AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2024] IESC 39

O'Donnell C.J.
Dunne J.
Charleton J.
O'Malley J.
Hogan J.
Collins J.
Donnelly J.

Between:

THE PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

Respondent

-and-

GRAHAM DWYER

Appellant

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 31st day of July, 2024

Background

1. In August 2012, Ms. Elaine O'Hara disappeared. Her body was later found partially buried in the Dublin mountains in September 2013 by a passer-by who chanced upon the remains. As it happens, a number of items were recovered around the same time by members of An Garda Síochána from the Vartry Reservoir in Co. Wicklow following a report from a member of the public. As Collins J. will recount in the judgment he is about to deliver, these items turned out to be connected to Ms O'Hara. They included a

department store loyalty card which the Gardaí traced to her. Two mobile telephone handsets were also recovered from the Vartry Reservoir, together with various items of clothing which had apparently been worn by Ms. O'Hara on the day of her disappearance.

2. The appellant, Graham Dwyer, was later convicted of the murder of Ms. O'Hara. The case against him rested largely on a considerable volume of circumstantial evidence, along with mobile telephone evidence which had been accessed by members of An Garda Síochána. Specially, at the trial in the Central Criminal Court, the DPP sought to use text messages on these mobile telephones which she attributed to exchanges between the appellant and Ms. O'Hara. The prosecution also relied on traffic and location data relating to those telephones. This data essentially pin-points the geographical location of both the sender and receiver of these telephone messages and calls. All of this is very helpfully set out in the judgment of Collins J., the factual details of which I gratefully adopt for the purposes of my concurring judgment.

The Decision of this Court in *The People (Director of Public Prosecutions) v. Smyth*

3. All of this assists me in coming directly to the essential question in this appeal, namely, whether this telephone evidence is admissible in view of the fact that there can be little doubt but that such evidence was obtained in breach of Article 8 of the EU Charter of Fundamental Rights. Although this Court is again pressed to exclude the admissibility of such evidence on the ground that it was obtained in breach of a higher law such as the Constitution or (as in this instance) the EU Charter of Fundamental Rights, I consider that the question presented here is essentially determined by the very recent judgment of this Court in *The People (Director of Public Prosecutions) v. Smyth* [2024] IESC 23. In that case this Court held telephone metadata which had been accessed by members of An Garda Síochána was lawfully admitted in evidence despite the fact that,

viewed objectively, the evidence had been obtained in breach of Article 8 of the Charter. The importance of that decision is perhaps underscored by the fact that the Court sat in extended composition as a panel of seven judges. If *Smyth* is correctly regarded as binding authority, then that decision is dispositive of this appeal.

4. As it happens, I was the sole dissenter in *Smyth*. In my judgment in that case, I set out at length why I considered that our then applicable domestic regime governing the access to telephone metadata (namely, Communications (Retention of Data) Act 2011) ("the 2011 Act") violated Article 8 of the Charter. This has been established beyond doubt by a decision of the Court of Justice in April 2022 in a case brought by the present appellant: see *GD* (Case C-140/20, EU:C: 2022: 258). I also held – and the majority also agreed – that the admissibility of this evidence in view of the acknowledged breach of the Charter was governed by the principles of national constitutional law enunciated by this Court in The *People (Director of Public Prosecutions) v. JC* [2015] IESC 31, [2017] 1 IR 417. In essence, this was because the principles governing the admissibility of unconstitutionally obtained evidence identified by this Court in *JC* apply also in the case of evidence obtained in breach of the Charter by reason of the application of the EU doctrine of equivalence.

5. I took the view, however, that the legal vulnerability of the 2011 Act had become increasingly manifest since the decision of the Court of Justice in *Digital Rights Ireland Ltd*. (Case C-293/12, EU:C: 2014: 238). In *Digital Rights* the Court of Justice had thereby annulled the provisions of the Data Retention Directive, Directive 2006/24/EC and the 2011 Act had after all been enacted to give effect to the Directive. In those circumstances I concluded (at para. 47) that, viewed objectively, "the continued use of this 2011 Act regime in June 2017 [the date when the telephone metadata at issue in that case was first accessed] was reckless or grossly negligent in the sense described by

Clarke J. in *JC*, even in advance of some formal judicial declaration that it was contrary to EU law". This led me to conclude that the evidence at issue in that case ought to have been excluded by reason of the application of the *JC* principles.

