AN CHÚIRT UACHTARACH

THE SUPREME COURT

Supreme Court Record No: S:AP:IE:2023:045

Neutral Citation: [2024] IESC 39

O' Donnell CJ

Dunne J

Charleton J

O' Malley J

Hogan J

Collins J

Donnelly J

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Prosecutor/Respondent

AND

GRAHAM DWYER

Accused/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 31 July 2024

INTRODUCTION

1. On 27 March 2015, following a lengthy trial in the Central Criminal Court, Graham Dwyer (hereafter "*the Appellant*" or "*Mr Dwyer*") was convicted of murdering Elaine O' Hara on 22 August 2012 at Killakee, Rathfarnham, County Dublin. He was subsequently sentenced to imprisonment for life and continues to serve that sentence.

2. Ms O' Hara was last seen alive on 22 August 2012. She was reported missing shortly afterwards. On 13 September 2013, a member of the public out walking dogs on land in the Killakee area of the Dublin mountains found human remains later identified as those of Ms O' Hara.

3. At around the same time - and entirely coincidentally - a number of items were recovered from Vartry Reservoir, also in County Wicklow, which turned out to be connected to Ms O' Hara, including a store loyalty card which the Gardaí traced to her. Two mobile phone handsets, including SIM cards, were also recovered from Vartry Reservoir. Items of clothing later identified as having been worn by Ms O' Hara on the day of her disappearance were also found in the Reservoir, along with a bag which appeared to be a bag she had owned. Various other items were discovered also which, on investigation, appeared to be linked with Ms O' Hara.

4. The DPP's case against the Appellant relied, in part, on mobile phone evidence. In the first place, the prosecution sought to rely on the content of text messages between three mobile phones which it sought to attribute to the Appellant (particularly two phones

which were not registered to him and which he denied knowledge of) and two mobile phones which it attributed to Ms O' Hara (including a phone which was not registered to her).[1] In addition, the prosecution case relied on traffic and location data relating to those phones. Traffic and location data includes data indicating the source/destination and duration of voice calls made to or received by a mobile phone and the source/destination (but not the content) of texts sent from or received by a mobile phone and data relating to the geographic location of a phone while connected to a mobile network. Traffic and location data are sometimes referred to as *call data records* or "*CDR*" and were so referred to by the Court of Appeal here.

5. One of the phones attributed to the Appellant was his work phone (referred to in the Court of Appeal's judgment as Phone A) which was registered in the name of his employer but used by him.[2] There was no issue at trial that this phone was used by the Appellant. In this judgment, I shall refer to this phone as "*the work phone*". The other two phones attributed to the Appellant by the prosecution were Phone B (also referred to as the "*green*" phone)[3] and Phone D.[4] Phone B was a pre-pay phone which had been bought by and registered to a man giving his name as "*Goroon Caisholm*" (and, consequently, Phone B was also referred to as the "*Goroon Caisholm phone*"). Goroon Caisholm was a fictional name which the prosecution sought to link with Mr Dwyer on

[1] A mobile phone number is associated with the SIM (Subscriber Identity Module) card, not the physical handset. A SIM card may be used in different handsets. It would therefore appear to be more accurate to refer here to *numbers* rather than *phones*. However, for the sake of consistency and clarity this judgment will use the nomenclature adopted in the courts below. References to phones include the associated SIM cards.

[2] 087-2100407.

[3] 083-1103474.

[4] 086-1759076.

the various grounds explained by the Court of Appeal at para 49 of its judgment and which are referred to later in this judgment. I shall refer to this phone as "*the green phone*".[5] Phone D was an unregistered prepaid phone and was one of the phones recovered from Vartry Reservoir. [6] It was also referred to as the "*Master*" phone and that is how I shall refer to it in this judgment.

6. The two phones which the prosecution sought to attribute to Ms O' Hara was, firstly, the phone registered in her name which had been left in her apartment on the night she disappeared (referred to the Court of Appeal's judgment as Phone C) .[7] There was no issue that this had been Ms O' Hara's phone. The other phone attributed to her was the other phone recovered from the Vartry Reservoir (Phone E). This phone was also referred to as the "*Slave*" phone and that is how I shall refer to it in this judgment.[8] The "*Slave*" phone was another prepaid unregistered phone which had been purchased in the same phone shop, at the same time, as the "*Master*" phone. Remarkably, despite the fact that both phones had been submerged in Vartry Reservoir for an extended period, Gardaí were able to activate them and recover data from them.

[5] So called because it was represented by a green phone icon in an exhibit presented by the prosecution at trial. No physical handset was ever located and the messages that passed between the green phone and Ms O' Hara's phone that were received by the Gardaí were recovered from Ms O' Hara's phone or from the backup on her computer.

[6] Called the "*Master"* phone because its number was saved as "*Mstr*" in Phone E. In turn, Phone D's number was saved as "*Slv*" in Phone D.

[7] 086-3311207. Gardaí were also able to access data from an earlier handset which had been used by Ms O' Hara (on same mobile number). Both of these handsets were available to the Gardaí.

[8] 086-1759151.

7. Mobile telephony data indicating the location of the work phone at certain times was relied on by the prosecution for the purposes of connecting the Appellant with the other two phones it sought to link to him, thus connecting him to the text messages sent between those two phones and the phones attributed to Ms O' Hara. Those text messages – comprising in excess of 2,600 messages recovered from Ms O' Hara's phone (Phone C) and from the laptop on which she regularly backed up her phone, as well as from the "*Master*" and "*Slave*" phones/SIM cards but also including messages sent to and from the "*green*" phone which were recovered from Ms O' Hara's phone/SIM card and/or her laptop – formed a critical element of the prosecution case against Mr Dwyer, establishing (so the prosecution said), that he was the person texting Ms O' Hara and also disclosing the nature of the relationship between them and revealing (it was said) the fact that he had intended to kill Ms O' Hara. The content of these messages was also relied on by the prosecution to identify the Appellant as the person communicating with Ms O' Hara by reason of matters disclosed in certain messages which corresponded closely with events in his personal and professional life.

8. There is no issue in this appeal as to the admissibility of the text messages. An issue was raised by the Appellant at trial about the manner in which the messages were recovered and dated during the extensive investigation into Ms O' Hara's death but that issue was determined against the Appellant and that determination was not appealed.

9. The traffic and location relating to the work phone was obtained by the Gardaí on foot of a series of access requests made pursuant to the Communications (Retention of Data) Act 2011 ("*the 2011 Act*"), such data having been retained by the relevant service providers in accordance with the 2011 Act. The 2011 Act was enacted to give effect to

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (*"the Data Retention Directive*"), which amended Directive 2002/58/EC ("*the ePrivacy Directive*").

10. Those access requests were made in early October 2013. Cumulatively, the access requests covered the period from 7 October 2011 to 30 November 2012. October 2011 was as far back as access could be obtained given that the mandatory retention period prescribed by the 2011 Act was 2 years.

11. Only traffic and location data relating to the work phone (Phone A) is at issue in this appeal. There was other evidence led at trial regarding the work phone – including bills retained by Mr Dwyer's employer – but that evidence did not come within the scope of the 2011 Act. No issue arose at trial as to the traffic and location data relating to the green phone or the "*Master*" or "*Slave*" phones also accessed by the Gardaí pursuant to the provisions of the 2011 Act.

12. In April 2014, the CJEU gave judgment in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238, holding that the Data Retention Directive was invalid on the basis that in adopting the Directive the EU legislature had exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union ("*the Charter*").

13. The Appellant's trial in the Central Criminal Court commenced in January 2015. In the course of the trial, the Appellant argued for the exclusion from evidence of the traffic and location data relating to his work phone on the ground that it had been retained and accessed in breach of EU law and was therefore inadmissible. That argument was advanced in reliance on *Digital Rights Ireland.* However, on Day 26, following a lengthy *voir dire*, the trial Judge (Hunt J) ruled that the evidence was admissible. In his view, the striking down of the Directive had not invalidated the 2011 Act. He rejected the contention that the 2011 Act breached the Charter. In the first place, he did not consider that the Charter had any application in circumstances where the Data Retention Directive had been annulled and where, consequently, the 2011 Act could not be said to be implementing EU law. In any event, he was not persuaded that the 2011 Act was in breach of it. "*Privacy rights*" were a highly variable category of rights in terms of their intimacy and the protection they attract. On the other hand, the 2011 Act enjoyed a presumption of constitutionality and the State had acted in good faith at all stages in its enactment and application in this case. Even if there was a breach of the Charter, the Judge did not accept that he should apply the exclusionary rule in *People (DPP) v Kenny* [1990] 2 IR 110. Rather than being of a "*supra-constitutional*" character, the privacy rights at stake in this case were "*very defeasible indeed*" and thus, even if there were any discretion to be exercised in respect of the evidence under discussion, that discretion would be exercised in favour of admitting the evidence.

14. Other issues arose in the course of the trial in the Central Criminal Court and a number of other grounds were advanced by way of appeal to the Court of Appeal but this appeal

is concerned solely with the admissibility of the traffic and location data relating to the work phone.

THE DECLARATORY PROCEEDINGS*:*

DWYER V COMMISSIONER OF AN GARDA SÍOCHÁNA AND OTHERS

15. Also in January 2015, Mr Dwyer issued civil proceedings seeking declarations (*inter alia*) to the effect that the provisions of the 2011 Act providing for the retention of, and access to, mobile phone traffic and location data were inconsistent with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector *("the ePrivacy Directive")* read in light of Articles 7, 8, 11 and 52(1) of the Charter.

16. In December 2018 – long after the conclusion of Mr Dwyer's trial in the Central Criminal Court - the High Court (O' Connor J) held that sections 3 and 6(1)(a) of the 2011 Act were incompatible with the Charter ([2018] IEHC 685, [2019] 1 ILRM 461) but stayed a declaration to that effect pending appeal ([2019] IEHC 48, [2019] 1 ILRM 523).

17. This Court gave leave for a direct appeal from the High Court. Having heard the parties, the Court (Charleton J dissenting) decided that it was necessary to refer the following questions to the CJEU pursuant to Article 267 TFEU ([2020] IESC 4, [2020] 1 ILRM 389):

> *"'(1) Is a general/universal data retention regime – even subject to stringent restrictions on retention and access – per se contrary to the provisions of Article 15 of[the ePrivacy Directive], interpreted in the light of the Charter?*

(2) In considering whether to grant a declaration of inconsistency of a national measure implemented pursuant to [the Data Retention Directive], and making provision for a general data retention regime (subject to the necessary stringent controls on retention and/or in relation to access), and in particular in assessing the proportionality of any such regime, is a national court entitled to have regard to the fact that data may be retained lawfully by service providers for their own commercial purposes, and may be required to be retained for reasons of national security excluded from the provisions of [the ePrivacy Directive]?

(3) In assessing, in the context of determining the compatibility with [EU] law and in particular with Charter Rights of a national measure for access to retained data, what criteria should a national court apply in considering whether any such access regime provides the required independent prior scrutiny as determined by the Court of Justice in its case-law? In that context, can a national court, in making such an assessment, have any regard to the existence of ex post judicial or independent scrutiny?

(4) In any event, is a national court obliged to declare the inconsistency of a national measure with the provisions of Article 15 of [the ePrivacy Directive], if the national measure makes provision for a general data retention regime for the purpose of combating serious crime, and where the national court has concluded, on all the evidence available, that such retention is both essential and strictly necessary to the achievement of the objective of combating serious crime?

