



**APPROVED
NO REDACTION NEEDED**

THE COURT OF APPEAL

**Bill No. SCDP0016/2020
Record No: 170/2021**

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

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

RESPONDENT

V

TREVOR BYRNE

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Edwards on 23rd of July 2024.

Introduction

1. On the 20th of May 2021, Mr. Trevor Byrne (i.e., "the appellant") was found guilty by the Special Criminal Court of the following offences:
 - (i) one count (count no. 1) of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences Act 2001 (i.e., "the Act of 2001");
 - (ii) one count (count no. 2) of false imprisonment contrary to s. 15 of the Non-Fatal Offences Against the Person Act 1997 (i.e., "the Act of 1997");
 - (iii) one count (count no. 3) of threatening to kill contrary to s. 5 of the Act of 1997;
 - (iv) one count (count no. 4) of carrying a firearm with intent to commit an indictable offence contrary to s. 27B of the Firearms Act 1964 (i.e., "the Act of 1964"), as substituted by s. 60 of the Criminal Justice Act 2006 as amended by s. 39 of the Criminal Justice Act 2007, and;
 - (v) one count (count no. 5) of unlawful seizure of a vehicle contrary to s. 10 of the Criminal Law (Jurisdiction) Act 1976 (i.e., "the Act of 1976").
2. Having been convicted by the Special Criminal Court of the foregoing offences, the appellant was duly sentenced on the 29th of July 2021 to concurrent terms of imprisonment of varying lengths, but effectively amounting to an aggregate carceral term of 8 ½ years, which said sentences were to date from the lawful expiration of a sentence

the appellant was serving arising out of a separate matter imposed on the 21st of December 2020.

3. The appellant, by Notice of Appeal dated the 27th of August 2021, has appealed against both his conviction and the severity of his sentence. The present judgment deals with the conviction module of his appeal. In respect of his appeal against conviction, the appellant originally advanced two grounds in his Notice of Appeal. However, prior to the hearing of the appeal we were informed via written submissions filed on behalf of the appellant that he intended pursuing only the following ground:

"1. The learned trial Court erred in fact and in law by admitting the evidence of identification of the Appellant by Detective Garda Patrick McDonagh in circumstances where the manner in which the footage was shown to the witness created a real risk both of prejudice to the Appellant, and of error".

Factual Background

4. The appellant's trial in the Special Criminal Court ran from the 13th of April 2021 until the 20th of April 2021. Following a month's adjournment, the Special Criminal Court delivered its verdict on the 20th of May 2021 whereupon it found the appellant guilty of the five counts outlined above. In circumstances where the grounds of appeal advanced relate to the admission of a specific strand of evidence, a summary of the prosecution case against the appellant suffices for the purpose of outlining the factual background to the present offending. The Court is in receipt of written submissions filed on behalf of both parties, and from a reading of same certain facts, which we will now summarise, do not appear to be in dispute between the parties.
5. On the 19th of March 2010, the week of the Cheltenham Races, the appellant and a co-accused (who was later acquitted on all counts alleged against him) entered the premises of a BoyleSports bookmakers in the Applewood area of Swords, County Dublin. They proceeded to enter the lavatory of the premises where they remained for approximately 35 minutes before emerging therefrom wearing balaclavas and brandishing a firearm. Present in the bookmakers were eleven persons comprising three members of staff and eight patrons. The assailants threatened the store manager at gunpoint and stole €1,490 from the cash register along with the manager's wallet. During the course of the robbery, one of the raiders dropped a mobile phone which was later attributed to the appellant. CCTV footage covered the events from within the bookmakers. The assailants left through the premises' back door and emerged therefrom onto an alleyway. At that remove, a Ms. Helen Leigh was passing in her vehicle, in front of which the two raiders jumped brandishing what she thought were firearms. They hijacked Ms. Leigh's vehicle and drove off with her inside it. During the course of that journey, at least one of the men threatened that he would kill Ms. Leigh. They drove for approximately fifteen minutes before they let Ms. Leigh out of the vehicle, and the two assailants then drove off. The vehicle was later abandoned in the Finglas area.

The Identification Evidence Issue

6. The appellant's appeal relates to the admission of the evidence of Detective Garda Patrick McDonagh (otherwise, "D/Garda McDonagh") identifying the appellant as a person depicted in CCTV footage which he was shown. The evidence in question was first the subject of a voir dire on the 14th of April 2021, with legal submissions being made on that date and into the 15th of April 2021. The trial court ruled on admissibility on the 19th of April 2021.

Evidence of D/Garda McDonagh on voir dire

7. D/Garda McDonagh was a member of An Garda Síochána stationed in Finglas Garda Station in 2010. He recalled that on the 6th of April 2010 he had attended at Swords Garda Station having received a phone call to attend there for the purposes of viewing CCTV footage of a robbery that had taken place. D/Garda McDonagh attended at Swords Garda Station in the company of a Detective Garda Eamon Ryan (otherwise "D/Garda Ryan"), and there the two members met a Detective Garda Dave O'Connor (otherwise "D/Garda O'Connor") and a Garda Daniel Rogers (otherwise "Garda Rogers"). D/Garda McDonagh and D/Garda Ryan went separately into the detective office of the Swords Garda Station wherein they each independently viewed the CCTV footage of a robbery that D/Garda McDonagh was told had taken place the previous March. Present in the detective office with D/Garda McDonagh at the time of viewing the footage were the aforementioned D/Garda O'Connor and Garda Rogers.
8. D/Garda McDonagh stressed that no-one, at the time he viewed the CCTV footage in question, had been nominated as a possible suspect in the offence captured in the footage. He stated that a phone call had been made to Finglas Garda Station (on foot of which he and D/Garda Ryan had made their way to Swords Garda Station) and that the car that was used in the course of the robbery had been found abandoned in Finglas.
9. D/Garda McDonagh stated that having viewed the footage he was able to identify the appellant as a person depicted therein. In response to a question by counsel for the prosecution asking whether this person was the accused in this case, D/Garda McDonagh replied in the affirmative. The Garda witness stated that he had been stationed in Finglas for some seventeen years prior to this, which career comprised approximately ten years on the "*regular units*" (i.e., uniformed units and mobile patrol) and approximately seven years in the detective office. D/Garda McDonagh stated that over the course of this seventeen-year period he had cause to come to know the appellant, having encountered the appellant in the course of his duty as a Garda doing patrols, stopping and searching, and conducting interviews. He stated that the accused had been arrested "*at times as well*". He further stated that he knew the appellant "*just from common knowledge and from my knowledge of the area and the people that would be living in the area*". The Garda witness went on to say that he would have "*known him well*", that he would have known a couple of the appellant's brothers, and further that he would have known where the appellant was living with his mother in Finglas at the time. He could not recall the exact regularity of his encounters with the appellant. In any event, he stated that having watched the CCTV footage in Swords Garda Station, he was able to identify the appellant as a person depicted therein. D/Garda McDonagh said that he was in a position to

categorise his degree of certitude in relation to that identification, and he assessed same as being at "100%".

10. Prosecuting counsel then asked D/Garda McDonagh whether he had recently met Garda Rogers (and by "recently" he specifically referred to the same week as the 14th of April 2021 on which date D/Garda McDonagh gave evidence). D/Garda McDonagh confirmed that he had, and that he was met by Garda Rogers who had come to him in Finglas. He said that the purpose of this meeting was for Garda Rogers to show him the CCTV footage again, which the witness viewed and was able to confirm as the original footage he had viewed back in 2010.
11. In the course of cross-examination, D/Garda McDonagh stated that at the time Finglas Garda Station received the phone call on the 6th of April 2010 it was not his understanding that he was being sought particularly. He stated that it just so happened to be the case that he and D/Garda Ryan were working in the detective office at Finglas Garda Station that morning, and that the nature of the phone call was to ask if whoever was there could come over to Swords Garda Station to view CCTV footage of a robbery. He confirmed that that was as much as he was told over the phone. He stated that requests to view CCTV footage were a regular occurrence, albeit that on that occasion there was no request for the assistance of anybody in particular.
12. He stated that he was not aware of any other person, besides D/Garda Ryan, attending at Swords Garda Station for the purpose of viewing the CCTV footage. He agreed with defence counsel's suggestion that gardaí based at Swords had "*struck gold*" in getting somebody who was able to identify the appellant when they made the phone call to Finglas Garda Station. The witness stated that he was asked to view the footage, and that he was informed that there had been a robbery in Swords and that a vehicle which was found abandoned in Finglas was used. He said that he was not informed of any further detail. He stated that he did not know D/Garda O'Connor. He confirmed that it was D/Garda O'Connor who had rung the detective office at Finglas Garda Station, which the witness surmised was done on the assumption that there would have been senior members present. He stated that D/Garda O'Connor had asked questions to the effect of "*who were we, first of all, and could we go over and view CCTV and he asked me [...] who was with me and I told him that I was with Detective Garda Ryan*".
13. Counsel inquired with the witness as to whether he had questioned why D/Garda O'Connor wanted members of Finglas Garda Station to view the CCTV footage. The witness answered that he understood D/Garda O'Connor's reasoning to be connected with the discovery of an abandoned vehicle in Finglas. He confirmed that D/Garda O'Connor had told him that a vehicle used in the robbery had been abandoned in Finglas. He said that he did not ask D/Garda O'Connor for any further detail about the robbery or whether there were any suspects in the case. Counsel put to the witness that this made little sense; saying, "*In other words, if you are going to, as I said, take an hour out of your day that could be an entirely wasted journey [...] if you go there?*" The witness did not disagree with this, stating "*It could have been, yes*". Counsel further suggested that "a

much more sensible way of proceeding would be to say: "Well, tell me a little bit about the robbery?" The witness responded by saying that he did not have a conversation with D/Garda O'Connor about the robbery. He agreed he could possibly have sought further detail regarding the robbery before embarking on the journey to Swords Garda Station, but as it happened he did not do so. He agreed with counsel that not having done so he ran the risk of his time being wasted. He accepted that he went over to Swords Garda Station *"entirely blind"*. He said that it was part of his job to view CCTV footage in respect of other investigations. He accepted that his trip could possibly have been a waste of time, but added that, *"as it turned out, it wasn't"*.

14. Counsel then asked D/Garda McDonagh, when he and D/Garda Ryan attended at Swords Garda Station, whether there was any discussion with D/Garda O'Connor about what was going to happen and what they were about to view. He replied that D/Garda O'Connor told him nothing other than *"would I have a look at this footage that they captured in relation to this robbery"*. Counsel for the defence then put to the witness that that seemed *"kind of unlikely"*; that he had driven over from Finglas to Swords and that there was no discussion about the purpose of his journey. The witness did not agree, stating *"No, I don't believe, no"*.
15. Counsel then turned the focus of the cross-examination to events inside the detective office at Swords Garda Station. The witness stated that he had met Garda Rogers in the room. Inside the room, D/Garda O'Connor told the witness that he was going to show the footage and that he was going to show it to him first before D/Garda Ryan. D/Garda McDonagh said that D/Garda Ryan left the room while he was watching the footage; and that he left when it was D/Garda Ryan's turn to view it. He said the footage in question comprised a moving image of the incident, and that it was not comprised of still images. He said it was footage from a BoyleSports camera and he was looking at people coming and going. He stated that his attention was directed by either D/Garda O'Connor or Garda Ryan to one particular person depicted in the footage, and he was asked whether he knew who that person was. He said that the person in question was holding a mobile phone and was wearing a hat. D/Garda McDonagh stated that this person was the only person depicted in the CCTV footage whom he was asked to identify. He said that he identified this person as Mr. Byrne, the appellant herein. He said that the footage ran for a few minutes, during which at some point the appellant turned towards the camera and then veered away from view. D/Garda McDonagh said that it was at the point at which Mr. Byrne faced the camera that he knew who he was. He confirmed that the person he nominated as Mr. Byrne was wearing a hat in the footage and had longish hair. He further confirmed that his identification of Mr. Byrne was on the basis of a frontal view of the person depicted in the footage, and not on the basis of a side or other profile. When asked what it was about the appellant that he recognised, the witness responded, *"his face"*. The witness clarified that he was able to recognise the appellant from the portion of his face that was visible, which namely was from the forehead down. The witness stated that he could see the appellant's eyes, nose, and mouth.

