THE COURT OF APPEAL

[53/21]

[51/21]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

GARY MCAREAVEY

APPELLANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

CAOLAN SMYTH

APPELLANT

JUDGMENT of the Court delivered on the 28th day of July 2022 by Birmingham P.

1. Following a trial which had taken place throughout much of the Michaelmas term in 2020, both appellants were, on 5th January 2021, convicted by the Special Criminal Court of certain offences. Caolan Smyth was convicted of counts of attempted murder and possession of a firearm with intent to endanger life contrary to s. 15(1) of the Firearms Act 1952 (as substituted and amended), while Gary McAreavey was convicted in respect of a single count of assisting an offender contrary to s. 7(2) and s. 7(4) of the Criminal Law Act 1997 (as amended). Both have appealed their respective convictions to this Court.

2. There is a significant overlap in terms of the issues between the two appeals, which were heard together. Both appeals raise issues as to the admissibility of what has come to be known as "telephone evidence". Counsel on behalf of Mr. Smyth took the lead in challenging the admissibility of this evidence both before the trial court and before this

Court, while counsel on behalf of Mr. McAreavey adopted and supported the position of his colleague. There is also a specific ground that applies only to Mr. McAreavey's appeal, which relates to the question of identifying the ingredients or elements of the offence of assisting an offender, and ascertaining what the prosecution has to prove in that regard. In particular, it relates to what must be proved about the extent of the state of knowledge of an accused. Before turning to consider the issues raised, it might be helpful to provide a little more detail by way of background.

Background

3. On 10th May 2017, a Mr. James Gately was shot at the Topaz filling station at Clonshaugh Road in Dublin. At the time of the incident, Mr. Gately was wearing a bulletproof vest. He survived the shooting, though he subsequently underwent surgery in respect of a bullet wound to his neck. It was not really in controversy at trial that what had occurred was an attempted murder, and the question at trial – certainly in the case of Mr. Smyth – was whether the prosecution could prove beyond reasonable doubt who the individual was who had attempted to commit murder.

4. The incident at the filling station was captured on CCTV which was of a very high quality. At about 1.30pm that day, Mr. Gately was in the filling station in a purple Mondeo, when a black Lexus vehicle, bearing CD plates and registration 08D 51984, arrived at the location and pulled up beside the purple Mondeo. Shots were discharged from the Lexus hitting Mr. Gately. It was the prosecution case at trial that the individual who shot Mr. Gately was the now appellant, Mr. Smyth. He was charged with attempted murder and with the offence of possession of a firearm with intent to endanger life, the firearm being that which was used in the course of the attempted murder. At about 2.30pm, the Lexus which had been used in the course of the shooting was found burnt out at Newrath, County Louth. In the course of its judgment delivered on 5th January 2021, the trial court referred to this vehicle as "the murder car". The case that the prosecution mounted against Mr. Smyth was essentially one of circumstantial evidence, and had several strands to it.

5. The prosecution was premised on the fact that it could be established as a matter of certainty that the vehicle involved in the shooting was the black Lexus 08D 51984. This was not really in dispute. The question then became whether the prosecution was in a position to prove beyond reasonable doubt that Mr. Smyth was the driver of the black Lexus on the day of the shooting and that it was he who had discharged the shots. Evidence was put before the trial court as to the movements of the vehicle on 9th May (the day prior to the shooting) and 10th May (the day of the shooting). The vehicle was seen coming and going from 3 Cuileann Court, Donore, County Meath – an address the prosecution contended could be linked to Mr. Smyth by various means, including a document which he had signed obliging him to live at that address. Moreover, when arrested in respect of this offence, he gave that address.

6. On 9th May 2017, an individual was seen leaving the address and an individual wearing precisely the same clothing, including distinctive tracksuit bottoms with particular markings on the rear calf, was identifiable at the Topaz filling station at 3.34pm. The prosecution contention at trial was that this visit to the filling station on 9th May 2017 was by way of a rehearsal for what was intended to happen the following day. The vehicle was monitored as being in or around the area of 77 Glin Drive, Coolock, where the intended victim, Mr. Gately, resided. There were some features of the car which assisted in distinguishing it from other black saloon vehicles that might have been in the area, including blacked out windows and a particular set of alloy wheels. The prosecution case was that the vehicle was driven in and around the home of Mr. Gately, that the person driving it was the person who is visible in the filling station at 3.34pm, and that the person in question was Mr. Smyth.

