness as hostile as outlined above. In the absence of the jury, the witness indicated that she would tell the jury that the appellant had said that he was involved in the murder. At the recommencement of her evidence in re-examination, the witness addressed someone off camera and asked them to leave as follows:

> "*Q. MR GREHAN: Ms Staunton?*
> *A. Yes.*
> *Q. Do you recall what Aaron Brady said when he came out of his bedroom on the evening that you have told us about in June or July of 2016?*
> *A. Yes, I do. He was in distress about one second. Can you leave?*
> *UNKNOWN SPEAKER: Fuck off?*
> *A. Sorry. He was in distress about the fact*
> *Q. MR GREHAN: Sorry, Ms Staunton, are you able to close the door there to make sure*
> *A. Yes, yes. One second. Sorry, I have to shut*
> *UNKNOWN SPEAKER: Put a stop to this now. Put a stop to this. No, I have to I have to put a stop to it.*
> *UNKNOWN SPEAKER: You can stop it right now. No more testimony.*
> *JUDGE: Can you excuse us, members of the jury, please? Yes. Thank you".*

503. It is said on behalf of the appellant that the man's tone was aggressive and intimidatory. This man emerged and brought Molly Staunton's testimony to a halt by slamming her laptop shut. A brief adjournment was granted and upon re-establishing the link it is said that the witness was breathless. The respondent sought reassurance that the witness was safe, and

she confirmed that the person had now left. Molly Staunton maintained that he was unaware she was giving evidence when he intervened. She was asked to turn her laptop 360 degrees around the room to confirm she was now alone and was advised to lock the door. The following exchange took place on re-establishing connection:

> *"Q. MR GREHAN: Ms Staunton?*
> *A. Yes.*
> *Q. First and foremost I want to make sure you are safe?*
> *A. I am safe. I am 100 % safe.*
> *Q. All right. Secondly is there somebody there with you?*
> *A. Yes. Somebody-- they had left -they just left. They -didn't- they weren't aware that I was still doing a conference, that I was still on video with you. They weren't- aware when they came in.*
> *Q. So, they hadn't been in the room before that?*
> *A. No, they were not but they just left.*
> *Q. Have they left the apartment?*
> *A. Yes, they have. Yes, they have.*
> *Q. Is your computer a laptop?*
> *A. Yes, it is.*
> *Q. Well, would you mind, Ms Staunton, just scanning it around the room for us?*
> *A. Sure.*
> *Q. All right. And you are sure there's nobody there and the person has left?*
> *A. Yes.*
> *Q. Are you in a position to lock the door from the inside so we can finish this?*
> *A. Yes, I can. I can do that right now.*
> *Q. I'd ask you to do that.*
> *A. One second.*
> *MR GREHAN: I am ready to proceed in front of the jury*".

504. Counsel for the appellant requested that the witness be disconnected and for the third time, reiterated their concerns about the manner in which the evidence was being given and the situation in New York. Counsel reiterated that the situation surrounding Molly Staunton's evidence could be visited upon the appellant in a negative way. Counsel, in particular, highlighted that it could not have escaped the jury's notice that the interjection occurred when counsel for the respondent asked a particular question, that is a question regarding precisely what she had heard when the appellant exited his room sometime in and around June/July 2016. Counsel for the appellant indicated that a point had now been reached in the light of the three interruptions that the integrity of the trial process was compromised, and counsel sought time to take instructions on the issue. The judge indicated that the witness's evidence must be completed, and the evidence resumed.

505. Counsel for the respondent confirmed with the witness that the apartment was empty, and the evidence resumed. The witness confirmed that she was happy to proceed. As set out in

considering ground 21 in this judgment, the witness did not come up to proof, excerpts from the video of her statement were played in the presence of the jury and the witness stated that the appellant had said that "*he killed a cop*".

506. Her evidence then concluded.

Evidence of Detective Inspector Phillips

507. On 15 June, evidence was given by Detective Inspector Phillips who had been liaising with Molly Staunton for the purposes of connecting her video-link, when there was a concern for her safety and at the conclusion of her evidence. In direct examination, he stated that the witness informed him that she did not need law enforcement to call to her. He conducted enquiries regarding the unknown male. She provided the detective with the address from where she gave evidence and the name of the person who interrupted the proceedings. In addition, she confirmed that Tommy McGeary had attempted to contact her after she finished her evidence on the first day via Snapchat and that she made contact with Special Agent Katzke in this regard. Molly Staunton contacted Detective Inspector Phillips when she concluded her evidence as she had received two messages from Tommy McGeary from his Snapchat account; one of which was a video of him making a gun gesture and saying "*bang, bang you're dead*", another saying "*you silly, silly girl*" with laughing emojis. She was reassured that Tommy McGeary was not in the US at that time.

508. In cross-examination, it transpired that Molly Staunton told Detective Inspector Phillips that the unknown man was a "*boyfriend of some sort*" and further that she had been giving evidence from this man's apartment and not from her own home. Certain questions were asked regarding the witness's view of the interruptions and the possibility of domestic abuse.

Application to Discharge the Jury

509. Application was made to discharge the jury following the above evidence. It was submitted that the appellant had suffered prejudice as a result of the interruptions, which could not be remedied by directions of the trial judge. It was further submitted that the fear they had held in relation to the absence of regulation in the taking of the evidence had been realised; the interruptions had come at crucial moments, in particular, the intervention of "*no more testimony*", and that no direction from the trial court could remedy the prejudice caused to the appellant in this regard.

510. Reliance was placed on *People (DPP) v. Mulder* [2007] 4 I.R. 796 in which the brother of the deceased made comments in the presence of the jury while the accused was being arraigned.

511. Counsel for the respondent at trial argued that there was no evidence from which the jury could conclude that the appellant was linked to the unfortunate circumstances which had occurred, rather, that what occurred was a consequence of a domestic set up. It was submitted that Molly Staunton had never said she was not cooperating and never suggested that she was under pressure from anybody to do anything. It was further submitted that the

exchange between the witness and "*Seamus*" made no reference to the substance of her evidence rather, that it seemed to address the finishing up of her evidence.

512. It was submitted that *Mulder* could be distinguished. Reliance was placed on *People (DPP) v. Lonergan* [2009] 4 I.R. 175 as well as *People* (*DPP) v. Michael Power* [2019] IECA 74, *Dawson v. District Judge Hamill (No. 2)* [1991] 1 I.R. 213, *D v. Director of Public Prosecutions* [1994] 2 I.R. 465 and *People (DPP) v. Michael Fahy* [2008] 2 I.R. 292. It was not accepted that the events would be viewed by the jury in a manner that was prejudicial to the appellant. It was submitted that the court must first assess how the matter could be dealt with by directions to the jury and that discharge was a last resort.

513. Counsel for the appellant at trial pointed out that counsel for the respondent sought a ruling that the witness was hostile but was now characterising her as cooperative and that this was difficult to reconcile. It was submitted that the witness's change in position was not as a result of her domestic situation but as a result of her being coerced and directed in her evidence and an enquiry ought to have been held.

514. The respondent argued that the trial court did not have to conduct an enquiry but could rely on what had occurred in its presence.

The Trial Judge's Ruling

515. The trial judge was of the opinion that it was self-evident that the accused had no role in the interruptions. He could not see how prejudice would arise, and he was satisfied to deal with the matter by way of directions:

i. An explanation that Molly Staunton's evidence was tendered in her own home without supervision and that the difficulties which ensued had nothing to do with the accused.
ii. A strong warning in the judge's charge to treat Molly Staunton's evidence with absolute caution.

516. A draft proposal of the direction was given to the parties for consideration. However, he removed the word "*strong*" from the direction.

517. The judge directed the jury on 6 July 2020 on this issue as follows:

> "[…] *I just want to -this is a matter that I -would have liked to have dealt with much earlier but it just wasn't possible for a number of reasons and it arises from the evidence of Molly Staunton before you on the 12th of June last* ***and it is a direction that I just want to give you in relation to it and I'd ask you to listen to it carefully at this point in time and I will be revisiting it again when it's my duty to charge you before you retire to consider your verdict.***

Members of the jury, I wish to address you on aspects of the interruption of the testimony of Molly Staunton on Friday the 12th of June last. In due course during my charge to you at the conclusion of the trial, I will be issuing a warning to you to exercise caution on the evaluation of her testimony. In your absence on Friday the 12th of June there was another interruption by this individual, aspects of which I will be dealing with during my charge. Today I wish to explain why she was giving evidence from a domestic setting without independent supervision. It was the initial intention of the prosecution to have the witnesses based in New York travel to Dublin to give evidence. Due to pandemic the prosecution applied to have the witnesses heard by video link. The Court agreed to that course by order of 6th of April. The Court on that date issued a formal request to the US authorities, the US Department of Justice Criminal Division, DC to provide facilities in New York to receive their evidence. There are mutual assistance arrangements in place between Ireland and USA. The Court was updated regularly. Due to the severe nature of the pandemic in New York the Court was informed that facilities could not be provided. Application was made to the Court by the prosecution on the 3rd and 5th of June to vary the Court's order of the 6th of April to permit the witnesses to give evidence from their residences without supervision. The Court agreed to this request. The defence expressed concern about this mode of testimony without supervision and did so again during Ms Staunton's testimony. The Court endeavoured to impose as much formality as was possible in the circumstances. ***A letter was sent by email to Ms Staunton where she was directed to give her evidence from a quiet room on her own where she would not be interrupted or distracted. Following this ruling the Court itself was in error in that a basic risk assessment was not carried out to ensure the location of the testimony was secure and that she had control over this location. On enquiry after her testimony it was established that the person who interrupted her was her friend/boyfriend and she was testifying from an apartment where she resided with him. The interruption was improper and regrettable and the Court apologies (sic) to you".***

(Emphasis added)

518. On 28 July 2020, the judge made a reference to Molly Staunton's evidence in advising the jury as to how he intended to proceed in his charge. It is relevant in that he states he will be giving them a warning:

> "*However, if a witness agrees that a question is correct, that contained in the question then becomes evidence and also when I reach the summary of the evidence of Molly Staunton I will be giving you a warning as to how to treat her evidence".*

519. On 31 July 2020, the judge reiterated that he would be giving the jury a warning regarding Molly Staunton's evidence and then in his charge to the jury on 4 August 2020, the judge

summarised the position as regards the interruptions, including the interruption for which the jury were absent:

> "*Now, members of the jury, I am just going to deal now with Ms Staunton's evidence, a controversial part of it, because you will recall that I already spoke to you about how Ms Staunton came to be giving her evidence from her home. I set all that out in terms of the applications of the prosecution, the Court's decision and the difficulties that arose and because of the interruption and possible interference with her evidence I am going to give you a warning about her evidence and just in relation to the warning, I just want to, before I give it, explain just about her friend/boyfriend's interruption that on Thursday afternoon someone came into the apartment. There was nothing said or anything like that but obviously there was issues about it and that was in the course of Ms Murphy's crossexamination. But then on Friday morning, just before you came out, in your presence before the trial started before you, I had dialled into Ms Staunton and I had heard a radio in the background and I asked her to turn the radio off and when she went to do that this individual became difficult and I -just want to- then the difficulties isn't what the relevant issue is, she just said something about Ms -Staunton's -he just said something about Ms Staunton's evidence which I want to bring to your attention, even though it wasn't said in your presence. So, Ms Staunton, when I asked her to go and turn off the radio, she says-* [...]".

520. The judge then warned the jury as follows:

> *"Now, because of the interruption and possible interference with Ms Staunton's evidence on Friday 12th of June 2020 I have decided to give you a warning in respect of her evidence. It may be dangerous to rely on her evidence because of the interruption. If realising the risk, and in the light of this solemn warning of the danger of so doing, if you are convinced beyond a reasonable doubt of the truth and reliability of her testimony you may rely on it. So, that's the warning, members of the jury, and I am just going to deal with her evidence now*".

521. The jury were provided with a transcript of the interruption for which they were absent.

Submissions of the Appellant on Ground 20 (i) –(iii)

522. Counsel for the appellant says that it is noteworthy that the person who is ultimately deemed to be some form of domestic abuser by the State and the trial court is the person who indicates to Molly Staunton that she should have a lawyer and also that it is worrying that he is saying phrases to her such as, "*tell them what you're supposed to tell them".*

523. Counsel highlights that nobody in the trial had any idea exactly where Molly Staunton was when she was giving her evidence and submits that this underlines the lack of any form of supervision or regulation in the giving of her evidence.

524. It is pointed out that Daniel Cahill gave evidence in secure environs after the conclusion of Molly Staunton's evidence. It is said that this a) demonstrates that same was a possibility all along and b) highlights the deficiencies of the manner in which the evidence was given by the witness.

525. Counsel for the appellant submits that Molly Staunton's evidence was very important evidence, essential to the case and to have it compromised in such a way fundamentally interfered with the integrity of the trial and caused a prejudice to the appellant.

526. In relation to the directions given, it is submitted that the judge ought not to have directed the jury as to who bore responsibility for the interruption, absent an investigation into the matter. Further, it is submitted that while the direction given may be open to the interpretation that it was the judge's attempt to communicate to the jury that the appellant was not involved, it did not resolve the situation, rather, it compounded a situation that was already beyond redemption.

527. It is further submitted that it was left open to the jury to consider that the interruptions had something to do with the appellant and that not only was the appellant prejudiced by this, but the jury was further informed of additional prejudicial interruptions that had occurred in their absence as is outlined below.

Submissions of the Respondent on Ground 20 (i) –(iii)

528. It is the respondent's position that the interruptions affected only how the evidence was presented and not the quality of the content and in those circumstances, the integrity of the trial was not in doubt and a discharge was not warranted.

529. In relation to the intervention "*tell them what you're supposed to tell them*", counsel for the respondent submits that this is to be understood as "*get on with it*" rather than any direction as to the content of Molly Staunton's evidence.

530. Counsel for the respondent characterises Molly Staunton as a resilient witness who stuck with the trial throughout despite the interruptions and attempts at contact from persons connected to the case. Counsel submits that there is no evidence in any shape or form that the interruptions had any effect at all on her evidence.

531. It is repeated that what occurred was capable of being dealt with by specific directions of the trial judge and it is submitted, was so dealt with by the judge both at the time and in his charge to the jury.

532. It is submitted that the directions given were sufficient to make it clear to the jury that the interruptions had nothing to do with the appellant and counsel for the appellant made no

requisitions on this point to the judge. Further, that there was no basis for the court to enter into a collateral investigation about what had occurred having satisfied itself with the queries it put and which were answered by Molly Staunton herself and the evidence of Detective Inspector Phillips.

Submissions of the Appellant on Grounds 22 and 23

533. The appellant repeats the submission that the direction to the jury was insufficient to rule out the appellant's involvement and that the judge could not have given a direction that the appellant had nothing to do with the interruptions without conducting an investigation.

534. It is submitted that if the direction had any value, it was reduced by delay in that the evidence was heard on 11/12 June and the direction was given on 6 July, allowing the jury to speculate on the reason for the interruptions.

535. It is submitted that the warning given was anaemic, cursory and contained no instruction on the requirement of voluntariness and the reliability of witness testimony.

536. It is complained that the trial judge said that nothing was said by the intruder in the first interruption, whereas a male voice was heard saying on being asked to leave that he "*wasn't fucking leaving anywhere*".

537. It is further complained that the aggressive and threatening tone of the second interruption which was made in the absence of the jury could not have been communicated by a transcript and that no reference was made to the third interruption during which "*Seamus*" could be heard saying "*put a stop to this, put a stop to it. You can stop it right now. There's no more testimony".*

538. Counsel for the appellant points out that both parties indicated that they were not in favour of the trial judge informing the jury of what happened in their absence at the relevant time.

539. It is submitted that the jury was being directed to act upon something which was not in evidence and to rely on the written word to decide whether the witness's evidence had been interfered with without seeing her demeanour which is not provided for in law.

Submissions of the Respondent on Grounds 22 and 23

540. It is the respondent's position that the decision of the judge to share with the jury information he had received in their absence was clearly done in ease of the appellant to emphasise that the jury should exercise additional caution above and beyond that which they might exercise with any other witness and providing context for that. It is said that in this regard, the trial judge was acting within his jurisdiction and only conveyed to the jury the additional information for that purpose.

541. Counsel for the respondent relies on Chapter 4, Section H of Declan McGrath's book, *Evidence* (3rd edn, Round Hall 2020) which was opened to this Court during oral hearing. Counsel submits that what arose here was a situation of witness interference which would fall to be dealt with "*by means of a more tailored cautionary instruction in accordance with the principles laid down by the Supreme Court in The People (AG) v. Casey (No. 2)*".

542. It is submitted that the jury were not being directed to act on some evidence they had not heard and that counsel for the appellant remained free to put whatever interpretation of events to the jury that they wished but the judge was not obliged to accept their interpretation.

Discussion

543. The gravamen of this application was quite straightforward in one way but complicated in others. It arose as a result of the most unusual circumstances imaginable in the context of a criminal trial. The witness was giving evidence via video link from another jurisdiction where there was no supervision or regulation of the manner of her giving her evidence. This was all due to the worldwide pandemic. It is to be hoped that such a situation for so many reasons will never occur again.

544. Counsel for the appellant contends that their concerns regarding the absence of supervision were entirely and unfortunately justified in the circumstances of interruptions by the male known only as "*Seamus*". Those interruptions, it is said, came at crucial moments in the evidence and caused prejudice to the appellant, culminating, with the individual saying stop this now, stop the testimony, and the closing of the laptop, resulting in irreparable damage and constituting an attack on the integrity of the trial.

545. It is said that the integrity of the trial was undermined entirely due to the mode of taking the evidence in the absence of supervision, the difficulties with technology and the impact on Molly Staunton's testimony due to the interventions by a third party.

546. The test to be applied and as applied by the trial judge is as set out in the headnote in *Mulder*:

> *"The right of an accused to be tried by a jury free from any suspicion or taint of bias is one of the cornerstones of the criminal justice system but this right has to be read in the context of the maxim that justice should not only be done but seen to be done. The test was an objective one as to whether a reasonable person would have a reasonable apprehension that the accused would not in the circumstances receive a fair and impartial trial. The Court also has to have regard to the robust common sense of juries".*

547. There are several points to be made at the outset of this analysis. The witness, Molly Staunton, was giving her evidence without any supervision, having received directions from the judge via the respondent as to the safeguards to be put in place regarding her evidence.

This was done in order to ensure insofar as possible in the prevailing circumstances that the evidence would be given in an appropriate environment. The most salient features of the judge's directions for the purpose of these grounds were that the witness was to give her evidence from a quiet room, on her own, without interruption or distractions. She was directed not to discuss her statements in advance. It is clear that while she attempted to comply with those directions and did indeed give her evidence from a quiet room, she did not do so without interruption. However, it is noteworthy that she contacted Special Agent Katzke following attempted contact by Tommy McGeary on the evening of day 1 of her evidence.

548. Significantly, the judge was informed that the witness told Special Agent Katzke that she was being cross-examined and she was aware she could not discuss the case. Secondly, following the conclusion of her evidence, she contacted Detective Inspector Phillips as she had received worrying messages from Tommy McGeary. The significance of the foregoing is obvious; the witness was on alert to contact the authorities following inappropriate contact with her, she knew she was not to discuss her evidence and when frightened for her safety following the messages from Tommy McGeary, she contacted the authorities. It can be said that she was mindful of her obligations.

549. The witness made herself available on a voluntary basis, without compulsion by way of a witness summons. She co-operated fully with the process and made herself available at the appointed time. It is notable that in the letter containing the judge's directions, gratitude was expressed for her cooperation. At this stage, we observe that at any point she could have simply stopped the process.

550. The respondent accepted in submissions in the trial court that factually there was no link between the appellant and the individual concerned in the interjections. In fact, while this is said in the appellant's submissions to be evidence, it seems this was a submission advanced on behalf of the appellant on foot of Detective Inspector Phillips' evidence.

551. It is necessary to scrutinise the context in which each of the three interruptions complained of took place in order to assess if all or any or cumulatively, the interjections impacted on the fairness of the trial to the extent that the trial judge ought to have discharged the jury.

Interruption 1

552. Direct examination had not been without its challenges, but ultimately, the witness gave the evidence sought by the respondent. Cross-examination resulted in counsel for the appellant successfully impugning the witness on the crucial issue. During cross-examination, the witness alerted counsel to her concerns that somebody had entered the apartment. At that point, the witness was answering questions regarding her contact with the appellant at the relevant time, including contact in the apartment he shared with her then boyfriend and a trip to a shopping centre in a car where the appellant was present. The point being made

was that there was not much contact between them, and that the appellant did not recall trips as a group.

553. She was given time to address the situation and when she reconnected, she appeared upset and flustered. She was in a different room. She was asked by the judge if she was alone in the room and she confirmed that she was.