(5) If a national court is obliged to conclude that a national measure is inconsistent with the provisions of Article 15 of [the ePrivacy Directive], as interpreted in the light of the Charter, is it entitled to limit the temporal effect of any such declaration, if satisfied that a failure to do so would lead to "resultant chaos and damage to the public interest" (in line with the approach taken, for example, in R (National Council for Civil Liberties) v Secretary of State for Home Department and Secretary of State for Foreign Affairs [2018] EWHC 975 [(Admin)], at paragraph 46)?

(6) May a national court invited to declare the inconsistency of national legislation with Article 15 of [the ePrivacy Directive], and/or to disapply this legislation, and/or to declare that the application of such legislation had breached the rights of an individual, either in the context of proceedings commenced in order to facilitate an argument in respect of the admissibility of evidence in criminal proceedings or otherwise, be permitted to refuse such relief in respect of data retained pursuant to the national provision enacted pursuant to the obligation under Article 288 TFEU to faithfully introduce into national law the provisions of a directive, or to limit any such declaration to the period after the declaration of invalidity of [the Data Retention Directive] issued by the [judgment of 8 April 2014, Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238)]?'"

18. On 5 April 2022 the CJEU (Grand Chamber) gave judgment on the reference: Case C-140/20, *GD v Commissioner of An Garda Síochána* EU:C:2022:258 ("*GD*"). The operative part of the judgment (the *dispositif*) is in the following terms:

1. Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding legislative measures which, as a preventive measure for the purposes of combating serious crime and preventing serious threats to public security, provide for the general and indiscriminate retention of traffic and location data. However, that Article 15(1), read in the light of Articles 7, 8, 11 and 52(1) of the Charter of Fundamental Rights, does not preclude legislative measures that provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for

– *the targeted retention of traffic and location data which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended;*

– *the general and indiscriminate retention of IP addresses assigned to the source of an internet connection for a period that is limited in time to what is strictly necessary;*

– *the general and indiscriminate retention of data relating to the civil identity of users of electronic communications systems; and*

– *recourse to an instruction requiring providers of electronic communications services, by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention of traffic and location data in the possession of those service providers,*

provided that those measures ensure, by means of clear and precise rules, that the retention of data at issue is subject to compliance with the applicable substantive and procedural conditions and that the persons concerned have effective safeguards against the risks of abuse.

2. Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights, must be interpreted as precluding national legislation pursuant to which the centralised processing of requests for access to data, which have been retained by providers of electronic communications services, issued by the police in the context of the investigation or prosecution of serious criminal offences, is the responsibility of a police officer, who is assisted by a unit established within the police service which has a degree of autonomy in the exercise of its duties, and whose decisions may subsequently be subject to judicial review.

3. EU law must be interpreted as precluding a national court from limiting the temporal effects of a declaration of invalidity which it is bound to make, under national law, with respect to national legislation imposing on providers of electronic communications services the general and indiscriminate retention of traffic and location data, owing to the incompatibility of that legislation with Article 15(1) of Directive 2002/58, as amended by Directive 2009/136, read in the light of the Charter of Fundamental Rights. The admissibility of evidence obtained by means of such retention 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.

19. Following the CJEU judgment, this Court dismissed the appeal from the decision of the High Court and affirmed the order made by O' Connor J.

APPEAL TO THE COURT OF APPEAL

20. The Appellant appealed his conviction to the Court of Appeal. Having been postponed to await the outcome of his declaratory proceedings, that appeal came on for hearing before the Court of Appeal (Birmingham P and Edwards & Kennedy JJ) on 1 and 2 December 2022. As noted, the Appellant challenged his conviction on a number of grounds, including (but not limited to) the admission of the traffic and location data.

21. On 24 March 2023, the Court of Appeal gave judgment ([2023] IECA 70) dismissing all of the grounds of appeal. As regards the admissibility of the traffic and location data relating to the work phone (Phone A), the Court of Appeal first observed that such evidence was "*not very significant at all*" (at para 116). It related only to the work phone. There was independent evidence – closely analysed by the Court of Appeal at paras 118-123 of its judgment – to the effect that the three phones attributed to Mr Dwyer were linked and had a common user. The court emphasised that the Gardaí had acted in compliance with the 2011 Act – they were, the court noted, "*blameless in the manner in which they conducted the investigation*" – which itself had been enacted to give effect to EU law (para 124).

22. However, the court went on, while it might be that the Director could have successfully mounted a prosecution without relying on the traffic and location data at all, that is not what she had done. She had chosen to introduce the traffic and location data, not just text records, even though she must have known that there would be a significant legal challenge to its admissibility. The CJEU had delivered judgment in *Digital Rights*

Ireland by the time of the trial and the subsequent decision of the CJEU in *GD (Dwyer)* "*put beyond doubt that illegality attached to the retention of the data which was accessed by the Gardaí*". (para 126)

23. As to the nature of that illegality, the Court of Appeal agreed with the Director that at the heart of the decision in *GD* was a finding that the 2011 Act failed to comply with the conditions laid down in a Directive, analogous to a determination in Irish law that a measure that was *ultra vires* a statutory power (Judgment, para 126). The court referred to the principles of equivalence and effectiveness and asked itself what an analogous situation in domestic law might be (Paras 127-128). In its view, what was involved was only an indirect breach of the Charter, more particularly a breach of a provision of a Directive (Article 15(1) of the ePrivacy Directive) "*read in light of the Charter*." In reaching that view, the Court of Appeal attached significant weight to the terms of the *dispositif* (operative part) of the CJEU's judgment in *GD* set out above. On that basis, it considered that the breach did not approach a level of directness that would warrant the application of *People (DPP) v JC* [2015] IESC 31, [2017] 1 IR 417 and the appropriate test of admissibility was that set out in *People (DPP) v O' Brien* [1965] IR 142 (Judgment, paras 129-130).

24. Applying *O' Brien*, the Court of Appeal considered that the trial Judge had a discretion to admit the evidence and that (echoing the language of Lavery J in *O' Brien*) it would be wrong to the point of absurdity and would bring the administration of the law into well-deserved contempt to exercise that discretion to exclude the evidence (Judgment, para 133).

25. Notwithstanding its view that the applicable test was that in *O' Brien*, the Court of Appeal went to address the position if *JC* applied. It rejected Mr Dwyer's contention that, because there had been no "*JC hearing*" at trial (the trial had, of course, taken place prior to the decision in *JC*), there ought to be a retrial, concluding that, having regard to the circumstances in which the applications for access had been made and the limited nature of the data accessed, the application of *JC* would inevitably have led to the admission of the disputed evidence. The court was firmly of that view, notwithstanding the arguments of the Appellant that the provision made for long-term blanket retention was something that could never have lawfully been provided for, and that therefore, the conditions for admission articulated by Clarke J in *JC* were not satisfied (this was a reference to para 871(vi) of Clarke J's judgment in *JC*). The court was fortified in its view that any consideration of the *JC* test would inevitably have led to the admission of the evidence by the approach actually taken by the trial Judge, who had considered what the situation would be if he was called on to exercise a discretion (Judgment, para 137).

26. Finally, the Court of Appeal considered section 3(1) of the Criminal Procedure Act 1993 (the "*proviso*"). Having discussed *People (DPP) v Fitzpatrick & McConnell* [2013] 3 IR 656 and *People (DPP) v Sheehan* [2021] IESC 49, [2021] 1 IR 33, the court stated that it was quite satisfied that the admission of the "*very limited*" traffic and location data evidence could not conceivably be regarded as giving rise to a miscarriage of justice so that, even if the court had concluded that such evidence ought not to have been admitted, it would nonetheless have dismissed the appeal: in its view, there had

been no lost chance of acquittal and no miscarriage of justice (Judgment, para 141). I will refer in more detail to the Court of Appeal's analysis later in this judgment.

LEAVE TO APPEAL TO THIS COURT

27. By Determination of 4 July 2023 ([2023] IESCDET 88) the Court granted the Appellant leave to appeal from the Court of Appeal in relation to the admissibility of the traffic and location data and, in particular, the test by which the admissibility of such evidence is to be determined and how that test is to be applied in the circumstances here and also in relation to the scope and application of the *proviso*.

THE ISSUES TO BE ADDRESSED

28. In his written submissions, the Appellant identified four issues as follows: (1) whether there was a breach of a Charter right; (2) whether a breach of a Charter right is equivalent to a breach of a constitutional right; (3) the application of the test in *JC* (and in particular whether that test can be applied retrospectively on appeal, without a retrial) and (4) the '*proviso*' in section 3(1) of the Criminal Procedure Act 1993. Subsequently, he proffered a more elaborate statement of the issues, which if not fully agreed, did not appear to be the subject of any significant dispute, in the following terms:

> *"1. Noting that it is common case that the provisions of the Communications (Retention of Data) Act 2011 relating to:*
>
> > *a. General and indiscriminate retention of phone location and call data, such as that at issue in this case, for the purpose of the investigation of crime, and*
> >
> > *b. access to such retained data for the purpose of the investigation of crime on the authorisation of a member of An Garda Síochána*
>
> *are, for the reasons stated in the judgment of the Court of Justice of the European Union of the 5th April 2022 in GD v Commissioner of An Garda Síochána ECLI:EU:C:2022:258 in breach of EU law, in what circumstances is such data admissible in evidence against an accused?*

2. Insofar as there was a breach of EU law (as identified at 1 above) was it a breach of the Appellant's Charter Rights or was it simply a breach of the provisions of Article 15(1) of the e-Privacy Directive as contended for by the Respondent?

3. Following on from 2 above, if the Appellant's Charter rights were breached is this to be treated as equivalent to the breach of a Constitutional right pursuant to the EU law principle of equivalence and, relatedly, is the test for admissibility that set out in People (DPP) v O' Brien [1965] IR 142 or People (DPP) v JC [2015] IESC 31, [2017] 1 IR 417 or is some other test applicable?

4 Assuming that the correct test for admissibility to be applied is that set out in People (DPP) v JC [2015] IESC 31, [2017] 1 IR 417, can such a test be applied retrospectively or is a re-trial necessitated?

5. Does the CDR evidence fall into the category of evidence the gathering of which 'could never have been authorised at all' and, if so, what are the consequences of this?

6. In considering the admissibility of the phone location and call data here, what is the significance (if any) of the other evidence, independent of retained call data records, connecting the appellant to the relevant phones and connecting those phones to each other as having a common user?

7 Did the learned trial judge err in admitting the phone location and call data in evidence in the circumstances here?

8. Did the Court of Appeal err in its application of the section 3(1) of the Criminal Procedure Act 1993 (the so-called "proviso")? [Letter of 11 December 2023]

29. While these formulations are helpful in focusing attention on specific aspects of the issues in dispute in this appeal, ultimately the appeal presents two questions: (1) whether the Trial Judge erred in admitting the disputed traffic and location data into evidence and, if so (2) whether the Court of Appeal erred in concluding, even if the evidence ought not to have been admitted, the Appellant's conviction should nonetheless be affirmed pursuant to the *proviso* on the basis that it considered that "*no miscarriage of justice [had] actually occurred.*" I shall refer to these as the "*Admissibility Issue*" and the "*Proviso Issue*" respectively.