7. There was further evidence relating to the movements of the vehicle on 10th May. There was evidence of the passage of the vehicle between the Topaz station where the shooting took place up to Dromiskin, referred to at trial as the "burning site". At trial, the prosecution contended that alongside the CCTV footage showing the movements of a vehicle was the cell site analysis of a phone registered to the number 085-8208691, referred to throughout the trial and throughout the appeal as the "691 phone". The prosecution case was that it was a phone that could be attributable to Mr. Smyth and that it could be attributable by a number of routes. Mr. Smyth had an involvement with a number of phones. At the time of his arrest in July, he was in possession of three phones, and six phones were found during the course of a search at Cuileann Court, though not all of these could be attributed to Mr. Smyth. One of the routes to attribution was through a phone which it was said could be attributed to Mr. McAreavey. On that phone were three numbers saved under the contact "QNU". It was suggested this was a phonetic spelling of Caolan. One of these QNU numbers is the 691 number. Also saved as QNU was a number 085-8193625. In that regard, there was evidence from social welfare officers in relation to a jobseeker's allowance application in which that number was given to the Department of Social Welfare.

8. There was also evidence that the 691 phone had been in contact with a number of phones belonging to or attributable to persons connected to Mr. Smyth, including contact with his father and a brother. This included contact on over 400 occasions with a number 083-4858026 registered to Oisin Smyth. On 10th May 2017, the 691 number was in contact with Oisin Smyth, brother of the appellant, on 20 occasions, 18 of which occurred after the shooting of Mr. Gately.

9. When closing the case, the prosecution made no secret about its view that the 691 phone was important for two reasons. The first area of interest was in the use of cell sites by that phone, and more particularly, the correlation and mirroring between the use of those cell sites and the passage of the vehicle that was used by the person involved in the shooting of Mr. Gately. It should be noted that phone records had a part to play at two distinct levels. Relevant was the evidence relating to a phone attributed to the accused, Mr. Smyth, on the eve of the attempted murder and of the day of the attempted murder,

but phone records were also relevant at a prior level in attributing the phone in question, the 691 phone, to Mr. Smyth.

10. The second area of interest for the prosecution in the 691 phone was the extent of contact that it had with 085-8308773, the phone which it was contended could be attributed to Mr. McAreavey. In the course of exchanges between the President of the trial court and prosecution counsel as she closed the case for the prosecution, it was agreed that Mr. McAreavey could not be convicted unless Mr. Smyth was first convicted. The case against Mr. McAreavey was based on a contention that he had purchased fuel which was put into a red container at the Campus Oil station in Castlebellingham. At trial, there was evidence that immediately after the shooting, the Lexus was driven, and it was the prosecution case that it was driven by Mr. Smyth, northwards via Ashbourne, Donore, Castlebellingham and on to Dromiskin where it was burned.

11. What has been offered here is by way of outline as to the circumstantial evidence case that was mounted. The evidence was referred to in greater detail by prosecution counsel in the course of her closing submissions which are to be found in the transcript of 3rd November 2020 and reviewed in much greater detail again in the judgment of the Court of 5th January 2021.

12. Even the brief overview provided here will have made clear the central significance of the telephone evidence to the trial. That significance emerges with even greater clarity from the very detailed written judgment delivered by the Special Criminal Court on 5th January 2021. It is with that knowledge that we address the arguments advanced in relation to admissibility.

The Admissibility Issue

13. The prosecution set about attributing a particular number to the appellant, Mr. Smyth. They did so by relying on records held by mobile phone service providers in order to establish contact between this appellant and family members. The prosecution then also made use of phone data records in relation to this phone, which they contended they had successfully attributed to the appellant, to show that it followed a geographical route that was consistent with the preparation for and execution of the attempted assassination.

