THE COURT OF APPEAL

Record No: 102/2022

Kennedy J.
Ní Raifeartaigh J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

KAREN HARRINGTON

APPELLANT

JUDGMENT of the Court delivered on the 6th day of June 2024 by Ms. Justice Isobel Kennedy

1. This is an appeal against conviction. On the 16th May 2022, the appellant was convicted of the murder of Santina Cawley, contrary to common law.

Factual Background

2. The appellant and Mr Cawley, the deceased child's father, were in a relationship. The child was two years old at the time of her death. The appellant resided at No. 26 Elderwood Park, Cork where the body of the deceased was later found.

3. The evidence disclosed events and movements of various people in various locations throughout the 4th and 5th July 2019, with the appellant, Mr Cawley and Santina Cawley being *inter alia* at No. 30 Elderwood Drive and No. 26 Elderwood Park. No. 30 was the residence of the appellant's friend, and it seems the parties were socialising there late on the 4th July into the early hours of the 5th July.

4. There were differing accounts of events at No. 30, but it seems that the appellant left No. 30 Elderwood Drive and returned to her own apartment building around 1:30 am, which movement was captured on CCTV footage from 19 Clanrickarde Estate.

5. The appellant resided in an apartment which was situated on levels 3 and 4 of the complex. Access to the properties was gained by means of a walkway. It seems that access can be gained to the apartment on both levels via a front door or a sliding door.

6. Mr Cawley remained at No. 30 Elderwood Drive for some time. CCTV evidence was adduced of Mr Cawley coming from the direction of No. 30, pushing a buggy, at 3am, arriving onto the stairwell at 3.04am and at 3.07am, the footage adduced disclosed the sliding door to the apartment

opening. However, there was some discrepancy between the recorded time and real time, and it seems that Mr Cawley entered the apartment at 3.05am and then left at 3.10am.

7. Mr Cawley said he arrived at No. 26 with his daughter, entering through the sliding door on the top balcony. The appellant, he said, was present in the living room and he left his daughter on a blanket in the room with her. He then left to retrieve his phone.

8. D/Sgt. Daly who was in charge of gathering and viewing the footage gave evidence that Mr Cawley entered the apartment at 3.05am and left at 3.10am. He also gave evidence that from viewing the footage nobody entered or left No. 26 Elderwood after 3.10am until Mr Cawley returned at approximately 5.10am, except for the movements of the appellant, evidence of which was given by her neighbours as outlined below.

9. Evidence was adduced from neighbours of the appellant concerning shouting in the early hours of the 5th July 2019. Ms McGaley, a neighbour of the appellant, gave evidence that at approximately 3am, she heard an argument between a man and a woman and that she was able to identify the woman's voice as the appellant's. She said that the appellant was screaming "*I'm going to tell them all, I'm going to tell them all, I'm going to tell them*" and that she heard a glass smash. Ms McGaley became concerned and called to No. 26. She described that when the appellant opened the door, she was very apologetic and indicated that she was going to bed. At 3:27am, Ms McGaley called a sister of the appellant to express her concern and at 3:42, the appellant called Ms McGaley, looking for a lighter. Ms McGaley next heard the appellant in the front garden of the apartment complex screaming up at Dylan Olney.

10. Mr Olney gave evidence of hearing a banging noise and looking out the back balcony doors of his apartment to see the appellant slamming her sliding door open and closed. He said that he swore at her: "*Listen, you fucking dingbat, you better stop that or I'll call the guards"* and that the appellant responded by saying: "*Go on, call them*" and that she stood in the front garden for a time chanting "*Dylan, go on, call them, call them, call them.*" He said that the appellant then knocked on his front door and asked for a lighter, at which point he refused to deal with her.

11. Next, Mr Olney described hearing a child crying, coming from No. 26, followed by taunting along the lines of: "*The poor baby, are you all right?"* and that he could hear the appellant shouting at the child to "*shut up*." Mr Olney became concerned and at 4:31am he called Anglesea Street Garda Station.

12. The gardaí arrived at 4:52am and Mr Olney admitted them into the building, but they could not gain access to No. 26. Mr Olney said that at the time of his call to the gardaí, the child was crying, but at the time of their arrival, the crying had ceased and there was silence.