ARGUMENT AND ANALYSIS

(1) The Admissibility Issue

30. The parties addressed this issue in detail in their comprehensive and helpful written and oral submissions.

31. At the time of hearing of this appeal, the Court had heard two appeals (*People (DPP) v Smyth* and *People (DPP) v McAreavey*) raising materially identical issues concerning the admissibility in criminal proceedings of traffic and location data that had been retained and accessed in accordance with the 2011 Act. The traffic and location data at issue in *Smyth* and *McAreavey* (which related to incidents which took place in May 2017) was accessed significantly later (in June – December 2017) than was the case here (the access requests here were made in October 2013). As of October 2013, the CJEU had yet to give judgment in *Digital Rights Ireland* (that judgment was given on 8 April 2014). As of the latter part of 2017, the CJEU had given judgment in *Digital Rights Ireland* and had also given judgment (in December 2016) in Joined Cases C-203/15 and C-698/15 *Tele2 Sverige & Watson* EU:C:2016:970.

32. The Court has since given judgment in *Smyth* [2024] IESC 22 and in *McAreavey* [2024] IESC 23. The Court addressed the issues relating to the admissibility of the traffic and location data in the *Smyth* appeal. For the reasons set out in my judgment in *Smyth* (with which O' Donnell CJ, Barniville P & Dunne, Charleton and O' Malley JJ agreed), the

Court held that the disputed traffic and location data had been correctly admitted in evidence by the Special Criminal Court. In the analysis leading to that conclusion, I addressed in some detail the various issues identified by Mr Dwyer in his appeal here and at para 215, I summarised my principal conclusions as follows (omitting certain sub-paragraphs directed to an issue that does not arise in this appeal):

> *"(1) The question of the admissibility of the traffic and location data here is governed by Irish law, subject to the principles of equivalence and effectiveness.*
>
> *(2) The test for the admissibility of evidence obtained in breach of constitutional rights is that set out in JC and Quirke (No 2).*
>
> *(3) That is so whether the constitutional right at issue is expressly provided for in the Constitution or is an unenumerated or derived right.*
>
> *(4) The traffic and location data at issue here must be regarded as having been retained and accessed in breach of the Charter and not merely in breach of the ePrivacy Directive.*
>
> *(5) The admissibility of the traffic and location data evidence therefore falls to be assessed by reference to JC as to apply any less-exacting test would not be consistent with the principles of equivalence and effectiveness in that it would effectively accord rights guaranteed by the Charter a lesser status than rights*

protected by the Constitution. Such would not be consistent with the obligations of the State – and of this Court – to respect, and give full effect to, EU law.

(6) The answer to the first admissibility issue is, therefore, that the test for admissibility is indeed that set out in JC.

…

(8) The application of JC here does not involve or require any factual inquiry or investigation but, rather, an objective assessment of whether it was reasonable for An Garda Síochána to rely on the provisions of the 2011 Act or whether such reliance involved a "deliberate or conscious" breach of the Charter. This Court is in a position to carry out that assessment.

(9) JC compels the conclusion that the breach of the Charter here was not "deliberate and conscious" in the sense used in JC. 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). An Garda Síochána was entitled to rely on it. Even if there may be circumstances where a law enacted by the Oireachtas is so manifestly unconstitutional (and/or contrary to the Charter) that, even in the absence of an order of a court of competent jurisdiction declaring that law invalid, it could be reckless or negligent for a law enforcement body to rely upon it – and JC suggests not – such is not the position here. This Court's decision in Dwyer is wholly inconsistent with the argument that, as of 2017, the 2011 Act was so clearly contrary to the Charter that it could not properly or reasonably be relied on by An Garda Síochána.

(9) By analogy with JC itself (where the search warrant had been issued pursuant to a statutory provision 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.

(10) In the circumstances, the traffic and location data at issue here was prima facie admissible under JC.

(11) As regards the so-called JC "backstop", the traffic and location data at issue here could have been retained and accessed in a manner compatible with the Charter. Access here was sought for the purpose of investigating a very serious crime. That is all that the backstop requires. It does not require the court to hypothesise an alternative legislative regime and to hypothesise how that regime might have operated in 2017 and whether, in particular, its operation would have led to the retention of the traffic and location data at issue here.

(12) If, as Quirke (No 2) seems to suggest, the backstop is properly understood as being directed at more general considerations of fairness, no basis for excluding the evidence arises here. The community's interest in the effective adjudication of the case against Mr Smyth and Mr McAreavey 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. Considerations 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 weighing in favour of the admission of the evidence.

(13) It follows – to address the third and final admissibility issue – that the SCC did not err in admitting the traffic and location evidence."

33. Hogan J delivered a dissenting judgment in *Smyth*. In his view, the continued use of the 2011 Act regime in June 2017 was reckless or grossly negligent in the sense described by Clarke J in *JC*, even in advance of a formal judicial declaration that it was contrary to EU law (at para 47). Hogan J considered that the annulment of the Data Retention Directive in *Digital Rights Ireland* was a "*flashing red light*" that, in conjunction with subsequent developments such as the CJEU's decision in *Tele2/Sverige*, meant that, as of 2017, it was not appropriate for the State to continue to rely on the 2011 Act (para 41). Here, as already noted, the disputed traffic and location data was retained and accessed prior to the decision in *Digital Rights Ireland*.

34. It is no disrespect to counsel for the Appellant and for the Director in this appeal to observe that their arguments around the Admissibility Issue and its component elements overlapped significantly with the arguments made in *Smyth.* As well as the arguments of the parties directly involved, the Court in *Smyth* also had the benefit of detailed

written and oral submissions on the admissibility issues in *Smyth* from the Irish Human Rights and Equality Commission, who were permitted to intervene in the appeal.

35. In his able arguments in this appeal, Remy Farrell SC (for the Appellant) focussed on the issue of the *retention* of the disputed traffic and location data, rather than on the question of subsequent *access* to that data. He emphasised the findings of the CJEU that the general and indiscriminate retention of such data constituted, in itself, a serious breach of EU law and of the Charter and was impermissible *per se*. He did not make the case that the disputed traffic and location data was retained (or accessed) in deliberate or conscious breach of the Charter nor did he suggest that the retention (or access) was reckless or negligent or done other than on a *bona fide* basis. Rather, the kernel of his case was that the traffic and location data at issue could *never* have been lawfully gathered in accordance with the Charter and therefore could not properly have been admitted into evidence having regard to the final limb of the *JC* test. That, he said, distinguished this case from *JC*, *People (DPP) v Behan* [2022] IESC 23 and *People (DPP) v Quirke* [2023] IESC 20, [2023] 1 ILRM 445 ("*Quirke (No 2)*"), which he characterised as defective authorisation cases where the evidence at issue could have been obtained lawfully by other means.

36. That part of the *JC* test – the so-called "*backstop*" – was considered at some length in my judgment in *Smyth*. As I explained in that judgment, I do not read *JC* as requiring the identification of a hypothetical alternative legislative regime that could have been in place in 2017 in lieu of the 2011 Act, on the basis of which the court could be satisfied that the specific data at issue here relating to Mr Dwyer's work phone *would* have been

lawfully retained and accessed. There is too much uncertainty and contingency for any such exercise to be meaningful or reliable. Rather, this aspect of the *JC* test is intended to exclude evidence otherwise admissible in accordance with *JC* which *could* never have been obtained lawfully – in other words evidence obtained by a method and/or in circumstances irreconcilable with fundamental constitutional norms.

37. It is clear that traffic and location data has no privileged or special status under either the Constitution or the Charter. It may be lawfully gathered, retained and accessed by a variety of actors in a wide variety of circumstances and for a variety of purposes. The retention of such data is not inherently contrary to the Constitution or the Charter. Although the general retention of such data is generally impermissible under the ePrivacy Directive and the Charter, there are nonetheless many circumstances in which such data may properly be retained. Traffic and location data may be subject to general retention for purposes of national security (Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* EU:C:2020:791). It is true of course that the circumstances in which such data may be retained for the purposes of the investigation and prosecution of serious crime are significantly more restricted. Even so, *La Quadrature du Net*, *GD* and Joined Cases C-793/19 & C-794/19 *Spacenet* EU:C:2022:702 all emphasise that there are many circumstances in which such data may be retained consistently with the Charter, including circumstances where such data may be retained (and thereafter accessed) on a general basis by reference to geographic criteria, not linked to any particular suspicion of individual communication services users (though where there are such suspicions that also will provide a basis for retention, potentially of significant volumes of data involving many users in addition to the target user(s)). Data may be

retained on the basis of "*expedited retention*" (or as this Court referred to it in *Dwyer*, "*quick freeze*"). As Mr Farrell SC (for the Appellant) accepted in the course of argument, it is clear from *Spacenet* that the category of circumstances in which traffic and location data may lawfully be retained for the purpose of criminal law enforcement and investigation is not closed (subject always to the exclusion of any regime of general and indiscriminate retention for that purpose).

38. That being so, it appears to me that, in principle, the traffic and location data at issue here *could* have been *retained* in a manner compatible with the Charter (and the Constitution). It is not a class or category of data the retention of which is *per se* excluded by either the Constitution or the Charter. That, in my view, is all that the backstop requires. It does not require the court to hypothesise an alternative legislative regime and then to hypothesise how that regime might have operated in 2011, 2012 or 2013 and whether, in particular, its operation *would* have led to the retention of the traffic and location data at issue here.

39. In argument, Mr Farrell SC observed that such an approach to the backstop would have the effect that evidence obtained pursuant to an Act of the Oireachtas that was subsequently struck down as unconstitutional (or, as here, as incompatible with the Charter) would always be held to be admissible. I do not think that is correct. If the Oireachtas purported to permit evidence to be obtained by a method and/or in circumstances irreconcilable with fundamental constitutional norms, the backstop would clearly be engaged. In any event, the backstop is not a test of admissibility as such. It is the earlier parts of the *JC* test that set out the substantive test of admissibility

for evidence obtained in breach of the Constitution (and by analogy the Charter). As I emphasised in *Smyth*, the backstop does not make admissible evidence which would otherwise be inadmissible; rather its function is to *exclude* evidence otherwise admissible under *JC if* such evidence could never have been obtained in a manner according with constitutional norms.

40. While his principal argument was that the backstop precluded the admission of the disputed evidence here, Mr Farrell SC argued in the alternative that *JC* required – or at least permitted – the Court to take a broad view of the admissibility of the evidence here, one in which considerations of the integrity of the administration of justice and the importance of upholding the rule of law should be recognised and given weight, in addition to considerations of deterring misconduct by law enforcement agencies. In that context, he relied on this Court's decision in *Criminal Assets Bureau v Murphy* [2018] IESC 12, [2018] 3 IR 640 and the decision of the Supreme Court of Canada in *R v Grant* [2009] 2 SCR 353.

41. I addressed arguments of this kind in my judgment in *Smyth* at para 211 and following, expressing the view that if - as *Quirke (No 2)* appears to suggest - the backstop is properly to be understood as directed at general considerations of fairness, such considerations would not lead to the exclusion of the evidence in that case. The considerations that led me to that view apply with at least equal force here. As in *Smyth*, it does not appear to me that the admission of the disputed evidence here brings the administration of justice into disrepute or undermines the integrity of the courts' processes. 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 to which Mr Farrell SC referred provides useful guidance in this context and was considered in detail in *JC, Quirke No 2* as well as in *Smyth*. Making all due allowance for the nature of the unlawfulness here and its impact on the interests of Mr Dwyer, it appears to me that the community's interest in the adjudication of the case against him on its merits weighed decisively in favour of the admission of the evidence and, as in *Smyth*, it is exclusion of that evidence rather than its admission that would bring the administration of justice into disrepute. The nature and probative value of the evidence, the fact that it was gathered (and accessed) in accordance with the 2011 Act – and at a point in time prior to the decision in *Digital Rights Ireland* when the Data Retention Directive was still in place - 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 significant factors in this context, all of which point to the admission of the evidence here.