14. The question of admissibility and the challenge mounted in that regard were the subject of extensive argument. In relation to the issue about the admissibility of the phone records, in summary, the position is that call data and records for various phones, including the attributed 691 phone, had been retained in accordance with the provisions of the Communications (Retention of Data) Act 2011 ('the 2011 Act'). These records were accessed by Gardaí pursuant to s. 6 of the 2011 Act. The question of the admissibility of this evidence was a very significant one during the course of the trial and was the subject of a detailed ruling from the Special Criminal Court on 22nd October 2020. The matter

was the subject of extensive argument in the trial court over a number of days and has been revisited before this Court.

15. The starting point for consideration of this issue is EU Directive 2006/24/EC ('the 2006 Directive') which was transposed into Irish law by the 2011 Act. In April 2014, in the case of Digital Rights Ireland Ltd. v Minister for Communications, joined cases C-293/12 and C-594/12, the Court of Justice of the EU ('the CJEU') determined that the 2006 Directive was inconsistent with EU law, and in particular, did not conform with the right to privacy set out in Article 7 of the Charter of Fundamental Rights of the EU ('the Charter'). There are two aspects of concern expressed in the judgment which might be noted. First, there was the question of the blanket retention of data for a period of up to two years. Second, there was a concern that the Directive breached the Charter by failing to provide sufficient procedural safeguards regarding access to data. In particular, the Directive did not require that access was dependent on a prior review carried out by a court or by an independent administrative body.

16. The next development of note is the fact that the CJEU ruling in the Digital Rights case was applied to a domestic legal provision in December 2016 in the case of Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson & ors, joined cases C-203/15 and C-698/15. At issue here was the validity of a number of national measures which predated the decision of the CJEU in Digital Rights. In a domestic context, in the case of Dwyer v. Commissioner of An Garda Síochána & ors [2018] IEHC 685, following a high profile murder trial in 2015 which resulted in a conviction, the convicted man commenced proceedings in the High Court seeking various reliefs. Telephone records had played a prominent role in his trial. In the High Court, O'Connor J. granted declaratory reliefs in terms of orders to the effect that s. 6 of the 2011 Act was incompatible with EU law. The matter was appealed by the State to the Supreme Court ([2020] IESC 4) which decided to make a reference to the CJEU. In the Supreme Court, Clarke CJ. expressed the view that, with regard to the system of access to retained data, he was inclined to conclude that the Irish regime does not provide adequate safeguards to meet the requirements of EU law in the light of the jurisprudence of the CJEU. On 18th November 2021, Advocate General Campos Sánchez-Bordona opined that the questions referred had already been answered. The judgment of the CJEU on foot of the reference (Case C-140/20) was delivered on 5th April 2022, after oral argument in this appeal. Following the approach of the Advocate General, the CJEU stated that the Irish regime did not comply with EU law. Once again, the focus of attention was on the provision for blanket retention for a prolonged period and the fact that access was not dependent on an application for an order to a court or independent tribunal.

17. The appellant argues that the evidence in the case leaves no room for doubt about the fact that the retention of the data which was in issue, and the system of access to the data, was unlawful. While, understandably, the appellant, at trial and before this Court, has referred to both the retention issue and the access issue, we think it is fair to say that the real focus of attention has been on the access issue in the absence of any involvement by a court or independent administrative body. It was pointed out that the

investigation in this case took place at a time when the Irish State had been told in clear and unequivocal terms that there was a difficulty about the indiscriminate retention of data and the fact that access was permitted without intervention from a court. It is said that despite knowing this, the State persisted in utilising the provisions that had been enacted and sought to use the fruits of an investigation based on it as the key evidence against the appellant at trial.

18. The situation, as it stands, is that the 691 phone (purportedly attributed to Mr. Smyth) and the 773 phone (purportedly attributed to Mr. McAreavey) have not been claimed by either individual. Indeed, when counsel for Mr. Smyth was asked directly whether it was conceded that the 691 phone belonged to his client, he responded "no". In those circumstances, it is said on behalf of the prosecution that the assertion of privacy rights is somewhat fanciful. In the course of exchanges between counsel and members of the court, the President of the trial court made the point that, given that what was in issue were unregistered telephones with only a very limited amount of data relating to a confined period being accessed, this must have implications for the extent to which privacy rights were engaged.

