THE SUPREME COURT

[S:AP:IE:2020: 047, 073, 075, 079, 080]

Clarke C.J.

MacMenamin J.

Charleton J.

O'Malley J.

Baker J.

BETWEEN/

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

SEÁN HANNAWAY, EDWARD O'BRIEN, DAVID NOONEY,

KEVIN HANNAWAY & EVA SHANNON

APPELLANTS

Judgment of Ms. Justice Iseult O'Malley delivered the 4th May 2021

Introduction

1. Each of the appellants has been convicted after a trial before the Special Criminal Court in which three of them (Sean Hannaway, David Nooney and Edward O'Brien) were charged with the offence of membership of an unlawful organisation (the self-styled

"Irish Republican Army") while the other two (Kevin Hannaway and Eva Shannon) were charged with providing assistance to that organisation.

2. The events giving rise to the charges occurred in a temporarily unoccupied rental dwelling in Castleknock, Co. Dublin. The prosecution case was that this house was used, over the course of the 7th and 8th August 2015, for the holding of an internal IRA inquiry into a failed operation. The inquiry was alleged to involve the questioning of three named individuals. Eyewitness evidence from members of the National Surveillance Unit connected the three individuals and each of the accused with the house over the course of the two days. A detective chief superintendent gave evidence of his belief that Sean Hannaway, David Nooney and Edward O'Brien were members of the IRA. However, the key evidence with which this appeal is concerned came from the use of audio surveillance equipment that was deployed in, or in the environs of, the house in order to capture any conversation within.

3. In deploying the equipment, the Gardaí acted on foot of an authorisation issued by the District Court under the provisions of the Criminal Justice (Surveillance) Act 2009 (as amended). The validity of the authorisation is not now in issue. It was however argued by the defence that certain provisions of the Act were not properly operated and that this resulted in a breach of their rights to the extent that the evidence resulting from the surveillance was not lawfully admissible. This argument succeeded to a certain extent in both the Special Criminal Court and the Court of Appeal, with each holding that there had been a degree of non-compliance with the provisions of the Act concerned with the handling and storage of such evidence when gathered. However, it was held in each court that the evidence had been "gathered" lawfully, while the breach of the legislation related to matters that occurred subsequently. Both the trial court and the Court of Appeal considered that the legal principles that can result in the exclusion of unconstitutionally or illegally obtained evidence were not engaged in the circumstances and that, therefore, an inquiry of the type envisaged by the majority judgments in *People (DPP) v. J.C.* [2017] 3 I.R. 417 ("*J.C.*") was not required. The appellants say that the distinction drawn between "gathering" and "handling" is not valid, given the nature of the recording and processing carried out in the case of the voice recordings. They contend that there should have been a *J.C.* inquiry in the circumstances. As well

as disagreeing with this view, the prosecution maintains that there was in fact no breach of the statute.

The statutory framework

4. While this appeal is concerned with the exercise of the powers in the Criminal Justice (Surveillance) Act 2009 for the purpose of investigating crime, it should be noted that the statute also clearly contemplates the gathering of information for intelligence purposes. The long title recites that its purpose is to provide for surveillance in connection with the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats. An "arrestable" offence is, in brief, one that carries a potential sentence of imprisonment for five or more years. The Act applies to surveillance carried out by members of the Garda Síochána, members of the Defence Forces and officers of the Revenue Commissioners, but for the purposes of this appeal the Court is concerned only with the provisions relating to the Gardaí.

5. "Surveillance" is defined in s.1 as:-

> *"(a) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or*
>
> *(b) monitoring or making a recording of places or things,*
>
> *by or with the assistance of surveillance devices."*

6. A surveillance device is defined as an apparatus designed or adapted for use in surveillance (excluding certain devices such as CCTV systems).

7. Section 2(2) provides that nothing in the Act shall render unlawful any activity that would otherwise be lawful. However, s. 3 provides that a member of the Garda Síochána shall carry out surveillance only in accordance with a valid authorisation

granted by a judge of the District Court or, in certain limited circumstances, an approval granted by a senior Garda officer under s. 7 or s. 8. (The "approval" procedure was not utilised in this case and for that reason will not be examined in this judgment.)

8. Pursuant to s.4 of the Act, a member of the Garda Síochána not below the rank of superintendent (referred to in the Act as a "superior officer") may apply to a judge of the District Court for an authorisation for the carrying out of surveillance, if he or she has reasonable grounds for believing that:-

    (a) as part of an operation or investigation being conducted by the Garda Síochána concerning an arrestable offence, the surveillance being sought to be authorised is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purposes of proceedings in relation to the offence,

    (b) the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of arrestable offences, or

    (c) the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State.

9. The superior officer must also have reasonable grounds for believing that the surveillance sought to be authorised is:-

    (a) the least intrusive means available, having regard to its objectives and other relevant considerations,

    (b) proportionate to its objectives, having regard to all the circumstances including its likely impact on the rights of any person, and

    (c) of a duration that is reasonably required to achieve its objectives.

10. The application for an authorisation is made, under the provisions of s.5, *ex parte* and in private. The officer must provide sworn information as to the requirements specified in s.4, and the judge must be satisfied that they are fulfilled and that the authorisation is justified having regard to those matters and all other relevant circumstances. An authorisation cannot be granted if the judge is satisfied that the surveillance in question is likely to relate primarily to privileged communications.

11. It is not necessary for either the sworn information or the authorisation to specify a particular arrestable offence. However, the authorisation must specify *inter alia* the particulars of the device that is authorised, the person, place or thing that is to be the subject of the surveillance, and the conditions (if any) attached by the judge to the authorisation. It must also set out the date of its expiry, which is to be a date, nominated by the judge, not later than three months from the day on which it is issued. Section 6 of the Act provides for the variation or renewal of an authorisation, again on application to the judge.

12. Section 9 deals, firstly, with the retention of the written records relating to the application for an authorisation. It also imposes obligations in relation to the retention of documents obtained as a result of surveillance. "Documents", for the purposes of the Act, include:-

> "*(a) any book, record or other written or printed material in any form, and*
>
> *(b) any recording, including any data or information stored, maintained or preserved electronically or otherwise than in legible form*".

13. Under the terms of s.9(3), documents obtained as a result of surveillance carried out under the Act are to be retained until the expiry of three years after the end of the surveillance or until "*the day on which they are no longer required for any prosecution or appeal to which they are relevant*" (s.9(3)(b)), whichever is the longer period. At that point they are to be destroyed as soon as practicable unless the "relevant" Minister (for the purposes of Garda surveillance, the Minister for Justice and Equality) authorises

their retention. Such authorised retention must be grounded on the opinion of the Minister that it is necessary, having regard to:-

(a) the interests of the protection of the privacy and other rights or persons,
(b) the security of the State,
(c) the aims of preventing the commission of, and detecting, arrestable offences, and
(d) the interests of justice.

14. Section 10 is the central provision for the purposes of the arguments in this appeal. Subsection (1) places an obligation on the Minister in the following terms:-

"*The relevant Minister shall ensure that information and documents to which this Act applies are stored securely and that only persons who he or she authorises for that purpose have access to them*".

15. The section then goes on:-

"(2) In the interests of the protection of the privacy and other rights of persons, the security of the State, and the aims of preventing the commission of, and detecting, arrestable offences, the relevant Minister may make regulations prescribing –

(a) the persons or categories of persons who are to have access for the purposes of this section to information with respect to the existence of authorisations, approvals granted under sections 7 and 8 and documents referred to in section 9,

(b) the procedures and arrangements for the secure storage, and the maintenance of the security, of that information and those documents, and

(c) the number of copies that may be made of those documents and the destruction of those copies as soon as possible after they are no longer required under section 9."

16. It is common case that no regulations have been made under this subsection.

17. Section 10(3) then provides that the Minister may make regulations respecting the disclosure or non-disclosure, to the person who was its subject or other persons whose interests are materially affected by it, of the existence of a surveillance authorisation, provided that any disclosure authorised by such regulations meets certain specified conditions. Again, no such regulations have been made.

18. Section 11 of the Act provides for the making of complaints to the Complaints Referee established under the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. It is unnecessary to consider this process in any detail, but it is relevant to note that relevant documents must be made available to the Referee on his or her request. I also note in passing that the Referee may *inter alia* direct the quashing of an authorisation or the destruction of documents, and may recommend the payment of compensation.

