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THE COURT OF CRIMINAL APPEAL

186/07

**Murray C.J.
Murphy J.
McCarthy J.**

BETWEEN

**THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENT

AND

JOSEPH O'REILLY

APPLICANT

**JUDGMENT of the Court delivered by Murray C.J. on the 6th day of
March, 2009**

The applicant stands convicted of the offence of murder. He was convicted of that offence on the 21st July, 2007 after trial by a Judge and Jury before the Central Criminal Court. He had pleaded not guilty to the offence.

The charge was that on the 4th day of October, 2004 he murdered one Rachel O'Reilly. The victim was the applicant's wife. The applicant applies to this Court for leave to appeal against his conviction. The grounds of appeal are set out in a Notice of Appeal filed on his behalf.

At the hearing of the appeal the applicant did not pursue all of those grounds.

At the trial the prosecution relied upon an extensive range of circumstantial evidence. During the trial a significant number of issues arose concerning the admissibility of evidence some of which were resolved in favour of the defence and in others the trial Judge ruled that evidence tendered by the prosecution should be admitted against the objection of the defence.

One of the broader grounds of appeal initially relied upon by the applicant was that the learned trial Judge erred in law in refusing to withdraw the case from the Jury and direct it to enter a not guilty verdict on the grounds that the evidence was in the main of a tenuous character, too circumstantial, and did no more than raise a suspicion of guilt.

This ground of appeal was, understandably, in the light of the totality of the evidence, not pursued. Counsel for the applicant acknowledged that if the evidence concerning the records and usage of the applicant's mobile phone were to be considered to have been properly admitted then, having regard to the totality of the evidence, there was a sufficient case to go to the Jury. That is to say that in those circumstances the trial Judge's ruling that there was sufficient evidence upon which the Jury could properly convict is not challenged in this appeal.

Instead in this application counsel for the applicant has focused on putting in issue decisions of the trial Judge on the admissibility of several parts of the evidence at the trial and in particular, but not exclusively, that relating to the phone record and usage. If his arguments concerning the admissibility of any of the evidence put in issue in this appeal are correct it is submitted that the verdict of the Jury must be set aside.

One other aspect of the grounds of appeal was also not pursued namely that the learned trial Judge erred in failing to give special directions to the Jury as to the weight they should attach to the evidence of the applicant's good character as adduced by the defence. This also is understandable. The learned trial Judge having drawn to the attention of the Jury that evidence had been adduced by the defence to this effect it is difficult to see how his charge to the Jury could be considered unfair or incomplete in that respect, notwithstanding some English authorities relied upon as to a practice followed in England and Wales.

At the hearing of this appeal the applicant relied on five grounds related to the admissibility of evidence at the trial which are as follows:

- (a) The learned trial Judge erred in permitting the prosecution to adduce evidence of interviews with the applicant while in custody "in a

format from which it was abundantly clear to the Jury that the applicant exercised his right to remain silent for most of the period during which he was interviewed.”

- (b) The learned trial Judge erred in law in refusing to exclude from evidence the witness statement of the applicant made on the 6th October 2004 in circumstances where the applicant was a suspect at that time and no caution was administered in violation of the applicant’s right to basic fairness of procedures.
- (c) The learned trial Judge erred in law in refusing to exclude evidence of telephone records and data relating to the applicant’s mobile telephone which was obtained from O2 Ireland “in the absence of evidence that at the relevant time O2 Ireland was a licensed operator within the meaning of s. 7 of the Postal and Telecommunications Services (Amendment) Act 1999.”
- (d) The learned trial Judge erred in refusing to exclude the evidence of Mr. Andrew Laws where a comparison was made of CCTV imagery of motor cars recorded on the 4th October 2004 and CCTV imagery of a Fiat Marea on the 19th November 2004 “in circumstances where such evidence was inherently flawed due to the failure to carry out a comparison with any motor vehicle other than a Fiat Marea.”
- (e) The learned trial Judge erred in law in refusing to exclude the evidence of Detective Garda Keane concerning emails found on a computer belonging to the applicant “in circumstances where such emails dated from June 2004 and accordingly their prejudicial effect greatly outweighed any probative value they might have.”

First Ground of Appeal

The first issue argued was that the learned trial Judge erred in law in permitting the prosecution to adduce evidence of certain interviews with the applicant while in custody, because, as it was put, they were in a “*format from which it was abundantly clear to the Jury that the applicant had exercised his right to remain silent for most of the period during which he was interviewed.*”

This issue relates to a number of memoranda of interviews conducted by the Gardaí with the applicant. No objection is taken to the substantive content of those memoranda, that is to say, the questions posed and the answers given by the applicant in the course of those interviews. In this context, it is not contended that the interviews were unfairly conducted or that what the applicant said was not said voluntarily.

In the course of their investigations the Gardaí arrested the applicant pursuant to the Criminal Justice Act 1984 on a number of occasions for the purpose of questioning him and these interviews were recorded on video tape. A note of these interviews was also taken in writing. The first set of interviews occurred when he was arrested on the 17th November, 2004. There were three separate interviews on that date and each of them was recorded on video tape. The second set of interviews occurred on 14th March, 2005. Again there were three separate periods of interviews on that date which were also recorded on video tape. The memoranda of the three interviews conducted on the 17th November, 2004 were tendered in evidence at the trial as exhibits 10, 11 and 12. Those of the 14th March, 2005 were tendered as exhibits 13, 14 and 15. Each of the memoranda commenced with an introduction stating that it was a memo of an interview with the applicant. It recited the standard caution given to the applicant at the time, namely, that he was not obliged to say anything unless he wished to do so but whatever he should say would be taken down in writing and may be given in evidence. Then the memos recite the fact that the interview is being recorded on video tape and other matters such as the location of the interview (Drogheda Garda Station); the time; the date; the name of the interviewing Officer and accompanying officer and a statement that the applicant had been given a notice pursuant to Article 5 (2) of the Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997.

The applicant was invariably asked if he understood the caution and to acknowledge that he had been given the aforementioned notice. This was recorded in writing. On each occasion the applicant was asked to give his name and date of birth.

There follows in relation to each interview the relevant questions posed by the investigating Gardaí and the answers given by the applicant.

The end of the memorandum records that the notes of the interview were read to the applicant and that he acknowledged them to be correct. He then appended his signature to each memorandum which was witnessed by the signature of the relevant Garda Officer. The date is noted as is the time when the recording was switched off.

The point made by counsel for the applicant is that the contents of each memorandum were quite brief and in some cases very brief and that it would be plain to the jury that they were only being given a memorandum of a portion of each interview given the total time which lapsed from the commencement of an interview and its recorded conclusion. This, it was submitted, inevitably conveyed to the jury that, during the course of some if not all the interviews, the applicant had exercised his right to silence. [It was submitted that the time, at least as to the commencement of the interview, could have been omitted in order that the jury would not be lead inevitably, as it was put, to conclude that during the interviews the applicant had exercised his right to silence].

