



THE COURT OF APPEAL

APPROVED

Neutral Citation: [2024] IECA 22

Record Number: 2018/0257

Bill No. SCDP 3/2017J

Birmingham P.

Edwards J.

Ní Raifeartaigh J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

FREDERICK THOMPSON

APPELLANT

Judgment of the Court delivered by Ní Raifeartaigh J. on the 30th day of January 2024

- 1.** This is an appeal against a murder conviction. The 12-day trial took place before the Special Criminal Court in May and June 2018. The trial court delivered judgment on the 30th August 2018.
- 2.** The issues raised are; (1) That recognition evidence was wrongly relied on by the court when the footage was of inadequate quality and there had been procedural flaws in the process leading to the recognition by members of An Garda Síochána; (2) That the verdict was wrong in

law and there was “double counting” of items of circumstantial evidence; and (3) That the CCTV footage should have been excluded because the recordings were made in breach of the appellant’s right to privacy and data protection law.

Background

3. The deceased, David Douglas, ran a shop known as Shoestown on Bridgefoot Street, Dublin 8, and the evidence was that he was in the habit of hanging around the front of the shop encouraging customers to enter. Shortly after 4 pm on the 1st July 2016, he was on the shop floor with his young daughter when a male in dark clothing approached the shop and shot Mr Douglas before leaving the scene, leaving the weapon he had used near the head of the prone victim. Mr Douglas had six wounds to the chest, head and neck and was pronounced dead shortly before 5 pm that afternoon. The serial number of the gun had been milled away. The CCTV system in the shop established the precise time of the shooting to be 4.11 pm.

4. An investigation commenced immediately and it transpired that the gunman had run from the scene towards Oliver Bond Street, where he got into a waiting Mercedes CLA, which was later identified to have registration number 161 D 26702. The Mercedes was seen driving down Francis Street and turning right into an area known as Spitalfields, where it was parked and two men were seen getting out. The car was set alight, in the course of which the driver’s leg caught fire (and he dropped his face mask). He then got into the passenger seat of a parked-up vehicle which was a silver Suzuki Swift, registration number 151 WW 918. Thus, two cars, the Mercedes and the Suzuki, were used as the getaway cars from the scene of the murder. It may be noted that the trial court referred to the Mercedes as “the CLA”, as will be seen below.

5. On the 4th July 2016, three days after the shooting, the Suzuki Swift was reported to have been set on fire in a car park on Strand Road, Dublin 4. As they were responding to this report, Gardaí observed a blue Mitsubishi Mirage, registration number 99 TS 5028, driving in the opposite direction at speed on Parnell Road, Dublin 12, which matched a vehicle seen leaving the scene of the fire. This vehicle was stopped, and the driver was a man referred to throughout the trial as Mr. F. The rear seat passenger was referred to as Mr. C.

6. Subsequently, two finger marks which matched the appellant were found on the rear-view mirror and on a card in the glove box of the Mirage. His DNA also matched samples found on an inhaler in the Mirage.

7. The prosecution case was that, in addition to the Mercedes CLA and the Suzuki Swift which were the getaway cars at the time of the shooting, two other vehicles were used as “spotter” cars and for logistical support in the planning and execution of the murder. These were (1) the Mirage in which Mr F and Mr C were arrested in the circumstances described above, and (2) a silver Ford Fiesta, 05 D 52309 .The prosecution case was that the four vehicles and their occupants were operating in concert throughout the day in the planning and execution of the murder, and the movements of those vehicles were captured throughout the day on various CCTV systems.

8. As to the forensic evidence, in addition to the connections found between the appellant and the Mirage as described above, DNA matching the appellant was found on an air freshener and hand sanitizer in the Fiesta as well as a finger mark on the internal rear-view mirror of the Fiesta. Mr F was also forensically linked to the Mirage and the Fiesta, and a finger mark attributed to Mr C was also found on the internal rear-view mirror of the Fiesta.

9. The prosecution also relied on CCTV footage of the four vehicles in particular locations. There were also some sightings of individuals entering and exiting those vehicles and their movements thereafter. Some of these sightings were in dispute at the trial and some were not. One piece of footage showed the appellant parking the Fiesta opposite a stall on Meath Street at 4.10pm (one minute before the murder), and then going to the stall and conversing with a female while dismantling a mobile phone. This identification was not challenged by the appellant. He was also identified from footage as being in Little Caesar's restaurant later that evening in the company of Mr. C and Mr. F. He got out of the front passenger seat of the Mitsubishi outside a parking lot (a "Q-Park") at 7.26pm and left for the restaurant accompanied by Mr. C who exited the car at the same time. The vehicle was being driven by Mr. F at that time and all three were in the restaurant together, along with the appellant's son and two females.

10. One of the contentious pieces of evidence at the trial consisted of an identification by Gardaí of the appellant from footage which was referred to as "the White Swan footage" because it showed the Fiesta outside the White Swan Business Park at 10.49. It was the prosecution contention that the appellant was driving it. The identification of the appellant on this piece of footage was made by Sergeant Adrian Whitelaw and Garda Seamus O'Donovan. It was unsuccessfully challenged on a *voir dire* during the trial and is the subject of the first issue raised in this appeal.

11. Neither of the statements made by Sergeant Whitelaw with regard to his recognition were dated and he made no notes as to the basis of his recognition of the appellant. He gave evidence that his recognition was not based on any particular feature but on his knowledge of having seen the appellant previously dressed in a similar manner and with the same beard "not too long before that". He said his identification was immediate and without doubt or hesitation. He said he thought he had seen him in April or May and "he looked exactly like that in the car". Overnight, the prosecution established that this was a photograph of the appellant outside Smithfield Children's Court on the 8th April. Counsel for the appellant established that the appellant's beard was red in the 8th April photograph and black in the CCTV footage. The witness said that it was "the same shape of facial hair" and the "same shape of face".

12. Sergeant Whitelaw denied that his recognition from the White Swan footage was influenced by his previous viewing of other pieces of footage. Sergeant Whitelaw was a member of the murder investigation and was aware that the appellant was a suspect. He was shown the Guild of the Little Flower footage before he saw the White Swan footage.

13. Detective Garda O'Donovan, who was the second member to identify the appellant from this footage, had previously investigated the appellant in respect of a violent disorder in January 2013, and also had spent most of the day in his presence when the latter was extradited from

Holland. He said he had dealt with the appellant over a ten-year period in the Dublin 8 area although counsel for the appellant pointed out that he had made only one entry into the PULSE system in that regard. He had dated his statement relating to the recognition, which was some four months after the murder and some three months after the footage had been obtained. He was not involved in the murder investigation and said he was not aware the appellant was a person of interest in relation to the murder.

14. Counsel on behalf of the appellant contended that the procedures concerning the identification were not adequate and that the low quality of the footage rendered such evidence well below the standard for a criminal conviction. He also contended that Sergeant Whitelaw's recognition was compromised by his prior viewing of clear footage from the Guild of the Little Flower, and drew attention to the difference in appearance on the part of the appellant as between when Sergeant Whitelaw had previously encountered him (as shown by the photograph).

15. The prosecution relied upon inferences from the silence of the appellant during interview when he was asked to account, under section 18 of the Criminal Justice Act 1984, for a number of matters. These included his possession of the silver Ford Fiesta at approximately 10.48 am on Merton Avenue, Dublin in the immediate vicinity of the Mercedes CLA which was later used in the murder; his possession of the silver Ford Fiesta at approximately 4.10 pm on Meath Street immediately prior to the murder of David Douglas; his dismantling of the phone at Meath Street; his being a passenger in the Mirage at approximately 7.38 pm at the entrance to the Q Park; and the items of forensic evidence described above. He was also requested to account for his presence in the various locations described with the people described. Under section 19A of the Criminal Justice Act 1984, the appellant was offered the opportunity to mention facts that he may rely upon in his defence being facts that clearly call for an explanation and he replied, "No comment at this time."

The first issue: the White Swan identification/recognition evidence (Ground 2 in the Notice of Appeal)

16. The appellant submitted that if the Court were to hold that the White Swan identification/recognition should not have been admitted as evidence, the remaining evidence would undoubtedly be insufficient to form the basis for the appellant's conviction. Without necessarily accepting that this is so without further consideration (and the trial court certainly did not consider that to be so), the Court considers it appropriate to consider this ground of appeal in the first instance, even though it was the second ground in the notice of appeal. In reality, counsel's arguments relating to the recognition issue formed the bulk of the arguments advanced at the oral hearing of the appeal.

The trial court's admissibility ruling in relation to the recognition evidence

17. In its ruling on admissibility in relation to the recognition evidence, the trial court distinguished between two pieces of footage, and ruled one piece inadmissible (the Donore Avenue footage) and the other (the White Swan footage) admissible.