16. Counsel then asked D/Garda McDonagh to look at a booklet of photographs containing stills from the CCTV footage in question. The witness identified the still which corresponded to the point in the CCTV footage at which he had made the identification of the appellant. He said that he had thought that he had seen the appellant's eyes when he had viewed the CCTV footage, but accepted that in the still, namely the photograph at no. 2 in the booklet, the appellant's eyes were not visible. He was asked if, at the time he had viewed the footage at Swords Garda Station, and at the time he had viewed that particular point in the footage, he had said "*that's Trevor Byrne*". The witness replied: "*yes, I possibly did say yes, that's Trevor Byrne, yes*". Pressed further in regard to the matter, he then revised this to "*Yes, I probably would have said this, yes, at the time*". He stated that he believed that he had told this to D/Garda O'Connor. The witness said that he could not recall the exact number of times he had viewed the footage on that occasion, but that it may have been twice. Counsel put to the witness that on a previous occasion he had said that he had watched the footage "*two or three times*". The witness said that that could have been the case, but he could not recall. He was asked if it could in fact have been four times, and he responded that "*it could have been four -- but I wouldn't -- wouldn't think so*".
17. Counsel then asked D/Garda McDonagh why, if he had recognised the person in question, he had looked at the footage again. The following exchange ensued:
- "A. *Yes, I -- I don't know if I looked at it again and if I said I looked at it again, but from -- as I say, I go back to still No. 2, that's definitely Trevor Byrne and that's when I identified him as Trevor Byrne.*
- Q. *But I'm not sure that answers my question?*
- A. *Yes.*
- Q. *If you recognized him, why look at it again?*
- A. *Sorry, when I look --*
- Q. *If you recognized him the first time, which I understand is your evidence, why look at it another once, twice or three times?*
- A. *I suppose it's like anything, I just had to be sure before I committed to paper and writing that it was him, that I was sure it was him.*
- Q. *Well you were asked by [counsel for the prosecution] how sure you were, and you said 100%?*
- A. *Yes, I would have been 100%.*
- Q. *You can't get much better than that?*
- A. *No.*

Q. *So why did you have to look at it again in order to be sure?*

A. *It's what you probably -- creature of habit, that's probably what you do, but, yes, I was 100% sure.*

Q. *So you didn't look at it in order to be sure, you just looked at it --*

A. *Pardon me?*

Q. *You didn't look at it the second and third time and possibly fourth time in order to be sure, you looked at it out of habit?*

A. *Possibly, yes".*

18. D/Garda McDonagh confirmed that he was being called on because he was in Finglas and that that was as much as he knew. He confirmed that he had been in Finglas for seventeen years. He confirmed that there was nothing said to him to the effect that he might be somebody who might have a particular knowledge of Mr. Byrne, stating that it was a phone call that was made on that Saturday morning, and he just so happened to be working at that time.
19. He confirmed that he had given evidence on previous occasions that he had known the appellant from his criminal activities in the past. He further confirmed it to be the situation that the appellant had served a lengthy sentence. He confirmed that in the second of his two statements he had said that the appellant had recently been released from prison. Counsel put it to the witness that this obviously betrayed a level of familiarity with the accused, that the witness knew that he was out of prison having served a five-year sentence imposed on the 28th of April 2005. The witness did not dispute this. The witness accepted that over the five-year period during which the appellant was incarcerated he had not seen the appellant in that time. The witness confirmed that, notwithstanding this five-year gap, he was able to identify the appellant with 100% certainty, within one viewing of a moving image that did not show the appellant's eyes.
20. Counsel for the defence then placed a document before D/Garda McDonagh from the UK Home Office which referred to that jurisdiction's Police and Criminal Evidence Act 1984, which document, counsel said, is a code followed in the UK since the mid-1990s in relation to *inter alia* identification of suspects (i.e. "PACE Code D" or "PACE"). It sets out certain safeguards for a witness being shown moving images, films, or photographs. Counsel then outlined these safeguards to the witness, including that precise record should be kept for somebody who does recognise someone, to say the reason they recognise them, the words of recognition, any expressions of doubt, and what features of the image triggered the recognition. Counsel suggested that what is contained in this policy document was "*a long way away*" from what occurred in April 2010 in Swords Garda Station. The witness accepted that no such record had been made in respect of his

recognition of the appellant, and he accepted that the making of such a record is “a good idea”, and acknowledged that this approach was being increasingly adopted in practice.

21. Counsel suggested that the viewing of CCTV footage “mimics” a formal identification parade; and that the formal identification parade procedure, whilst lengthy and cumbersome, had been devised to reduce the possibility of error in visual identification. The witness accepted this. Counsel then put to the witness, “*And I take it, that given the history and the experience of the law in that regard, you’re going to (sic) admit to some possibility of error, I take it, in relation to identifying Mr Byrne in that footage?*” The witness replied that on the day that he had viewed the footage, “*I made a statement confirming that I was 100% sure that it was Trevor Byrne, so I was no doubt (sic), even though I understand what you’re saying that you can make mistakes and, of course, mistakes have been made -- [...] but I was sure*”. Counsel subsequently asked the witness to admit at least the possibility of error, to which the witness responded, “*Oh, there’s always a possibility, yes, of course*”.

Submissions on the voir dire

22. Immediately following D/Garda McDonagh’s evidence, counsel for the defence made submissions on certain difficulties or concerns he harboured regarding the identification evidence in the case, and in essence he advanced that the identification of the accused was the result of suspect confirmation and not suspect generation. A particular point of concern for the defence was the absence of evidence by key members of An Garda Síochána with respect to identification and regarding the procedure that was followed, and most particularly the absence of evidence from D/Garda O’Connor regarding such matters. It was confirmed to the trial court by prosecuting counsel that D/Garda O’Connor was not available to testify, and that while a witness summons had been obtained it had not been possible for the State to serve him with that witness summons. However, D/Garda O’Connor had testified on two previous occasions on which the appellant was tried in respect of the present offending. Counsel for the defence stated that the transcripts of D/Garda O’Connor’s evidence in those previous trials would show that the identification procedure was not followed, and he sought to have those transcripts put before the Special Criminal Court on this occasion.
23. Counsel for the prosecution initially objected to this on the basis that there was no mechanism under Irish law whereby transcripts of a witness’s evidence from a previous trial could be tendered in evidence in substitution for the same witness’s evidence at a subsequent trial. However, ultimately the prosecution indicated a willingness to consent to what was being proposed in the interests of fairness, but on a strict understanding that the transcript evidence would be used in the *voir dire* only, and that the unorthodox arrangement to which they were prepared to consent on this single occasion should not be treated as, or relied upon, as a precedent in any future case. It had been agreed by the parties that it would suffice if the trial court would receive 16 pages of the transcript from the appellant’s second trial.
24. Prosecuting counsel concluded the outlining of the DPP’s position by saying that while he was not going to object to counsel for the defence making submission upon select

excerpts of the agreed transcript extract, he was requesting the trial court to nonetheless review the entirety of the relevant transcript booklet such that any submission could be made on the basis of the trial court having the full context.

25. Counsel for the defence characterised what the prosecution proposed as being "*an entirely sensible suggestion*", and he stated that he would only expressly highlight select issues "*for the sake of saving everyone's time*". He said that he had thought carefully how to best approach this, and that it would make the most sense if he did so as part of "*an omnibus objection*" to the introduction of D/Garda McDonagh's recognition evidence, as the issue of D/Garda O'Connor's evidence was to be more properly understood in that context and as part of a general submission.
26. The trial court then rose briefly to deliberate. Subsequently, it issued a ruling on how it would approach the issue of the transcript. The court's ruling was brief, and stated as follows:

"what the Court proposes to do is to I suppose go along with what has been suggested on the basis that the evidence, which is contained in the transcript of the third day of the trial of the 15th of April 2015, of Garda O'Connor, would be admitted in this trial -- sorry, in this voir dire as evidence. So, in other words, for the purposes of the voir dire the Court, as I understand it, and that's what I understand the Court's been asked to do, is that the transcript, or the particular transcript in question, is to be considered for the purposes of the voir dire as evidence".

Transcript of the 15th of April 2015 – Evidence of D/Garda O'Connor

27. The transcript of D/Garda O'Connor's evidence from the previous trial was then read into the record by counsel for the prosecution. Its reproduction in the transcript of the 15th of April 2021 runs to some length and it is not proposed to quote it in full. An outline of his evidence is instead provided.
28. Commencing with the examination-in-chief, D/Garda O'Connor stated that he was a member of An Garda Síochána attached to Swords Garda Station but had since retired. He confirmed that in 2010 was a detective at the said Garda station and had participated in the investigation into matters that had transpired on the 19th of March 2010. He further confirmed that in the course of that investigation he had a role in relation to CCTV footage and in relation to the playing of the said footage for other gardaí. He outlined that the CCTV footage was downloaded and was in the possession of Garda Rogers who was the exhibit officer. He stated that he had rung several Garda station detective offices, including Coolock, Finglas and Ashbourne, to see if there were any detectives, and to ask them to come to Swords Garda station to view the CCTV footage of the robbery "*in case they might be able to identify the culprit*". He stated that he did not take any note of the stations he rang, and that the list of same might have included Ballymun. These phone calls he made to various Garda stations bore some fruit, inasmuch as he stated that "*[a] guard from Finglas came and a sergeant from Coolock came to Swords on different dates to view the footage*".