554. Regarding this interruption, it is significant that the witness immediately brought this to the trial court's attention and sought time to address the situation, which she then does. It cannot be ignored that she was giving evidence on a voluntary basis and could have stopped the process at any stage. Her directions from the judge were to give evidence from a quiet room, alone without interruption. She did her best to do so. It is important to note that at this point, the witness was being cross-examined in what could be termed as, general terms, before actually reaching the meat of her testimony. The cross-examination continued with the same line of questioning and after some time, counsel for the appellant brought the witness to the real issue: the admission. She was asked about the appellant's condition; including distress and the consumption of alcohol and when questioned about what she said she had heard, she initially maintained her position as in her direct evidence but ultimately, towards the end of day 1 of cross-examination, agreed with the defence suggestion that he was upset because gardaí were looking for him, rather than that he had admitted to killing a garda.

555. In the circumstances, counsel for the appellant quite properly did not apply for a direction at the time of being alerted to another's presence in the apartment in New York. The judge addressed the situation by confirming the witness's position in a room alone and the trial continued. It could not, on any analysis, be said to have interfered with the integrity of the trial. Certainly, there was another person present, but this did not conflict with the judge's direction that the witness give evidence from a quiet room, alone. It did not interfere with her evidence, and it cannot be said that the appellant was prejudiced.

Interruption 2

556. This occurred on the second morning of the witness's evidence. The detail of the interruption can be seen earlier in this segment of the judgment. It would be puerile not to recognise that this was a serious and concerning interruption. Clearly, the witness had a verbal altercation with the individual off screen. He was verbally abusive to her and used the words, "*tell them what you are supposed to tell them*". She pleaded with him to leave, that she could not focus. She said he just wanted to terrorise her. Ultimately, she is successful in getting him to leave and indicates that she is okay to proceed, that she is safe and that no police officer is needed.

557. When Detective Inspector Phillips was questioned by counsel for the appellant at trial, part of that cross-examination related to the spectre of domestic abuse and in essence, whether

this altercation had some of the characteristics which may generally be associated with such abuse and the witness agreed with that suggestion. While it was not directly in evidence, the respondent agreed that the person in the apartment had no links to the appellant.

558. The point in her evidence when this came about was on day 2, prior to the resumption of cross-examination. She had already changed her evidence. She maintained that stance after this interruption; therefore, it cannot be said that this impacted on her evidence. The witness confirmed when asked by the judge that she had not discussed her evidence with anyone. The words – "*tell them what you are supposed to tell them*" do not, in our view, invite of a malign connotation. There is no doubt that she was not alone in the apartment, however, it can be gleaned from the words spoken by the male that she was in a different room when he exhorted her profanely to get back in her room. The witness herself can also be heard saying – *"the judge just said you have to leave, they don't want anyone else in the room".*

559. Certainly, the event underlined the difficulties with the absence of supervision or regulation of the witness. However, the broader point is, of course, made that this conduct in and of itself invited speculation of some link and thus prejudiced the appellant's right to a fair trial. However, that is on any objective view, speculative. The judge made it clear it was a situation of domestic abuse. His direction was a carefully worded one. There is no reason to believe that the jury disregarded his direction.

560. We do not see that this interruption impacted on the fairness of the trial in the circumstances.

Interruption 3

561. This took place at a time when the witness was being re-examined. She had been declared hostile and having been questioned in the absence of the jury and having agreed that she would give her evidence, the specific question was asked as to what she recalled the appellant saying in June/July 2016. At this point she is heard asking someone to leave, this person tells her to "*Fuck off*" and it seems she tries to shut the door, when a male is heard saying– "*Put a stop to it right now, no more testimony*" and the link is disconnected.

562. Counsel for the appellant at trial submitted that the value of her evidence had been compromised. This took place in the presence of the jury and while that might initially be thought to be of concern, in fact, it was not. When one considers the absence of supervision, it is relevant that this interruption took place in the jury's presence. Therefore, the jury were aware of exactly what transpired in the same way as if the trial had been conducted in person. If an individual stormed into a court shouting at a witness to end her testimony, the jury would be aware of this and the judge would undoubtedly, all things being equal, advise the jury to ignore the interruption and that it was unconnected to the accused. This situation whilst utterly different in so many respects, was similar in that respect.

563. The witness on resuming with the jury, continues to say that the appellant did not, in effect, make an admission. Therefore, her evidence had not altered from the stance that she took in cross-examination, notwithstanding that she had agreed in the absence of the jury to give

her original evidence. However, once the recording was played, she then reverted to her original position. Thus, it was the playing of the recording that caused this *volte face*.

564. Again, we do not see that prejudice was visited upon the appellant as a result. What can be said is that the male was a verbally abusive individual with no respect for the witness or for the administration of justice, but that is an entirely different matter from concluding that his conduct impacted on the fairness of the trial.

Conclusion

565. There is no doubt that the manner in which it was necessary to take Molly Staunton's evidence due to the pandemic was less than ideal. Undoubtedly, it would have been far preferable if there had been some form of invigilation over the process and the concerns expressed in this regard by counsel for the appellant were well-founded. However, the fact that that preferable situation did not come to pass does not segue into a successful application for a discharge. One must step back and analyse the consequences of these interruptions and, in our opinion, whether taking each interruption separately or together, the consequence was not a breach of the integrity of the trial and did not cause prejudice to the appellant, necessitating the discharge of this jury. We are not persuaded that there was a real and substantial risk of an unfair trial which could not be avoided by directions of the trial judge.

566. We entirely agree with the trial judge's assessment of the witness's evidence when he commented as follows in the course of his ruling:

> "*The whole tenor of her evidence was that she had set out on a course from the beginning of her evidence on Thursday, which the Court noted, to try and avoid a direct implication of the accused in the most important aspect of her testimony. There is in the Court's opinion very little evidence that she changed any evidence as a result of her friend's intervention but that is a matter for the jury*".

567. The appellant in submissions takes issue with this assessment by the trial judge and contends that the judge set out no basis for this finding. Moreover, the appellant invites this Court to set aside the "*finding*" on the basis of perversity.

568. In so arguing, the appellant acknowledges that the bar for setting aside a finding on the basis of perversity is high, but it is said on behalf of the appellant that the finding is legally perverse and contrary to the evidence.

569. This is not elaborated upon in written submissions. We are entirely satisfied that the judge was fully entitled to assess the witness's evidence in the manner in which he did. He observed that the tenor of her evidence was to avoid directly implicating the appellant. The judge was patently present for the trial and fully and completely engaged. He carefully went through the witness's evidence, noting, of course, the times when she altered her evidence. He was

fully entitled to conclude in his view that the witness tried to avoid directly implicating the appellant. This was clearly founded on the evidence. The witness altered her evidence on the central issue. She was clearly reluctant to give that evidence on any reading of her evidence. She then gave the evidence, resiled from the evidence, changed her position again and eventually reverted to her original position. This suggestion that the judge's finding was perverse is wholly unfounded.

570. The submission is made that for this Court to review the judge's ruling that the appellant was not prejudiced by the interruptions so as to necessitate the jury's discharge, this cannot be done without evidence which simply was not before the court of trial.

571. We do not agree, the court of trial had evidence, the court had witnessed the interventions, the impact on the witness and had the evidence of Detective Inspector Phillips. It is not for a court of trial to conduct *"side trials"* during the currency of a criminal trial. Should the trial have been conducted in the ordinary manner, then undoubtedly the male would have been removed from court and the trial would have proceeded.

572. The witness would be advised not to discuss her evidence during cross-examination, as occurred here. The witness would resume her evidence and if necessary, the jury would receive directions from the trial judge on the interruptions in due course.

573. The judge's function was to assess whether the interventions, serious as they were, had the effect of prejudicing the appellant to the extent that the jury should have been discharged and whether the impact of the interventions could be addressed by directions from him.

574. He did so and was fully capable of doing so, absent a side trial or investigation. Should a court decide to proceed to contempt proceedings, that is another matter entirely.

575. Complaint is made that the trial judge ought not to have directed the jury who had responsibility for the interruptions without an investigation, and it is also said that the trial judge failed to indicate that the interruptions had nothing to do with the appellant.

576. It appears to this Court that the judge carefully and properly addressed the jury on the issue. He acknowledged the absence of supervision and referred to the interruptions as being from her boyfriend. This, of course, had the direct effect of dissociating the appellant from the male in New York without mentioning the appellant at all. The evidence was that the person was in some kind of relationship with her. The judge also made it clear that she was in his apartment and armed with that knowledge, the jury were in a position to assess her evidence.

577. The complaint that the judge ought not to have informed the jury of what occurred in their absence is equally unfounded. This ensured that the jury were aware of the interruptions to enable them to view Molly Staunton's evidence in that knowledge. By doing so, the judge gave the necessary information to the jury to enable them to properly apply the warning he gave to them in terms of her evidence.

578. It has been argued by the respondent that it is akin to the judge advising the jury as to the background underpinning the reasons for a *Casey* warning. However, ordinarily those reasons are not directly related to the facts of any given case but serve to explain the necessity for such a warning. It was unusual, but in the present case, advising the jury as he did, was something which inured, in our view, to the benefit of the appellant. The jury had witnessed some interruptions and it was not inappropriate in the unusual circumstances for the judge to advise them of all interruptions.

579. This is a matter within the trial judge's discretion to ensure the proper administration of justice. The jury were not invited to consider the material the judge gave them as evidence to determine the issues in the case, but in order to contextualise the warning regarding Molly Staunton's evidence.

580. We do not agree with the appellant that the absence of onsite supervision, together with the interjections by "*Seamus*" rendered the trial unfair and that prejudice would be visited upon the appellant in the eyes of the jury. The latter presupposes that the jury perceived a nexus between the conduct of the man in the apartment and the appellant. This, in fact, on careful analysis, is speculative. One must keep in mind the objective test; would a reasonable person apprehend that the accused would not receive a fair trial? Did the interjections actually interfere with the evidence? All one has to do is look to the thrust of her evidence on the central issue to see whether the interruptions impacted upon it.

581. Molly Staunton's evidence was certainly prejudicial, she gave evidence that the appellant had made an admission to murdering/killing a "*cop*" in Ireland. The sequence of her evidence *vis-à-vis* the interjections is as follows: sometime after the whisper off camera, the jury hear the witness say in direct examination that she heard the appellant say he had killed a policeman. Following the first interruption, where the witness heard someone come into her apartment, she maintains her original position in cross-examination. Then towards the end of day 1 in cross-examination, the jury hear her change her evidence. The following day and following the second interruption, she maintains that change of position. She is then re-examined and treated as hostile; she then reverts to her original position in the absence of the jury. The third and final interruption by the male occurs, she resiles in the jury's presence, the video recording of her statement is played to her in the jury's presence, and she reverts to her original evidence.

582. So, it is clear that the witness alters her evidence from time to time, but those alterations cannot be directly connected to the interruptions, in our view. The words "*tell them what you are supposed to tell them*", invites of an anodyne connotation particularly when viewed in the context of the direction by the trial judge on the issue and the fact that following that interruption, the witness continued with her evidence maintaining her altered position; that the appellant had not made the admission, which position had altered before the interruption.

583. Someone clearly interrupted her evidence. If that occurred in other circumstances, during a trial in person, that individual would undoubtedly be removed from the court. Contempt proceedings may or may not follow on the conclusion of the trial.

584. It must be recalled that Molly Staunton of her own volition complained to the authorities when someone tried to contact her and when she was frightened by that person. Under oath, she told the judge she had not discussed her evidence and that she was safe to continue with the evidence.

585. No doubt the circumstances were extraordinary, the times we lived in due to the pandemic were extraordinary times, but the witness gave her evidence, imperfect as it was and that was highlighted to the jury by the trial judge. Moreover, the jury witnessed some of the interruptions and were informed of them by the trial judge. This ensured that the jury could view her evidence through that prism and assess it accordingly. That, coupled with the judge's direction that the interruptions were not linked to the appellant ensured that the trial, while not perfect, was fair.

586. Accordingly, these grounds fail.

Ground 20(iv - vii) - That the trial judge further erred in failing to discharge the jury when:

(iv) In failing to either direct:

- **An Garda Síochána to carry out an investigation to what had occurred and in particular to identify the precise circumstances whom the individual was, how it came about that he was directing her testimony, whether he was acting alone or in concert, what his motivation was, and whether he was exercising as the video appeared to demonstrate some form of coercive control over Molly Staunton or otherwise intimidating her into giving evidence in a manner directed by him.**
- **That the court by its own motion investigate what was a blatant and serious contempt in the fact of the court (that had it occurred in ordinary course where a witness was giving evidence in court would undoubtedly have been the subject of a full inquiry) for the purposes of addressing the foregoing issues highlighted above, and for the purposes of protecting the integrity of the trial process.**

(v) the cumulative flaws that had occurred during or related to the video link testimony rendered the trial unfair.

(vi) Refusal to direct An Garda Síochána carry out an investigation into the circumstances under which Molly Staunton's evidence was interrupted.

Ground 24 – That the trial judge erred in telling the jury as a matter of fact that the intervention by the hostile male had nothing to do with Aaron Brady, in circumstances where the matter had not been the subject of an investigation, no evidence had been put before the court which would have justified reaching such a conclusion, or the jury in circumstances where a jury had no way of assessing whether the interpretation of the trial judge was well-founded, or not, and in circumstances where the jury was confined as a matter of law to reaching a verdict in accordance with the evidence

587. These grounds are taken together. It seems that ground 20 (vi) is encompassed in ground 24. In any event, ground 20 (vi) is only referred to in the submissions and is not contained in the appellant's Notice of Appeal as lodged.

Background

Application to Discharge the Jury – 23 June 2020

588. As outlined above, the court ruled that it was self-evident that the appellant had no role in the interruptions and was satisfied to deal with the matter by way of direction to the jury.

589. However, on 23 June 2020, counsel for the appellant at trial made a fresh application to discharge the jury. It was argued that the events that had occurred amounted to a clear contempt of court and an investigation should be carried out.

590. It was submitted that the court's finding that Molly Staunton had become a "*reluctant witness*" was, in effect, a finding that the witness was committing perjury and had to be investigated. Counsel for the appellant further questioned on what legal basis the court could tell the jury that the interruptions were nothing to do with the appellant in the absence of an investigation.

591. Reliance was placed on the evidence of Detective Inspector Phillips that had he overheard the conversation which had occurred on camera, outside a courtroom he would have informed the Director of Public Prosecutions and would have expected the court to investigate the matter in full.

592. It was submitted that the solution put forward by the court could not be applied in a way which was not prejudicial to the accused and accordingly, the jury should be discharged.

593. Counsel for the respondent at trial argued that counsel for the appellant should not question a judgment of the court and pointed out that the appellant had not made the argument that there was a contempt in advance of the court's ruling on the earlier discharge application.

594. In relation to Detective Inspector Phillips, it was submitted that he carried out his enquiries in the context of concerns for Molly Staunton's welfare and not any contempt of court.

595. It was submitted that the proposition that the jury would be told that the difficulties which ensued had nothing to do with the accused was unremarkable; the jury would see that what occurred was a domestic situation which had nothing to do with the case.

596. It was further submitted that the court had no jurisdiction over the person who interfered with the process.

597. The court acknowledged its error in not teasing out Molly Staunton's accommodation or who she was living with but stated that her friend/boyfriend "*Seamus*" was not subject to the court's jurisdiction and refused to make a finding that Molly Staunton was in contempt of court.

598. The judge accepted that the witness did not properly follow the court's directions but considered that this may have been because she was in an abusive relationship. In refusing the discharge application, he stated that the court's opinion on the evidence did not matter. This was a trial by jury. However, the judge clarified that the court held no view that Molly Staunton was committing perjury.

Submissions of the Appellant

599. The appellant submits that the fact that the person directing or controlling the witness's testimony was not a witness in the case or present in Ireland does not mean that the court did not have jurisdiction over that person and further, that if it was not possible to investigate what occurred, the proper course was for the jury to be discharged and the trial recommenced.

600. It is further submitted that refusing to investigate because there was no power or ability to investigate is not a substitute or a reason for refusing to investigate.

601. Counsel for the appellant, before this Court, clarified what the defence were seeking; counsel says that statements should have been taken from both Molly Staunton and "*Seamus".* He says Molly Staunton should have been asked what was meant by *"tell them what you're supposed to tell them"* and the reference to needing a lawyer.

602. Counsel for the appellant further submitted that, in particular, the intervention *"tell them what you're supposed to tell them"* was predicated on there being a previous conversation between the witness and "*Seamus*" about her evidence.

603. It is complained that the direction ultimately given was inadequate in that it did not inform the jury that the appellant had nothing to do with the interruptions and therefore did not afford the appellant the limited protection which would have arisen from such a direction.

Submissions of the Respondent

604. The respondent points out that counsel for the appellant seems to concede in their written submissions that an investigation was not possible.

605. Counsel for the respondent did not agree that it was necessary to take a statement from Molly Staunton or "*Seamus*" in the context of the trial. Counsel took the view that an investigation into any alleged contempt of court should be totally separate from the trial and the court should not be side-tracked into conducting a collateral inquiry into something other than the trial before it.

606. It is submitted that the ultimate goal was not to procure an impossible investigation but to secure the collapse of the trial. It is repeated that counsel for the appellant at trial made no requisitions on how the trial judge warned the jury on this matter in his charge. It is submitted that this can only be interpreted as indicating that they were not unhappy with the warning actually given.

Discussion and Determination – Ground 24

607. Ground 24 asserts that the judge erred in telling the jury as a matter of fact that the intervention by the hostile male had nothing to do with the appellant. This ground may well be inelegantly phrased, as it is clear that the judge did not tell the jury that the intervention had nothing to do with the appellant and in fact this is something of which counsel for the appellant complained.

608. The judge's direction to the jury on 6 July was much more subtle and nuanced than a direct assertion that the hostile male's intervention had nothing to do with the appellant. The judge clearly took great care in the words he chose and advised the jury:

> "*On enquiry after her testimony it was established that the person who interrupted her was her friend/boyfriend and she was testifying from an apartment where she resided with him. The interruption was improper and regrettable and the Court apologies* (sic) *to you*".

609. The reference to the trial judge's finding that the appellant had nothing to do with the male's interventions is to be found in his ruling refusing to discharge the jury on 17 June 2020. In that ruling, the judge addressed the appellant's submission that a direction from the trial judge could not surmount the prejudice accruing to the appellant on foot of the male's interruptions. He specifically referred to the submission that a jury could only take a negative view of the appellant in light of the intervention and noted that even if the court were not to give a direction to the jury, that the jury would be acting contrary to the general directions as it would involve speculation. He then went on to say:

"*It is self-evident that the accused had nothing to do with this man's intervention*".

610. Having complained that the judge did not tell the jury that the appellant had no connection with the interventions, the criticism now seems to be made that the judge erred in telling this to the jury.

611. This is both factually incorrect and contradictory. Indeed, at a later stage in the appellant's submissions, the complaint is made that the judge failed to order an investigation into the interventions, failed to discharge the jury and also failed to direct the jury that the interventions had nothing to do with the appellant. Yet the within ground remains that the judge erred in so telling the jury. Even if the judge had said this to the jury, it is impossible to see how this would have disadvantaged the appellant.

612. The judge advised the jury in careful terms that the situation in New York was, in effect, a domestic one. As already stated in this judgment, his direction to the jury was careful and measured and served to disassociate the appellant from the interventions taking place in New York. The manner in which the judge addressed the issue, was, in the view of this Court, the optimum approach.

613. We have no hesitation in dismissing this ground.

Discussion – Ground 20(iv)

614. Much of this territory has already been traversed. The application to discharge the jury was made on 23 June 2020 on the basis *inter alia* that the solution put forward earlier to address the interventions could not operate to address the situation without causing prejudice to the appellant. Counsel for the appellant at trial contended that the court should address the contempt of court issue and requested that an investigation be conducted into the matter and the court refused to do so.

615. The matter was canvassed at some length and some of the arguments made on 15 and 16 June culminating in the ruling of 17 June were rehearsed. The judge considered the matter carefully and gave a lengthy ruling. We do not intend to set out that ruling in full but set out hereunder some of the salient aspects.

616. The judge initially sought to place the application in context and said:

> "*Now, I just want to deal with two of the contexts. Just to first of all deal with the issue of contempt of court and intimidation. I should say that this court has been particularly careful to deal with that issue. That's been obvious in relation to the issue of emails, in relation to what it said initially in relation to the matter but one of the most important aspects in the late sitting on the Friday evening in relation to the WhatsApp matter and then subsequently in relation to Facebook was the concern*

of the Director and the Court that this could travel out. So, the whole focus of that issue was to make sure that it didn't travel very far and particularly in the Facebook issue. So, I want to make that absolutely clear, that the Court itself didn't engage with the intimidation issue, other than to protect the integrity of the Court and the Court's processes.