It was submitted that in admitting the memoranda of interviews in this format the applicants right to a fair trial was prejudiced by virtue of the fact that the jury had become aware of his exercise of his right to remain silent. In support of this proposition the applicant relied upon the decision of the Supreme Court in **D.P.P. –v- Finnerty, [1999] 4 I.R. 364.**

It is also to be noted that it is evident from the transcript that a great deal of material was excised or excluded by the prosecution from the memoranda as tendered in evidence either in anticipation of or because of objections from the defence on the grounds of irrelevance or inadmissibility due to the absence of any probative value.

During the course of his submissions counsel for the applicant acknowledge that he could see the logic of including a start time for the interview “*because simply it gives a framework*” but that there was no requirement to put the end time in and why should the prosecution be so anxious that this should be done.

In fact a record had been made of a total of eight interviews which the Gardaí conducted with the applicant. Two of the memoranda were not admitted in evidence at all because they did not contain anything of relevance to the issues of the trial. There were other statements also excluded by the trial Judge as shall appear from his ruling referred to later. The contents of the other six memoranda were admitted in part, that is to say insofar as they contained material of relevance and they were admitted in the format referred to. In doing so the learned trial judge in commenting on the objections of the defence, acknowledged that a person is entitled to his right to silence and pointed out to counsel that the jury cannot draw any adverse inference from a person exercising his right to silence and that they could be so advised. He ruled that the prosecution were entitled to adduce the admissible evidence and were at liberty to do so.

The Court will address the issue raised in the context of the **Finnerty** case in due course and it is sufficient to note for the moment that counsel for the applicant relied in particular on a passage contained at p. 381 of the report, namely:

“Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained, but that nothing of probative value emerged.”

At this point it is also relevant to note certain relevant directions which the learned trial judge gave to the jury in the course of his summing up to them. First of all, in the course of giving directions to the jury as regards the onus of proof on the prosecution the learned trial judge stated “. . . again as a general principle of law, there is no onus on an accused either to say anything to a member of An Garda Síochána when he is suspected of an offence or to give evidence before a jury. You cannot draw any adverse inferences from the fact that a man perhaps does not answer questions for An Garda Síochána or a man that does not give evidence before you as a Jury.” He went to say, further down the same page, “by speaking to An Garda Síochána, by giving a statement to the Garda Síochána and by calling witnesses in this case, the accused man is not undertaking any form of onus of proving his

innocence. The onus of proof never shifts from the prosecution and by giving evidence or giving an account, the accused man is not undertaking the burden of proving his innocence. That burden of proof rests with the prosecution.”

When the learned trial Judge came to refer to the memoranda of interviews he told the jury, at p. 24, “*you heard, ladies and gentlemen, evidence in relation to that detention and the fact that he was interviewed. You heard the relevant questions that were put to him and the answers he gave to those relevant questions that were put to him. Clearly, there were other matters discussed, as you will perhaps have gathered, from the time frame that were given by the members of An Garda Síochána but they do not go into irrelevancies as regards matters that are not of evidential value. They are not presented before a jury.*” Later in his charge, at p. 37, he told the jury “*you decide that case, ladies and gentlemen, on the evidence you have heard and on the introductions or inferences that you draw from the evidence, but you do not speculate. Courts do not operate by speculation.*”

No requisition was made to the learned trial judge concerning his directions to the Jury on these matters after the conclusion of the charge nor was any issue raised in this appeal concerning them.

DECISION ON FIRST GROUND OF APPEAL

First of all the Court observes that it is not, and certainly has not been, the law that any evidence from which it might be inferred that an accused exercise his right to silence should be excluded from the jury for that reason alone. Certainly such evidence can be excluded on the grounds of irrelevance if it does not otherwise have relevance to the issues in a trial. Evidence of arrest, charge and caution and an accused’s response, which may expressly indicate that he is exercising his right to silence has generally not been considered inadmissible (see **D.P.P. v. Finnerty** at p. 376). Also the Court considers that it would be impossible in many circumstances, having regard to the course of a particular investigation or a particular trial, to avoid or prevent matters coming before a jury, from which they might conclude or infer that the accused exercised his right to silence. A rather obvious example is the exercise by an accused of his right to silence by declining to give evidence at his trial. That is why the law permits a trial Judge to tell a Jury that an accused’s failure to give

evidence cannot lead to any inference adverse to him being drawn by it. (**D.P.P. v. Finnerty p. 376**).

Similarly, as counsel for the prosecution has pointed out in this case, where relevant or important and admissible evidence as to what an accused said in the course of an interview consists of his answers to a half a dozen or so or even just a few questions, even without a time frame, it would be just as open to a jury to speculate that there was much more that passed between the investigating Gardaí and an accused than such a short exchange. Apart from the fact that a jury may be told, where the context of the trial so requires, that no inferences adverse to the accused, should be drawn from the exercise by him or her of the right to silence it will invariably be told that the evidence which is tendered to them is the relevant evidence and they should only act on the evidence before them and not speculate. It is somewhat speculative in itself to try and determine whether in a particular case a jury might infer, from the format or brevity of evidence concerning a particular interview, whether any other matter not mentioned was simply irrelevant because it did not concern matters germane to the trial or was irrelevant because an accused, exercising his right to silence, had nothing to say.

In a criminal trial the task of the Jury is to decide whether the prosecution has adduced evidence which is sufficient to convince them, beyond a reasonable doubt, that the accused is guilty. The prosecution can only be brought on the basis of the admissible evidence available. There may be many matters or circumstances related to the commission of the crime in respect of which the prosecution cannot offer an explanation or present evidence because such evidence simply has not been found. There may for example be no evidence of motive or how the victim or alternatively the accused came to be in a particular place at a particular time. In principle a Jury may be tempted to speculate on any number of matters that could arise or which failed to be addressed by the evidence during the course of a trial. Since the trial is not a roving enquiry but one in which the issue of guilt or innocence must be determined on the basis of the actual evidence, a Jury is invariably instructed not to speculate and to act only on the evidence that has been placed before them. The fact that some part of the evidence for the prosecution, in the absence of complete evidence on the matter, or for whatever reason, might risk prompting some speculation is not a reason for

excluding it. The avoidance of speculation arising from the nature of the evidence is dealt with by the appropriate directions to the Jury by the trial Judge.

Counsel for the applicant anchors this ground of appeal on the judgment of the Supreme Court in **D.P.P. v. Finnerty**. Counsel did acknowledge that the factual circumstances in **Finnerty** are markedly different.

The Finnerty case was not about disclosing to the Jury just the simple fact that an accused had exercised his right to silence but the overt proof of that fact for the purpose of inviting the Jury to draw adverse inferences from the failure of the accused to give certain explanations to the Gardaí when in custody. The **Finnerty** case concerned a decision by the prosecution, in the course of the trial, and permitted by the trial Judge, to expressly elicit from the Garda Síochána who interviewed the accused, the fact that he declined to say anything during such interviews in relation to the complainant's accusations. This was done by the prosecution for the express purpose of inviting the jury to draw adverse inferences as to the credibility of the accused and in particular for the purpose of cross-examining the accused, when he gave evidence, (it already having been stated that he would be giving evidence) as to why he did not give his account of events when interviewed by the members of the Garda Síochána during his detention. Nothing of that nature occurred in this case.