13. At 5:10am, Mr Cawley was captured on CCTV entering the apartment building. Mr Cawley described that on entering No. 26, he saw blood and glass on the floor and that the appellant was lying down on the couch and there was a blanket over Santina's face. Mr Cawley asked the appellant what had happened, and she ran from the apartment. The appellant was captured on CCTV running from the complex.

14. Mr Cawley said that when he removed the blanket from Santina, she was naked with bruising to her forehead, and he was unable to get a response from her. Mr Cawley raised the alarm with Mr Olney and at 5:13am, Mr Olney called the gardaí a second time. Gardaí arrived at 5:23am and

secured the scene. Santina was conveyed to Cork University Hospital where she was pronounced dead at 9:20am.

Grounds of Appeal

15. The appellant advances the following grounds of appeal:-

> *"1. That the learned trial judge erred in law in admitting into evidence CCTV footage from 19 Clanrickarde Estate.*
>
> *2. That the learned trial judge erred in law in admitting into evidence memoranda and videos of interview that were conducted at a time when the applicant was medically unwell and unfit to be interviewed.*
>
> *3. That the learned trial judge failed to adequately charge the jury on the issue of circumstantial evidence."*

Submissions of the Parties

CCTV Footage from 19 Clanrickarde Estate

The Appellant

16. Counsel on behalf of the appellant acknowledges that neither an application to exclude nor requisitions were made at trial concerning this CCTV footage but argues that this was because the ruling of the Court of Justice of the European Union (CJEU) in Case C-140/20, *GD v Commissioner of An Garda Síochána & Ors* (5th April 2022), had not yet been addressed by the Supreme Court when the within matter came on for trial and therefore the legal position in Ireland was unclear at that time.

17. The appellant submits that in line with *People (DPP) v Cronin (No. 2)* [2006] 4 IR 329, the lack of engagement at trial with the CJEU decision as interpreted by the Irish Supreme Court was an oversight which amounts to a real injustice.

18. The appellant submits that the prejudicial effect of the CCTV footage from 19 Clanrickarde far outweighed its probative value. It is argued that the footage violated the appellant's unenumerated right to privacy and the inviolability of her dwelling under the Constitution by capturing not only the exterior of her dwelling but the interior also and that her privacy rights under EU law, the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union were interfered with.

19. The appellant asserts herself as a data subject under the General Data Protection Regulation (GDPR) and argues that suitable and specific measures were not taken to safeguard her fundamental rights and freedoms as is required by s. 55(1) of the legislative transposition of the Regulation, the Data Protection Act, 2018:-

> *"Without prejudice to the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 and subject to compliance with Article 6(1) and to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of the data subject, personal data referred to in Article 10 (in this section referred to as "Article 10 data") may be processed…"*

Section 55 of the 2018 Act applies to the processing of personal data relating to criminal convictions and offences.

20. The appellant relies on the CJEU's ruling in *GD*, in particular, the Court's finding that access to meta data in the context of a criminal offence, must be subject to prior review carried out either by a court or an independent administrative body, which should not be a police officer. The appellant equates the "meta data" referred to therein with "personal data" as referred to in the GDPR and submits that the retention of meta data can be likened to the retention of personal data in relation to a specific data subject where, for example, domestic CCTV is installed for the purposes of preventing damage or guarding a dwelling.

21. The Clanrickarde footage with which the appellant takes issue was captured by a domestic CCTV system installed in a private home. The appellant explains that Article 2(2)(c) of the GDPR disapplies the Regulation from the processing of personal data by a natural person in the course of a purely personal or household activity. Article 2(2)(c) GDPR reaffirms the so-called "household exemption" which already existed under Directive EC/95/46.

22. It is submitted that the use of the Clanrickarde footage in the investigation of a serious crime went beyond the personal use envisaged by Article 2(2)(c) and violated the appellant's rights under the Constitution, the GDPR and the 2018 Act. It is further submitted that the footage was collected, retained and processed without adequate safeguards in place for the protection of the appellant's fundamental rights and freedoms.

23. The appellant also relies on Case C-212/13*, František Ryneš v Úřad pro ochranu osobních údajů* (11th December 2014), a ruling of the CJEU which found that where domestic CCTV covers a public space it cannot avail of the household exemption.

24. The appellant sets out excerpts from the transcripts of the trial in order to demonstrate the extent to which the Clanrickarde footage was relied upon. It is submitted that this domestic CCTV was disproportionately used given its original intended function and purpose.