18. The court referred to the observation of McKechnie J. in *DPP v O'Shea* [2014] IECCA 49 that if continuity, clarity and coherence of the CCTV footage were established, the question is whether

the evidence "is of such a quality that a jury can conduct a fair and reliable assessment of it", and continued:-

We do not propose to dwell on or resolve at this stage the procedural and credibility matters raised by Mr O'Higgins in his cross-examination of Detective Sergeant Whitelaw and Detective Garda O'Donovan. We have simply analysed the objective evidence embodied in the CCTV footage in the light of the test outlined above. In that respect, our conclusions are very simple and very straightforward. In respect of the footage from the Donore Avenue apartments, at or about 15.53 on the 1st of July, we are not satisfied that the CCTV evidence is of such a quality that, in acting as a jury, we could conduct a fair and reliable assessment of any recognition evidence based on that excerpt of footage, no matter how honestly given that that evidence may be. In our view, the view of the driver of the silver vehicle is too fleeting and indistinct to permit proper analysis of a subsequent recognition exercise based on that footage. Consequently, the recognition evidence based on that piece of footage is inadmissible. The footage itself, however, remains admissible for purposes other than direct recognition of the driver. However, so far as the footage from the White Swan industrial estate earlier in the morning of the 1st of July is concerned, we are totally satisfied that this material is of sufficient quality to be admissible for all purposes, including for that assessing the weight, cogency and reliability of recognition evidence based on that footage. All other matters raised with the witnesses in relation to this footage go to the latter issues, rather than to admissibility.

The trial court's analysis and conclusion with regard to the recognition evidence

19. In its ultimate judgment, the court, having set out the evidence of Detective Sergeant Whitelaw and Detective Garda O'Donovan and the appellant's contentions in respect of the recognition evidence, formally gave itself a Casey warning, even though, as it said, "it is a case of recognition as opposed to first time identification, because although recognition evidence may be more reliable than the identification of a stranger, it remains the case that mistakes in recognition have also been made and made by more than one witness". It said that if the recognition evidence was the only evidence in the case, they would have a "significant difficulty" in convicting the appellant but that it was not. The court accepted that the matters raised by the appellant's counsel "were undoubtedly such as to significantly affect the potential weight of the evidence of both witnesses" and that these "infirmities" illustrated the requirement to proceed with "special caution". However, the court, in accordance with the latter part of the Casey warning, took into account all of the evidence in the case. The trial court said:-

If the two officers are mistaken and the driver of the vehicle at 10.42 or 10.48 was not Mr Thompson, we are left once again with the issue of odd and extensive coincidences. Assuming that both witnesses are mistaken and not correct it is still inopportune that if Mr Thompson was not the driver of the Fiesta in the morning when it was attending to the needs of the two getaway cars, it should have transpired that at the very time he got out of the car at 16.10 the murder was about to happen nearby and the primary getaway car and the Mirage which he got out of a few short hours later had each been driven by where he chose

to park just a few minutes earlier and he had moments earlier driven past the second getaway car in Carman's Hall on the way to Meath Street. If these witnesses are not correct in recognising Mr Thompson, it is doubly adverse that the driver who was wrongly identified as Mr Thompson also had a dark beard and a dark cap in separate pieces of footage at 10.42 and 10.48 when Mr Thompson arrived at Meath Street with a full black beard and a black cap at 16.10. It is a triple misfortune that the passenger in the Fiesta that morning, Mr C, was seen getting out of a car at half 7 that evening with Mr Thompson and socialising with him thereafter in Little Caesar's restaurant. It is a fourth regrettable coincidence that if Mr Thompson was not driving the Fiesta that morning he had by 7.30 that evening been inadvertently either driving or been a passenger in not one but two vehicles that were intimately involved in marshalling the getaway vehicles for the murder that afternoon.

Having considered the recognition evidence carefully, applying caution, and in the light of all of the circumstances and the other evidence in the case we are satisfied that there is no doubt but that the witnesses are each correct in their identification. Correct recognition fits comfortable with everything else that is known about Mr Thompson and the persons, cars and places that he did associate with on that day and mistaken recognition involves acceptance of a string of odd and unexplained coincidences. Such matters can clearly buttress the conclusion on evidence that necessarily requires special caution but we are... satisfied that they do so in this case. However, it must be emphasised that the weight of this conclusion arises from the compelling nature of all of the surrounding evidence and circumstances rather than the intrinsic weight of the recognition evidence. The surrounding circumstances and other evidence are sufficient to resolve the doubts that would otherwise arise in connection with recognitions based on the 10.48 footage.

Therefore, we are satisfied beyond reasonable doubt Mr Thompson drove the Fiesta outside the White Swan Business Park that morning at a time when Mr C, with whom he went to dinner that evening, was engaged in purchasing a ticket to secure parking for the CLA at Merton Avenue. It is factually consistent with the 16.10 footage from Meath Street showing that Mr Thompson was driving that same car later that afternoon. There is also no reason to doubt that Mr Thompson also drove the car from Merton Avenue at 10.48 via John Street and the Liberties Training Centre to pass Shoestown at 11.04, some 16 minutes later. The dropped rear wiper is visible on the clip from Sweeney's garage, as is the red top of the front seat passenger in the clip of the Fiesta passing the traffic light outside Agnes Brown's pub.

The red top passenger is consistent with the footage showing the Fiesta driving Mr C in his red top from Merton Avenue after he attended to the CLA. As we are satisfied that Mr Thompson drove the Fiesta at 10.48 we see no reason to think that he did not drive it for the seven minutes prior to that as it led the CLA to Merton Avenue and ferried Mr C to and from the Timgad shop and back to the CLA. Mr C was obviously a passenger and was therefore too busy to drive the car during those seven minutes in any event. There does not

seem to be more than two occupants in the Fiesta as it passed the business park at these various times. There is no basis whatsoever for inferring that an off camera change of driver took place in those seven minutes, especially as the footage from 10.44 indicates a driver similar in appearance to the one at 10.48, otherwise we would be back in the familiar territory of unlikely coincidences.

The appellant's submissions

20. The appellant submits that the images used during the trial were incapable of supporting any identification and should not have been admitted at trial. He cites *DPP v O'Shea* [2014] IECCA 49 where McKechnie J observed that it is necessary to ask whether "*the evidence is of such a quality that a jury can conduct a fair and reliable assessment of it.*". He submits that the images from the White Swan footage were not capable of sustaining a viable recognition of the individual on the footage to any degree of confidence and certainly fell below the threshold of "*such quality [to] ... conduct a fair and reliable assessment of it.*".

21. He also submits that the procedures followed by the Gardaí in respect of the recognition evidence were fundamentally flawed. In the first instance, the two statements Detective Sergeant Whitelaw had made were undated. The other identifying member, Garda O'Donovan, did date his statement, and the appellant notes that the statement and the viewing of the CCTV footage dated from almost four months after the murder and almost three months after the CCTV footage had been procured.

22. A second complaint is that neither of the members documented or noted any of the identifying markers or features which formed the basis for their identification/recognition of the appellant. In *People DPP v Maguire* [1995] 2 IR 286 it was said that in order to lay the foundation for the admission of an identification made by a witness on the basis of a review of CCTV footage, the witness should also indicate any feature which, in their view, identified the accused with the person in the still. Moreover, in *People (DPP) v Kirwan* [2015] IECA 228 the Court agreed that a note should have been taken (although it is accepted that this flaw was not fatal in that case). The appellant submits that the failure to document such identifying markers or features severely hampered the ability of defence counsel to effectively cross-examine and probe this aspect of the prosecution case, thus causing a fundamental unfairness to the appellant. This was of crucial significance in circumstances whereby a crucial part of the prosecution case against the appellant consisted of the identification and recognition evidence.

23. A third complaint is that no contemporaneous notes were kept in relation to the purported recognition, including the witnesses' initial reactions to the footage. Nor were any notes kept as to who compiled the list of Garda members who were selected for the purpose of viewing the CCTV footage and the basis on which they were selected.

24. A fourth complaint was that there were no notes as to the process by which the members were selected for viewing the footage, nor any record of any Garda members who viewed the aforementioned CCTV footage and were *not* able to recognise the Appellant therein.

25. A fifth complaint related to potential contamination of the recognition in respect of the identification/recognition by Sergeant Whitelaw in circumstances where he had been shown the footage from the Guild of the Little Flowers before being shown the (disputed) White Swan footage.

26. Other complaints included that one of the identifying members was involved in the murder investigation (thus leading to potential contamination).

27. A final complaint was that while Sergeant Whitelaw claimed that he could recognize the appellant from the White Swan footage because he had previously encountered him in April of that year, when a photograph from that time showed that the appellant had a very different appearance at that time.

28. The appellant refers to the English Court of Appeal decisions in *R v. Smith* [2009] 1 Cr App R 36, and in *R v Deakin* [2012] EWCA 2637 which provided detailed guidance in respect of how CCTV identification should be undertaken and the procedural safeguards that should be utilised to secure the integrity and validity of same and on foot of which the Police and Criminal Evidence Act 1984 (PACE) Guidelines in Code D were amended. While he accepts that the English authorities derive from a separate statutory scheme, he submits that the guidance provided is nonetheless relevant because those safeguards are intended to prevent misidentification, mistake, and/or bias.

The submissions on behalf of the Director

29. The Director submits that the trial court applied the correct test to the question of admissibility, citing *People (DPP) v A McD* [2016] 3 IR 123, where McKechnie J., on behalf of the Supreme Court, expressed the general test for the admissibility of CCTV footage at paragraph 60:

In the established phraseology, the evidence should prove the provenance and authenticity of the footage; the recording must be intelligible and of sufficient quality, and must also be relevant and have probative value.

