# THE COURT OF APPEAL

**UNAPPROVED** **NO REDACTION NEEDED**

**[197/17]**

**Neutral Citation: [2021] IECA 179**

**The President**

**Edwards J**

**Murray J**

**BETWEEN**

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

**RESPONDENT**

**AND**

**CHRISTOPHER MCDONALD**

**APPELLANT**

**JUDGMENT of the Court delivered (*via* electronic delivery) on the 24th day of June 2021 by Birmingham P.**

**1.** On 10th July 2017, after a trial that had lasted 15 days in the Central Criminal Court, the appellant was convicted of the offence of murder. The offence with which he was charged was that, on 12th June 2015, at Blanchardstown Racing Pigeon Club, Clonsilla, he had murdered Keith Walker. A large number of grounds of appeal have been formulated and advanced, and it can be said immediately that many of them are completely lacking in any substance. To put the grounds of appeal in context, it is necessary to say something about the events that led to the trial.

## Background facts

**2.** Keith Walker, the deceased, drove to Blanchardstown Racing Pigeon Club on 12th June 2015 in a car belonging to a man named Jason O'Connor. Mr. O'Connor was actively involved in pigeon racing at the club. On the evening that he met his death, Mr. Walker left Mr. O'Connor's home in the Blanchardstown area between 5.20pm and 5.40pm to drop Mr. O'Connor's pigeons to the club before a race that was due to commence at 6.30pm. Mr. Walker parked Mr. O'Connor's vehicle at the club and was shot dead shortly after exiting the vehicle. There were a number of eyewitnesses who described an individual, who appeared to be a woman, take what was described as a submachine gun out of a handbag and then open fire at the deceased. The shooter was described as wearing a long black wig, women's sunglasses and leggings. The deceased fell to the ground, and as he did, his assailant was described as running very fast out of the club towards the entrance carrying a machinegun. That machinegun was described as being a foot and a half long.

**3.** A number of witnesses who had been in the vicinity of the shooting gave evidence of having seen a man dressed like a woman in the vicinity of the pigeon club on the day of the fatal shooting. Two witnesses, Jordan Reid and Robert Hovekis, referred to the fact that they had encountered a man in women's clothes and wearing makeup, who had a cut over his right eye, at the junction of Whitestown Gardens and Whitestown Avenue. The man had asked for directions to the pigeon club or care centre. The man was carrying a woman's handbag and they referred to the fact that he had a tattoo on his arm.

**4.** Thereafter, a motorcyclist attended at James Connolly Memorial Hospital, but departed from there when he noticed that there were Gardaí present. It appears the Garda presence at that stage may have been unconnected with this investigation but the aborted hospital visit was to prove of some significance.

**5.** As is now standard practice in any significant investigation, CCTV footage was harvested and at trial, the jury was shown footage that had been downloaded from the nearby

Lidl supermarket, from the pigeon club, and also from a camera on a private residence in Sheepmoor.

**6.** At approximately 4.00am on 13th June 2015, Gardaí obtained a search warrant from the Dublin District Court. The warrant purported to authorise the searching of 32 Leigh Valley, Ratoath, County Meath. Gardaí went to that address at about 5.15am with a view to executing the warrant. Armed Gardaí entered the premises and the appellant was located in a bedroom. He was noted to have a cut over his right eye and appeared to have makeup on his face. At 6.10am, the appellant was arrested and brought to Blanchardstown Garda station. There was a delay between the entry of armed Gardaí onto the premises and the location of the appellant in the bedroom and his arrest. This was explained by a decision to have the suspect viewed by the member of An Garda Síochána, Detective Sergeant Thomas Lynch, who had taken a statement from one of the two teenage boys, Jordan Reid, who had been asked for directions to the pigeon club. While the appellant was detained in Blanchardstown Garda Station, samples were taken from him for forensic analysis, these being samples for firearms residue analysis, swabs for DNA comparison purposes and a swab of what was suspected to be makeup on his face.

**7.** On 16th June 2015, Gardaí who had received relevant information went to a laneway in Sheepmoor Grove. There, they located a beige, fur-type handbag, a firearm, a wig, a clear disposable glove and an earplug. The firearm was some 23.5 inches in length and had a 6-inch barrel. According to ballistics experts, it could be used as a semiautomatic weapon or automatic weapon. The magazine was capable of taking 25 rounds, and when located, there were six rounds in it. Discharged bullets found at the scene of the fatal shooting and retrieved during the post-mortem of the deceased were of the same type of ammunition as would be used for the gun in question. At trial, there was evidence from a forensic scientist, Dr. Edward Connolly, that DNA profiles obtained from both the inside and outside aspects of the glove matched the DNA profile of the appellant. A DNA profile obtained from the wig was a mixture consisting

of DNA from more than two sources, but there was one major contribution to the profile and that matched the profile of the appellant. The DNA profile obtained from the strap of the shoulder bag was a mixture, consisting of contributions from at least three people and the complexity of the profile was such that it was not suitable for further interpretation. In relation to the earplug, a low level DNA profile was obtained which was from an unknown male source and the appellant was excluded as a possible source. In relation to the firearm, a DNA profile was obtained which was a low level mixed profile consisting of DNA from two or more sources, but which was not suitable for interpretation.