The Respondent

25. The respondent emphasises that no objection was raised at trial to the Clanrickarde footage and suggests that there was a tactical basis behind this decision as the appellant insisted upon the playing of the footage, in particular, the footage from 5:03am-5:08am on the 5th July 2019.

26. The respondent submits that the dicta in *Cronin* ought to apply. It is submitted that not only was this issue not raised at trial but the appellant in fact requested a portion of the Clanrickarde footage be placed before the jury.

27. The respondent notes that the appellant seeks to explain her failure to raise this issue at trial by reference to the fact that the Supreme Court had not yet dealt with the CJEU's ruling in *GD*. In this regard, it is emphasised that the CJEU's ruling was published 20 days before the commencement of the trial and that the *Dwyer* line of caselaw was fully ventilated in the High Court in December 2018.

28. It is submitted that the *Dwyer* line of jurisprudence relates to the retention of mobile telephone records under the specific EU legal framework applicable and has no relevance to CCTV footage which is regulated by an entirely different legal framework.

29. The respondent disputes the appellant's assertion that the Clanrickarde footage shows the interior of the appellant's dwelling. It is submitted that the residence opens onto a communal walkway and that the footage shows the walkway and the front door of the appellant's apartment both of which, it is said, are public/communal areas of the complex.

30. It is submitted that there is no authority in this jurisdiction or in neighbouring jurisdictions to the effect that insofar as CCTV footage might breach Data Protection law, this renders the evidence inadmissible.

31. The respondent relies on the recent decisions of this Court in *People (DPP) v Thompson* [2024] IECA 22 and *People (DPP) v Dunbar* [2024] IECA 85.

Discussion

32. The appellant contends that the footage obtained by gardaí from No. 19 Clanrickarde Estate infringed her right to privacy under EU law, the ECHR, the Charter, her unenumerated right to privacy and the inviolability of the dwelling under the Constitution.

33. In essence, she has conflated Constitutional concepts, such as the right to privacy and unconstitutionally obtained evidence with certain EU concepts, such as the right to privacy and data protection under the Charter.

34. The appellant contends that she was a "data subject" in terms of the GDPR and that suitable measures were not taken to safeguard her fundamental rights and freedoms. She relies on the decision in *GD* and argues that the "meta data" referred to therein and the retention thereof, is akin to "personal data" in respect of a specific data subject. It is said that the gathering of the CCTV evidence infringed the appellant's right to privacy under the ECHR, Articles 6, 7 and 8 (Protection of Personal Data) of the Charter, EU law and under the Constitution.

35. We will address the three strands within this ground separately:-

1. The Explanation Proffered for the Failure to Raise the Admissibility Issue at Trial;
2. EU Law Issues; and
3. The Constitutional Issue

1. The Explanation Proffered for the Failure to Raise the Admissibility Issue at Trial

36. The first point to address is that no issue was raised as to the admissibility of this footage at trial. Indeed, the appellant sought particular extracts from this footage to be played showing, *inter alia,* Mr Cawley's return to the apartment building shortly after 5am. While the prosecution had prepared a compilation video of the recorded material, the defence specifically requested that the complete extract in uninterrupted form be played to the jury and made an exhibit. In those circumstances, applying the principle in *Cronin*, it cannot be argued that the reason for the failure to raise the matter at trial was due to an error or oversight. The footage was clearly a very important feature of the evidence with specific reference to the footage arising from Clanrickarde Estate.

37. The argument advanced on behalf of the appellant in seeking to explain the reason for the failure to raise any issue as to the admissibility of the footage at trial concerns the ruling of the CJEU in *GD.*

38. In 2018, the High Court delivered its judgment in *Dwyer v Commissioner of An Garda Síochána & Ors* [2018] IEHC 685 whereby the court granted a declaration that ss. 3 and 6(1)(a) of the Communications (Retention of Data) Act, 2011 are incompatible with the Charter. Those sections concerned the processing of personal data in the electronic communications sector. That decision was appealed directly to the Supreme Court and the Supreme Court, by judgment of the 24th February 2020, referred certain questions to the CJEU.

39. The legal landscape was usefully summarised by this Court (Birmingham P) in *People (DPP) v Dwyer* [2023] IECA 70, the relevant portion being as follows:-

"On 21st December 2016, the CJEU gave judgment in the case of Joined Cases C-203/15 & C-698/15 Tele2 Sverige/Watson & Ors, 21st December 2016, establishing the relevance of Digital Rights Ireland with regard to domestic legislation.