42. As I stated in *Smyth*, 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 (or in breach of the Charter) that it must be excluded. The issue of admissibility of evidence is a distinct issue, following on from but also distinct from the issue of the lawfulness of the circumstances in which the evidence was obtained. That issue - admissibility - engages compelling interests above

and beyond the interests of the accused. As O' Malley J observed in *Criminal Assets Bureau v Murphy*, at para 125, "*the exclusionary rule is not a free-standing rule that evolved or exists purely for the benefit of defendants in either criminal or civil proceedings.*" *JC* seeks to balance those interests and does so in a way that does *not* require the exclusion of unconstitutionally obtained evidence in all or nearly all cases. For the reasons set out in the majority judgment in *JC*, any absolute rule of exclusion exacts too high a price in terms of the adverse impact on the administration of criminal justice.

43. In argument, Mr Farrell SC suggested that the focus of *JC* on the point at which evidence was obtained was unduly narrow and that it was also necessary to consider questions of legality, constitutionality and compliance with the Charter at subsequent points, such as evidential analysis and deployment at trial. Acknowledging that the Appellant could not rely on it in circumstances where his trial had taken place before it came into force, Mr Farrell referred to Directive (EU) 2016/680, commonly known as the Law Enforcement Directive, as illustrating the principle that the *deployment* of unlawfully obtained evidence may require distinct consideration by the court. In this context, he suggested that, following the commencement of the Data Protection Act 2018 (which, *inter alia*, gives effect to the Law Enforcement Directive) and this Court's Order of 26 May 2022 in *Dwyer*, there was no longer a basis on which traffic and location data gathered pursuant to the 2011 Act could lawfully be processed.

44. As the CJEU made clear in *GD* (referring back to Case C-746/18 *Prokuratuur* EU:C:2021:152), the admissibility of the disputed traffic and location data was and is a

matter of Irish law, subject to the principles of effectiveness and equivalence. For the reasons set out in *Smyth*, the question of admissibility is governed by *JC*. The Appellant accepts that the *JC* test satisfies the principles of equivalence and effectiveness: it was on that basis that he contended that *JC* was applicable to evidence obtained in breach of the Charter. Admissibility is *not* governed by EU law, whether the provisions of the Charter or otherwise. As already explained, the application of the *JC* test here leads to the conclusion that the evidence was admissible, notwithstanding that it was obtained in breach of the Charter.

45. As Mr Farrell SC accepted, the Law Enforcement Directive has no application on the facts here. Other than a brief reference to Article 4(1), it was not the subject of any discussion in the written or oral submissions of the parties in this appeal. No reliance was placed on the Directive in *Smyth* or *McAreavey* either. In the absence of argument directed to the provisions of the Directive (or the provisions of Part 5 of the 2018 Act that give it effect in domestic law) it would not be appropriate to express any concluded view on its effect. I nonetheless observe that neither the Law Enforcement Directive nor Part 5 of the 2018 Act appears to be directed to issues of the admissibility of evidence in court proceedings. That is perhaps unsurprising given that that issue is, as a matter of principle, one for the domestic law of Member States. Furthermore, the 2018 Act includes broad authorisations for the processing of personal data for the purposes of the investigation and prosecution of crime: see, *inter alia*, sections 41(b), 49, 55(1)(b)(iii), 60(3)(a)(iv) and 73(1)(b)(v). Finally, there appears to be nothing to suggest that traffic and location data obtained pursuant to the 2011 Act might not

subsequently be processed in accordance with any applicable requirements of the Law Enforcement Directive/Part 5 of the 2018 Act.

46. It will be evident from my judgment in *Smyth* that I accept many of the submissions advanced on Mr Dwyer's behalf. I accept that the evidence at issue here was obtained in breach of the Charter and that it follows that the issue of admissibility falls to be determined by *JC*. However, for the reasons I set out in *Smyth*, I do not accept that necessitates a retrial. As Mr Farrell SC fairly accepted in argument, there are no disputed issues of fact requiring a hearing. This Court can and should apply *JC* itself. Applying *JC*, for the reasons set out above, which should be read in conjunction with the more detailed analysis set out in my judgment in *Smyth*, and which differ somewhat from the reasoning of the High Court and the Court of Appeal, I would hold that the traffic and location data evidence was properly admitted at trial.

(2) The Proviso Issue

47. My conclusion on the Admissibility Issue means that it is not strictly necessary to address the Proviso Issue. However, it was the subject of detailed analysis by the Court of Appeal and was fully addressed by the parties in their written and oral submissions. In the circumstances, it appears appropriate to address it.

Relevant Statutory Provisions

48. Prior to the enactment of the Courts of Justice Act 1924 ("*the 1924 Act*"), there was no general right of appeal in cases tried on indictment in this jurisdiction. Neither the Crown Cases Act 1848 (which established the Court for Crown Cases Reserved) nor the Criminal Appeal Act 1907 (which established a new Court of Criminal Appeal) applied in Ireland. The 1924 Act provided for an Irish Court of Criminal Appeal with "*jurisdiction to affirm or to reverse the conviction in whole or in part, and to remit, or to reduce, or to increase or otherwise vary the sentence, and generally to make such order, including any order as to costs as may be necessary for the purpose of doing justice in the case before the court*" (section 34 of the 1924 Act). The 1924 Act did not give the Court of Criminal Appeal any power to direct a retrial where it reversed a conviction. However, such a power was given by section 5(1)(b) of the Courts of Justice Act 1928 ("*the 1928 Act*"). Section 5(1)(a) of that Act enacted the so-called *proviso*, as follows::

> *"the Court may notwithstanding that they are of opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."*

Section 5(1) was clearly modelled on section 4(1) of the Criminal Appeals Act 1907, though that provision refers to a "*substantial miscarriage of justice*". The Irish statutory

regime otherwise differed significantly from section 4(1) in that section 4(1) specified the grounds for allowing an appeal.[9]

49. Section 34 of the 1924 Act and section 5 of the 1928 Act were repealed by the Criminal Procedure Act 1993, section 3(1) of which now provides in relevant part that, on the hearing of an appeal against conviction of an offence the court may:

> *"(a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred).*
>
> *(b) quash the conviction …*

As was the case with section 34 of the 1924 Act – and in contrast with the equivalent statutory provisions in England and Wales - section 3(1) does not set out the grounds for allowing an appeal.

50. The former appellate jurisdiction of the former Court of Criminal Appeal now vests in the Court of Appeal established by the Court of Appeal Act 2014: section 7A(3) of the Courts (Supplemental Provisions) Act 1961 (inserted by section 8 of the Court of Appeal Act 2014).

[9] Section 4(1) of the 1907 Act provided that the appeal court should allow the appeal "*if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that any ground there was a miscarriage of justice*"

The Jurisprudence on the Proviso

51. The earliest available Irish decision in which the *proviso* was addressed appears to be that of the Court of Criminal Appeal in *Attorney General v Richmond* (1935) 1 Frewen 28. There the court considered that the trial judge had not properly directed the jury on the distinctions between acts constituting an attempt to commit a criminal offence and acts that were merely preparatory. Nonetheless, the court declined to quash the conviction. Giving its judgment, Kennedy CJ explained:

> *"... having considered the whole of the evidence in this case with the utmost care the Court has come to the conclusion that under the Courts of Justice Act 1928, the Court is relieved from the sending back of the case because the Court is not satisfied that there has been any miscarriage of justice. The Court has formed the opinion that any reasonable jury hearing the same evidence with the same assistance of counsel would inevitably and acting quite reasonably have reached the same verdict. The Court is of opinion that there has not been any miscarriage of justice by reason of the deficient summing up and that it should not therefore interfere with the verdict or direct a new trial."*

52. No authorities were cited in the judgment in *Richmond*. However the language in the passage above appears to echo the language of Viscount Sankey LC in his celebrated speech in *Woolmington v Director of Public Prosecutions* [1935] AC 462, a decision from earlier in 1935. Having concluded that the trial judge had misdirected the jury on the burden of proof and the presumption of innocence, he addressed the possible

application of the proviso, expressing the view that it was "*impossible*" to apply it because "*we cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion*" (482-483). That formulation was "*explained*" by the House of Lords in *Stirland v Director of Public Prosecutions* [1944] AC 315 as meaning that the proviso should apply if it was "*evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken*" and that section 4(1) assumed a situation where "*a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict*" (per Viscount Simons LC at 321). Both formulations have been applied by the Privy Council subsequently: see for example *Anderson v The Queen* [1972] AC 100 and *Stafford v State* [1999] 1 WLR 2026.

53. In England and Wales, the Criminal Appeal Act 1968 significantly recast the appeal regime. It repealed the 1907 Act and reformulated the grounds for allowing an appeal.[10] While the proviso was retained, its significance diminished in practice. The Criminal Appeals Act 1995 made further significant changes, providing for a single ground for allowing a conviction appeal – that the court thinks that the conviction is "*unsafe*" - and in consequence dropping the proviso: if a conviction is "*unsafe*" it clearly follows that a miscarriage of justice has occurred.

[10] Section 2(1) provided that, subject to the proviso, "*the Court of Appeal shall allow an appeal against conviction if they think (a)that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory ; or (b)that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or (c)that there was a material irregularity in the course of the trial".*

54. Returning to this jurisdiction, in *People (DPP) v EC* [2007] 1 IR 749, the Court of Criminal Appeal declined to apply the proviso in circumstances where in sexual abuses in which there had been significant delay, the trial judge had failed to give any warning to the jury of the dangers arising from the delay. The court considered that it could not apply the *proviso* because "*the omission of the warning has to be seen as going to a central and critical aspect of this whole case*" noting in that context that the delay issue was such that the issue of whether the prosecution should be permitted to proceed had taken up seven days at the trial: per Kearns J at para 24.

55. The next relevant decision is that of the Court of Criminal Appeal in *People (DPP) v Fitzpatrick* [2013] 3 IR 656. In *Fitzpatrick*, section 18 of the Criminal Justice Act 1984 (which permits an adverse inference to be drawn from the failure or refusal of a person charged with an arrestable offence to account for certain matters) was invoked by the Gardaí without giving the first appellant an opportunity to consult with his solicitor in relation to its invocation. That, in the court's view, did not comply with what was required by section 18. In these circumstances, the court addressed the *proviso*. It did not, in the court's view:

> *"... invite a court of appeal to make its own value judgment as to the guilt or innocence of the first appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the first appellant would have been convicted. If a departure from*

the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed." (at para 46)

56. The court was, however, satisfied that the proceedings could not be said to be "*fundamentally flawed.*" The significance of any section 18 inference would depend on the facts of each case and in the case before the court the evidence properly before the court was "*direct and compelling*" . The first appellant's evidence had been rejected by the Special Criminal Court and the inference evidence had not played any role in its assessment. The Court of Criminal Appeal had the benefit of the detailed reasoning of that court. In all the circumstances, the court was satisfied that no miscarriage of justice had actually occurred and so refused the first appellant's application for leave to appeal.