**8.** Thomas Hannigan, also a forensic scientist at the Forensic Science Laboratory, gave evidence of having examined the black wig, the glove and a discharged round of ammunition from the scene, as well as a firearms residue sample kit taken from the appellant. He found firearms residue on the wig and on the glove which was similar in terms of the range of elements present to the discharged round found at the scene. Mr. Hannigan was of the view that the forensic analysis provided very strong support for the suggestion that the items in question had been worn by the shooter, rather than that they were unconnected with and had nothing to do with the incident.

**Grounds of appeal**

**9.** The grounds of appeal are as follows:

(i) That the trial judge erred in law and in fact in refusing to discharge the jury when prosecution witness Jason O'Connor threatened to kill the appellant in open court in the presence of the jury on the way to the witness box to give evidence;

(ii) That the trial judge erred in law and in fact in upholding the validity of the search warrant in respect of 32 Leigh Valley, Ratoath, Co. Meath, in circumstances

where it was bad on its face and further erred in admitting evidence of the items seized by An Garda Síochána during the course of the search conducted on foot of the said warrant (this ground was not pursued);

(iii) That the trial judge erred in law and in fact in ruling that the arrest of the appellant was lawful;

(iv) That the trial judge erred in law and in fact in failing to rule that the appellant was unlawfully detained between 5.40am and 6.10am on 13th June 2015, and in admitting evidence of the informal identification carried out by Detective Sergeant Thomas Lynch during that period;

(v) That the trial judge erred in law and in fact in allowing evidence in terms of an additional statement of evidence provided just prior to trial which altered the dates various actions were allegedly carried out in a manner highly prejudicial to the appellant (this ground was not pursued);

(vi) That the trial judge erred in law and in fact in admitting evidence in respect of forensic samples taken from the appellant in circumstances where it had not been established in evidence that the samples were lawfully taken;

(vii) That the trial judge erred in law and in fact in admitting evidence of the items said to have been located in a bag found by a member of the public in Sheepmoor, Dublin 15, in circumstances where it appeared on the evidence that the integrity and safe custody of the item and its alleged contents had not been proved (this ground was not pursued);

(viii) That the trial judge erred in law and in fact in admitting CCTV evidence from the Lidl carpark in circumstances where it had not been proven that the footage related to the time and date of the alleged offence;

(ix) That the trial judge erred in law and in fact in permitting narrative evidence in respect of what was suggested could be observed on the CCTV footage in the case (this ground was not pursued);

(x) That the trial judge erred in law and in fact in admitting CCTV evidence gathered at a private residence in circumstances where the integrity and relevance of same had not been established;

(x)(a) That the trial judge erred in law and in fact in refusing an application to remove the matter from the jury due to the failure to conduct an identification procedure with witnesses, Robert Hovekis and Jordan Reid;

(xi) That the trial judge erred in law and in fact in admitting the evidence of Jordan Reid and Robert Hovekis in circumstances where the witnesses had been observed in discussion during the *voir dire* in relation to the proposed evidence, and where one of the witnesses appeared to alter his evidence as a result;

(xii) That the trial judge erred in law and in fact in refusing to give a warning to the jury in terms of the decision in *Teper*; and

(xiii) That the trial judge erred in law and in fact in refusing to discharge the jury on foot of an application grounded on the inconsistent evidence given by Dr. Hegazy.

**Ground (i): That the trial judge erred in law and in fact in refusing to discharge the jury when prosecution witness, Jason O'Connor, threatened to kill the appellant in open court in the presence of the jury on the way to the witness box to give evidence.**

**10.** This issue arises in circumstances where, on the first day of the trial, after the prosecution had called formal witnesses in relation to the preparation of maps and albums of

photographs, Jason O'Connor was called to give evidence. Earlier that day, the jury had heard from prosecution counsel in his opening statement that the deceased, Keith Walker, had left his home in Clondalkin and gone to the home of Mr. O'Connor in Blanchardstown. The jury was told that Mr. O'Connor was "big into racing pigeons", and that in Mr. O'Connor's home, the two men had discussed pigeons and the fact that Mr. O'Connor intended to enter pigeons in two upcoming races. The jury was told that the deceased had packed Mr. O'Connor's pigeons into carrier baskets, loaded them into Mr. O'Connor's car and had then driven off in the car in the direction of the nearby Blanchardstown Racing Pigeon Club. When Mr. O'Connor was called to give evidence, as he made his way to the witness box, which brought him past the accused, he engaged in a violent outburst which involved him lunging at the accused and having to be restrained by a number of prison officers. Threats were made in respect of the accused and his family. The matter is dealt with as follows in the transcript, though it must be accepted that the transcript may not give the full flavour of the incident:

> "MR VAUGHAN BUCKLEY [Senior Counsel for the Prosecution]: Jason O'Connor, please. I'm allowed lead this witness, Judge.
>
> JUDGE: Thank you.
>
> SPEAKER: Jay don't, please don't.
>
> WITNESS: See your family, God bless your family.
>
> JUDGE: Excuse me, Mr O'Connor --
>
> WITNESS: He's making smart remarks that man sitting down, all right.
>
> JUDGE: Excuse me, Mr O'Connor now, this is a court where you're going to treat --
>
> WITNESS: Yes, exactly.
>
> JUDGE: Do you understand?
>
> WITNESS: He's the one on trial, not me.

JUDGE: Mr O'Connor, please now, before we go anymore, are you prepared to behave in a civilised manner? Are you?