19. The Director says that what is in issue is how a balance is to be struck between the privacy rights of the accused in relation to a very small and focused amount of data, arising from the ownership or use of phones where that is not admitted, when the data was accessed by An Garda Síochána in the course of an investigation pursuant to what was then a lawful statutory scheme, as against the rights of the community to have serious crime investigated effectively. It is said that part of the balancing exercise involves having regard to the rights of victims of crime to see to it that those who commit crimes against them are brought to justice where there is sufficient probative evidence to establish the guilt of the person concerned to the criminal standard. The Director draws attention to observation to this effect in the course of judgments in the cases of DPP v. JC [2015] IESC 31 and Nash v. DPP [2015] IESC 32.

20. Having heard evidence and legal argument in relation to the issue, and having considered matters overnight, the trial court proceeded to deliver a careful, considered and comprehensive ruling on the matter on 22nd October 2020. It is necessary to refer to that ruling in some detail.

Ruling of the Special Criminal Court

21. At the beginning of its ruling, the trial court addressed the precise position of Mr. Smyth, stating:

> "He does not assert ownership of the relevant phone numbers, SIM cards or handsets. In fact, it appears that ownership of these will be disclaimed for the purposes of the trial. It is not asserted that he has been specifically associated with these items, either by registration of his personal details of ownership or by long established association with unregistered items. The privacy right appears to us to

be asserted solely on a precautionary basis, that it arises if the prosecution established that he was, in fact, associated with these items at times material to the commission of the offences alleged by the prosecution in this case."

The trial court then observed that if the prosecution did establish that, then it was very difficult to see how such privacy rights could then be asserted, since the proposition that the right to privacy cannot extend to participation in criminal activity was both unremarkable and long-established, referring, in that context, to the case of EMI Records (Ireland) Ltd v. UPC Communications [2010] IEHC 377 and Idah v. DPP [2014] IECCA 3. The trial court said that the 2011 Act was at all material times presumptively constitutional; however, since 21st December 2016, certain salient provisions in that Act are "precluded" by virtue of certain case law of the CJEU. The trial court referred to the fact that the annulment of the 2006 Directive by the CJEU in the Digital Rights Ireland case did not leave "a complete vacuum in the law of the European Union" as the provisions of Directive 2002/58 remain in force. It commented:

> "Since the directive of 2002 has not been annulled and continues to be part of the body of the law of the European Union, the State is still required to implement the provisions of that directive and, therefore, the 2011 Act retains a significant purpose in that respect. Consequently, the [G]ardaí were entitled and obliged to apply presumptively constitutional legislative measures applicable at the time of the investigation into these serious crimes. We are satisfied that the garda actions in this case followed, and in many ways went beyond, the requirements of the 2011 Act."

The trial court then made reference to the decision given by the CJEU on 21st December 2016 in the Tele2 and Watson cases, drawing attention to the fact that the CJEU had stated that, with respect to retention issue, if the retained data was taken as a whole (and the trial court placed emphasis on the phrase "as a whole"), then it was liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data had been obtained. The CJEU was quoted as saying that because the retention of data without the users of electronic communications services being informed of that fact was likely, in the view of the CJEU, to cause persons concerned to feel that their private lives were the subject of constant surveillance. At this point, the trial court observed with some force that the CJEU has "never set out a scintilla of evidence to support or justify" that assertion, and that "general observations of the behaviour of the Irish population in relation to telephone usage would not support such a conclusion". The trial court indicated that it preferred the weighty dissenting observations of Charleton J. set out in paragraph 12 of his judgment in the Dwyer case ([2020] IESC 4). It was pointed out that, while technically a dissent, Charleton J. had dissented only on the necessity to refer questions in that case to the CJEU. The trial court then proceeded to quote at some length, with evident approval, from Charleton J.'s judgment.