30. The Director also cites *People (DPP) v O'Shea*, cited above. The Director also cites *DPP v. Hughes* [2018] IECA 77, where the Court referred with approval to *R v. Robson* [1972] 1 WLR 651. In *Robson*, Shaw J. said:-

It may be difficult if not impossible to draw the philosophical or theoretical boundary between matters going to admissibility and matters going properly to weight and cogency; but, as I have already said, it is simple enough to make a practicable demarcation and set practical limits to an enquiry as to admissibility if the correct principle is that the prosecution are required to do no more than set up a prima facie case in favour of it. If they should do so, the questioned evidence remains subject to the more strident test the jury must apply in the context of the whole case namely that they must be sure of the authenticity of that evidence before they take any account of its content. There is, so it seems to me, no danger of injustice to an accused in such a procedure, for nothing could be more damaging to, if not destructive of, a prosecution case than to have part of the evidence on which it relies exposed in the face of the jury as fabricated and contrived.'

31. The Director points out that the trial court drew a distinction between the quality of the footage from Donore Avenue and the other footage. It decided that the view of the driver in the former footage was too fleeting and indistinct to permit proper analysis of recognition evidence given

on foot of it, whereas it considered that the White Swan footage was sufficiently cogent and that the recognition evidence of the two members could be assessed by the Court. These were issues of fact which, the Director submits, the trial court was entitled to decide, and it reached these conclusions after considering the footage with some care. Furthermore, the footage from the White Swan Industrial Estate was slowed down and cropped so that it could be viewed, and this was also of assistance to the court.

32. As to the other grounds of complaint, the Director submits that the alleged deficits in procedures were not such as to warrant a finding that the said evidence was inadmissible. She points out that in *People (DPP) v Kirwan* [2015] IECA 228 the conviction was upheld even though the Court acknowledged that contemporaneous records should have been kept and other procedural flaws. She cites *People (DPP) v Tynan* [2017] IECA 202, where, similarly, a failure to keep contemporaneous notes did not render the identification evidence inadmissible.

33. The Director points to the fact that Sergeant Whitelaw, Detective Garda O'Donovan and Garda Ciaran Byrne were cross-examined in full terms about the way in which the identification/recognition process was carried out. A photograph was produced as part of the evidence of Sergeant Whitelaw dealing with a previous interaction with the Appellant as part of the *voir dire* itself. She submits that the appellant's legal team had a full opportunity to challenge the evidence and the trial court was able to assess any deficiencies in that evidence.

34. She points out that the trial court itself acknowledged in its judgment that there were "*significant weaknesses*" in the recording of the identification by Sergeant Whitelaw. However, having applied the *Casey* warning to itself, the court considered that the evidence could be relied upon arising "*from the compelling nature of all the surrounding evidence and circumstances rather than the intrinsic weight of the recognition evidence*".

Discussion and Conclusion

35. This Court in its recent judgment in *People (DPP) v. Darren Murphy* [2023] IECA 330 discussed the principles relating to recognition evidence at paragraphs 60-69, including authorities such as *People (DPP) v. Larkin* [2008] IECCA 138; [2009] 2 IR 381, *People (DPP) v Kirwan* [2015] IECA 228, and *People (DPP) v Tynan* [2017] IECA 202. It is not therefore necessary to repeat what was said there. The parties have also referred to the court to some additional authorities, including *DPP v O'Shea* [2014] IECCA 49 and *People (DPP) v. A McD* [2016] 3 I.R. 123 as to when CCTV footage evidence is admissible. There is little dispute in the authorities as to the relevant principles; the question is usually, as it is in the present case, how the principles apply to the facts of a particular case.

36. Having considered the video clip and taken into account the submissions of the parties, we are of the view that the trial court did not err in ruling admissible the White Swan footage. We note that the court took a different view in relation to a different piece of footage and was clearly aware of the need for the CCTV footage to be of sufficient quality before ruling it admissible.

37. We are also of the view that the trial court did not err in its conclusion that the recognition evidence could be given *some* weight, given the overall circumstances of the case. Overall, the

court's approach to the recognition evidence was legally correct and carefully considered. The court clearly knew that it was required to exercise caution and gave itself the *Casey* warning. It also took into account each of the factors raised by the appellant as weakening the reliability of the recognition evidence. Indeed, the court explicitly said that by reason of those weaknesses, it would not have relied on the recognition evidence if it had been the only evidence in the case. However, the trial court was ultimately persuaded that it was appropriate to give, as we have said, *some* weight to the recognition evidence in view of the remainder of the evidence. We have set out above the passage in which the trial court referred to the number of extraordinary coincidences that would have had to have taken place if the recognition were wrong and we agree with the court's views in that regard. We have considered each of the complaints made by the appellant and consider that the alleged procedural shortcomings identified (whether taken individually or on a cumulative basis) were not, in the circumstances of this case, such as to disentitle the trial court from ultimately relying on the evidence of the two recognition witnesses, although some of them (in particular, failing to date statements) were at the very least sub-optimal in terms of procedures. However, the trial court had an opportunity to observe the witnesses first-hand and to assess whether the alleged shortcomings in the procedures were such as to deprive the evidence of any probative value and was entitled to conclude that in this particular case, they did not. The task of this Court is not to devise a code of best practice with regard to recognition procedures but rather to assess whether, on the facts of a particular case, the trial court was entitled to reach the factual conclusion that it did. Nonetheless, the Gardaí should strive for best practice in this, as in other areas and the Garda procedures described in *DPP v. Darren Murphy* show the kind of attention to detail that can lend weight to a recognition procedure and render the evidence more likely to be admissible and probative.

38. In the present case, it is important to remember that the trial court specifically said that this recognition evidence was not essential to its conclusion, saying that it was "*useful*" but that "*it derives its weight from the earlier strands rather than from the inherent strength of the recognition evidence*".

39. In light of all the above, we reject this ground of appeal.

The second issue: The verdict was wrong in law and alleged double counting of circumstantial evidence (Grounds 1 & 3 in the Notice of Appeal)

The trial court's judgment

40. The court started by briefly describing the shooting and commented, in a passage with which we agree:

As is obvious even from this brief statement of facts there was nothing spontaneous in the circumstances of Mr Douglas's death. This was, in effect, an execution and in all such cases it is the prosecution case that this murder involved intricate advanced planning and coordination, the involvement of persons other than the gunman and the use of several motor vehicles in support of the plan to carry out the murder.

41. The court then proceeded to set out in detail the evidence of eyewitnesses to the shooting and its immediate aftermath as well as the eyewitness accounts of the Suzuki being set on fire three days later; the evidence arising from the CCTV footage; and the individual items of forensic evidence recovered from the vehicles.

42. The trial court accepted that the prosecution case was heavily reliant on circumstantial evidence in the case against the appellant and started by explicitly recording the basis upon which it was approaching the circumstantial evidence. It is not proposed to set out this portion of the trial court's judgment but it may be noted that it was both detailed and entirely correct. No complaint has been made about the court's exposition of the appropriate principles relating to circumstantial evidence. Rather, the grounds of appeal relate to the application of those principles to the evidence in the case.

43. The court then turned to the individual strands of evidence in respect of the appellant, describing them as five-fold: (1) the movements of the Fiesta between 15.55 and 16.10 on the day of the murder: (2) the appellant's behaviour on Meath Street between 16.10 and 16.14 including his disassembling of his phone; (3) the CCTV footage from the Q Park and Little Caesar's restaurant; (4) the CCTV footage in respect of the Fiesta outside the White Swan Business Park at 10.48 and the recognition evidence of Detective Sergeant Whitelaw and Detective Garda O'Donovan; (5) inferences drawn from his failure to answer questions during 'inference interviews'.

44. Regarding the "first strand" of the prosecution case, namely the evidence of the Fiesta's movements in the period 15.55 to 16.10, the court said –

The first strand of the prosecution case is based on the undoubted fact that Mr Thompson drove the Fiesta on Meath Street and parked outside the church one minute before the murder. As already noted above, we are satisfied that it is apparent from the CCTV clip from the Donore Avenue apartments at 15.55 that the Fiesta was being driven by a man with a very dark beard and cap. We are also satisfied that the Fiesta travelling from that point to its destination on Meath Street at 16.10 via Lullymore Terrace, also at 15.55, Thomas Street at 16.06, Bridgefoot Street and the scene of the murder at 16.07, John Street and Francis Street at 16.07 where the dark beard of the driver is also visible, Carman's Hall at 16.08 and the southern end of Meath Street at 16.09. In closing on day 11 at page 26, Mr Gillane submitted that the Court could work backwards rationally and reasonably from the point where Mr Thompson alighted from the Fiesta at 16.10 on Meath Street to infer that he had been driving the car on its journey to that point of arrival which included passing the Donore Avenue apartments at 15.55 just before it passed the Lullymore Terrace driving immediately in front of the CLA which was then commencing its journey to the scene of the killing.

