An Chúirt Achomhairc

The Court of Appeal

Charleton J
Edwards J
McCarthy J

Court of Appeal Criminal number: 111/2024
[2024] IECA 204
Limerick Criminal Court bill number: LK 125/2021

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Appellant

- and -

Edmond (Eamon) O'Neill, Colm Geary, Thomas McGlinchey and Anne-Marie Hassett
Accused/Respondents

Judgment of the Court delivered on Wednesday 31 July 2024

1. On 14 May 2019 the District Court, sitting at Ennis, issued two search warrants for the home and office of the accused Edmond O'Neill in county Clare. He is a Superintendent in An Garda Síochána, the other accused are also sworn members. The basis of that warrant is argued to be inadequate and intentionally deceptive. It was justified by an 8 page, single-spaced, information sworn before the court by a garda of detective inspector rank. At that point, the enquiries pursued were as to offences under the Criminal Justice (Corruption Offences) Act 2018. The charges on the indictment against the accused now concern interference with the course of justice between May 2018 and May 2019. The search yielded information, the prosecution allege, which may tend towards the establishment of proof. That, however, will ultimately be a matter for a jury. Of significance here is that during the search, several mobile telephones and computer devices were seized and scrutinised as to messages stored therein. It is appropriate to avoid any particular detail concerning that proposed evidence here.

2. Before Judge Tom O'Donnell in Limerick Circuit Court, an application was made in October 2023 at a very long preliminary hearing by all accused, under s 6 of the Criminal Procedure Act 2021, to exclude essentially everything found in the home of Edmond O'Neill. Judge O'Donnell, in a ruling on 6 November 2023, found the search warrant to be bad in law because of deception and inadequacy. The judge also held that Anne-Marie Hassett, who also lived in the house, had also been illegally held by the gardaí during that search. This is a prosecution appeal under s 7(1) of the 2021 Act seeking to reverse that ruling. Section 7(1) of the 2021 Act provides:

> (1) Where the trial court makes a relevant order at a preliminary trial hearing to the effect that evidence shall not be admitted at the trial of the offence, the prosecution may, subject to subsection (2), appeal the order on a question of law to—
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> (a) the Court of Appeal, or
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> (b) in the case of an order made by the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution.

Ruling

3. Put in concise terms, the reasoning of the trial judge was that:

1. A crucial witness had not been called by the prosecution and that this put a "spectre" over the prosecution case because, as it was put, that witness "looms largely" and his "absence is a mystery to the Court": that this absence of testimony undermined the State's case.
2. In presenting the information grounding the search warrant to the District Court judge, the gardaí "displayed a lack of candour", which was deliberate and was a conscious stratagem both in testimony and in the conduct of the corruption investigation.
3. That Anne-Marie Hassett was both unlawfully questioned and unlawfully detained during the course of the search while she was in her night attire at the home she shared with Edmond O'Neill and, consequently, in revealing to the investigating gardaí the pin number to unlock her phone and in giving them permission to examine it, all such evidence should be excluded.
4. In addition, the judge found a problem with the continuity of the chain of custody of the electronic file whereon the analysis pertinent to the phone and computer devices was excluded: evidence that could not be more central to the prosecution case.
5. Finally, the judge reasoned that the judge issuing the warrant should have been warned that the suburban address at which Edmond O'Neill and Anne-Marie Hassett resided was a dwelling, within the meaning of Article 40.5 of the Constitution and that this constituted further proof of "the mindset throughout the process".

4. This is how the trial judge put his reasoning, numbers added where the sequence stopped to assist analysis, as to the main basis for excluding the bulk of the evidence:

> The Court has carried out a thorough analysis of all the evidence in this case. It has carefully considered all the legal submissions and the vast amount of supporting caselaw that has been opened to it. In analysing the very thorough legal arguments and propositions, the Court has posited a number of questions to itself insofar as the section 10 warrants are concerned in respect of [suburban address] and Roxboro Road Garda Station. These are the warrants that were issued on the 14th of May 2019. The questions based on the evidence adduced and the legal submissions and the caselaw opened:
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> 1. Do I believe that the constitutional rights and protections of Eamon O'Neill and Anne-Marie Hassett are engaged? I do.
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> 2. Do I believe that their constitutional rights and protections were breached? I do.
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> 3. Do I believe that the gardaí displayed a lack of candour in the preparation of the informations seeking the issue of the warrants signed on the 14th of May 2019? I do.

4. Do I believe it was deliberate? I do. In the light of the contents of the informations and in the light of the contents of the briefing document which was discovered at a very late stage, I do.

5. Do I believe that the informations put before District Judge [Name] contained a serious deficit of material facts? I do.

6. Do I believe that there was a conscious and deliberate decision to exclude any mention of Anne-Marie Hassett in the informations? I do.