WITNESS: Hmm.

JUDGE: You are? Well, you better because there are -- I have powers to deal with people who don't and I don't want to be causing difficulty for anybody, all right? Mr O'Connor, be careful now.

MR CONDON [Senior Counsel for the then Accused]: I'm sorry, Judge, I have an application.

JUDGE: Yes, very good. Would you excuse us, ladies and gentlemen?

In absence of jury

JUDGE: Mr O'Connor, you can sit down again in the body of the court. Gentlemen, will you take Mr O'Connor down. Yes."

**11.** In the absence of the jury, counsel on behalf of the then accused sought to have the jury discharged, commenting that his client was entitled to have a trial which was not poisoned by such behaviour. There was strenuous objection to the application by the prosecution who offered to proceed with the case without calling the witness back.

**12.** The judge ruled on the matter as follows:

"Yes, very good. Well, I'm against you, Mr Condon, I think that one must -- a witness has behaved appallingly badly, such things have happened in trials before and the jury can be -- can easily appreciate, I'm sure, it's not one of those difficult things at all, it's easily understandable how they cannot have any regard to such behaviour by a witness

in a case and it's, in my view, one of the most straightforward directions that they can be given and they can understand, so I'm against you."

**13.** Thereafter, the judge dealt with the issue when the jury returned to court and again in the course of his charge, stressing that it was not a matter that should influence the jury.

**14.** In the Court's view, the trial judge was fully within his rights to decline to discharge the jury. We fully understand his observation that it was a particularly easy direction to give. It was an incident that should not have occurred and the behaviour of Mr. O'Connor was unacceptable. However, without in any way excusing the behaviour, it has to be viewed in context. Even from the opening statement, it must have been clear to the jury that the deceased and Mr. O'Connor were friends; the deceased went to the place where he met his death from the home of Mr. O'Connor and he travelled there in Mr. O'Connor's car, transporting Mr. O'Connor's pigeons. It would be surprising if Mr. O'Connor did not find himself wondering if he was, in fact, the intended target of the gunman and that his friend, Mr. Walker, met his death in a case of mistaken identity. Jurors would hardly be surprised about the fact that he would have strong views about the case, though we cannot see that the outburst, unfortunate and indeed unacceptable as it was, would prejudice the accused in the eyes of the jury.

**15.** Quite simply, we can see no reason why the jury should have been discharged and we have no hesitation in dismissing this ground.

**Ground (ii): That the trial judge erred in law and in fact in upholding the validity of the search warrant in respect of 32 Leigh Valley, Ratoath, Co. Meath, in circumstances where it was bad on its face and further erred in admitting evidence of the items seized by An Garda Síochána during the course of the search conducted on foot of the said warrant.**

**16.** This ground was ultimately not pursued.

**Ground (iii): That the trial judge erred in law and in fact in ruling that the arrest of the appellant was lawful.**

**Ground (iv): That the trial judge erred in law and in fact in failing to rule that the appellant was unlawfully detained between 5.40am and 6.10am on 13th June 2015, and admitting evidence of the informal identification carried out by Detective Sergeant Thomas Lynch during that period.**

**17.** To put these grounds in context, it should be explained that Detective Sergeant Paul Tallon gave evidence in the course of a *voir dire* that he had been contacted by colleagues about a shooting at the Blanchardstown Racing Pigeon Club. He went to the scene and Gardaí there informed him of the fact that there was some information from witnesses suggesting that shots had been fired by a lone gunman; that there were a large number of shots fired in quick succession and that the gunman was dressed as a female in a long black wig. Detective Sergeant Tallon became aware that there was a witness, Jordan Reid, who may have spoken to someone who was dressed as a female shortly before the shooting, and he learned that a colleague of his, Detective Sergeant Lynch, was arranging to meet that witness in order to interview him. At the scene, he became aware of further information that shortly after the shooting, what was thought to be a high-powered motorcycle left a nearby field at speed and drove out onto the Ongar Distributor Road in the direction of Ongar. The driver was described as carrying some sort of backpack or sports pack and as wearing a black and yellow helmet and carrying a second helmet in his hand. He explained how a motorcyclist wearing a black and yellow helmet had attended at James Connolly Memorial Hospital following a crash, but then had seemed to flee the hospital and how this had led to the identification of 32, Leigh Valley, Ratoath as an address of interest to the investigation. Detective Sergeant Tallon described the preparations put in

place for entry onto the premises. He commented, very understandably, that the exercise was deemed as high risk, in that it was taking place in the aftermath of a murder with a firearm. Detective Sergeant Tallon referred to meeting the householder, who was a tenant in the house, and her partner. He referred to meeting another male in a rear bedroom and said that he initially noticed that this person had a cut over his right eye and that he had on his face what he believed to be some sort of makeup, like a foundation. Detective Sergeant Tallon explained that he was aware from a Garda conference that his colleague, Detective Sergeant Lynch, had been present when a statement had been taken from witness, Jordan Reid. He wanted Detective Sergeant Lynch to go up and see Christopher McDonald in the back room in order to see if he came to a similar conclusion as to whether the witness matched the description. He believed that his colleague would be in a better position to make a judgment because he was present when Mr. Reid was interviewed. Detective Sergeant Lynch viewed the suspect and informed the witness that the description was very similar, in particular, the build, the cut over the right eye, and the fact that there was what was believed to be makeup on the face. At 6.10am, Detective Sergeant Tallon arrested Mr. McDonald on suspicion of murder and cautioned him, to which Mr. McDonald replied, "go fuck yourself". In relation to this reply, it should be noted that it was referred to by prosecution counsel in the course of his opening remarks, though defence counsel was indicating that he was objecting to it as probative of nothing and as a "piece of prejudice". In fact, at a later stage of the trial, the judge ruled that Detective Sergeant Tallon should not give evidence of the reply, but declined to discharge the jury.