19. Section 12 of the Act provides for the designation of a High Court judge whose function under the Act is to keep under review, and report upon to the Taoiseach, the operation of ss. 4 to 8 (i.e. those sections dealing with the process for the grant and renewal of authorisation for surveillance by a judge, and the approval for surveillance by a superior officer). For the purpose of performing his or her functions he or she may investigate any case in which an authorisation or approval has been granted. Having investigated a case, he or she may refer it to the Referee, if of the opinion that it is in the interests of justice so to do. The remit of the designated judge does not cover systems of retention, storage or access. However, the person in charge of a Garda station or any other place in which documents are kept that are relevant to the functions of the designated judge shall ensure that the judge has access to the station or place "*and to the authorisations, written records of approval, reports and other relevant documents*" that he or she may request.

20. Section 13(1), in relevant part, creates a criminal offence in the following terms:-

> *"A person shall not disclose, inside or outside the State, any information in connection with the operation of this Act in relation to surveillance carried out under an authorisation…, including any information or documents obtained as a result of such surveillance…unless the disclosure is to an authorised person and is –*
>
> *(a) for the purposes of the prevention, investigation or detection of crime,*
>
> *(b) for the prosecution of offences,*
>
> *(c) in the interests of the security of the State, or*
>
> *(d) required under any other enactment."*

21. If committed by a member of the Garda Síochána or its civilian staff, the offence carries a potential sentence of up to five years.

22. Section 13(4) lists, for the purposes of the section, the "authorised" persons to whom disclosure may be lawfully made. The first such category is that of the persons referred to in section 62(4)(a) of the Garda Síochána Act 2005. Section 62 of that Act is concerned with prohibited disclosure of information obtained in the course of carrying out duties either by members of the force or by civilians carrying out work for it as staff or under contract or other arrangement. However, by virtue of s.62(4), the prohibition does not apply in specified circumstances. For present purposes, the relevant consideration is that disclosure is permissible if made to, firstly any of the following persons listed in s.62(4)(a):-

(i) The Minister for Justice and Equality,
(ii) The Attorney General,
(iii) The Director of Public Prosecutions,
(iv) The Chief State Solicitor,
(v) The Criminal Assets Bureau,

(vi) The Comptroller and Auditor General,

(vii) The Ombudsman Commission or an officer of the Commission,

(viii) The Garda Síochána Inspectorate or an officer of the Inspectorate,

(ix) The Revenue Commissioners, or

(x) A member of either of the Houses of the Oireachtas where relevant to the proper discharge of the member's functions.

23. The importation of this list into the Criminal Justice (Surveillance) Act 2009 means, therefore, that information may be disclosed to any person in the specified categories if such disclosure is for one or more of the purposes referred to above.

24. Section 13(4)(b) and (c) of the Act of 2009 then specify the Ministers for Defence and Finance as "authorised persons". Lastly, s.13(4)(d) refers to:-

> *"a person the disclosure to whom is –*
>
> *(i) authorised by the Commissioner of the Garda Síochána…or*
>
> *(ii) otherwise authorised by law".*

25. Next, it is necessary to refer to s.14 of the Act. Subsection (1) states:-

> "*Evidence obtained as a result of surveillance carried out under an authorisation… may be admitted as evidence in criminal proceedings*".

26. Subsection (2) provides that nothing in the Act is to be construed as prejudicing the admissibility of information or material obtained otherwise than as a result of surveillance carried out under an authorisation.

27. Subsections (3) and (4) of s.14 deal, respectively, with cases where there is an error or omission on the face of the written authorisation and where there is a failure by any member of the Garda Síochána to comply with a requirement of the authorisation. In the former case, any information or documents obtained as a result of surveillance carried out under the authorisation may be admitted as evidence in criminal proceedings

if the court decides that the error or omission concerned was inadvertent and that the information or document ought to be admitted in the interests of justice. In making its decision, the court must have regard to:-

(i) whether the error or omission concerned was serious or merely technical in nature;

(ii) the nature of any right infringed by the obtaining of the information or document concerned;

(iii) whether there were circumstances of urgency;

(iv) the possible prejudicial effect of the information or document concerned;

(v) the probative value of the information or document concerned.

28. In the case of a failure by a garda to comply with a requirement, the court may admit the information or document as evidence if it decides that the garda concerned acted in good faith, that the failure was inadvertent, and that the information or document ought to be admitted in the interests of justice. Again, in making its decision it must have regard to whether the failure was serious or merely technical in nature, and to the other considerations listed in the preceding paragraph.

29. Section 14(5) provides for a presumption, until the contrary is shown, that a surveillance device used for the purposes of the Act was capable of producing accurate information or material, without the necessity of proving that it was in good working order.

30. Finally, s.15 is of some relevance. In summary, it provides that the fact that authorisation for surveillance was sought or granted, or that surveillance was carried out, is not to be disclosed "*by way of discovery or otherwise"* in the course of any proceedings, unless authorised by the court.

The issue in the trial

31. The evidence established that an authorisation was obtained in accordance with s. 5 of the Act. Privilege was claimed in respect of the functioning, concealment, capacity, deployment and retrieval of the devices used, but there was evidence that the conversations inside the house were listened to as they occurred by the member of the garda National Surveillance Unit (the "NSU") operating the equipment. They were simultaneously recorded. A number of files were created as a result. Each recording was described as representing the live feed from one or more microphones.

32. Later on the 8th August 2015, the recordings were downloaded, from whatever devices had been used, to a labelled folder on a hard drive. The hard drive was one that was in general use by the NSU for storing audio recordings, and it was retained by the NSU to be available for inspection by the High Court judge as required by the Act. A disc containing the unedited recordings was subsequently created by a superintendent of the NSU and given to Detective Sergeant Boyce in the Special Detective Unit (the "SDU"). As the names imply, the NSU deploys, operates and is responsible for surveillance equipment, while the SDU has responsibility for the investigation of the activities of unlawful organisations.

33. D/Sergeant Boyce labelled the disc with his initials and a brief description of its contents. It was transferred into the custody of other gardai involved in the investigation from time to time – for example, the investigation exhibits officer, who used it in the process of interviewing the arrested suspects. It was also used for the purpose of interviews with other persons suspected of other terrorist offences. However, D/Sergeant Boyce stated that it was at all times under his control in that he was always present or in the vicinity when it was used.

34. Apart from PB1 a number of copies of the recordings were made, and transcripts of the contents were produced. A version of the transcript with timings noted was also produced. A copy was given to a commercial company in Ireland for the purpose of making it "more presentable in court". At one point the recordings, along with "voice samples", were downloaded onto an Ironkey which was sent to a commercial company

in the United Kingdom with a request for a price estimate for a phonetic and computer-based analysis of voice and speech patterns, with the aim of attributing a voice or voices on the recording to one or more of the accused persons. Evidence was given in the trial that the Garda Commissioner authorised this process. However, the company asked for further information in relation to the methodology used, to which the response was that such information would not be provided as the gardai would be claiming privilege in respect of this aspect. The idea was ultimately abandoned.

35. Encrypted copies of the recordings were made by the gardai and supplied to the defence by way of disclosure. The evidence was that there were no deletions, additions, alterations or any other interference after the live recording.

36. The prosecution produced exhibit PB1 for the purpose of playing it in the trial, and its admissibility was the subject of a *voir dire*. Each of the relevant witnesses accepted that he or she had not obtained Ministerial authorisation to deal with the material. At one point in the *voir dire,* counsel for one of the accused was asked to explain the relevance of a particular line he was taking in cross-examination. He said that there was an issue about the number of copies made and the use of the material after it was gathered. Counsel for the prosecution expressed the view that it would not matter if she "made several thousand copies and gave them out free at concerts", since the only issue to be determined at that stage was the admissibility of PB1.

37. Before determining that the recording was admissible, the Special Criminal Court firstly ruled on the meaning of s.10(1) and found that it was clear and unambiguous. There was no evidence that the Minister had issued any authorisation as mandated by the Act. The section expressly provided that the Minister was to ensure that only persons authorised by him or her should have access to the documents or information, for the purpose of storage. There was therefore a legal impediment to access to the documents in the absence of authorisation and the evidence had therefore been accessed without the requisite ministerial authority. While the original recording had been lawfully obtained on foot of a valid authorisation, the subsequent storage of and access to the recording for the purpose of making copies had no ministerial authorisation. The Court considered that it was "clear" that s.14 of the Act had no application to the case

since there was no question of an error or omission on the face of the authorisation, or of a failure by the gardai to comply with its requirements.