29. He stated that the Garda from Finglas attended at Swords Garda Station on the 6th of April 2010 and that his name was "*Garda Pat McDonagh*". He said that D/Garda McDonagh was accompanied to Swords Garda Station by another member, although he could not be sure of this. He stated that he had arranged for certain CCTV footage to be played for D/Garda McDonagh, which footage was harvested from the bookmakers where the robbery took place. He could not recall whether D/Garda McDonagh was shown all of the footage or whether he was shown just a portion of it. He stated, "*I know he was shown some of it but I don't know whether he's even seen it all because he picked him out straight away. I didn't even think (sic) he looked at it a second time because he -- straight away*". He told the trial court that D/Garda McDonagh was possibly joined in the room by somebody, a person who may or may not have been Garda Rogers. He stated that there could have been another person there as well, as it was "*an open office*" and people were coming and going "*the whole time*".
30. In relation to a discussion he had had with D/Garda McDonagh regarding the incident then being investigated by gardaí, he outlined his recall of this conversation. In circumstances where the issue of whether D/Garda McDonagh had sought detail regarding the incident was the subject of considerable questioning in the course of his cross-examination on the 14th of April 2021, D/Garda O'Connor's evidence in relation to same bears quotation:

PROSECUTING COUNSEL: "*And can you tell the Court what discussion you had with Detective Garda McDonagh in relation to the incident that was being investigated?*"

DETECTIVE GARDA O'CONNOR: "*I basically rang the station and the car that was used in it. I rang Finglas but the car that was used in it was found in the Finglas/Ashbourne area or that it was taken after. It was found in that area so usually if there's a serious robbery or something like that, god forbid a murder or something like that, we try to get the local station where the car obviously was found or anybody that had good local knowledge or know a lot of people basically. So basically the conversation was: 'Could you come over and have a look at it. You might be able to identify this fellow or maybe not or is there anybody there?' I think I asked: 'Is there anybody there who knew the local criminals?' basically*".

JUDGE: "*The local --?*"

DETECTIVE GARDA O'CONNOR: "*And where who has good knowledge, the criminals are known, who has knowledge of them well or who could know them very well. And he said he'd drop over and have a look. The same conversation was had with the sergeant at Coolock*".

PROSECUTING COUNSEL: "*And in respect of when he arrived at the station, what discussion was had with him in advance of his viewing the footage?*"

DETECTIVE GARDA O'CONNOR: "*Well I don't know. I just put it on and said: 'This is the robbery that happened the other day' or I think it was two weeks beforehand,*

could he identify him or did he know this man or who they were. Either of them, there was two (sic)".

31. The examination-in-chief terminates at that point, and the cross-examination of D/Garda O'Connor commenced. The focus of the cross-examination initially centred on D/Garda O'Connor's role in the investigation. He outlined that he was not acting in an oversight role in relation to the matter, that he was "*kind of winding down*" with his retirement due to arise two years later. He said that he was not wanting to take the lead in respect of the investigation, and so a Garda Sergeant Mairead Murray (otherwise "Sgt. Murray") did. He said that he had very little to do with the investigation, his involvement in same being limited to "*[j]ust the video footage*" and the fact that he was there on the date of the robbery. He said that Sgt. Murray did not have the rank of detective at the time, and he confirmed that he was the detective in situ at Swords Garda Station. He clarified that a Garda's rank was immaterial, stating "*The gardaí all have all the same powers and we all deal with the same stuff more or less*". Counsel for the defence then put to him that that may be so, but that in terms of an investigation into a fairly serious offence, one would have thought that the Detective Unit would have had an interest in relation to what had occurred at the bookmakers. The witness responded that the unit indeed would have had an interest, but that there was an ongoing investigation involving different units comprising of members tasked with different jobs. He stated that did not know what other members involved in the investigation were doing because he was "*wasn't really involved in it*". He repeated that his involvement was confined to his attendance at the scene of the crime on the date of the robbery; the taking of statements from Ms. Leigh in the vehicle and from staff members at the bookmakers; the request for the CCTV footage from the bookmakers; the viewing of same; and subsequently the making of contact by way of telephone to other Garda stations in relation to the viewing of that footage.
32. The witness then outlined his involvement in the taking of statements from staff at the bookmakers. As such statements are not relevant to the issues being raised on appeal, it is not proposed to rehearse the detail of this process. The witness proceeded thereafter to outline the request for the CCTV footage. He said that he made the request. He confirmed that by the time the CCTV footage was viewed either by him or by D/Garda McDonagh, two sets of CCTV footage had been obtained from a Ms. Clem Devitt, which sets were exhibited as DR1 and OF1, respectively. DR1 was obtained on the 22nd of March 2010 and OF1 was obtained on the 31st of March 2010. There was a further third CCTV exhibit which was not produced until February 2011. D/Garda O'Connor stated that he had asked for these CCTV exhibits, and that he showed at least one to D/Garda McDonagh, although he could not be sure if he had shown two. He repeated that D/Garda McDonagh picked out the appellant straight away: "*Whichever one, I didn't take any note. Whichever one I showed him, he picked him out straight away and he looked at it a bit more again obviously*".
33. Counsel for the defence in the previous trial then asked the witness: "*Garda O'Connor, even with your reluctance to engage yourself as the person who was involved in the investigation, what was your view in relation to the accused man that's before the Court*

by the time Garda McDonagh came to view these stills?" D/Garda O'Connor responded, "I'd no view. I didn't know who he was. I'd never heard of him before". He later added "Still don't know who he is. Garda McDonagh pointed out who he was or said he was; that he knew him and that was it". Counsel then asked the witness, "Well, were you aware that he was a suspect by the time that Garda McDonagh viewed the CCTV?"; the witness replied that he was not. Counsel then referred to a fingerprint form being returned to Swords Garda Station on the 29th of March 2010 wherein the appellant's fingerprint was identified on a mobile phone that was found at the scene, and she asked the witness whether he was aware of this, to which he replied that he was not.

34. At this point in the course of reading the transcript into the record, counsel for the prosecution briefly stopped to clarify matters to the trial court. He stated unequivocally that there was no fingerprint evidence in this case, and further emphasising, for the avoidance of confusion, that he would not be calling fingerprint evidence.
35. Counsel for the prosecution then resumed his reading of the transcript. D/Garda O'Connor stated that he was not aware of any fingerprint evidence owing to the fact that he had very little involvement in the investigation and that there would be gardaí, whom he had never met, who would be in different units. Counsel for the defence then asked, again, leaving the purported fingerprint evidence aside, whether the witness was aware that the accused was a suspect. Again, the witness responded in the negative. Counsel stated that she found this hard to believe, that the sole detective involved in the investigation, who took statements from various persons at the scene and who requested CCTV footage, would not be aware that there was in fact a nominated suspect in relation to the incident at the bookmakers within, at most, a three-week period since its occurrence. The witness stressed, *"Yes, I wasn't, honestly"*, and he repeated that he had little involvement in the case, and that he had not met other members who were involved. He further and again referred to having no knowledge of any purported fingerprint evidence. Counsel for the defence then asked the witness were the gardaí not treating the matter as a serious incident. The witness responded stating that he presumed they were, but he stated that gardaí handle so many different investigations in a week that one cannot go *"sticking your nose into one and another"*, further adding, *"You can be involved with other investigations yourself and you've enough to be doing than going around chasing other people"*. Counsel at that point seized upon an aspect of the witness's answer, querying *"Well again, Mr O'Connor, this isn't a situation of you having to chase after anybody because the position is that Mr Byrne has been nominated as a suspect?"*; and further asking, *"I find it hard to believe that, without you chasing after anybody, that there wouldn't have been talk within the station that a Trevor Byrne, whether you knew him or didn't know him, [...] that you wouldn't have heard that there was a suspect, in fact two nominated suspects, in relation to the robbery at Applewood Boyle Sports?"* He replied, *"As I've stated already, I did not know he was a suspect or who anybody was a suspect (sic)"*.
36. The focus of the cross-examination then returned to the contact that was made with other Garda stations making requests for other gardaí to attend at Swords Garda Station for the purpose of viewing the CCTV footage of the robbery. What counsel sought to establish

was why D/Garda O'Connor contacted the stations at Ashbourne, Ballymun, Coolock, and Finglas specifically. The exchange went as follows:

DEFENCE COUNSEL: *"I see. Well, moving on from that then, Mr O'Connor, you've indicated that you made phone calls to a number of stations and if I'm right you've indicated to this Judge that you made phone calls to Coolock and Finglas and you seem to be sure about that and then you think possibly you made a phone call to Ashbourne and you've also mentioned Ballymun, but I'm not quite sure what you're saying in relation to Ballymun?"*

DETECTIVE GARDA O'CONNOR: *"Yes, well I know for definite there was two because two came from those two stations. In the order of business I probably would have rang Ashbourne. I'm not 100% did I do Ashbourne or Ballymun, but I probably would have, and asked, if I got an answer, 'Could somebody drop over?' They might have dropped over, I didn't follow it up."*

DEFENCE COUNSEL: *"I see, so in terms of your actual recollection as to who you rang, you're basing that on who came back and also basing it on what your practice would have been. So you know that a garda attended from Coolock. You know that a garda attended from Finglas. And you think that your practice would have been to ring somebody because the car had been found in Ashbourne, so because of that you think possibly you rang Ashbourne; is that correct?"*

DETECTIVE GARDA O'CONNOR: *"Yes, that's correct".*

DEFENCE COUNSEL: *"And where does Ballymun figure in it then?"*

DETECTIVE GARDA O'CONNOR: *"A lot of the crimes in these sort of areas happens (sic), comes from those three areas."*

DEFENCE COUNSEL: *"I see. And --?"*

DETECTIVE GARDA O'CONNOR: *"the culprits come from those three areas. The majority of the crime it happens in Swords".*

DEFENCE COUNSEL: *"And, Mr O'Connor, I only have an interest in establishing why you think that you rang four stations and whether you in fact -- you did ring four stations. But I take it from your evidence that you feel it would have been these four stations that you rang to see if somebody could identify somebody from the footage?"* DETECTIVE GARDA O'CONNOR: *"Yes, that would. That would be a fair assumption".*

37. Defence counsel then referred to what D/Garda O'Connor had said in the previous (i.e., first) trial, to the effect that he was unaware of anybody other than D/Garda McDonagh and his colleague from Finglas attending at Swords Garda station. The witness insisted that he was not asked about Coolock on the last occasion. Counsel doubled down, putting to him that he was asked about what stations he had contacted and that he had given

evidence stating that it was Finglas and Ashbourne; with no mention of either Ballymun or Coolock. The witness accepted that he may not have mentioned those stations on the last occasion, conceding *"If I didn't, I didn't"*.