**18.** This issue was the subject of a lengthy *voir dire* which stretched over a number of days. Attention focused on the fact that the search warrant, issued in the Dublin Metropolitan District, had referred to the address of 32 Leigh Valley as being "in the district aforesaid" when, in fact, it was County Meath. In that regard, the trial judge ruled the warrant invalid, but also ruled that the appellant could not rely on this invalidity in circumstances where it was not his dwelling

and where he was not in a position to assert a breach of the constitutional rights of the householder. In that regard, it was submitted on behalf of the appellant that while it might be that he was not in a position to assert any rights in relation to the sanctity of the dwelling, nonetheless, he was lawfully present on the premises and therefore entitled to some protection when officers of the State had entered as trespassers. It was submitted that on the run of the evidence, it had not been proved that the arresting officer had formed a reasonable suspicion to justify the arrest. It is said that what in fact had occurred was that the arresting officer delegated the decision to a tripartite group, a reference to Detective Sergeant Lynch and Detective Inspector Murphy, who was the senior Garda present at Leigh Valley.

**19.** It is said that the fact that Gardaí were in possession of a description of someone who had been seeking directions from Mr. Reid, and that Mr. McDonald matched the description, did not provide a sufficient basis for an arrest. Reference is made to the case of *DPP v. Mekonnen* [2012] 1 IR 210. Reference is also made to Walsh on *Criminal Procedure* (2nd Ed, Round Hall 2016) and to the observations there (at para. 4-99) that:

> "Particular problems can arise where the member has acted wholly or partly on the basis of a direction to arrest issued by a superior officer. A member cannot acquire a power of arrest by virtue of a direction to arrest issued by a superior officer."

Moreover, Professor Walsh had cautioned that (at para. 4-95):

> "…it is worth emphasising that it will not always be sufficient that the suspect fits the victim's or a witness' description of the alleged offender. Fitting the description might be sufficient for the Garda to classify an individual as a suspect worth checking out. However, unless the description is highly specific, or there are other factors which heighten the suspicion against the individual, it is unlikely that there will be a sufficient basis for a reasonable suspicion".

**20.** We have no doubt that Detective Sergeant Tallon had ample grounds for his suspicions. The description provided by the witnesses of the person who had engaged them in conversation just before the shooting was highly specific. It was not just a question of build, but highly significantly, the reference to a cut above the eye and the foundation makeup. The fact that Detective Sergeant Tallon saw fit to consult with his colleague, Detective Sergeant Lynch, who had taken the statement, and to discuss the situation with Detective Sergeant Lynch and Detective Inspector Murphy, is not, in our view, a reason for criticism. On the contrary, he is to be commended for his responsible and careful approach.

**21.** It was also submitted that the judge was in error in ruling that the appellant was not unlawfully detained during the period from 5.15am to 6.10am. The argument is made that in a situation where a large number of Gardaí, including members of the Armed Support Unit, as well as detectives who were armed at the time, had forcibly entered the premises, that it is clear that from the moment of entry, the appellant's liberty was in fact restricted. Thus, it is said that the identification process, which involved Detective Sergeant Lynch viewing Mr. McDonald, occurred at a time when Mr. McDonald was *de facto* detained, and at a time when he was unlawfully detained. Moreover, it is said that the involvement of Detective Sergeant Lynch in the identification procedure was very much second best. The two teenagers, Jordan Reid and Robert Hovekis, should have been involved in the process.

**22.** The judge dealt with the matter by ruling the arrest lawful but in a situation where he accepted that his liberty was restricted, calculating the time from 5.20am, a few minutes after Garda entry.

**23.** In the Court's view, the judge's conclusion that the arrest by Detective Sergeant Tallon was a lawful one and was not vitiated by his status in the period between the first entry of Gardaí onto the premises and the arrest was one that was fully open to him, and in those

circumstances, we reject the challenge to the validity of the arrest and reject grounds (iii) and (iv).

**Ground (v): That the trial judge erred in law and in fact in allowing evidence in terms of an additional statement of evidence provided just prior to trial which altered dates various actions were allegedly carried out in a manner highly prejudicial to the appellant.**

**24.** This ground has not been pressed and understandably so. It arises in circumstances where a witness on the book had initially provided a witness statement which contained the following passage:

> "About two weeks ago I heard that the guards were down in Sheepmore Grove where my fiancé's sister lives. I was aware that a fellow was shot at the health club a few days previous. I didn't know that there was a pigeon club over here. I also heard that the guards were looking for something over at Sheepmore Grove so I put two and two together. I didn't think it was relevant at the time but I remember meeting a fellow on Sheepmore Grove on the evening of the shooting. I finished work at 5.30 pm and I went to collect my son."