38. The Special Criminal Court heard submissions as to the consequences for the admissibility of the evidence some days later. It is clear from the transcript of the hearings in the intervening period that while the initial position of the prosecution was that it should now serve and adduce evidence for the purposes of a *J.C.* inquiry, the argument ultimately made on the issue was that *J.C.* was concerned only with the obtaining or gathering of evidence. The judgment of Clarke J. was relied upon in that respect, insofar as he had stated that the test was concerned with the circumstances in which evidence was gathered and not with the integrity or probative value of the evidence in question. The evidence in question here was obtained at the point at which it was recorded. The making of PB1, which was a copy of the original, was a separate and distinct event that occurred after that and was not, itself, the gathering of evidence. The copy was admissible by virtue of s.30 of the Criminal Evidence Act 1992, and the evidence as to its history and provenance was relevant only to any issue that might arise about authenticity. In those circumstances the exclusionary rule did not apply, and the breach could not have the effect of excluding the evidence. Counsel drew an analogy with a hypothetical case where the privacy of a suspect was breached by showing his statement of admission to a third party, and argued that if the statement had been lawfully taken its admissibility in a trial could not be affected by such an event.

39. In response defence counsel argued that the information was "stored" by the device on which it was recorded during the act of recording. Therefore, s. 10 came into operation at that point. The concept of "gathering" had to include the processing of evidence into a coherent unit. PB1 was a copy that could not have been made in the absence of the breach of the statute. It had been obtained or gathered illegally, since its content had been illegally transferred onto it by what amounted to a criminal act and in breach of a self-contained statutory scheme. There had to be significant consequences for that, and in his judgment in *J.C.* Clarke J. had emphasised the constitutional value attached to ensuring that that investigative and enforcement agencies operated properly within the law, and that illegality was discouraged by the courts. The purpose of the test set out in *J.C.* had to be seen in that context, and the distinction drawn between the gathering of evidence and its integrity or probative value should be seen as a statement that the Court

was not, in *J.C.,* concerned with the balance between probative value and prejudicial effect, rather than as a statement that no test applied to the handling of the evidence after it was gathered.

40. Counsel submitted that the Act had two objectives – one was to allow for breaches of the right to privacy in controlled circumstances, and the other was to control the handing on of private material that came into the possession of agencies such as the Garda Síochána. It was pointed out that the power of the Minister to make regulations under s.10(2) was expressly stated to be "in the interests of the protection of privacy and other rights of persons" as well as in the interests of the security of the State and the aims of preventing the commission of, and detecting, arrestable offences.

41. The Special Criminal Court agreed with the prosecution argument that the exclusionary rule in respect of evidence obtained in breach of constitutional rights was concerned with the circumstances in which evidence was gathered, and was not engaged by subsequent handling. The material in this case came into existence at the time of the original authorised recording and so had been lawfully obtained. In those circumstances, it was not necessary to hear evidence or submissions regarding the application of the principles set out by this Court in *J.C.* In so ruling, the Court cited the following passage from the judgment of Clarke J.:-

> *"The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned."*

42. This was understood by the Special Criminal Court to mean that the application of the exclusionary rule was limited to the circumstances in which evidence was gathered, and therefore that it did not arise in respect of anything occurring after the audio recording was made.

43. After the ruling was given, counsel for one of the accused made a submission to the effect that the Court could not now proceed to hear the evidence, given its earlier

decision that access to the recording was a breach of the statute in the absence of Ministerial authority. The Minister had not authorised access for the purpose of producing it in court and the Court should not perpetuate an illegality. The Court's attention was also drawn to the judgment of this Court, delivered that morning, in the case of *Criminal Assets Bureau v. Murphy* [2018]3 I.R. 640..

44. The Court's response was to the effect that it had made its ruling on the admissibility of PB1, after a lengthy *voir dire* in which the parties had had full opportunity to raise all relevant issues. It did not consider the new judgment to be relevant to those issues. However, an argument to the effect that the Court was permitting an ongoing illegality in relation to the presentation of evidence continued to be raised by the defence. Objection was made to the use (not as evidence, but as a form of assistance to the court) of a transcript of the recording. Again, the Court stated that it had already ruled on the consequences of s.10(1) for the admissibility of the material.

The Court of Appeal

45. The prosecution submitted in the appeal that the Special Criminal Court had erred in finding that there had been a breach of s.10(1) of the Act. It was pointed out that in a number of other trials, before different panels of the court, the view had been taken that the section was not a penal provision, did not require to be strictly construed, and could be given a purposive interpretation. The argument was that the Oireachtas plainly intended that the evidence should be admitted. However, the construction that had been put upon the section by the trial court would require members of the Garda Síochána, who were engaged in the gathering of evidence, to obtain separate Ministerial sanction to retain and deal with it for the purpose of using it in a prosecution.

46. The Court of Appeal did not accept that an argument based on purposive interpretation had any merit, in circumstances where it considered that the legislation was clear and unambiguous. The literal interpretation might be highly inconvenient, but it could not be seen as "a nonsense and contradiction of manifest legislative intention". The Oireachtas had taken into account the protection of the privacy rights of persons, as

well as the security of the State and the aims of preventing and detecting arrestable offences, and had imposed a requirement to obtain Ministerial authorisation.

47. The Court then went on to consider the consequences for the admissibility of the evidence of the failure to obtain such authorisation.

48. The appellants argued that it should have been excluded, as having been obtained in breach of the privacy rights protected by the Constitution and by the European Convention on Human Rights. The authorisation issued to the Gardai by the District Court permitted them to deploy the equipment, but further authority was required to record, store and access the resulting material. It was also submitted that the "gathering" of evidence must include the making of copies, but that in any event the distinction drawn in the trial court between gathering and subsequent handling had created an artificial division in circumstances where the audio received by the device was, at the same time, being gathered, and also stored and accessed by being digitally recorded.

49. It was further submitted that the trial court had erred in its treatment of the exhibit PB1. The original recordings and CDs had been stored, without the requisite authority. PB1 was then created, some days later, by unlawfully accessing and gathering that unlawfully stored material.

50. The prosecution maintained that the exclusionary rule applied only to the gathering of evidence, and did not extend to its subsequent storage or handling.

51. The Court of Appeal held that the Special Criminal Court had been correct in admitting the evidence. Firstly, it found that the nature of sound was such that it could be "gathered" only by the simultaneous creation of a recording, whether in the memory of a person hearing it or by recording the impact of its vibrational wave on some medium. Accordingly, in the case of sound, the recording constituted the "gathering", and the gathering was complete once the recording process stopped. Secondly, the Court held that s.10 of the Act was not concerned with the gathering of evidence but with its subsequent handling and processing. The exclusionary rule was not applicable to those latter aspects, since it was engaged only where there was a causative link between the evidence sought to be excluded and the breach of constitutional rights in question.

52. It was accepted that, arguably, the physical exhibit PB1 might have been unlawfully created in the absence of authorisation, but the mere introduction of that physical copy did not breach the constitutional rights of the appellants. The content was the same as that of the original, which had been lawfully gathered. The admission into evidence of a copy of a lawfully obtained document was provided for in s.30 of the Criminal Evidence Act 1992.

The applications for leave to appeal

53. The first in time of the applications for leave was that of Mr. Sean Hannaway (see [2020] IESCDET 80). He raised a number of issues in his application but the only one in respect of which leave was granted was a question framed in the following terms:-

> *"With regard to s 10(1) of the Criminal Justice (Surveillance) Act 2009, to what degree can a true distinction be drawn between the gathering as opposed to storage of and access to a recording of voices obtained in breach of the said section as a basis for determining the admissibility or otherwise of surveillance evidence?"*

54. The Director of Public Prosecutions did not, in her respondent's notice in relation to this particular application, take issue with or seek to appeal the finding of the Court of Appeal that there had been a breach of s.10 of the Act of 2009. Her argument, as set out in the notice at that point, was simply that the Court had been correct in distinguishing between the gathering of evidence and its subsequent handling for the purposes of the exclusionary rule.