Mr O'Higgins dealt with this area at pages 55 to 60 of his closing submission on day 12 but this submission focused primarily on the absence of evidence concerning text messages or other phone communication from the occupants or occupants of that vehicle as it passed the scene of the impending murder. His submission did not specifically address the inference advocated by Mr Gillane. We have approached the issue by starting with the

application of the presumption of innocence which requires starting with the view most favourable to the accused and investigating whether the prosecution evidence rebuts that view or leaves open a proposition based on the evidence that is reasonably consistent with innocence. The innocent construction of these events is that Mr Thompson was not the driver of the vehicle in the area of the South Circular Road at 15.55. We find that the driver of the car at that time must have been complicit in the impending murder because the Fiesta was clearly involved in marshaling or directing the CLA at Lullymore Terrace, a narrow, one way residential street and was about to pass the location on Saint Anne's Road where the Swift rejoined the CLA for the final journey to their respective destinations. There is no room, in our view, for an innocent interpretation of the act of the driving of the Fiesta at that time and place. Whoever it was was inexplicably linked to the final implementation of the murder plan. There is no scope for ambiguity as to the meaning and import of the activities of the CLA, the Fiesta and the Swift at this time.

However, this innocent interpretation also involves the consequence finding that somebody other than Mr Thompson drove the Fiesta from Donore Avenue, down Lullymore Terrace at 15.55 and passed Shoestown at Bridgefoot at 16.07 and that there was a change of driver at some point on this journey prior to Mr Thompson alighting from the car on Meath Street at 16.10. Considering the fact that the Fiesta was operating directly in conjunction with the primary and secondary getaway cars at 15.55 it would be both an appalling and an unlikely coincidence for Mr Thompson to have blundered unwittingly into this activity by becoming the driver of the Fiesta for some unknown reason and at some unknown place between 15.55 at Lullymore Terrace and the footpath outside the church at Thomas Street on Thomas Street at 16.10. We consider that this scenario is so inherently improbable and remote that it can safely be discounted as a reasonable possibility on the evidence.

Such a possibility is eliminated all together by the fact that although the driver of the Fiesta is not specifically identifiable due to the low quality of the 15.55 footage from the Donore Avenue apartments, that footage is undoubtedly clear enough to show that the driver of the Fiesta was then sporting a dark beard and a dark cap, which coincides precisely of the appearance of Mr Thompson in the high quality footage from the Little Flower Centre 15 minutes later. The appearance of the driver of the Fiesta on Donore Avenue is best seen by stopping the footage at system time 15.53 and 18 seconds. It is therefore even less likely and even more unfortunate for Mr Thompson that the unknown driver at 15.55 on Donore Avenue had the same two physical characteristics that Mr Thompson clearly displayed on Meath Street at 16.10. Even if this defence hypothesis was correct, the fact that Mr Thompson assumed the driving of a car manifestly associated with a murder that was just about to take place very close to its point of arrival would raise a further set of significant and uncomfortable issues for Mr Thompson as to how precisely such a transfer could happen on an innocent basis.

Such issues do not arise because we are satisfied that the safe and obvious inference from the evidence set out above is that Mr Thompson drove the Fiesta continuously on its

journey from Donore Avenue at 15.55 before passing down Bridgefoot Street 12 minutes later until it came to rest at Meath Street three minutes after passing Shoestown on Bridgefoot Street. We are satisfied that the fact that the Fiesta passed the murder scene for the second time that day a mere four minutes before the killing had a connection with what was about to happen given the instrumentality of this vehicle in relation to the two getaway cars earlier that morning and at the start of this journey. On a journey from Donore Avenue via Lullymore Terrace to Meath Street there was no other reason for the Fiesta to take such an indirect route by way of Thomas Street, Bridgefoot Street, Oliver Bond Street, Francis Street and Carman's Hall. The direct route between these two points is that taken by the Swift and the CLA, namely down Donore Avenue, on to Cork Street, Ardee Street and the Coombe followed by the turn into Meath Street. It would be an appalling coincidence if Mr Thompson was innocently driving the car to Meath Street and took an indirect route past Shoestown at that time for no apparent reason.

45. The court acknowledged that counsel for the appellant at trial had made much of the absence of phone communications at the time but pointed out that the phone used by the appellant at that time was broken up by him and given to the female on Meath Street, a fact which he declined to account for in inference interviews. As to the fact that the victim was not at the door of his shop when the Fiesta passed by, the court said that “[I]ooked at in context, we can infer that a planned execution such as this will inevitably have involved surveillance of the target and his habits and movements to isolate a time and place likely to be most suitable for the intended purpose”. It also said that “we can safely conclude on the evidence that the driver of the Fiesta performed a last-minute check before the shooting took place, this being the only obvious reason for the Fiesta to take the route that it did at that time, irrespective of whether or not the driver found it necessary to communicate his observations to others.”.

46. The court then referred to the “second strand” of the prosecution case, namely his behaviour after ceasing to drive the Fiesta at 16.10 opposite the family stall on Meath Street. His behaviour was, the court said, “recorded with great clarity” by the CCTV cameras at the Guild of the Little Flower, and his general demeanour between 16.10 and 16.14 was “restless, anxious and furtive”. The court then referred to the movements of the other cars at this time:

At 16.00 the Mitsubishi passed the stall followed at 16.05 by the CLA passing by having just left the Swift in near Carman's Hall on its way to the murder scene. At 16.07 the Mirage was seen at this location for a third time that afternoon. The Fiesta and Mr Thompson arrived and parked three minutes later. All three of these vehicles had travelled from the South Circular Road during the previous 15 minutes or so. If Mr Thompson's arrival at the stall was not related to the impending murder of Mr Douglas these are undoubtedly a further series of unhappy coincidences from his point of view.

47. The court then described in minute detail the movements of the appellant while standing on Meath Street, including the direction in which he was looking, his disassembly of the phone, and giving of the parts of the phone to the female, the appearance of an unmarked garda car, and commented:

We have no doubt but that Mr Thompson's demeanour and his behaviour in breaking up the phone and organising the removal of the phone parts and the Fiesta from the scene at Meath Street were highly suspicious and Mr O'Higgins wisely did not suggest otherwise. If Mr Thompson was innocent of involvement in the murder of Mr Douglas the fact that he engaged in such behaviour at the precise time of that murder, a very short distance away, having just arrived in a vehicle that had been closely associated with the preparations for the murder that day would be a further and very sad coincidence.

48. The court addressed the suggestion of counsel on behalf of the appellant that the appellant had a habit of breaking up mobile phones whenever he perceived Gardaí in his vicinity. This was based on the fact that a garda car had driven down Meath Street around the time the phone was broken up and the evidence of Detective Inspector John Walsh who testified to an incident in 2005 when the appellant removed a sim card and chewed it up in the presence of the Gardaí. Garda Byrne gave evidence of two similar incidents.

49. The court said that it had carefully reviewed the dash cam footage from the garda vehicle in question as well as footage from the Little Flower centre. It pointed out that the appellant did not answer any questions about this incident during interview. It said that the question was whether there was a reasonably possible inference that could be drawn in favour of the appellant and concluded that there was not:-

Our analysis of the CCTV footage does not suggest that such an inference is reasonably possible. In examining and comparing the footage from the garda car of the Little Flower Centre we've operated on the basis that the time on the little flower footage is two seconds faster than that on the garda dash cam. At 16.11.05, when Mr Thompson took his phone from his pocket looking in the opposite direction to the garda car, the car was just approaching Granger's pub on the right hand side of Meath Street heading north. At this point the black van at the stall behind which Mr Thompson was standing was the length of at least 22 parked vehicles, two free parking spaces and two junctions on that side of the street from the garda car and the line of sight between those two positions must have included those vehicles including the three high sided vans. By reference to the maps, trial exhibit 1, at 16.11.05, the garda car was approximately 160 metres distant from where Mr Thompson stood in the doorway behind the stall.

The garda car was travelling at 13 kilometres per hour at that point and was unmarked and not operating warning lights or sirens. When Mr Thompson looks out at 16.11.10 the garda car had not yet reached the Bull Ring market or passed Crostock Alley on the right of the street. There were still 18 vehicles and two junctions on Mr Thompson's side of the street between him and the garda car travelling at 14 kilometres per hour. By the map, this point was about 135 metres away from Mr Thompson. By 16.11.15, when Mr Thompson pulled on the phone the garda car had not yet moved past the Bull Ring market and was still at least 115 metres away moving at 14 kilometres per hour. By 16.11.24, when Mr Thompson broke the phone up, the garda car was about to cross the junction with Engine Alley at Liberty Clothing on the right hand side of the street moving at 13

kilometres per hour at a distance of about 75 metres. At that point there were 11 cars and vans and the width of a junction between Mr Thompson and the garda car, including three taller vans parked on either side of the junction with Earl Street South. If the presence of the unmarked garda car was truly the catalyst for Mr Thompson breaking up the phone, we are satisfied that he would have had to observed the garda car after he looked south wards at 16.11.10 and before he began to pull on the phone at 16.11.15. At the distance between Mr Thompson and the garda car at that point and with the cars and vans parked on Mr Thompson's side of the street we do not consider it reasonably possible that Mr Thompson could have registered the presence of an unremarkable silver saloon, decided that it was a garda car and for whatever reason deemed it prudent to begin breaking up the phone immediately, presumably on some off chance that the gardaí in the car would have spotted him behind the van as they approached and then decided to pull him over, to question him and to seize his phone. If this were so it would have been simpler to give the phone to Ms Moloney to conceal or remove as she was demonstrably willing to follow his direction in such matters. There are other reasons why we reject this hypothesis which we will return to when considering the question of statutory inferences.