The complaint is that in a further statement taken during the trial on 24th June 2017, and then served as additional evidence, the witness had stated:

> "The evening of the shooting at the pigeon club on the Shelerin Road two years ago, I'd gone to the pub after I collected my son, Harry, from my fiancé's sister's house. The pub on Mountain View Road was Sammon's. It was the talk of the place about the shooting and how it happened. The next day I heard on the news there was supposed to have been a fellow dressed as a woman who did the shooting. I thought nothing of this until I heard that there was a skip on Sheepmore Grove on my fiancé's

sister's road and that the guards were searching there. This was two or three days after the shooting. Then it clicked in that the person I described in my first statement must have something to do with the shooting."

**25.** The appellant complains that the second statement was an attempt to tie down the date and time that the witness claimed to have observed an individual near a lane where certain items were later located in a manner that benefited the prosecution.

**26.** The Court sees no substance in this ground whatsoever. In the original statement, the witness had said that he did not think it was relevant at the time, but he remembered meeting a fellow on Sheepmoor Grove on the evening of the shooting.

**Ground (vi): That the trial judge erred in law and in fact in admitting evidence in respect of forensic samples taken from the appellant in circumstances where it had not been established in evidence that the samples were lawfully taken).**

**27.** Following his arrest, the appellant was brought to Blanchardstown Garda Station. He arrived there at 6.40 am. At 7.03 am he was informed by the member-in-charge that he was being detained pursuant to s. 50 of the Criminal Justice Act 2007. He was asked if he wished to have a solicitor present and contacted, and that if he wished he could have a solicitor present during interview. The appellant advised that he wanted John Quinn to be called. At 7.20 am, Mr. Quinn was telephoned and a message left for him to contact Blanchardstown station. Mr. Quinn duly rang the station at 7.40 am and spoke with the appellant. Their conversation lasted approximately 2 minutes. Mr. Quinn thereafter arrived to the station at 9.20 am or so and met with the appellant.

**28.** Between the appellant's short discussion with Mr. Quinn and the latter's arrival at the station, swabs were taken from the appellant. This occurred between 8.00 am and 8.15 am.

**29.** At the trial, an issue was raised as to the legal authority for the taking of these samples and, specifically, whether they were taken on the basis of what was described as a 'common law' power, or whether they were taken pursuant to the provisions of the Criminal Justice (Forensic Evidence) Act 1990. Evidence was given by Superintendent Mahon that he had authorised the taking of the samples pursuant to s. 2 of the Act. However, and at the same time, Garda Dillon gave evidence that he had tendered a bodily samples consent form to the appellant. This was a generalised consent form in relation to the taking of samples, as opposed to the consent form appended to the Criminal Justice (Forensic Evidence) Act 1990 Regulations 1992. That form - which was signed by the appellant prior to the taking of the samples - was generally used where the samples were taken pursuant to the common law power.

**30.** The question of which power was relied upon for the taking of the samples was central to the appellant's claim that they had been obtained unlawfully. Had they been taken on the basis of the common law power, the consent of the appellant was required. That consent was obtained at a point after the appellant had sought legal advice, been in contact with his solicitor and was awaiting his arrival at the station. If, however, the legal basis for the taking of the samples was the Criminal Justice (Forensic Evidence) Act 1990, the consent of the appellant was not required and the samples could be taken compulsorily. From there, it was said that if the samples had been taken pursuant to the 1990 Act, they were taken unlawfully because the procedures set out in that Act had not been followed. If, on the other hand, the samples had been taken pursuant to the common law power, they had been taken in breach of the appellant's constitutional right of access to a lawyer.

**31.** At the trial, the judge decided that the samples had been taken in exercise of a common law power, and the Director has not contended otherwise before this Court. Accordingly, the issue was focused in the course of this appeal upon the second of these arguments. This depended on the implications of the decision of the Supreme Court in *DPP v. Gormley and*

*White* [2014] 2 IR 591 (‘*Gormley and White’*). The appellant contended that the effect of *Gormley and White* was that because he had a choice as to whether or not to give a sample sought pursuant to the common law power, the taking of the sample when he did not have the opportunity to take advice from his solicitor meant that his constitutional right of access to a lawyer was breached and that, in consequence, the evidence of those samples ought to have been excluded. The Director contested this interpretation of *Gormley and White,* and contended that the effect of that decision and certain dicta of Charleton J. in *DPP v. Barry Doyle* [2018] 1 IR 1 (‘*Doyle*’) was that access to legal advice was not required where forensic samples were being taken *inter alia* because this ‘does not engage the right against self-incrimination’.

**32.** The two cases considered by the Supreme Court in *Gormley and White* addressed the entitlement of a person in police custody to access a solicitor in two situations. Before these cases, it was well established that a failure to provide reasonable access to a lawyer after a request from a suspect in custody could render the custody unconstitutional and thus lead to any evidence obtained on foot of that custody being rendered inadmissible. *Gormley* raised the issue of whether the advice thus sought had to be made available to the suspect prior to questioning, and *White* presented the question of whether it had to be made available before samples were taken.

**33.** The issue arose in *Gormley* in a context in which the appellant, having been arrested and brought to a Garda station, requested a solicitor. Contact having been made with one of the solicitors nominated by him and that solicitor having indicated he would attend at the station an hour or so later, the Gardaí proceeded to interview the appellant in the course of which he made inculpatory admissions. The Court concluded that the requirement of trial in due course of law under Article 38.1 of the Constitution carried with it - at least in general terms and potentially subject to exceptions - an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender the requested

advice. The right to be given the opportunity to consult with a lawyer, it was held, implied a duty on the part of the police to hold off questioning until the detainee had had a reasonable opportunity to consult with the lawyer.