92. On 6th December 2018, the High Court (O'Connor J.) gave judgment in the case of Dwyer v. Commissioner of An Garda Síochána & Ors [2018] IEHC 685 and concluded that sections 3 and 6(1)(a) of the 2011 Act are incompatible with the Charter.

93. The decision in Dwyer v. Commissioner of An Garda Síochána & Ors was the subject of a so-called leapfrog appeal, and on 24th February 2020, the Supreme Court made a reference to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the EU.

94. In the following months, the CJEU gave judgment in Joined Cases C-511/18, C-512/18 & C-520/18, La Quadrature du Net, 6th October 2020, and further in Case C-746/18, Prokuratuur, 2nd March 2021. Last year, the CJEU gave its decision in the Supreme Court's reference, in Case C-140/20, GD v. The Commissioner of An Garda Síochána, 5th April 2022. In broad terms, it restated its previous position as well as the approach adopted by the Advocate General in the case."

40. As can be seen, the use of call data records or location metadata retained by mobile telephone companies pursuant to the 2011 Act, which was adopted by Ireland to transpose the 2006 Directive, has been conclusively declared incompatible with EU law, specifically the Charter of Fundamental Rights of the European Union, by the CJEU. *GD* essentially restates the earlier caselaw of the CJEU.

41. Therefore, the reason posited for the failure to engage with the admissibility of the footage at trial: that the latter decision had not been addressed by the Supreme Court when the present case came on for trial before the Central Criminal Court does not hold water, as the issue regarding the use of metadata had been well-canvassed before the courts at the highest level.

42. We entirely agree with the point made by the Director that the decision in *GD* was one which was within the public domain and undoubtedly it was well-known to all the parties. Moreover, the CJEU had stated its position on the issue prior to delivering its decision on the reference. We are not persuaded that the appellant has overcome the dicta in *Cronin*. We do not see an error or oversight of substance demonstrating that a fundamental injustice would occur if this Court does not entertain this ground of appeal. The issue was one well known to all and sundry. Moreover, it simply cannot be said to be an oversight or error when aspects of the impugned footage was relied upon.

2. EU Law Issues

43. This aspect may be further divided:

(i) Is the data personal data?

(ii) Was it retained in breach of EU Directive 95/46/EC? (the appellant relies on the *Ryneš* decision (CJEU))

(iii) Even if obtained/retained in breach, was it admissible?

44. The gardaí in the present case who were tasked with harvesting footage called to various business premises and households and sought and obtained permission to access and download footage. Dash cam footage from a citizen's vehicle was also obtained, which transpired to be of no evidential value. The footage from the private residence at 19 Clanrickarde Estate showed the sliding

door and the main door to the appellant's apartment at No. 26, and it seems that internal lighting, if on, could be visible from the footage of the apartments.

45. The footage also captured movement along the top and lower balconies and the stairwell to the apartments. The footage was significant in that it captured Mr Cawley entering the stairwell at 3.03am, exiting the stairwell a minute later and going towards apartment No. 26. The upstairs sliding door can then be seen to open and close. A few minutes later, he is seen reversing the process. He is seen returning a few hours later to the apartment and the appellant can be seen leaving the apartment. After Mr Cawley left the apartment around 3.10am, no one can be seen entering or leaving the premises, except for the appellant herself, until he returns around 5.10am.

(i) Is the data personal data and (ii) was it retained in breach of Directive 95/46

46. Firstly, the argument is advanced that the decision in *GD* has relevance, however, the issue raised in that case concerned the retention of mobile phone records by way of the 2011 Act which has no bearing upon CCTV footage harvested in the course of an investigation. The CCTV footage in this case was harvested from commercial and private sources in an entirely independent manner and did not concern the mass retention of data. As observed by Birmingham P in *People (DPP) v Flynn* [2018] IECA 39 at para. 56:-

> *"In this case the information was being sought, soon after it came into existence, as part of an investigation into a very serious crime, a premeditated murder. The appellant is not entitled to call in aid the EU data protection regime in order to cover his tracks…."*

47. The decision in *Ryneš* is of limited relevance in that the question posed was whether the camera system in a private residence which monitored the private property but extended onto a public space, could fall within the exception to processing personal data under Art. 3(2) of Directive 95/46. However, the judgment does not concern the admissibility of such evidence in criminal trials. As neatly stated by Ní Raifeartaigh J in *Thompson*; "*The decisions in Dwyer and Quirke make it clear that a breach of EU law in the gathering of evidence does not necessarily translate into the exclusion of evidence."*

48. Moreover, decisions of the CJEU elucidate that the admissibility of evidence in criminal cases is for domestic courts subject to the principles of equivalence and effectiveness.