[…]

So, from that point of view -the Court also has to deal with matters pragmatically and deal with the situation in the real world. This happened in New York. Ms Staunton was giving evidence. She didn't signal in advance about her change of accommodation or who she was living with. That's unfortunate and the Court has acknowledged its error in not teasing that out. I have no difficulty him being called a boyfriend or as Inspector Phillips called him friend/boyfriend or something of that nature but I mean Seamus, I don't know his surname, isn't subject to my jurisdiction. Ms Staunton wasn't in contempt of court except that she didn't properly acknowledge to me or follow my directions and I think in the particular circumstances that arose where it may be that she was in an abusive relationship, the Court understands that and I mean that was brought out at some length by Mr O'Higgins in his -crossexamination-. So, those are the contexts of that matter.

[…]

Now, the Court specifically in relation to the issue now which Mr O'Higgins has addressed in my view addressed this in the most fundamental way. It said, "The most serious issue facing the Court is the intervention of her friend when he referred to any aspect of her testimony, both in the absence of the jury and in the presence of the jury, and how that affects the integrity of the trial by the fact that he was there in the first place and that he intervened and if this issue can be dealt with by direction or directions or must the jury be discharged. The issue is a complicated one in which the Court again has to review its ruling of the 8th of June and letter sent by email to Ms Staunton by Ms Hudson on the Court's direction, all the testimony of Ms Staunton over the two days and the various applications and rulings of the Court in the absence of the jury and the evidence of Inspector Phillips of Monday the 15th of June and the submissions of the defence and the prosecution".

617. With reference to the judge's previous decision to give directions to the jury, he reminded the parties of what he had said in his previous ruling:

> "*Applying the Court's view of the circumstances and the law, the Court is satisfied to deal with it by way of two directions. The Court does not believe that in dealing with it this way that it compromises the accused's right to a fair trial".*

618. He then went on to say:

"*Now, the Court may be wrong on that but that's the Court's decision. It's clearly made. It's justified. It is explained in a very detailed ruling by the Court and to the extent - I mean obviously Mr O'Higgins is, by implication, asking the Court to revisit its judgment because it is asking for the jury to be discharged again which the Court has no intention of doing but the Court has to follow through on its ruling-".*

Conclusion on Grounds 24 and 20 (iv)

619. This application to discharge the jury was moved on the basis of a consideration of the ruling of the trial judge on 17 June 2020. The trial judge carefully considered the application which was, in essence, a request for the judge to conduct contempt proceedings in a location not within his jurisdiction. While s. 29(3) and (4) of the 1992 Act provide:

> *"(3) Any person who while giving evidence pursuant to subsection (1) makes a statement material in the proceedings which he knows to be false or does not believe to be true shall, whatever his nationality, be guilty of perjury.*
> *(4) Proceedings for an offence under subsection (3) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State*".

This did not avail the court in contempt proceedings. The unknown male was clearly in the US, over which the courts in this jurisdiction have no jurisdiction. The matter had been investigated insofar as Detective Inspector Phillips became involved and gave evidence before the court of trial. Any further investigation would have been very much a collateral issue and would have served to detract from the matter at hand.

620. The matter before the court of trial was that of the trial of the appellant for the murder of Detective Garda Donohoe. The question for the judge at that point was not whether an unknown male had acted in contempt of court, but whether the impact of his interventions served to render the trial unfair and impacted on the integrity of the trial.

621. The judge addressed the issues and found that the matter could be addressed by his directions to the jury. The fact that counsel for the appellant did not believe this could address the situation gave rise to this application to discharge the jury coupled with the request to investigate the matter and for the court to investigate contempt issues.

622. We are not persuaded that the trial judge in his conscientious and considered ruling erred in refusing to grant the discharge application, nor do we agree that the direction given by the judge was utterly inadequate protection for the appellant as asserted in the submissions. On the contrary, the directions given were entirely fair and enured to the benefit of the appellant.

623. Accordingly, this ground fails.

Ground 20 (v)

624. The appellant contends that the cumulative flaws that had occurred during or related to the video link evidence rendered the trial unfair.

625. This ground does not appear to be elaborated upon in the submissions and consequently, this Court is making the assumption that as the transcript reference is 23 June 2020, the within ground relates to the following submission:

> "*This was a case in which the Court allowed a video link and it was a link that was allowed without supervision. The Court in its determination noted that the Court had, as it were, failed to meet the requisite standard in that there was no sort of health and safety type assessment of the procedure but in my respectful submission error, if error there be, actually goes back further because the Court made its determination on this event, as it has done on so many occasions in this case, without hearing evidence and on the basis of things said from the well of the Court and for reasons which the Court in my respectful submission would now be well on notice, that is not a process that's favoured by the defence as a way of determining important issues and we saw last Friday in my respectful submission when there was a test link done with Homeland Security, where initially Special Agent Wade said well how this process is all arrived at is in effect above my pay grade as to who gets in here and how but yet appeared to relent very quickly to the prospect of a paralegal being also allowed into the building and in my respectful submission it's patently clear that the facility that was on offer this week could well have been on offer the week before but instead sort of letters were read out or emails were read out and the Court made a decision on that basis.*
>
> *When, Judge, you made the order, this is going on my recollection, you were stressing to the parties that the manner in which evidence would be given, examined and crossexamined and put before the jury, would be as close to what happens here in court as was practicable and that what was being looking for was as mirror an image as if the whole matter were taking place in the ordinary way and for reasons which I will enlarge upon in my respectful submission that's important*".

Conclusion on Ground 20 (v)

626. As we have already stated in this judgment, these were extraordinary times. That in itself does not of course justify a situation where an individual ends up with an unfair trial. But that is not the position here. An accused person's trial is not required to be a counsel of perfection, an accused person is entitled to a fair trial.

627. It cannot be gainsaid that it would have been preferable if the evidence of Molly Staunton were taken in a supervised setting. That did not happen. However, even if it were to have

occurred, little control could have been exerted over Molly Staunton from the perspective of her friends and associates. In that respect, this situation was no different to any other trial, save that if a person had interjected in the manner of this unknown male during evidence, he would have been removed from court and contempt proceedings within this jurisdiction may or may not have followed.

628. It is noteworthy that the jury witnessed the interventions, as would have been the case if the trial had been conducted in the normal manner and so were in a position to assess her evidence with that in mind and of course having regard to the directions of the trial judge.

629. Juries are robust, there is no reason to believe that this jury disregarded the direction of the judge that this was a situation in New York regarding a boyfriend of sorts. Moreover, they were warned in very clear and emphatic terms to treat Molly Staunton's evidence with caution.

630. We do not agree that the issues which arose during the video link testimony of Molly Staunton rendered the trial unfair.

631. Accordingly, this ground fails.

Ground 28 – That the trial judge erred in refusing to conduct a voir dire on the admissibility of Daniel Cahill's evidence *inter alia* to determine whether his statements of proposed evidence were voluntary, and whether the terms of the Letters of Scope impacted on the fair trial rights of the accused, and for the purposes of establishing whether the immigration status of Daniel Cahill was a material factor in his making a statement, whether discussions had been entered into regarding his future status, and the circumstances under which charges relating to controlled drugs had not been pursued.

Ground 33 – That the trial judge erred in ruling that the proper course was not to deal with matters relating to the Letters of Scope and ancillary matters relating to the evidence of Daniel Cahill was not as is customary in a voir dire but in the course of the giving of evidence.

632. These two grounds were dealt with together in submissions and we see no reason to depart from that procedure.

Background

633. Daniel Cahill, an Irish citizen, worked as a barman at The Coachman's Inn, in the Bronx borough of New York City. He was a crucial prosecution witness and, from the perspective of the defence, a potentially devastating witness.

634. Daniel Cahill gave evidence that he saw and spoke with the appellant in The Coachman's Inn most weekends. Further, he gave evidence of the appellant speaking with him on four separate occasions about the murder of a garda between the summer of 2014 and late 2015.

635. He would testify that the first incident occurred after the appellant was assaulted by another patron in The Coachman's Inn and suffered a laceration to his face. Daniel Cahill stated that he followed the appellant into the bathroom to assist him. The appellant told him that the person who assaulted him should have known better as he had shot a member of An Garda Síochána and it would be a stupid thing to retaliate or mess with him. Daniel Cahill stated that it was a small single cubicle bathroom and that no one else was present.

636. He gave evidence that the second such incident entailed the appellant drinking heavily in The Coachman's Inn and engaging Daniel Cahill in conversation whilst he was working. The appellant made reference to a robbery having gone wrong and having shot a "*Garda Síochána*". The appellant told Daniel Cahill that this had occurred in a credit union or a post office. Daniel Cahill stated that this occurred on a Sunday night in the summer and was within a year of the first incident.

637. The third incident described by him was said to have occurred at an apartment owned by a Matthew Damien who was also a patron of The Coachman's Inn and who lived in the area. Daniel Cahill stated that he called to this apartment after finishing his shift. The appellant was present along with Matthew Damien and two other males who were not known to Daniel Cahill. A conversation was taking place which Daniel Cahill described as a "*pissing competition*" whereby each person was attempting to out-do the others. Daniel Cahill stated he heard the appellant say in the course of this conversation that he had shot a garda.

638. His evidence in regard to the fourth incident was that it occurred at Katonah Avenue in the Bronx in the summer of 2016. Daniel Cahill stated he believed it was a Friday or Saturday night and that he was now working in another bar, The Brazen Fox in White Plains. Daniel Cahill described meeting the appellant on the street when he was driving home from work. He stated that he was flagged down by the appellant who came to the driver's window and showed him a newspaper article. The article was accompanied by a picture of men at a sporting event and a headline which referred to them as being on the run from shooting a police officer in Ireland and living it up in New York. The appellant told Daniel Cahill that he was one of the men in the picture and showed him the same picture which he said was taken from his Facebook account.

639. The evidence was that the appellant had told Daniel Cahill that he was confident that no one would talk to the police.

The Appellant's Evidence

640. Just for completeness, it should be stated that the evidence of Daniel Cahill was dealt with by the appellant in his own evidence in the following way. The appellant stated that he was initially an acquaintance of Daniel Cahill but that he began to dislike him as time went on. The appellant accepted some of the surrounding detail given in Daniel Cahill's accounts; but he rejected Daniel

Cahill's evidence that he had made admissions to him. The appellant called Daniel Cahill "*an absolute liar and a psychopath*". He said that Daniel Cahill had previously broken into his house with three others and threatened to cut off his toes. The appellant suggested that Daniel Cahill made his statement because he had been found hiding in his attic, had drugs in his house and wanted to stay in America.

The Arguments at Trial

641. From an early stage of the case, counsel for the appellant had suggested that there was reason to suspect that Daniel Cahill, whose immigration status in the US was arguably irregular (he had overstayed the visa on foot of which he had legally entered the US), and who, as indicated in the last paragraph, was also found to have been in possession of drugs in the course of a raid on his home by immigration personnel backed up by local police, may have been offered inducements by persons in authority in the US, including HSI/ICE officials and possibly Yonkers police officials. It was suggested that these inducements were offered by such persons in authority to incentivise co-operation with An Garda Síochána in regard to the investigation then being conducted by the latter into the robbery of the Lordship Credit Union and the murder of Detective Garda Donohoe. The trial court was apprised of the defence's suspicions in that regard in the context of the lengthy debates concerning disclosure and the parameters of various MLAT requests that at that point the court below was contemplating making. It is correct and fair to say that the trial judge, in dealing with disclosure and the MLAT request(s) that he proposed to make in support of the disclosure process, did acknowledge that the appellant had raised valid concerns in terms of what was known at that point about the circumstances in which the statements of a number of prosecution witnesses, including Daniel Cahill, had been obtained; and further that he had opined that these concerns were sufficient to justify the making of a MLAT request directed towards obtaining further and better information (which might serve either to support the concerns that had been expressed, or to allay them). However, the trial judge made no finding one way or the other as to whether inducements had in fact been offered to Daniel Cahill or any other witness, and he expressed no view on this other than to suggest that a valid concern had been raised which could be legitimately explored by the appellant's legal team later in the trial with the benefit of such disclosure as had been made on foot of his orders and pursuant to his MLAT request(s).

642. At the point at which the respondent proposed to adduce the evidence of Daniel Cahill before the jury, the appellant requested that a *voir dire* be conducted as to its admissibility, but without providing any detailed parameters of the proposed challenge. The basis put forward for the suggested *voir dire*, that it was "*customary*" to conduct a *voir dire* to establish if a witness' statement had been made voluntarily. The weakness in that argument was that while it may be customary to do so in circumstances where it is proposed that a document recording a witness's documentary statement (as opposed to his or her oral testimony) might be admitted in evidence, e.g., an inculpatory statement made by a suspect in a garda station may potentially be admitted in evidence as part of the prosecution case relying on the exception to the hearsay rule that applies in the case of a declaration made against interest, the respondent were not proposing in this case to introduce adduce any documentary recording of a statement made by Daniel Cahill.

Rather, they were proposing to call *viva voce* evidence from Daniel Cahill, which, unlike in the case of evidence comprising a documentary statement where the statement maker was not being called, was capable of being cross-examined upon.

643. Counsel for the appellant further urged upon the trial court that there was a very low threshold for the holding of a *voir dire.* No authority was cited in support of that proposition.

644. It was further contended by counsel for the appellant that the case of *People (DPP) v. Gilligan* [2006] 1 I.R. 107 provided an authority for the proposition that it was appropriate to conduct a *voir dire* in the circumstances, as contended for by the appellant. This case had concerned an application to exclude proposed prosecution evidence that would have involved the giving of testimony by three persons who were part of the State's witness protection programme, on the grounds that that program lacked accountability and transparency for a number of reasons. The appellant had sought a *voir dire* as to the admissibility of the three witnesses' testimony. The trial court (i.e., the Special Criminal Court) took the view that as it was not a jury trial that it was open to the court to hear the evidence on a *de bene esse* basis and that if at the conclusion of the witnesses' evidence there was a submission to the effect that their evidence ought to be excluded from the court's deliberations then the court would consider it. The evidence was heard and was not excluded, and the defendant was convicted. He subsequently appealed unsuccessfully to the Court of Criminal Appeal, and from there on foot of a certificate pursuant to s. 29 of the Courts of Justice Act 1924 to the Supreme Court. The Supreme Court dismissed his appeal and in doing so held, *inter alia*, that the testimony of a person in receipt of a benefit from the State, such as a witness protection programme, should be viewed with caution. Such evidence was not inadmissible but the reality of benefit of the witness required a cautious approach and might reduce the weight which might be attached to such evidence. Such evidence was comparable to the evidence of an accomplice as both an accomplice and the person receiving benefit from a witness protection programme had a potential motive to perjure themselves. The Supreme Court went on to hold that the appropriate approach for the court to take to such evidence included: (a) that testimony from persons receiving a benefit should be viewed with caution; (b) while such evidence was not inadmissible, it should be scrutinised carefully; (c) the credibility of such a witness should be analysed in light of all the evidence in the case; (d) all the facts and factors of the case should be analysed to determine the weight, if any, to be given to the evidence; (e) the trial judge should give a warning to a jury of the dangers of relying on such evidence without corroboration; (f) once the warning was given, however, the trier of fact might determine the appropriate weight to be attached to such evidence and might convict in the absence of corroborative evidence, and; (g) corroborative evidence might include circumstantial evidence.

645. We should observe that despite the contention that the above case was authority for the procedure that the defence in the present case were seeking to invoke, it does not in fact address the issue as to whether or not it is appropriate in the context of a jury trial to seek to test the evidence of a witness who is being called to give *viva voce* evidence in accordance with a statement previously made by them and included in the Book of Evidence, and in respect of

whom there is a concern that in making their statement they may have been subjected to pressure or an inducement, in a *voir dire* conducted in the absence of the jury. Indeed, *prima facie*, the *Gilligan* case suggests that such evidence is admissible and that issues as to its reliability or credibility will be matters for the trier of fact.

646. Be that as it may, counsel for the appellant pointed to the section of the judgment of Denham J. (as she then was), commencing at paragraph 143 (on p. 161 of the report) under the heading "*Right to every man's evidence*". As the section is brief, it bears quotation in full:

> "*143 The accused sought to exclude the evidence of Charles Bowden, Russell Warren and to a lesser extent John Dunne, on the basis that they were in or would be in a witness protection programme and were accomplices. It has long been settled law that, subject to the appropriate warning, the evidence of an accomplice may be relied upon by a trier of fact. I am satisfied that the same approach should be taken to a witness who is or will be in a witness protection programme. This approach is subject to the trial judge's control of the trial court and the right and duty of the trial judge to make decisions to achieve a fair trial. This requires constant vigilance as matters may change in the course of a trial.*
>
> *144 The trial court had the duty to find facts in this case, to be satisfied beyond all reasonable doubt of the guilt of the accused, or, if not, to find the accused not guilty.*
>
> *145 While counsel on behalf of the accused sought to exclude the three key witnesses for the prosecution, the trial court is entitled to every man's evidence and on the evidence to determine what is admissible or relevant and to weigh that evidence. Walsh J giving the judgment of the Court of Criminal Appeal in The People (Director of Public Prosecutions) v J T (1988) 3 Frewen 141 at pp 160 to 161, stated:-*
>
> > *"Attention should also be drawn to the fact that the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution …*
> > *The exercise of the judicial power carries with it the power to compel the attendance of witnesses, the production of evidence and, a fortiori, the answering of questions by the witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or in vindication of the innocent."*
> > *I would adopt this approach. The administration of justice requires that the public has a right to every man's evidence except for that evidence which is excluded by law or the Constitution*".

647. This was the high-water mark of the submission made to the trial judge. It did not, however, suggest any cogent reason why Daniel Cahill's evidence should be excluded either by law or under the Constitution. Moreover, it did not address why a pre-screening of Daniel Cahill's evidence might be necessary, and why the jury could not be trusted to resolve any controversies arising on the evidence with respect to the credibility and reliability of Daniel Cahill's testimony.

648. The trial court was also referred to a case of *People (DPP) v. Kenny*, a case in which there is no written judgment in respect of any ruling at first instance, but in respect of which there is a judgment of the Court of Appeal bearing the neutral citation [2018] IECA 38. In that case, which involved a murder trial before the Central Criminal Court, the admissibility of the evidence of a witness was challenged in the context of a *voir dire.* However, the Court of Appeal found it unnecessary to address the correctness or otherwise of the adoption of that procedure. The trial court in this case was therefore presented with nothing more than anecdotal evidence that on a previous occasion a trial court had adopted the procedure that was being contended for in this instance. However, it was provided with no reasoned written judgment or ruling to assist it as to when, or in what circumstances, this might be appropriate.

649. Unsurprisingly, the respondent objected to the proposal that there should be a *voir dire* on the basis that there was no precedent for it, and it would give the appellant a dry run at testing the witness. It was argued that the *Gilligan* case in fact supported the prosecution's view that there should not be a *voir dire.* Moreover, it was suggested, it could facilitate witness intimidation, or cause the witness to apprehend being intimidated. The suggestion was made in circumstances where there had already been intimidation of a witness in the case, albeit that it did not concern Daniel Cahill, a fact known to the trial judge. The allusion is to the intimidation of a potential witness, namely Ronan Flynn. Further, the respondent contested the suggestion that there was a low threshold for the conduct of a *voir dire* in respect of the admissibility of the evidence of a witness.

The Trial Judge's Ruling

650. Having heard the arguments on both sides the trial judge on 22 June 2020 ruled *inter alia*:

> "*Now, I am of the view that the law would dictate that this has very little or no chance of success. That in fact these are matters of credibility and weight and that they would not be in any way prevented from raising these and in my view that the appropriate decision in the circumstances is to refuse the voir dire as the Court is of the view that it would be trespassing on the jury's function and the matters which occur are matters for the jury to determine*".