55. In each of the subsequent applications for leave, the Court granted leave to appeal on the same issue (see [2020] IESCDET 107, [2020] IESCDET 112, [2020] IESCDET 113, [2020] IESCDET 114). In respect of most of those applications, the respondent expressly stated in her notice that if leave was granted on that issue she would maintain her prior submission that access to a stored recording for the purpose of adducing it in

evidence did not constitute a breach of s.10. She submitted that the consideration of the section by this Court would in any event necessarily include its precise interpretation, application and parameters and that, since the Court of Appeal had not made any specific order in relation to the issue, a cross appeal was not formally necessary.

56. All of the appellants object to submissions being made that are beyond the scope of the leave granted. It is argued that in granting leave to appeal the Court framed the issue in terms based on the finding of the Court of Appeal that there was an illegality, and that it follows that this finding cannot now be disturbed. Separately, the appellants in respect of whom the Director did expressly state her position complain that they should not be treated differently to Mr. Sean Hannaway. However, none of them suggest that they are taken by surprise or that they are at a disadvantage in having to address the issue and in fact they have done so.

Submissions in the appeal

Appellants

57. As they did in the trial, the appellants have each adopted the submissions made by others and it is therefore possible, for the most part, to describe any particular submission as being made by all of them although the arguments as presented in the oral hearing naturally varied to some extent. Where different approaches have been taken, they are probably best treated as alternative submissions. On that basis, the following summary is a composite of the various arguments made.

58. As a matter of broad principle, it is submitted that evidence resulting from surveillance is admissible only if there is compliance with the provisions of the Act. The core complaint made in the appeal is that, having found a breach of the statute, the Special Criminal Court should have conducted a *J.C.* inquiry to determine the impact of that breach.

59. Section 10 is seen as an "all-encompassing" provision, a "legislative pathway" through which storage and access are sanctioned and that ultimately maps the route to admissibility. Counsel have argued that the structure of the Act is such that, so far as the admission of evidence in court is concerned, it is in effect inoperable unless

regulations are made. It is submitted that s.9 simply authorises retention of documents, but the manner in which retained documents can be accessed and used is governed by s.10. The sections are said to be inter-dependent, with the effect that a breach of s.10 may render retention under s.9 unlawful. Section 10 applies to all information and documents to which the Act applies, expressly refers to s.9 and makes no exceptions in relation to investigations or trials. Therefore, the intention of the Oireachtas is that all persons who wish to have access to the material, for any purpose, must be authorised under the terms of the Act.

60. It is contended that the "authorised persons", to whom information may be disclosed as referred to in s.13, must be persons authorised under s.10.

61. Section 14(1) of the Act is described as permissive only. It is said that the two subsections which follow it make express excusatory provision for two specific kinds of error that may occur, but none is made in respect of a failure to comply with any other requirement of the Act. Where such a failure occurs, its effect should be considered in the light of the principles concerning the exclusionary rule.

62. It is submitted that the Court of Appeal reached its conclusions in relation to the exclusionary rule on too narrow and artificial a basis, and by making a technical analysis of the nature of sound that was not the subject of any evidence in the trial. The case made is that, given the nature of the technology involved, and since the officer operating the equipment was listening as the voices were recorded by the equipment, he was thereby simultaneously "gathering", "storing" and "accessing" the information/data/conversations/evidence (these words are used interchangeably in the appellants' submissions). Evidence of this kind can only be "obtained" by storing it on a recording device, and such storage must be regulated. It is therefore submitted that no valid distinction can be drawn between these actions for the purposes of the exclusionary rule.

63. Alternatively, it is argued that, after it was "gathered", the original recording was "stored" when it was downloaded onto the hard drive in the NSU offices, and that it was thereafter "accessed" for the purpose of making copies. The storage and the access both required authorisation by the Minister.

64. The appellants do not accept, in any event, that the exclusionary rule is concerned only with the manner in which evidence is gathered. It is submitted that any step taken which is directed to the production of evidence in court must be lawful. Further, it is contended that unlawful access to or handling of (otherwise lawfully admissible) evidence may engage the rights of the accused and render that evidence inadmissible. Reference is made to the judgment of Kingsmill Moore J. in *People (Attorney General) v. O'Brien* [1965] I.R. 142, where the phrase "*facts ascertained by illegal means*" is used. The underlying policy is to deter police illegality. Even if the Court decides, firstly, that the exclusionary rule applies only to the "gathering" of evidence and, secondly, that there has not been a breach of any constitutional right, the court of trail retains a discretion to exclude evidence that is tainted by illegality. However, the Special Criminal Court did not properly consider its discretion in this instance, but set aside the clear intention of the Oireachtas.

65. In this context a comparison is made with the use in evidence of retained telephony data and DNA analysis, and the rhetorical question is asked whether a court could find that data that was retained in breach of the relevant statutory regime was nonetheless admissible because it had originally been gathered lawfully.

66. The trial court and the Court of Appeal both found that there had been a breach of the statutory provisions. It is argued that this breach resulted from the absence of regulations, and that, therefore, utilising the *J.C.* analysis, an issue arose as to whether the Minister was reckless or grossly negligent in failing to provide a lawful means by which material obtained from surveillance could be stored and accessed. If the Special Criminal Court had inquired into the circumstances of that absence, it might have found that there was a deliberate policy not to introduce regulations. That would have raised a public policy issue in respect of the decision on admissibility. Alternatively, it might have found that the plan to obtain a "voice recognition" analysis had been dropped because of a concern that the court would consider the unauthorised processing by a third party to have been unlawful.

67. A separate argument is raised to the effect that PB1 was created by unlawfully "gathering" the stored documents some days after the recording took place, without the

necessary authority. It was therefore, it is said, created in breach of the appellants' constitutional rights in circumstances where no claim of inadvertence was or could be made. The information gathered by the surveillance operation was then unlawfully disclosed to the accused, to officers of the Director of Public Prosecutions, to lawyers, to expert witnesses and, further, to the press and the public in the course of a public trial. The disclosure in these circumstances is said to have amounted to the commission of a criminal offence. The appellants do not accept that any of these persons could be considered to have been "authorised" within the meaning of the Act. It is submitted that the inclusion of the Director in the statute does not encompass her officers, in contrast to the express inclusion of officers of the Garda Síochána Ombudsman Commission.

68. It is submitted that the effect of the decision of the Court of Appeal is to remove evidence of this type from the protection of the statutory safeguards which, in turn, are intended to uphold the guarantees provided by the Constitution and the Convention in respect of privacy and inviolability of the dwelling. Both instruments require the exercise of powers such as those involved here to be "in accordance with law" and subject to appropriate safeguards. The effect of the Act should have been that, in the absence of authorisation, no person should have had access to the recordings. There was, therefore, illegality in the unauthorised access, storage, distribution, copying and presentation of the recordings as evidence in court. There is an obligation on the courts to uphold the law and discourage illegality, and evidence taken in circumstances of illegality should not be readily admitted even where there is no breach of constitutional rights. In the circumstances, the trial court should have inquired into the reasons for what had happened and should have determined whether either legal or constitutional rights had been breached for the purpose of deciding whether or not the evidence should have been excluded.

69. The appellants submit that the court of trial failed to give proper consideration to the State's obligations pursuant to Article 8 of the European Convention on Human Rights and in respect of the constitutional right to privacy. The jurisprudence of the European Court of Human Rights is relied upon for a number of propositions. Interference by way of surveillance with the rights protected by Article 8 of the European Convention on Human Rights must be authorised by a specific, precise legal rule or regime, that

must be "in accordance with law" in the sense that it is compatible with the rule of law. Citizens must have adequate access to the law in question. The law must be formulated with sufficient precision to enable the citizen to foresee the circumstances in which it will be applied. There must be adequate safeguards against abuse, to ensure that there cannot be arbitrary or disproportionate interference with rights. A lack of appropriate regulation including adequate safeguards led the ECtHR to find the United Kingdom in breach of Article 8 in *Halford v. United Kingdom* (1997) 24 E.H.R.R. 523, Malone v. United Kingdom (1985) 7 E.H.R.R. 14, *Khan v. United Kingdom* (2001) 31 E.H.R.R. 45 and *Liberty and Ors. v. United Kingdom* [2008] ECHR 58243/00.