22. The trial court went on to state that the domestic privacy rights relied on in the case had never been identified as absolute or unqualified. The exercise of those rights might be

restricted by the constitutional rights of others or by the requirements of the common good and was always subject to the requirements of public order and morality. It was stated that "[w]hilst courts should, in principle, be prepared to exclude any evidence tainted with illegality, evidence so obtained may be admitted, where other interests outweigh the privacy interests breached by illegal action." The trial court then commented, correctly, in our view, that a court is "entitled to assess the actual significance of any interference with privacy or data rights in the context of the facts of the individual case and to balance the precise level of privacy rights arising against any competing interest that also arises."

23. The trial court observed that the evidence in issue did not disclose surveillance of the accused, whether electronically or otherwise, within any sense in which that word was ordinarily understood. What had happened was that the Gardaí sought and received a precise amount of information, targeted on issues that came to the attention of Gardaí during their investigation. On a standalone basis, the trial court considered that insofar as disclosure or access to any retained data could be said to constitute an interference with the private lives of either of the accused, the nature of such interference must, on any view of it, be inherently slight when one looks at the facts of this case as are available, because none of the numbers in this case were apparently registered to a specific user. Neither of the accused chose to identify or associate themselves with the telephone numbers in question in this way, and as far as the trial court members knew at that stage, their identities were not directly ascertainable from the access data. The trial court added, and this cannot really be the source of any great controversy, that data of the type sought by Gardaí in this case ordinarily requires the application of further layers of evidence, information and detail in order for those numbers or other data to become attributable to identified individuals. It did concede that it was possible that, perhaps, armed with such information and two years' worth of data, conclusions or inferences could be drawn about the conduct of the private lives of any person identified by the entirety of the retained data, but that no such suggestion arose in the case before the court. The information requested and obtained in the case related to anonymous handsets, SIM cards and cell site activity and was tightly focused on and related to the attempted murder of Mr. Gately. The trial court went on to comment, which we think merits quotation, as follows:

> "It is not suggested, for example, that the limited quantity of data accessed by the gardaí revealed anything about the identity of the callers, where they lived or worked, their gender, their religion, their beliefs, their opinions, their sexuality, what they were doing at the time of the call, the internal content of the communications, the identity of the persons with whom they were communicating or associating or the nature of the activity associated with the communications in question. In these circumstances, the access data says absolutely nothing, or at best very little about the private life or details of either of the accused. Presumably, it will tell us in due course, that on particular occasions one telephone number contacted, or attempted to contact, another telephone number at a time when the contacting SIM card or handset was within the footprint or area of operation of a

particular cell site location, or perhaps that certain items such as top ups were purchased at particular times and particular places."

24. The trial court then looked to the other side of the equation, observing that there was no question about the strength and depth of the public interest in the investigation of these crimes which were serious by any possible applicable standard:

> ". . . The weight of the general recognised interest of the State in investigating the serious crime of attempted murder, and/or the destruction of evidence and the rights and freedoms of other members of society, far outweigh any possible breach of a privacy right by a failure to obtain advance judicial or other independent assent to disclosure in this case.
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> A useful way to approach the matter is to ask whether it is likely that a replacement system involving prior judicial or other independent authorisation would be likely to have produced a different result on the applications in this case. We do not think so. In the circumstances of this case, we cannot envisage any reasonable possibility that any such authority would have had any reasonable basis for refusing the specific detailed and timely requests that were made by the [G]ardaí for access to the materials in question. In our view a decision to refuse access would have been both arbitrary and capricious, and a system that would produce any such result would be effectively worthless in terms of public protection.
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> Moreover, as the material has been accessed and used by the State authorities for the purpose of investigating and prosecuting a serious crime, as opposed to being accessed by the State for surveillance or some other nefarious purpose, the accused have had the benefit as a matter of fact of judicial supervision of access to the material in the light of the circumstances as they are now known to be, and not necessarily the more limited form of supervision that arises at an early and ex parte stage of the investigation. We are satisfied that when accessed data is used in the trial context, that the trial court provides a full independent and effective safeguard against any potential abuses of privacy and data rights and a trial court can do so by assessing proportionality and balancing rights on the basis of facts proved at trial, rather than those asserted by investigators in the context of an access application at an inchoate stage of the investigation.
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> Therefore, we conclude that the weighted public interest and common good associated with the need to properly investigate these matters comprehensively outweighs any limited privacy rights attaching to the data accessed in this investigation. We therefore decline the invitation to exclude evidence obtained on

foot of the challenged requests. The exclusion of otherwise cogent, probative and lawfully obtained evidence is not a proportionate response to the breach of the individual rights asserted in this case. The degree of disproportion that would justify the exclusion of otherwise lawfully obtained and probative evidence has not been remotely approached by the facts of this case."