7. Do I believe that Anne-Marie Hassett was unlawfully detained? I do.

8. Do I believe that Anne-Marie Hassett was unlawfully questioned about specific matters regarding a phone call from her phone made on the 23rd of January 2019 and also about the movements of her husband [at that time domestic-partner, in fact] on the nights of the 11th, 12th and 13th of January? I do.

9. Do I believe that the data information extracted from Eamon O'Neill's mobile phone and Anne-Marie Hassett's mobile phone was unlawful in the context of the section 10 warrants? I do.

10. Do I believe that this was a deliberate action on the part of the gardaí in the light of the evidence adduced in this particular case? I do.

11. Do I believe that the search warrants and all that flowed from them should be excluded in all the circumstances? Yes, I do.

5. The point of an appeal under s 7 of the 2021 Act is that an erroneous exclusion of evidence can be reversed, provided error is demonstrated and that it is ostensibly reliable and significant evidence which, on its own, or in conjunction with the rest of the testimony, might reasonably assert the guilt of the accused. Since the context here is the simple process of a judge approving the issuing of a search warrant on the basis that the judicial mind is satisfied with the reasons for suspicion, put before him or her, that evidence is to be found at a particular place, it is important to quote s 10 of the Criminal Justice Act (Miscellaneous Provisions) Act 1997. In doing so, and having regard to (1) and (2) above, the reason for the interposition of a judge in searches, at least since *Damache v DPP* [2012] IESC 11, [2012] 2 IR 266, and in arresting people, keeping them in place for a search or restricting their movements, and intruding on a dwelling with the concomitant invasion of privacy, is because constitutional rights are engaged. Section 10 provides:

> (1) A judge of the District Court, on hearing evidence on oath given by a member not below the rank of inspector, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of—
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> > (a) an indictable offence involving the death of or serious bodily injury to any person,
> > (b) an offence of false imprisonment,
> > (c) an offence of rape, or
> > (d) an offence under an enactment set out in the First Schedule to this Act,
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> is to be found in any place, issue a warrant for the search of that place and any persons found at that place.

(2) A warrant under this section shall be expressed to and shall operate to authorise a named member, accompanied by any other member, to enter, within one week of the date of issuing of the warrant (if necessary by the use of reasonable force), the place named on the warrant, and to search it and any persons found at that place and seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to an offence referred to in subsection (1).

(3) A member acting under the authority of a warrant under this section may—

(a) require any person present at the place where the search is carried out to give to the member his or her name and address, and
(b) arrest otherwise than on foot of a warrant any person—

(i) who obstructs or attempts to obstruct that member in the carrying out of his or her duties,
(ii) who fails to comply with a requirement under paragraph (a), or
(iii) who gives a name or address which the member has reasonable cause for believing is false or misleading.

(4) A person who obstructs or attempts to obstruct a member acting under the authority of a warrant under this section, who fails to comply with a requirement under paragraph (a) of subsection (3) or who gives a false name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500, or to imprisonment for a period not exceeding 6 months, or to both.

(5) The power to issue a warrant under this section is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.

(6) In this section—

"commission" in relation to an offence, includes an attempt to commit such offence; and "place" includes a dwelling.

Findings of fact

6. Central to the submissions made on behalf of all accused, who succeeded to varying degrees in having the central evidence in this case excluded by the trial judge, is the proposition that a finding of fact has been made and that this cannot be appealed. What, however, is being analysed on an appeal is whether there was not only evidence to support a finding of fact but whether the foundation in law of such finding was in error or not. The principles to be applied by the appellate courts in considering the argument that a trial judge was incorrect in making a finding of fact based on oral evidence were set out in *Hay v O'Grady* by McCarthy J as follows [1992] 1 IR 210, 217:

1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.

> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority.
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> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. … I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge.

7. These principles can be more concisely stated to the effect that: firstly, findings of fact supported by credible evidence are not to be disturbed; secondly, inferences of fact derived from oral evidence can be reconsidered, but an appellate court should be slow to do so; and, thirdly, inferences drawn from circumstantial evidence can be more readily put aside by an appellate court since that court is in as good a position to draw its own inferences as the court of trial; see *Ryanair v Billigfluege* [2015] IESC 11 [3-4]. But, even with fact, an appellate court is not simply looking at facts in isolation, as if separated from the analysis whereby they have been found, but the stated basis on which facts were found. Thus, in *O'Connor v Dublin Bus* [2003] 4 IR 459, the Supreme Court found that there was credible evidence on which the trial judge could have concluded that, although the plaintiff had exaggerated his injuries, he believed what he was saying and was an honest person. In these circumstances, it was not open to the Court to put these findings aside. As Denham J stated, at 466-7:

> It is quintessentially a matter for the jury (or a trial judge acting in place of a jury) to hear and consider the evidence of a plaintiff or witness and to determine the credibility and reliability of that person and to determine the consequent facts of a case. It is only in exceptional circumstances that an appellate court would intervene in such a determination.