What happened at that trial, is set out at pages 368 and 369 of the report, *“when the complainant had finished her evidence prosecuting counsel told the learned trial Judge, in the absence of the jury, that she now proposed to adduce evidence as to the fact that the applicant during the period of his detention in the garda station under the Act of 1984 had made no statement of any sort. This was objected to by counsel on behalf of the applicant . . . Counsel for the prosecution, however, submitted that, since it had been made clear on behalf of the applicant that he would be giving evidence which would contradict the account of events given by the complainant, the fact that he had given no such account when [been] interviewed in the garda station, would be relevant when the jury came to assess his credibility. The learned trial Judge having heard the submissions on behalf of the prosecution and the applicant ruled that the evidence was admissible.”*

In that case, the applicant, the accused at the trial, gave evidence in his defence. He was cross-examined in relation to his failure to answer questions. One of the questions put was “*are they [the Gardaí] correct in saying that you did not give a single answer to any question posed to you about this matter, the complaint [complainant]?*” It was subsequently put to the applicant at the trial in that case “*now, if you had told them [the Gardaí] what you are now telling members of the jury, wouldn’t you have told them well over a page of facts concerning this evening in which you were blissfully innocent of any wrongdoing?*”

As can be seen the conduct of the prosecution was totally different from the conduct in course of the trial in the present case. It is evident from the transcript of exchanges between counsel and between counsel and the trial Judge in the present case that the prosecution consciously sought not to introduce a significant amount of evidence, which consisted of questions to which the applicant simply declined, in one form or another, to answer, because it had no evidential value.

At no stage did the prosecution in the present case invite the jury to infer that the accused had exercised his right to silence. More relevant and much more important at no stage did the prosecution suggest or make the case that inferences adverse to the accused should be drawn from any exercise of a right to silence.

In its judgment in **Finnerty** the Supreme Court went on to note that “*in the course of his charge to the jury, the learned trial Judge made no reference to the issue raised by the prosecution as to whether the jury were entitled to take into account, in assessing the credibility of the applicant’s evidence, the unchallenged evidence of the Gardaí that he had made no statement during the course of his detention.*”

In the **Finnerty** case counsel for the accused had taken issue with the learned trial Judge’s charge having referred to his ruling on admissibility as “*novel*” which, it was submitted, “*in effect abolished and accused’s right to silence and to exercise that right in the police station*”. The trial Judge in that case declined to recharge the jury or give them any further direction in relation to inferences to be drawn from the

exercise of a right to silence. That issue did not arise in the present case at the trial and thus no requisitions were made to the trial Judge regarding any such matter.

It was in the forgoing context that the Supreme Court, in the Judgment (*nem diss*) of Keane J., (as he then was) reached its conclusions. Keane J., first of all noted that counsel on behalf of the applicant said that he would have had no complaint if the prosecution had simply informed the court that the applicant had been detained under the Act of 1984 and that nothing of probative value had emerged from the detention. *“He urged, however that that was not what happened in this case: on the contrary, evidence was adduced by the prosecution to the jury as to what transpired during the detention after the complainant had been cross-examined, with the avowed intention of cross-examining the applicant as to his failure to give such an account during the course of his detention, when he came to give evidence, a course of action strenuously objected to on behalf of the defence, but permitted by the learned trial Judge.”*

It was in the foregoing context that Keane J. went on to state:

“The principles applicable in a case such as the present (emphasis added) where a defendant detained under the provisions of the Act of 1984, has refused to answer questions put to him, can be stated as follows:-

- “(1) Where nothing of probative value has emerged as a result of such a detention, but it is thought desirable that the court should be aware that the defendant was so detained, the court should be simply informed that he was so detained, but that nothing of probative value emerged.*
- (2) Under no circumstances should any cross-examination by the prosecution as to the refusal of the defendant, during the course of his detention, to answer any questions, be permitted.*
- (3) In the case of a trial before a jury, the trial Judge in his charge should, in general, make no reference to the fact that the defendant refused to answer questions during the course of his detention.”*

It was on the basis of the application of the first and second principles that the appeal in the **Finnerty** case was allowed. In doing so Keane J. observed that the jury,

in deliberating on the guilt or innocence of the accused, might well have been under the impression that, *inter alia*, they were entitled to draw adverse inferences from the failure of the defendant to give his version of events in detail in the garda station.

Nothing occurred during the course of the present trial, and in particular in the conduct of the prosecution, which could have left the Jury under the impression that they were entitled to draw adverse inferences from an exercise of a right to silence by the applicant.

Moreover the learned trial Judge was very careful in the directions which he gave to the Jury as to where the onus of proof lay and that there was no onus on an accused to prove anything. He also made it clear to the Jury that they were to act on the evidence and only the evidence which they had heard and that they were not allowed to speculate.

In particular the learned trial Judge directed, as he had indicated to Counsel when he raised this issue, that what they heard in evidence with regard to interviews with the applicant were his answers to relevant questions and that anything else which may have occurred was irrelevant and not of evidential value. No exception was taken to the trial Judge's direction to the defence, which was entirely consistent with paragraph (1) cited above. In substance the learned trial Judge told the Jury that what they heard of the interviews was the relevant evidence and that nothing else that was relevant or of probative value emerged from the interviews.

Accordingly, in the Court's view the learned trial Judge was correct in admitting evidence of the portions of the interview which were admitted in evidence including the start and conclusion time of the interviews. As regards the recording of the time of commencement and the conclusion of the interviews the Court is of the view that these are not germane to the objections made on behalf of the applicant in part because, as pointed out above, the alleged speculation complained of could arise even where the times are not recorded. In any event, the Court is satisfied that the recording of the times for the commencement and conclusion of an interview provide a proper framework for the evidence in question and their inclusion is not prejudicial to an accused or certainly not so as to require the normal evidence concerning the commencement and conclusion of an interview to be given. In this regard it is also

relevant to bear in mind that the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (S.I. No. 74/1997) imposed certain legal obligations on Garda members conducting an interview during the period for which the electronic recording is in operation and it is relevant therefore that such times are recorded. Moreover those Regulations require certain things to be done at the commencement of the recording of an interview, at the stage of any interruption of an interview and at the conclusion of the recording of an interview. Among those matters which the Gardaí are obliged by statutory regulation to record is the commencement time and the time when the recording is switched off.

The Court would just add that in addition to being consistent with the principles set out in **Finnerty** the trial Judge's directions to the Jury, in the light of defence objections at the time, were apt and appropriate and he left the Jury in no doubt that the onus of proof rested at all times with the prosecution and that no adverse inference could be drawn from any exercise of a right to silence by the accused.

Accordingly for the foregoing reasons this ground of appeal must fail.

Second Ground of Appeal

In this ground of appeal Counsel for the applicant has argued that the learned trial Judge ought to have excluded a witness statement made by the applicant to Sergeant Gormley in the presence of Garda Murphy on 6th October 2004 because the applicant was a suspect at that time and no caution was administered in violation of the applicant's right to basic fairness of procedures.

This ground of appeal, as formulated in the Notice of Appeal, was more specifically based on an alleged failure to caution the applicant in breach of the Judges' Rules (to which more detailed reference is made below) but this was not pursued at the hearing of the appeal.