**34.** In *White*, the appellant also requested a solicitor following his arrest, and the solicitor indicated that she would attend at the Garda station immediately. She arrived approximately an hour and a half later. In the meantime, samples were taken from the appellant pursuant to the provisions of the Criminal Justice (Forensic Evidence) Act 1990. The appellant, having been mistakenly informed by the Gardaí that his consent was required for the taking of the samples, did not object to this. This sequence of events, the Court held, did not breach Mr. White's rights. He was, as a matter of law, obliged to allow the forensic testing which was required of him and therefore there was no breach of fair process resulting from the requirement that he provide the samples prior to the arrival of his solicitor.

**35.** In one sense it might be said that this case falls somewhere between *Gormley* and *White*. The appellant here was not questioned before his solicitor arrived, and to that extent the strict *ratio* of *Gormley* does not apply to his situation. At the same time, the samples were not taken from him pursuant to a compulsory process of the kind found in *White* to negate any breach of fair process that would otherwise arise. He had a choice whether to consent to the samples or not and to that extent, it might be said, had a right to consult his solicitor when that choice was presented to him and before he exercised it. As emphasised by the appellant in the course of his submissions, Clarke J. noticed the potential for this issue to arise when, in his judgment, he observed that while Mr. White had no right to consult a lawyer prior to his acquiescence in a process of forensic sampling which was mandatory (para. 107) :

> 'The situation might be different in a case where the suspect has genuine legal choices available in respect of the taking of samples *and* where it would be reasonably

necessary for the suspect concerned to have access to legal advice before making any such choices.'

**36.** The conclusion reached by the Court in *Gormley* was heavily influenced by the approach adopted to the issue in other jurisdictions and, in particular, by that reached by the European Court of Human Rights in *Salduz v. Turkey* (App. No. 36391/02) (2009) 49 EHRR 19 ('*Salduz'*). The rationale of *Salduz*, as explained by Lord Hope in *Cadder v. HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 (at p. 2623), was that contracting states were under a duty to organise their systems in such a way that unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to advice from a lawyer 'before he is subjected to police questioning'. Obviously, the limitation on the right entailed by the reference to questioning is important in this case and reflects the fact that the Court in *Salduz* related the right so formulated to the protection of the right of an accused not to incriminate himself. According to the settled jurisprudence of the European Court of Human Rights, the right not to incriminate oneself is limited to a right to remain silent, and does not extend to the compulsory procurement by the State of material which has an existence independently of the will of the suspect such as documents, blood and urine samples and bodily tissue used for the purposes of DNA testing (see *Saunders v. United Kingdom* (App. No. 19187/91) (1997) 23 EHRR 313 at para. 69 and *Boyce v. Ireland* (App. No. 8428/09) (2013) 56 EHRR SE11). However, it is also clear that in extreme circumstances engaging Article 3 of the Convention, a forcible and invasive procedure could constitute a violation of a prisoner's physical and mental integrity (*Jalloh v. Germany* (App. No. 54810/00) (2007) 44 EHRR 32).

**37.** Equally importantly, the Court in *Salduz* grounded the right to a lawyer in this circumstance upon the right to legal assistance stipulated in Article 6(3)(c) of the Convention. Effectively, what the Court held was that while this right was primarily directed to proceedings

before a tribunal competent to determine a criminal charge, it also had an application to pre-trial proceedings. The right was thus engaged where national law attached consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospect of the defence in subsequent criminal proceedings (para. 50). In that circumstance, the fairness of what happened at those initial stages of the investigation could affect the fairness of the trial itself (para. 50). The particular vulnerability of an accused at that stage of the process 'can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure the respect of the right of an accused not to incriminate himself' (para. 54). The judgment makes clear that the conclusion is also affected by some significant practical considerations – the presence of a lawyer protects against abusive coercion on the part of the authorities, contributes to the prevention of miscarriages of justice, promotes equality of arms between investigating authorities and the accused and affords a fundamental safeguard against ill treatment (paras. 53 and 54).

**38.** In *Gormley*, Clarke J. (with whose judgment Denham CJ, Murray, Hardiman and McKechnie JJ. agreed, Hardiman J. also delivering a separate judgment) observed these same principles in Irish constitutional law. The right to trial in due course of law secured by Article 38.1 of the Constitution entailed a right of 'basic fairness of process'. That applied from the time of the arrest of a suspect (para. 82). It was that requirement of fairness of process that demanded that, generally, a person in detention had a right not to be interrogated prior to the arrival of a requested lawyer (para. 85). This followed from the practical reality that advice on the immediate events that often occur on the arrest of a suspect – such as questioning – is one of the most important aspects of the advice which any suspect is likely to require.

**39.** Underlying both the approach of the European Court of Human Rights in *Salduz* and that of the Supreme Court in *Gormley* is the obvious fact that in the course of an interrogation a detained suspect has basic, sometimes difficult and always important choices to make as to

how he or she negotiates the questioning. The course of action the suspect thus adopts may have significant implications for his or her position in the course of any subsequent trial. That is the context in which it has been held that they should have the right to consult a lawyer before making those choices, that they should have the right to have that lawyer present to intervene at appropriate points in the interrogation and that that entitlement should be legally related to the rights of the accused in the course of the trial – which is of course the point at which the choices made by the accused in the course of interrogation may have their most significant effect.