By 16.11.39, when the garda car approached the vicinity of the stall and the lady with the buggy and the child crossing the road in front of the gardaí, nine seconds had passed since Mr Thompson had completed the actions of breaking up the phone and crossing the path to place the pieces on the stall table for removal by Ms Moloney. After the garda car passed, Mr Thompson threw the black and silver object, probably the keys of the Fiesta, to Ms Moloney, and continued to manipulate the small object in his hands. We are satisfied that his actions respected a continuum of events intended by him to lead to the removal of the Fiesta and the phone pieces from the scene by Ms Moloney, which was in no way prompted by the presence of the garda car on Meath Street at that time which on close analysis of the footage was a true coincidence in the sense that we do not believe that there was any connection between the car between sighting of the car and the breaking of the phone.

Mr Thompson did not retrieve his phone or put it back together after the garda car that he supposedly saw passed on down the street. We are satisfied from our analysis of the CCTV and dash cam footage that Mr Thompson could not have fully seen the silver saloon in sufficient detail to recognise it as an unmarked garda vehicle until it was almost upon him. Even if Mr Thompson was responding to the presence of a garda car on the street at 16.11, rather than breaking up the phone in response to the murder taking place at exactly the same time, that would have been another dreadful piece of bad luck for him and not the first unfortunate coincidence that day to occur to an innocent man. The breaking of this phone also happened at the same time or just before Nokia phones were being burned around the corner in the CLA, yet another gloomy coincidence if the two events were unconnected, without including the fact that his social acquaintance, Mr F, had acquired two boxed Nokias from the shop three doors away from the stall earlier that afternoon.

50. The trial court then moved on to the “third strand”, which was the footage from the Q Park and Little Caesar restaurant and acknowledged that it did not know what conversations took place at that meal, and that three other persons were also present, although it described the latter point as “*not one of substance one way or another*”. It went on to say:

[W]e are left once more to observe that his presence in the Mirage and in the restaurant in the company of Messrs. C and F is yet another doleful coincidence if Mr Thompson was truly an innocent abroad on that evening. In fact, we have no doubt whatsoever that the presence of Mr Thompson, together with Messrs. C and F in the Mirage and subsequently in the restaurant was not explicable by unlucky coincidence but because the three of them were inextricably linked together on that day, were inextricably linked together on that day by their joint participation in the murder of Mr Douglas. If Mr Thompson was not involved in this conspiracy to murder it must surely have struck Mr C that his dining companion bore an uncanny resemblance in appearance and apparel to the driver with whom he had travelled in the Fiesta that morning.

51. The court turned to the “fourth strand”, consisting of the White Swan footage. We have already set out the relevant passages in that regard in the section of this judgment concerning the White Swan identification/recognition evidence.

52. The court turned to the “fifth strand” of evidence, namely the invitation to draw inferences adverse to the appellant from his failure or refusal to answer questions. It said:—

In this case, we are satisfied that the evidence has established that certain areas were material to the investigation of the suspected offence, namely the activities of the Fiesta in servicing and directing the getaway cars on the day of the murder, the observed behaviour of the accused at the time of the murder and his association with Messrs. F and C who, in our view, were undoubtedly involved in this matter at various times before and after the murder of Mr Douglas. We are satisfied that an innocent explanation of these matters, if such existed, would have been peculiarly within the knowledge of the accused and it would have been appropriate and reasonable for him to have advanced such explanation when confronted with an allegation that such matters were attributable to his involvement in the most serious offence of murder. We are satisfied that the questions put to the accused were specific, reasonable and highly relevant questions as to his activities concerning the material matters set out above. We are satisfied that at the time when each of these questions were asked the accused was fully aware that a failure or refusal on his part to provide an answer to these questions carried with it the very real possibility that his silence could subsequently be used as evidence to corroborate other evidence suggesting involvement on his part in this matter.

In these circumstances, we are satisfied that each of the statutory provisions invoked were properly operative and it is open to us to consider whether it is proper to draw inferences from the various failures of the accused to answer the specific material questions put to

him concerning the alleged offence for which he was then being questioned and for which he is now on trial. In this regard, we have considered the submission made by Mr O'Higgins at day 12 and page 64. It was put forward that Mr Thompson might be a person who is in the class of people who simply do not engage with An Garda Síochána, period. It was suggested that Mr Thompson might be a person who, as a matter of policy, would not answer any question posed by a member of An Garda Síochána, no matter how innocuous. He was he suggested that there was compelling evidence that Mr Thompson might just be such a person. It was also suggested that an answer given by an innocent person could conceivably make his case worse. We are not convinced by these arguments. There is evidence in the case that Mr Thompson has had a number of previous engagements with An Garda Síochána as recorded in the PULSE system. There is also evidence that on some of these occasions his mobile phone was seized and examined. The PULSE evidence also suggests that on other occasions Mr Thompson was in possession of multiple phones and on two other occasions in 2012 and 2016 either smashed or broke up a phone when stopped by the guards.

There is no evidence that suggests that it was a matter of settled policy with him to stonewall the guards on every occasion, nor was such a proposition put to any of the garda witnesses who gave evidence and who had such previous dealings with Mr Thompson. Even if there was such a policy it does not, in our view, represent a good reason not to draw an adverse inference from a failure or a refusal to answer a material question where to draw such an inference would be otherwise proper and justifiable. To do so would be to permit persons to elect to avoid the potential consequences of statute law by adopting such a policy, nor do we accept the suggestion that an innocent person could compromise themselves by providing a truthful and accurate response to such questions. Fear of the truth need not concern innocent persons who have a possible explanation to advance when confronted with material questions which attribute to them the commission of a serious criminal offence.

The whole purpose of the statutory provisions is to elicit explanations of matters that objectively call out for the provision of an explanation and to provide a fair opportunity for the suspect to engage with the evidence by advancing an innocent explanation if such he possess. This has the added advantage for the accused of providing evidence that is immune to cross examination by the prosecution. We have considered the matter carefully and we are satisfied that the absence of an innocent explanation from Mr Thompson when confronted with a perfectly reasonable requirement to explain or account for matters that were manifestly suspicious in the context of the crime under investigation is that our conclusion is that his failure or refusal to account for each of these matters is that the failure or refusal to account for each of these matters was attributable solely to the want of

an innocent account on his part and not for the possible reasons advanced by Mr O'Higgins for his silence which are not good reasons.

Therefore, although such inferences cannot, for statutory as well as practical reasons, suffice as a sole basis for convicting the accused on the charge in this case, we are satisfied that they are available to us as corroboration of or support of other evidence in relation to which the failure to respond, failure or refusal to respond is material. Moreover, in the context of the invocation of section 19 A we are satisfied that Mr Thompson has advanced at least one factual matter in this trial which was not mentioned at the time of interview, that being the reason for the dismantling of the mobile phone was the presence of the unmarked car on Meath Street rather than being attributable to the contemporaneous murder of Mr Douglas. The adverse statutory inferences in this case are important because they serve to allay any possible doubt as to whether the facts put to Mr Thompson were susceptible of some innocent explanation.

53. In its final conclusions, the trial court then said:-

We have borne in mind that the evidence must always be examined in the light of the presumption of innocence and as a case based on circumstantial evidence must be examined in the light of the principles set out at some length in this verdict. We have examined the strands of the evidence, both individually and in combination, with a view to isolating a reasonably possible a reasonable possibility consistent with innocence with the assistance of Mr O'Higgins' closing arguments...We cannot locate a construction of a reasonable possibility consistent with innocence in the evidence of this case. Such a conclusion would require acceptance that the accused was the victim of multiple unfortunate coincidences in a short period of time. The acceptance of a reasonable possibility of innocence consistent with this evidence simply stretches credulity and belief in the possibility of multiple unhappy coincidences beyond the breaking point. We are satisfied that the totality of the evidence establishes the necessary proof beyond reasonable doubt of the guilt of the accused. It is evident to us that Mr Thompson had a visible role in the organisation and deployment of the getaway vehicles prior to the murder, that he travelled by the Shoestown store that morning, that he performed a final check on the murder scene four minutes before it occurred, that he behaved in a furtive and suspicious manner at the precise time of the shooting, that he directed the removal of the Fiesta and the pieces of the mobile phone, of his mobile phone three minutes after the killing, that he travelled in a connected car and socialised with connected persons a short number of hours later. We are fully satisfied that the evidence justifies an irresistible inference that he played a significant part in the organisation of the murder of Mr Douglas. The Court has weighed and evaluated the various strands of evidence set out above and has concluded that all of the strands of the evidence relied upon by the Court in this verdict point only in the direction of guilt. The innocent view of Mr Thompson's conduct and associations before, during and after this murder requires excessive reliance on

the occurrence of multiple unlucky coincidences to explain the intersection between Mr Thompson and people, places and vehicles associated with this crime. The accused declined the opportunity in the inference interviews to provide an innocent explanation of these matters which may have been known to him and which is not apparent to us on the evidence and we have heard nothing else in the case to disturb the conclusion that there is no reasonably possible scenario which could explain Mr Thompson's actions and associations except that for which the prosecution contend."