8. An example of where facts were re-analysed on appeal outside the parameters of considering the legal basis on which these were found is *McDonagh v Independent Newspapers* [2017] IESC 59, [20], [2018] 2 IR 79. This was a defamation case concerning the role of an appellate court in reversing findings of fact of a trial court, and, in particular, in circumstances where an appellate court substitutes its own ruling in place of a trial court's determination. In relation to this particular case, Charleton J stated:

> Up to the date of the Court of Appeal judgment, appellate courts had certainly substituted their own view of damages when upholding liability against a defendant and had also reversed a finding relating to the defamatory nature of words. Courts on appeal, however, had never purported to make a finding of fact that facts rejected by a jury were in reality only capable of acceptance thus enabling the substitution by an appellate court of findings of fact in their place. Transcripts of evidence are not a sound basis for substituting findings of fact made by those who have listened and watched through an entire trial. It is all too easy to miss a nuance within an issue, to misstate similar events in substitution for one another, to take the view that what does not read well could not be true, or to blanch at an unattractive statement without being forced to listen through to any qualification that may accompany it. Certainly, the role of an appellate court in reassessing what in the court of

> trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.

9. In *Leopardstown Club Limited v Templeville Developments Limited* [2017] IESC 50 [80], [2017] 3 IR 707, the Supreme Court considered the rule in *Hay v O'Grady* and whether this had been misapplied by the Court of Appeal. Denham CJ found that that Court of Appeal "proceeded as if it were a trial court re-hearing a case and consider[ed] evidence afresh. It dismissed the learned trial judge's findings as to credibility and facts." Denham CJ stressed that "an appellate court should not interfere with a primary finding of fact by a trial court which has heard oral evidence, unless it is so clearly against the weight of the evidence as to be unjust." In *The People (DPP) v Doyle* [2017] IESC 1, [2018] 1 IR 1, McMenamin J confirmed that the principles set out in *Hay v O'Grady* governed appeals in criminal as well as civil cases. And here, it must be remembered, that what is happening on a preliminary trial hearing is, apart from directions as to conduct of the trial, a ruling is being made as to fact whereby evidence is excluded. That must be done on the proper legal foundation:

> 242. The issues of fact-finding and inference drawing were dealt with by the Court of Criminal Appeal in *The People v Madden* [1977] IR 336. But the principles outlined there were later refined by this Court in *Hay v O'Grady* [1992] 1 I.R. 210. Relying on statements of the law in *The People v Madden* [1977] IR 336, counsel for the appellant submitted that this Court was in as good a position to draw inferences from facts as the trial judge, and should do so in support of the case he advanced.
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> 243. However, in *Hay v O'Grady* [1992] 1 IR 210 at 217, McCarthy J observed that:
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> > 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes LJ in "Gairloch," The SS, Aberdeen Glenline *Steamship Co v Macken* [1899] 2 IR 1, cited by O'Higgins CJ in *The People (Director of Public Prosecutions) v Madden* [1977] IR 336 at p 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge.

10. No judge is at large in making what may appear to be un-appealable findings of fact. For a start, there has to be evidence to support a finding. That may, incorrectly, be said to be especially so where the findings, as here, are of deception and of effective abuse of a court process; but there is no difference in standard depending on the gravity of the findings, only a caution to exercise heedfulness as to what a judge is doing. Then, if inferences are being drawn, and here those inferences were devastating, the logic underpinning a proposition that because of fact A, on its own, or fact B and C together with A, another fact is found of which there is no direct evidence, must be sound. Finally, the reasoning of such an inference may be subject to existing legal analysis. That must be followed. It was not here.

Inference from absence of a witness

11. Making an inference on the basis of the failure of a litigant to call readily available and highly important evidence should only be engaged in where that is justified. Here, the trial judge founded his later inferences on a basis that, somehow, an engagement with deception of the court had been kept by the State witnesses through the deliberate suppression of the testimony of one Detective Inspector McNulty. Whereas hints may have been dropped by counsel to this effect, there is a need to make an actual case. A proposition as devastating as a witness having been deliberately hidden should not be left lingering in the shadows but should instead be put directly out into the searching rays of forensic analysis. This merely floated idea assumes a colourful and foundational part of the reasoning underpinning the entire of the ruling. The trial judge stated:

> Also, the spectre of Detective Inspector McNulty looms largely in every aspect of this case. In the Court's view, his absence is a mystery to the Court as no doubt he might have given valuable evidence as to the mindset throughout the process and the direction of this whole investigation and in particular, surrounding the instructions given regarding the preparations by Superintendent Brennan and Detective Sergeant Gilmore of the informations laid before [the judge who issued the search warrant] on the 14th of May '19 and the briefing note that was prepared.

12. In the next paragraph, the trial judge references this: "Again, the presence of Detective Inspector McNulty at the time and the absence now is puzzling in the extreme." That is followed by a passage stating that the judge had carried out "a thorough analysis" of the evidence and references the "vast amount of supporting caselaw that has been opened to" the court. It is difficult not to sympathise with yet another case where simple legal propositions have been turned into a maze of complexity. That is why counsel in addressing a court are best expressing a principle. It is not necessary to reconsider what are decided cases: these establish a principle.