57. The judgment in *Fitzpatrick* does not refer to any authorities on the *proviso*. It appears, however, that the court's analysis was influenced by Australian jurisprudence on equivalent provisions in the law of the various Australian States. The language of "*a lost chance of acquittal*" appears to have it roots in that jurisprudence: see, for example, the judgment of Fullagar J in *Mraz v The Queen* (1955) 93 CLR 493 ("*if ... the appellant may ... have lost a chance which was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice*") and that of Barwick CJ in *R v Storey* (1978) 140 CLR 364 (*"If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors lost a real chance of acquittal"*). *Fitzgerald's* holding that, where there has been a fundamental error going to the root of the trial, the conviction must be set aside,

regardless of whether the court considers that the appellant would have been convicted in a properly conducted trial, is also consistent with the Australian jurisprudence. I will refer further to some of that jurisprudence (which is extensive) later.

58. In *People (DPP) v Forsey* [2018] IESC 55, [2019] 2 IR 417, this Court (per O' Malley J) held that the trial judge had misdirected the jury in a prosecution under the Prevention of Corruption Act 1906 by instructing it that it was necessary for the accused to show, on the balance of probabilities, that monies received by him had not been received corruptly. The issue then arose as to whether the conviction should be quashed. Noting the submission of the prosecution that the evidence against the accused was so strong that no real injustice could be said to have occurred, O' Malley J expressed the view that an appellate court should be "*extremely cautious*" in taking such an approach, which could be seen as diminishing the status in general of the constitutional rights to a presumption of innocence and to a trial in due course of law. In her view, to dismiss on appeal on that basis, where the jury had been given "*fundamentally wrong instructions*", would be appropriate only in "*the clearest of cases*." On the facts, she did not consider it appropriate "*for this Court to assume that a properly instructed jury might not have found that there was a reasonable doubt*" (at para 194).[11]

59. O' Malley J also gave the judgment of this Court in *People (DPP) v Sheehan* [2021] IESC 49, [2021] 1 IR 33. As it happened, *Sheehan* also concerned section 18 inferences (as well as another issue concerning legal representation). Ultimately, O' Malley J came

[11] MacMenamin J took a different view, though by reference to *People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329, rather than section 3(1) of the 1993 Act: para 40.

to the view that the prosecution should not have been permitted to rely on section 18 in relation to text messages on the appellant's mobile (because such messages were not matters coming within the scope of the section) and therefore the case should not have gone to the jury on the basis that it could draw a section 18 inference by reason of the appellant's failure to account or explain the messages in question. That was the context in which the potential application of the proviso fell for consideration (the appellant failed on the representation issue so the application of the proviso did not arise in relation that issue).

60. In O' Malley J's view, the question of whether there is a category of legal error so fundamental as to render the trial a nullity, regardless of its likelihood of acquittal, did not arise in the circumstances of the appeal (para 135). Where the issue is the wrongful admission of evidence at trial, or an incorrect instruction to the jury, the correct approach was that set out by O' Donnell J in *Fitzpatrick* (as set out in para 55 above). *Forsey* was, in her view, an example of such approach: the majority had taken the view that, after a trial in which the jury had been given "*fundamentally wrong instructions*" as to the presumption of innocence, it would only be in the clearest of cases that it would be appropriate to dismiss the appeal on the basis that the strength of the evidence was such that no real justice could be said to have occurred (para 138). On the facts, O' Malley J considered that views expressed in favour of the appellant on "*one limited matter"* could not justify quashing the convictions, emphasising that the text of the messages was admissible in evidence and that the jury could draw inferences from those messages. Having reviewed the other evidence against the appellant (including CCTV footage showing him in possession of a gun), she concluded that there was "*no real*

possibility in the case that the defendant had lost a chance of acquittal" and therefore there had been no miscarriage of justice resulting from the incorrect application of section 18 (para 146 of the report).

61. It is apparent from O' Malley J's judgment in *Sheehan* that a number of decisions of the High Court of Australia were cited in argument, including *Wilde v The Queen* (1988) 164 CLR 365 and *Kalbasi v Western Australia* (2018) 264 CLR 62. I will refer to these decisions when I have finished discussing the Irish authorities.

62. In *People (DPP) v Behan* [2022] IESC 23, the appellant had been convicted of a number of offences arising from an armed robbery, during which a firearm had been discharged. Evidence incriminating the appellant (primarily a glove bearing traces of firearms residue and of the appellant's DNA) had been found in the appellant's home during a search carried on foot of a search warrant issued pursuant to section 29 of the Offences Against the State Act 1939 (as substituted by the Criminal Justice (Search Warrants) Act 2012, enacted in the wake of this Court's decision in *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266). At trial, the appellant challenged the warrant on the basis that the detective superintendent who had issued the warrant was not independent of the investigation (a requirement of the section 29). The trial judge rejected the challenge to the warrant and admitted the evidence. The Court of Appeal rejected the appellant's appeal. On the appellant's further appeal to this Court, the Court, by a majority, held that the search warrant was invalid: see the judgment of O' Malley J (with which Dunne and Baker JJ agreed). However, all the members of the Court agreed that, even so, the appeal should be dismissed.

63. In her judgment, O' Malley J noted that *Sheehan* had approved the formulation in *Fitzpatrick* as the correct approach where an appellate court was dealing with the admission of evidence, and also noted that in neither case did the evidence at issue play a "*legally necessary role in the verdict of the jury*" (as where corroborative evidence was legally required) and that in both cases the outcome was clear, in that it was only necessary for the appellate court to determine whether there would have been a chance of acquittal if the jury had not been invited to draw inferences (para 70). But, she went on, the issue before the Court was more complex in that, even if the trial judge had ruled that the search warrant was invalid, the evidence might nonetheless have been admissible pursuant to *JC* (and it is clear from the discussion that O' Malley J was inclined to agree with the view of the Court of Appeal that the evidence would have been admitted). However, on the premise that the evidence might in fact have been excluded, it was "*necessary to consider whether the appellant could then have been acquitted*." In her view, that "*could not have been much more than a remote possibility*" even without the evidence obtained on the search. Noting the other evidence against the appellant. O' Malley J concluded that it "*was more than sufficient for a conviction, even without the glove*" (at para 75). In stating that the other evidence was more than sufficient for a conviction, O' Malley J clearly meant that the evidence of guilt was such as to exclude any reasonable possibility of acquittal, not merely that the admissible evidence was sufficient for a jury to convict. It was on that basis that there was no miscarriage of justice. Charleton and Woulfe JJ agreed with O' Malley J's judgment on this issue.

64. The proviso was also considered in *Quirke (No 2)*. The Court had earlier held that a search warrant obtained by the Gardaí did not authorise the searching of the appellant's computer devices ([2023] IESC 5, [2023] 1 ILRM 225). Evidence obtained from those devices, disclosing that the accused had carried out internet searches relating to the decomposition of the human body and DNA, had been led by the prosecution at trial. An issue then arose as to whether, if that evidence ought to have been excluded (and the Court ultimately concluded, applying *JC*, that the evidence was admissible), the proviso might nonetheless apply.

65. Charleton J (with whose judgment O' Donnell CJ and Dunne, O' Malley, Baker, Woulfe and Murray JJ agreed) stated that the test was that "*no injustice has been done*." *Fitzpatrick* and *Behan* suggested that, where there was "*a departure from the essential requirement of the law that goes to the root of the proceedings*", the proviso could not be applied (para 9, at page 451). The security of the conviction had to be judged *"in the context of the nature of the evidence presented, whether it should have been excluded, and whether that evidence is inescapably so integral to the jury's verdict of guilty of murder that a claim that no injustice has been done is impossible*" (para 10).

66. The evidence in *Quirke* was circumstantial. Having identified the various strands of the prosecution case, it was, in his view, "*inescapable"* that the computer evidence was *"more than a throw-away strand incapable of carrying any significant weight*". It was thus "*impossible to claim on the basis of the proviso in the 1993 Act that the admission of the computer evidence as to the accused's interest, if unlawful at the trial, could not have caused any injustice*" Para 15). Rather:

"*it was an integral strand to the circumstances presented by the prosecution as being proof of guilt. While, perhaps in other cases, a strand that could be characterised as insignificant might enable an appeal court to apply the proviso if wrongly admitted in evidence, this was a significant element of the prosecution case and incapable of extraction from the web of proof which the jury accepted as enabling a guilty verdict against the accused*" (para 15, at pages 452-453)

67. Turning to Australia, there have been criminal appeal statutes in force in the various States since the late 19th Century/early 20th Century, all of which included some version of the proviso. The decision of the Privy Council in *Makin v Attorney General for New South Wales* [1894] AC 57 - which is still cited in the context of the admissibility of similar fact evidence - involved consideration of an early such provision, section 423 of the (NSW) Criminal Law Amendment Act 1883. That section provided that no conviction should be reversed "*unless for some substantial wrong or other miscarriage of justice*." In *Makin*, the defendants were accused of murdering an infant committed into their care on foot of their representations that they would adopt the child. The prosecution was permitted to lead evidence of other occasions when infants had been committed to the care of the defendants on the same basis and had also ended up dead. The Judicial Committee held that such evidence relating to other infants was relevant and admissible. One of the points reserved by the judge at the trial related to the application of section 423 and the Committee proceeded to consider that issue notwithstanding its finding that the evidence had been admissible.. The prosecution had argued that, even without the disputed evidence, there was sufficient evidence to

convict the accused. However, the Board considered that any finding to that effect would subvert the role of the jury – the verdict would become the verdict of judges rather than of the jury, without an opportunity of seeing the witnesses - and characterised as "*startling*" the possibility that the court might let the judgment and sentence stand where the *"evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses."* The Board did not think it could properly be said that there had been no substantial wrong or miscarriage of justice "*where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them"* (at 69-70).

68. The statutory provisions that have been considered by the High Court of Australia generally make provision for the court to allow an appeal if, in its opinion, the verdict of the jury was unreasonable or cannot be supported having regard to the evidence, or should be set aside on the ground of the wrong decision of any question of law, or that on any other ground there was "*a miscarriage of justice*", provided that the court may dismiss the appeal if it considers that "*no substantial miscarriage of justice has actually occurred"*: see, for example, section 6 of the Criminal Appeal Act 1912 from New South Wales.

69. Section 6 was the provision at issue in *Wilde v The Queen* (1988) 164 CLR 365, which was referred to in *Sheehan*. Again, it concerned the mistaken admission of similar fact

evidence. A sharply divided court applied the proviso and dismissed the appeal. The majority (Brennan, Dawson and Toohey JJ) considered that the threshold test involved asking whether it could be said that, had there been no error, an appropriately instructed jury, acting reasonably on the evidence before them and applying the correct onus and standard of proof, "*would inevitably have convicted*." If not, the conviction had to be set aside because "*the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed*." The question of whether the jury would have inevitably convicted was answered by the Court of Criminal Appeal according to its assessment of the evidence (joint judgment, at 372). Some errors were undoubtedly so fundamental as to involve a substantial miscarriage of justice: the proviso had "*no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings*" (at 373). But the terms of the proviso did not, in principle, exclude its application even where there was misdirection as to the law or the wrongful admission of evidence. Whether the wrongful admission of evidence involved a fundamental error would depend on the significance of the wrongly admitted evidence.