- 54.** The court also went on to elaborate further on the relative weight given to each strand:
For the sake of completeness, we should indicate as a jury the relative weight attached by us to the various strands of evidence. The first and most important is the driving of the Fiesta by Mr Thompson at 16.10 on Meath Street, allied to the matching general appearance of the driver of that car at 15.50 on Donore Avenue. This firmly ties Mr Thompson to the murder plot because of the role fulfilled by the Fiesta between 15.55 and 16.10 when it was safe to infer that Mr Thompson was driving this car. This conclusion is reinforced by his demeanour and actions on Meath Street between 16.10 and 16.14, particularly in relation to the breaking of his phone at the time of the murder, followed by the directed removal of the Fiesta. It is put beyond any doubt by the footage then associating him with the Mirage and Messrs. C and F at the Q Park and Little Caesar's just over three hours later and the confirmation of such associations by the forensic examination of these two cars and the association of Mr C with the front passenger area of the Swift.

The fourth strands is useful in that it confirms the involvement of Mr Thompson but as already pointed out, it derives its weight from the earlier strands rather than from the inherent strength of the recognition evidence. In the circumstances, this strand could not be and is not essential to our conclusion and therefore we do not accept the argument made by Mr O'Higgins that this case stands or falls on whether Mr Thompson drove the Fiesta at 10.48. The first three strands and inferences from the facts involved in those strands have convicted Mr Thompson in any event.

The weight of the fifth strands is also limited in the sense that it does also does not stand independently but serves to reassure us that we have not overlooked any reasonably possible interpretation of the first four strands that might have been open to Mr Thompson because, as the person best placed to provide an innocent explanation, he opted to exercise his right to silence instead of explaining how the gardaí were misconstruing the evidence that they had assembled and put to him and it also confirms the lack of substance of the suggested facts not mentioned by him in the inference interviews but which were subsequently advanced on his behalf at the trial.

The appellant's submissions

55. The appellant submits that the totality of the evidence presented by the prosecution did not amount to sufficient evidence to establish the prosecution case beyond reasonable doubt and that the verdict was perverse. The appellant accepts that an appellate court should not substitute its own view of the facts for that of the jury and that a verdict can only be set aside in exceptional cases but submits that the trial court made an error in law as opposed to fact. He submits that the court erred in aggregating items of evidence when some of those items were reasonably consistent with innocence. He also submits that there was double-counting of the circumstantial evidence insofar as it was also used in respect of the disputed recognition evidence. He submits that while circumstantial evidence may be joined together to establish proof beyond a reasonable doubt, each individual item must be proved beyond a reasonable doubt, which was not the case here.

56. First, the appellant criticises the trial court's treatment of his presence in Meath Street at 16.10 on the day of murder. The trial court said:

"[I]t would be both an appalling and an unlikely coincidence for Mr Thompson to have blundered unwittingly into this activity by becoming the driver of the Fiesta for some unknown reason and at some unknown place between 15.55 at Lullymore Terrace and the footpath outside the church at Thomas Street—on Thomas Street at 16.10. We consider that this scenario is so inherently improbable and remote that it can safely be discounted as a reasonable possibility on the evidence."

57. The appellant submits that the court was engaging in mere supposition in concluding that the appellant was the driver and/or operator of the Fiesta at all relevant times, and the court did not give the appellant the benefit of the doubt on this issue. The movements of the Fiesta were, he says, simply unclear between the time at 15.35 when it travelled up Lullymore until it was captured again on CCTV footage by a Credit Union camera at Thomas Street. However, the court "discarded" the possibility that there could have been a change in drivers and made a serious error in focusing upon the non-direct route that the Fiesta took, when the non-direct route passed close to the appellant's home address and said it would be "*an appalling coincidence if Mr Thompson was innocently driving the car to Meath Street and took an indirect route past Shoestown at that time for no apparent reason.*"

70. Secondly, the appellant submits that the court refused to afford any or any adequate weight to the evidence that the appellant habitually destroys mobile phones when he perceives Gardaí in the vicinity. Both Detective Inspector Walsh and Garda Byrne gave evidence of similar behaviour with mobile phones over several years, going back according to the evidence of Detective Inspector Walsh, to 2005. The appellant submits that the court erred in finding that it was not reasonably possible that the appellant was able to see an unmarked garda car at the time when he was breaking up the mentioned phone. The court made a finding of fact that the garda car was operating without the lights and sirens being engaged, which was questionable in circumstances where the garda car, immediately prior to coming on to Meath Street, was shown overtaking a line of traffic, breaking a red light, and then moving with speed over speed bumps before turning onto Meath Street and

slowing to a speed of 13 km/h with an empty street ahead of it. This finding in turn had a bearing on the finding concerning the reason the appellant broke up his mobile phone.

58. Thirdly, the appellant submits that the court erred in its treatment of the appellant's presence at Little Caesar's restaurant on the evening of the murder. It was accepted that the mere presence at a single event of this nature was insufficient to implicate a participant in a joint enterprise but the court then said that the appellant's presence there with two named individuals meant that they were "*inextricably linked by their joint participation in the murder of Mr. Douglas.*" The appellant complains that the court afforded no weight to the fact that a number of other attendees were present along with the appellant and these named men, including the appellant's son.

The Director's submissions

59. The Director's position is that the trial court considered the other evidence and used the recognition evidence as one strand, and that this does not amount to double-counting. Rather, the evidence was placed in context to see if it still stood up to scrutiny and that it only led to one conclusion. In relation to the other grounds for complaint in this section, the Director submits that the appellant's contentions ignore the adverse inference interview evidence that was placed before the Court. While it could not ground a conviction on its own, the evidence was properly accepted as a strand of the prosecution case.

Discussion and Conclusion

60. The court has carefully reviewed the evidence in the case and the trial court's analysis and conclusions in relation to it. We are of the view that the trial court not only engaged with each and every one of the issues raised by the appellant at trial (and which are now repeated on appeal), but that its conclusions are entirely persuasive for the reasons set out by the court. We have set those out in full above, and do not propose to repeat them here. The trial court's points with regard to coincidences were well made, and it engaged closely with the question of the 'phone disassembly' evidence in a manner which was entirely appropriate and compelling. We have no hesitation in rejecting this ground of appeal.

The third issue: the Data Protection point (Ground of Appeal No. 4)

61. In this particular instance, it may be of assistance to set out the submissions before examining the trial court's conclusions and then proceeding to our own analysis. The arguments before the trial court were the same as those on appeal.

The appellant's submissions

62. The appellant submits that the prosecution relied upon a large number of images obtained from CCTV cameras operated by private entities at various locations in Dublin in breach of the appellant's right to privacy and of the relevant statutory code. He cites *People (DPP) v. Idah* [2014] IECCA 3 for the proposition that the Court of Criminal Appeal recognised that a person has a right to privacy even in a public place. He points out that by amalgamating footage from different locations along a route, a picture can be built up of a person's movements. He submits that such information was considered to engage the right to privacy by the CJEU in *Digital Rights Ireland, Case C-293/12*,

8th April 2014, where the court struck down the Data Retention Directive which enabled the retention and accessing of mobile phone records because such data *"taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them"* (para 27). The appellant points by way of contrast to the *"rights-sensitive"* approach in s.38 of the Garda Síochána Act 2005, which imposes a number of conditions on the installation and use of garda CCTV systems which have the *"sole or primary purpose of securing public order and safety in public places"*.

63. The appellant places considerable reliance on the decision of the CJEU in *Ryneš*, Case C-212/13, 11th December 2014, with regard to private CCTV installations. After multiple attacks on his property, a householder had installed a CCTV system which covered a public area and a house across the road, through which he identified two suspects with regard to the most recent attack. The footage was handed over to the police for their investigation. During the subsequent criminal trial, one of the accused raised the issue of whether the CCTV system installed by the householder was in accordance with Czech data protection law. The equipment was fixed in position; operated on a continuous recording basis, deleting images as soon as the drive on which they were stored was full so as to allow the newer images to be stored; was only accessible by the householder; and did not have a monitor so could not be viewed in real time. In a procedure that does not appear to have any parallel under Irish law, the question was put before the relevant office for data protection (even though the question arose during criminal proceedings) and the office determined that the householder had infringed the Directive. He challenged that decision in court proceedings and from those proceedings, a reference was made to the CJEU. The question posed was whether the householder's system could benefit from the exemption in the Directive concerning purely household or personal data processing. It was held that it could not. However, as the trial court in the present case noted, nothing in the judgment of the CJEU concerns the admissibility of the evidence in the criminal proceedings.

64. The appellant points out that Directive 95/46/EC is transposed into Irish law in the Data Protection Acts 2003 to 2018, which place an obligation on persons using CCTV to register with the Data Protection Commission. He observes that the Data Protection Commissioner has determined that CCTV images in which a person is recognisable amounts to personal data and that such systems are subject to the data protection regime with the result that recording in the absence of the required registration is a criminal offence. Section 2C sets out the safeguards associated with safe processing. While there is an exception with regard to compliance with some of the safeguards, in the case of the processing of data *"... for the purpose of preventing, detecting, or investigating offences, apprehending, or prosecuting offenders..."*, the requirement to register is not exempted.