651. It is argued on the appeal that the trial judge was incorrect in his conclusion and in error so ruling.

Discussion and Determination

652. We find no error in how the trial judge approached the issue of a possible *voir dire* and we consider that his ruling was correct in law. The trial court was not obliged to conduct a *voir dire* simply because the defence asked for one. He required to be satisfied that a legitimate admissibility issue had been raised. In that regard we do not consider that the *Gilligan* case supports the argument in favour of a *voir dire* in the case of Daniel Cahill's evidence. On the contrary, it provides support for the prosecution's position. The public has a right to every man's evidence unless there is a reason in law under the Constitution for believing it is inadmissible. *Gilligan* makes clear that the mere fact that there was concern that the witness may have been offered an inducement either to make a statement or to give evidence was not a basis *per se* for challenging the admissibility of his testimony. Such matters could be put to him in cross-examination, and the result of doing so might or might not be that his credibility and reliability would be undermined in the eyes of the trier of fact whether that be the judges of a non-jury court or a jury. Whether or not that was so would be a matter for the trier of fact to determine. Such issues would go to weight not admissibility. The situation is entirely different in the case of the possible admission of a documentary witness statement, in circumstances where the maker of that statement is not a compellable witness by the party tendering the statement in evidence, and therefore may not be available to be cross-examined. There was no reason why Daniel Cahill could not be cross-examined about the circumstances in which he made his statement and was willing to give evidence. We are satisfied that it would have been inappropriate, in the absence of an indication of some clear legal basis on which his evidence might be considered possibly inadmissible, for him to have been required to give his evidence in a *voir dire.*

653. Accordingly, we reject grounds 28 and 33.

Ground 42 – That the trial judge erred in permitting the respondent to lead the evidence of an exchange between the appellant and Daniel Cahill on Katonah Avenue New York despite the Audio Visual recording of that portion of the interview between members of An Garda Síochána and Daniel Cahill being unavailable due to a technical failing.

Background

654. Daniel Cahill was a witness for the prosecution. He was interviewed by members of An Garda Síochána for the purpose of taking statements from him. There were two such interviews which the gardaí opted, on a discretionary basis, to electronically record. The electronic recording process should have provided both an audio and video record of the interviewing process, which could have been made up into a verbatim written transcript if required.

655. Unfortunately, due to a technical issue with the equipment, only the first interview and part of the second interview was captured on the electronic recording. Part of the second interview was not captured. However, during both interviews the principal interviewer, a Detective Garda McGovern, had also made a written record.

656. At the end of the first interview the written record of that interview was read back over to Daniel Cahill and, as is usual following the taking of statements by police, he, as the interviewee, was offered the opportunity to make any alterations or additions thereto that he might wish to make, before signing it and having his statement witnessed. The complete reading back, signing and witnessing process was also recorded on camera and audio in respect of the first statement.

657. Following the taking of the second statement, it was intended to engage in the same process. However, it was discovered that the electronic recording had been interrupted at a certain point due to a fault, and accordingly the equipment was not available to record a reading back, signing and witnessing process in respect of the second statement. Arising from this the reading back, signing and witnessing process was postponed to a later date when properly functioning equipment was again available. On this occasion, Detective Garda McGovern's written record of the second interview was read over to Daniel Cahill, he was afforded an opportunity to make alterations or additions to it if he wished, and it was then signed and witnessed in the normal way, with the entire process also being recorded electronically.

658. Daniel Cahill, who would prove to be a significant witness for the prosecution, had said in the course of his interviews that on four occasions he had heard the appellant admit, either directly or indirectly, to having been involved in the shooting of Detective Garda Donohoe. The first two of those four occasions were dealt with by him during so much of his interviews as was uneventfully electronically recorded. However, the third and fourth of those occasions were dealt with by him during the period in which the electronic recording equipment had failed.

Discussion

659. From the prosecution's perspective, the failure of the recording equipment was not considered fatal in circumstances where a contemporaneous written record had also been made and was available. Unlike statements and memoranda of interviews conducted with accused persons, which contain inculpatory material, and which are admissible in evidence in their own right as testimonial evidence (i.e., evidence as to the truth of their contents) by virtue of an exception to the hearsay rule which allows for the admission of declarations against interest, a record whether electronic or documentary of what a witness who is not an accused person may have said is not (in general) admissible as testimonial evidence. Rather, such a record merely serves to provide notice of what an intended witness may say. However, the evidence that is ultimately adduced is the *viva voce* testimony of the witness.

660. Of course, it may be put in cross-examination to a witness who has given *viva voce* testimony that they have made a prior inconsistent statement, and if that proposition is not accepted by the witness then the cross-examiner may seek to have the witness stood down while the cross-examiner calls evidence himself from a relevant witness to prove the making of the prior inconsistent statement, which such a witness may produce as an exhibit. However, in this instance the documentary record is not adduced as testimonial evidence, but rather as original evidence (i.e., it proves merely what the witness may have said on the prior occasion, but not that what the witness said on that occasion was true).

661. Criminal legal practitioners in this jurisdiction, involved in conducting criminal trials, have at this stage many years' experience of the electronic recording of the interviews of suspects in garda stations. We take judicial notice of the fact that it is a ubiquitous feature of the introduction of this facility that the contemporaneous written record which an interviewer is also required to make during the interviewing of the suspect rarely matches up exactly with the transcript of the electronic recording. Even with the best will in the world, it is difficult to make a word-perfect hand-written record of a spoken narrative, or of a spoken question-and-answer session. The experience of the courts is that the written record will frequently exhibit a high degree of accuracy, but it will rarely be perfect.

662. In this case, the appellant has compared the electronic record of the first of the interviews of Daniel Cahill, and so much of the second interview with him as was captured, with the written record taken by Detective Garda McGovern and have identified certain discrepancies. It is common case that those discrepancies exist, and they are highlighted in the appellant's written submissions. Extrapolating from this, the appellant invited the court below, and again his counsel invites this Court, to conclude that the written record taken by Detective Garda McGovern of so much of the second interview as was not successfully electronically recorded cannot be regarded as reliable in all material respects.

663. They say that they are not disadvantaged with respect to so much of the record of the interviewing of Daniel Cahill as is captured both by means of electronic recording and also manually by Detective Garda McGovern. In that instance they had the facility to compare and contrast and a basis on which to cross-examine both Daniel Cahill and Detective Garda McGovern. However, they complain, in circumstances where they have only the manual record created by Detective Garda McGovern in respect of the portion of the interview that was conducted during a failure of the electronic recording equipment, they had no means of comparing and contrasting that manual record with an electronic counterpart, and they were deprived of any meaningful basis on which to cross-examine with respect to the accuracy of the manual record.

664. This issue was raised in the context of a *voir dire* in which the defence sought to persuade the trial judge that because of the failure of the electronic record, and the consequent disadvantage to which they were pointing, he should rule so much of the proposed testimony of Daniel Cahill as was covered in the portion of the garda interviews with him which it was not possible to electronically record inadmissible, on the grounds that it would be unfair to the accused to admit such evidence in circumstances where the accuracy of what he had said to the gardaí could not be properly tested. In substance, the application was to exclude Daniel Cahill's testimony as to the third and fourth occasions on which he claimed to have heard the appellant admit to involvement in the killing of Detective Garda Donohoe.

665. It was submitted to the trial judge that the circumstances of the case, i.e., the nonavailability of an electronic recording of the entirety of the interviews with Daniel Cahill, amounted to a failure by the respondent to retain and preserve evidence. It was suggested that, applying the principles

set out by the Supreme Court in *Braddish v. DPP* [2001] 3 I.R. 127 and in *Savage v. DPP* [2009] 1 I.R. 185, the trial judge should withdraw the case from the jury on account of that failure.

666. The respondent contended that counsel for the appellant's application was fundamentally flawed, pointing out that witness statements (while they may find their way into evidence as we have described above) are not fundamentally to be characterised as evidence in their own right. The evidence which the respondent was seeking to rely on was Daniel Cahill's *viva voce* evidence. What he had said during interviews merely flagged what he was likely to say in the witness box. On that basis, such material had properly been included in the Book of Evidence, but legally speaking it constituted nothing more than notice of his intended testimony.

667. The respondent rejected, and continues to reject, any suggestion that the *Braddish* / *Savage* line of jurisprudence has any application to the situation in controversy.

The Trial Judge's Ruling

668. In a lengthy ruling on 22 June 2020 the trial judge rejected the application and refused to rule the evidence of Daniel Cahill inadmissible. In doing so, he considered in great detail the discrepancies being pointed to following a comparison of Detective Garda McGovern's written record of the interviews with the electronic record of so much of those interviews as had been successfully electronically recorded. He then continued:

> "*The statements and video recordings are not evidence. There is or was no legal obligation on An Garda Síochána to video record the interviews with the witness. The evidence will be the sworn testimony of the witness before the jury. The case law referred to relates to the seeking out and preservation of evidence. Savage relates to the failure to preserve for examination a motor vehicle the accused was driving where the charges related to his use of the vehicle. Braddish related to the failure to preserve CCTV at the location of a robbery. Dunne related to the same. A videorecording of a robbery at a filling station was not preserved. Those authorities have no application to the facts of this case. The issue in this matter is a fair procedure one on the effect of the crossexamination of the witness arising from the unavailability of the video of the exchange between An Garda Síochána and Mr Cahill on the alleged production of a newspaper article on the accused's phone in the interview of the 29th of July 2017. In the Court's opinion the defence will have no difficulty in highlighting before the jury issues which it is alleged support alleged inaccuracies, inconsistencies and prompting as the full videorecording of the first interview and portion of the second are available. The defence have available to it the two written statements highlighting the differing accounts of the production of the newspaper article. It is obvious the issue was clarified by the Garda Síochána in the interview of the 29th of July as clarified is inserted in brackets. The defence are deprived of the exact exchange between An Garda Síochána and Mr Cahill on the clarification in the second interview of the alleged production of a newspaper article and/or a photo on social media. The omission is far short of the lack of an effective*

crossexamination, even if the issue is an island of fact. Mr Cahill will have to deal with the alleged inconsistencies between his statements. The Court is of the view that this is not an admissibility issue but one for consideration by the jury. The absence of a video record of a portion of the second interview where highlighted does not affect the fair trial rights of the accused".

Conclusion

669. We can deal with this matter briefly. We agree completely with the approach and analysis of the trial judge on this issue. We regard the argument advanced by the appellant as being utterly untenable. There was no obligation on the interviewing gardaí to electronically record their interviews with Daniel Cahill. If they had not done so at all, the appellant would have no basis for complaint. They opted to do so as a matter of discretion, and the appellant's legal team were furnished with both the written record and the electronic record. Regrettably, the resultant electronic record was only partial for technical reasons beyond the control of An Garda Síochána. However, even the partial record that was provided proved capable of being deployed by the appellant to his advantage and was so deployed. Be that as it may, in circumstances where the defence received an admittedly partial electronic record that they could never have insisted upon being made in the first place, and were able to deploy that to their advantage, it is untenable to suggest that their client's trial was unfair simply because, due to circumstances beyond anybody's control, they did not receive more of the same material. We find no error in how the trial judge dealt with the matter. The issues raised arising from discrepancies between Detective Garda McGovern's written record and so much of an electronic record as exists were, as the trial judge suggested, matters for the jury. There was simply no basis in law to rule the evidence of Daniel Cahill, or any part of it, inadmissible.

670. Accordingly, we unhesitatingly reject ground 42

Letters of Scope

Ground 25 – That the trial judge erred in determining that the appellant's fair trial rights were not compromised by the Letters of Scope.

Ground 27 – That the trial judge erred in allowing the witness Special Agent Wade to give evidence in circumstances where the witness restricted her testimony in a manner that excluded examination or cross-examination in respect of a number of material issues relevant to matters the jury had to determine.

Ground 34 – That the trial judge erred in refusing to direct Special Agent Wade to answer material questions under cross examination in relation to relevant matters in issue and allowing the witness to refuse to answer the questions on the grounds by placing reliance on the restrictions contained in the letter of scope imposed upon the Court by her employer.

Ground 35 – That the trial judge erred in determining that many of the questions put to Special Agent Wade and which she had specifically refused to answer, on the basis of the letter of scope, were questions that fell within the terms of the said letter when it was manifest that they were not.

Ground 36 – That the trial judge erred in determining that it was permissible for a witness to refuse to answer material questions relating to relevant matters that were in issue.

Ground 37 – That the trial judge erred in determining that there was a residual jurisdiction conferred in the first instance on the Director of Public Prosecutions, and thereafter on a court, to allow a witness not to answer material questions on relevant matters that were in issue.

Ground 38 – That the trial judge further erred in determining that this was an acceptable limitation to impose in the interests of *inter alia* for the purposes of promoting international co-operation between sovereign states, and further ruling that if such a limitation could be placed it superseded the accused's fair trial rights.

671. As already outlined, Special Agents Wade and Katzke had been involved in the garda investigation within the US from its beginning and had interacted with the various visa overstayers who had been identified as possibly being of assistance to the investigation. It had not been intended by the respondent to call Special Agents Wade and Katzke in the course of the trial: Special Agent Katzke did not feature on the Book of Evidence and Special Agent Wade's evidence, served as part of the Book of Evidence, was limited to continuity evidence of a seized mobile phone. However, arising from the disclosure hearings which took place, the trial judge directed that both Special Agents should be made available by the respondent for cross-examination by the appellant. On foot of this direction, the Letters of Scope, already referred to, were issued to both special agents by their employer, namely the United States Federal Government, setting out the limits of the evidence which they were permitted to give.

672. As has already been referred to, the respondent was notified of the Letters of Scope in advance of Special Agent Wade giving evidence. The respondent indicated to the US authorities that her counsel would advocate for the privilege claimed by Special Agent Wade to be upheld by the trial court.

673. Prior to Special Agent Wade being called to give evidence at the trial judge's direction, the judge restricted the subjects on which he would permit cross-examination to be conducted, as follows:

"*In my view Special Agent Wade can give relevant and material evidence in relation to the purpose of the visit of Homeland Security on the 25th of July 2018, the factual events surrounding that visit, the conversation at Yonkers Police Station before Mr Cahill met An Garda Síochána and any conversation immediately after the 25th of July in interview and those are material and relevant issues on which Special Agent Wade could assist the jury*".

674. Special Agent Wade gave evidence remotely from the US. She was cross-examined extensively about immigration issues relating to Daniel Cahill and the interaction which she and Agent Katzke had with him that led to him giving statements of evidence to the investigating gardaí. Special Agent Wade refused to answer a vast series of questions over a period of two days relating to these issues, and more general issues, on the basis she was prohibited by the Letters of Scope. However, she did indicate that she had not made any promises to Daniel Cahill regarding regularising his residency status. She also explained to the jury that she wanted to answer questions but that she was restricted as to what she could say by virtue of the Letters of Scope.

675. Arising from the cross-examination which had taken place, counsel for the appellant asked the trial judge to determine whether Special Agent Wade had abused the Letter of Scope to avoid answering questions which she should have answered, and also sought a ruling as to whether Special Agent Wade was permitted to invoke the Letters of Scope when relevant questions were being asked. The trial judge gave a ruling in the following terms:

"*So, the Court has already given two rulings on the 26th of May, a substantial ruling and then on the 2nd of June and then again on the 1st of July in relation to this witness's evidence. Special Agent Wade was a willing [wit]ness. In fact when it arose today, when she felt it was being put to her that she wasn't, she made quite clear that she was a willing [wit]ness and that her only reason in not answering the questions was because of her interpretation of the letters of scope. This witness was put under a lot of pressure and Mr O'Higgins has complained to the Court about me putting pressure on him about repetition and how difficult it was for him. It is two, three or four times more difficult for a witness under pressure in a witness box being crossexamined by an experienced senior counsel. In an exchange with Mr O'Higgins last Wednesday the 1st of July, in a particular ruling, I said that the witness was not evasive at all. I think she was a very willing, helpful witness. She answered an awful lot of questions. She dealt as best she could with the issues around the 25th of July 2019 up in Mr Cahill's residence, the difficult situation that she encountered which she had to call in the local police department because of issues in relation to the finding of the cannabis plants. I mean the issue of the steroids is in my view a matter for the jury, if it gets there, but I don't accept that in any way that she hid behind the letter of scope of the 31st of October 2019 directed to her. She had to*

make her decisions on the spur. You could say that she could have gone a bit further but that's a judgment call she had to make, conscious of where she was in relation to the letter of scope from her employers and I think she did very well and tried her best to answer honestly issues which did come up and the Court's assessment in relation to that is that there are no questions that she didn't answer under the category which Mr O'Higgins has described, that effectively she should have answered and that they were outside the letter of scope.

I agree that this is a hybrid issue [...] *it has a form of privilege* [...] *in terms of the employer's privilege but this is the practical reality that the Court has had to deal with. [T]he Garda Síochána sought the assistance of the Department of Homeland Security because* [the appellant]*, went to the United States of America in April 2013. At that time he was a suspect in very serious alleged offences and had given voluntary interviews in relation to that matter. He was a fugitive from justice in Ireland at the time and the guards were determined to pursue investigations in relation to him in the United States of America and they sought the assistance of the Department of Homeland Security. They had no jurisdiction in that Country and they had to rely on the Department of Homeland Security in relation to the interview of persons there and they were at their disposal as to how they ran their business in the United States of America and as part of that Special Agent Wade in effect, and the Court really describes her as such, she is a voluntary witness before this court. There was an administrative mutual legal assistance request made in October by the Director of Public Prosecutions and I don't consider that Special Agent Wade is here under a direct subpoena or a witness order or that the Court should use direct coercive powers in relation to her and she has received a letter from her employer of the 31st of October 2019 which is quite strict and she has done her very best to answer the questions that she has been put in accordance with being a willing witness but respecting the situation where she was obliged to obey her employers in relation to the letter of scope and it's also very important to stress that she wasn't giving evidence outside any course of her employment. She was giving evidence in her capacity as a Special Agent employee of the Department of Homeland Security US Immigrations Customs Enforcement or whatever it was* [...] *I am quite satisfied that it would be entirely inappropriate for this court to direct Special Agent Wade to answer any specific question. The Court has left it to her own judgment and the Court in my view has been quite right to do so and certainly will not direct Special Agent Wade to answer any question and of course in due course the Court will deal with any further consequences that arise*".

Submissions of the Parties

676. In summary, the appellant submitted that Special Agent Wade was required to answer all relevant questions and that the trial judge should have compelled her to answer such questions (which he had already determined to be relevant) regardless of the Letter of

Scope. In addition, it was submitted that Special Agent Wade deployed the Letter of Scope in a wider context than the prohibition set out in the letter covered. The trial judge should have determined whether her deployment of the restriction provided in the letter was appropriate to all the questions which she was asked. It was also argued that an unfairness arose in circumstances where Special Agent Wade indicated that she had not made any promise to Daniel Cahill in relation to his immigration status, but then refused to answer any other question in relation to this issue by relying on the Letter of Scope.

677. The respondent submitted that the trial judge made findings of fact, which he was entitled to make, to the effect that Special Agent Wade had not abused the Letter of Scope and that she was a willing witness who found herself constrained by the Letter of Scope. Furthermore, Special Agent Wade was not a compellable witness and the Court could not compel her to answer questions in light of the Letter of Scope issued to her by her employer.

Discussion and Determination

678. Special Agent Wade gave evidence remotely from the US on foot of a direction from the trial judge that she be made available for cross-examination in the light of the issues which he saw arising in the trial in relation to HSI's involvement with the witnesses from the US who had provided statements against the appellant. The trial judge was correct to categorise her evidence as voluntary regardless of whether a subpoena was served on her. Whilst she had provided a statement which was served as part of the Book of Evidence, that statement related to establishing the continuity of an exhibit and did not reflect the issues which she ultimately was called before the Court in respect of.

679. A further novelty of her evidence is that she had not provided a statement in relation to her proposed evidence. Accordingly, a situation could never arise whereby the trial court could declare her to be a hostile witness or there could be an application pursuant to s. 16 of the 2006 Act to seek to admit her statement into evidence. For these reasons, there was a limitation to the powers which the trial court could exercise over her and to any outcome available to the Court.

680. These issues are aside from the fact that Special Agent Wade was placed in a very difficult position by her employer, the United States Federal Government. The Letters of Scope were extremely detailed with respect to what Special Agent Wade could not give evidence in respect of and were definitive that she was not authorised to give such evidence. While the letter did not specify what the outcome would be for Special Agent Wade if she gave evidence which she was not authorised to give, it is clear that non-compliance with the Letter of Scope would be in breach of her contract of employment.

681. The question arises as to what the trial judge could do in these circumstances? Even if the trial judge directed Special Agent Wade to answer specific questions, was there any reality

to the Special Agent answering a question prohibited by her employer, particularly when answering from another jurisdiction?

682. The outcome of Special Agent Wade refusing to answer questions which were undoubtedly relevant is far from perfect. However, this Court's concern is not that a perfect trial is conducted but rather that a fair trial is conducted in accordance with Article 38.1 of the Constitution.

683. Whilst Special Agent Wade did not answer a vast array of questions, many areas of interest to the appellant were explored in the course of her cross-examination, to include the assertion that Daniel Cahill was treated in an unconventional and favourable manner by HSI. In addition, the fact that there was an issue for Agents of HSI answering questions around these matters was clearly before the jury. Furthermore, the cross-examination was conducted in the context of the appellant realising that Special Agent Wade's evidence would be severely restricted in light of the Letter of Scope.

684. That a witness refused to answer questions because she was directed not to do so by her employer, namely the United States Federal Government, raises significant questions. It is not the case that a witness can choose what questions they answer. Neither is it the case that an employer can direct a witness not to answer questions. A witness under subpoena is required to answer any relevant question posed to her and can be directed to answer such questions by a trial judge. Failure to comply with any such direction can have adverse consequences for a witness.