13. But, the principle engaged by the judge, that there was a sinister connotation to the absence of a witness, was wrong in law. Laffoy J has analysed this matter in *Fyffes PLC v DCC PLC and Others* [2009] 2 IR 417. Essentially, as a proposition, it is wrong to raise an inference as to a missing witness unless that inference is compelled by the run of the evidence. Further, that proposition is one expressly related to civil litigation, since a trial judge has other remedies in a criminal case: these should be called on before being drawn into unsupported fact finding based on inference. In *Fyffes*, Laffoy J stated:

> The other issue which it is convenient to consider in the context of the burden of proof is much more difficult. It was the plaintiff's contention that the court should draw certain inferences from the failure of the defendants to call certain witnesses. The plaintiff made this argument in relation to the defendants' failure to call –
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> > (a) Kyran McLaughlin, a senior executive in Davy, whom it was contended was a critical witness in relation to the dealing issue and whose involvement will be outlined later, and
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> > (b) two of the non-executive directors of DCC, the chairman, Mr Spain, and Mr Gallagher, and two of the Dutch directors of Lotus Green, Gerard Jansen Venneboer and Henri Roskam, in relation what was characterised as Mr Flavin's direct and controlling involvement in the share deals.

While the plaintiff did not cite any authority of a court of this jurisdiction in support of its argument, it did rely on a number of English authorities, which it is necessary to consider in some depth in order to ascertain whether they support the proposition advanced by the plaintiff.

The earliest authority cited by the plaintiff was *M'Queen v Great Western Railway Company* [1875] LR 10 QB 569. The plaintiff in that case sued for the value of a parcel of drawings which he had entrusted to the defendant railway company for delivery. The goods never reached their destination, having been stolen while in the custody of the defendant. The defendant pleaded a defence under the Carriers Act. The plaintiff responded that the defence was not available because the goods were lost by reason of having been taken feloniously by the servants of the carrier. The trial judge directed the jury that, if the facts, in their opinion, were more consistent with the guilt of the defendant's servants than with that of any other person not in their employ, that was sufficient to call upon the defendants for an answer, which not having been given, the inference might well be that a felony had been committed by some of the defendant's servants. It was held that the direction was wrong and that the jury's verdict in favour of the plaintiff was wrong. The principle relied on by the plaintiff is contained in the following passage of the judgment of Cockburn CJ, who, coincidentally, had been the trial judge, at p 574:

> "If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that *prima facie* case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not as a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not disprove the *prima facie* case. But that always presupposes that a *prima facie* case has been established; and unless we can see our way clearly to the conclusion that a *prima facie* case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."

It was held that a *prima facie* case had not been made out that the defendant's servants, rather than somebody else, had stolen the goods. All that had been established was that the defendant's servants had a greater opportunity of committing the theft.

In *Reg v IRC, ex p Coombs & Co* [1991] 2 AC 283, the issue was whether a notice under the taxation code issued by the Inland Revenue to a firm of stockbrokers to deliver or make available for inspection documents in their possession relevant to the tax liability of a taxpayer, a former employee, in connection with various named companies should be quashed. Against the background of a presumption of validity and having noted the sparseness of the evidence adduced by the IRC, Lord Lowry, with whom the other Law Lords agreed, stated as follows at p 300:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."

The IRC had relied on their general duty of confidentiality as a justification for their reticence. Lord Lowry accepted that, by reason of the principle of confidentiality, the general rule for taking account of a party's silence did not fully apply. The earlier authorities were reviewed by the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Reports Med 223. Brooks LJ summarised their effect in the following passage from his judgment:

> From this line of authority I derive the following principles in the context of the present case:
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> (1) In certain circumstances the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
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> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call witnesses.
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> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
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> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

That case which concerned a claim on behalf of an infant who suffered irreversible brain damage before birth in the defendants' hospital, which it was alleged was caused by negligence of the defendants, illustrates the application of the foregoing principles. The trial judge had held that the defendants were negligent, in that the senior house officer should have attended and examined the plaintiff's mother about two hours before the birth. That led to an issue on causation, which turned on what the senior house officer would probably have done if he had attended the mother, read her notes and seen the cardiotocograph trace and, in particular, whether a caesarean section would have been performed at that stage, which would have prevented the injury which was caused because, as the baby moved down the birth canal, the umbilical cord was wrapped around his neck and had a knot in it and he was effectively being strangled. The senior house officer, who was living in Australia, was not called, nor was the registrar who had been on call that night, nor the consultant with overall responsibility for the obstetrics unit. On an analysis of the evidence, Brookes LJ identified the evidence on the issue as to what the senior house officer would have done which was adduced by the plaintiff as the evidence of two expert witnesses (whose evidence conflicted with the evidence of two expert witnesses called on behalf of the defendants) and certain textbook references. The Court of Appeal held that the trial judge was entitled to adopt the course he chose to adopt, which was to infer from the failure of the senior house officer to attend the trial that he had no answer to the criticism made and to find that he would have done what the plaintiff's expert witnesses testified should have been done and that he would have proceeded to a Caesarean section. The Court of Appeal found that the plaintiff had established a *prima facie*, if weak, case as