The submissions on behalf of the Director

65. The Director submits that the Gardaí acted lawfully in gathering the CCTV evidence and there was no breach of the appellant's rights in their obtaining the said footage from business premises and householders throughout Dublin. There is a positive duty on An Garda Síochána, given their

unique investigatory role, to seek out and preserve such evidence, an obligation which was emphasised by the Supreme Court decision in *Braddish v DPP* [2001] 3 I.R. 127. She submits that it is preposterous, in the absence of some positive subterfuge or conspiracy being engaged in by agents of the State, to suggest that An Garda Síochána should not seek out and preserve relevant and probative evidence that might be available from CCTV systems held by private parties.

66. The Director also submits that even if there was some illegality on the part of third parties in not registering their CCTV systems with the Data Protection Commission, this could not lead to an automatic exclusion of the evidence. She refers to *People (DPP) v. Gold* [2021] IECA 160, where it was contended on behalf of the appellant that the trial judge erred in law by admitting evidence of voice recordings where it was accepted by the prosecution that the said recordings had been made illegally by a third party. The issue was whether the exclusionary rule relating to unlawful or prohibited or unconstitutional acts extended beyond actions taken by agencies of the State, and whether the trial judge ought to have engaged in a balancing act in order to determine whether the recordings that had been found should be admitted. The Court of Appeal noted that the laptop on which the audio file was located was taken possession of during the course of a lawful search of the home of SR; and that there was no suggestion that any agent of the State had any involvement whatsoever in the creation of the recording. The recording was of potentially significant probative value, involving detailed discussions between the participants in relation to criminal activity. The court upheld the trial judge's approach of admitting the evidence, it being a situation where the recording was created without any State involvement, and where there was no suggestion that the State was complicit in unconstitutional actions taken by a private party to introduce evidence. The court added that this was not to say that evidence generated by a third party will always be admissible as all would depend on the circumstances of the case, but there was no rule of automatic exclusion. The Director submits that a similar approach should be applied here.

67. The Director also submits that the CJEU has made it clear in recent cases that the general principles of EU law do not require any automatic exclusion of evidence/material which was obtained/held in breach of EU law. She cites *Prokuratuur (Conditions of access to data relating to electronic communications)*, Case C 746/18, 2nd March 2021, in this regard.

68. The Director submits that it is clear that the principles of effectiveness and equivalence identified by the CJEU do not render the evidence in the instant case the subject of automatic exclusion. The admissibility of evidence are matters for the national courts. The principle of effectiveness requires that national courts provide a remedy for the protection of European rights and offer individuals an opportunity to vindicate and assert those rights. Evidence could be rendered inadmissible in accordance with this principle where an accused was not in a position to comment effectively on the information and evidence where they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact. It is submitted that the appellant was not in such a position. The CCTV material was provided to him and could be challenged at trial either on procedural or substantive grounds.

69. The principle of equivalence requires that domestic procedural law must operate in the same way for rights that are derived from domestic law as for those that originate in the law of the European Union. It is common case that breach of a domestic law does not render evidence

automatically inadmissible, and this is referred to in the *Gold* decision. It depends on the circumstances, and critically on the nature of the illegality.

70. The Director also submits that it cannot be assumed that the appellant has any reasonable expectation of privacy because the right to privacy does not extend to a right to privacy to participate in criminal activity. She also refers to *Idah*, where, the Court having referred to *Kennedy v Ireland* [1987] I.R. 587, described the right as being "... to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely a sovereign, independent and democratic republic" and went on to observe that it was not an unqualified right but was subject to the constitutional rights of others, and the requirements of public order, public morality, and the common good. McMenamin J (delivering the judgment of the Court of Criminal Appeal) also noted the Law Reform Commission Report on Privacy in 1998 and its view that a person is entitled to "reasonable expectation of privacy" even in a public place, but he observed that the Commission took care to identify *context* as being a major factor in determining the extent of the right of privacy and giving rise to a "reasonable expectation of privacy". MacMenamin J also noted the decision of the European Court of Human Rights in *Ludi v Switzerland* [1992] 50 E.H.R.R. 173 interpreting it as supporting the proposition that the closer the individual is to criminality, the lesser the privacy interest.

71. She observes that in *DPP v Doherty* [2019] IECA 209 the appellant was criticised for baldly asserting a breach of the accused's right to privacy while failing to engage with the actual facts of the case in order to particularise exactly how her constitutional right to privacy (or under Article 7 of the Charter) was said to have been allegedly breached (see para. 101 and 121). The Court held, inter alia, that the appellant could have had no expectation of privacy while in an internet café, using an IP address which could only identify the owner of the café. The Court stated at para. 127:-

"Moreover, it is well established (see EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd [2010] 4 IR 349, Idah v DPP [2014] IECCA 3 and People (DPP) v Kearney [2015] IECA 64), and as Hogan et al in the 5th edition of Kelly: The Irish Constitution characterise it, "an unremarkable proposition", that the right to privacy cannot extend to participation in criminal activity."

72. The Director submits that even if there has been any illegality, the evidence should not be excluded, citing *DPP v. Dwyer* [2023] IECA 70. She further submits that insofar as any balancing exercise or exercise of discretion is involved, the following factors are relevant to the consideration of the CCTV footage; (a) Evidence gleaned from CCTV systems, if authentic and relevant and reliable, is *prima facie* admissible evidence in a criminal trial; (b) There is positive duty on An Garda Síochána, given their unique investigatory role, to seek out and preserve such evidence, an obligation which was emphasised by the Supreme Court decision in *Braddish v. DPP* [2001] 3 I.R. 127; (c) Whether the appellant is making some sort of generalised claim about his privacy, or is asserting some specific breach. (d) The appellant cannot assert rights of third parties: he must assert a breach of his own rights; *DPP v Flynn* [2018] IECA 39 (e) The nature of the breach concerned, which (if there was any such) was by third parties and not the State itself.

The trial court's ruling on the data protection/privacy arguments

73. The trial court provided a detailed response to the appellant's submissions on data protection and privacy, covering a number of points: (i) whether the material could be characterised as "personal data" in the first place; (ii) whether (if it did constitute personal data) it was a criminal offence for the premises to have recorded on CCTV without registering with the Data Protection Commission; (iii) whether (if it did constitute such a criminal offence), it was illegal for the Garda Síochána to gather and make use of the material in a garda investigation and prosecution; (iv) whether there had been any breach of the appellants' constitutional right to privacy such that the evidence should be excluded. It answered all of these questions in the negative.

74. The court started by discussing the definition of "personal data" and said that it did not necessarily agree that the material in question amounted to "personal data" as was the "conventional wisdom", but added that by reason of the extensive arguments put forward by counsel, and having regard to the decision of the CJEU in *Ryneš*, it would proceed on the assumption that it did.

75. As to the decision in *Ryneš*, the court described it as a "*rather curious decision, which in our view demonstrates little practical appreciation on the part of the authors of what is required for the effective use of a CCTV system designed solely for the purpose of household protection*" and continued-

It is our firm view that in the absence of this decision, the natural and ordinary meaning of the relevant provisions of domestic legislation is such that persons such as the witnesses who were called to give evidence in this case are entitled to the exemption contained in the Acts, on the basis that if it could be said that the systems contained personal data in the form of images of complete strangers outside the curtilage of the building sought to be protected by CCTV, such data was, in each individual case that was presented in this court, and I refer to individuals as opposed to other kinds of entities, to use the words of the statute, "Concerned only with the management of their personal, family or household affairs", for the plain and obvious reason that such CCTV systems cannot be properly used for the purpose for which they were purchased and installed if they do not cover all possible avenues of entry across the boundary of the property or adjacent areas from which damage or injury to the property or persons therein could be caused by persons outside without actual entry to the property.

In this context, we have to regard any other conclusion as lacking sense. By way of contrast, a fair and reasonable view of the practical requirements for the operation of such domestic CCTV systems, in Irish law, is in fact encapsulated and illustrated by section 38(13) of the Garda Síochána Act 2005, which exempts from the operation of that Act "the installation and operation of CCTV on any premises by the owner and occupier of premises for the purpose of safeguarding persons or property on the property or in its environs." We add emphasis to the last four words of that section. The rest of the section applies to garda cameras and not to private CCTV cameras, for the good reason that garda conduct and actions must be regulated in a different way to the conduct and actions of a private citizen.

76. The court was extremely dubious, to say the least, that any criminal offence had been committed in this jurisdiction by any of the property owners who had provided the CCTV footage to the garda investigation. But it went on to consider the position on the supposition that such behaviour was criminal, noting the appellant's submission that the Gardaí are systematically taking advantage of these wholesale breaches of the law by private CCTV operators and that their use of the materials cannot be characterised as inadvertence within the meaning of the exclusionary rule.

77. The court referred to s.8 of the Data Protection Act which disapplies the legislation to garda investigations. It referred to the duty to search, find and preserve evidence as well-established and said that the garda investigation here had carried out "*exactly the kind of painstaking and comprehensive exercise that law abiding taxpayers would expect police officers to carry out in response to a serious crime*". Accordingly, it rejected the suggestion of individual or systemic wrongdoing by CCTV owners or the Gardaí.