The statement in question was taken by Garda Aaron Gormley, as he then was, when he visited the applicant at his mother's home on that date in the company of Sergeant Denis Murphy. In the aftermath of the killing of Mrs O'Reilly and the establishment of the Garda investigation Garda Gormley had been assigned the duty

of Liaison Officer with the O'Reilly family and in particular with the applicant as the bereaved husband of the victim. According to his evidence this involved keeping in contact with the O'Reilly family especially the applicant and dealing with any queries or questions that he might have and to assist him where possible. He had previously met Mr. O'Reilly in that capacity at his mother's house on the evening of the murder, October 4th 2004. On the 6th October 2004 Garda Gormley returned to the applicant's mother's house with Sergeant Murphy for the purpose of taking a witness statement from the applicant, Mr. O'Reilly.

The applicant had agreed to make that statement. At no stage during the course of the trial, as the learned trial Judge himself noted at one point, was it suggested that the statement made by the applicant was other than a voluntary one. That voluntary statement was made by the applicant and taken down by Garda Gormley. At its commencement the written statement contains the standard declaration made by a witness when making such a statement in the following terms:

"I hereby declare that this statement is true to the best of my knowledge and belief, and that I make it knowing that if it is tendered in evidence, I will be liable to prosecution, if I state in it, anything which I know to be false, or do not believe to be true."

The statement concludes with the sentence

"This statement has been read over to me and is correct."

It is then signed by the applicant and witnessed by Garda Gormley and Sergeant Murphy.

The statement is a wide ranging one in which the applicant gave his own account concerning the family background, how he came to meet and marry his late wife and general family activities both business and recreational. It referred to family routines, relationships with friends and extended family members. It went on to give a detailed account of the course of events and his movements from the time when he got up and left the house on the morning of the murder and returned there shortly after 2 p.m., that afternoon and described how he discovered, in the presence of his mother-in-law who had arrived at the home not long before that, that his wife was murdered.

The statement was entirely exculpatory so that the account which he gave in that statement, if accepted, meant that he did not and could not have been responsible for the murder of his wife. Nonetheless it was to constitute an important element in the prosecution case since the accounts which he gave of his movements were found to conflict directly with the evidence tendered by the prosecution insofar as the data derived from his use of his mobile phone showed that his movements that morning were markedly different from those set out in the applicant's statement. The information and data concerning the mobile phone did not become available until a later date subsequent to the request for mobile telephone records.

Decision on Second Ground of Appeal

Counsel for the applicant points out the learned trial Judge found as a fact that, at the time when the applicant was interviewed by Garda Gormley, he must be considered to have been a Garda 'suspect'. It is obviously not for this Court to go behind that finding of fact. The notion or term 'suspect' has a rather elastic meaning. In the aftermath of a crime, particularly a crime as serious as murder, the investigating Gardaí may have in mind a number of suspects. Indeed as the learned trial Judge himself remarked, illustratively, after a serious crime the whole world is a potential suspect. One or more persons may fall particularly into the category of 'suspect' because of their presence and/or proximity to the scene of the crime at the time it was committed, or because of a particular marital, social or business relationship, with attendant circumstances, with the victim. As the learned trial Judge observed, a person may fall into the category of suspect because of a person's particular attitude and demeanour as observed by the investigators in the immediate aftermath.

A person who comes under Garda suspicion so as to be regarded as a 'suspect' or 'potential suspect' (and it would be at least sometimes difficult to draw a line of distinction between those two terms) may be eliminated and replaced by another 'suspect' or 'suspects' as an investigation progresses. The degree to which a person might be considered a 'suspect' may vary greatly. A person on the one hand, may be the subject of an investigation in order to either eliminate that person as a suspect or confirm the need for further investigation. On the other hand a person in respect of whom the investigating Gardaí have formed a firm opinion that he or she is the culprit, requires proof to charge such a person. This will depend on the gathering

of sufficient evidence by further investigation. The decision to charge is a critical element so is the fact of a suspect being in custody.

In order to place this ground of appeal in context the Court feels it necessary to make some general reference to relevant terms of what are known as the Judges' Rules. As pointed out above, the applicant had originally alleged that the failure to caution him in respect of the above statement was in breach of those Rules but that point was not pursued. Under those Rules, as the case-law cited below shows, evidence obtained in breach of the Rules may be admitted if the trial Judge in his discretion so decides.

The origin and status of the Judges' Rules were summarised by Walsh J. (*nem diss.*) in **The People (at the suit of the Attorney General) –v- Cummins 1972 I.R. 312.**

The Report of that Judgment contains a statement of the Judges' Rules the first three of which are the most relevant in the present context and state:

- “(1) When a Police Officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not, from whom he thinks that useful information may be obtained. (emphasis added)*
- “(2) Whenever a Police Officer has made up his mind to charge a person with a crime, he should first caution such a person before asking him any questions, or any further questions as the case may be.*
- “(3) Persons in custody should not be questioned without the usual caution being first administered.”*

As to the status of the Rules Walsh J., quoted from the statement which appeared in **R –v- Voisin [1918] 1 K.B. 531** to the following effect:

“These Rules have not the force of law; they are administrative directions the observance of which the Police Authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners,

contrary to the spirit of these Rules, may be rejected as evidence by the Judge presiding at the trial.”

As is pointed out in the Supreme Court Judgment in that case (at p. 324) where a breach of the Judges’ Rules occurs a trial Judge may “*exercise his discretion to exclude this piece of evidence on the grounds that it was obtained in violation of the Judges’ Rules.*” Walsh J. later added:

*“There is ample authority for the proposition that a confession which was induced by a false pretence or a trick or a fraud, however reprehensible they are in themselves, it is not necessarily excluded from evidence provided that the trick does not itself constitute an illegal act or a breach of the accused’s constitutional rights. This Court in **The People (Attorney General) –v- O’Brien [1965] I.R. 142** decided that in the former event the Judge at his discretion could refuse to admit the evidence so obtained and that in the latter event he must do so, subject to the exceptions there set out.”*

Walsh J. also concluded:

“This is a matter however, which must be judged in the circumstances peculiar to any particular case.”

In short, a breach of the Judges’ Rules, such as the failure to give a caution, does not automatically require a Judge to exclude from evidence a voluntary statement made by an accused. The Judges’ Rules give specific protection to persons being questioned in custody or after a Garda Officer has made up his mind to charge that person with an offence and in general the Courts will be reluctant to admit evidence of statements obtained in breach of the Judges’ Rules.

Nonetheless, a breach of the Judges’ Rules, such as the failure to give a caution, does not automatically require a Judge to exclude from evidence a voluntary statement made by an accused. Thus in principle, notwithstanding such a breach, such a voluntary statement remains admissible with the trial Judge having discretion to exclude it.

If a trial Judge has a discretion to admit an inculpatory statement notwithstanding a breach of the Judges' Rules a voluntary statement (and in this case it was both voluntary and exculpatory) where there is no breach of such specific rules must enjoy a strong presumption of admissibility unless there are quite exceptional circumstances, like those referred to in the case of **D.P.P. –v- Breen** considered below.