> to what a doctor would have done in the hypothetical situation the court was required to envisage. The trial judge was entitled to treat the absence of the senior house officer, in the face of a charge that his negligence had been causative of the catastrophe which had befallen the plaintiff, as strengthening the case against him on that issue.
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> The court was referred to three recent decisions of the English High Court in which the application of the principles set out by Brooks L.J. in the *Wisniewski* case was considered: *Pedley v Avon Insurance* [2003] EWHC 2007; *Rock Nominees v RCO Holdings* [2003] 2 B.C.L.C. 493; and *Lewis v Eliades (No. 4)* [2005] EWHC 488 (Unreported, England and Wales, High Court, Smith J, 23rd March, 2003). Having considered the judgments in those cases, I am of the view that decisions made in the last two cases to draw adverse inferences because of the failure to call witnesses turned very much on the facts of those cases.
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> While, as I have already stated, the plaintiff did not point to any Irish authority in which the basis on which adverse inferences may be drawn from the absence or silence of a witness whose evidence might be expected to be critical to an issue arose, I have no doubt that in practice, in the course of fact finding, judges do draw adverse inferences in such circumstances. The type of situation I have in mind arose in one of the earlier authorities considered in the *Wisniewski*: *Herrington v British Railways Board* [1972] AC 877. Where an issue arises as to whether an adverse inference should be drawn, I consider that the principles outlined in *Wisniewski* are helpful guidelines for the court.

14. That analysis has been quoted at length because the principle is so important: a judge is not to be drawn into a false equation that the absence of witness A means deceit by every other witness testifying to the same effect. That, in reality is what the trial judge held here. There are examples where a witness is so central to a fact that their absence may be held to be more than puzzling. Failing, in *The Leopardstown Club Ltd v Templeville Developments Ltd and Philip Smith* [2013] IEHC 526 to call the very person who had the most knowledge as to the citing of a major electricity cable, which was the crux of the case, enabled an inference, but one arrived at with caution. That case also cited the analysis of Laffoy J. But, that is not this case. Furthermore, at the appeal hearing, the Court made enquiry as to whether anyone on behalf of the accused gardaí had addressed the trial judge and called for the detective inspector to be called. That did not happen. The distinction as between civil and criminal cases is that in a civil case a trial judge is not empowered, of the judge's own motion, to call further witnesses. To that, statutory exceptions may be grafted. But, at common law, and especially for the resolving of controversies, in criminal proceedings, a trial judge in the interests of justice is empowered to call a witness; Steven Powles, Lydia Waine and Radmila May, *May on Criminal Evidence* (6th edn, Sweet & Maxwell 2015) at [19-06] citing Lord Parker CJ in *Cleghorn* [1967] 2 QB 584 at 5587:

> It is abundantly clear that a judge in a criminal case where the liberty of the subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the state should have the right to call a witness who has not been called by either party. It is clear, of course, that the discretion to call such a witness, should be carefully exercised, and indeed, as it was said in Edwards by Erle J: 'There are, no doubt, cases in which a judge might think it a matter of justice so to interfere, but generally speaking, we ought to be careful not to overrule the discretion of counsel who are, of course, more fully aware of the facts of the case than we can be.

15. While it is, accordingly, exceptional for a judge to call a witness, instead of being inveigled into the foundation for his judgment that deception was afoot, the trial judge should instead, himself, have considered calling the detective inspector. No doubt he would have done so had the notion

of deception by common design been more than hinted at. Or, the trial judge could have simply said: the Court needs to hear from witness N. That was what was appropriate had these emotions of disquiet been forming during the hearing; and they may have been mere seeds that later unexpectedly flowered. While that power was not available in the *Templeville* case or the *Fyffes* case, it was available here. That would have cleared up any mystery that might have gravitated the thinking of the judge towards a deliberate scheme to withhold information so important and so damning to the State's case that it had been cunningly supressed.

16. That finding was unjustifiable. It was wrong in law. Since, further, it was a foundational element of the trial judge's decision that he had been the subject of deception by State witnesses, the ruling of 6 November 2023 on that ground alone must be reversed. There are, however, other reasons and in the context of the use made of the decisions as to search warrants, it is important to restate the underlying principles.