70. In dissent, Deane J considered that the convictions were "*fatally flawed"* and so in his view, it was not open to the court to affirm the conviction even if "*at this distance from the impact of live evidence and the atmosphere of the trial*" the case against the accused appeared to have been "*an overwhelmingly strong one*" (376). Gaudron J also dissented. Citing *Makin*, he was not prepared to accept that the question which arose when there

was an error of law in the course of a trial resulting in a wrongful statement of the legal principles relevant to the jury's consideration of its verdict or the receipt of inadmissible evidence or the exclusion of admissible evidence was ever to be answered by reference to an appellate court's view as to the strength of the prosecution case (at 382). That, in his view, would be tantamount to the accused being tried with the appellate court acting as the tribunal of fact which would clearly contravene the fundamental precept that guilt should be decided by the jury (383-384).

71. Subsequently, in *Weiss v The Queen* (2005) 224 CLR 300 – an appeal from Victoria in which evidence prejudicial to the accused had been wrongly admitted - the High Court emphasised the primacy of the language of the proviso (in section 568(1) of the Crimes Act 1958 (Vic)). It rejected any suggestion that the proviso did not apply where inadmissible evidence had been heard or that in such cases the accused had any "*right*" to a verdict of a jury rather than a verdict of an appellate court. In the court's view, *Makin* did not go so far as to establish any such proposition and did not exclude the application of the proviso where, taken as a whole, the record of the trial revealed that the accused was shown, beyond reasonable doubt, to be guilty of the offence charged (at page 312). There was in the court's view a risk that references in the authorities to whether a conviction was "*inevitable*" or whether a "*real chance*" of acquittal had been lost could mask the nature of the appellate court's task in applying the proviso (313). The question was not what the jury would have done: rather the court's task was to decide the appeal and decide for itself whether a substantial miscarriage of justice had occurred (314). That required the appellate court to make its own independent and objective assessment of the evidence and determine whether, making "*due allowance*"

for the limitations that exist in the case of an appellate court proceeding on the trial record, the accused was proved guilty beyond reasonable doubt **(**page 316). One "*negative proposition*" was clear, which was it could *not* be said that no substantial miscarriage of justice had actually occurred unless the appellate court was persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the guilt of the accused (317). While there would be cases where it would be proper to allow an appeal, even where the appellate court was so persuaded, such as cases where there had been a significant denial of procedural fairness at trial, the court did not consider it necessary to consider that issue further on the facts. Ultimately, the High Court remitted the appeal to the Court of Appeal for further consideration.

72. *Kalbasi v State of Western Australia* (2018) 264 CLR 62 was also cited in *Sheehan*. It involved a misdirection as to the application of a statutory presumption in a drugs prosecution. The effect of that misdirection was that the jury was wrongly directed that in the event that they were satisfied that the accused had attempted to take possession of certain drugs, it was to be presumed that such possession was for the purpose of sale or supply. The majority of the court (Kiefel CJ and Bell, Keane and Gaudron JJ) nonetheless dismissed the appeal on the basis that the Court of Appeal had correctly reasoned that the evidence compelled the conclusion that it was the accused's intention to sell or supply the drugs. Any irregularity or failure to comply strictly with the rules of procedure or evidence was a "*miscarriage of justice"* within the statute (*Kalbasi* was concerned with section 30 of the Criminal Appeals Act 2004 (WA) which was an updated version of the common form criminal appeal statute considered in *Wilde* and *Weiss*), but the determination of whether, notwithstanding such an error, there had been

no "*substantial miscarriage of justice*" was one committed to the appellate court. In the majority's view, that determination did not turn on the appellate court's estimate of the verdict that a jury – whether the jury that tried the accused or a hypothetical reasonable jury – might have returned if the error had not occurred. The concepts of a "*lost chance of acquittal*" or its converse, the "*inevitability of conviction*" did not serve as tests because the appellate court was not predicting the outcome of a hypothetical error-free trial but was rather deciding whether, notwithstanding error, guilt beyond reasonable doubt was proved on the admissible evidence adduced at the trial (at pages 69-70). Certain errors – for instance cases where guilt turned on contested credibility, where there had been a failure to leave a defence to the jury or a misdirection on an element of liability - could prevent the appellate court from being able to assess guilt and in such cases the court might not be satisfied that guilt had been proved, regardless of the apparent strength of the prosecution case (71**)**. But the error at issue did not have that effect in the majority's view.

73. The other members of the court would have quashed the conviction. In Gageler J's view, the ultimate test of whether there was a "*substantial miscarriage of justice*" was whether the appellant had been denied "*a chance of acquittal fairly open to him or her*" or that there was some other departure from a trial according to law that warranted such a description. Insofar as that involved the appellate court making its own assessment of the evidence, that was not because the appellate court substituted itself for the jury but because it was in effect acting as a proxy for a reasonable jury. In his judgment Nettle J emphasised that the statutory test was whether there had been no substantial miscarriage of justice. The appellate court's satisfaction of guilt beyond a reasonable

doubt was a necessary condition for the engagement of the proviso but, depending on the circumstances, "*it may not be open to an appellate court to be satisfied of guilt beyond reasonable doubt if the processes designed to allow the jury's fair assessment of the issues have not been followed*." That did not necessarily require an error so serious as to warrant description as a radical departure from the requirements of a fair trial or as a fundamental flaw in the proceedings. Finally, Edelman J considered that it was well-established that the *Weiss* "*negative proposition*" was not always sufficient for the proviso to apply. Certain errors in the trial process were sufficiently fundamental as to be sufficient, in and of themselves, to warrant a conclusion that there had been a substantial miscarriage of justice. The error at issue was, in his case, such an error, amounting as it did to a "*serious breach of the presuppositions of the trial.*"

74. These Australian decisions are not, of course, of any binding effect in this jurisdiction but they nonetheless appear to me to be helpful, reflecting as they do a considered engagement with the proviso over many decades. Furthermore, it seems clear that these decisions have influenced the Irish authorities which I have already considered. That the Australian statutes refer to a "*substantial miscarriage of justice*", and not (as is the case in this jurisdiction) to a "*miscarriage of justice*" *simpliciter*, might appear to suggest a higher threshold. But that reflects the fact that the common form criminal appeal statutes enacted in Australia, following in this respect section 6 of the Criminal Appeal Act 1907, provided that a "*miscarriage of justice*" was a basis for allowing an appeal. That potentially encompassed any form of error, however insignificant. Expressing the proviso in terms of a "*substantial miscarriage of justice*" was intended to ensure that not every error should necessarily result in the setting aside of a

conviction: see the discussion of the so-called "*Exchequer rule*" in *Weiss*. In contrast to the 1907 Act, the statutory provisions governing criminal appeals in this jurisdiction do not prescribe the grounds on which an appeal may be allowed and make no reference in that context to a "*miscarriage of justice.*" In referring to a "*miscarriage of justice*" in the proviso, the Oireachtas plainly intended that it mean something more than an error at trial, however harmless. Otherwise, the proviso would be deprived of any effect: establishing error would *ipso facto* exclude its application. That such is not the correct interpretation of the proviso is evident from the authorities and it is also clear from the authorities here that the threshold is effectively the same as in Australia and as previously applied in England and Wales, notwithstanding the differences in statutory language.

75. Drawing together what is stated in the authorities, the following propositions may be advanced:

(1) In every case, the ultimate question presented by section 3(1)(a) is whether, notwithstanding that an appeal has raised a point that might be decided in favour of the appellant, "*no miscarriage of justice has actually occurred*". That is the sole statutory test.

(2) As a matter of hypothesis, the *proviso* is engaged only where it is established that an error has occurred at trial. Establishing error is a necessary but not necessarily sufficient condition to succeeding in an appeal: not every error will warrant the quashing of a conviction.

(3) The assessment of whether, notwithstanding such error, no "*miscarriage of justice*" has occurred, is one committed to the appellate courts by the Oireachtas.

(4) Such an assessment necessarily involves the appellate court making an assessment of the nature of the error and its impact on the trial and on the jury's verdict. That is not unique to the proviso: appellate courts must engage in a similar assessment, for instance, when considering the admission of new evidence on appeal (see, for example, this Court's decision in *People (DPP) v DC* [2021] IESC 17, [2021] 3 IR 409) or when considering the consequences of a failure to make disclosure (see *People (DPP) v McCarthy* [2007] IECCA 64, [2008] 3 IR 1 and *People (DPP) v McKevitt* [2008] IESC 51, [2009] 1 IR 525)).

(5) No class or category of error is *a priori* excluded from the application of the *proviso*.

(6) However, where the error involves "*a departure from the essential requirements of the law .. that goes to the root of the proceedings*" there will be no scope for the application of the *proviso* and the appeal must be allowed (*Fitzpatrick*, para 46; *Sheehan*, para 138, *Quirke (No 2)*, para 9). *Forsey* can be seen as an example of such of an error (though it is clear from the observations of O' Malley J that she did not exclude the possibility that there might be clear cases where the evidence against the accused was so strong that no real injustice could be said to have occurred, so that the proviso might be applied even though fundamentally incorrect

jury instructions had been given). *EC* provides another example – there the issue of delay was so fundamental in those proceedings that the trial judge's failure to give a delay warning went to the essential validity of the verdicts and required the convictions to be quashed. Any denial of fundamental fair trial rights, such as the right to be informed of the charge, the right to be notified of the hearing, the right to legal representation; the right to cross-examine; the right to call evidence and the right to follow the proceedings (by the provision of any necessary interpretation/translation services), would clearly come into this category. These rights are directed to ensuring a fair process for the assessment of guilt by a jury – enshrined in the constitutional guarantee of a trial in due course of law – and any denial of such fundamental procedural rights is liable to fatally undermine the fairness of that assessment.

(7) Subject to (6) above – and that is a significant caveat - where the *proviso* is relied on the appellate court must consider the impact of the error on the outcome of the trial i.e. on the verdict of the jury (or, as the case may be, the verdict of the Special Criminal Court) and where it is clear that, absent the error, a guilty verdict would have been returned in any event, the *proviso* should normally be applied and the appeal dismissed.

(8) Where it is not clear that the outcome of the trial would have been the same, the *proviso* cannot apply (this is the "*negative proposition*" referred to in the Australian cases; although that language has not been used there, it appears to me to be entirely consistent with the approach taken in this jurisdiction).

(9) There has been much contentious debate in the Australian authorities as to whether the appellate court's task is to be carried by reference to its own assessment of guilt or whether it involves asking whether, absent the error, a hypothetical *"reasonable jury*" would have convicted the accused. In most if not all cases, one would expect those two approaches to produce the same result.

(10) In any event, it seems clear from the weight of the Irish authorities that the essential issue is whether a properly directed and reasonable jury, on the evidence properly admissible, would "*without doubt*" have convicted the accused. If that cannot be said, then the accused has lost a real chance of acquittal and so an injustice has been done requiring the conviction to be quashed. However, the chance of acquittal must be real rather than remote or fanciful.

(11) That assessment must be carried out by the appellate court, effectively acting as a proxy for the reasonable jury. The assessment is an objective one, involving an assessment of how a reasonable jury, properly instructed, would decide: it is not directed at measuring the impact of the error on the subjective assessment of the actual trial jury, which the appellate court has no way of knowing. In making its assessment, the appellate court proceeds on the basis that any reasonable doubt experienced by it is one which a reasonable jury would experience and, conversely, that, if it considers that the evidence leaves no room for doubt, a reasonable jury would convict.