**40.** We do not see that basic fairness of process is engaged in anything like the same way where a suspect is given the choice of providing samples, but where if he or she declines to provide them, there is available (and, as here, both an authority and intention to invoke it) a statutory power to compulsorily obtain those samples. In that situation, certainly, the suspect has a choice, but it is a choice which if made against providing the sample leads inevitably and through the process of compulsorily obtaining it, to the same destination – the provision of the sample. This, ultimately, is why the Strasbourg Court has not (outside the extreme circumstances in which Article 3 of the Convention is engaged) extended the right identified in *Salduz* to the obtaining of real evidence. The evidence is not merely, as Charleton J. described it in *DPP v. Doyle* [2018] 1 IR 1 at para. 366, 'static in nature and uninfluenced by the mental state of the arrested person', but in the circumstances that presented themselves in this case, the 'choice' is in one sense an illusory one because there is available a mechanism by which an election not to provide the same can be over-ridden. Or, to put it another way, the informed advice that would be given by the lawyer in that situation would be (a) that the suspect did not have to co-operate in the taking of the sample where it was sought to obtain it at common law, and (b) that in the event of his not co-operating, the Gardaí would have the power to obtain the sample compulsorily. We cannot see how fair process could mandate that the

Gardaí would be obliged to await taking the sample voluntarily to enable that advice to be tendered.

**41.** It will be observed that in reaching this conclusion we do so because and only because of the availability of a power to obtain the sample compulsorily. Where there is such a power, there is (to use the words of Clarke J. in *Gormley*) no 'genuine legal choice' and, if there is, it is not 'reasonably necessary for the suspect concerned to have access to legal advice before making any such choices'. We have not based our conclusion on the proposition (seemingly accepted by Charleton J. in *Doyle*, but not decided by Clarke J. in *Gormley*) that the entitlement to a lawyer can *never* arise in relation to choices relevant to the gathering of 'static' evidence. We note, however, not merely that the Strasbourg case law limits the obligations imposed upon the State to postponing police questioning until a lawyer has arrived (where one is requested) and does not extend this to the gathering of real evidence, but that the United States Supreme Court has similarly limited the scope of its decision in *Miranda v. Arizona* (1966) 384 US 436 (also referred to by Clarke J. in the course of his judgment in *Gormley*) to 'testimonial' communications (see *Pennsylvania v. Muniz* (1990) 496 US 582). It follows that even were the scope of the right identified in *Gormley* to be extended to evidence of the kind in issue here, this would represent a significant development of the law to which the exclusionary rule relied upon by the appellant would not apply (see *DPP v. JC* at para. 853, per Clarke J. and *DPP v. Doyle* at para. 283-284, per MacMenamin J.).

**Ground (vii): That the trial judge erred in law and in fact in admitting evidence of the items said to have been located in a bag found by a member of the public in Sheepmoor, Dublin 15, in circumstances where it appeared on the evidence that the integrity and safe custody of the item and its contents had not been proved.**

**42.** This issue has not been pressed, and again, very understandably so.

**Ground (viii): That the trial judge erred in law and in fact in admitting CCTV evidence from Lidl carpark in circumstances where it had not been proven that the footage related to the time and date of the alleged offence.**

**43.** On behalf of the appellant, it is submitted that the trial judge erred in law and in fact in admitting CCTV evidence from the Lidl carpark in circumstances where it had not been proved properly that the footage related to the time and date of the alleged offence. The argument is advanced in circumstances where a Lidl employee, Ian Patrick Lynch, gave evidence that he was tasked with downloading CCTV footage and that he entered the time and date required into the computer, but his evidence did not really go beyond that. It is said there is a *lacuna* in the evidence as it is not established that the footage did, in fact, relate to 12th June 2015. Again, it is said that the difficulties were compounded by an error in mislabelling the exhibit at one stage, and that all in all, the effect of this is to leave the provenance of the material in doubt.

**44.** This is one of the grounds of appeal that the Court regards as entirely without substance. Unlike some cases, this was not a situation of a witness being asked to view material and purport to make an identification. This was real evidence. The Court is in no doubt that the footage was correctly admitted in evidence.

**45.** Somewhat similar arguments were advanced in relation to the CCTV footage from the private residence. Again, it is said that the integrity and relevance of the footage was not established. This issue arose in circumstances where a tenant, Mr. Dimitri Kretof, moved into his home at 32 Sheepmoor Grove. Again, material was harvested. As in the case of the Lidl footage, there was no question of a witness being asked to view the material and make an identification. It simply recorded what appeared to have occurred at a relevant time.

**Ground (ix): That the trial judge erred in law and in fact in permitting narrative evidence in respect of what was suggested could be observed on the CCTV footage in the case.**

**46.** This issue was also not ultimately pressed on appeal.

**Ground (x): That the trial judge erred in law and in fact in admitting CCTV evidence gathered at a private residence in circumstances where the integrity and relevance of same had not been established.**

**47.** This ground has already been addressed in paragraph 45 of this judgment. For the avoidance of doubt, this ground of appeal is rejected.