Discussion

25. In relation to the question as to the admissibility of telephone record evidence, we have quoted at length from the ruling of the trial court in circumstances where we find ourselves in agreement both with the conclusions of the trial court and with its approach to the issue. It seems to us that the starting point for consideration of this issue has to be that it is for national courts to assess whether national measures breach EU law, and if so finding, to determine the consequences of that breach. In particular, it is for national courts to determine questions of admissibility of evidence. Indeed, this much was recognised by the CJEU in its preliminary ruling delivered on 5th April 2022 in the case of GD v. Commissioner of An Garda Síochána & ors:

"127. Finally, as regards the effect of a declaration of the potential incompatibility of the 2011 Act with Directive 2002/58, read in the light of the Charter, on the admissibility of evidence relied on against G.D. in the context of the criminal proceedings, it suffices to refer to the Court's case-law on that subject, in particular the principles recalled in paragraphs 41 to 44 of the judgment of 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications) (C 746/18, EU:C:2021:152), from which it follows that that admissibility is, in accordance with the principle of procedural autonomy of the Member States, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness.

128. [. . .] The admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member State, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness." (Emphasis added)

26. We do not believe that sight can be lost of the fact that the crimes in issue here were committed less than six months after judgment in Watson and Tele2 was delivered. While, in an ideal world, there might have been a legislative response within that timeframe, it seems to us – and we think that we are in agreement with the trial court in this regard – that any expectation to that effect would be unrealistic given the complexity of the issues at stake. The actual request for access to data was both timely and focused. In terms of the timeline, the other matter of significance is that the shooting which precipitated the Garda investigation, and which led to the request for access to records, took place some eighteen months before the decision of the High Court in the Dwyer case ([2018] IEHC 685) was delivered in December 2018. At the time of the investigation, the

Act of 2011 represented the statute law of the State and, accordingly, enjoyed a presumption of constitutionality.

27. We agree with the trial court's finding that any interference with privacy rights in the present case is limited in the extreme, and with its assessment that, in considering the extent of that interference, the fact that ownership of the phones has not been asserted is a relevant consideration.

28. Insofar as a major aspect of the challenge is based on the fact that there was no prior authorisation from a judicial or independent administrative authority, we find persuasive the point made by the trial court that it is inconceivable that if such an authority existed, and approval had been sought, that access would have been refused. A notional decision to refuse could properly be described as arbitrary and capricious, as the trial court did. We agree with the trial court that the public interest in the investigation of crime, part of which involves the rights of victims, comprehensively outweighs, to use the language of trial court, any limited privacy rights attached to the data that was accessed in this investigation. Insofar as questions of admissibility of evidence are matters for national courts, we are firmly of the view that the trial court did not fall into error in admitting the telephone evidence, and in those circumstances, we are not prepared to uphold the grounds of appeal that relate to telephone records.

The Offence of Assisting an Offender

29. We turn now to the issues raised by Mr. McAreavey, and in order to put those issues specific to his appeal in context, it is necessary to explain that on the day of the drive-by shooting at the Topaz filling station on Clonshaugh Road, a number of witnesses saw smoke emanating from an area in Drumiskin shortly after 2.00pm on the same day. A number of Gardaí attended, including Garda Boyle from the Louth Divisional Crime Scene, who gave evidence of finding a vehicle substantially damaged by fire. The chassis number was still visible and it was possible to link this to the vehicle which had been in the filling station earlier that day. Bullet casings found in the footwell matched bullets extracted from Mr. Gately.