49. The Data Protection Act, 2018 permits CCTV evidence to be processed for a purpose other than that for which it was originally sought pursuant to s. 41(b), which only comes into play if the data is personal data in the first instance. The subsection provides:

> "*Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data Protection Regulations, the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes –*
>
> *(a) […]*
>
> *(b) of preventing, detecting, investigating or prosecuting criminal offences…"*

(iii) Even if obtained/retained in breach, was it admissible?

50. Therefore, the Act provides for circumstances where a data subject's rights may be curtailed, which includes the investigation of crime, as in this case. The footage was obtained by the gardaí

from the householder for the purpose of investigating a serious crime. Even if the impugned material constitutes personal data, and we do not need to determine that, the rights afforded to individuals are, as clearly stated above, subject to necessary and proportionate restrictions. The footage covered communal areas, it was for a particular time frame and the obtaining and retention of the footage was entirely proportionate and reasonable in the context of the investigation into the murder of a two year old child.

3. The Constitutional Issue

51. It is clear that many businesses and householders now have CCTV cameras installed for security purposes. This is something that is well known to citizens of this country. An individual cannot possibly hold an expectation of privacy when walking along a city street or a residential area. As noted in *Dunbar*, this may work to the advantage or indeed disadvantage of individuals depending on the circumstances.

52. Insofar as CCTV footage is concerned, this Court has stated time and again that an individual does not have an expectation of privacy while moving through public spaces. This was stated in recent decisions of this Court; specifically, *People (DPP) v Thompson* [2024] IECA 22*; People (DPP) v Dunbar* [2024] IECA 85*;* and *People (DPP) v Anghel* [2024] IECA 90,

53. In *Thompson,* (Ní Raifeartaigh J) said that:-

> *"We are inclined to agree with the trial court that there was no breach of the appellant's right to privacy at all, and that individuals walking down a public street, driving a car on the public road, or even eating a meal in a restaurant open to the public do not, in this day and age, have a reasonable expectation that their movements will be immune from CCTV observation, certainly in a situation where no individual is being targeted for the purpose of gathering information and where the camera is simply gathering random information about persons or vehicles in the location."*

54. In *Dunbar,* (Edwards J) said that:-

> *"147. That one's presence in a public place may be recorded works to the advantage and disadvantage of individuals. If the individual recorded as being at a particular location is someone who is or has been or is about to become involved in criminal activity, that may be to the disadvantage of that individual, in one sense. In other cases, it may advantage an individual. In this case, there was a witness, AB, who, as the trial judge pointed out, was pleased that footage existed. The material available included footage showing him going in and out of his own home. On the part of the appellant, there was a suggestion that AB was involved in the killing or was present at the killing, but the availability of CCTV footage provided this witness with valuable cover.*
>
> *148. In this case, the CCTV footage that was entered in evidence at trial was accessed as a result of requests to householders and businesses by gardaí, but it must be noted that there is nothing to suggest that the appellant was identified by any of the householders who provided the CCTV footage, or that any of those who made footage available might have identified the appellant as a data subject."*

55. We observe in the present case, that it was of importance that the movements of Mr Cawley were given in evidence, which was done by way of the CCTV footage.

56. Finally, and most recently in *Anghel* (Edwards J) held that:-

> *"In the present case there was nothing about the appellant's presence in Dublin city centre, or on the Luas, or in Tallaght, or in any of the other places in which he was captured on CCTV, to suggest that he could have had a reasonable expectation, by virtue of being engaged in something private, intimate or sensitive in a public place, that he would not be recorded, on a non-targeted basis, while, for example, just walking down the street, standing on a station or travelling on a tram.* ***We are completely satisfied that he had no expectation of privacy in the circumstances of this case, and that once he became a person of interest in connection with the investigation into the death of Mr. Bob it was both appropriate and justified that An Garda Síochána should seek to track and gather evidence with respect to his movements to the extent that they may have been serendipitously captured on CCTV systems which were not specifically targeting him.*** *We have no hesitation in dismissing this aspect of the challenge to the admissibility of the CCTV evidence."* (our emphasis).