78. The court again went on to conclude that, in the event it was wrong in the above, that there had been no breach of the appellant's privacy right, saying:

The first question to be posed in any question or in any case where the right of privacy is asserted and relied upon, is as to whether the subject matter of the claim gives rise to a reasonable expectation of privacy. The nature of the activities which the prosecution seek to associate with Mr Thompson has been set out at the beginning of this ruling. We do not accept that any such activities are capable of giving rise to a reasonable right or expectation of privacy on Mr Thompson's part and we therefore do not think that the constitutional right to privacy could be engaged such that the retention of electronic data recording those activities could give rise to a breach of that right. In our view, such claims border on the absurd.

We do not accept that Mr Thompson, or any other citizen walking down a public street, in 2016 or 2018, driving a car on the public road, or even eating a meal in a restaurant open to the public has any reasonable expectation that such matters would be kept private, in the sense that they cannot, either in whole or in part, be immune from capture by the operation of private CCTV systems. To find otherwise, would be to fail to recognise a ubiquitous feature of modern life. No reasonable person could expect that they would not be recorded in such circumstances or that the data associated with such recording would not be retained by the owner for a reasonable period. In our view, a reasonable period in this context includes up to and beyond one month.

So far as CCTV coverage of the type that we are concerned with in this case is concerned, the evidence shows that the degree to which one may be observed, still less identified, whilst out and about in public by such systems is somewhat random and haphazard and is certainly not systemic. In fact, there are large areas of space and time where the persons and vehicles depicted in the evidence have apparently not been captured by CCTV footage. In a lot of the footage, nothing specific is identifiable beyond motor vehicles in motion on the public street.

79. The court referred to the discussion of privacy in *Idah* as “a useful and helpful guide in deciding any privacy issue that could conceivably arise in this case” and said –

In the particular circumstances of this case, where one is dealing with an alleged execution-style murder, the common good must weigh heavily in the balance. It cannot be said that the accused's reasonable expectation of privacy extends to involvement in any such illegal enterprise. That is not to say that this accused is left without protection, but to acknowledge that, in relation to the possibility of his being captured on static domestic or commercial CCTV systems whilst he is out and about in public, he is left to the channels and safeguards granted to him under the Data Protection Acts which adequately vindicate any rights that he may wish to exercise in that regard. On the other hand, if the prosecution can establish hereafter that he is a person who appears in some or all of this footage, even if he ever had any reasonable right to an expectation of privacy in relation to such occasions in the first place, that expectation would then begin to fall away in the context of the right of this Court to have access to potentially relevant evidence in this trial.

80. The court also referred to *Atherton v DPP* [2006] 1 IR 245 where “the activities complained of were far more directly pointed towards the activities of the accused than the operation of the CCTV systems was in this case” and commented that the appellant’s rights to privacy were “no more breached than if a human eye witness was standing watching him behaving oddly on Meath Street, travelling in a car at various locations, or having a good time in a restaurant”.

81. Finally the court rejected any application of the rationale in the CJEU decisions in *Digital Rights*, saying that the present case concerned “the assembly of a number of pieces of information retained by domestic and commercial CCTV systems which was gathered by each of those systems in a completely independent and non-systemic manner” which could be contrasted with “mass state-directed retention of electronic data for lengthy periods” at issue in those cases. In this regard, the court referred to the decision of this Court in *Flynn*, saying that the CCTV footage was sought soon after it came into existence as part of a murder investigation, and that if it turned out that it implicated the appellant in murder, then he was not entitled to call in aid the provisions that he invoked in order to cover his tracks. In *Flynn*, Birmingham P. delivering the judgment of the Court said at paragraph 56:

A concern expressed in the digital rights cases is that telecommunication data would be misused if retained in bulk and so there should be an entitlement to have it erased. In this case the information was being sought, soon after it came into existence, as part of an investigation into a very serious crime, a premeditated murder. The appellant is not entitled to call in aid the EU data protection regime in order to cover his tracks or to assist in the covering of the tracks of others.

Discussion and Conclusion

82. The appellant did not address the data protection/privacy aspect of the case at the oral hearing of the appeal and rested upon his written submissions as summarised above.

83. The court does not consider it necessary to address in detail each of the individual submissions under this ground of appeal in the circumstances of this case. We agree with the trial court that even if one assumes that the householders should have registered with the Data Protection Commission and that it was an infringement of the data protection regime not to do so, this does not and should not automatically lead to a conclusion that the CCTV footage obtained from them should have been ruled inadmissible as a breach of the appellant's right to privacy.

84. We preface our remarks by saying that the appellant has sought to marry a point of EU law with the Irish doctrine of unconstitutionally obtained evidence to create a generalised argument that if there was a breach of the data protection regime, the CCTV evidence should be ruled inadmissible. In fact, certain issues are distinct and must be disentangled from each other, including: (i) Was there a breach of EU law by the operators of the CCTV cameras? (ii) If so, should this lead to exclusion of the evidence? (iii) Was there a breach of the appellant's constitutional right to privacy? (iv) If so, should the evidence be excluded?

85. Nothing in *Ryneš* concerns the admissibility or non-admissibility of evidence as that decision of the CJEU is confined solely to the question of the interpretation of the Directive's exemption relating to private CCTV systems. It does not suggest that an infringement of the EU data protection regime necessarily leads to the exclusion of the evidence thereby obtained in criminal proceedings in which the footage is deployed. It is true that the context in which the issue arose there was that of criminal proceedings in which the footage was deployed, but the net legal issue is discussed by the CJEU shorn of any connection to the question of whether the evidence should be admitted in the criminal proceedings. The judgment reports that the householder Mr. Ryneš brought court proceedings himself to determine the issue, but we have no further information about what the effect of the CJEU decision was on the criminal proceedings. The decisions in *Dwyer* and *Quirke* make it clear that a breach of EU law in the gathering of evidence does not necessarily translate into the exclusion of the evidence.

86. Further, decisions of the CJEU in cases such as *Prokuratuur (Conditions of access to data relating to electronic communications)* Case C 746/18, 2nd March 2021, make it clear that decisions on the admissibility of evidence in criminal cases are for the domestic courts, subject to the overall parameters of equivalence and effectiveness which are of course basic principles relating to the EU law. In *Prokuratuur*, the court stated at paragraphs 42 - 44:-

*The Court has consistently held that, in the absence of EU rules on the matter, it is for the national legal order of each Member State, in accordance with the principle of procedural autonomy, to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law, provided, however, that those rules are no less favourable than the rules governing similar situations subject to domestic law (**the principle of equivalence**) and do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (**the principle of effectiveness**) (judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 223 and the case-law cited).*

As regards the principle of effectiveness in particular, it should be noted that the objective of national rules on the admissibility and use of information and evidence is, in accordance with the choices made by national law, to prevent information and evidence obtained

unlawfully from unduly prejudicing a person who is suspected of having committed criminal offences. That objective may be achieved under national law not only by prohibiting the use of such information and evidence, but also by means of national rules and practices governing the assessment and weighting of such material, or by factoring in whether that material is unlawful when determining the sentence (judgment of 6 October 2020, La Quadrature du Net and Others, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 225).

In deciding whether to exclude information and evidence obtained in contravention of the requirements of EU law, regard must be had, in particular, to the risk of breach of the adversarial principle and, therefore, of the right to a fair trial entailed by the admissibility of such information and evidence. If a court takes the view that a party is not in a position to comment effectively on evidence pertaining to a field of which the judges have no knowledge and that is likely to have a preponderant influence on the findings of fact, it must find an infringement of the right to a fair trial and exclude that evidence in order to avoid such an infringement. Therefore, the principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law or by means of access of the competent authority thereto in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact (see, to that effect, judgment of 6 October 2020, La Quadrature du Net and Others, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraphs 226 and 227).

87. The appellant has simply not engaged with the principles of equivalence and effectiveness with a view to establishing why EU law (as distinct from domestic law) would require the evidence in question to be excluded, even if there has been an infringement of the data protection regime by property owners who have not registered with the Data Protection Commission insofar as their systems record the movements of individuals in public spaces.

88. The question of whether the appellant's constitutional right of privacy was breached is separate and distinct from the question of whether individual householders were in breach of the data protection regime. The trial court concluded that the appellant's right to privacy was not breached in circumstances where what was recorded was his presence (in or out of vehicles) on public streets along with the rest of the public in a non-targeted way and where (it is now clear) his movements at that time were in furtherance of a criminal conspiracy to murder. It therefore did not proceed to engage in a discussion of the test for the admissibility of illegally or unconstitutionally obtained evidence (i.e. *People (DPP) v. J.C.* [2017] 1 IR 417, most recently discussed in *People (DPP) v. Quirke* [2023] IESC 20, although that judgment was delivered since the trial herein and indeed since the appeal hearing in the present case).

89. We agree with the trial court that there was no breach of the appellant's right to privacy at all, and that individuals walking down a public street, driving a car on the public road, or even eating a meal in a restaurant open to the public do not, in this day and age, have a reasonable expectation

that their movements will be immune from CCTV observation, certainly in a situation where no individual is being targeted for the purpose of gathering information and where the camera is simply gathering random information about persons or vehicles in the location. In the absence of any breach of the constitutional right to privacy, it was not necessary for the trial court to consider the principles applicable to the exclusionary rule (as discussed in *J.C.*, and more recently in *Quirke*).

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

91. Accordingly, this ground of appeal is refused.