685. However, Special Agent Wade was giving evidence outside this jurisdiction as a federal agent of a foreign country under a direction from that foreign government with respect to the extent of the evidence which she was permitted to give. In those circumstances do different considerations apply?

686. Ultimately, it is a matter for the jury to consider her evidence. Had the trial judge compelled her to answer questions, what would the effect of that direction be? She was not within the Irish jurisdiction or within the control of the trial court. It is fanciful to suggest that Special Agent Wade would comply with any such direction from the Court and defy the orders of her employer.

687. However, this does not mean that the deficit in the answers given by Special Agent Wade is without consequence. As alluded to by the trial judge, the significance of the failure to answer the questions correctly falls to be determined within the confines of a *P.O'C* application in the light of all the evidence adduced in the course of the trial.

688. Accordingly, as standalone grounds of appeal, separate to a *P.O'C* application, the Court is of the view that the trial judge did not err in determining that the appellant's fair trial rights were not compromised by the Letters of Scope; in not directing Special Agent Wade to

answer relevant questions; and in determining that the Letters of Scope generally applied to the questions which she asked.

Ground 40 – Ultimately the learned trial judge erred in fact and in law in permitting the jury receive and consider the evidence of Daniel Cahill.

Ground 41 – That the failure of the respondent to disclose an important police report, until after Daniel Cahill had completed his evidence, that dealt with the circumstances of Daniel Cahill's arrest on suspicion of drug-dealing offences, and which contained information that was contradictory of, and was in conflict with the evidence given by Special Agent Wade and Daniel Cahill, rendered the cross-examination unsatisfactory in a material way and rendered the trial unfair.

Ground 40 - Background

689. Ground 40 is a complaint to the effect that ultimately the learned trial judge erred in fact and in law in permitting the jury to receive and consider the evidence of Daniel Cahill. Elaborating on this, the written submissions on behalf of the appellant assert that the effect of restrictions on cross-examination of Special Agent Wade impacted on the ability of the defence to engage with the evidence of Daniel Cahill. It was submitted that it was not possible to test his assertion that he had not been promised anything, and/or properly explore the circumstances surrounding his arrest. It is said that this failure was aggravated by the omission of the trial judge to conduct a *voir dire,* which point we have already addressed.

690. We consider that in substance and reality ground 40 represents nothing more than a reiteration on a rolled-up basis of complaints made in other grounds (specifically grounds 25, 27, 34, 35, 36, 37 and 38) dealt with elsewhere in this judgment. However, without prejudice to that observation, the position as correctly noted by the trial judge was that Special Agent Wade was not a compellable witness and was giving evidence voluntarily. She was entitled in the circumstances to assert unwillingness to answer certain questions based on the Letters of Scope and the trial court could not compel her to answer such questions. Moreover, no fault or criticism for that being the situation could be legitimately laid at the door of the respondent. As the trial judge observed in considering the appellant's *P.O'C* application on 13 July 2020, there was "*no culpable prosecutorial failure or wrongdoing on the part of the Director of Public Prosecutions which can be considered in assessing the degree of prejudice which renders the trial unfair*".

The Trial Judge's Ruling

691. The trial judge gave great consideration to the contention by the appellant that his trial was rendered unfair in consequence, *inter alia*, of his counsel's inability to cross-examine Special Agent Wade on the various matters in respect of which she maintained a steadfast refusal to answer questions in reliance on the instructions of her superiors as reflected in the Letters of Scope. In ruling on 13 July 2020 on the *P.O'C* application in which the appellant's concerns in that regard were ventilated, he stated, *inter alia*:

"*The jury are quite entitled to infer, if they so wish, based on the evidence of Special Agent Wade and Daniel Cahill, that he was the subject of an administrative arrest or detention because of his immigration status. They are equally entitled to resolve any conflict between detention for immigration issues or for alleged drug offences. The jury already know the immigration status of Mr Cahill based on his own evidence. The jury do not have a deficit because of Special Agent Wade's lack of evidence in this regard. He had entered USA in August 2013 on a 90 day visitor visa which did not entitle him to work. Despite that, he did work and remained over 90 days. He has accepted that he is out of status and has yet to file his papers seeking permanent residence. The jury are quite entitled to decide, if they so wish, that he was vulnerable due to his status and reject his evidence or, in the alternative, accept that his evidence had nothing to do with his immigration status. The jury are quite entitled to contrast his treatment vis-à-vis the accused if they so wish. The Court accepts that the jury cannot speculate on any conversation between Daniel Cahill and the Special Agents but both Daniel Cahill and Special Agent Wade have given evidence about conversations they had with each other and both deny that there was any offer made to him of status for testimony. That's no different to any other situation where the defence get answers which are not in accordance with the scenario the defence wish to highlight. Daniel Cahill was cross-examined at length on this issue and, as already stated, the jury are always entitled to consider the letter of scope restriction on Special Agent Wade if they so wish. As already outlined in the Court's ruling of the 6th of July 2020, the defence are quite entitled to highlight the circumstances of his detention, his behaviour and the possibility he was influenced by his own status to cooperate and the possibility of future assistance from the Department of Homeland Security and also to highlight any conflicts in his statement*".

Discussion and Determination on Ground 40

692. We consider the approach of the trial judge to this issue to have been impeccable and unassailable. While we have only quoted a portion of a lengthier ruling, we are satisfied that the trial judge's approach was rigorous and probing, and that his analysis of the reality of the claim of unfairness in the trial on account of the issues raised was carefully and appropriately conducted. His conclusions were rational and evidence-based. We therefore find no error in his decision not to withdraw the case from the jury on *P.O'C* grounds of an apprehended inability to obtain a fair trial by reason of the matters complained of, including those in ground 40, or in his conclusion that the trial could safely continue.

693. Accordingly, we reject ground 40.

Ground 41 - Background

694. Ground 41 contains the further complaint that the failure of the respondent to disclose, until after Daniel Cahill had completed his evidence, an important police report that dealt with the circumstances of Daniel Cahill's arrest on suspicion of drug dealing offences, and which contained information that was contradictory of, and was in conflict with the evidence given by Special Agent Wade and Daniel Cahill, render their cross-examinations unsatisfactory in a material way and rendered the trial unfair.

695. Insofar as ground 41 is concerned, the basis for the complaint is as follows. After Daniel Cahill and Special Agent Wade had completed their evidence, the respondent informed the Court of the existence of a Yonkers Police report dated 28 December 2019. On the morning of 7 July 2020, the respondent handed a copy of the report to the appellant's legal team immediately prior to the Court sitting. It contained the following information:

> "*The narcotics unit responded to address to assist Homeland Security with an investigation. The target of their investigation was Daniel Cahill who they wanted to speak with in relation to the investigation. While at scene Cahill's wife, Erica, allowed members of Homeland Security to enter the apartment to confirm that Cahill was not at the location. While looking for Cahill a small marijuana grow operation was observed in a small room adjacent to the living room. Erica signed a consent to search for the apartment and a search was conducted. Along with the small marijuana grow operation, a quantity of steroids were located. During the search Cahill was located in the attic of the location and agreed to be brought to the detective division to speak with members of Homeland Security. CSU was notified and responded to the location to and photographed the recovered evidence. While at the detective division the undersigned spoke with Assistant District Attorney Lloyd to determine whether or not charges would be filed against Cahill for the marijuana and steroids found in the home. ADA Lloyd related that her office would not file charges. All of the evidence recovered was property clerked at the narcotics unit*".

696. When Daniel Cahill was asked in the witness box if anything else was found during the search, he failed to mention the finding of the steroids.

697. The defence were concerned that ostensibly this document had not been disclosed and that ostensibly it could have been deployed in the cross-examination of Daniel Cahill. Explanations were sought from the prosecution, and it emerged that Detective Inspector Phillips had procured the original report from the US on a police-to-police basis. It had been brought to the attention of counsel for the respondent, who had read it and had accepted responsibility for its redaction. It was fully redacted because it was New York Police Department's documentation. The existence of the document, however, was disclosed in the disclosure process to the extent that it was itemised within a 10-page schedule to a statement of a Detective Inspector Martin Beggy, listing reports over which privilege was being claimed. This schedule was designated as exhibit MB4. However, the schedule as constructed did not identify any document listed within it by means

of a narrative description. Accordingly, the item at issue was not identified by any narrative description as being a "*Yonkers Police Department report*". The schedule merely listed the number of the report, specified whether the redaction on account of privilege was in whole or in part, the reason for the redaction, and a reference to whether or not it might be regarded as being relevant by a suspected person. It was in a sub-part of the schedule entitled "*Category F - Third party documents/data*", which contained just two items, beside each of which was the word "*relevant*" in brackets. It was further referenced as being of relevance to "*AB*".

698. The respondent accepted with hindsight that the schedule did not contain any information which might have alerted the appellant to the fact that it was a Yonkers Police report. However, the substance of what it contained, with the exception it was accepted of the reference to steroids, could be gleaned from a report of the aforementioned Detective Inspector Phillips which was fully disclosed. That report had said:

> "*During the detention of Daniel Cahill at his home on the 25th of July 2019 a small quantity of cannabis plants were discovered by Homeland Security Investigations in a communal area at his shared residence. I understand that due to the quantity of plants involved this did not amount to a federal offence and subsequently officers from Yonkers Police Department attended at the scene. These drugs were not attributable to Daniel Cahill and he was not arrested in relation to same. I understand from Yonkers Police Department that the district attorney for Yonkers advised on the 25th of July that no prosecution was directed in respect of this small quantity of drugs*".

While there was acceptance by the respondent with hindsight that ideally the defence should have been made aware not just of the existence of the report, but also of its contents, the prosecution's position was that there was essentially nothing new in the report. It was accepted that there was a reference in the Yonkers Police report to steroids. However, the question of steroids had only become relevant for the first time during the cross-examination of Special Agent Wade. This was in circumstances where Special Agent Wade was asked to explain why, if he had committed no offence, Daniel Cahill had been handcuffed by federal agents during the search of his home, and she replied, "*There was also steroids in the house*". It was put to her that in her evidence in the matter up to that point and in her statement she had only mentioned cannabis plants and that she had not previously mentioned steroids, and she accepted that she possibly had not mentioned it.

The Arguments at Trial

699. Counsel for the appellant contended that the finding of steroids in Daniel Cahill's apartment was a relevant fact, and if the defence had been aware of it both Daniel Cahill and Special Agent Wade would have been questioned about it.

700. The respondent said in response that when the difficulty arose it was resolved on the basis that the appellant's legal team was permitted to cross-examine the contents of the Yonkers Police report into evidence in dealing with Detective Inspector Phillips. This was done on 9 July 2020. While it is the case that the cross-examination of Daniel Cahill and Special Agent Wade was conducted prior to the emergence that steroids had been found in a search of Daniel Cahill's home, it was open to the appellant to seek to have both Daniel Cahill and Special Agent Wade recalled. Moreover, the document could have been put to Special Agent Katzke. The appellant's legal team, for their own reasons, opted to do none of these things.

701. It was argued on this appeal that the appellant could not contemplate recalling Daniel Cahill when none of the background material to this report was available. To do so would provide Daniel Cahill with an opportunity to *"rubbish"* the report and the appellant would be bound by his answers. Further, to suggest that the appellant might seek to put the report to Special Agent Katzke lacked any reality in circumstances where he was a dangerous witness from the defence perspective and to give him the floor would be very unwise.

702. The appellant's counsel argued that so prejudiced was their client by the late disclosure of the Yonkers Police report, that he faced a real risk of being unfairly convicted, and that the only course open to the trial judge in order to prevent that was to withdraw the case from the jury. This argument was incorporated as a facet to the appellant's previously mentioned *P.O'C* application.

703. Responding to this, the respondent invited the trial court to consider whether this was truly a material matter of such significance that a fair trial could not take place on account of it.

The Trial Judge's Ruling

704. The trial judge in ruling on the *P.O'C* application on 13 July 2020 dealt with the Yonkers Police report aspect to the complaint as follows:

> "*The failure to disclose the Yonkers Police Department supplementary report:*
> *The first reference to steroids having been found at Mr Cahill's residence on the 25th of July 2019 was on the last day of Special Agent Wade's evidence on the 6th of July 2020. This alerted Inspector Phillips to enquire after her evidence if the report from Yonkers Police Department which he had procured on a visit to US in September 2019 and furnished to the incident room at Dundalk on the 28th of September 2019 had been disclosed. On enquiry, it had been disclosed in a way that the defence could not have been expected to understand its relevance. It was fully redacted in a schedule marked relevant. Inspector Phillips gave evidence in the presence of the jury about the report. He accepted that a report of the 4th of October 2019, which he prepared in respect of Daniel Cahill for the purposes of disclosure to the defence, that cannabis plants were referred to but not steroids. Inspector Phillips stated in evidence, "This the only mention of the word steroids in the dealings with Daniel Cahill and any law enforcement in the United States." The report should have been disclosed to the defence before the evidence of Daniel Cahill and Special Agent*

Wade. The Court accepts that this was due to inadvertence and that the report is now before the jury.

The major deficit as far as the Court is concerned is that the quantity of steroids is unknown and Daniel Cahill was not crossexamined by the steroids. I do not consider the conflict about the reason for the search an issue of importance or who brought him to Yonkers Police Department. Daniel Cahill and Special Agent Wade were crossexamined in detail about the cannabis plants. The jury are quite entitled to consider the report and compare it to evidence already tendered and in respect of the steroids be as favourable to the defence as they consider necessary.

The Court is of the view that the defence is not prevented by reason of the letter of scope from pursuing the line of defence that Daniel Cahill was vulnerable to inducement by reason of his immigration status, his detention and the circumstances of detention. There is certainly a deficit in the inability of Special Agent Wade to answer questions because of the letter of scope to her. The Court has already in its ruling of the 6th of July indicated that it was not appropriate for this court because of the circumstances to direct or try enforce her to answer any question she felt came within the terms of the letter of scope. In that ruling the Court considered she did her best in the circumstances she found herself in. Likewise there is a deficit in respect of the issue of steroids.

The duty of the Court is to vindicate the fair trial rights of the accused and apply the principles of PO'C as now framed by the decision of DPP v. C CE. It is an exceptional jurisdiction. It is an exceptional jurisdiction to withdraw a case from the jury. This is not really a missing evidence case. It has its own very particular circumstances of fact. I do not consider that the Court must speculate very much on the missing testimony of Special Agent Wade. Mr Cahill's immigrant status in the US was clear. It was open to the jury to hold there was an administrative arrest for immigration issues and that he was released at Yonkers Police Department. There is no evidence that there was a direct promise made to him that in exchange for giving evidence his status would be regularised. The jury are quite entitled to decide that there was an expectation on his part that he would be assisted but that is a matter for the jury and to assess any impact they so decide on the truth of his evidence. The jury are entitled to assess the evidence of the visit by the New York Police Department Narcotics Unit to the residence and the evidence of Mr Cahill, Special Agent Wade and Inspector Phillips in that regard.

The Court accepts that it must assess cumulatively all the issues raised by the defence. The onus is on the defence to persuade the Court that there is a possibility that an obviously useful line of defence is not available to the accused so as to render the trial unfair. By reference to all the issues raised by the defence, including rulings

already made, the evidence of Special Agent Wade in the context of the letter of scope to her of the 31st of October 2019, the evidence of Daniel Cahill and the failure to disclose the Yonkers Police Department supplementary report, the Court is not satisfied that this renders the trial infirm or unfair to the extent that it necessitates the charges on the indictment being withdrawn from the jury and the Court directing a not guilty verdict or, in the alternative, discharging the jury for failing to disclose the Yonkers Police Department report in a timely manner".

Submissions of the Appellant

705. It is submitted to this Court on behalf of the appellant that the trial judge's ruling was flawed in the following respects. It is suggested that the trial court did not adequately address the argument and that the ruling on the impact of the late disclosure of the Yonkers Police report represented nothing more than an afterthought to a more substantial ruling on the application in relation to the Letters of Scope. It is further complained that the trial judge's ruling did not sufficiently consider the implications of the late disclosure for cross-examination. If the appellant had known about the contents of the report at issue Daniel Cahill could have been confronted as being a liar, as could have Special Agent Wade. It is submitted that the coincidence that both Daniel Cahill and Special Agent Wade (before it emerged at a late stage of the latter's cross-examination) had not mentioned steroids would have been explored, as would Special Wade Wade's failure to mention it to An Garda Síochána, as would the issue of how it came about that there was no prosecution for possession of steroids. It is suggested that the trial judge's lack of consideration of this issue has to be viewed against the background where inducements and threats were categorically demonstrated to be operative elsewhere in the case.

Submissions of the Respondent

706. In response to these submissions, counsel for the respondent submits that the only significant new information in the report was confirmation that steroids had been found in addition to cannabis. Counsel suggests that the appellant had sought to inflate this to something of dramatic importance; yet they declined the opportunity to have either Daniel Cahill or Special Agent Wade recalled to be cross-examined on it. The appellant's team were permitted in any event to cross-examine the information in the report into evidence through Detective Inspector Phillips so that the defence could rely on it in their case to the jury to make what they wished of it.

707. The point is made that disclosure in this case was a mammoth exercise. There was a lot of material over which the respondent were obliged to claim privilege. Privilege was asserted in relation to this report because it was received in the context of a police-to-police inquiry. It was referenced in a report of Detective Inspector Beggy, Senior Investigating Officer, which asserted privilege over certain materials. This report contained schedules listing the materials over which privilege was claimed and identifying materials which the respondent considered relevant to the defence in order that disclosure be addressed and litigated if necessary.

708. Detective Inspector Phillips had addressed its contents in his own report which was disclosed to the defence. The reference to steroids by Special Agent Wade in the course of being cross-

examined caused Detective Inspector Phillips to recall the matter and bring it to counsel for the respondent's attention and its existence and contents were immediately brought to the trial court's and to counsel for the appellant's attention. In the circumstances counsel for the respondent maintained that the criticisms of the manner in which the trial judge dealt with this matter were unwarranted. He contended that the document simply does not have the significance which the appellant sought to have placed upon it and that its late disclosure certainly did not justify the discharge of the jury.

Discussion and Determination on Ground 41

709. We have considered the full trial transcript, including that of the evidence given both by Daniel Cahill and by Special Agent Wade. We completely agree with the trial judge that the failure to provide the contents of the Yonkers Police report to the appellant until 7 July 2020 in the circumstances outlined was not of such import or significance as to have justified withdrawing the case from the jury. The appellant was not inhibited from seeking to draw a connection between the finding of drugs in the house of Daniel Cahill and his subsequent giving of evidence in this case. They knew at all stages that illegal drugs (comprising cannabis plants at least, although they did not know anything at that point about steroids) had been found in his house when it was raided; that both HSI and Yonkers Police Department was involved in that raid; that Daniel Cahill was handcuffed, detained and taken to Yonkers Police Department; that his immigration status was irregular at that point; that in fact no prosecution ensued in respect of any drugs found; further that Daniel Cahill subsequently agreed to make a statement and give evidence in the appellant's trial; and that they were able to suggest to the jury (although it may be inferred that the suggestion was ultimately rejected by them) that there must have been some form of inducement offered to him connected to his precarious immigration status and/or his exposure to possible criminal prosecution to have caused him to do so. It is true that Daniel Cahill denied that anything else was found during the raid at his house. In circumstances where the report of the Yonkers Police Department was read into the record on 9 July 2020, and the jury had also heard Special Agent Wade say that steroids were found in the house, the jury would have been fully alive to the fact that his evidence was contradicted in that respect. The defence were able to exploit this in their closing speech, and they did so. They had the option of bringing back Daniel Cahill, and Special Agent Wade, but for their own reasons decided not to do so. Special Agent Wade was extensively cross-examined on 6 July 2020, after she had mentioned steroids for the first time, about the fact that she had not done so previously. The jury had all of that. We are therefore not persuaded that the fact that the appellant did not have the contents of the Yonkers Police report before cross-examining Daniel Cahill and Special Agent Wade was a matter of significance at the level that the appellant seeks to attribute to it. The appellant was not entitled to a perfect trial. He was, however, entitled to a fair trial, and if we felt that he had not received one we would allow his appeal without hesitation. However, while it is unfortunate that the appellant did not have the Yonkers Police report disclosed to them earlier than in fact it was, we do not believe that this failure could have impacted materially on the fairness of the appellant's trial having regard to the overall run of the trial.