70. In this context, it is submitted that by virtue of s.2(1) of the European Convention on Human Rights Act 2003, the constitutional right to privacy must be read "co-terminously" with the State's obligations under Article 8, and therefore that the same principles are applicable to the State's constitutional obligations. It is claimed that the State is in breach of these principles, in that it came to light in the course of the trial that there was a Garda policy in relation to the operation and application of the Act of 2009, but a claim of privilege in respect of the content of that policy was upheld.

71. It is submitted that the power conferred on the Minister to make regulations in relation to the storage of material, and access to it, constitutes a recognition by the Oireachtas that further regulations are required to make the Act compliant with Article 8 and with the Constitution. As a consequence of what is characterised as the "failure" to make such regulations, the surveillance regime established by the Act is in breach of both. The appellants argue that the purpose of s.10(1) is to provide the required safeguards – access must be authorised by the Minister, and unauthorised disclosure is a criminal offence. Here, however, the Special Criminal Court refused to enter into an inquiry as to whether members of the Garda Síochána had committed that offence.

72. It must be noted here that the appellants do not claim that their personal rights to privacy were invaded. They say that they are entitled to raise the issue of illegal actions on the part of the prosecution or its agents without any requirement to admit that they were present in the house or that words of theirs were captured on the recording.

73. The appellants contend that the admission of the evidence, despite what they say were breaches of s.10 and offences under s.13, constituted an abuse of the process of the court that undermined the integrity of the criminal justice system, in the sense that there was in the words used in Ryan v. Director of Public Prosecutions [1988] I.R. 232 a "contamination of…the fundamental basis upon which the proceedings were brought". The appellants would not have stood trial but for the executive's abuse of power. A number of English authorities (mostly concerned with entrapment) are cited for the argument that this should have led to the court staying the prosecution.

Respondent

74. The respondent submits that the distinction between the gathering of evidence and its subsequent handling is valid and important because, in her view, the analysis in *J.C.* relates only to the circumstances in which evidence is gathered or obtained and has no application to any later illegality. In any event, it is submitted that there was no illegality in this case.

75. Emphasis is laid on the fact that a sound recording is to be regarded as a document under the Act. A "document" cannot be regarded as such until it is complete. The suggestion, therefore, that recorded sound is being "stored" within the meaning of s.10 at the same time that it is being gathered is not relevant to the purpose of the provision, which relates to the storage of a recording that has resulted from the surveillance. Any breach of s.10 could only occur after the completion of a document or recording – material cannot be stored, or accessed, until it has been obtained.

76. The respondent then makes the case that if evidence was lawfully obtained, a subsequent breach of the statute could not affect its admissibility. It is argued that the test formulated in *J.C.* (and, indeed, the line of authority which led to *J.C.*) relates solely to the circumstances in which the evidence was gathered.

77. However, as noted above, the respondent also makes the case that, in any event, there was no breach of the statutory provisions. The Gardaí had lawfully gathered and had custody of items that were real evidence, and they were required to retain them for the

purpose of a criminal trial. It is suggested that it would be absurd to say that they needed Ministerial authorisation to "access" that which they already had, and that s.10 is intended to apply to third party access to materials that are held by the Gardaí. The Minister has responsibility for regulating that form of access, and for ensuring that the material is securely held.

78. In the alternative, the respondent submits that s.10 should not be read literally, if the effect of a literal reading is that the Minister would have the power to prevent material evidence being put before a court. Such a situation would breach the separation of powers, and the independence of the prosecution service, and would involve the Minister in criminal investigations at an operational level. The respondent points out that the disclosure of the material for the purposes of a prosecution is expressly contemplated by s.13, which makes no reference to Ministerial authorisation. If, therefore, s.10 is ambiguous it should be given a purposive interpretation.

Scope of the appeal

79. The first issue to be addressed is the proper scope of the appeal. It must be said that it is of course highly desirable that a respondent should indicate clearly what matters remain in issue between the parties, having regard to the contents of the application for leave. Not to do so can lead to confusion in dealing with the appeal if leave is granted, and to the waste of time in arguments about the permitted scope of the debate.

80. However, it must also be borne in mind that this Court has the constitutional function of determining points of law of general public importance. It has been made clear in a number of judgments of the Court (see, for example, *People (DPP) v. C.O'R* [2016] 3 I.R. 322 and *McDonagh v Sunday Newspapers* [2018] 2 I.R. 79, [2017] IESC 59) that determinations are decisions made in the context of the limited information available from the notices filed by the parties and are not to be approached in an overly rigid or semantic way. The Court has jurisdiction to address and deal with any issue that arises as a matter of logic from the grant of leave of a particular case. Where the issue before the Court arises from the application of a statute, the constitutional function would not be properly fulfilled if the Court were bound to accept the views of either or both parties

as to the true interpretation of the statute, simply because the Court did not expressly raise the question of interpretation in its determination.

81. The general issue upon which leave was granted in this case necessarily entails the ascertainment of the proper construction of the Act of 2009 and in particular of s.10(1). The prosecution and defence have taken opposing views as to the meaning and effect of the statute throughout the proceedings, and their disputes in that regard have been the subject of rulings in the court of trial and the Court of Appeal. It seems to me that the Court's function necessarily includes dealing with the question whether those courts were correct in deciding that there had been a breach of the terms of s.10(1). In the circumstances I do not consider that there is any injustice to any of the appellants, including Mr. Sean Hannaway, in examining that issue.

The Statute

82. Charleton J. has cited a number of the relevant authorities on statutory interpretation and I agree with his analysis. I add some further observations here about the matters that must be borne in mind when engaging in the exercise of statutory interpretation of the Act of 2009. The first important point to make is that the constitutionality of the Act has not been challenged and it must be presumed to be capable of being operated in accordance with constitutional rules, principles and values.

83. The second is that when interpreting any provision of a statute which, like this one, is intended to regulate a more or less self-contained area of activity, it is necessary to consider the scheme of the Act as a whole. The purpose is, where possible, to give the provision a harmonious interpretation.

84. The third is that the rule of interpretation that penal legislation must be construed strictly does not necessarily apply to all legislation that becomes the subject of dispute in a particular trial. The principle is that a person should not be subjected to criminal conviction or punishment on the basis of an ambiguous law. It applies, therefore, to statutory provisions that create criminal liability or impose penalties on conviction. Provisions that do not impose liability or punishment, such as those that deal with evidentiary matters, are generally not penal provisions. Moreover, the principle applies

for the benefit of persons accused of a crime under the provision in question. So, in this instance, the question whether an offence has been committed under s.13 of the Act would have to be looked at from the point of view of a person charged with such an offence, with any ambiguity favouring the proposition that a crime has not been committed. It is not a question to be approached from the point of view of the accused in this trial.

85. Finally, I would point out that where a statute defines a particular word for the purposes of part or all of the statue, that is the definition that must be utilised in construing the word in that context. However, it is possible that a word that is not a term of art and is not the subject of a statutory definition may be used in different senses in different sections. Context is a highly relevant consideration.

86. Turning to the substance of this statute, I will consider the other relevant provisions before examining s.10 more closely. It is necessary to repeat that the purpose of the Act is to provide for surveillance in connection with the investigation of serious crime, the prevention of serious crime and the safeguarding of the State against subversive and terrorist threats. Therefore, the intention of the Oireachtas must be that any information gleaned by the lawful carrying out of surveillance is to be available for those purposes. The power to authorise the carrying out of surveillance is not, save in the limited circumstances dealt with in ss. 7 and 8, entrusted to agents of the *force publique* but is reserved to the judicial branch of government. The criteria for the grant of authorisation, on foot of an application by a senior officer, are intended to balance the public interest with the private interests of the individuals who may be subjected to surveillance.

87. I take the view that where a judge authorises the *use* under s.5 of a surveillance device capable of recording sound or images, the *making* of such a recording is also clearly authorised. That is the point of deploying the device. Further, the statutory purpose for which the authorisation is granted will clearly not be fulfilled if those who make the recording cannot listen to it while it is being made, since the objective is to obtain information relevant to that statutory purpose. The "recording" may include any data or information stored, maintained or preserved electronically or otherwise than in legible form. "*Storage*" in this context plainly means stored on a device. The storage of

the recording on the device that recorded it is in my view part of the making of the recording and, similarly, is covered by the authorisation.