38. The defence then sought to elicit in cross-examination further evidence regarding the process or procedure by which D/Garda McDonagh viewed the CCTV footage at Swords Garda Station. The witness confirmed that when D/Garda McDonagh arrived at the station, he and D/Garda McDonagh went to view the CCTV footage. He confirmed that there was another member involved, and he accepted that he did not have *"huge computer knowledge"* and confirmed that another member had to play the footage. He said that he then gave D/Garda McDonagh a witness statement, that he made his statement and *"that's it"*. He said that he was with D/Garda McDonagh for the entire time during which D/Garda McDonagh viewed the footage. In relation to the sequencing of events culminating in D/Garda McDonagh's making of a statement that he recognised the accused in the footage, D/Garda O'Connor did not recall D/Garda McDonagh making the statement then and there; that D/Garda McDonagh looked for a statement form in which to write his statement; that the usual practice was to do it then and there, and to leave the completed statement behind in situ. He could not recall whether he left the detective office prior to the looking by D/Garda McDonagh for a statement form on which to write his statement. He said that he could have left the office, it being a small detective office, and went to the public office which was adjacent to it; and he said that D/Garda McDonagh could have been looking at it as he was walking in and out, adding *"I wouldn't have stood over him like a teacher would"*. Counsel then sought a clear answer from D/Garda O'Connor on the issue of whether he was in attendance *"on all occasions or for the entire time that Garda MacDonagh (sic) was viewing the CCTV footage"*. The witness responded, *"Yes"*. Counsel then asked for how long did he leave the room. The witness responded that he could not recall whether he left the room or not, adding *"It's five years ago"*.
39. Counsel then returned to the issue of which CCTV footage exhibit was viewed on that occasion. The witness repeated that he was not sure which was viewed with reference to the exhibit numbers. In ease of the witness, counsel briefly stated what each CCTV exhibit depicted. Again, he could not recall. Counsel then rephrased her question, asking *"Really what I'm asking you, was it the CCTV footage of the actual robbery itself or was it CCTV footage prior to the robbery?"* D/Garda O'Connor answered that it was CCTV footage of the actual robbery itself. Counsel then asked how long it took D/Garda McDonagh to recognise the accused. D/Garda O'Connor repeated, *"It was straight away"*. Counsel then asked whether the person was *"viewable"* on the footage, to which the witness responded *"Yes"*. Counsel then sought to have the witness describe the person that D/Garda McDonagh recognised. The witness described a tall man with short hair, fairly well-built, and wearing dark clothing. Counsel then asked the witness again how many times the footage was viewed by D/Garda McDonagh. He reiterated that it was viewed by D/Garda McDonagh only once, although with the lapse of time in the five-year intervening period since the viewing at Swords Garda Station he could not recall this with certainty. Counsel for the defence then put to the witness that D/Garda McDonagh in his

statement had referred to viewing the footage "a number of times", and that he had previously indicated in the first trial that he had viewed it three times. D/Garda O'Connor could not recall, repeating that what he could remember was that D/Garda McDonagh had recognised Trevor Byrne straight away. He added, "Now he could have went, watched it back and forward a bit because I couldn't control the thing or I didn't know how to work it. He could have watched it two or three times possibly. I don't remember to be honest".

40. Counsel questioned the witness on what the person recognised by D/Garda McDonagh was doing at the point in the footage at which he was recognised by D/Garda McDonagh. The following exchange ensued:

DETECTIVE GARDA O'CONNOR: "I think he was in the bookies shop. Look, there's a camera at the toilet and I think that one picked him up looking at the screens. The bookies screens in front of him, just I think standing there for a minute or two and then he moved around the shop I think. That's the best I can remember".

DEFENCE COUNSEL: "I see. And you've indicated that's straight away, so literally as soon as the CCTV footage began to be played and this person came within view, the person was identified?"

DETECTIVE GARDA O'CONNOR: "Yes, that's my view, that's my recollection, yes".

41. The focus of the cross-examination then turned to whether a record or note of the claim of recognition was made and kept. The witness stated that he made no record or note, whether it be regarding when the recognition in fact took place or the number of times the CCTV footage was viewed. He repeated that he could not be sure as to whether he was, in fact, present for the entire time that D/Garda McDonagh viewed the CCTV footage. And he could not say to whom he reported regarding the identification that had been made, stating that he had no idea and that it could probably have been Sgt. Murray. He further said that if Garda Rogers was there, he would have told Sgt. Murray. He said that nobody had indicated to him anything to the effect that, the accused having been identified, he was the person whom the gardaí had "in [their] sights". Counsel stated that she found it hard to believe that somebody who had greater interest in the matter would not have informed him of further detail upon receipt of information of identification. He responded, "Well that's my memory of it". With that, the cross-examination of D/Garda O'Connor concluded. There was no re-examination of the witness by the prosecution.

Evidence of Garda Flynn, Garda Rogers and Sgt. Murray

42. We think it necessary at this point to also briefly outline certain evidence given by Garda Peter Flynn, Garda Daniel Rogers and Sgt. Mairead Murray in the court below regarding the appellant's nomination as a suspect, as such evidence bears relevance to the issues to be considered in this appeal.
43. Garda Peter Flynn's written statement was admitted in evidence pursuant to s. 21 of the Criminal Justice Act 1984 and was accordingly read into the record by counsel for the prosecution on the 13th of April 2021. Therein, he stated that he was a member of An

Garda Síochána attached to the scenes of crime unit, Santry; and that on the 19th of March 2010 he had attended at the scene of an alleged robbery at a BoyleSports bookmakers in Applewood village, Swords. He then described what he observed at the scene. Subsequent to this, he related that he had found a Nokia phone on the floor of the lavatory at the premises, that it showed an incorrect time from 12 hours earlier, and that there were 15 missed calls on the phone. He stated that he bagged and sealed the Nokia phone in bag 4330318 and handed it over to Sgt. Murray. The remainder of his statement was not relevant to present issues, and it is not therefore necessary to review it.

44. Garda Daniel Rogers gave evidence at various points throughout the appellant's trial in the court below. In the *voir dire* on the 14th of April 2021, he was questioned with respect to the compilation of CCTV footage and the viewing of same by D/Garda McDonagh. In cross-examination, counsel for the defence commenced his questioning of Garda Rogers by asking him whether, when Mr. Byrne was nominated as a suspect or was identified by D/Garda McDonagh, it came as a surprise to him. Garda Rogers answered "No". When asked why, Garda Rogers replied, "*Well, as part of the investigation team, has already been alluded to and I was aware that Mr Byrne was a suspect*". Counsel then questioned the witness as to when he formed this awareness. Garda Rogers responded "*I don't recall the exact date. I don't have a note of it but I was aware that he was a suspect*". Garda Rogers was then presented with C56 forms, which type forms are handed up with exhibits when they are sent for analysis. These forms bore a date of receipt of the 25th of March 2010 and for the purposes of the present judgment their relevance is that amongst the entries set out therein are names of individuals nominated as suspects in the investigation. Trevor Byrne was one such individual who was nominated as a suspect. Having been directed to this fact by counsel for the defence, Garda Rogers accepted that by at least the 25th of March 2010 he was aware that Trevor Byrne was a suspect in the case, and further that it could be taken that the investigation team were also aware of this. Counsel for the prosecution subsequently re-examined Garda Rogers. The witness told the trial court that he was made aware that Mr. Byrne was a suspect by Sgt. Murray.
45. Sgt. Mairead Murray gave evidence immediately after Garda Rogers on the 14th of April 2021. Counsel for the prosecution examined the witness on what had just been said by Garda Rogers in the course of his evidence. Sgt. Murray told the trial court that to the best of her knowledge Mr. Byrne's nomination as a suspect came from preliminary examination of a mobile phone which was found on the shop floor after the robbery, and she further stated that she played no role in respect of the completion of the C56 forms.
46. Under cross-examination she confirmed that she attended at the scene of the crime with Garda Rogers, and that they were followed there by scene of crime officer Garda Flynn. She confirmed that she had directed Garda Flynn's attention to a mobile phone on the shop floor, that he had photographed it in situ, and that he had subsequently carried out an examination on the mobile phone. She confirmed that this initial examination was conducted at the scene of the crime soon after the incident. Sgt. Murray stated that it was incorrect to say that the nomination of Mr. Byrne as a suspect came about sooner on the 19th of March 2010, clarifying that Garda Flynn's role in respect of the examination of the

mobile phone was limited to his role as scene of crime officer, i.e., examining for fingerprints. Sgt. Murray stated that there were some observations made to the effect that the phone still on, and that there was a time difference of some 12 hours; but she stressed that at that point in time on the 19th of March 2010 she was "*none the wiser that Trevor Byrne was a suspect in the case*". Sgt. Murray stated that "*it would stand to reason*" that she would have formed the awareness that Mr. Byrne was a suspect in the case before the 23rd of March 2010, the date upon which the C56 forms were signed and the entry regarding nominated suspects was completed.

47. Counsel for the defence then asked the witness whether it was the separate examination of the mobile phone by a Garda Brian Reidy on the 19th of March 2010 that resulted in Mr. Byrne's nomination as suspect. Sgt. Murray did not accept or deny this. She stated that she could not recall the date upon which Garda Reidy had conducted his examination or that upon which she became aware that Mr. Byrne was a suspect. She stated that CCTV stills were never used as a tool to try to confirm the identification of Mr. Byrne as a suspect subsequent to Garda Reidy's investigation; that this was not the purpose of taking the stills; and that CCTV footage is of more beneficial use in that regard. She stated that the stills were not used for the purpose of identification as the actual CCTV footage of the full episode of robbery was made available in early course. In relation to Garda Flynn's awareness of Mr. Byrne as a suspect, Sgt. Murray confirmed that Garda Flynn had completed the C56 form and she agreed that at that stage he was aware of there being two suspects, including Mr. Byrne.

Submissions on the voir dire

48. The thrust of the defence submission on the *voir dire* was (i) that the recognition evidence of D/Garda McDonagh should not be admitted in circumstances where what the gardaí were engaged in was a case of suspect confirmation and not suspect generation, which is impermissible, having regard to the dicta of Barron J. in *People (DPP) v. Rapple* [1999] 1 I.R.L.M. 113 and of O'Malley J. in *People (DPP) v. Gruchacz* [2020] 2 I.R. 213; and (ii) that the identification process which was adopted in the present case left much to be desired in the way of appropriate safeguards to its integrity, in particular that gardaí had failed to keep contemporaneous notes or records in respect of the identification, and that an unfairness accrued to the defendant owing to the inability of his counsel to put matters to D/Garda O'Connor at trial relating to frailties in the procedure.
49. Counsel submitted that the trial court had heard that when D/Garda O'Connor made the call on the 6th of April 2010 he was very anxious to distance himself from the investigation; that despite the fact that he had taken witness statements, had attended at the crime scene, and had requested and obtained CCTV footage, he insisted that he did not know that Mr. Byrne was a suspect when he made phone calls to various Garda stations. Counsel submitted that this was not credible, and that the defence were placed at a disadvantage in not being able to put this to him due to his absence. He contended that as D/Garda O'Connor had conducted the procedure, he should be present at trial "*to stand over its frailties and explain what frailties there were*", of which frailties he submitted there were many. He started by pointing to the content of the phone call and

subsequent discussions, which were not clear, and which did not appear to be characterised by any effort to determine whether D/Garda McDonagh would or would not be wasting his time in attending at Swords Garda Station to view the CCTV footage. He added that it had been established that Sgt. Murray, Garda Peter Flynn and Garda Rogers were all aware, by the time that D/Garda McDonagh went to Swords Garda Station on the 6th of April 2010 to view the footage, that Mr. Byrne was a suspect in the investigation.

50. Defence counsel submitted that the investigation team, of which D/Garda O'Connor was a member, were aware that Mr. Byrne was a suspect in the case for nearly three weeks prior to D/Garda McDonagh's viewing of the CCTV footage at Swords Garda Station. While he accepted that none of the members of the investigation team could speak to D/Garda McDonagh's state of mind, it followed as a matter of course (*"of abundant common sense"*, in counsel's words) that in a serious incident such as the present, if a suspect is identified, that news of that development would be shared amongst the members of the investigation. In his submission:

"They'd be failing in their duties if they didn't. If an investigation team operated as a series of silos, sitting on information without sharing it with each other, that would be a nonsensical way for any investigation team to operate. And that's precisely what they deny. They say: "No, no, of course we should have."