In the present case it is obvious from the circumstances in which the statement in issue was made that it did not come within the ambit of the Judges' Rules and accordingly there could be no breach of those Rules. The obligation to administer a caution referred to in Rule 2 and Rule 3 of the Rules as cited above did not apply, and it was not contended that they did apply, because the applicant, even though a suspect, was not a person in respect of whom the Garda Officer had made up his mind to charge with a crime nor was he in custody.

A Garda Investigator is not obliged to caution a person simply because he is a suspect. Counsel for the applicant acknowledged at the hearing that he could not argue otherwise as there is no authority to support a contrary proposition.

A voluntary witness statement, whether it be that the person who makes a statement is a suspect or not, is admissible and the discretion which resides in the trial Judge is to exclude it if he considers the grounds envisaged by the law that this should be done in all the circumstances of the case.

However, Counsel for the applicant argued that the fact that no breach of the Judges' Rules was involved was not the end of the matter. He argued that the applicant, independent of the Judges' Rules, enjoyed an inherent right to fair procedures and this was denied to him. The only unfairness is alleged to be the failure of the Garda member to give the applicant a caution, in the terms of the caution provided for in the Judges' Rules, before he made the statement in question.

In support of this submission Counsel for the applicant relied on the case of **D.P.P. –v- Breen (Unreported) Court of Criminal Appeal 13th March 1995.** In that case the Court concluded that “...*the failure to administer a caution in the circumstances of this case violated the requirements of basic fairness and the*

evidence was wrongly admitted.” The evidence concerned was an inculpatory oral statement made by the accused.

Counsel for the applicant was the first to acknowledge that the facts of that case were very different from this particular case although he still submitted that the principles should be applied to the circumstances of this case.

In that case the Gardaí were carrying out a search of the accused’s farm where it was suspected that guns, ammunition or explosives were likely to be hidden. A Detective Garda had been called to the scene to carry out a survey of part of the property and was not involved in the actual search. After he had completed the survey the Detective Garda called to the farmhouse. He was invited in by the accused who had known him previously. Neither the accused nor the Detective Garda had any knowledge as to what, if anything, had been found on the farm at this point. The Judgment recounts that both the accused and the Garda member had a general conversation about farming matters and his family and the like when the conversation took a turn and the applicant said that the Gardaí were searching again. The Judgment recounts Detective Garda Heverin’s evidence concerning the accused: *“He became agitated and said that he had wanted several times to tell somebody about it but he was afraid.”* Garda Heverin asked him to tell him what was troubling him. *The applicant had a bread knife in his hand and he started banging the table with his fist. He said “I can’t talk. Don’t ask me. I’ll end up like those in the North.” And he was crying. Garda Heverin stated that he was troubled and wanted to tell somebody about it, that it appeared to him to be connected with the searching of the lands and the farm buildings. He did not, however, administer a caution.”*

In passing the Court of Criminal Appeal approved the decision of the trial Court in that case which ruled that because Garda Heverin had not made up his mind to charge the applicant with any crime there had been no breach of the Judges’ Rules.

The Judgment then went on to cite judicial dicta relevant to the question of basic fairness. It first of all referred to the case of **D.P.P. –v- Shaw [1982] I.R.** and stated:

“Griffin J., deals expressly with a point at page 61 where he states as follows:-

“Secondly, even if a statement itself had been voluntarily obtained in the sense indicated, it may nevertheless be inadmissible for another reason. Because our system of law is accusatorial and not inquisitorial, and because (as has been stated in a number of decisions of this Court) our Constitution postulates the observance of basic or fundamental fairness of procedures, the Judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or circumstances by which it was obtained it falls below the required standard of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum standards must be observed in the administration of justice. Whether the objection to the statement be unconstitutional or other grounds the crucial test is whether it was obtained in compliance with basic or fundamental fairness and the trial Judge will have a discretion to exclude it “where it appears to him that public policy based on a balancing of public interest, requires such exclusion – per Kingsmill Moore J., at page 161 of the Report of the O’Brien case¹. This is a fairer and more workable test than a consideration of whether the questioned statement complies with specific constitutional provisions, because most of the criminal trials in this State are held in courts (the District Court, the Circuit Court and the Special Criminal Court) which, in terms of their judicial personnel, are not designed for constitutional interpretation or for balancing constitutional rights or the preferment of one in both constitutional provision over another.”” (emphasis added).

The Court then went on to state:

“The test of basic fairness, based on a due consideration of the rights of an accused coupled with the requirements in the interests of the common good, of the prosecution, superimposed on the need for voluntariness, has the merit of ensuring, if the judicial discretion is correctly exercised, that an accused will not wrongfully or unfairly be convicted out of his own mouth.”

The Court then went on to emphasise the facts of that particular case in stating

¹ [1965] I.R. 142

“In the present case, the applicant was quite clearly troubled and afraid. He informed Detective Garda Heverin of this. His agitation was visible. The Court of trial was of the opinion that the Officer knew or ought to have appreciated that he was on the threshold of admitting some involvement in a crime relating to the use of his property for the purposes of a subversive organisation. In these circumstances he ought not to have been encouraged to make any admission without first being cautioned. Instead, however, Detective Garda Heverin said “Tell me, Sean”.”

It was then that the Court went on to hold that in those particular circumstances he ought to have been cautioned and the evidence was wrongly admitted. The basic unfairness did not stem from the failure to caution simpliciter but from the failure to do so in the attendant circumstances of encouraging an admission when the accused was troubled, afraid and in an agitated stage.

As can be seen there is a stark contrast between the circumstances pertaining in the **Breen** case and this particular case. There is no suggestion in this case that the applicant at the time was troubled and afraid or agitated in any way or that there were any other such attendant circumstances. In fact the evidence is that the applicant freely and voluntarily gave, by way of a witness statement, an account of the family background, family activities, work activities and his movements on the day when the murder occurred. Also, unlike the **Breen** case, there was no suggestion that the applicant was on the threshold of admitting some involvement in a crime and indeed the contrary was the case and the account given by the applicant on its face, exonerated him from any involvement in any crime and in particular the murder in question.

It is quite clear, apart from the obligations under the Judges’ Rules where those apply, that when a person, even a suspect, is being interviewed or being questioned by a Garda member there is in principle no obligation to administer a caution and this is not affected even if in the course of that interview the person makes an admission of involvement in a crime.

It is only where there are other attendant circumstances so that “*by reason of the manner or of the circumstances in which it was obtained it falls below the required standard of fairness that the question of exclusion arises.*”

To hold that a mere failure to caution a person being interviewed, even a suspect, (and where the Judges’ Rules do not in any event apply) in itself would constitute unfairness would be to apply a rule which does not exist, as the authorities cited establish and indeed which Counsel for the applicant accepted could not be said to exist for that reason. There must be something more in the particular circumstances of the case to render it necessary that such a caution be given.

Even then, as the authorities, including the **Breen** case make clear, the evidence is admissible and it is a matter for the discretion of the trial Judge to determine whether he should exclude it or admit it even if there was a want of fairness. In exercising that discretion the trial Judge is entitled and indeed bound to have regard to all the circumstances of the case and the evidence before him. In exercising that discretion he has to decide whether public policy, based on a balancing of the public interest requires its exclusion.