6. In this conclusion I was, as I have just noted, the sole dissentient. The majority of the Court took a different view on the facts to the admissibility of this evidence and proceeded to uphold the conviction. In these circumstances, I find that so far as the present issue is concerned, I must respectfully defer to the majority view of the Court as expressed in *Smyth* and conclude that the disputed evidence at issue here is also admissible in evidence, my earlier dissent in that case notwithstanding. In effect, therefore, the reasoning of the majority in *Smyth* governs the issue of admissibility in this case.

The Decision in *Mogul* and the Doctrine of Precedent

7. The leading authority on the doctrine of precedent in this Court remains that of the judgment of Henchy J. in *Mogul of Ireland Ltd v. Tipperary (NR) County Council* [1976] IR 260. In this case the question was whether the phrase "such injury or damage" in s. 135 of the Grand Jury (Ireland) Act 1836, extended to direct loss only or whether this statutory phrase embraced consequential loss. The plaintiff in that case was a mining company who had suffered loss as a result of the deliberate detonation of explosives at its premises by an assembly of armed intruders. If *consequential loss* was recoverable by virtue of this provision, then the plaintiff stood to obtain an award of some IR£220,000. If, on the other hand, this Court were to follow its earlier decision in *Smith v. Cavan and Monaghan County Councils* [1949] IR 322, then the plaintiff could only recover for direct loss, which in this case came to IR£29,000.

8. In *Mogul* this Court refused, however, to take the opportunity to overrule the previous decision in *Smith.* While Henchy J. agreed that if the matter were *res integra* there

might be much to be said for the proposition that the statutory reference to "such injury or damage" should not be confined to direct loss, he nonetheless insisted, however, that it was generally necessary to go further in a case of this kind and to demonstrate that the earlier judgment was clearly wrong ([1976] IR 260 at 273):

> "We are here concerned with a question of pure statutory interpretation which was fully argued and answered in *Smith's* case after mature consideration. There are no new factors, no shifts in the underlying considerations, no suggestion that the decision has produced untoward results not within the range of the court's foresight. In short, all that has been suggested to justify a rejection of the decision is that it was wrong. Before such a *volte-face* could be justified it would first have to be shown that it was clearly wrong. Otherwise the decision to overrule it might itself become liable to be overruled."

9. This Court, accordingly, refused to overrule its earlier decision in *Smith*. Two reasons were given for this conclusion. First, the earlier decision had not been shown to be "clearly wrong". Second, the disputed question must be shown to have been "fully argued and answered" in the judgment under consideration and this was found to have been true of *Smith*. On this latter point Henchy J. also said ([1976] IR 260 at 272): "A decision of the full Supreme Court… given in a fully argued case *on a consideration of all the relevant materials*, should not normally be overruled merely because a later Court inclines to a different conclusion." (emphasis supplied)

10. This latter observation applies with particular force to the present case. There can be no question at all but that *Smyth* was fully argued and the judgment was delivered following a consideration of all of the relevant materials. To that extent it was quite different from the issue presented in our very recent decision in *Director of Public Prosecutions (O'Grady) v. Hodgins* [2024] IESC 36. In *O'Grady* I took the view that

the earlier Supreme Court decision in *Director of Public Prosecutions v. Freeman* (Unreported, Supreme Court, 25th March 2014) which had been relied on as the governing precedent had been delivered *ex tempore*. It was, moreover, one which had not (or so I concluded) engaged with the earlier authorities from this Court dealing with the question of harmless error in the context of a Road Traffic Act prosecution. To that extent I concluded (in a dissenting judgment) that the precedential status of that earlier ruling of this Court in *Freeman* had thereby been significantly undermined.

11. As I have just indicated, the present case is a very different one. *Smyth* was a decision of a seven-judge court in which all the authorities were carefully considered in a meticulously detailed judgment delivered by Collins J. for the majority. While it is true that the doctrine of precedent should not be applied so rigorously in constitutional cases lest an incorrect judicial decision perpetuate an incorrect interpretation of the Constitution (see, e.g., the comments to this effect of O'Donnell C.J. in *O'Meara v. Minister for Social Protection* [2024] IESC 1), it would nonetheless in these circumstances be importunate of me to insist on adhering to the terms of my dissent in *Smyth* so far as the issues presented in this appeal are concerned.