57. The footage from 19 Clanrickarde Estate was relevant evidence depicting the movements of people during the period before and after the killing of the child. The evidential value rested, primarily, with the movements of the appellant, Mr Cawley and the deceased child. The impugned footage showed the communal stairwell and walkways leading to the apartment. While the sliding door to the appellant's apartment could be seen opening and closing, the movements caught are those to and from the communal walkway.

Conclusion

58. First, we are satisfied that the dicta in *Cronin* applies and that the appellant is precluded from arguing this point on appeal for the reasons stated above.

59. Second, the reference to *GD* is misconceived and stretches the decision beyond its limits, not on account of any distinction between metadata and personal data but owing to the distinct legal framework which was the subject of the *Dwyer* line of jurisprudence, of which CCTV evidence was never a part.

60. Third, we are not persuaded that the appellant's right to privacy, whether under the Constitution, the ECHR or the Charter has been infringed.

61. No fundamental injustice may be said to arise in the circumstances where the footage was harvested to advance the investigation and transpired to provide relevant and thus, admissible evidence at trial.

62. The focus of the footage rested with communal areas. The appellant contends that the evidence was more prejudicial than probative. We do not agree; the evidence was certainly prejudicial in that it showed the deceased child being returned to the appellant's apartment shortly after 3am, Mr Cawley leaving shortly thereafter and no one entering or leaving, except for the appellant herself, until he arrived back and found the child unresponsive, however, as can be seen from this brief synopsis, it was highly probative evidence and the balance certainly lay in its admission.

63. Even if objection had been made, we cannot see that the appellant would have been successful in excluding the evidence.

64. Accordingly, we reject this ground.

Memoranda of Interview

The Appellant

65. It is submitted that the judge erred in admitting into evidence the memoranda of the appellant's first, third and fourth interviews, in circumstances where the first interview continued even after the appellant had made it clear that she felt ill and the third and fourth interviews took place during a time period which it is said falls outside the limitations set out in the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 or the exceptions therein.

66. Reliance is placed on the following excerpts of the memorandum of the appellant's first interview:-

> *"Question: "Tell me about that." And it's noted, answer: "(Prisoner emotional). Feel sick in my stomach." Question: "You've seen the doctor?" Answer: "Yeah."*
>
> *[…]*
>
> *Answer: "All of them." Question: "This is upsetting. We're here to listen to you, we'll take our time." Answer: "I can't. I feel sick in my stomach." Question: "Tell us what you're thinking?" Answer: "My mind is blank, just blank."*
>
> *[…]*
>
> *Question: "We're here to listen to you, this is your opportunity, doctor offered at any stage we can get him for you, you just let us know. You saw doctor earlier, if need to see again say so, you feel sick, how?" Answer: "Vomiting like, I want to vomit." Question: "Doctor offered again, are you okay to continue?" Answer: "Yeah."*
>
> *[…]*
>
> *Question: "Back to Elderwood, you said you were there for three years, you got it through the council, two bedrooms that are downstairs, how do you get into the apartment?" Answer: "I'm weak, I'm sick, I didn't eat in a few days." Question: "When's the last time you ate?" Answer: "Toast a while ago, chips last night at Yvonne's." Question: "Before that?" I think it's noted she shrugged she (sic) shoulders and said, "Don't know." Question: "Tell us about the apartment?" Answer: "I don't feel I'm in a position to talk now, I'm not able, I'm weak." Question: "Try to tell us?" And I think it's then noted that she requested to go to the toilet and Detective Garda Hegarty left then at 16:04; is that right?*
>
> *[…]*
>
> *Question: "Asked about Lisa's kids?" Answer: "I feel very weak, and I don't feel in a position to speak." Question: "Did you tell the doctor how you feel?" Answer: "He knows, I told him." Question: "Before Elderwood, where did you live?" Answer: "Mahon, Ravensdale." Question: "Who was there?" Answer: "Sisters back and forth."*

67. In relation to the appellant's third and fourth interviews it is noted that her third interview started at 23:33pm on the 8th July 2019 and finished at 1:44am on the 9th July 2019 and that her fourth interview took place between 6:11am and 8:14am on the 9th July 2019.