88. I do not believe, therefore, that any further or separate authorisation is required to permit the gardaí to listen to and record the conversations as they occur.

89. When it has been made, a recording is then regarded for the purposes of s.9 of the Act in the same way as a document. Section 9 mandates the retention of documents obtained as a result of surveillance for the period of three years or until "*the day on which they are no longer required for any prosecution or appeal to which they are relevant, whichever is later*". This section therefore obliges those who have possession of the documents to retain them. It also acknowledges that the recording made on foot of the authorisation may be "*required*" as evidence in a trial.

90. Sections 11 and 12 clearly provide that where the Referee or the designated judge is investigating a particular matter, relevant documents must be made available on request. The Act envisages that the documents will be in a Garda Station or other place, and the person in charge of the station or other place is the person who is obliged to comply with the request. There is no suggestion that either that person, the Referee or the designated judge must obtain Ministerial authorisation.

91. Bearing in mind the three overall purposes of the Act, the intent in s.13 seems to me to be the protection of both the interest of the State in the non-disclosure of sensitive intelligence and the rights of individual persons about whom information is gathered by surveillance. Disclosure is, therefore, an offence unless it is to an authorised person for one or more of the specified purposes. "Authorised" in this context does not mean a person who has been authorised by the Minister under s.10 – the section carries its own definition. Any person who comes within that definition is authorised to receive the information by virtue of that fact.

92. The list of permissible purposes for which disclosure may be made includes the prosecution of offences. The list of authorised persons includes the Director of Public Prosecutions. It includes any person authorised by the Garda Commissioner. It also includes any person "*otherwise authorised by law*".

93. The question arises whether the gardaí who worked on this particular investigation were authorised to handle the recordings or transcripts, or whether a criminal offence might have been committed by any officer who made the material available to a fellow officer. Without reference to s.10, it seems to me that they were clearly persons authorised by the Garda Commissioner. The Garda Síochána is a unitary, hierarchical organisation, whose personnel are assigned to work in different areas of law enforcement including crime prevention and the investigation of crimes. In my view any member of the force whose duties, as assigned to him or her in accordance with the command structure of the force, include the carrying out of surveillance or working on an investigation that relies upon the use of evidence obtained by surveillance must be considered to have been authorised by the Commissioner to do so.

94. It may be necessary to make some observations here about the position of the Director of Public Prosecutions. Article 30.3 of the Constitution provides that all crimes prosecuted on indictment are to be prosecuted in the name of the Attorney General "*or some other person authorised in accordance with law to act for that purpose*". It is relevant to note that in discussing the position of the Attorney General and the status of his or her staff, Ó Dálaigh J. observed that the Attorney was independent in discharging his functions as a prosecutor and could not be subject to the directions of the Taoiseach (*McLoughlin v. Minister for Social Welfare* [1958] I.R. 1).

95. The office of the Director of Public Prosecutions was created by the Prosecution of Offences Act 1974. Section 3 provides *inter alia* that the Director is to perform all the functions capable of being performed by the Attorney General in relation to criminal matters (apart from certain statutory exclusions). The Director is, like the Attorney General, a law officer of the State, and s.4 of the Act of 1974 provides that a law officer may direct any of his or her professional officers to perform on his or her behalf any particular function, whether in relation to a particular case or cases or in all cases where that function falls to be performed. In *Flynn v. Director of Public Prosecutions* [1986] I.L.R.M. 290 this Court held that the power of delegation thereby conferred covered, *inter alia*, the making of decisions and the issuing of instructions to lawyers acting on behalf of the Director. The Court also held that the Act imposed a "constitutional duty" on the Director by vesting in him or her the power and duty to prosecute all offences

other than those in a court of summary jurisdiction, and that that duty necessarily implied into the powers of the office a power to engage solicitor and counsel for the purpose of conducting trials.

96. In those circumstances, I can see no merit in the argument that the Director's officers and the lawyers engaged by her for the purposes of a trial are not included in the category of persons who are authorised to receive disclosure.

97. Section 14(1) of the Act makes a general statement that evidence obtained as a result of authorised surveillance may be admitted as evidence in criminal proceedings. The word "may" in the context of a provision concerned with evidence, indicates an acknowledgement by the legislature that the evidence might, for some reason, be held to be inadmissible according to the normal principles relevant to the admissibility of evidence. However, the section does not refer back to s.10, and does not suggest in any way that admissibility is limited by reference to any power of the Minister to give authorisation. In my view, the operation of the general statement in s.14(1) is also not limited to the two specific situations provided for in subss. (3) and (4), where something has gone wrong in either the authorisation process under s.5 or the compliance with the terms of the authorisation.

98. Section 15 prohibits the disclosure in court proceedings, by way of discovery or otherwise, of the fact that surveillance has been authorised or carried out unless the court orders such disclosure. This provision is, probably, relatively uncontroversial where the prosecution wishes to rely on evidence obtained by surveillance. Obviously, the prosecution cannot proceed unless the evidence is provided to the defence. However, there may be other cases where the defence suspect that surveillance was carried out and that evidence about such surveillance, or resulting therefrom, might be of assistance. In such a case the court is empowered, having regard to the statutory criteria, to make an order for the disclosure of the information. That power necessarily implies a power to receive the evidence if disclosure is ordered. It may also (although this may be a matter for another day) imply that the court has the power to ask for and consider the material information, for the purpose of deciding whether or not to order disclosure, in the same way that a claim of privilege might be assessed. In any event, the Act clearly envisages that a court of trial has the jurisdiction to order disclosure. It

follows that an accused person and his or her legal representatives must therefore be entitled to receive it as persons "authorised by law".

99. Turning back, then, to s.10, one must ask what role it plays in the statutory scheme. To answer that question, it is necessary to examine the section closely, while keeping in mind the fact that no other provision in the Act is stated to be subject to it in any way. It cannot be read, therefore, as overriding those other provisions.

100. Section 10(1) is in mandatory terms. The Minister is, firstly, obliged to ensure that information and documents to which the Act applies are stored securely. Thus, while the Commissioner has operational responsibility, the Minister must ensure that a secure system is in operation and will presumably be liable to any person harmed as a result of insecure storage. The second obligation is to ensure that "only persons who he or she authorises for that purpose have access to them". I will return to the meaning of this shortly.

101. Subsection (2) confers a discretion to make regulations. It must, of course, be borne in mind that regulations made under a statute must be *intra vires* the Act, and therefore cannot affect the force of any substantive provision in it. It must also be noted that there is nothing in either the section or elsewhere in the Act to suggest that any other provision is not to have effect pending the introduction of regulations.

102. If the Minister makes regulations under this power, they may prescribe the persons or categories of persons who are to have access, for the purposes of the section, to information with respect to the existence of authorisations, approvals, and documents referred to in s.9. The first thing to note here is that the prescribed persons or categories of persons will have access to *information* as to the *existence* of the various items – not to the actual material. The second is that the regulations, if made, are to provide for access "*for the purposes of this section"* only, and therefore will not affect the position of any person who has lawful access to that material on foot of any other legal power or authorisation, for a purpose authorised by some other provision or law. Therefore, they would not affect the position of garda investigators or civilian contractors authorised by the Commissioner, or the position of the Director of Public Prosecutions and her officers and legal representatives.

103. Where it is proposed to adduce surveillance evidence in a prosecution, it is equally the case that regulations made under this power could not affect the right of the defence to be furnished with that evidence, or the right of the trial court to receive it. That is implicit in the concept of a trial in due course of law, guaranteed by Article 38. The persons concerned in a trial must, therefore, be deemed to be persons "otherwise authorised by law". Furthermore, justice is administered in public. Criminal trials must be held in public and may be reported upon. It is implicit in that process that the public can be informed of the evidence against an accused person.

104. The regulations may also prescribe the procedures and arrangements for the secure storage, and the maintenance of the security of that information and those documents (being the documents referred to in s.9). Finally, they may provide for the number of copies that may be made of the documents, and for their destruction as soon as possible after they are no longer required under s.9.