(12) Notwithstanding the decision of the Privy Council in *Makin*, the *proviso* is capable of applying where the error at trial involved the admission of inadmissible evidence. So much is clear from *Fitzpatrick*, *Sheehan*, *Behan* and *Quirke (No 2)*.

(13) Even so, an appellate court must be cautious in applying the *proviso* to this category of error. The essential question will be whether the admissible evidence could have left a properly directed and reasonable jury with a reasonable doubt as to the guilt of the accused or, to put the same question the other way, whether the admissible evidence demonstrates the guilt of the accused beyond reasonable doubt. Caution is required because the assessment of evidence is quintessentially a jury function. That is a fundamental tenet of our criminal justice system (though, as I have already observed, appellate courts are required to assess evidence in a wide variety of circumstances). It is only in clear cases that the *proviso* should be applied where the error at trial involves the admission of inadmissible and prejudicial evidence.

(14) The exercise will, in every case, be highly fact sensitive. That is illustrated by the differing outcomes of *Behan* and *Quirke (No 2)* on this point. The evidence wrongly admitted in *Behan* – principally the glove bearing firearms residue and traces of the accused's DNA – was significantly prejudicial to the accused. However, this Court was satisfied that even if that evidence had been excluded, the accused would have had not much more than a remote possibility of being acquitted: the admissible evidence against him was, in this Court's assessment, such as to lead inevitably to a conviction.

(15) *Quirke (No 2)* fell on the other side of the line in that the evidence of the internet searches carried out by the accused was "*inescapably so integral to the jury's verdict of guilty of murder that a claim that no injustice has been done is impossible"* (at para 10). In those circumstances, and having regard to the significance of that evidence and the nature of the other evidence against the accused, it was clearly not possible to say that, if the internet search evidence was inadmissible (and, as already noted, the Court ultimately concluded that it was admissible) the admissible evidence was such that a reasonable jury would "*no doubt*" have convicted. Therefore it followed that it could not be said that, if the evidence been found to be inadmissible, there was no miscarriage of justice.

(16)The prosecution case in *Quirke* depended on circumstantial evidence (in contrast to *Behan*) and the observations of Charleton J indicate that, where that is the case – and this is, of course such a case - an appellate court should be particularly cautious in applying the *proviso*.

The Arguments

76. The Appellant says that an appellate court should not make its own value judgment on guilt or innocence. Unlike the position in *Sheehan* and *Behan*, where, it is said, the outcome was clear and the accused had not lost a chance of acquittal, here the disputed traffic and location data here was clearly of considerable import. The Appellant criticises the Court of Appeal for failing to engage with the relevance of the traffic and

location data evidence. In his written submissions, citing *Quirke No 2*, the Appellant says that the Court of Appeal both failed to consider the evidence in context and failed to *"engage with <u>all</u> of the relevant strands of evidence that would have been excluded"* (original emphasis). Here, the Appellant emphasises, there was no evidence of cause of death and clearly suicide was a possibility and so the admission of strands of evidence from which, on the prosecution case, the jury were invited to infer that the Appellant had murdered Ms O' Hara was particularly significant.

77. Mr Bowman SC dealt with this aspect of the appeal. He suggested in his submissions that the Court of Appeal was equivocal on the significance of the traffic and location data, referring in that context to what was said at para 125 of its judgment (where the court observed that the Director must have concluded that the "*icing*" – the disputed traffic and location data evidence – *"significantly enhanced the cake*", given that she had elected to introduce that evidence knowing that it would face a significant legal challenge). Mr Bowman accepted that the Trial Judge had not said a great deal about the evidence in his charge but he brought the Court to what the Judge had said about Mr Dwyer's movements on the afternoon/evening of 21 August 2012, relying on the prosecution evidence as to the location of Mr Dwyer's work phone.[12] Prosecuting counsel had also, in his closing, referred to that evidence and to the text message that had been sent from the "*Master*" phone to the "*Slave*" phone at 5 pm that day (which read "*I am heading out to the spot now to double check*").[13] That both counsel and the

[12] Day 44, at pages 50 & 80.

[13] On Day 36, Ms Skedd gave evidence that Mr Dwyer's work phone had connected through cells at Edmondstown Golf Course (in the vicinity of the M50) at 18.26 and again at 18.28 (at pages 47-48). Ms Skedd also gave evidence

Judge had referred to that evidence was, Mr Bowman suggested, an indicator of its significance. Mr Bowman accepted that there was other evidence establishing Mr Dwyer's movements and location at various other times. He also accepted that there was other evidence connecting the green phone and the "*Master*" phone to Mr Dwyer and acknowledged that, as a matter of fact, the Gardaí identified Mr Dwyer as a suspect, and had attributed the other phones to him, ever before they had access to the traffic and location data relating to the work phone. On his submission, however, access to that data had enabled the prosecution to give evidence (through Ms Skedd) that there had not been a single occasion when the location of the work phone and the location of the green phone and "*Master*" phone had diverged and had enabled the prosecution to assert that the phones had "*shadowed*" his client. The location of the work phone – which the prosecution was able to trace because of the data accessed under the 2011 Act – was the "*known variable*" or "*baseline*" point for the purposes of comparing the location of the other phones and had enabled the prosecution to say that, after carrying out a "*day-to-day analysis*", the locations were consistent and revealed no discrepancy or separation. This was, Mr Bowman submitted, important evidence in the context of the attribution of the other phones (the green phone and the "*Master*" phone) to Mr Dwyer which attribution was "*absolutely key*" in the case against his client.

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that the Master phone was connected to the network through a cell at Fitzwilliam, in the South City Centre, when the *"I am heading out …"* message was sent at 5pm. It was the prosecution case that Mr Dwyer had driven out to check out the location where he intended to kill Ms O' Hara on 21 August. Unlike other instances where the prosecution relied on location data/cell site analysis relating to the work phone in order to establish Mr Dwyer's location, there was no independent evidence of Mr Dwyer's location on the evening of 21 August.

78. When in the course of argument it was put to him that there had been other evidence for such attribution and that the Court of Appeal had characterised the disputed traffic and location data as being of only limited value, Mr Bowman disputed that characterisation. He accepted that an appellate court was required by section 3(1) of the 1993 Act to assess the significance of the evidence and that that was ultimately a matter of degree. But, he emphasised, the disputed evidence here was part of the "*overall tapestry*" and was inextricably interwoven with the other evidence going to the issue of attribution. It was not "*freestanding*" and could not readily be "*carved out*".

79. In her written submissions, the Director suggested that the Appellant's submissions were "*noticeably light on any analysis of the forensic and evidential significance of the call data records*". She said that the "*primary purpose*" of the Traffic and location data evidence was to show a connection between the Appellant and the green phone and the "*Master*" phone. There were, according to the Director, occasions when the movement of the work phone and one or other of those phones was so synchronised as to allow an inference to be drawn as to the Appellant having been in possession of both. But, she says, the same conclusion was established with "*irresistible and irrefutable force*" by an analysis of the content of the available text messages and other evidence which connected such content to the Appellant. The Director's submissions contain a detailed analysis of the evidence connecting the Appellant to the green phone and the "*Master*" phone respectively. The value of the disputed traffic and location data was merely to confirm "*other compelling evidence*" and it was the content of the text messages, not the disputed evidence, that was the "*cornerstone of the prosecution case*". In any event, with only one exception, the location evidence was duplicated by other independent

evidence. The test under section 3 was "*that no injustice has been done"* (citing *Quirke (No 2)* and, the Director said, the admission of the disputed evidence could not have caused an injustice as it was of very limited value.

80. Ms Lawlor SC dealt with this aspect of the appeal at the hearing. . She said that the content of the text messages established "*beyond any possible coincidence*" the Appellant's connection to the other phones, referring back to the analysis in the Director's written submissions. There was, she suggested, "*overwhelming evidence*" linking Mr Dwyer to the texts. It did not follow from the fact that the Director had chosen to rely on the disputed evidence that it was integral to the conviction. Asked how the Court could assess the extra weight that the jury may have placed on the disputed evidence and how it might separate that evidence out if wrongly admitted, Ms Lawlor invited the Court to consider whether there was (admissible) evidence that proved beyond reasonable doubt that Mr Dwyer was the controller and the person connected with the green phone and the "*Master*" phone. In her submission, the "*inescapable conclusion*" from all the other evidence relied on by the prosecution (particularly the very personal content of the text messages) was that those phones should indeed be attributed to Mr Dwyer. The disputed evidence merely confirmed that attribution. The messages were the core of the prosecution case and, once the messages were attributed to Mr Dwyer, that, in her submission, was sufficient to establish the guilt of Mr Dwyer.

The Judgment of the Court of Appeal on the Proviso Issue

81. In light of the Appellant's criticisms of its analysis, it is appropriate to look again at the Court of Appeal's treatment of the Proviso Issue. It should be observed immediately that its judgment pre-dated *Quirke (No 2*) and so the Court of Appeal cannot fairly be criticised for not citing that decision or structuring its analysis by reference to it. In any event, *Quirke (No 2)* does not establish any new test but rather involves the application of the principles established in the prior caselaw to the particular circumstances of that case. Secondly, it should be noted that while the section of the Court of Appeal's judgment headed "*The Proviso*" is relatively short, it must be read in conjunction with the court's earlier analysis of the evidence against the accused, including a detailed analysis of the text messages (Judgment, paras 55 – 74) and its analysis of the independent evidence (i.e. evidence other than the disputed traffic and location data relating to the work phone) establishing Mr Dwyer's movements and location at various times (Judgment, paras 77-81) and its discussion of the significance of the disputed traffic and location data (Judgment, paras 116-123).

82. It was in light of that analysis, and after considering *Fitzpatrick* and *Sheehan*, that the Court of Appeal concluded that the admission of the "*very limited*" call data record evidence "*could not conceivably be regard as giving rise to a miscarriage of justice"* and that "*there had been no lost chance of acquittal."* (para 141)

83. The onus is on the Appellant to demonstrate that that conclusion was erroneous.

Conclusions on the Proviso Issue

84. It is evident from a review of the transcripts of the trial (and I have reviewed all those transcripts) that the Garda investigation into Ms O' Hara's disappearance and death was meticulous and exhaustive. That was reflected in the evidence adduced at the trial, both through the testimony of the very many witnesses called, the many witness statements admitted into evidence by agreement and the very many exhibits proved or admitted.

85. It is evident from the trial record that the Appellant was identified as a suspect relatively early in the investigation and ever before the Gardaí obtained access to the traffic and location data relating to his work phone. He was identified as a suspect as a result of analysis of traffic and location data relating to the "*Master*" phone carried out by Ms Sarah Skedd, a crime and policy analyst employed by An Garda Síochána who gave evidence over a number of days. Ms Skedd noticed that the data indicated that that phone was generally active in the Dublin 2 area between Monday and Friday whereas in the evenings and at the weekends its activity tended to be centred in South County Dublin. She hypothesised that the user of the phone worked in the City Centre and resided in South County Dublin. She also noticed that, on 2 July 2022, the phone connected to cells in Galway (in the morning) and in Dublin 2 (in the afternoon). Surmising that the user of the phone had travelled from Galway to Dublin on the motorway, the toll company records for the toll booths on the M4 and M6 were obtained by the Gardaí and Ms Skedd examined the records to ascertain whether any of the cars passing through the two toll booths was registered to a resident of South County Dublin and as a result she identified the Appellant as the registered owner of one of the cars that had passed through the toll booths.