Reasonable suspicion

17. Section 10 of the 1997 Act has already been quoted. To reiterate, where the offence under investigation is one involving death or serious injury, or is false imprisonment, or is rape, or comes within the list of scheduled offences to the legislation, a judge may "issue a warrant for the search of that place and any persons found" there, provided the judge is satisfied that "there are reasonable grounds for suspecting that evidence of, or relating to the commission of" such an offence is to be found there. The standard is: (1) that the offence under investigation has passed a threshold of seriousness, this does; and that (2) the suspicions of the investigating gardaí put before the judge are based on reasonable grounds.

18. That is the principle and a plethora of case law, such as that opened to the trial judge, is both unnecessary and liable to unintentionally confuse.

19. A reasonable suspicion is self-explanatory and case citations cannot add to the analysis of a simple concept. What is not allowed is that arbitrary or capricious imaginings are enabled to infringe the right to privacy or to liberty. Both are involved in a search and both are constitutional rights; Article 40.5 and Article 40.4.1º of the Constitution. In so acting, there will be an invasion of the private space of suspects, whereby aspects of the nature of their lives will inevitably be revealed. That is unavoidable. What the law has set is the standard for such intrusion: reasonable suspicion. A search warrant is part of the investigation process and is not the proof of guilt. There must be a suspicion and that suspicion must be based on reason. That can be contrasted to hunch or intuition. There is nothing wrong with inference or mere suspicion leading gardaí in the direction of enquiries or investigations, but to breach the protection of the home, grounds for suspicion that would enable a reasonable person to also hold such a suspicion must be demonstrated. That is the principle, nothing more or less.

20. It is appropriate to eschew detail in reference to the lengthy and extremely thorough information sworn in aid of obtaining the relevant warrant. Referenced here is the sworn information for the dwelling, as opposed to the office in respect of which an issue does not arise. That sworn document details the circumstances for seeking the warrant. The warrant was granted by a District Court judge in the context of a criminal investigation by the Garda National Bureau of Criminal Investigation into alleged corruption by members of An Garda Síochána. Superintendent Brennan applied for the warrants at Ennis District Court on 14 May 2019. Information from an anonymous source, it was averred, was received implicating a member of An Garda Síochána directly in criminal offences in the Limerick area. Surveillance under s 5 of the Criminal Justice (Surveillance) Act 2009 began on 20 December 2018, and it was alleged that it

had been established, inter alia, that this member of the gardaí had received a sum of money in exchange for providing information to persons of interest concerning an ongoing investigation into money laundering offences. This Court has no idea as to the validity of any such allegation. That, however, is not the point: reasonable suspicion is the point.

21. Gardaí, it was averred, received information that Edmond O'Neill informed that member that the GNBCI were investigating his activities. This was corroborated, or so it is claimed, by way of CCTV and mobile phone records. On the basis of this, the sworn information for the warrant sets out that there was a reasonably held belief that Edmond O'Neill was in possession of information in relation to a confidential and sensitive garda investigation into the criminal activity of "a sworn member" and that he had unlawfully disclosed confidential information to that member which, it is alleged, impeded the prevention, detection or investigation of criminal offences. Following from these developments, a warrant was sought to further investigate these alleged offences by Edmond O'Neill. This included the location and seizure of evidence including any mobile phones, laptop computer, electronic devices onto which a mobile phone could be backed up, any relevant paper documents and any other evidence relevant to the investigation that could be found at Gort na Rí, which was obviously a personal home. The application for the warrant also included a request to search the said place and any person found at the said place pursuant to the provisions of s 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as amended by s 6 of the Criminal Justice Act 2006. Again, how any of this might stand up at trial, the Court can have no idea. The point is that there was a reasonable suspicion. The point is that it was put before a judge who agreed there was. Any judge would.

22. There is more than ample there, by a multiple, to justify this search. What is noticeable is the absence of citation of fundamental principle in the application and ruling. A reasonable suspicion is one founded on some basis in fact which demonstrates that in issuing the warrant the judge may be satisfied that the officers are not skating off on a whim but acting reasonably. This is not about proof or the application of the laws of evidence; that is for the trial. A suspicion based on hearsay evidence may still be reasonable as may, of itself, the discovery of a false alibi, or information offered by an informer who is categorised as reliable. A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion; *The People (DPP) v McCaffrey* [1986] ILRM 687. The relevant law has been fully explained by the Supreme Court in *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34, [2018] 1 IR 521, in general terms and noting that the particular decision in that case is confined to competition investigations, which was the legislation in question on that appeal. Charleton J summarised the law on reasonable suspicion thus:

> In terms of the ordinary construction of the powers of search, a warrant is issuable by the District Court on reasonable suspicion that "evidence of, or relating to" an offence under the 2002 Act "is to be found in any place"; thereafter the officers of the Commission have a month to "enter and search the place" and to "exercise all or any of the powers conferred on an authorised officer under this section." A reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting, issuing the warrant or extending the detention of the accused acted reasonably; see Glanville Williams, "Arrest for Felony at Common Law" [1954] Crim LR 408. A reasonable suspicion can be based on hearsay evidence or the discovery of a false alibi; *Hussein v Chong Fook Kam* [1970] AC 942: or on information offered by an informer who is adjudged reliable; *Lister v Perryman* [1870] LR 4 HL 521, *Isaacs v Brand* (1817) 2 Stark 167, *The People (DPP) v Reddan* [1995] 3 IR 560. A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion, as may a suspicion communicated from one official to another, which is enough to leave that other individual in a state of