Insofar as this Court is asked to hold that the statement in question should not have been admitted because there was some want of basic fairness the Court is of the view that there are no objective grounds for concluding, having regard to the evidence tendered at the trial, that there was any want of basic fairness so as to require it to be excluded. To say that the mere failure to give a caution is a want of fairness is to misconceive the principle involved since, as already pointed out, apart from the circumstances to which the Judges’ Rules apply, the law does not require a caution to be administered to a person being interviewed in the ordinary way, even if a suspect, unless there are other attendant factors concerning the manner or circumstance in which it was obtained which were such as to require a caution to be given in order to respect such basic fair procedures. Even then all the factors referred to in **Breen**, including those cited from the judgment in **Shaw**, must be taken into account.

So far as the ruling of the trial Judge admitting the statement in evidence is concerned that was in any event a matter for him to rule upon within the margin of his discretion. His decision in exercising that discretion is considered in the context of

the next argument advanced by Counsel for the applicant with regard to this ground of appeal.

In the context of this ground of appeal Counsel for the applicant raised another argument, not mentioned in the ground of appeal but not objected to by the respondent, the D.P.P.

Counsel argued that the statement in question, having regard to the findings of the trial Judge, was “*presumptively inadmissible*”. That was, he submitted, the approach adopted by the trial Judge according to his interpretation of the trial Judge’s rulings on this statement. In his submission, the trial Judge held that it was inadmissible but was saved from inadmissibility because the correctness of the statement was later acknowledged by the applicant on the 17th October, an occasion when the accused was in custody and had been cautioned. Counsel’s submission was if the statement itself was inadmissible for want of fairness it could not be considered admissible because of the subsequent acknowledgment of the correctness of the statement by the applicant. In relying on that subsequent acknowledgment by the applicant the trial Judge was wrong in law in admitting the statement.

With regard to the ruling of the trial Judge it should be first noted, as indeed pointed out by Counsel on both sides, that the trial Judge had to deal with a number of issues concerning the admissibility of various aspects of the evidence and what he did was first of all to give his ruling on those various issues. He then indicated that he would give reasons for his rulings at a later stage in the trial. The Judge’s ruling in relation to the admissibility of the statement of 6th October 2004 was given on day 11 of the trial. That ruling was as follows:

“I will also exclude a number of interviews that took place with the accused man prior to his arrest, and the only interviews I propose to admit in evidence are the interview of the 4th October, which is the interview in his mother’s home, and also the interview of the 6th October, which is acknowledged in the course of an interview whilst lawfully detained.”

On the 18th day of the trial the learned trial Judge gave a slightly more detailed ruling in referring to a number of uncautioned witness statements taken from the applicant between the 6th and 12th October 2004. In making his ruling he stated:

“I am not entirely certain as to what stage he [the applicant] became a suspect but it seems to me that, in fairness, the written statements that were made by the accused should have been taken under caution. I propose to exclude from evidence the vast majority of those statements, indeed all of those statements, with the exception of the statement taken on 6th October 2004. My reason for permitting that statement to be admitted into evidence is that whereas it was not taken under caution, on the occasion of the accused man’s first arrest while he was under caution that statement was read to him and he was asked as to its correctness. He passed an observation that he thought it was, which is, in effect, an acknowledgment and acceptance of that statement whilst under caution.”

As the authority cited above clearly establishes the admissibility of the statement was a matter for the trial Judge’s discretion. That was a discretion that he was bound to exercise having regard to all the circumstances of the case and the evidence before him.

He did not find that the statement was presumptively inadmissible and indeed that was not the position in law as the authorities above make clear, given that the statement was a voluntary one. Furthermore its taking was not tainted by any illegality or breach of a particular constitutional right such as the applicant being in unlawful custody or denied access to a solicitor. (See **D.P.P. –v- O’Brien cited below**).

At no stage did the trial Judge hold the statement made on 6th October 2004 to be inadmissible for lack of fairness. He gave one decision (the ruling first and the reasons later). As he made clear on the 11th day of the trial his decision was, notwithstanding any unfairness to admit the evidence having regard to the circumstances and this was done within the bounds of his discretion. It is evident that he did not conclude that public “policy based on a balancing of public interests” (see **Shaw above**) required its exclusion. The Court is satisfied that the trial Judge exercised his discretion correctly.

Finally, as regards this ground of appeal, Counsel for the applicant referred to the decision of the Supreme Court in **D.P.P. –v- O’Brien [2005] 2 I.R. 206**. That

was a case in which the statement of an accused was excluded from evidence because at that time his detention in custody had been rendered unlawful by reason of the conscious and deliberate denial of a constitutional right to consult a solicitor which he had requested. In those circumstances the trial Judge was bound to exclude the statement as a matter of law and it was not a question of exercising a discretion whether or not to do so. No issue arose in the appeal in that case concerning the admissibility of that statement. What the Court had to consider is whether statements made by the accused in that case subsequently and after he had an opportunity to consult and be advised by his solicitor were properly admitted at the trial or whether they should have been excluded as having been tainted by the original illegality and deliberate denial of a constitutional right. McCracken J. (*nem diss*) in his Judgment concluded that the accused “*was in lawful detention at the time he made the statements subsequent to the arrival of his solicitor and those statements are rightly admitted in evidence.*”

In the course of his Judgment McCracken J., did point out that if there was a causative link between the original unlawful detention and breach of constitutional rights and the making of the later statements there would be grounds for excluding those statements. However he found there was no causative link and he concluded as indicated above.

That case can have no bearing on the circumstances of this case. In this case the applicant was not in custody at all and there was no denial of a constitutional right, deliberate or otherwise, like access to a solicitor while in custody. In the O’Brien case the trial Judge had no discretion as to whether or not to exclude the original statement but was bound to do so as a matter of law by reason of the denial of the deliberate constitutional right and the unlawful custody.

In this case, as has already been pointed out, the voluntary statement made by the applicant was in principle admissible. As the case-law referred to makes clear the trial Judge had a discretion to exclude the evidence if he considered it appropriate to do so in all the circumstances of the case and the evidence before him. His only decision, as made on the 11th day of the trial, was to admit the evidence. Again as previously noted, the Court is satisfied that in allowing evidence to be given of the statement he exercised his discretion properly and lawfully.

Accordingly this ground of appeal also fails.

Third Ground of Appeal

The third issue raised by the applicant as a ground of appeal is the submission that the trial Judge was wrong in law in admitting evidence relating to telephone records and the usage of certain telephones which were obtained from the Telecommunications Operator O2 Ireland.

The objection made to the admissibility of this evidence is purely technical, although that does not take away from its importance. Counsel for the applicant submits that the evidence should not have been admitted because it was not proved in evidence at the trial that O2 Ireland was a licensed operator within the meaning of s. 7 of the Postal and Telecommunications Services (Amendment) Act 1999.

When objection was made to the admissibility of this evidence at the trial both the prosecution and the defence curiously omitted to refer to the evidence of a Ms. Fox on the 11th day of the trial. Her evidence, the admissibility of which was not challenged, commenced with the following question:

Q. “Ms Fox are you the Government Liaison Officer for O2 Ireland?”

A. “That is correct, yes.”

Q. “Just to be clear, is O2 Ireland a licensed telecommunications operator for the purposes of the telecommunications legislation?”