30. A significant part of the case against Mr. McAreavey related to CCTV footage obtained from Campus Oil filling station, a petrol station located near the appellant's home, which showed the appellant purchasing a small volume of petrol in a red canister, along with fuel for his own vehicle. Mr. McAreavey was seen returning to his home, and then later, CCTV footage showed a white van leaving the property. At trial, there was CCTV footage from various sources identifying the movements of the van, and it was the prosecution case that the van in question belonged to Mr. McAreavey. In particular, it was said the footage showed that it and a black vehicle, the "murder car", were driven in convoy to an area very close to where the Lexus was found. The appellant's home was searched and a number of electronic items were taken by Gardaí. On 11th October 2017, Gardaí called to

the appellant's home at 3 Gort Nua, County Louth and took a cautioned statement, during which he appeared to deny all knowledge of his co-accused.

31. Another significant part of the case against Mr. McAreavey related to phone analysis, which is why the discussion earlier in this judgment in relation to phone evidence is relevant to both appellants. At this stage, it is suffice to note that, at trial, there was evidence of contact between a number attributed to this appellant, referred to as the 773 number, with a phone number attributed to his co-accused, referred to, as previously noted, as the 691 number. In particular, there was evidence of five phone calls and one SMS message sent during the time between the shooting and the time when smoke was seen rising in Drumiskin, the period in question being just over one hour. The first call post-shooting on the 691 phone was made to the 773 number.

32. The issue that is specific to Mr. McAreavey's appeal relates to the ingredients of the offence with which he was charged: assisting an offender contrary to s. 7(2) of the Criminal Law Act 1997 (as amended), which provides:

> "(2) Where a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or of some other arrestable offence, does without reasonable excuse any act, whether in or outside the State, with intent to impede his or her apprehension or prosecution shall be guilty of an offence."

33. It is evident from the above that the offence in question is committed in circumstances where an individual has committed an arrestable offence, and another person knowing or believing that individual to be guilty of the offence committed, "or of some other arrestable offence, does without reasonable excuse any act" with the intention to impede the apprehension or prosecution of the other individual. At trial, and again on this appeal, focus has been placed on the phrase "knowing or believing that individual to be guilty of the offence or of some other arrestable offence". At trial, the dispute between the parties centred on the fact that it was the prosecution position that it was not required to identify the "other arrestable offence" if it failed to prove knowledge of the primary offence. The position of the appellant is that the prosecution's interpretation is incorrect, and that the way in which the legislation is framed means that while the prosecution does not carry the burden of having to prove knowledge of the specific offence committed, it is not relieved of having to produce any evidence pointing to knowledge by the accused of a set of circumstances or crime.

34. Before the trial court and before this Court, it has been contended on behalf of the Director that s. 7(2) of the Criminal Law Act 1997 (as amended) is clear and unambiguous.

35. The trial court dealt with the issue raised as to the ingredients of the offence in the following terms:

> "Breaking down the particulars of count 3 in the indictment it appears that the ingredients of the offence requiring proof are that; A) Caolan Smyth committed the offence of attempted murder, B) Mr McAreavey knew or believed that Mr Smyth had committed the offence of attempted murder, C), in the alternative, that he knew or believed that Mr Smyth had committed some other indictable offence, D) Mr McAreavey purchased petrol and assisted in the burning out of the vehicle used in the attempted murder, E) that he did those acts without reasonable excuse and with the intent of impeding the apprehension or prosecution of Mr Smyth."

The reference to "some other indictable offence" was an error on the part of the trial court since the reference in the section is to "some other arrestable offence".

36. Having reviewed the evidence that had been adduced at trial, the trial court then commented:

> "Having considered the available evidence, we think it probable that Mr McAreavey knew precisely what Mr Smyth was about on that day, with specific reference to the phone call the previous afternoon. However, that level of certainty is insufficient to convict Mr McAreavey based on the first option relied on by the prosecution."