68. The appellant relies on s. 12(7) of the 1987 Regulations as follows:-

> *"(7) (a) Except with the authority of the member in charge, an arrested person shall not be questioned between midnight and 8 a.m. in relation to an offence, which authority shall not be given unless—*

(i) *he has been taken to the station during that period,*

(ii) *in the case of a person detained under section 4 of the Act, he has not consented in writing to the suspension of questioning in accordance with subsection (6) of that section, or*

(iii) *the member in charge has reasonable grounds for believing that to delay questioning the person would involve a risk of injury to persons, serious loss of or damage to property, destruction of or interference with evidence or escape of accomplices."*

69. The appellant also relies on s. 19(2) of the Regulations*: "(2) A person in custody shall be allowed such reasonable time for rest as is necessary."*

70. It is submitted that the third and fourth interviews took place during a time period which was clearly outside the limitations set out in the Regulations. Further, it is noted that the third interview ended at 1:44am and the fourth interview began at 6:11am, a mere 4 hours and 27 minutes later, which it is submitted could not be considered a "reasonable" rest period. It is contended that the interviews were oppressive and ought not to have been admitted into evidence.

The Respondent

71. Again, the respondent emphasises that no objection was made at trial by counsel for the appellant to the memoranda of interview and relies on *Cronin.* It is submitted that the appellant specifically conceded to their admission at trial.

72. It is outlined that the appellant was seen by a Dr Doran during her detention, she was examined and assessed as fit to be interviewed and further, that she had her solicitor present in all five of her interviews and that he made no complaint to the various members in charge as to her wellness or fitness to be interviewed.

Discussion

73. This point can be addressed succinctly. The principle in *Cronin* applies in that no issue was raised at trial regarding the admissibility of the memoranda of interview and consequently, an error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred must be demonstrated before the point may be argued on appeal.

74. Furthermore, it is not only the position that no issue was canvassed at trial by way of voir dire on the admissibility of any interview, but prior to the introduction of that material, counsel for the appellant at trial made admissions on behalf of his client covering several matters and including her detention in garda custody.

75. Where a formal admission is made pursuant to s. 22 of the Criminal Justice Act, 1984, there is then no requirement on the prosecution to prove that fact. The admission made in the present case was made in the presence of the jury and specific reference was made to the Custody Regulations as follows:-

> *"…I can indicate at this stage there is no issue in relation to the arrest,* ***detention,*** *the extensions of detention, the authorisations to take various samples, photographs, fingerprints and the like. Any consents that were provided by Ms. Harrington in relation to that,* ***compliance with the custody regulations,*** *access to solicitor or anything else that*

was required during that, so that all formal matters, in effect are not in issue. So, I don't require formal proof of them, and we can deal with the actual fruits of the investigation."

76. The evidence then proceeded. No application of any kind was made.

Conclusion

77. By way of consideration of the within ground, it cannot be said that there was an error or oversight as it is clear that certain formal concessions were made in the presence of the judge and jury. The matter was specifically addressed. No explanation could possibly be offered in terms of *Cronin* as to why the point was not raised when counsel specifically adverted to the precise issue now sought to be litigated.

78. In any event, two further points may be made; no evidence was led regarding the appellant's detention and, her solicitor was present for all five interviews.

79. In the circumstances, the principle in *Cronin* applies and we refuse this ground of appeal.

The Charge

The Appellant

80. The appellant relies on *People (DPP) v Nevin* [2003] IR 321 and the guidance arising therefrom in relation to the direction to be given to a jury on the issue of circumstantial evidence. As put by Coonan and Foley in their work, *The Judge's Charge in Criminal Trials* (2008), the jury ought to be directed:-

> *"(a) that it must be satisfied that it can accept the circumstantial evidence (i.e it must be satisfied that the circumstantial evidence is credible or true);*
>
> *(b) that it must consider whether the inference suggested to be drawn from the evidence is warranted or not;*
>
> *(c) that it is the combined or "cumulative" effect of the evidence that is of importance in considering whether the Accused's guilt has been proven beyond a reasonable doubt."*

81. On the 12th May 2022, the judge charged the jury in the following terms:-

> *"Now, I should say something to you about circumstantial evidence. Circumstantial evidence arises where you have evidence of independent facts, each in itself insufficient to prove the main fact, but which may yet, either by their cumulative weight, or still more by their connection one with the other as links in the chain, prove the principal fact to be established. So I think be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. As I've said to you, speculation is to be avoided, you should not speculate. Speculation is formulating a theory without any evidence and amounts to no more than guessing or making up theories without good evidence to support them. This you must not do. Consider the evidence as a whole. You must be satisfied that the circumstantial evidence is credible. Consider whether an inference suggested to be drawn from the evidence is warranted or not. Bear in mind that it is the combined or cumulative of the effect of the evidence that is of importance in considering whether the accused's guilt has been proven beyond reasonable doubt. And I must warn you that you should consider the weight to be attached to each piece of circumstantial evidence and then*