105. It seems to me that the only matter potentially relevant to the context of a trial that could be the subject of regulations made under subs. (2) is the possibility that the Minister could make a regulation providing that, for example, the parties in a trial and their legal representatives are to receive only the number of copies required for the purposes of the trial and must return them for the purpose of destruction at the end of the proceedings.

106. Subsection (3) confers a separate power to make regulations in respect of the disclosure, or non-disclosure, of the existence of an authorisation (or approval) to a person who was the subject of it or whose interests are materially affected by it. The power to make such regulations is stated to be "notwithstanding section 13" – that is, notwithstanding the general prohibition on the disclosure of any information about or derived from a surveillance operation. If made, such regulations would provide a route to the information that surveillance was authorised without the necessity for court proceedings to be in progress. However, it does not appear that the regulation could encompass access to the information actually gathered as a result of the surveillance. Such regulations could not, therefore, be intended to address the right of an accused person and his or her representatives to be furnished with evidence that is proposed to

be adduced against him or her. If made, they would simply have the effect of entitling some categories of people to some limited information about surveillance operations where, in the absence of regulations, there is no such entitlement. They do not appear relevant to either the investigation of a crime or its prosecution.

107. Looking at the entire section, in the context of the Act as a whole, therefore, it seems to me that it cannot be read as conferring on the Minister an exclusive power to authorise access to surveillance evidence, either on an *ad hoc* basis or by way of regulations, for the purposes of either an investigation or a trial. Such an interpretation cannot be squared with the limited nature of the regulatory power, with the provisions dealing with the authorisation process, or with ss.11, 12, 13(4) and 15. I therefore cannot agree that s.10 has the pivotal role in the Act attributed to it by the appellants.

108. I also agree with counsel for the prosecution that such an interpretation would involve participation by the Minister in Garda operational matters to a wholly unprecedented extent, for no apparent reason. As Charleton J. points out, a typical investigation of a crime will involve the forensic examination of items of real evidence, which is often done by independent scientists in the State or, on occasion, abroad. The lawfulness of that process has always been considered to follow from the lawful seizure of evidence. While the authority of the Commissioner may sometimes be required, it has never before been suggested that it would be appropriate for the Minister to be involved.

109. Even more seriously, the proposed interpretation could permit the Minister to override the decision of an independent judge to authorise the carrying out of surveillance where that judge has been satisfied that the statutory criteria have been met. If surveillance is authorised for the purpose of obtaining information or evidence as to the commission of a serious offence, it cannot be correct that such authorisation could be overridden by a decision of a Minister not to permit the gardaí to listen to or examine that information, to assess its effect and its relevance to other information, and to forward it to the Director of Public Prosecutions where appropriate.

110. Nor could it be correct that it is for the Minister to determine what evidence can or cannot be placed before or received by a court of law in an individual case. In this jurisdiction, an assertion of a claim of executive privilege must, for constitutional

reasons, be capable of being assessed and where necessary overruled by a court. The Special Criminal Court frequently also has to examine the material underlying the belief evidence of a Chief Superintendent on a charge of membership of an unlawful organisation. I do not believe that a statutory provision allowing a Minister to prevent such examination by simply refusing to authorise access to the evidence would be likely to pass constitutional muster. It must be remembered that such evidence is capable of assisting the defence in some cases, particularly in this particular area of law. For example, belief evidence might well be undermined by recordings of an accused person's conversations with known members.

111. Counsel for the defence have referred to s.10 as providing a safeguard for the rights of the individual, but the whole concept of a safeguard against the abuse of executive powers is at odds with the notion of conferring such power on an individual member of the Government. It is also fundamentally at odds with the concept of a trial in due course of law. In my view, the safeguards in this legislation lie in the requirements that surveillance may not be carried out other than on foot of an authorisation granted by an independent judge, for the purposes specified in the Act and having due regard to the rights of the individuals concerned and the proportionality of the proposed measures; in the obligation imposed on all relevant persons (not just the Minister) to ensure that the information gathered as a result of surveillance is used only for the permitted purposes and is kept securely; and in the oversight functions of the Referee and the designated judge of the High Court.

112. Having regard to those considerations, it seems to me that the interpretation proposed by the appellants would cast serious doubt on the constitutionality of the provision. However, I am satisfied in any event that this was not the intention of the Oireachtas or the true meaning of the legislation.

113. Section 10(1) is concerned, firstly, with the security of the documents, and the responsibility of the Minister for that security. It is only the second half of the sentence that is problematic – the obligation being to ensure "that only persons who he or she authorises for that purpose have access to them". It will be recalled that the Special Criminal Court considered that the words "that purpose" meant that authorisation was for *the purpose of storage*. The Court found that the effect of the provision was that

both storage of and access to documents required authorisation by the Minister, and that the gardaí had both stored and accessed the evidence in question without such authorisation. The Court of Appeal agreed.

114. Unfortunately, I cannot share the view of the Court of Appeal that s.10 is clear in its terms. Some further consideration leads me to a conclusion that this interpretation leads up a blind alley – if it is correct, then, after evidential material is lawfully gathered, it can be handled only by those authorised by the Minister for the purpose of keeping it securely stored. It is difficult to see how, if that is so, it could ever be lawfully produced in court. In fact, it is difficult to see how even the mandatory requirement to destroy material could be complied with. Such an interpretation would render much of the Act a complete nullity and would undoubtedly not reflect the intention of the Oireachtas. The Act clearly envisages the use of such material as evidence in a prosecution.

115. I have come to the view that the "purpose" referred to in s.10(1) relates to the obligation of the Minister to ensure that material is "securely" stored. The word "stored" is not a term of art and in this context it cannot mean the same thing as the "storage" of a recording on a device. The latter will have been expressly authorised by the judge when permission to carry out surveillance was granted, and it is not subject to a further requirement to obtain the permission of the Minister. It seems to me that in s.10(1) the word simply means "kept", in the way that one stores or keeps items that are not currently in use. However, for the reasons already discussed, I do not believe that it is capable of applying to material that is, at a given time, the subject of an ongoing investigation or trial. If this view is correct, then the obligation on the Minister is to ensure that material that is not being otherwise lawfully handled is kept securely.

116. The further obligation to ensure "that only persons who he or she authorises for that purpose have access to them" cannot, for the reasons already discussed, be read so broadly as to amount to a prohibition on any access, by any person, for any purpose, without Ministerial authorisation. The provision must of course have a meaning, but it must be a meaning that does not impinge upon powers, obligations and fair trial rights otherwise conferred or imposed by law. It may be that the most likely meaning is that the Minister must approve a system of secure storage. Such a system might, for example, entail ensuring that stored material can only be accessed by officers of a

specified rank, for specified purposes, so that improper access by gardaí not assigned to work with the material could not occur. It might require that material of this nature must be kept in a specified way or in a specific place (and not, for example, in personal lockers). It might also entail rules or principles according to which non-staff civilian contractors could be engaged.

117. It may also be that the operational policy of the Garda Síochána, the existence of which was disclosed in the trial but over which a successful claim of privilege was made, deals with these matters and was approved by the Minister. That has not been the subject of evidence or debate in this case. However, whether or not the privilege claim was properly upheld (which is not an issue before this Court), it would appear that the content of such a policy would become relevant to a trial only in the event of there being some evidence that the security of stored material had been compromised. Were that to happen, then the failure of a Minister to concern himself or herself with the storage system could be a ground for a finding of liability in an action by a person injured as a result. However, I cannot see that it is relevant to any issue in this appeal.

118. The section may also mean that the Minister has a residual power to authorise access on an *ad hoc* basis to persons who are not authorised by the express terms of the Act and are not otherwise authorised by law. However, since I do not consider that s.10(1) can have any bearing on the investigatory or trial processes, I do not believe that it is necessary to definitively rule upon its meaning in this appeal.

119. This analysis, if correct, is consistent with the constitutional values underpinning the separation of powers and the requirements of a trial in due course of law. It is also, I believe, consistent with the jurisprudence of the European Court of Human Rights.

120. The ECtHR has consistently stated certain clear principles in many decisions over several decades. Firstly, where a particular type of State action is required to be "in accordance with law", the national law in question must be compatible with the concept of the rule of law. In the case of surveillance powers, the national law must provide protection against arbitrary interference with an individual's rights under Article 8. Further, the law must be sufficiently clear in its terms to give individuals an adequate

indication as to the circumstances in which and the conditions on which public authorities are entitled to resort to covert measures.