37. The Court dealt with the arguments it had heard as to how s. 7 of the Criminal Law Act 1997 was to be interpreted as follows:

> "[Senior counsel on behalf of Mr. McAreavey] argued that the alternative for the specific offence alleged must be couched or detailed by reference to another specified arrestable offence. This is a matter of construction of the plain and ordinary meaning of the words used in section 7 (2) of the 1997 act. As this is a penal statutory provision any term that is unclear or ambiguous must be construed in a manner that avoids imposing criminal liability. The question therefore presents; is there any ambiguity or lack of clarity in the language of the statutory provision?

Having considered the matter thus, we are satisfied that there is in fact no such ambiguity in the section which was drafted to amend the common law to cater precisely for situations such as arose in this case. Under previous law relating to the charging of an accessory after the fact, it was necessary to specify both the precise felony which had been committed and this was known to the accessory. The words 'or some other offence' were designed in our view to provide an expanded alternative to knowledge of a precise offence. The words 'some other' simply signify any of the various alternatives within the limitation that the alternative must also be an 'arrestable offence'. The combined effect of the words used in the subsection is simple and straightforward and that is that the prosecution must prove knowledge or belief on the part of the assistant of the commission of an arrestable offence. The section as drafted permits the prosecution to rely on alternatives by proving knowledge or belief of the offence committed which is specific or some other arrestable offence which is not. In our view the clear legislative intention as expressed in the words used in the statute is to bring about a change in the previous law. Had a specific alternative been required as part of the second limb of the statutory

definition that would have been expressed by different words importing that requirement of specificity, otherwise the section would in effect have failed to change the previous law. It seems to us that the deliberate policy of the Oireachtas was that those who assist offenders with knowledge or belief of offending do so at their own risk, subject to the threshold that they do so in the context of knowledge or belief of arrestable offending of some variety on the part of the principal offender."

Discussion

38. In our view, the approach of the trial court was the proper one. There was no doubt about the fact that, because this was a penal statute, any ambiguity would have to be resolved in favour of the accused. Having expressly acknowledged that fact, the trial court asked itself whether any ambiguity did in fact exist and answered the question it had posed in the negative. We believe it was correct in doing so.

39. The phrase "some other arrestable offence" is a very telling one and it seems to us to mandate that the section be interpreted in the way contended for by the Director, an argument that also found favour with the trial court.

40. At the time that assistance is offered, neither the assister nor the principal offender may be aware of what precise offence has been committed; in fact, that may not yet be determined. It may be that in a particular case, uncertainty may persist for a prolonged period about the likely extent of a victim's recovery, or about whether a victim will recover at all. Accordingly, in the immediate aftermath of offending behaviour, there may be uncertainty as to whether the offence that will ultimately be identified as having been committed was murder, or attempted murder, or s. 3 or s. 4 of the Non-Fatal Offences Against the Person Act 1997.

41. We have carefully considered the arguments advanced on behalf of Mr. McAreavey. In particular, we have considered the arguments advanced by reference to the decision of the Supreme Court in DPP v. AC [2021] IESC 74; however, what we find missing in Mr. McAreavey's case is the presence of a dual purpose. It will be recalled that AC concerned the interpretation of s. 25 of the Non-Fatal Offences Against the Person Act 1997. That section provides for the receipt of evidence from a registered medical practitioner by way of certificate without the necessity for the practitioner to attend court and give evidence viva voce. The first interpretation contended for was that only a practitioner having personal knowledge of the matter could provide a certificate, whereas the alternate interpretation argued for was that the section permitted evidence by way of certificate from any practitioner without qualification. The Supreme Court was of the view that it was clear that if the section had one purpose, i.e. permitting evidence by way of certificate from a practitioner, the question was whether it had a second or dual purpose permitting a certificate from a person with no actual personal knowledge. The Court found that the language of the statute did not establish that the Oireachtas had intended to provide for a dual purpose.

42. In the present case, what we find missing is the existence of a dual purpose. It is for that reason that we reject the grounds of appeal relating to the interpretation of s. 7(2) of the Criminal Law Act 1997, being of the view that the language of the statute is clear and unambiguous.

Conclusion

43. In summary, we have not been persuaded to uphold any ground argued on behalf of either appellant. In those circumstances, we will dismiss both appeals.