*consider the whole. And it is the cumulative weight of each piece of circumstantial evidence, which you have accepted as being true to your satisfaction beyond reasonable doubt. And if the weight of the accumulation of evidence is such as to prove to your satisfaction beyond reasonable doubt that the accused committed the offence, then you may convict**.** But I must also tell you that while a jury may convict on purely circumstantial evidence, and to do this you must be satisfied not only that the circumstances are consistent with the accused having committed the act, but also that the facts are such as to be inconsistent with any other rational conclusion than that she was a guilty person. So please bear that in mind."*

82. It is contended that given the volume of circumstantial evidence in the appellant's case, the trial judge ought to have devoted more than a paragraph of his two-day charge to the concept and in failing to do so, he erred in law.

83. It is submitted that in his charge on circumstantial evidence, the trial judge gave an *"erroneous impression as to the weight of circumstantial, as distinct from direct evidence"* as per *People (DPP) v Cahill* [2001] 3 IR 494.

84. It is submitted that the charge was prejudicial in nature where it was open to the trial judge to rephrase his charge along the lines of *"…if there is another rational explanation which can point to innocence, the jury must adopt the inference in favour of the applicant."*

The Respondent

85. The respondent submits that the charge delivered by the trial judge as to the issue of circumstantial evidence was impeccable and notes that no requisition was raised in relation to same despite the judge enquiring of counsel, on repeated occasions, whether there were any matters they wished to raise with him. The respondent again relies on *Cronin* in this regard.

86. The respondent notes the appellant's argument to the effect that the issue of circumstantial evidence took up but a paragraph of the trial judge's two-day charge but submits that the charge, while delivered over two days did not actually take two days, that the vast bulk of the charge related to the summing up of the evidence and that the portion of the charge which dealt with legal directions took up a mere 16 pages of transcript.

Discussion

87. The decision in *Cronin* has application also to this ground of appeal. No requisition was raised following the trial judge's charge. Moreover, prior to his charge and following counsel's closing speeches, the judge adverted to circumstantial evidence saying:-

"In terms of my charge to the jury tomorrow morning, it would be my intention to address them to some limited extent in terms of circumstantial evidence. I will prepare something that I intend saying to them and perhaps give it to you in advance of my charge commencing tomorrow morning, lest you have any input that you wish to make in respect of something which I intend saying on that point."

88. It seems that the judge furnished his intended direction on circumstantial evidence to counsel that evening and the following morning enquired if anyone had a comment to make. Counsel made the following submission:-

"It is sometimes said, but this you might be saying in addition, I'm not sure, that the circumstantial evidence, in order for the jury to rely on it, they must be sure that the facts are inconsistent with any other rational hypothesis."

89. Counsel went on to quote from *Criminal Law and Evidence,* 2nd ed. Charleton and McDermott at p. 93:-

> *"A jury may convict on purely circumstantial evidence but to so (sic) this they must be satisfied not only that the circumstances were consistent with any other rational conclusion than that he or she was guilty of the offence".*

90. The judge agreed to add that to his charge and in charging on the issue said *inter alia*:-

> "*But I must also tell you that while a jury may convict on purely circumstantial evidence, and to do this you must be satisfied not only that the circumstances are consistent with the accused having committed the act, but also that the facts are such as to be inconsistent with any other rational conclusion than that she was a guilty person.*"

Conclusion

91. It is unsurprising that no requisition was raised when we read the charge and, in particular, the extract concerning circumstantial evidence. It was a clear and readily understandable exposition of the law on circumstantial evidence.

On the conclusion of the first day of his charge, the judge invited requisitions and no issue was raised on this aspect of his charge. On the conclusion of the charge no requisitions were raised.

92. We are not at all persuaded that there is merit in this ground. In the first instance, the matter was not raised at trial, it was not an issue of inadvertence or error and there is no question of a fundamental injustice in terms of the charge on circumstantial evidence.

Decision

93. As we are not persuaded on the merits of the grounds of appeal, we dismiss the appeal against conviction.