51. Counsel stated that for this reason the defence were at a disadvantage in the case. Specifically, they were disadvantaged in terms of not being able to put to D/Garda O'Connor that it was not credible that despite his involvement in the investigation he was not aware, before D/Garda McDonagh's recognition of Mr. Byrne, that Mr. Byrne was a suspect in the case. He said that the only explanation for D/Garda O'Connor's absence that was forthcoming from the prosecution was that they had served a witness summons to no success (this submission was not strictly correct – the transcript reveals that what prosecuting counsel had stated to the court was that while a witness summons had been obtained, it had not been possible to serve it successfully); and he submitted that the existence of this evidential deficit begged the question as to whether the trial court could in the circumstances be satisfied that a number of people, who knew that a suspect had been nominated, had engaged in an identification process that was neither be tainted nor contaminated by that knowledge. He contended that the *"much more likely"* version of events was that there was a process of establishing why D/Garda McDonagh might have been of assistance rather than relying on *"pot-luck"* and running the risk of having everyone's time wasted. He argued that there was a very real danger of taint even if Mr. Byrne was not named, because D/Garda McDonagh, who was so familiar with Mr. Byrne as to have known that he had then recently been released from custody, was specifically directed to the image of Mr Byrne in particular, and he was asked, *"Do you know him?"* It was submitted that this was *"a kind of targeted process which is entirely at odds with the manner in which suspect confirmation should be carried out"*.
52. Defence counsel submitted that the trial court was left in the dark for two reasons: first, because the circumstances of the identification of Mr. Byrne were *"a million miles from*

the circumstances in Code D [i.e., the PACE code of practice promoted by the UK Home Office and adopted by British police forces, referred to in the course of D/Garda McDonagh's cross-examination]", which code of practice he submitted is now followed by the gardaí; and second, the trial court did not have the benefit of D/Garda O'Connor's testimony in relation to all this, in circumstances where he was not available to be asked on it. He acknowledged that inherent to this submission was a level of speculation as to what answers D/Garda O'Connor might have provided; but contended that this speculation was caused by D/Garda O'Connor's absence. Defence Counsel thus sought to have the identification evidence of D/Garda McDonagh excluded. He said that there was no record of the circumstances of recognition kept, as there would have been had Mr. Byrne been charged ten years later than he was; and he contended that this resulted in an unfairness to his client in circumstances where there was what he characterised as an "opaque identification process, the circumstances of which very easily lend themselves to contamination". He said that these such circumstances were criticised in *Rapple*, which was endorsed by the Supreme Court in *Gruchacz*. Counsel noted that D/Garda McDonagh clearly accepted that there is a danger with identification evidence which is why procedures recording the circumstances in which a person is recognised should be put in place.

53. At the end of his submission, defence counsel confirmed the presiding judge's understanding of the defence application; that the basis of the defence application was to question the credibility of D/Garda McDonagh's evidence and that the defence were seeking to do this in the context of requesting the trial court to look at all the evidence in the *voir dire*; that the defence were saying that it was not so much a question that somebody had perjured themselves but whether a doubt existed, and this was the approach which the defence were inviting the trial court to adopt with respect to considering the evidence of D/Garda O'Connor and that of D/Garda McDonagh. Counsel further submitted that while he might not have met the standard for establishing that D/Garda O'Connor was guilty of perjury, the trial court must have a very real doubt as to whether he was, in fact, not aware of the existence of the accused as a suspect, and further as to whether that the accused was a suspect might have been conveyed to D/Garda McDonagh, either expressly or by way of a process of identifying the usefulness of D/Garda McDonagh as a potential witness of recognition. He said that these concerns could and should have been allayed by having a proper record of what transpired, but in the event no such record was kept. He submitted that it is difficult to assess the credibility of D/Garda O'Connor without assessing his demeanour, which could not be done in his absence.
54. Counsel for the prosecution in reply distilled the defence's submission down to an invitation to the trial court to take the view that two gardaí had perjured themselves at different times in respect of the identification of Mr. Byrne as a suspect. He noted that D/Garda McDonagh had been challenged on whether he knew the identity of the person who he was being asked to identify and that the witness's evidence was emphatically that he did not.

55. Prosecuting counsel submitted that the situations contemplated in *Rapple* and *Gruchacz* whereby the identification process may be contaminated or tainted as a result of an identifying witness being shown photographs or stills of a person in advance did not arise in the present case. He emphasised that the evidence was that D/Garda McDonagh was contacted as a result of him being present in the detective office in Finglas Garda Station when that office received a call from D/Garda O'Connor because a vehicle believed to be connected with the robbery was found abandoned and burned out in the Finglas area. Counsel submitted that inviting a Garda from the Finglas area to come and view CCTV footage from the robbery was accordingly a course of action that could not be more sensible and proper. He repeated that it was the express evidence of D/Garda McDonagh that he had no idea who he was being invited to identify.
56. In relation to the evidence of D/Garda O'Connor counsel for the prosecution submitted that he was quite obviously a witness who had no proper recollection of the process that he had undertaken at the time, and that this could be inferred from the transcript of his evidence from the previous trial which was read into the record. Notwithstanding this, counsel contended that if there was one thing on which D/Garda O'Connor was sure, it was that he had not involved himself to any significant extent in the investigation. He emphasised that the witness had been pressed time and time again on whether he was aware of there being any suspect(s) in the case, and that on each such occasion of having been questioned in relation to this he had maintained that he was not.
57. In relation to the CCTV footage, prosecuting counsel submitted that it was illogical in the circumstances of the case to say, as the defence were suggesting, that gardaí could not point at a person entering the toilets in the lead up to the robbery whose visage was captured on CCTV, and whom they suspected as being amongst the raiders who had later emerged from the same toilets wearing masks; and further that they could not ask their identifying witness if he knew that person.
58. Counsel contended that the authorities were on the prosecution's side, and in particular he referenced the judgment of Kearns J. in the former Court of Criminal Appeal in *People (DPP) v. Larkin* [2009] 2 I.R. 381 wherein the learned judge stated at paras. 27 and 28:

"[27] [...] If identification evidence is available from police officers and the same can be given in circumstances where the probative value of the evidence outweighs the prejudicial effect, the court sees no reason why such evidence should not be given. It is difficult to conceive of a greater affront to the community's interest in the prosecution of crime than to deny to the prosecution the opportunity of calling such evidence, all the more so in modern social conditions where gun crime and intimidation of witnesses has regrettably become all too frequent.

[28] That is not to say that an endless stream of police witnesses should be paraded through court, each of whom would successively provide recognition evidence of an accused person from a video or photograph. As the cases indicate, there is a balancing exercise to be performed in this sort of situation by the trial judge. It is important that witnesses who are called should wherever possible be

able to point to some non-criminal background context whereby the identification or recognition has been made. In a situation where this is not possible (a situation which does not arise in the present case) a very real difficulty may arise, the resolution of which is beyond the purview of this judgment”.

59. Counsel noted that the above dicta were considered and applied in the judgment of McCarthy J. giving judgment for this Court in *People (DPP) v. Michael Power* [2019] IECA 74, in which the admissibility of identification evidence by two gardaí, one of whom who knew the accused from the community and the other who knew the accused from stopping him while on patrol on previous occasions, was challenged. At para. 15 of his judgment in that case, McCarthy J. stated:

“It seems that this case and other decisions preceding it pertaining to, for example, the receipt in evidence of CCTV footage date from a time where the availability and consequent introduction of such evidence was a novelty, but it is now of course commonplace in trial after trial. And indeed, if the Gardaí fail to harvest such evidence there may be circumstances in which an accused person is prejudiced to the extent that he cannot receive a fair trial, rare though that circumstance will be. It is also commonplace to introduce recognition evidence from members of An Garda Síochána, either without reference to the circumstances in which the gardaí became acquainted with the accused, especially in cases where it is not possible, say, because the accused has been recognised by the Gardaí because of his engagement in criminality, to adduce evidence of recognition based upon innocuous knowledge. When it is sought to contest recognition evidence, it may well be in such circumstances that either in cross-examination or otherwise evidence will emerge as to, say, the extent or frequency of contact and perhaps even the circumstance. We think that it is now recognised that it would be an affront to common sense if evidence identifying an accused as engaged in the criminal act alleged were to be excluded merely because the identification is made by Gardaí because of their prior acquaintanceship with the accused. It is hard to conceive of circumstances where such evidence could be more prejudicial than probative. [...]”

60. Counsel for the prosecution concluded by submitting that insofar as the defence purported to rely on PACE, this jurisdiction had had close to four decades to adopt analogous provisions to that provided in the neighbouring jurisdiction but had not done so. He submitted that the law in force in this jurisdiction was that as set out in *Larkin and Power*. Insofar as the defence had sought to complain about the mechanism by which the identification process was conducted in the present case, counsel for the prosecution contended that this was a matter which went to weight and not admissibility. He argued that this was so because the basis upon which the trial court could rule on the admissibility or otherwise of the identification evidence would require an assessment of whether *Rapple* had been complied with and whether there had been some sort of breach along the lines of Garda collusion. Counsel submitted on this point that the opposite was true; that there had been no collusion amongst members of the gardaí and that this was

the uncontradicted evidence in the present case. He emphasised that PACE is not law in this jurisdiction.

61. In the latter regard we should digress to state that the court of trial asked to be addressed by both sides in relation to the judgment of Birmingham J. (as he then was) in *People (DPP) v. Tynan* [2017] IECA 202.
62. In the *Tynan* case, in giving judgment for this Court, Birmingham J. rejected arguments by an appellant that recognition evidence should have been excluded at trial due to alleged infirmities, and want of safeguards (e.g., such as apply in the neighbouring jurisdiction under Code D of PACE), in regard to the circumstances in which it had been obtained. He said at para. 12 of his judgment:

"It must be appreciated that what occurred in the present case differs from what is usually at issue in cases involving visual identification or indeed voice identification. What ordinarily happens is that a witness, at a time after a crime was committed is asked to view an identification parade or view a number of people at an identification opportunity with a view to seeing whether they can pick out someone and say that the person they are viewing was the same person as they saw commit the crime on the earlier occasion. Here, what is happening is quite different. Here, there is footage actually showing the crime being committed in the sense that it shows those involved in the incident present at the crime scene and the person viewing the footage is doing so in order to see whether he can identify anyone on screen as someone who was previously known to him. This is a fundamental difference and it may mean that procedures suitable for a visual identification parade or voice recognition opportunity may not be readily transferable".

63. Defence counsel did not argue with a suggestion (made by the prosecution) that *Tynan* was authority for the proposition that PACE does not apply in this jurisdiction. He submitted that it was not so much a question as to whether PACE is applicable, but rather was one as to what standards should our courts require our police to adhere to. While he did not posit PACE as being the gold standard, he nonetheless submitted that it was a far superior standard of procedural safeguards than that in force in this jurisdiction. He observed that matters had moved on from *Tynan* in the time since that case was decided, and that the standard in PACE appeared to be increasingly applied in this jurisdiction in practice. Accordingly, he submitted that *Tynan* was not dispositive or even persuasive in the present case.
64. Prosecuting counsel submitted to the trial court that *Tynan* was more on point with the facts of the present case than his opponent was suggesting. He further contended that while the defence had argued that *Tynan* was somewhat anachronistic, the case was in fact decided in 2017 and was thus of sufficient recency. He therefore submitted that *Tynan* was of assistance to the trial court in disposing of the issue at hand.