12. A similar issue arose in *ACC v. Connolly* [2017] IECA 119; [2017] 3 IR 629. This was a case concerning the duty of credit institutions *vis-a-vis* guarantors and the extent to which they were obliged to inform the sureties of the advisability of securing independent legal advice in advance of entering into such guarantees. There had, however, been two earlier decisions of the Court of Appeal on this point. *Bank of Ireland v. Curran* [2016] IECA 399 and *Ulster Bank (Ireland) Ltd -v. De Kretser* [2016] IECA 371. In *De Kretser* I concluded that there was a tenable argument that a bank was under a duty to ensure that the surety was independently advised, but a majority of the Court (Peart and Birmingham JJ.) took a different view. A few weeks later Irvine J.

delivered a judgment in *Curran* for a different panel which unanimously found for the bank on this point.

13. When the same point arose in *Connolly* a few months later, I concluded that I should join the majority judgment of Finlay Geoghegan J. (which judgment was in similar terms to the majority judgment of Birmingham J in *de Kretser* and the judgment of Irvine J. in *Curran*) for reasons of *stare decisis*, saying (at para. 25):

> "…. absent special circumstances, an individual member of this Court should normally yield to the prevailing consensus as reflected in prior decisions of this Court which are clearly on point and which, in the words of Finlay C.J. in *Finucane v. McMahon* [1990] 1 IR 165, 207, represent decisions "reached after the most comprehensive and detailed consideration of all relevant factors.'"

14. I then went on to observe (at para. 26):

> "The decision in *Finucane* had concerned the proper interpretation of the political offence exception in s. 50 of the Extradition Act 1965 in respect of which there had been a range of divergent judicial views expressed by various Supreme Court judges in the case-law leading up to *Finucane*. Even though Finlay C.J. evidently disagreed with the majority view which ultimately emerged from that case-law and in *Finucane* itself, he stated that he was henceforth willing to accept the majority view and adopt it as his own by reason of *stare decisis*. By analogy, therefore, with the approach adopted by Finlay C.J. in *Finucane*, I consider that it would be appropriate that I should accept and adopt this majority view as reflected in *de Kretser* and *Curran* "so that the basic principles underlying it may clearly represent the decision of this Court": see [1990] 1 IR 165, 207."

15. I propose here to adopt the approach to *stare decisis* taken by Finlay C.J. in *Finucane*, which approach I sought to apply in *Connolly*. While I still respectfully adhere to the views which I expressed on this subject in my dissent in *Smyth,* I must nonetheless treat the majority decision in *Smyth* as binding. Given that this is so, this is dispositive of the appeal, and it is unnecessary for me to consider any other argument. If the disputed evidence was admissible in *Smyth* by reference to *JC* principles, then the same is true *a fortiori* of the present case where, after all, the telephone metadata material had been accessed in 2013 even before the decision of the Court of Justice in *Digital Rights Ireland* in April 2014.

16. One could of course persuasively make the case that as the various items of mobile telephony evidence in this case had been accessed prior to the decision in *Digital Rights Ireland* (and other subsequent legal developments which post-dated that decision) it could not be said that the Gardaí (or any other agents of the State) had any reason to suppose *at that point* that the 2011 Act was legally infirm so that they were by reason of that fact alone protected by the application of the *JC* test. But given that the majority has ruled as it has in *Smyth* and as that decision now binds this Court, this is in itself is dispositive of the appeal. It is accordingly unnecessary for me to consider any other question.

Conclusions

17. It is clear that the ultimate issue of the admissibility of the mobile telephony metadata (and other cognate items of telephone evidence described in more detail in the judgment of Collins J.) is governed by this Court's decision in *Smyth*, a decision which was delivered just a few weeks ago. Even though I dissented in that case, I now consider myself bound by the outcome of that decision. I propose accordingly to follow *Smyth*, if only for reasons of *stare decisis*.

18. As the majority in *Smyth* considered that such evidence was admissible, then *a fortiori* in the present case this means that the disputed mobile telephony evidence in the present case must also be regarded as admissible. This, therefore, is sufficient to dispose of the appeal in a manner which is adverse to Mr. Dwyer. It follows, therefore, that I would join the judgment of Collins J. and I would accordingly dismiss the appeal.

19. In these circumstances, it is unnecessary for me to address the question of the possible application of the proviso to s.3(1)(a) of the Criminal Justice Act 1993.