710. We are satisfied therefore that the trial judge was correct in his ruling. We do not consider that the trial court failed to address the arguments. The trial judge was entitled to address this particular issue in the context of the wider contention being made by the appellant's legal team that the case should be withdrawn from the jury on *P.O'C* grounds. His ruling was carefully crafted and modulated. We reject any suggestion that the issue arising from the late disclosure of the Yonkers Police report was dealt with as an afterthought. We are satisfied that there was a detailed and sufficiently rigorous engagement with the issue by the trial judge, and that his ultimate decision with regard to it, as conveyed in his ruling, was rational, cogent, and open to him on the evidence. We find no error of principle in how he dealt with it and accordingly we also reject ground 41.

Ground 45 – That the trial judge erred in failing to withdraw the Capital Murder case from the consideration of the jury.

Relevant Law

711. Section 3 of the Criminal Justice Act 1990 ("the 1990 Act") applies to the murder of a member of An Garda Síochána acting in the course of his duty.

> "***3. Special Provision in relation to certain murders and attempts***
>
> *(1) This section applies to –*
>
> *(a) murder of a member of the Garda Siochana acting in the course of his duty,*
>
> *(b) […]*
>
> *(c) […]*
>
> *(d) […]*
>
> *(2) (a) Subject to paragraph (b), murder to which this section applies, […] shall be a distinct offence from murder […] and a person shall not be convicted of murder to which this section applies […] unless it is proved that he knew of the existence of each ingredient of the offence specified in the relevant paragraph of subsection (1) or was reckless as to whether or not that ingredient existed*".

Background to the Application for a Direction

712. On 9 July 2020, an application was made on behalf of the appellant pursuant to the *Galbraith* principles to withdraw the capital murder charge from the jury on the basis of insufficiency of evidence.

713. Counsel for the appellant at trial opened paragraph 24-09 of Prof. Dermot Walsh's book *Criminal Procedure* (2nd edn, Round Hall 2016) to the trial court as follows: "*The statutory requirement to prove knowledge or recklessness applies only to the existence of the*

additional ingredients, namely membership and acting in the course of duty. It is further submitted that recklessness in this context connotes subjective recklessness of the Cunningham variety". The case of *People (DPP) v. Murray* [1977] I.R. 360 was also opened to the trial court.

714. Counsel for the appellant referred to the evidence of Detective Garda Joe Ryan in the application insofar as it was relevant to the knowledge or recklessness of the individual who fired the firearm resulting in the death of Detective Garda Donohoe.

715. Detective Garda Ryan gave evidence that he and Detective Garda Donohoe were assigned to a cash escort from various credit unions to the bank in Dundalk town. He was the driver and Detective Garda Donohoe, the passenger. They travelled in an unmarked patrol car. They arrived at Lordship Credit Union around 21.25. On leaving the credit union, a vehicle driven by the raiders blocked the entrance causing the vehicle driven by Detective Garda Ryan to stop and Detective Garda Donohoe to exit the passenger side. Detective Garda Ryan heard a banging noise behind him. He looked to his right-hand side to see the cause of the noise and saw two men approaching the vehicle. They were running and shouting, and the first man was wielding a long-barrelled shot gun, held level with his shoulder and the weapon was pointed at the gardaí. Detective Garda Ryan released his seatbelt and reached for his firearm. The door of the driver's side of the car where Detective Garda Ryan was sitting was opened and he recalled the barrel of the shotgun coming into the driver's well area and pointing at his legs and torso with, it seems, an up and down movement. The person holding the shotgun shouted at him "*I am going to fucking kill you, I am going to shoot you, give us the money*". The second raider had a handgun. Both weapons were pointed at the witness. The man with the shotgun looked for the car keys, however, the other raider had taken those keys already. The men then ran towards the entrance, got into their vehicle and sped off in the direction of Dundalk.

716. Reference was made to aspects of the evidence given by a number of credit union employees and volunteers. The transcript of the evidence discloses that members of An Garda Síochána would assist in bringing the money from the credit union to the bank in Dundalk, normally, but not invariably driving an unmarked car.

717. It was submitted by counsel for the appellant at trial that the two detectives were in plain clothes, in an unmarked patrol car and that the conduct and language of the raiders in looking for money did not suggest that they were aware that they were dealing with members of An Garda Síochána. Counsel submitted that there was nothing to distinguish the gardaí or their vehicle so as to identify them as members of An Garda Síochána. Moreover, that there was no evidence of public knowledge in that regard.

718. Counsel for the respondent at trial placed reliance, *inter alia,* on *People (DPP) v. M.* [2015] IECA 65. It was submitted by counsel that the robbery was highly organised and professional

and that the jury had evidence that the vehicle used in the robbery was acquired well in advance and there was CCTV evidence that members of the gang surveyed the scene in advance of 25 January 2013. Reference was also made to the fact that a loaded firearm was brought to the robbery. Counsel questioned why there would be a reason to bring a loaded firearm to the robbery unless the robbers were aware that there was a garda escort. Further reference was made to the fact that there was evidence of the use of walkie talkies by the raiders. In light of that evidence, it was submitted that the jury could infer beyond reasonable doubt that the raiders would have known that cash-in-transits of this nature would be monitored by armed gardaí.

719. It was further submitted that the CCTV footage demonstrated that the four vehicles in the car park were present there for a period of two minutes and 24 seconds before the raiders came over the wall. For a large portion of that time, the floodlights were on and so it was argued that there was a good opportunity to observe the vehicles enter and note the positions of those vehicles. Counsel for the respondent argued that the raiders armed with the firearms went directly to the garda vehicle in the knowledge that this vehicle posed a danger to them as it contained armed gardaí.

720. The judge refused the application, taking the view that there was enough evidence to go before the jury on the capital murder charge.

Submissions of the Appellant

721. It is accepted that the principles in *People (DPP) v. M.* apply; that is the withdrawal of a case from the jury is an exceptional step.

722. It is submitted that the respondent's references to the raiders surveying the scene were of no assistance in circumstances where the detectives were in plain clothes and in an unmarked patrol car and that references to the purported professional and organised nature of the robbery did not cure this.

723. Counsel for the appellant suggests that the submission that a loaded firearm is synonymous with the presence of armed gardaí is not a valid or realistic submission and that if it were, the ultimate decision in *Murray* would never have been reached because the accused in that case had a firearm and ultimately, the court found that the necessary ingredient had not been proven.

724. The appellant highlights that the bulk of the money was missed by the two men and so it could not be said that the robbery was well-organised and executed.

725. It is repeated that there was no evidence of an awareness of the garda escort on the part of the wider population at all.

726. It is submitted that any decision to convict the appellant of capital murder was not based on direct evidence. Moreover, any inference drawn that the appellant knew or was reckless as to whether the man exiting the vehicle was a garda, was not grounded on evidence, but on supposition or prejudice.

Submissions of the Respondent

727. It is submitted on behalf of the respondent that gardaí do not need to be in uniform or in a marked patrol car for an ordinary citizen (not to mention, an armed robber) to know that the vehicle in question is an unmarked patrol car.

728. Counsel for the respondent makes the point that it may be inferred that those who were engaged in this particular robbery would have known well what an unmarked patrol car looks like.

729. The submissions regarding the evidence of the loaded firearm, the sourcing of the getaway car in advance and the CCTV evidence of the survey of the scene undertaken by the robbers are repeated. It is also pointed out that there was evidence before the jury that the robbers wore dark clothing, had their faces covered and used walkie talkies rather than their own mobile phones.

730. It is noted that the CCTV footage shows that three civilian vehicles and the unmarked car were in the car park for a period of two minutes and 24 seconds before the robbers came over the wall and that for a large portion of that two minute and 24 second period, the carpark was floodlit.

731. The respondent further draws attention to the evidence that the getaway vehicle blocked the entrance of the credit union, that it escaped without being stopped or detected by law enforcement and that it was dumped and burnt in an isolated location in Northern Ireland.

732. It is suggested that the gang had an awareness of garda investigations into crime and sought to make same more difficult through the use of walkie talkies and the burning of the car in another jurisdiction.

733. It is repeated that if the gang did not expect to be confronted by armed gardaí there would be no reason to bring a loaded firearm to the robbery. It is also highlighted that the two armed robbers went directly to the unmarked garda vehicle.

734. It is submitted that the jury were entitled to draw the inference that the robbers knew that the unmarked patrol car contained members of An Garda Síochána acting in the course of their duty and that when the appellant pulled the trigger that he did so knowing that the man that he murdered was a member of An Garda Síochána acting in the course of his duty.

Discussion and Determination

735. The *mens rea* required for the offence of capital murder is twofold. Firstly, there must be evidence of the necessary *mens rea* for murder and secondly, there must be knowledge on the part of the accused that the victim was a member of An Garda Síochána acting in the course of his duty, or recklessness in that regard. In *People (DPP) v. Murray*, the Supreme Court found that capital murder necessitates proof of the *mens rea* in respect of each of the elements. Subsequently, the position was addressed by the legislature through the enactment of s. 3(2)(a) of the 1990 Act. It is necessary that there be evidence of an intention to kill or cause serious injury; the *mens rea* for murder, and knowledge or recklessness in terms of the identity of the victim. Recklessness is subjective under Irish law.

736. The question here is a net one; was there evidence enabling the jury to conclude beyond reasonable doubt that the appellant knew or was reckless that Detective Garda Donohoe was a member of An Garda Síochána acting in the course of his duty on 25 January 2013?

737. The principles concerning an application for a direction are well-settled at this point. The withdrawal of a case from the jury is an exceptional jurisdiction and as stated in *M.,* by this Court (Edwards J.) is one "*to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction".*

738. It seems to this Court on a review of the evidence of the various credit union employees and volunteers and Detective Garda Ryan's evidence, that the trial judge did not err in his ruling.

739. It was the usual practice that the transfer of cash from the credit unions in the area to Dundalk was conducted with the assistance of a garda escort. It seems on the evidence that this assistance was usually rendered by gardaí in an unmarked car as was the position on the night in question.

740. It is not without significance that the armed raiders proceeded directly to the car in which the gardaí were travelling, having had the opportunity of a period of 2 minutes and 24 seconds to survey the scene, including the position of the vehicles.

741. We are satisfied that there was evidence that this was a well-organised raid. It cannot be gainsaid but that the operation was a planned one; two of the raiders were armed with weapons, the shotgun was loaded and the raiders with the firearms pointed those weapons directly at the garda car. There was evidence of the use of walkie talkies, from which an inference could be drawn of a desire not to be tracked by the authorities, showing knowledge and insight into law enforcement. The vehicle used in the raid had been stolen in advance, thus pointing to a significant level of pre-planning.

742. The facts of *Murray* are totally different to those of the present case and readily distinguishable. The garda victim in that case was off duty and driving with his wife and child. The collision between that vehicle and the Murray's vehicle was happenstance.

743. In the present case, the gardaí were at the scene for a purpose, that is to escort the cash-in-transit. That was not happenstance.

744. When we look at the opportunity to survey the vehicles in the floodlit car park, the raiders proceeding with the firearms to the unmarked car and the fact that the shooter held the weapon at shoulder height and pointed it at the unmarked car, the evidence from which the jury could infer that this was a pre-planned organised operation was more than sufficient evidence to leave to the jury to consider whether the appellant knew or was reckless as to the aggravating factors of this offence.

745. Accordingly, we do not find any error in the trial judge's ruling to refuse the application and this ground fails.

Ground 44 – That the trial judge erred in failing to withdraw the case from the jury on the grounds advanced during a *P.O'C* application made at the close of the prosecution's evidence.

746. An application was made to the trial judge at the conclusion of the prosecution case, pursuant to *People (DPP) v. P.O'C* [2006] 3 I.R. 238, seeking to withdraw the case from the jury on the basis of unfairness arising in the trial such that the appellant could not avail of a trial in due course of law in accordance with Article 38.1 of the Constitution.

Submissions of the Parties

747. In summary, the appellant asserts the trial was unfair arising from the Letters of Scope and the manner in which Special Agent Wade dealt with cross-examination; the failure to hold a *voir dire* in respect of Daniel Cahill's evidence; and the late disclosure of the Yonkers Police report.

748. Counsel for the appellant submits that arising from the Letters of Scope and Special Agent Wade's cross-examination, the appellant had lost the opportunity of obtaining evidence relating to the defence case, namely whether inducements or threats had been issued to Daniel Cahill. With respect to refusing to hold a *voir dire* regarding Daniel Cahill's evidence, it is asserted that this was unfair as the appellant had been unable to explore important areas of Daniel Cahill's evidence in the absence of the jury. In relation to the Yonkers Police report, it is submitted that this document contained extremely important information, which had not been disclosed to the appellant, namely that Daniel Cahill was in possession of steroids at the time of his interaction with HSI. This was in addition to cannabis (which the appellant had notice of). It is argued that Daniel Cahill's possession of these substances

added support to the proposition that he was treated favourably in return for providing a statement against the appellant.

749. The respondent, whilst acknowledging that the run of the trial had been unusual, submits that an unfairness had not arisen in the trial which necessitated the case being withdrawn from the jury. It is submitted that the appellant was in a position to explore all issues relating to the case being made by him including the specific claim that Daniel Cahill had been given favourable treatment. Whilst the Letter of Scope, and Special Agent Wade's deployment of it, meant that evidence was not given by her in relation to the appellant's proposition that Daniel Cahill had been treated favourably in return for providing his statement against the appellant, nonetheless the defence case was fully put before the jury. With respect to the Yonkers Police report, it is accepted that this report should have been disclosed earlier. Nonetheless, Daniel Cahill, Special Agent Wade and/or Special Agent Katzke could have been called back to be questioned in relation to this. As the appellant had not taken this opportunity, he could not claim that an unfairness necessitating the withdrawal of the case from the jury had arisen on this basis. It is further submitted that there was no legal basis to hold the *voir dire* sought by the appellant in relation to Daniel Cahill.

750. In *People (DPP) v. CCE* [2019] IESC 94, the Supreme Court set out the principles a trial court must consider in the context of a *P.O'C* application. O'Donnell J. (as he then was) stated at paragraphs 14- 19 of his judgment:

> *"14.* […] *[T]rial judges must exercise* [the P'OC] *jurisdiction fully and conscientiously, and be prepared to withdraw cases based on their own consideration of the impact of a lapse of time on the case. It should be emphasised, moreover, that the test is not whether a trial judge would himself or herself consider that a guilty verdict was or could be appropriate (that is, that as a matter of fact the defendant was or might be guilty of the offence), but rather the distinct question of whether any question of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. The trial judge is not asked to second-guess or anticipate the decision of the jury, but rather whether the process meets the standard required to permit a jury to deliver its verdict.*
>
> *15. Not only is this a distinct function of the judge, it is one to which a judge is particularly suited. It might be thought that most questions of the extent and significance of the evidence can safely be left to a jury, who must be satisfied beyond any reasonable doubt before they can convict an accused. Generally speaking, deficiencies in the evidence – lapses, inconsistencies, gaps, and absences – will tend to make it more difficult to reach that standard. Furthermore, a jury in delay or in lapse of time cases will be given a detailed warning about the impact of delay upon their adjudications* [...]

16. These are, themselves, substantial guarantees of the fairness of the process. Nevertheless, a trial judge has critical information and experience in this regard that a jury lacks. The assessment of the impact of lapse of time and the unavailability of evidence necessarily involves an assessment not just of the evidence actually adduced, which the jury can be expected to appreciate and assess, but rather a consideration of the absence of evidence. A jury has no comparator against which to gauge the trial which they are hearing. A trial judge, by contrast, will normally have heard many cases and may have participated in such trials as a practising lawyer, and therefore may be expected to have the capacity to attempt to assess the impact on the trial in reality of what is now unavailable. A trial judge may be expected to understand that in a trial in which all available evidence is adduced and tested, there may be a number of side-issues which may be explored with greater or lesser effect, which may give rise to unexpected twists and turns, and which may be of benefit to the accused, if not in providing evidence that is positively exculpatory, at least raising doubts about the case. This investigation is part of the trial process.

17. Even, therefore, if the core components of a case remain – the complainant's allegation and the defendant's denial, whether contained in evidence, a statement made, or simply by maintaining that the case has not been established – a trial which is limited to such matters may be rendered unjust because it has been shorn of all the surrounding detail which might be expected in a trial held soon after the event, the investigation and testing of which is a normal part of the fair trial process.

18. Few trials, however, are perfect reproductions of all the evidence that could possibly exist. The absence of a witness or a piece of evidence does not render such trials unfair. A trial judge has therefore a vantage point which allows him or her to consider whether what has occurred crosses the line between a just and an unjust process. In shorthand terms, this involves considering whether the evidence which is no longer available is "no more than a missed opportunity", as the trial judge and the Court of Appeal considered, or by contrast whether the applicant has "lost the real possibility of an obviously useful line of defence", as considered by the majority in this court, adopting in this regard the language of Hardiman J. in S.B. v. Director of Public Prosecutions [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006) (" S.B."), at para. 56. These judicially adopted phrases seek to identify either side of the dividing line: it is inevitable that many cases will proceed to trial without all the evidence that was potentially available at the time of the alleged offence, but that in itself does not prevent a trial occurring. There is a point, however, at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed.

19. It follows that there is a particular and distinct onus upon trial judges to address this issue separately and conscientiously. This jurisdiction, which is in addition to the power of the jury to consider the impact of lapse of time, is an important protection for fair trial rights in circumstances which can be challenging. The exercise of that jurisdiction can, and must, be reviewed on appeal. That is a further important aspect of maintaining a fair trial. However, it is in the nature of such a determination, which is to some extent dependent upon an appreciation of the manner in which the case has progressed, the demeanour of witnesses and parties, and the manner and cogency with which evidence is given, that a significant margin of appreciation must necessarily be afforded to the decision of the judge presiding at the trial. For this reason, it is important that trial judges should set out the relevant factors involved, their assessment of them, and the reasons for arriving at their conclusion, in order to permit an assessment of the matter on appeal".

O'Donnell J. continued at paragraph 46 of his judgment:

"*I would suggest that the following principles might be identified:-*

(i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial;

(ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed;

(iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial;

(iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter;

(v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed".

751. O'Malley J. stated at paragraph 4 of her judgment in *People (DPP) v. CCE*, which the trial judge placed particular reliance on:

"*[C]onsidering an application of this nature, will involve an assessment of the prosecution case. There must, of course, be sufficient evidence for a properly instructed jury to convict the accused, since otherwise he or she will be entitled to a direction in any event. Assuming that this threshold is met, the trial judge must next*

consider the evidence said to be missing. What is required here, if the accused is to succeed in the application, is a legitimate basis on which it can be said to be reasonable to infer that particular evidence, potentially favourable to the defence, might have been given had the trial taken place at an earlier stage. If the prosecution case is very strong, then the evidence said to be missing would need to be such that there was a real possibility that it could influence the decision of the jury notwithstanding the strength of the prosecution case. A theoretical possibility that the absence of some tangentially material piece of evidence might render the trial unfair is not enough. It is necessary to look at the case in the round, to have regard to the likelihood of evidence favourable to the defence being genuinely lost by reason of the lapse of time and also to have regard to the role which the evidence might reasonably have been expected to play at the trial, in the light of the prosecution case as it actually appeared at the trial. The issue to be determined is whether the accused has lost the real possibility of an obviously useful line of defence. The task of the trial judge is to determine whether the trial is fair, rather than whether the accused is guilty or innocent. The burden in such an application is on the accused, who may be able to make the case on the basis of the evidence already adduced by the prosecution or may need to adduce defence evidence. It may be necessary to call evidence in absence of jury".

752. Having considered *People (DPP) v. CCE*, and noting that the *P.O'C* application only related to the testimony of Daniel Cahill, the trial judge ruled as follows:

> "*The decision of the Court on the 22nd of June 2020 not to permit a voir dire on the overall admissibility of Daniel Cahill's evidence before the jury and the background to it:*
> *On the 9th of June 2020 the defence sought a voir dire in respect of the admissibility of some of the proposed evidence of Daniel Cahill. There was no mention of seeking the total exclusion of his evidence. The Court conducted that voir dire over four days, Tuesday the 9th, Wednesday 10th, Thursday 18th and Friday 19th of June* […] *The Court ruled on this voir dire on the morning of the 22nd of June.*
>
> *During that voir dire, Detective Garda Jim McGovern, Sergeant Paul Gill and Inspector Mark Phillips all gave evidence. There was no suggestion in the crossexamination of these witnesses that there was any wrongdoing on their part by engaging in any form of collusion with agents from the Department of Homeland Security to effect the arrest of Mr Cahill.*
> […]
> *Thereafter Mr O'Higgins sought a voir dire on the total admissibility of Mr Cahill's evidence because of alleged inducements to Mr Cahill. He made detailed submissions to the Court. The prosecution objected on the basis that there was no need for a voir dire whatsoever as all the issues which Mr O'Higgins had referenced went to*

credibility rather than admissibility. Case law was opened to the Court. The Court considered all the arguments carefully and gave a detailed ruling in the issue. Having summarised all the issues the Court stated, "I am of the view that the law would dictate that this has very little or no chance of success. That in fact these are matters of credibility and weight and that they would not be in any way prevented from raising these and in my view that the appropriate decision in the circumstances is to refuse the voir dire as the Court is of the view that it would be trespassing on the jury's function and the matters which occur are matters for the jury to determine."