> reasonably suspecting; *The People (DPP) v McCaffrey* [1986] ILRM 687. The fact that a suspect is later acquitted does not mean that there was not a reasonable suspicion to ground either an arrest or a search. It is accepted by the European Court of Human Rights that "the existence of a reasonable suspicion is to be assessed at the time of issuing the search warrant"; *Robathin v Austria* [2012] ECHR 30457/06 at para. 46. Having information before a judge of the District Court whereby he or she may reasonably suspect the potential presence of information on a premises founds the warrant. The standard being applied here is such as might be familiar from civil or criminal practice. But issuing a search warrant is not to be confounded with any analogy with the criminal trial process. That is not the task. Facts are not being found: facts are being gathered. It necessarily follows that what is involved is an exercise in the pursuit of what is potential, essentially an exercise which may yield no information or limited information. It is of the nature of a criminal enquiry that a warrant may authorise an intrusion into someone's privacy to little or no effect. This is of the nature of what is required in the course of information gathering and a negative result does not upset the validity of what was done if, after the event, information that may serve towards displacing the presumption of innocence happens not to have been gleaned. The power to issue the search warrant, therefore, does not in this instance inform the nature of the powers that may be exercised pursuant to it.

23. This judgment drew on the earlier analysis in *DPP (Walsh) v Cash* [2007] IEHC 108 [11]; [2008] 1 ILRM 443 which in any event, is standard law:

> Reasonable cause for arrest equates with the concept of reasonable suspicion. In that regard, a reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting the suspect acted reasonably in suspecting them. A suspicion communicated by one garda to another can be sufficient to constitute a reasonable suspicion, provided there is sufficient particularity provided as to why that suspicion should be held; *The People (DPP) v McCaffrey* [1986] ILRM 687. Information offered by an informer who was adjudged reliable can be sufficient to ground an arrest; *Lister v Perryman* [1870] LR 4 HL 521, *The People (DPP) v Reddin and Butler* [1995] 3 I.R. 560.

24. It is also appropriate to consider this issue of reasonable suspicion from the point of view of how the law has developed. The intervention of judicial authorisation used to be no more than that of reading a brief sentence from the officer applying for the warrant to search merely affirming that that officer held a reasonable suspicion. Here, the major change was in *The People (DPP) v Tallant* [2003] 4 IR 343. This authority requires that the basis for holding that the officer did indeed have a reasonable suspicion must be stated and that this must be enough for the judge to conclude that such suspicion is reasonably held. There is nothing more than that required. This is demonstrated by this Court's decision in *The People (DPP) v FR and AR* [2019] IECA 212 [48], [2020] 2 IR 719, where that standard was all too clearly reiterated:

> There was no systems failure and no evidence to justify a finding that the warrant had been issued in excess of jurisdiction. There was sufficient evidence before the District Judge to enable him to be satisfied of that about which he was required to be satisfied, namely that the informant had formed a suspicion, upon reasonable grounds, that the circumstances said to justify the issuing of a warrant existed. He had the informant's sworn testimony that she held the required suspicion, and the grounds upon which she had formed it, namely that she was in receipt of intelligence that she believed to be reliable and, moreover, on the basis of matters observed in the course of her own personally conducted covert surveillance of the subject premises.

25. What is also notable about this information is that it looks forward to the Supreme Court decision in *The People (DPP) v Quirke* [2023] IESC 5 in that it specifies an interest in the digital space by specifying a desire to search the home and the office stating that the deponent was "seeking to locate and seize evidence to include any mobile phones, any laptop computers, any electronic devices onto which a mobile phone can be 'backed up', and any relevant paper documents at this place to which Superintendent Eamon O'Neill has access and any other evidence relevant to this investigation at this place." In the written submissions on this appeal, some accused submit that the Supreme Court in *Quirke* held the warrant unlawful for not mentioning a desire to search in the digital space. That is inaccurate. The warrant was expressly found to be valid. Further, the finding was that the computer in question, demonstrating an interest in human decomposition through the searches found on it, could have been seized as a physical object. Here, the request is specific for a search in the digital space and the searches of those devices is lawful. It is unnecessary to excuse a breach of rights by inadvertence or subsequent legal development as the information seeks enquiry into the digital space. Further, while the phone of Anne-Marie Hassett was of interest to the investigators, there is authorised a search in the digital space of her phone, being any phone to which the accused Eamon O'Neill had access. That, together with the overriding action, if necessary to this analysis, of her surrendering her phone and of giving the searching officers the pin number to unlock it was an act of consent.