A. “It is indeed.”

Q. “And if it were not, it would not be able to operate?”

A. “Pardon?”

Q. “If it were not a licensed operator it would not be able to operate in Ireland.”

A. “Exactly.”

She then went on to confirm that one of her duties is to deal with requests received from the Gardaí in the course of their investigations and supplying them with details of customers’ accounts and telephone calls and that she did so in this case.

Her accuracy of the evidence was not challenged by the defence and in fact no questions were asked of her at all.

Notwithstanding the evidence of Ms Fox it is submitted on behalf of the applicant that proof that O2 Ireland was a telecommunications operator in accordance with the relevant statute could only have been established by the production of the licence itself. Absent proof of the actual licence it is contended that the Act of 1999 did not apply to O2 Ireland. It was then submitted that in the absence of such proof the records of phone usage relied upon by the prosecution which were obtained by the Gardaí pursuant to the telecommunications legislation could not be considered to have been lawfully obtained pursuant to that legislation and therefore was inadmissible and the trial Judge should have so ruled. Furthermore, in the absence of such statutory authority the obtaining and use of such records by the Gardaí for the purposes of the investigation and the trial was a breach of the applicant's constitutional right to privacy

Decision on Third Ground of Appeal

The applicant's arguments are premised on the contention that there was not adequate or appropriate proof that O2 Ireland was a licensed telecommunications operator. In support of that submission Counsel relied on the judgment of this State in **The People (DPP) –v- Cleary [2005] 2 IR 189**.

That case, as Counsel for the applicant readily acknowledged, concerned formal proof of secondary legislation namely a statutory instrument.

The head note in the report summarises the facts of that case as follows:

“The accused was charged under the provisions of the Misuse of Drugs Act 1977, as amended by the Misuse of Drugs Regulations 1988 and 1993. He was convicted of possession of a controlled drug and of possession with intent to supply ...

Following the close of the prosecution's case, Counsel for the accused sought a direction on the grounds that the prosecution had failed to prove the Misuse of Drugs regulations. It was further submitted on behalf of the accused that the regulations formed an integral part of the statement of the offence charging the accused and it was therefore essential in a criminal trial that they be proved, as regulations made by statutory instrument were not in

the same position as statutes. The trial Judge rejected the accused's submissions regarding the regulations without giving any reason for so doing. It was contended by Counsel for the accused that it was not open to the trial Judge to make such a ruling without giving reasons."

As the judgment of the Court itself points out Counsel for the prosecution in that case conceded at the trial that the regulations had not been proved and that it was the "invariable practice" that such regulations be proved in a criminal trial by handing in an official copy of the regulations to the trial Judge. Nonetheless, at the hearing of the appeal in that case before this Court Counsel for the prosecution contended that the trial Judge was entitled to take judicial notice of the regulations in question without further proof that the regulations had been made.

As is evident from the above that case was concerned specifically with proof of the enactment of a statutory instrument. As the Court pointed out in its judgment the method of proof of statutory instruments and regulations is expressly provided for in s. 4(1) of the Documentary Act 1925 which provides that such regulations may be proved by the production of a copy of the regulations either in Iris Oifigiúil or as printed by the Stationery Office.

In reaching its conclusion to allow the appeal in that case the Court stated:

"It appears to this Court that the weight of authority is in favour of Counsel for the accused's contention that it is incumbent on the prosecution to prove the relevant regulations in the manner prescribed by the Documentary Evidence Act 1925. Even if that were not so in every case, the position in the instant case is that Counsel for the prosecutor conceded that the regulations had not been proved and, subsequently, applied to re-open the prosecution case in order to prove them, thus tending to acknowledge that such proof was necessary. The trial Judge, having refused the application, went on to reject the submission of Counsel for the accused, giving no reasons for his decision. It appears to this Court that the trial Judge erred in so doing."

Accordingly it set aside the conviction of the accused on one of the counts in which the regulations in question formed an integral part of the statement of the offence. In doing so the Court did not exclude the fact that in certain circumstances

Judicial notice could be taken of a statutory instrument but not in the circumstances of that case.

As is evident from the Judgment in that case the obligation on the prosecution to prove the statutory instrument by handing a copy of it into the Court derived from the provisions of the Documentary Evidence Act 1925. The decision turns therefore on the obligation of the prosecution having regard to s. 4(1) of the Act of 1925 allied, as it happens, to the concession by the prosecution at the trial that the Regulations had not been proved. The section in question and the decision of the Court in that case is not pertinent to proof of a fact such as whether an incorporated company is licensed to carry out a particular activity. Of course what is involved here is the proof of the fact of a licence. It obviously does not involve the proof of a document for the purpose of establishing the truth of facts recited in it, such as a document containing statements of the accused. Whether a company is licensed to carry out a certain activity, such as in this case whether O2 Ireland is a licensed telecommunications operator for the purposes of the Telecommunications legislation is thus a question of fact which may be proved by admissible evidence. One way of doing so is of course the production of the relevant licence by a competent officer of the company. Equally, a competent officer of the company who has knowledge of the fact that the company is licensed may give evidence that it is so licensed. It is clear that the witness, Ms Fox was competent to give the evidence and her evidence was admissible. As can be seen from the extract of her evidence it was clear and unequivocal as to the fact that O2 Ireland were licensed and without such a licence it would have been unable to operate. That factual evidence was unchallenged. If the existence of a licence had been put in issue such as by the presence of other evidence to suggest that it had not been licensed then the absence of the actual licence itself might go to the weight of Ms Fox's evidence but would not have rendered it inadmissible. However that is entirely hypothetical.

It is also to be noted that there was no objection to the admissibility of Ms Fox's evidence. It was at a later stage in the trial that the defence submitted that there was not proper evidence to prove that O2 Ireland had been licensed. That submission was flawed since it never addressed the evidence of Ms Fox. Although the trial Judge expressed the view that he was entitled to take Judicial notice of the notorious fact

that O2 Ireland was long established as a telecommunications operator in a strongly regulated industry (and he may have been correct in that, although it is not necessary to address that point specifically in the light of Ms Fox's evidence) this Court is quite satisfied that on the basis of the clear and admissible evidence of Ms Fox concerning the fact of the licence that the Jury were entitled to act on that evidence as they saw fit and to conclude that O2 Ireland was indeed a licensed operator at the relevant time.

Accordingly the basic premise of the applicant's submissions with regard to this ground of appeal fails and the Jury were entitled to take into account all the evidence tendered by the prosecution concerning the phones, including the accused's mobile phone. Other arguments were advanced by both the applicant and the D.P.P. concerning an individual's right to privacy on the one hand including that right in relation to his or her telephone records, and on the other hand, the right or power of the Gardaí to investigate crime and seek material evidence including that of phone records. However, these arguments were necessarily contingent on whether or not the evidence regarding telephone records obtained pursuant to the provisions of the Act of 1999 should be excluded as not having been properly obtained under the said Act due to the absence of proof that O2 Ireland was a licensed operator. Having concluded that there was evidence of the existence of such a licence and that therefore the Gardaí were entitled to obtain the telephone records pursuant to their statutory powers, it is not necessary to consider those arguments.