The Court does not consider this is a ground to take into consideration in this PO'C ruling. The Court made its decision having heard submissions. It set out its reasons. It was open to the defence to raise all the issues of concern about inducements with Mr Cahill during his cross-examination.

The rulings of the Court of the 6th and 8th of July 2020:
The defence has raised this issue of the tape and its contents of the meeting of the 6th of June 2017 at Belfast International Airport again in the context of this application. The Court is concerned that the defence may have misunderstood the Court's ruling on collateral issues. It is important to understand that the ruling of the 6th of July was in the context of the crossexamination of retired Inspector Marry. There were four legal reasons why the tape and its contents were ruled out on this application. Admissibility of real evidence and whether in the context of this application authentication by the creator of the tape recording was a required oral proof rather than authentication by reference to the contents of the tape. Breach of the rule against hearsay as Inspector Marry was not present. The purpose of admissibility in respect of Inspector Marry only was collateral. The Court did not rule or say that the issue of the possible inducement of Mr Cahill itself was a collateral issue. That is not and never has been the Court's opinion. It was intended to use the tape to challenge before the jury the truth of Inspector Marry's evidence on a clearly collateral issue to him.

In the ruling of the 8th of July 2020 the Court decided the restrictions on Agent Katzke's crossexamination on the tape for different reasons as is clear in that ruling, i.e. remoteness and fundamental unfairness to the prosecution in the context of the only relevant evidence it could relate to, the evidence of Mr Cahill. However, to vindicate the accused's rights the Court made clear the defence was entitled to crossexamine on the email of the 19th of July 2017 which was authored by Agent Katzke in respect of an intended witness who did give a statement which would have allowed the defence to highlight the issue of status for testimony. Even though Agent Katzke may have relied on the letter of scope to him, the email and its contents could have been put before the jury. The Court respects the right of the accused not to crossexamine any witness tendered. This court cannot see how its rulings of the

6th and 8th of July in those circumstances could in any way affected the fair trial rights of the accused.

The role of the DPP:
The Court has set out in a very detailed ruling of the 26th of May the role of the DPP, the Irish Central Authority, the US Central Authority and the Department of Homeland Security US on issues of disclosure and making available Agents Katzke and Wade to give evidence in this trial. The Court in a further ruling of the 2nd of June gave further directions on the way to deal with the letters of scope. This aspect of the Court's ruling should be read in conjunction with those rulings.

The DPP has been placed in a situation not of her making. She had a choice through her counsel at the trial to make provision for Special Agents Wade and Katzke to be available for crossexamination. It was always the intention that Special Agent Wade would be a very limited witness for the prosecution based on her two statements in the book of evidence. It was envisaged that Agent Katzke would not be called by the prosecution. It was entirely appropriate for her to consider and anticipate that the trial judge would make an order either inviting or directing that they be tendered for crossexamination. The Court has received significant assistance from the US Central Authority, the US Department of Justice Criminal Division, through the offices of the Irish Central Authority, the Department of Justice. The Court has issued three separate letters of mutual request.

The DPP had to confront a very significant hurdle because of this court's ruling that an internal email of the 19th of July 2019 had to be disclosed to the defence because of the Ward principles. She took the view that the email could not be disclosed because of the issue of mutual respect between the sovereign powers. The US Department of Justice Criminal Division had authorised the release of important emails provided conditions laid down by it were complied with. That included emails which are important to the defence in anticipation of the evidence of Ronan Flynn. One of the conditions laid down was the DPP had to accept the letters of scope which govern both the ability of the Court to make available to the defence the two Special Agents for crossexamination and the disclosure of the emails. It certainly could be objectively assessed that considering the original commitment given to An Garda Síochána that every assistance would be rendered, the insistence that the letters of scope be complied with was unreasonable but the Court, the DPP or the defence had no control or say on the decision making of the US authorities.

Accordingly, it is the Court's view that there has been no culpable prosecutorial failure or wrongdoing on the part of the Director of Public Prosecutions which can be considered in assessing the degree of prejudice which renders the trial unfair.

The next matter is the nature of the relationship between An Garda Síochána and the Department of Homeland Security and any conversations between An Garda Síochána and Agent Wade and Katzke about this. The letter of scope placed very little restriction on this issue. All the gardaí who visited the US in July and September 2019 were amenable for crossexamination by the defence, including the senior officer, Inspector Phillips, who gave evidence on Tuesday 6th and Thursday 9th of July. Detective Garda McGovern was tendered and retired Inspector Marry gave evidence. Daniel Cahill was not crossexamined on it. At no stage in the trial, either in the absence or the presence of the jury, has the accused sought to make this case. The gardaí involved were compellable witnesses and would have had to answer any questions put to them.

The next matter: Concern that the trial judge is treating the issue of possible inducement or implied threat of consequences as a collateral issue. The Court does not regard the possible inducement of the witness Daniel Cahill as a collateral issue. If it is a view held by the defence, it is a misunderstanding. The Court has never accepted the prosecution case that Mr Cahill's answers on the issues are final. The jury are quite entitled to take all the circumstances they establish or infer beyond a reasonable doubt into account.

The effect of the letter of scope of the 31st of October 2019 on Special Agent Wade's evidence:
"The central issues in the defence application is the effect on the accused's right to a fair trial because of the letter of scope […] *and the anticipated evidence of Agent Katzke and the failure to disclose the Yonkers police report. In respect of Special Agent Wade's evidence, the defence allege that the letter of scope to her has prevented it from pursuing relevant issues. The defence has highlighted the following; was Mr Cahill arrested by Homeland Security? Was he arrested by the New York police? Was his status or lack of it an issue that morning? Was the visit that morning connected to him being illegally in the US? Was there discussion about his status? If so, what were they? Was any help offered to him? Why were the drugs charged not proceeded with? Was this some form of quid pro quo? Why was the decision not to prosecute made so quickly? Was there any threat or inducement brought to bear? Was something said to him along the lines put Aaron Brady away and that would ease his situation? What was the purpose of the search at his residence? What was the condition of the plants? Was there any justification for the garda view that the plants were discovered in a communal area?*

The Court accepts, the prosecution evidence having concluded, that this is the appropriate time to consider the effect of the letters of scope on the trial [...]

It is important to consider all the evidence of Special Agent Wade and what the jury

can or can't consider, decide or infer. She did answer many questions. She did on many occasions decline to answer questions based on her interpretation on the letters of scope. The defence knew in advance that she could not answer questions about the immigration status of the accused because of the letter of scope. There is a conflict and uncertainty arising from her evidence about the grounds for Daniel Cahill's detention at his residence and on the way to the police station. She did say that Daniel Cahill was not promised anything. The issues raised by the defence that her answer to the question about promises is unfair to the defence because of her failure to answer other questions is a matter of weight if the Court allows the trial to proceed to the jury.

The assessment of the witness, whether she was hardened, peremptory, dismissive, well capable of disablement, literal, very quick to pick counsel up on his language if not sufficiently tight, deliberately misleading are entirely matters for the jury, not the trial judge, if it is allowed to proceed before the jury. If it proceeds before the jury, the jury are perfectly entitled to consider the restrictions on the witness because of the letters of scope in their assessment of guilt or innocence.

[...]

The jury are quite entitled to infer, if they so wish, based on the evidence of Special Agent Wade and Daniel Cahill, that he was the subject of an administrative arrest or detention because of his immigration status. They are equally entitled to resolve any conflict between detention for immigration issues or for alleged drug offences. The jury already know the immigration status of Mr Cahill based on his own evidence. The jury do not have a deficit because of Special Agent Wade's lack of evidence in this regard. He had entered USA in August 2013 on a 90 day visitor visa which did not entitle him to work. Despite that, he did work and remained over 90 days. He has accepted that he is out of status and has yet to file his papers seeking permanent residence. The jury are quite entitled to decide, if they so wish, that he was vulnerable due to his status and reject his evidence or, in the alternative, accept that his evidence had nothing to do with his immigration status. The jury are quite entitled to contrast his treatment visàvis the accused if they so wish. The Court accepts that the jury cannot speculate on any conversation between Daniel Cahill and the Special Agents but both Daniel Cahill and Special Agent Wade have given evidence about conversations they had with each other and both deny that there was any offer made to him of status for testimony. That's no different to any other situation where the defence get answers which are not in accordance with the scenario the defence wish to highlight. Daniel Cahill was crossexamined at length on this issue and, as already stated, the jury are always entitled to consider the letter of scope restriction on Special Agent Wade if they so wish.

As already outlined in the Court's ruling of the 6th of July 2020, the defence are quite entitled to highlight the circumstances of his detention, his behaviour and the

possibility he was influenced by his own status to cooperate and the possibility of future assistance from the Department of Homeland Security and also to highlight any conflicts in his statement.

The failure to disclose the Yonkers Police Department supplementary report:
[…]
The report should have been disclosed to the defence before the evidence of Daniel Cahill and Special Agent Wade. The Court accepts that this was due to inadvertence and that the report is now before the jury.

The major deficit as far as the Court is concerned is that the quantity of steroids is unknown and Daniel Cahill was not crossexamined by the steroids. I do not consider the conflict about the reason for the search an issue of importance or who brought him to Yonkers Police Department. Daniel Cahill and Special Agent Wade were crossexamined in detail about the cannabis plants. The jury are quite entitled to consider the report and compare it to evidence already tendered and in respect of the steroids be as favourable to the defence as they consider necessary.

The Court is of the view that the defence is not prevented by reason of the letter of scope from pursuing the line of defence that Daniel Cahill was vulnerable to inducement by reason of his immigration status, his detention and the circumstances of detention. There is certainly a deficit in the inability of Special Agent Wade to answer questions because of the letter of scope to her. The Court has already in its ruling of the 6th of July indicated that it was not appropriate for this court because of the circumstances to direct or try enforce her to answer any question she felt came within the terms of the letter of scope. In that ruling the Court considered she did her best in the circumstances she found herself in. Likewise there is a deficit in respect of the issue of steroids.

The duty of the Court is to vindicate the fair trial rights of the accused and apply the principles of PO'C as now framed by the decision of DPP v. CCE. It is an exceptional jurisdiction. It is an exceptional jurisdiction to withdraw a case from the jury. This is not really a missing evidence case. It has its own very particular circumstances of fact. I do not consider that the Court must speculate very much on the missing testimony of Special Agent Wade. Mr Cahill's immigrant status in the US was clear. It was open to the jury to hold there was an administrative arrest for immigration issues and that he was released at Yonkers Police Department. There is no evidence that there was a direct promise made to him that in exchange for giving evidence his status would be regularised. The jury are quite entitled to decide that there was an expectation on his part that he would be assisted but that is a matter for the jury and to assess any impact they so decide on the truth of his evidence. The jury are entitled to assess the evidence of the visit by the New York Police Department Narcotics Unit to the residence and the evidence of Mr Cahill, Special Agent Wade and Inspector Phillips in that regard.

The Court accepts that it must assess cumulatively all the issues raised by the defence. The onus is on the defence to persuade the Court that there is a possibility that an obviously useful line of defence is not available to the accused so as to render the trial unfair. By reference to all the issues raised by the defence, including rulings already made, the evidence of Special Agent Wade in the context of the letter of scope to her of the 31st of October 2019, the evidence of Daniel Cahill and the failure to disclose the Yonkers Police Department supplementary report, the Court is not satisfied that this renders the trial infirm or unfair to the extent that it necessitates the charges on the indictment being withdrawn from the jury and the Court directing a not guilty verdict or, in the alternative, discharging the jury for failing to disclose the Yonkers Police Department report in a timely manner".

Discussion and Determination

753. With respect to the refusal to hold a *voir dire* in relation to Daniel Cahill's evidence, the trial judge did not err in his decision that the appellant's complaint in this regard was not an appropriate matter to take into consideration in the *P.O'C* application. The question as to whether a *voir dire* should be conducted had already been correctly determined. Nothing subsequent had occurred to render that decision incorrectly determined. Accordingly, it was inappropriate that this issue was raised again in the course of the *P.O'C* application.

754. With respect to the remaining ingredients of the *P.O'C* application, the trial judge's determination, in essence, was that while the appellant did not get answers to very many relevant questions asked of Special Agent Wade in relation to Daniel Cahill, and did not have the benefit of the Yonkers Police report when cross-examining Daniel Cahill, nonetheless the issues he wished to raise, which included the Tommy McGeary email, were all before the jury for their consideration. Furthermore, the jury were aware of the reason why Special Agent Wade was refusing to answer questions and could have regard to that in the course of their deliberations, if they were of the view that this was a matter which they should consider.

755. In terms of the principles to be applied on foot of *People (DPP) v. CCE*, the question to be asked is whether these matters, namely the Letters of Scope and Special Agent Wade's deployment of the directions in her Letter of Scope and/or the late disclosure of the Yonkers Police report resulted in a trial being conducted which in real terms was unfair to the appellant.

756. The use of the Letters of Scope was a very unusual feature of the trial and the late disclosure of the Yonkers Police report should not have occurred. However, does that result in an automatic determination that the trial was unfair? A perfect trial, while the ideal, is rarely achieved. Deviations from the perfect standard must be assessed so that the effect of the deviation on the trial process can be determined to decide whether it is unjust to permit the trial to proceed.

757. While Special Agent Wade refused to answer relevant questions on foot of the Letter of Scope, nonetheless all issues which the appellant wished to raise were canvassed at length with her, including the Tommy McGeary email. This is not a situation where the defence were left in the position of being unable to advance an avenue because of a lack of a witness. Instead, a wide-ranging cross-examination took place covering all aspects of the concerns which the appellant had regarding Special Agent Wade's interaction with Daniel Cahill, to include it being put to her, having regard to the Tommy McGeary email, that if a witness with residency difficulties did not co-operate they would be deported. While Special Agent Wade did not answer these questions, it was a matter for the jury to consider what they made of this evidence.

758. In relation to the failure to disclose the Yonkers Police report, this should not have occurred. However, the opportunity arose to recall Daniel Cahill, or indeed Special Agent Katzke. This was not availed of by the appellant. In *People (DPP) v. McKevitt*, where an issue of late disclosure also arose, the Supreme Court determined that the offer to recall the principal witness so that the disclosed material could be put to him was of importance in determining whether an unfairness of such significance arose that the conviction should be quashed. In the instant case, not only was this offer made and not availed of, the jury were fully aware of the contents of the Yonkers Police report; the importance of its contents; and that there was a failure to disclose it at the appropriate stage.

759. The question which must be asked is whether the trial judge erred in the exercise of his discretion by permitting the trial to proceed. The question which the trial judge had to address was whether the specific infirmities which had arisen in the trial process were such that it rendered it unjust to proceed with the trial before the jury.

760. It is difficult to see how this could be so when the case made by the appellant was extensively put before the jury by the cross-examination which took place of Special Agent Wade coupled with the existence of an email put to the witness which evidenced the case being made. Whilst questions put to a witness are never evidence in a case, the manner in which a witness deals with questioning is a matter which the jury can have regard to when assessing a witness's credibility. With respect to the Yonkers Police report, the report was opened before the jury and they were aware of its contents. While questions could of course have been put to Daniel Cahill or Special Agent Katzke, the issue of steroids having been found at Daniel Cahill's residence was before the jury.

761. In all the circumstances, while there were extremely unusual features in this trial, the trial judge did not err in determining that the issues raised did not materially affect the trial such that the appellant lost the real possibility of an obviously useful line of defence thereby rendering the trial unfair.

762. Accordingly, the trial judge did not err in refusing to withdraw the case from the jury and this ground of appeal fails.

Ground 46 – That the trial judge erred in refusing the appellant's renewed *P.O'C* application, made after the defence case closed.

763. The appellant renewed his application pursuant to *People (DPP) v. P.O'C* seeking that the case be withdrawn from the jury on the basis of unfairness, after the close of evidence called on his behalf, to include evidence from an experienced immigration lawyer from the US, Kerry Bretz.

764. Kerry Bretz was a specialist US immigration lawyer practising in this area for over 30 years. He stated that in his experience, a visa overstayer, once arrested and detained, was normally removed from the US on the next available commercial flight, provided he was not a security risk and did not have a criminal background. Kerry Bretz indicated that immigration officials did have a discretion when the person was a co-operating witness in a criminal investigation; suffering from a serious medical condition; a confidential informant; or claiming political asylum. He said that he had no experience of the immigration service releasing an overstayer so that he could file an application for status. In relation to Daniel Cahill's situation he stated:

> "[…] *it just seems very odd they* [i.e., HSI] *would have left him at the Yonkers Police Station knowing that he wasn't going to be prosecuted criminally and then say hey, you know, come see us a couple of days later rather than wait for him to be released from Yonkers and process him for the removal order that day. That was very, very strange because when they came to his house HSI and the ERO came together. EROs, generally the immigration enforcement end, the one that would issue these removal orders, although HSI can do it, so they did not know when they came in that they were going to find a cannabis plants or steroids. They came in to process this person down at their headquarters and they I guess they thought they got a bonus by a criminal prosecution and brought them to Yonkers PD but then left him at Yonkers. That just seems very odd, especially knowing that Yonkers would not prosecute".*

765. Kerry Bretz also gave evidence that a conviction for possession of any controlled substance (unless the conviction related to simple possession of less than 30 grams of cannabis) would have made Daniel Cahill inadmissible to the US, which was a requirement to be in a position to adjust one's status. If the steroids were controlled substances, they would have been detrimental to Daniel Cahill's application to adjust his status. Kerry Bretz outlined the paperwork he would expect to have been generated had Daniel Cahill been the subject of an administrative arrest to remove him from the US.

766. In the course of cross-examination on behalf of the respondent, it was suggested to Kerry Bretz that having regard to the evidence given by him to the effect that he had volunteered to go to Yonkers Police Station to speak with the investigating gardaí, and the documentation

generated around this event, he had not been the subject of an administrative arrest. The following exchange took place between counsel for the respondent and Kerry Bretz:

> *"Q. [I]n this case you have been asked about, and I am going to adopt Mr McQuade's term, the lots of pieces of paper that might go flying back and forth in relation to particular scenarios and you have given us very detailed evidence in relation to those, how and when they can arise and the circumstances where obviously they have to be communicated to the person concerned which would have been Mr Cahill in this case; isn't that right?*
>
> *A. That's correct.*
>
> *Q. And all of that evidence that you have given in relation to those matters is predicated on the basis that Mr Cahill was actually detained for a breach of immigration law, correct?*
>
> *A. Correct.*
>
> *Q. So that these are all pieces of paper that then would arise in the event of him being released in certain scenarios, correct?*
>
> *A. Yes.*
>
> *Q. But they wouldn't arise at all if he wasn't detained under immigration law, correct?*
>
> *A. Correct.*
>
> *Q. And again I know you have been shown various documents here but were you shown a Yonkers Police Department supplemental report?*
>
> *A. I was not.*
>
> *Q. All right. Can I just quote from it, "During the search Cahill was located in the attic of the location and agreed to be brought to the detective division to speak with members of Homeland Security." As a lawyer, Mr Bretz, does that not suggest that Mr Cahill was not detained in the sense that we understand it by way of an administrative arrest or otherwise?*
>
> *A. Who authored that?*
>
> *Q. It is the police detective who was -- who came to assist Homeland Security but the crucial bit is agreed to be brought to the detective division to speak with members of Homeland Security?*
>
> *A. Yes. I would much rather see the HSI report or the ERO report but again I am happy to elaborate, if they weren't there for an immigration violation, then what was the ERO doing there?*
>
> *Q. Oh no, there is no question, Mr Bretz, but that Homeland Security, and whichever branches and whichever combination of persons, went there with knowledge of the fact that Mr Cahill may have been an overstay on his ESTA, there's no question about that, and what Ms Wade said, and I am sure you saw her report, was that he was detained and interviewed but that appears to be at the house because she says, "Daniel Cahill, with the assistance of ERO New York and others ..." -- sorry, that Cahill told Special Agent Wade that he would like to speak with*

members of An Garda Síochána. Cahill was transported to it appears the Yonkers Police Department located at its address and provided a witness declaration to the garda. So, all of the suggestions you make about various pieces of paper, they wouldn't arise unless he was actually detained under the immigration procedures; isn't that right?