121. The appellants have placed some emphasis on the decision of the ECtHR in *Khan v. United Kingdom* (2001) 31 E.H.R.R. 45. The applicant had been convicted of an offence on the basis of a covertly recorded conversation with another person in that person's home. The ECtHR found that there had been interference with the applicant's rights under Article 8(1). The surveillance had not been carried out "in accordance with law", as required by Article 8(2), since there was at that time no legislation in the United Kingdom governing the use of surveillance devices by the police. While there were Home Office guidelines, these were neither legally binding nor readily accessible. Secondly, as had been made clear in the decision of the House of Lords, the English common law did not recognise a right to privacy and the Convention was not part of domestic law. The Court also found that there had been a breach of Article 13, because the applicant had no domestic remedy to enforce the substance of the Convention right that had been breached. The criminal courts were not capable of providing such a remedy, and the official complaints system lacked sufficient independence.

122. However, the Court did not consider that there had been a breach of the right to a fair trial as guaranteed by Article 6. It stated (as it frequently has) that rules relating to the admissibility of evidence are primarily a matter for national law. The concern of the ECtHR was not whether particular evidence should not have been admitted, but whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. On the facts of the case before it, the Court noted that the applicant had had ample opportunity to challenge both the authenticity and the use of the recording, and the trial and appellate courts had had a discretion to exclude the evidence if they considered that its admission gave rise to substantive unfairness.

123. By contrast, the situation here is that privacy is recognised as a constitutional right. The surveillance powers of the police force are set out in statute. Permission to exercise those powers can only be granted by an independent judge, save in certain limited circumstances. The statute makes it clear that the right to privacy is protected by the principles of proportionality and by the obligation to ensure that only those authorised by law may have access to information obtained by way of surveillance. Oversight

functions are exercised by the designated High Court judge and the Referee. Trial courts must, obviously, permit defendants to challenge both the admissibility of surveillance evidence and its authenticity.

124. In the circumstances, I would hold that, contrary to the findings of the trial court and the Court of Appeal, the evidence in this case does not establish that there was any breach of the statutory provisions. However, I think it desirable to express a view, albeit necessarily *obiter*, on the question whether the exclusionary rule might have relevance where it is shown that the handling of evidential material is in breach of relevant legislation.

125. The authorities on the exclusionary rule are overwhelmingly concerned with situations where the evidence in question was only obtained in the first place by means which violated some right of the accused person. The reason for that is the causal relationship between the unlawful acts and the availability of the evidence. The following passage from the judgment of Hardiman J. in *Lynch v. Attorney General* [2003] 3 I.R. 416 sets out the explanation:

> *"The courts do not exercise a general disciplinary power over the executive, or the gardai in particular. That power is vested elsewhere. The role of the courts is invoked when, in the course of properly constituted proceedings, a complaint is made that some step or thing adverse to an individual has been taken, or come into being, on the basis of an illegality or an unconstitutional act on the part of his opponents. If this has occurred, the courts will not normally permit the opponent to have the benefit of what flows from an unconstitutional act, in the interests of upholding the Constitution itself. But it will not interfere with a procedure, otherwise proper, on the basis of disapproval of some step taken in its general context."*

126. However, it should be noted that Hardiman J. added that these comments were posited on the assumption that the gardaí were under effective discipline and control at the hands of their authorities. It should also be noted that in the same case, Denham J. left

open the possibility that there could be cases where the unconscionable behaviour of a member of a State agency might be such as to nullify the proceedings.

127. *Lynch* and a number of other authorities relevant to the exclusionary rule were considered by this Court in *Criminal Assets Bureau v. Murphy* [2018] 3 I.R. 640. The question there was not just whether the rule applied in litigation of the sort taken by the Bureau under the Proceeds of Crime Act 1996, but whether the principles that underly the rule could apply in a situation where what was sought was **not** the exclusion of evidence. An amount of cash had been seized on foot of an invalid warrant. The cash was not "evidence" in the case and the real question was whether the Bureau could be entitled to an order of the court prohibiting the putative owners from dealing with it. The judgment delivered in this Court concluded that the rights and values protected by the exclusionary rule – the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals – were not confined to issues about the exclusion of evidence. Circumstances could arise in criminal assets cases where the court might find the actions by State agents to be such that the proceedings should be "nullified", and the order sought by the Bureau refused.

128. Although it was not concerned with the exclusion of evidence *per se*, the factual situation in *Murphy* did however display the same causal connection, between the breach of rights and the benefit sought to be gained by the agents of the State who had committed that breach, as arises in the normal case where the exclusionary rule is invoked. That causal relationship is not present in a case such as the instant appeal, where the alleged breach of rights was said to have occurred after the evidence had been lawfully obtained. However, in my view it does not necessarily follow from the general focus on the causal relationship that the court of trial is never to concern itself with the manner in which evidence that was lawfully gathered was subsequently treated. Although any privacy or proprietary rights of the accused person in relation to the evidence will certainly be heavily limited by the fact that the evidence is intended to be deployed against him in a public trial, those rights are not to be seen as entirely extinguished.

129. It will be recalled that in the debate on the issue in the trial, counsel for the prosecution said that the admissibility of PB1 would not be affected if "thousands of copies were made and distributed free at concerts". This was, of course, a rhetorical image and not to be taken over-literally. However, I feel it necessary to state that it may have been incorrect. It is at least arguable that actions taken in a given case by authorised persons, or indeed by some person improperly given access to the evidence, could amount to such a violation of the rights of the individual that the court of trial would feel that its own process and the integrity of the administration of justice would be called into question if the breach were to be ignored. For example, it is entirely possible that the lawfully obtained surveillance material in a particular case might contain a large amount of sensitive personal information of no relevance to the trial. If that material were to be improperly and widely disseminated by persons handling it before the trial got underway, the court might feel that a response going beyond an expression of disapproval was called for.

130. However, since in such circumstances the causal relationship will be absent, I would not propose that a trial court should embark upon a *J.C.* inquiry in each case where a breach of any relevant statutory rule, occurring after evidence has been lawfully obtained, can be identified but where that breach has not in any way affected the integrity or probative value of the evidence. In my view, if such an issue is raised by the defence, the court need not immediately proceed to hear further evidence about the circumstances surrounding the breach but could usefully pose a threshold question:- is the breach of such a nature that it could warrant the exclusion of otherwise lawfully admissible evidence? The answer to this question would depend in part on the seriousness of the violation – does it involve a breach of constitutional rights, a serious breach of a statutory provision, or just a technical illegality? – but must also depend on the extent to which the court might feel that its own process and the integrity of the administration would require such a course to be taken.

131. I have already concluded that on the facts of this case no breach of the statutory provisions was established and no rights of the appellants were violated. However, even if I considered that the courts below were correct in finding a breach of s.10 of the Act, I would not conclude that the facts of the case would or could have passed the threshold test just suggested.

Summary

132. In this case both the trial court and the Court of Appeal took the view that evidence lawfully obtained as a result of surveillance had been stored, accessed and handled in a manner that breached s.10 of the Criminal Justice (Surveillance) Act 2009, because no Ministerial authorisation had been given for such storage, access or handling. However, both courts concluded that the evidence was not thereby rendered inadmissible, because in their view the exclusionary rule had no application to illegalities that occurred after the evidence had been gathered.

133. I have come to the view that this interpretation of s.10 was incorrect, insofar as it appears to give to the Minister for Justice and Equality a role in the investigation and prosecution of criminal offences that I do not believe was intended by the legislature and that would have constitutional implications. I have reached that view on the basis of examining the statutory scheme as a whole, and in particular the provision made for disclosure to persons whose authority to receive it derives from either other sections of the Act or from the law applicable to a trial conducted in due course of law. In the circumstances I have concluded that there was no breach of s.10, and that, in any event, the section has no relevance to the processes of investigation and trial of offences.

134. I have offered a suggestion as to what the scope of the Minister's role under s.10 may be. I have also tentatively suggested that there may be cases in which a trial court might properly come to a view that the manner in which lawfully gathered evidence was handled by agents of the State breached the rights of the accused person, and was such as to merit a refusal by the court to permit the State to benefit from that evidence. However, both of these suggestions are necessarily *obiter*.

135. In the circumstances I would dismiss all of the appeals.