Fourth Ground of Appeal

As regards this ground of appeal the applicant submits that the learned trial Judge erred in law in refusing to exclude the evidence of Mr. Andrew Laws. Before referring to the specific terms of the ground of appeal in relation to Mr. Law's evidence it is necessary to refer to the nature of his evidence and place it in context.

Mr. Law's speciality is to analyse imagery, *inter alia*, from CCTV cameras. The Gardaí had obtained CCTV imagery of traffic moving along the public road in the vicinity of the applicant's home, where his wife was found murdered, on the morning of the murder, October 4th 2004. The CCTV imagery related to traffic at two locations near that home at a time when the evidence obtained in relation to the applicant's mobile phone usage located him as moving towards his home not long

after 9 a.m. and in the area moving away from his home not long before 10 a.m. The CCTV footage related to two locations, one known as Murphy's Quarry and the other as Blakes Cross.

The applicant owned a Fiat Marea at the time in question and he had told the Gardaí that he had been driving it on the morning when his wife had been murdered in her home. It had also been established that he had used his mobile phone to make calls on that morning. The applicant's own account to the Gardaí of his movements on that morning differed from that indicated by the location of his mobile phone, while being used by him, as disclosed by phone usage records. There was evidence that the location of the mobile phone user could be determined by, *inter alia*, reference to the mobile phone mast or masts through which each call was transmitted.

It is evident that Mr. Laws was asked to examine and analyse the images on the CCTV footage in order to determine whether the applicant's motor car or a motor car of the same make and model, a Fiat Marea, appeared on the footage at either or both of the locations near his home on the morning of the murder.

For that purpose he was also provided with CCTV footage, in what may be described as a "controlled" sample, of motor traffic at the same locations on a later date, 19th November 2004. That footage included the applicant's car which, for the purpose of this controlled sample, was being driven by a Garda member on that occasion.

It should be noted that the CCTV imagery, including that recorded on the day of the murder, was not sufficiently clear or of sufficient quality to identify a motor car as the applicant's motor car or one of the same model simply by viewing the footage in the ordinary way. If it had been, as Mr. Laws pointed out, his expertise as an image analyst would not have been required.

Mr. Laws told the Jury of the various tests and methods which he used to analyse the video footage taken at Murphy's Quarry and Blakes Cross, both, as already mentioned, close to the applicant's home, and the use which he made of the controlled sample CCTV footage. It is not necessary for present purposes to review that aspect of the evidence or other details of Mr. Laws' evidence. It is sufficient for those purposes to summarise the conclusions which he gave in evidence to the Jury.

While he found some positive support in his analysis for the proposition that on at least one of the journeys on the day of the murder a car seen on the video footage was indeed the same make and model as the applicant's, his basic conclusion in respect of the CCTV footage of traffic near the applicant's home on the day of the murder was that there was present a motor car which could not be eliminated as being of the same make and model as the applicant's car. The video footage did not thus exclude the possibility that the applicant's car was on the roadway at the two locations in question at the time in question, or to put it another way the CCTV footage was not inconsistent with the presence of the applicant and his motor car among the traffic at the locations and times in question.

Mr. Laws indicated that the range of possible conclusions from his analysis of the imagery on the CCTV footage could be a range from a definitive exclusion of any car being the same make and model as the applicant's, a motor car which could not be eliminated as being the same make and model and thus being consistent with the presence of such a car among the traffic, to a positive identification at varying degrees of confidence that a particular car was indeed the same make and model. As indicated his basic conclusion related to the first of these.

In submitting that this evidence should not have been submitted Counsel for the applicant does so on the grounds that the evidence was inherently flawed due to the failure of Mr. Laws to carry out a comparison with any motor vehicle other than a Fiat Marea. Therefore it should not have been admitted.

Decision on Fourth Ground of Appeal

In the view of the Court this ground of objection to the admissibility of the motor car is misconceived. The evidence of Mr. Laws, even limited as it was, was evidence of two facts. The first was that in examination of the CCTV footage of road traffic at the particular times and locations in question did not establish that there was no car of the same make and model as the applicant's on the road near his home at that time. Secondly, although it may not have established in itself that there was a motor car of the same make and model of the applicant's there at the time, let alone the applicant's actual motor car, the footage was not inconsistent with the other

evidence which showed that the applicant was in fact driving in that area at that time, if the Jury accepted the evidence stemming from the applicant's mobile phone usage.

It was manifest that there were cars of other makes on the road and Mr. Laws did not exclude the possibility, at least on some of the journeys if not all, that the motor car which he said he could not eliminate from being the same make and model as the applicant's could be another model of a similar profile. That is why he reached the basic conclusion which he did, namely, that there was present at the locations on the video footage a motor car which could not be excluded from being the same make and model as the applicant's. A failure to carry out a comparison with any other motor vehicle was irrelevant to Mr. Law's basic conclusion.

Counsel may well argue, and no doubt did argue before the Jury, that Mr. Laws' evidence should be given little or even no weight by them. That was a matter for the Jury and there is no reason to conclude that the evidence itself was inadmissible.

Accordingly this ground of appeal also fails.

The Fifth Ground of Appeal

The final ground of appeal relied upon by the applicant concerns the admissibility of emails between the applicant and his sister and specifically emails which passed between them on 9th June 2004 some four months before the murder. It was not submitted that these emails were inadmissible in themselves but that by reason of the fact that they were exchanged on a date that was just over four months before the murder meant that their probative value was outweighed by their prejudicial effect on a Jury. The emails, *inter alia*, reflected the attitude or state of mind of the applicant with regard to his wife and the state of their marriage. For example at one point he emphasised the state of that relationship by writing "*Me + Rachel + marriage = over!!!!*" and referred to her in very disparaging terms. There was also an allusion to possible divorce and separation and the question of custody of the children.

Counsel for the applicant argued that if evidence as to the state of mind of the accused with regard to his relationship with his wife and to the marriage related to circumstances immediately before or much closer to the murder it would have been

admissible but such evidence at such a remove of four months before the murder would have little, if any, probative value. The contents of the emails, although not there to prove the truth of the statements contained in the emails but rather the state of mind of the applicant, was such as to prejudice the Jury to a degree disproportionate to its probative value.

Decision on Fifth Ground of Appeal

The Court considers that these emails were manifestly admissible and relevant evidence. The fact that the evidence consists of emails sent and received by the applicant four months rather than say, four days, prior to the murder does not, in the view of the Court, affect the probative value of the evidence. Clearly the material was relevant evidence with real probative value. It was also relevant to other material evidence concerning the applicant's state of mind concerning his marriage and the breakdown in relations with his wife. Indeed it was open to the Jury to infer that the applicant's disaffection with his wife and marriage was not merely short term and transient but may have been of some duration. That of course was a matter for the Jury and also a matter for them to decide what importance they could attach to that evidence. In any event the Court considers that these emails were sent and received at a time sufficiently proximate to the crime as to be material evidence. In the circumstances the Court is quite satisfied that there are no grounds for concluding that the evidence had any prejudicial value which would outweigh its probative value.

Accordingly, having regard to the conclusions of the Court set out above the application is refused.