The Trial Court's Ruling

65. On the 19th of April 2021, the trial court delivered its ruling on the defence application to have the evidence of D/Garda McDonagh excluded. The ruling in question, delivered by the presiding judge, is lengthy and runs to some 24 pages of the transcript of the 19th of April 2021. Accordingly, it is not proposed to reproduce it *ad longum* in the present judgment; instead it will suffice for present purposes to provide a summary thereof.
66. The curial part of the ruling commences at p. 14 of the transcript with a discussion of the issues raised in the course of the application and addressed by counsel for both sides in submissions on *voir dire* on the previous dates. The trial court noted that on this application it was concerned with the issue of admissibility. The presiding judge stated that in this context the trial court was conscious of the observations of Barron J. in *Rapple* that it is the duty of the police to behave with exemplary fairness in the whole area of the use of photographs, remembering always that the State has no interest in securing a conviction but has an interest in securing the conviction of the right person; and the presiding judge further noted that the trial court was conscious of the distinction made between suspect confirmation and suspect generation. He further stated that the trial court had kept in mind the danger of prejudice which can arise in circumstances of suspect confirmation. The presiding judge stated that the trial court was satisfied that it should approach the defence application on the basis that if there was a doubt in relation to the integrity of the identification evidence, the benefit of the doubt should be afforded to the accused. He said that to the extent that D/Garda O'Connor was not present at the trial, and in the light of any suggestion of unfairness arising from his absence, the trial court must exercise additional caution.
67. In relation to the transcript of D/Garda O'Connor's evidence in the course of the previous trial, the presiding judge made the following observations on behalf of the trial court. He noted that the transcript which had been introduced was not concerned with what D/Garda McDonagh may have said in the prior trial, rather it was concerned with what D/Garda O'Connor, who was not, in the context of the present proceedings, available to give evidence, had said. He observed that the prosecution had initially objected to the transcript's introduction, in particular with regards to a concern regarding its evidential status; however, this objection fell away notwithstanding a residual reservation which remained regarding whether there was a mechanism by which the transcript could be produced. He noted that the prosecution had made efforts to ascertain whether D/Garda O'Connor would be in a position to attend to give evidence *viva voce* but that these efforts were not successful. He acknowledged that the prosecution did not raise an objection to the transcript's introduction in circumstances where its introduction was a fallback position that would arise where the witness was not available to be examined at the trial, and where any unfairness resulting from his non-availability fell to be mitigated. He observed that the prosecution's position in this regard, notwithstanding a remaining concern regarding the proper basis for the transcript's introduction, was also on the basis that its admission would not be of precedential value and was at the behest of the accused. Last, he noted that the trial court had agreed to admit D/Garda Connor's evidence tendered on the 15th of April 2015 at the previous trial (in the form of a transcript which was read into the record) for the purposes of the *voir dire*.

68. The presiding judge observed that notwithstanding the foregoing, counsel for the defence maintained an objection to the admission of D/Garda McDonagh's evidence which objection was premised on the basis of an alleged unfairness he maintained persisted in circumstances of D/Garda O'Connor's unavailability to give evidence *viva voce* at trial. This unfairness was particularised as a deprivation of the opportunity to extract answers from D/Garda O'Connor which may have had the effect of casting doubt on the integrity of the identification process and the credibility and reliability of the evidence of D/Garda McDonagh. The presiding judge noted that the defence had invited the trial court to draw inferences and conclusions regarding the reliability of such evidence. He noted that it had been submitted that the doubt as to the integrity of the identification process must result in the trial court giving the accused the benefit of that doubt, and thereby excluding the said visual identification evidence.
69. The trial court observed that the transcript of D/Garda O'Connor's evidence had thus been admitted and considered in the *voir dire* for dual purposes of (a) supporting the accused's challenge to the admissibility of D/Garda McDonagh's evidence, and; (b) to lay a foundation for the grounds on which that challenge was based, including contamination of the identification process and the reliability and credibility of D/Garda McDonagh's evidence. The presiding judge noted that the reasons advanced by the defence included the potential prejudice occasioned by reason of the trial court being unable to hear from D/Garda O'Connor on what procedures he had conducted and why, and to deal with the concerns which counsel for the defence said the trial court should have with the credibility of the evidence of D/Garda McDonagh in the context of the other evidence in the case, and whether unfairness resulted to the accused in the exploration of the issue of admissibility by reason of D/Garda O'Connor's non-availability for questioning.
70. The presiding judge's focus then turned to a consideration of the transcript. He noted that it had been introduced not for the purposes of simply confirming what was or what might have been said by D/Garda O'Connor; rather it had been admitted to assess the evidence in its entirety. He stated that the trial court had approached the content of the transcript and the evidence contained therein, including questioning and replies to questioning by D/Garda O'Connor as well as counsel's observations thereon, as a tool to assist in the determination of the matter which had arisen on this issue, including and in particular the credibility and reliability of the evidence of D/Garda McDonagh, the integrity of the identification process, the risk or potential risk of contamination of that process, and any prejudice which may arise by reason of D/Garda O'Connor's non-availability at the trial to be questioned on such issues. He noted that it was clear that notes of the identification process were not kept, either by D/Garda O'Connor or anyone else; and to the extent to which it could be said that D/Garda O'Connor was in charge of the operation, the presiding judge noted that there was no evidence that procedures outlined in the PACE Code had been maintained. The presiding judge further observed that D/Garda McDonagh had given evidence that he had made a statement following his identification of the accused and that nothing had been raised in evidence before the trial court to cast any doubt about that.

71. In relation to the issue of failure to comply with procedures contained in the PACE Code, the trial court considered what the effect of this was, and in particular whether such a failure would operate to render the evidence of identification inadmissible as a matter of law. The presiding judge stated that it appeared to the trial court that the answer to this question was to be found in the *Tynan* and *Larkin* judgments (referred to previously). He observed that in *Larkin* Kearns J. had stressed that there arises in every case the requirement to conduct a balancing exercise between the probative value of the evidence against the possible prejudice to the accused, an exercise which can only be undertaken by examining the particular facts of each case. The presiding judge then repeated certain observations made by Kearns J. which have already been quoted *in extenso* at para. 58, above. The presiding judge remarked that it followed from the dicta of Kearns J. that the fact that a Garda might know that a person is "*in the frame*" before seeking and purporting to identify him or her does not automatically render inadmissible evidence of his or her identification.
72. The presiding judge noted that in *Tynan* the appellant had, *inter alia*, raised a point that the admissibility of identification evidence should be governed by an assessment of whether the process by which the evidence had been garnered was adequate, to ensure that any probative value was not diminished to the extent that it was outweighed by the prejudicial effect; and further that the appellant therein had referred to and relied on a number of English authorities, and that notwithstanding his acceptance that those cases were decided under a different statutory regime he had submitted that the considerations identified in those authorities were matters of first principle and common sense such as to be highly relevant and should be applicable in this jurisdiction. The presiding judge noted that in *Tynan* Birmingham J. had observed that the principles governing visual identification parades or voice recognition opportunity may not be readily transferable to instances whereby a person is shown footage of a crime for the purpose of establishing whether a person previously known to him and depicted therein could be identified; and that this was a result of a fundamental difference between these phenomena. The presiding judge also referred to Birmingham J.'s comments to the effect that the jury at trial had the benefit of high-quality footage and stills which they could make use of as valuable tools in assessing the reliability of the identifying witness; and that this differed from the quality of footage and stills in earlier cases. Accordingly, Birmingham J. had observed that the outcome of earlier cases required to be treated with a degree of caution. The Court of Appeal in *Tynan* was thus not persuaded of any of the arguments raised and dismissed that ground of appeal.
73. Returning to the defence application, having considered these authorities, the evidence, and the submissions of the parties, the trial court was satisfied that, subject to the issue of D/Garda O'Connor's nonavailability, timing was relevant to the issue of admissibility in this case. The presiding judge stated that the fact that procedures similar to those in the PACE Code may or may not have been followed in the instant case was not determinative of the issue of admissibility; and that the issue which the trial court was required to address was whether the evidence of identification was such as to give rise to an unfairness to the accused such as would warrant its exclusion. He stated that the trial

court was satisfied that *Tynan* supported the proposition that evidence is not rendered inadmissible by reason of there being an absence of evidence of contemporaneous notes recording the process undertaken in the identification of a person from CCTV footage. The trial court further acknowledged that the procedures adopted by the gardaí in more recent times, as discussed in the course of the *voir dire* and in the evidence of D/Garda McDonagh, may have moved on and reflect more what occurs under the PACE Code; but this development since the date of identification by D/Garda McDonagh in this case did not render what happened back then inadmissible. The trial court was satisfied that the issue was one of weight rather than admissibility.

74. Whereas the presiding judge observed that in *Tynan* the jury had the benefit of the evidence of all those who were present at the identification, the same situation did not obtain in the present case owing to D/Garda O'Connor's absence. He noted the submissions that had been made by the defence, in relation to D/Garda O'Connor's absence, in the context of the application to have D/Garda McDonagh's evidence excluded; and he acknowledged that the prosecution had made efforts to compel the absent witness's attendance at the trial, with reference to the evidence of Sgt. Murray who had testified in relation to those efforts subsequent to the submissions which were made in the *voir dire* on the 15th of April 2021. These efforts were composite, comprising unsuccessful attempts at personal service of the witness order, phone calls which went unanswered, and text messages which received no response. The presiding judge also noted that the evidence of Sgt. Murray was that D/Garda O'Connor, who had retired some years before the trial, had previously indicated to her that he would not be available to give evidence at trial. The trial court observed that the prosecution must take reasonable steps to secure the attendance of all witnesses who can give relevant evidence, but that the absence of one or more such witnesses will not necessarily prevent a trial from going ahead; that this obligation is confined to those persons whose attendance they can secure, and; that the overriding obligation on the trial court is to ensure that no injustice would be done thereby. He referenced in this regard, *R. v. Oliva* [1965] 1 W.L.R. 1028 (approved in *People (DPP) v. Lacey* [2005] 2 I.R. 241), *O'Regan v. DPP & MacGruairc* [2000] 2 I.L.R.M. 68, *People (DPP) v. Byrne* [1974] I.R. 1, and *People (DPP) v. Griffin* [2009] IECCA 75.
75. The trial court considered that any suggested potential unfairness which may result to the accused in consequence of D/Garda O'Connor's nonavailability as a witness at trial could be answered in the following way. The presiding judge observed that both Garda Rogers and D/Garda McDonagh were present at the identification and had given evidence at trial. In respect of Garda Rogers's evidence, he noted that while Garda Rogers had indicated that he was aware that Mr. Byrne was a suspect in the case by at least the 25th of March 2010, at no stage in the course of his cross-examination was it put to him by the defence that the identification process had been contaminated by any discussion with D/Garda McDonagh, wherein he was informed that there was a suspect and that his name was Trevor Byrne. The evidence of Garda Rogers was that he was present while the CCTV footage was being played for D/Garda McDonagh, and the presiding judge remarked that it therefore seemed to the trial court that any issue arising as to what might have

occurred in the room, or while he was present, or indeed any knowledge that he may have had of any exchanges, was capable of being explored with Garda Rogers. The witness had outlined that while in the normal course of events investigation teams are told of breakthroughs such as nominations of suspects, he could not say who became aware of what and when in the course of the investigation into the present (then) alleged offending.