86. There was a substantial amount of evidence linking the Appellant to Ms O' Hara. The billing records relating to the work phone (which had been retained by the Appellant's employer, who provided them to the Gardaí) indicated that between January 2008 and December 2009 the Appellant had sent 847 text messages to Ms O' Hara's number (there was no evidence of messages the other way: the billing records did not provide that information and it was unavailable from the mobile phone companies due to the passage of time). The Appellant was identified from CCTV footage from Ms O' Hara's apartment complex on a number of occasions, including on 13 and 15 August 2012 when he was recording leaving the complex carrying a bag identified as belonging to Ms O' Hara which closely resembled a bag recovered from the Vartry Reservoir in September 2013. Mr Dwyer's DNA was identified from semen found on a mattress in Ms O' Hara's apartment. There was a wealth of evidence from a range of sources (including very graphic videos recovered by the Gardaí from various electronic devices as described in detail in evidence) that established that the Appellant and Ms O' Hara had been in a sexual relationship and the violent nature of that relationship, which included the use of knives by the Appellant on Ms O' Hara. Ultimately, the Appellant accepted in interview that he had a BDSM relationship with Ms O' Hara, while denying that he was responsible for her death.

87. There was also substantial evidence that, on the prosecution's case, demonstrated that the Appellant was obsessed with knives and with the prospect of torturing and stabbing a woman to death during sex. That evidence included evidence from the Appellant's former partner and also included documents recovered by the Gardaí from devices

connected to the Appellant, particularly the "*Killing Darci*" and "*Jenny's First Rape*" documents proved at trial.

88. However, the "*cornerstone*" of the prosecution case against the Appellant was the content and timing of the text messages exchanged between the green phone and Ms O' Hara's phone in the period between 25 March 2011 and 12 July 2012 (no further messages were sent through that channel after that date) and those exchanged between the "*Master*" phone and the "*Slave*" *phone* in the period from 1 December 2011 to 22 August 2012.

89. In argument on this appeal, Ms Lawlor submitted that, once it was accepted that Mr Dwyer was the author of the messages sent from the green phone and the "*Master*" phone, it was inevitable that the jury would convict. The attribution of those messages to the Appellant was therefore an essential building block of the prosecution case.

90. In his closing speech, Mr Guerin SC (for the Director) laid out in detail the evidence linking the green phone to the Appellant.[14] That evidence is also summarised in the Court of Appeal's judgment. It included the following:

- The fact that (i) "*Goroon Caisholm*" (the name given by the person who had purchased the phone on 25 March 2011) appeared to be a slight modification of the name of a person known to the Appellant, Mr Gordon Chisholm (who

[14] Day 41, page 5 and following.

gave evidence at trial); (ii) the subscriber's address given to the store very closely resembled the address of the Appellant's sister (who also gave evidence) and (iii) the mobile number given by the purchaser was, but for a different prefix, the same as the number of the work phone.

- An address book belonging to Ms O' Hara contained a handwritten note "*Graham 0831103474*" (the number of the green phone).

- A calendar entry for 30 June 2011 found on Ms O' Hara's MacBook read "*Graham's phone number is 083110374"*.

- There was evidence of the green phone being topped up on different occasions in locations near Mr Dwyer's place of work or residence.

- The messages sent from the green phone disclosed events that closely mapped events happening in the Appellant's life, including landmark personal and family events, events in his professional life and events relating to his hobby of flying model aircraft (all of which were proved in evidence).[eg messages 103 - 104 (relating to the birth of a child of the Appellant); 1382-1389 (pay cut at work/results of a flying competition); 2199-2202 (trip to Poland).][15]

[15] The numbers refer to the numbers assigned to the messages in exhibit 318.

- Evidence as to the location of the green phone at places/times consistent with the presence of the Appellant, as established by independent evidence (as for instance on 3 April 2012 and 23 June 2012, the latter being particularly significant given that texts were exchanged between Ms O' Hara and the green phone regarding a visit to her apartment that evening (messages 1471 - 1487) and there was CCTV footage showing the subsequent arrival of the Appellant there).

91. That Ms O' Hara was the user of the "*Slave*" phone does not appear to have been disputed at trial. The prosecution led evidence that the phone had been topped up in the newsagent in which Ms O' Hara worked. Messages sent from the "*Slave*" phone matched events in Ms O' Hara's life, the details of which were provided in evidence:: [messages 2389, 2455 (volunteering in Tall Ships event); messages 2418 & 2486 – 2487 (hospitalisation of Ms O' Hara). In addition, the location data relating to the "*Slave*" phone was consistent only with it being Ms O' Hara's, including the data establishing its location near Shanganagh Park at 5.30/6pm on 22 August 2012 consistent with the sightings of Ms O' Hara there at that time.[16]

92. There were also numerous links between the Appellant and the "*Master*" phone detailed in Mr Guerin's closing and summarised in the Court of Appeal's judgment, including:

[16] Evidence of Ms Skedd on Day 36, page 54. No further contact was received from the "*Slave*" phone after 6pm. The "*Master*" phone was also located at that area at that time: see again Day 36, pages 54-56.

- The discussion in the text messages between the green phone and Ms O' Hara about the purchase of an 086 phone by the user of the green phone (eg messages 2201-2202).

- The continuity in tone and content of the messages exchanged between the green phone and Ms O' Hara's phone and those exchanged between the "*Master*" and "*Slave*" phones (including an ongoing discussion about tattoos).

- Events mentioned by the user of the "Master" phone were matched to events in Mr Dwyer's life [eg message 2342 (absence at "*a family thing this weekend*")]

- The fact that on 3 July the "*Master*" phone was topped up in a shop around the corner from the offices of An Bord Pleanála on Marlborough Street in circumstances where it was proved in evidence that Mr Dwyer had attended an oral hearing in the Bord's offices that day.

- Evidence as to the location of the "*Master*" phone at places/times consistent with the presence of Mr Dwyer, as established by independent evidence. The location of the phone in the vicinity of An Bord Pleanála's offices on 3 July 2012 is one instance. Its locations on 4 July 2012 (when Mr Dwyer travelled from Galway to Dublin – the journey that led to him first being identified as a suspect) is another. On 5 July 2012, the "*Master*" was proved to have connected to a cell near Dorrian's Hotel in Ballyshannon, County Donegal and there was evidence from the hotel that Mr Dwyer had stayed there that night, as well as

evidence that Mr Dwyer had travelled south on the M3 (as for instance he had on 3 April 2012 and 23 June 2012).

- There was evidence connecting the "*Master*" phone to visits made by Mr Dwyer to Belarmine on 11 July and 15 August 2012. On each occasion, the "*Master*" phone called the entry code for access to the complex and on each occasion CCTV footage proved in evidence showed Mr Dwyer entering and leaving. In addition, on 15 August, 2012 there was a series of messages between the "*Master*" and "*Slave*" phones about a visit that evening the detail and timing of which matched the CCTV evidence showing Mr Dwyer's arrival (messages 2372-2388). This was, in itself, highly probative evidence in terms of the attribution of the "*Master*" phone to the Appellant (as well as confirming the attribution of the "*Slave*" phone to Ms O' Hara)

93. There is no doubt that, in her evidence, Ms Skedd gave many instances of when the work phone and (as the case may be) the green phone or "*Master*" phone were in the same location and gave evidence that the traffic and location data did not disclose any occasion when the phones were in active use in different locations (Day 32, page 17). That evidence was relied upon by Mr Guerin SC in his closing (Day 41, pages 19-22). That is the evidence identified by Mr Bowman SC in his submissions as establishing that the green phone and "*Master*" had "*shadowed*" the Appellant. He submits that this evidence must have been significant as far as the jury was concerned and, in that context, makes the point that it must have been significant so far as the Director was

concerned, given that she pressed for the admission of that evidence even though she was aware that its admissibility would be strenuously opposed. He also relies in this context on the Trial Judge's reference in his charge to the location of the work phone on the evening of 21 August 2012. In contrast to the other instances referred to by Mr Guerin in his closing, there was no independent evidence of the Appellant's location on the evening of 21 August (though a message from the "*Master*" phone to the "Slave" phone sent at 5 pm on 21 August stated that the user – who on the prosecution's case was Mr Dwyer – was "*heading out to the spot now to double check*").

94. I share the Court of Appeal's view that these are points of substance (Judgment, para 122). But the fact that the prosecution attached significance to this evidence is not determinative of the issue here. In the Court of Appeal's view, the admission of this evidence (the evidence relating to the location of the work phone and the fact that its location was consistent with the location of the green phone and "*Master*" phone whenever they were in active use) did not result in any lost chance of an acquittal. That clearly was because the court took the view that there was sufficient other evidence to establish beyond any reasonable doubt that the green phone and the "*Master*" phone had to be attributed to the Appellant (that being - as Mr Bowman accepted - the issue to which the evidence was directed).

95. The evidence I have briefly summarised at paragraphs 90 - 92 above was not challenged in cross-examination. It was not suggested to the prosecution witnesses (and in particular to Ms Skedd) that the links they had identified between Mr Dwyer and the green phone and the "*Master*" phone did not exist and/or had some exculpatory

explanation. No contrary evidence was called. There was no "*credibility contest*" (a phrase used in some of the Australian authorities). The evidence was not addressed by Counsel in his closing to the jury (beyond expressing confidence that the jury would carefully consider whether to accept the prosecution evidence). That is not a criticism: it simply reflected the reality of the position in which Counsel found himself.

96. It was not suggested by the Appellant that the admission of the traffic and location data relating to the work phone, if inadmissible, amounted to a fundamental error such that, without more, the conviction had to be set aside. Instead – and correctly – Mr Bowman accepted that the assessment here was of degree. For the reasons set out earlier, I agree with Mr Bowman that the court should be cautious in applying the *proviso* where inadmissible evidence has been left go to the jury and should do so only in a clear case. That is particularly so where – as here – the prosecution case was dependent on circumstantial evidence. It would not be appropriate to apply the proviso in this appeal unless it is very clear that the admissible evidence establishes the Appellant's guilt beyond any reasonable doubt.

97. Here, in my view, the position is very clear. Even if the traffic and location data relating to the work was inadmissible – which, for the reasons set out above, it was not - the remaining evidence available to the prosecution was more than sufficient to establish attribution beyond any reasonable doubt. The evidence was in fact overwhelming and unanswerable. The contents of the text messages alone effectively excluded any possibility that the person texting Ms O' Hara from the green phone was anyone other

than the Appellant but that was far from being the only evidence to that effect. The evidence relating to the "*Master*" phone equally left no room for doubt. No reasonable jury hearing such evidence could have had a reasonable doubt that the Appellant was the user of the green phone and the "*Master*" phone (or, for that matter, that Ms O' Hara was the user of the "*Slave*" phone, which as I have said does not appear to have been the subject of dispute). Once those phones (and the messages sent from them) were attributed to the Appellant, the evidence that his work phone was located near the M50 on the evening of 21 August had little or no significance. The evidence established beyond any reasonable doubt that the Appellant met up with the late Ms O' Hara near Shanganagh Park on the evening of 22 August 2012 for the purpose of killing her.

98. It follows, in my view, that there was no question of any lost chance of acquittal here and therefore no *"miscarriage of justice*" within the meaning of the proviso. Accordingly, had I concluded that the traffic and location data was inadmissible, I would have upheld the decision of the Court of Appeal to apply the "*proviso*" and would have dismissed Mr Dwyer's appeal on that basis.

99. I would therefore dismiss the appeal.