A. Correct but I believe he was handcuffed. He didn't walk to the police department on his own.

Q. Correct. He said he was handcuffed and furthermore I think it was indicated that he was transported by Homeland Security and then while at the police department, the decision, it appears -- well, sorry, I better take it in order, while at the -- he initially agreed to go to the police department to speak to the gardaí and the evidence was that the Homeland Security officers had said that they were there to protect his rights, he having agreed to go to the precinct, and Mr Cahill at the precinct doesn't appear to have been interviewed by Homeland Security at all, other than to be introduced to the gardaí who he then gave a statement on video which he then gave evidence at this trial but that appears to be the sequence?

A. It may be the sequence but once you are handcuffed your liberty is restrained. That's an arrest. Arrest and detained is the same thing.

Q. Well --

A. Once you are not free to leave.

Q. Well, I agree completely with you but it appears he was brought downtown, the Yonkers Police Department suggest it was by his agreement but one thing that is crystal clear is that there is no suggestion of any kind of paperwork with Homeland Security at all and Mr Cahill was quite clear about that in terms of there being any quid pro quo or anything like that. Mr Cahill said that he wasn't offered anything of that nature, that he was happy to make a statement and to be interviewed by the gardaí so that there was no paper, there is no paperwork. You understand?

A. But we don't know the answer to that because we don't have the answer from the Special Agent. It's not within her scope to answer. We don't know what really happened and all I can testify to what I think would normally happen.

Q. No, Mr Bretz, what we have is what Mr Cahill's evidence was in relation to this which it simply never arose. He was challenged as to whether he was offered some kind of a you go to the airport or you go in there and you make a statement, he said nothing like that ever happened, there was no suggestion of that, Special Agent Wade, if you saw her testimony, which I understand you did, she was very clear, she made no offer of any kind to Mr Cahill along those lines, it simply never arose, and that's Mr Cahill's evidence as well. You appreciate that?

A. I appreciate that, yes.

Q. All right. And what appears to be the case is, notwithstanding perhaps the strict letters of the law, that Mr Cahill was certainly afforded a discretion to enable him to put his papers in to rectify his situation which was non-status, I think which you explained is how people describe themselves when they are I suppose in a limbo,

correct?

A. That's correct".

767. In conjunction with other matters, the second *P.O'C* application related to this cross-examination of Kerry Bretz. A curious feature relating to this issue is that while it was raised in the second *P.O'C* application, and while it is argued before this Court that an unfairness arises that counsel for the respondent cross-examined Kerry Bretz on this basis, there was no objection to this line of questioning when it was being conducted.

Submissions of the Parties

768. Counsel for the appellant submits that this was a wholly inappropriate line of questioning for the respondent to pursue in the light of the fact that the respondent had called a witness (Special Agent Wade) who was in a position to clarify this issue but who refused to do so. It is submitted that the failure by Special Agent Wade to answer relevant questions in relation to her interaction with Daniel Cahill not only deprived the appellant of a realistic prospect of a defence, but in addition rendered the calling of an expert witness on the appellant's behalf ineffective as he did not know the factual scenario pertaining to HSI's interaction with Daniel Cahill and therefore was not able to address the legal situation.

769. Counsel for the respondent submits that having regard to the evidence, it was the respondent's position that there had not been an administrative arrest and that regardless of the fact that Special Agent Wade refused to answer whether or not there had been an administrative arrest, the respondent at trial was entitled to conduct the cross-examination of Kerry Bretz in the manner which it had been conducted. Ultimately, this was a matter for the jury to consider.

770. The trial judge considered this application having regard to his earlier ruling on the first *P.O'C* application and concluded the following:

> "*[T]he prosecution in an adversarial trial, within certain parameters, they have certain duties, can assert what their view of the case is and theirs was always the view that the issue of any promise to Mr Cahill or any inducement is effectively not an issue in the case at all and Mr Grehan, in his crossexamination of Mr Bretz in relation to that line of position that the DPP has taken up, pursued that in his crossexamination and the DPP is quite entitled to do that and to assert before the jury that there wasn't an administrative arrest or that this doesn't have a bearing at all on Mr Cahill's evidence and the central issue again is Mr Cahill's evidence about what happened on these alleged four incidents, now a dispute about a fifth not central to the central issues in the allegations but a meeting denied by Mr Brady, is the truth or otherwise of Mr Cahill's evidence. Now, having determined already that the defence have their line of defence open to them in relation to the possible inducement of Mr Cahill, which Mr O'Higgins has very fairly outlined those extracts from the Court's ruling where it makes that clear, the addition of Mr Bretz's evidence*

doesn't in any way effectively add to the Court's ruling of the 13th of July. That useful line of defence is still open to the defence. It is a matter for the jury to determine. Mr Bretz gave opinion evidence in relation to immigration law […] *which is useful to the defence in the advance of their case to the jury that Mr Cahill's evidence is tainted by inducement or promise or expectation and the jury are quite entitled to consider if it assists their defence in that regard but it doesn't in any way go to the Court's decision as to how PO'C was applied because the Court has already determined, even without the addition which, on balance, the Court would have to say assists the defence, that this line of defence was always open to them, even though the letters of scope restricted in some way the type of evidence that was given and in my view the Court very fairly dealt with the issues on the PO'C application and the evidence of Mr Bretz makes entirely, in my view, no difference whatsoever to the decision of the Court in that regard and it certainly doesn't in any way taint the unfairness of the trial and I mean to stress again the prosecution are entitled to put forward to the jury what they consider to be their view on Mr Cahill's evidence but the defence aren't in any way prevented, as the Court ruling makes absolutely clear, to make the case otherwise…*

I have no doubt that this issue has been clearly articulated to [the jury] *and they know exactly what's at stake and the challenge to Mr Cahill's evidence as put up by the defence. They could be in no doubt about it and can evaluate it themselves and give it the due weight and credibility that it deserves and I don't consider that the case should be withdrawn from the jury on the basis of Mr Bretz's further evidence which, on balance, assists the defence".*

Discussion and Determination

771. Special Agent Wade could have answered questions in relation to this issue, however she declined to do so relying on the Letter of Scope. The Court has already determined that this course of action by her did not render the trial unfair such that the case should have been withdrawn from the jury. It is also the case that it is unknown what Special Agent Wade's answers would have been. However, the question which arose for the trial judge was whether an unfairness arose within the meaning of *People (DPP) v. P.O'C* by counsel for the respondent putting to the appellant's expert witness that an administrative arrest had not occurred, when that information was within the knowledge of a witness called by the respondent.

772. The basis of the defence case in relation to Daniel Cahill was that he had been offered an inducement or issued with a threat regarding his residency status. The respondent's case was that this did not occur. This was an issue which the jury would have to consider. Nothing unfair arises from cross-examining the defence expert on the basis that an administrative arrest had not occurred when this was the respondent's case. The fact that a witness for the

prosecution could have clarified this issue, does not render the cross-examination unfair, in the light of the settled positions adopted by the parties regarding this issue.

773. Accordingly, the trial judge did not err in refusing to withdraw the case from the jury on foot of this application and this ground of appeal fails.

Proposed Ground 47 (motion) – That the verdict was rendered unsafe by virtue of the fact that two jurors travelled to County Armagh for the purposes of retracing routes driven by the accused and other relevant parties which was in breach of the judge's direction to deal with the case only on the evidence presented in court.

Background

774. By a Notice of Motion dated 15 September 2023 the appellant has applied to this Court for leave to add an additional ground, i.e., a proposed ground 47, and further seeking leave to adduce additional evidence in support of that ground. The motion is grounded upon an affidavit of a Peter Corrigan, solicitor, sworn on 15 September 2023 and the documents exhibited therein.

775. The proposed new ground is to the effect that the verdict was rendered unsafe by virtue of the fact that two jurors travelled to County Armagh for the purposes of retracing routes driven by the accused and other relevant parties which was in breach of the judge's direction to deal with the case only on the evidence presented in court.

The Affidavit

776. In his said affidavit, Peter Corrigan states that on 3 March 2021 he met with a Charlie Redmond who had been the jury minder during the appellant's trial before the Central Criminal Court. He related that Charlie Redmond informed him that two jurors in this matter, one of whom was from Ashbourne, had taken a trip to Crossmaglen. Peter Corrigan stated that he was concerned that the trip had occurred during the course of the trial and that it may have been an exercise in retracing routes at issue in the case. The routes taken by cars around the Crossmaglen area, as well as the timings of same, were of controversy during the trial. He stated that he recounted this conversation to other members of the appellant's legal team.

777. Peter Corrigan averred that on 16 June 2022, by arrangement and along with counsel, he met with Charlie Redmond in the Criminal Courts of Justice, Parkgate Street, Dublin 8. He stated that Charlie Redmond confirmed that around six weeks after the trial had ended, he met a juror on the street in Ashbourne. The juror said, "*We went down to Crossmaglen*". Charlie Redmond said that the juror did not say when he had gone to Crossmaglen.

778. In the remainder of his affidavit Peter Corrigan states that he raised the issue with the respondent in correspondence by means of a letter dated 18 July 2023 and that he formally requested that An Garda Síochána should take a statement from the juror in question

seeking clarification as to what had occurred in regard to any journey to Crossmaglen. The respondent had replied by letter dated 27 July 2023 that she did not see any basis for a garda investigation given the vague nature of the information that had been provided (which did not extend beyond what is set out in paragraphs 776 and 777 above). In rejoinder by way of a letter dated 5 September 2023, Peter Corrigan stated:

> "*Our letter refers to a conversation between a jury member and the jury keeper. The parties are identified. The conversation is specific. The two jurors had allegedly travelled to Armagh and retraced routes which were referred to in evidence during the trial. The information provided is in fact very specific. One relevant piece of information which is unknown relates to when this trip took place. This is what merits further investigation*".

779. The correspondence between Peter Corrigan and the respondent was exhibited.

780. Peter Corrigan prayed for leave to amend the grounds of appeal to include an additional ground, ground 47, complaining that the verdict was rendered unsafe by virtue of the fact that two jurors travelled to County Armagh for the purposes of retracing routes driven by the accused and other relevant parties which was in breach of the judge's direction to deal with the case only on the evidence presented in court. He further prayed for leave to adduce additional evidence at the hearing of the appeal in support of that ground.

Submissions of the Parties

781. In argument before this Court on 12 October 2023, counsel for the appellant conceded that Peter Corrigan's letter of 5 September 2023 overstated the position. The jury minder Charlie Redmond had not said that the juror had said that they retraced routes which were referred to in evidence. The height of what was said was that "*We went down to Crossmaglen*".

782. In his submission to the Court, counsel for the appellant stated:

> "*We had just hoped that the guards would go to the juror and confirm, I suspect, what everyone thinks is probable: 'Yes, we did go up,' or, 'Mr Redmond has got it wrong,' or, 'We went up after the trial was over.' And the whole thing could be put to bed but as it stands at the moment, that's the state of play. We clearly don't have the resources to go and investigate it but the guards do and where left in this position of having to call that evidence*".

783. In reply to the application, counsel for the respondent submitted that the law was crystal clear that the jury could not be questioned either as a group or as individuals after their verdict in relation to anything pertaining to their deliberations. He accepted that there was law to the effect that there could be an enquiry into extraneous matters affecting the process, as opposed to the jury's deliberations *per se*, but maintained that even in respect of that the Court should be very slow to embark upon any such enquiry unless there was a highly cogent

basis for doing so. In his submission, that threshold had not been reached on any view of the matter in the context of the application before the Court. In support of his submissions on the law, the Court was referred to the decision of the late Mr. Justice Haugh, in *People (AG) v. Longe* [1967] I.R. 369. In subsequent exchanges between counsel and members of the bench reference was also made to the judgment of Charleton J. in the Supreme Court case of *People (DPP) v. Mahon* [2019] 3 I.R. 151, to *People (DPP) v. McDonagh* [2003] 4 I.R. 417, to this Court's judgment in *People (DPP) v. O'Donoghue* [2024] IECA 74 (which in turn cites this Court's decision in *People (DPP) v. J.N.* [2022] IECA 188). We were also referred to extracts from Prof. Dermot Walsh's book *Criminal Procedure* (2nd edn, Round Hall 2016) entitled "*Deliberations in Secret*" at paragraph 22-277 *et seq.*, and from Prof. Thomas O'Malley's book, *The Criminal Process* (Round Hall, 2009), in the chapter entitled "*Jury Trial: Policy Issues*", and under the heading "*Jury Secrecy*" at paragraph 21.24 *et seq*.

784. Counsel for the respondent made much of the delay on the part of the appellant's legal team in raising this issue. The conversation between the juror concerned and Charlie Redmond was said to have taken place within six weeks of the verdict which was delivered on 12 August 2020, and it had come to the attention of Peter Corrigan on 3 March 2021. Despite this, the matter was only raised in correspondence with the respondent for the first time in late July 2023, a matter of just weeks before the appeal hearing was due to commence. He submitted that if there was any reality in any concerns that the appellant's solicitor had arising out of his communication with Charlie Redmond, the matter would have been agitated long before it was in fact raised.

785. Counsel for the appellant, replying to his opponent, maintained that the issue of concern was extrinsic to the jury's deliberations, and he referenced the case of *People (DPP) v. O'Loughlin* [2018] IECA 25 where an appeal had been allowed by this Court in circumstances where there was evidence that the jury had attended a court-ordered site inspection, namely to view a rubbish chute in the apartment complex in which the deceased's body had been found, and that, in the course of that inspection, a juror had, without the authorisation or knowledge of the trial judge, conducted an experiment by throwing a stone into the rubbish chute.

786. In regard to the issue of delay, he contended that it did not follow from the fact that there was alleged delay that the matter was not of significance.

Discussion and Determination

787. We accept that the leading authority in this area is that of the former Court of Criminal Appeal in *People (AG) v. Longe*. In that case, Haugh J., giving judgment for that court, said at p. 377 of the report:

> "*In our opinion the principle is well established that the nature of the deliberation of a jury in a criminal case should not be revealed or inquired into. For these*

reasons this Court is of the opinion the application for leave to appeal, on the three grounds stated in the notice, must fail".

788. Any process whereby a juror could be questioned about their deliberations is fraught with considerable difficulty and creates substantial risk of undermining the finality of a verdict. The sanctity of jury deliberations has long been recognised (see *Vaise v. Delaval* (1785) 99 Eng. Rep. 944 (KB)). More recently, in *People (DPP) v. Mahon* Charleton J., delivering the judgment of the Supreme Court, stated:

> "*[20] Rightly, a jury's verdict is protected against intrusion into the reasoning behind it. Jury confidentiality has been recognised by the European Court of Human Rights in Gregory v. United Kingdom (1998) 25 E.H.R.R. 577 at para. 44, p. 594, as being 'a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence which they have heard'. There can be no interrogation of a verdict as to the reasoning whereby a decision was reached. This, according to Lord Denning M.R. in Boston v. W.S. Bagshaw & Sons [1966] 1 W.L.R. 1135 at p. 1136, is to uphold the finality of decisions and to protect the jury so as to prevent any individual juror being exposed 'to pressure or inducement to explain or alter their views'. Thus, the verdict of a jury cannot be impeached, even if the allegation is that the decision has been reached not by a consideration of the evidence but by a randomtossing of a coin by two of their number: Vaise v. Delaval (1785) 1 T.R. 11, see also Harvey v. Hewitt (1840) 8 Dowl. 598 where it alleged that the jurors had drawn lots to decide their verdict. An affidavit from the jury bailiff who had witnessed this take place was admitted as evidence. In O'Callaghan v. The Attorney General [1993] 2 I.R. 17 at p. 26, O'Flaherty J. dismissed a claim that legislation providing for majority verdicts offended the Constitution in its guarantee of jury trial in Article 38.5 and trial in due course of law in Article 38.1, but reiterated the unimpeachable nature of jury deliberations:-*
>
> > *'The Court would wish to reiterate that the deliberations of a jury should always be regarded as completely confidential. The course of the deliberations of a jury should not be published after a trial. As was said by Haugh J. in delivering the judgment of the Court of Criminal Appeal in The People (Attorney General) v. Longe [1967] I.R. 369 (at p. 377):-*
> >
> > *"In our opinion the principle is well established that the nature of the deliberation of a jury in a criminal case should not be revealed or inquired into".*

789. A recent consideration of this issue arose in *People* (*DPP) v. J.N.* where this Court considered the law surrounding juror deliberations where a juror had contacted a member of the

appellant's team in the aftermath of the trial. Kennedy J. in her judgment reiterated that jury deliberations are sacrosanct and protected by the jury secrecy rule and that this rule prohibits any person from disclosing information about discussions, opinions and arguments had within the confines of the jury room.

790. This Court's most recent decision was in the case of *People (DPP) v. John O' Donoghue*. In that case the day after the return of the jury verdict, a member of the jury contacted Senior Counsel for the appellant by email indicating that the decision to convict the appellant of assault causing serious harm, had not been unanimous as had been directed by the trial Court and as was read out by the foreperson. Burns J. held at paragraphs 52-54 of her judgment:

> "*52. The sanctity of the jury verdict has long been recognised within our system. It was reaffirmed in the recent Court of Appeal decision in The People (Director of Public Prosecutions) v. JN [2022] IECA 188 which carefully considered the matter, including the exceptionality of the circumstances in which a jury verdict might be scrutinised.*
>
> *53. The unanimous verdict was returned in this matter in open court in accordance with s. 25(2) of the Criminal Justice Act 1984. It was pronounced in the presence of the juror member who subsequently contacted the appellant's Senior Counsel. No issue was raised by that juror at that time. The verdict was correctly received and recorded and no issue arises with it. This Court has no basis to interfere with the verdict having regard to what has been set out by the appellant and the law as summarised in JN.*
>
> *54. Accordingly, we do not uphold this ground of appeal*".

791. As has been accepted by counsel for the respondent, the authorities on the secrecy of jury deliberations do recognise that an investigation may be permitted into alleged irregularities that were extrinsic to the deliberations as long there is no inquiry into the deliberations themselves. In *People (DPP) v. McDonagh* [2003] 4 I.R. 417 the Court of Criminal Appeal dealt with a case where there had been external influence, and the circumstances of that case included that the gardaí sworn as jury keepers had been drinking with members of the jury. There was some level of physical contact between one Garda and a juror who remained, and it was established that during this encounter there were statements made by the Garda regarding how the jury, or that particular juror, should approach her deliberations. Similar statements were also made earlier in the evening by the gardaí to members of the jury regarding how the jury should approach their deliberations. The Court of Criminal Appeal quashed the conviction and held that the test to be applied was an objective one of whether a reasonable and fair minded observer would consider that there was a danger in the sense of a possibility that the juror might have been unconsciously influenced by his or her personal experience and for that reason the accused might not receive a fair trial, and that the

behavior of the jury keeper in this case was inappropriate and was such as to render the decision of the jury unsafe and unsatisfactory.

792. Other examples of extrinsic influence leading to the quashing of verdicts include *People (DPP) v. O'Loughlin*, and *R. v. Brandon* (1969) 53 Cr. App. R. 466 in which a jury bailiff had made remarks to the jury while it was in retirement which suggested that the appellant had previous convictions. The conviction was quashed.

793. However, while an investigation into extrinsic influence is possible in principle, and it is something that may appropriately be enquired into where there are cogent reasons to believe that the jury may have been extensively influenced in the course of their deliberations, a court should be very slow to direct such an enquiry, absent the clearest of indications of a potentially serious irregularity, having regard to the foundational significance and importance of the sanctity of a jury verdict and of the jury's entitlement to secrecy in regard to their deliberations and their deliberation process. The threshold for intervention will be a high one. Mere assertion of the possibility of irregularity will not begin to approach what is required. The clearest evidence of the existence of substantial grounds for believing that the process may have been irregular to such a degree as to potentially lead to an injustice will be required before the Court would be justified in intervening.

794. In the present case, the evidence that has been put forward in respect of the concern raised by Peter Corrigan does not, in our view, reach the threshold of what would be required to justify this Court in intervening. The evidence does not extend beyond a suggestion that a juror may have said in a conversation with a third party, some weeks after the trial, that "*we went down to Crossmaglen*". There is no information as to when this was. The juror is not reported as having suggested to the jury minder, nor is the jury minder in turn said to have suggested to Peter Corrigan, that this was during the currency of the trial or that this was for the purpose of retracing journeys that featured in the evidence at the trial. On the present state of the evidence the suggestion of improper conduct by a juror or jurors which could have resulted in extrinsic influence is nothing more than conjecture on the part of Peter Corrigan based on the thinnest of evidence. We do not consider that the threshold level of clear and cogent evidence as to a basis for real concern required to justify an intervention on this Court's part, and to justify the initiation of an investigation of the sort suggested by counsel on behalf of the appellant, has been shown to exist.

795. In those circumstances we are not disposed to grant leave to the appellant to amend his existing grounds of appeal to include an additional ground 47 in the terms suggested. It follows that the request for leave to adduce additional evidence must also be refused.

Conclusion

796. In circumstances where this Court has not upheld any of the appellant's grounds of appeal, his appeal against conviction is dismissed.