76. In relation to D/Garda McDonagh's evidence, the presiding judge noted that the trial court was in a position to assess his evidence for the purpose of the *voir dire*. His evidence was that he was unaware that any person had been nominated as a possible suspect in the offence captured on the CCTV footage. He further stated that he did not know D/Garda O'Connor before the events of April 2010. The trial court was in a position to assess his evidence in the light of the questions asked of him by counsel and the answers he tendered in response thereto, including such suggestions by the defence that his answers were unlikely or nonsensical.

77. The presiding judge's ruling on behalf of the trial court concluded by stating as follows:

"The Court is satisfied that the evidence of Detective Garda McDonagh is sufficiently credible to be allowed to go a jury or a fact finder, properly charged and cautioned of the dangers associated with type of evidence. The Court is not satisfied that the process was contaminated in the manner suggested and advanced by counsel such that it ought to be excluded. Further, even if the Court is incorrect in its conclusion and that information may have been conveyed by Mr O'Connor to Detective Garda McDonagh, that the person to whom his attention was drawn was a suspect or was in the frame, the Court is not satisfied based on both Larkin and Tynan that such is or would be fatal to the admissibility of evidence as a matter of law. The Court has to determine whether there is an unfairness in the process such that prejudice is caused which outweighs any probative effect of the evidence. The Court is not satisfied that the probative value of the evidence is outweighed by any suggested prejudicial effect and is satisfied that the evidence ought to be admitted. The Court is satisfied that the issue is one of weight and not admissibility and in this regard in assessing the weight the Court ought to give to the evidence, it will and must warn and caution itself about the dangers associated with a reliance upon such evidence.

In summary, in light of its consideration of the evidence of Detective Garda McDonagh, Garda Rogers and the transcript of Mr O'Connor's evidence at the second trial and having considered the submissions of the parties, the Court is not satisfied that the evidence ought to be excluded on the basis of the nonavailability of Mr O'Connor, either on a standalone basis or as part of a general application on admissibility. The Court is not satisfied that an unfairness arises by virtue of his absence such that gives rise to prejudice to the extent that the evidence ought to be excluded, or that there was otherwise an unfairness in the procedure followed which may have given rise to the risk of contamination or to render the evidence

inadmissible as a matter of law. However, as I have said, the Court is also satisfied that it must exercise particular care and afford itself and take heed of all appropriate warnings in relation to visual identification evidence and the dangers which arise from reliance upon such identification and recognition evidence. The Court considers that the evidence of Garda McDonagh passes the threshold of admissible and therefore should be admitted in evidence”.

Parties’ Submissions on Appeal

Submissions on behalf of the appellant

78. The sole ground pursued on appeal complains:

“1. The learned trial Court erred in fact and in law by admitting the evidence of identification of the Appellant by Detective Garda Patrick McDonagh in circumstances where the manner in which the footage was shown to the witness created a real risk both of prejudice to the Appellant, and of error”.

79. Counsel for the appellant submitted that while the dangers and risk of error inherent in identification evidence are well established and do not require further elaboration, further difficulties may arise where the purported identification is made by gardaí in circumstances which may involve an added risk of prejudice to the accused, and this has been recognised in *People (DPP) v. Larkin* (cited earlier), *People (DPP) v. Power* (also cited earlier), and *People (DPP) v. Foley* [2007] 2 I.R. 486. He observed that Declan McGrath in his treatise *Evidence* (3rd edn, Round Hall 2020) emphasises at para. 4-228 that there is accordingly a particular importance to the procedures adopted by gardaí in obtaining identification evidence, as where improper procedures are used there is a *“serious danger that a witness’s recollection may crystallise into a mistaken identification”*. Counsel submitted that the courts through the years have put in place safeguards with respect to identification with reference to CCTV footage, and he has referred this Court in this regard to *People (DPP) v. Maguire* [1995] 2 I.R. 286, *People (DPP) v. O’Shea* [2014] IECCA 49, and *People (DPP) v. A.McD.* [2016] 3 I.R. 123.

80. Counsel for the appellant emphasised the distinction drawn between suspect generation and suspect confirmation in *People (DPP) v. Rapple* (cited earlier). In respect of suspect confirmation (which counsel for the appellant described as a situation where the gardaí have identified a suspect and wish for an identifying witness to confirm or deny that they are correct in their suspicion), counsel submitted that particular care should be adopted to ensure that the witness’s identification is not contaminated.

81. Counsel for the appellant further referenced *People (DPP) v. Gruchacz* (cited earlier) in which the distinction drawn in *Rapple* was considered by the Supreme Court. While the Supreme Court accepted (following *Maguire*) that a jury could look at CCTV footage itself in order to make its own assessment of what was shown, it had pointed to potential dangers in their doing so, with O’Malley J. stating (at para. 102 of her judgment):

“However, I would caution against any belief that the assessment of video evidence by a jury is necessarily an entirely straightforward task, or (as might be read into

the judgment of the Court of Appeal) that it does not require any particular warning. While the technology has undoubtedly improved, it remains a fact of life that many people struggle with the recognition of unfamiliar faces from images”.

82. Counsel for the appellant further referred us to this Court’s recent decisions in *People (DPP) v. Coade* [2023] IECA 150 and *People (DPP) v. Hayes* [2023] IECA 100. He observed that this Court had endorsed the approach of trial judges who had previously commented on the good quality of the footage and the ease with which a person who knew the person depicted in the footage would be able to make a recognition of that person therefrom. He submitted that this Court had stated that cases involving CCTV footage allowed the finders of fact to see for themselves what was viewed by the witness, and as a minimum, that they would be in a position to make an assessment of how good or otherwise the opportunity available to the person was when asked to view the footage.
83. Counsel for the appellant submitted that on the basis of these authorities it was clear that while a tribunal of fact may examine CCTV footage, either to assess the credibility of identification evidence or in order to make its own assessment of what is shown, the courts have continuously recognised that the dangers of identification evidence apply equally to identifications through examination of CCTV footage as they do to identifications utilising more traditional methods. He contended that procedures should be adopted to minimise what he termed as “*the attendant risk of either prejudice or mistake in any examination of CCTV footage*”; and he reiterated that the quality of the footage is also an important factor going to the ability of the viewer to make a positive identification of the person shown therein.
84. One facet to counsel’s complaint in the present case was that there was a failure to document adequately or at all the manner in which the recognition by D/Garda McDonagh was secured. He contended that contrary to what was suggested in the *Maguire* case (i.e., the importance of allowing a witness to indicate how he/she knew the person shown in the footage, and any physical feature which, in his/her view, identified the accused with the person shown), in the present case no particular feature of the accused was referred to by D/Garda McDonagh beyond what counsel characterised as a “*bland reply*” that it was the appellant’s face he recognised. He submitted that it was only when D/Garda McDonagh was questioned further did the witness refer to the appellant’s eyes, nose and mouth; but he ultimately had to accept that the footage he was shown did not, in fact, show the suspect’s eyes.
85. Counsel argued that while D/Garda McDonagh professed to have identified the appellant with 100% certitude, it is an unfortunate reality of identification cases that even those witnesses who claim to be that certain in their recognition of a suspect can be incorrect.
86. Counsel submitted that the failure in the present case to document identifying markers or features severely hampered the ability of defence counsel to effectively cross-examine and probe this aspect of the prosecution case, thus giving rise to a fundamental unfairness to the appellant. It was contended that this is of crucial significance in circumstances where a significant strand of the prosecution case relied upon the

admission, and thereafter the strength and value, of this identification and recognition evidence.

87. Counsel for the appellant particularised in written submissions the type or species of notes that were not kept in relation to identification and recognition; the absence of which, he contended, severely hampered the ability of the defence to effectively probe the recognition evidence at trial:

- "(i) Any contemporaneous notes in relation to the purported recognition of the appellant by [D/Garda McDonagh];*
- (ii) Any contemporaneous notes in relation to the initial reactions of the Garda member at the time he purported to recognise the appellant from the aforementioned CCTV footage;*
- (iii) Any notes on the process by which the Garda member contained in the Book of Evidence were selected for the duty of viewing the aforementioned CCTV footage;*
- (iv) Any notes on who compiled the list of Garda members who were selected for the purpose of viewing the CCTV footage;*
- (v) Any notes on the criteria by which the aforementioned Garda members were selected for this duty;*
- (vi) Any record of a list of Garda members who viewed the aforementioned CCTV footage, and who were not able to recognise the appellant therein".*

88. Counsel noted that in the neighbouring jurisdiction of England and Wales, the Court of Appeal (Criminal Division) in *R. v. Deakin (otherwise R. v. J.D.)* [2012] EWCA 2637 had provided detailed guidance in respect of how CCTV identification should be undertaken and the procedural safeguards that should be utilised to secure the integrity and validity of same; which include the recording of dates, details, features used in identification, on foot of which PACE Code D were amended in the United Kingdom. Counsel submitted that while it is accepted by the appellant that the English authorities derive from a distinct statutory regime unique to that jurisdiction, the guidance provided is relevant as to the procedural safeguards that must be adopted to combat mistaken identification, and/or prejudice. He contended that the commended guidance could appositely have been, but was not, applied in the context of the present case, which was characterised by a failure to implement procedural safeguards and to record details of the identification. He submitted that in the circumstances there was a significant danger that the identification by D/Garda McDonagh of the appellant was contaminated. He thus maintained that these procedural defects were such as to render the appellant's conviction unsafe.

Submissions on behalf of the Respondent

89. Addressing the question of alleged unfairness in the trial and lack of safeguards head on, counsel for the respondent noted that the trial court had the benefit of the full transcript

of D/Garda O'Connor's evidence at the second trial, which transcript afforded the trial court full insight to what (if any) unfairness arose for the accused. He further said that the evidence of D/Garda McDonagh was bolstered by the fact that clear CCTV footage was available for the trial court to consider the reliability of his recognition of the appellant; which he described as an important safeguard which was in place at the appellant's trial, and he noted the significance of this with reference to this Court's observations in *People (DPP) v. Coade* (cited earlier) regarding the availability of high-quality CCTV footage.