**Ground (x)(a): That the trial judge erred in law and in fact in refusing an application to remove the matter from the jury due to the failure to conduct an identification procedure with witnesses, Robert Hovekis and Jordan Reid.**

**48.** This ground relates to the interaction between the two teenagers and the man dressed in women's clothing. The witnesses provided statements, giving detailed descriptions of the person that they interacted with and the conversation they had with him. The description provided then fed into the arrest of the suspect at 32 Leigh Valley, Ratoath. Following his arrest, the appellant was detained for some seven days, during which some 25 interviews were conducted. No identification parade involving these two young men was arranged. The evidence of Detective Inspector Murphy was that it was an issue that was considered. The Detective Inspector was of the view that it would be difficult, if not impossible, to arrange a

parade which would involve foils dressed as females with makeup, wigs and sunglasses, with a scar or mark or cut over the right eye and with a distinctive tattoo on the forearm.

**49.** The appellant says that the failure to organise an identification procedure calls into question the fairness and adequacy of the investigation, and that in the circumstances, it amounted to a failure to seek out relevant evidence and preserve that evidence. Again, one has to have regard to the significance of the actual evidence from these two young men and the evidence that they were not giving. There was no question of any attempt to make a dock identification, nor, for that matter, were they ever going to be asked to make an identification, whether based on some informal identification opportunity or otherwise. In those circumstances, it was a matter for judgment by the Gardaí in charge of the investigation whether it would be appropriate to have them view an identification parade. It was certainly not a situation where the arrangement of an identification parade was mandated.

**50.** In the circumstances, the Court has no hesitation in dismissing this ground.

**Ground (xi): That the trial judge erred in law and in fact in admitting the evidence of Jordan Reid and Robert Hovekis in circumstances where the witnesses had been observed in discussion during the *voir dire* in relation to the proposed evidence, and where one of the witnesses appeared to alter his evidence as a result.**

**51.** Again, this Court feels bound to say that this is a ground that lacks reality. At the time of the fatal shooting, Mr. Hovekis was new to the country, having arrived here from Latvia some months before. Indeed, at the time, his English was somewhat limited, though by the time the matter came to trial, his command of English was excellent. Be that as it may, shortly afterwards, Mr. Hovekis and his family moved away from Dublin and contact with Mr. Reid was broken off. Contact was only re-established in the CCJ. When they found themselves in

the CCJ but excluded from the courtroom, it is scarcely surprising that their conversation would have turned to the events which had served to bring them back together. That they had discussed the matter was an issue that could be probed and was probed in cross-examination. However, again, the limitations of their evidence has to be borne in mind. There were a number of witnesses that had spoken about the presence of a man dressed as a woman. There was absolutely no reason to doubt their veracity when they indicated that they had interacted with such an individual. Thereafter, the significance of what they had to say related to how their report of their interaction fed into the arrest. As we have already pointed out, neither witness ever purported to identify Mr. McDonald, or indeed, as we have seen, neither witness was ever given an opportunity to make such an identification. We are forced to conclude that the application to the trial judge simply lacked reality.

**Ground (xii): That the trial judge erred in law and in fact in refusing to give a warning to the jury in terms of the decision in *Teper*.**

**52.** In the course of his charge to the jury, the trial judge correctly explained the concept of circumstantial evidence to the jury and directed the jury as to how circumstantial evidence should be treated. After the charge was completed, counsel for the appellant submitted that the Court should give a "close examination" direction. What was sought was a direction along the lines approved in *Teper v. R* [1952] AC 480.

**53.** In the Court's view, the judge's charge was an appropriate one and made absolutely clear that the most important aspect of the consideration of circumstantial evidence was that the evidence would be consistent with guilt and inconsistent with any other rational possibility.

**Ground (xiii): That the trial judge erred in law and in fact in refusing to discharge the jury on foot of an application grounded on the inconsistent evidence given by Dr. Hegazy.**

**54.** Dr. Hegazy's first involvement in the trial was as a witness on the *voir dire* that was dealing with the taking of samples from the appellant while he was in custody. Later, Dr. Hegazy was recalled to give evidence in the presence of the jury. The appellant says that the evidence he gave was materially different. In the course of the *voir dire*, Dr. Hegazy gave evidence that he had taken the sample, and then, following some argument, modified his position to that of saying that he had been present for the taking of samples and that it was more likely that it was he who took the samples. In the presence of the jury, the witness indicated that he could not remember whether it was he or the guard who took the samples, but then said that he believed that he had taken the seventh swab from the appellant's mouth because he would not let the guard do that. At that stage, counsel for the accused made an application to discharge the jury on the basis that the trial judge had ruled Dr. Hegazy's evidence admissible, having heard what he had to say on the *voir dire*. At trial, it was submitted to the judge that the evidence had now changed, and that as a result, the judge's ruling on the *voir dire* was undermined and ought to be revisited, and indeed, the jury should be discharged. The trial judge indicated that he was not revisiting his ruling.

**55.** It is accepted that Dr. Hegazy's evidence was less than entirely satisfactory. However, we cannot see that it provided a basis for the discharge of the jury. The issues raised were matters to be explored in cross-examinations and were matters that could be the subject of comment. They did not, however, by any stretch of the imagination amount to matters that should have resulted in the discharge of the jury.

**Conclusion**

**56.** Overall, we have not been persuaded to uphold any ground of appeal. None of the grounds advanced by way of written or oral submission have caused us to doubt the fairness of the trial or the safety of the verdict.