90. With respect to purported defects in the identification procedure, alleged by the appellant, counsel for the respondent refuted any suggestion that the failure of D/Garda O'Connor to give evidence at the appellant's trial contaminated D/Garda McDonagh's evidence to such an extent that it should have been excluded.
91. While counsel for the respondent did not dispute the principle identified by counsel for the appellant that the risk of error and frailties is inherent to identification evidence, he stressed that there is an important distinction between identification evidence and recognition evidence, and he referred the Court to the judgment of Macken J. of the former Court of Criminal Appeal in *People (DPP) v. Fee* [2006] IECCA 102 in this regard. While counsel did not elaborate on this distinction in written submissions, Macken J.'s dicta at p. 24 of her judgment bear quotation in this context:

*"However, the jurisprudence on the matter has also further developed in that it now draws a distinction between identification and recognition, the former covering the real issue of identification and the latter covering the position where a person "identified" is in fact a person who is already known to the witness and this is more accurately classified as "recognition". This is the situation in the present case where the trial court found the witness already well knew the Applicant, a matter which had not been challenged in the course of trial. The issue was not therefore an identification issue, in reality or in law, but rather one of recognition. The applicant asserts that even in the case of recognition, indeed even more so in the case of recognition, mistakes can be made, and therefore the required warning is essential. However that does not take account of the jurisprudence in that regard, and the distinction which the trial court accepted exists, which it was entitled to accept, and which distinction it applied, in finding that it "had no doubt about Detective Garda Ryan's identification of Mr. Fee given that, "at the time Mr. Fee was well known to Garda Ryan." (emphasis added). The distinction has been recognised and applied in the recent case of **DPP v. Gilligan** (unreported Sup. Ct. 23rd November 2005). It might of course be different, if, on the particular facts of a case it was established that a material error had been made in the recognition exercise. But here there was no such evidence, and the trial court was entitled to reject the challenge to Detective Garda Ryan's evidence and to conclude that he was placed in a position of surveillance which in fact enabled him to recognise a person who was already well known to him, as the Applicant was".*

92. Counsel noted that when procedures adopted are called into question, the case of *People (DPP) v. Tynan* (cited earlier) is instructive. He observed that in that case the Court of Appeal had noted the important distinction between identification and recognition from CCTV footage, and he submitted that the law applicable to identification evidence is not readily transferrable to visual recognition; such evidence is considered, he said, to be more reliable and can be viewed in the context of the CCTV footage that is available to the trial court. While he accepted that there were defects in the procedural steps taken by gardaí in the 2010 investigation into the offences, and that it would have been preferable that contemporaneous notes were taken, he submitted that as per *Tynan* these defects fell far short of a risk of a miscarriage of justice. He observed that in the present case, the recognition evidence of D/Garda McDonagh was reliable and was buttressed by independent circumstantial evidence. The defects were instead a matter of weight, rather than admissibility, which was carefully and lawfully considered by the court below.

93. On the point of admissibility, counsel for the respondent said that the appellant has failed to properly engage with the test for admissibility in their submissions, which test he identified as having been outlined by Declan McGrath in his aforementioned work on Evidence at para. 4-263:

"The test should, instead, be whether the identification evidence is sufficiently reliable that it can safely ground a conviction or whether it is so unreliable that there would be a risk of miscarriage of justice if it is left to the jury. This accords with the approach taken in R. v. Turnbull [[1977] Q.B. 244 at pp. 229-230, [1976] 3 All E.R. 549 at p. 553], where it was held by the English Court of Appeal that, if a trial judge forms the opinion that the quality of identification evidence is "poor", he or she should withdraw the case from the jury and direct an acquittal unless there is other evidence which serves to support the correctness of the identification. This was the approach adopted by the Court of Criminal Appeal in People (DPP) v. Christo [[2005] IECCA 3 at paras. 8-9]".

94. Counsel expanded on the foregoing, identifying that in *People (DPP) v. O'Reilly* [1990] 2 I.R. 415 the former Court of Criminal Appeal (judgment of O'Flaherty J.), with reference to the judgment of Kingsmill Moore J. in *People (AG) v. Casey* (No. 2) [1963] I.R. 33, established that where the prosecution case depends *wholly or substantially* (counsel's emphasis) on identification evidence, it is for the trial judge to consider whether the evidence is sufficiently reliable to be left to the jury with a cautionary instruction or whether it should more properly be withdrawn from the jury. Counsel submitted that all facts and circumstances which bear on the correctness of the identification should be considered, including the conditions of the observation, the characteristics and demeanour of the witness and the adequacy of the procedures used. He said that a trial court is uniquely placed to consider these factors in their entirety; and if a trial court is so satisfied, that the evidence should be left to the jury and is a matter of weight to be considered by them. In respect of the present case, counsel submitted that all the surrounding circumstances were properly considered by the trial court including: independent assessment of the CCTV; the demeanour of D/Garda McDonagh; the fact

that there was independent circumstantial evidence connecting the appellant to the offences; and the fact that D/Garda McDonagh was confident in his assertion.

95. Counsel also referred this Court to *People (DPP) v. Cahill* [2001] 3 I.R. 494 wherein the Court of Criminal Appeal drew a distinction between identification evidence which purported, on its own, to connect an accused with the crime, and identification evidence which is supported by additional and independent circumstantial evidence which purported to achieve the same end. Counsel noted that in that case, the latter was properly admitted. He observed throughout his submissions that D/Garda McDonagh's evidence was, in fact, buttressed by independent circumstantial evidence, and as such it was properly admitted in the present case.
96. In relation to any reliance on the part of the appellant on *R. v. Deakin* (cited earlier), counsel for the respondent submitted that this authority is of limited applicability in this jurisdiction; that it and related jurisprudence is derived from a separate statutory scheme in a neighbouring jurisdiction; and that its applicability is further limited in circumstances where there is no lacuna in Irish law that requires to be filled.
97. In relation to counsel for the appellant's reliance upon the distinction between suspect generation and suspect confirmation, counsel for the respondent's position is that this reliance runs contrary to the evidence at trial. He observed that it was firmly established in evidence that D/Garda McDonagh recognised the appellant prior to obtaining any knowledge or awareness of the suspect; and he noted that this recognition was premised on a familiarity with the appellant owing to past encounters D/Garda McDonagh had had with him in the course of his duties as a Garda and in the local community. Counsel emphasised that notwithstanding the challenge to D/Garda McDonagh's evidence by the defence in the course of cross-examination, the witness's assertions were unwavering in that throughout he maintained an account of not being aware of any suspect(s) prior to his viewing of the footage. Counsel also drew the Court's attention to the fact that D/Garda McDonagh had expressly acknowledged the possibility of mistaken identification, but that he had not conceded that there was any such mistake in the present case; rather, he maintained his confidence and certitude in recognising the appellant to the one-hundredth percentile.
98. In net, counsel for the respondent contended that the recognition evidence in the case was sufficiently reliable to ground a conviction and that there was no reason to consider it unreliable to the extent that it risked a miscarriage of justice, as required by law. On the contrary, he argued that the evidence of D/Garda McDonagh was convincing, was capable of being independently assessed by the viewing of clear CCTV footage, and it was supported by circumstantial evidence connecting the appellant to the offences. He submitted that the trial court acted in accordance with the principles identified in its approach to the defence application at trial; and he submitted that the appellant had not established, with respect to the trial court's ruling, any error in law necessary to warrant intervention by this Court on appeal.

Court's Analysis & Decision

99. We are grateful to counsel for their detailed and helpful submissions. We have carefully considered both the law and the evidence and have arrived at a clear view in respect of the matter. We are satisfied that the appeal must be dismissed.
100. We consider that the approach of the trial court to the issue which has been ventilated again on this appeal was impeccable. In our judgment, the recognition evidence of D/Garda McDonagh was properly admitted on the basis that it was relevant and probative. Insofar as there were criticisms as to the manner in which the evidence was obtained and recorded, the court of trial was right in asserting that these went to weight rather than to admissibility. While it was contended on behalf of the appellant that the prejudicial effect of D/Garda McDonagh's evidence outweighed its probative value, we profoundly disagree with that submission.
101. While the appellant relied upon the provisions of Code D of PACE for their persuasive influence, it is not part of the law of Ireland. There was of course nothing improper in referring to that for the purpose of contending that it illustrates what is regarded as best practice in another jurisdiction, but it has to be borne in mind that we live and operate in a different jurisdiction, with our own jurisprudence and our own statutes and a written constitution guaranteeing personal rights. The trial judge in this case was right in saying that the fact that procedures similar to those in the Code D of PACE had not been followed was not determinative of the issue of admissibility.
102. That having been said, insofar as the written submissions on behalf of the respondent expressly concede that there were "*defects*" in the procedural steps taken by An Garda Síochána in the obtaining of the recognition evidence of D/Garda McDonagh, and that it would have been preferable if contemporaneous notes had been taken, there appears to be a clear and realistic acceptance and recognition by the respondent that the procedures adopted in this case were capable of legitimate criticism, and that they did not perhaps therefore represent best practice. Further, that safeguards were lacking. In regard to the latter, D/Garda McDonagh was himself prepared to acknowledge in cross-examination that a requirement, such as exists under Code D of PACE, that a record should be made was "*a good idea*", and that this approach was being increasingly adopted in practice. We therefore accept the contention of the appellant that the manner in which D/Garda McDonagh's evidence was obtained was arguably sub-optimal, but that only takes the appellant a certain distance. The fact that the procedure adopted was capable of being legitimately criticised, and the fact that there was an absence of desirable safeguards (particularly the making of a written record specifying with some particularity the basis for the recognition), is neither dispositive of the issues as to whether the evidence was properly admitted and, in circumstances where it was, in fact, admitted, whether the appellant's conviction is safe.
103. The correct approach, which we are satisfied was followed by the court below, is that commended in McGrath on *Evidence*, quoted at para. 93 above. The court of trial expressly considered whether, notwithstanding criticisms legitimately made, the evidence of D/Garda McDonagh was sufficiently reliable that it could safely ground a conviction or

whether it was so unreliable that there would be a risk of miscarriage of justice if it was left to the jury. The conclusions of the court of trial in that regard have already been quoted at para. 77 above, but bear reiteration in part at this point:

"In summary, in light of its consideration of the evidence of Detective Garda McDonagh, Garda Rogers and the transcript of Mr O'Connor's evidence at the second trial and having considered the submissions of the parties, the Court is not satisfied that the evidence ought to be excluded on the basis of the nonavailability of Mr O'Connor, either on a standalone basis or as part of a general application on admissibility. The Court is not satisfied that an unfairness arises by virtue of his absence such that gives rise to prejudice to the extent that the evidence ought to be excluded, or that there was otherwise an unfairness in the procedure followed which may have given rise to the risk of contamination or to render the evidence inadmissible as a matter of law. However, as I have said, the Court is also satisfied that it must exercise particular care and afford itself and take heed of all appropriate warnings in relation to visual identification evidence and the dangers which arise from reliance upon such identification and recognition evidence. The Court considers that the evidence of Garda McDonagh passes the threshold of admissible and therefore should be admitted in evidence".

104. We reiterate that the approach of the court of trial was impeccable. They were correct in law. Their findings as to fact were findings that were legitimately open to them on the evidence. The criticisms made by the defence as to the procedures utilised for the purpose of obtaining the recognition evidence of D/Garda McDonagh, and the lack of safeguards pointed to, were acknowledged, and were taken into account by the court of trial in considering the weight to attach to that witness's evidence. The court below considered the dangers associated with recognition evidence and cautioned itself in regard to such evidence. It considered the implications of the criticisms that had been made, and in particular those arising from the lack of contemporaneous notes, and it concluded that it could nonetheless safely consider the recognition evidence in light of the CCTV evidence also available. This was consistent with the approach taken by this Court in *Tynan* and other cases where, as the submissions made by the respondent have emphasised, a distinction has been drawn between identification evidence and recognition evidence, and guidance has been provided as to how the latter may be approached in circumstances where the trier of fact may have available to them high quality CCTV footage and/or stills that could be utilised as tools in assessing the reliability of the identifying witness. In this case, the Special Criminal Court, in its role as a trier of fact, had available to it high quality CCTV footage and stills to assist it in assessing the reliability of the recognition evidence proffered by D/Garda McDonagh. Ultimately, the court of trial in this case was of the view that, notwithstanding the criticism made of the procedures by means of which the recognition evidence had been obtained, it could safely be admitted, and that reliance could be placed upon it.

105. Accordingly, in the absence of any error of principle on the part of the court of trial having been demonstrated, we are satisfied that the appellant's trial was satisfactory and that his conviction is safe. The appeal is accordingly dismissed.