Missing averments

26. Part of the reasoning in the trial judge's ruling is that vital averments were excluded; and that deliberately. There is no basis for that decision. The basic test is proof that a reasonable suspicion was held by the officer applying for a warrant to search. Further, it seems that the decision in *The People (DPP) v Corcoran* [2023] IESC 15 was presented to support such a proposition. That is incorrect.

27. In that case, the Supreme Court affirmed a Court of Appeal decision which ruled in favour of a journalist who had his mobile phone seized by gardaí with a view to obtaining information relating to a serious criminal incident pursuant to s 10 of the Criminal Procedure Act 1997. The accused asserted journalistic privilege over his refusal to give the phone to gardaí and reveal his sources. The search warrants there were issued without any evident regard to these facts. Of fundamental importance to that case was that the District Court Judge was entitled to be told that Emmett Corcoran was a journalist who had always asserted journalistic privilege in respect of this material before any disclosure order was ultimately made by the District Court. Hogan J held that these were matters which ought to have been, but were not, specifically drawn to the judge's notice by the gardaí involved. That omission was fatal to the validity of the search warrants here. He stated:

> 102. This means that unless such is plainly contraindicated by another statutory provision or by a common law rule, State bodies (including the Gardaí) must exercise their functions in a manner compatible with the State's ECHR obligations. Using the language of Henchy J in *McMahon*, one might say that the Oireachtas could never have intended that the exercise of the s 10 power was to be mechanical or directionless or that the District Court could not have had regard to the fact that its order will have the effect (or potentially might have the effect) of infringing Article 10 ECHR or (I would add) Article 40.6.1°. Here one might note that the language of s 10 of the 1997 Act underscores all of this in that it provides that the District Judge "may" issue the warrant in question.
>
> 103. In this instance the judge's task was accordingly to make an independent assessment of whether or not to grant the warrant based on the evidence contained in the two

> informations. As cases such as *Damache* (in relation to the dwelling) and *CRH* (in relation to business premises) clearly show, an independent assessment is properly regarded by the Oireachtas as a key safeguard prior to the issue of any s 10 warrant. This judicial discretion cannot, however, be exercised in a meaningful fashion unless the judge called upon to do so stands possessed of all the relevant materials pertinent to the exercise of that discretion where this might breach the State's Article 10 ECHR obligations (or, as may arise in some future case, which might otherwise have an unconstitutional impact on the journalist's right to privilege).

28. There is nothing like that in this case. There is no basis for a criminal trial to concern itself with whether an investigation was a paragon of perfection. That is not what a criminal trial is about. There was a memorandum to which far too much importance was attached. It is inevitable that unless the entire investigation file is transcribed that something will be missing in a sworn information. Maybe more will be put in, but obviously less needs to be. The point is reasonable suspicion being put forward for judicial consideration. The point is that a major issue, such as that the premises to be searched is a barrister's chambers or is the office of a newspaper, needs to be put up as well. That was not the case here. The memorandum as to the plan of the gardaí was presented by the accused as novel and only lately discovered. The idea being to pick holes in the differences as between that and the sworn information. What a trial judge needs to bear in mind is that the test is reasonable suspicion and whether that was validly present. If there is a fundamental undermining fact to that excluded, and it of necessity and the vagaries of human perfection being unattainable, then that can be looked at. But it needs to be as fundamental as in *Corcoran*, provided there is enough presented in the sworn information.

False imprisonment

29. The trial judge expressed the belief that Anne-Marie Hassett was in unlawful detention in her kitchen while the home she shared with Edmond O'Neill was being searched. It is necessary to return to the definition of what that is. The offence of false imprisonment at common law was abolished by s 28 of the Non-Fatal Offences Against the Person Act 1997. Section 11 of the Criminal Law Act 1976 makes it an offence to kidnap or falsely imprison someone. Section 15 of the Non-Fatal Offences Against the Person Act 1997 provides that a "person shall be guilty of false imprisonment who internally or recklessly – (a) takes or detains, or (b) causes to be taken or detained, or (c) otherwise restricts the personal liberty of, another without that other's consent". Hawkins in *A Treatise of Pleas of the Crown; or, a system of the principal matters relating to that subject, digested under proper heads* (1716, volume 1, chapter 9) describes a wrong which is common to both tort law and criminal law thus: "Every restraint of a man's liberty under the custody of another, either in a goal, house stocks, or in the street, whenever it is done without lawful authority." What is required is not that a person is blocked from going somewhere but that they be confined to a place so that they cannot go away if they so please; *Dullaghan v Hillon* [1957] Ir Jur Rep 10. This is illustrated by *Kane v Governor of Mountjoy Prison* [1988] IR 757. There, in anticipation of a warrant of extradition arriving for backing, as it was then, the applicant was surveilled in his home and closely followed when out and about. This was not a deprivation of liberty.

30. Here, the transcript discloses a number of complaints by Anne-Marie Hassett. Much is made of the fact that her baby was sleeping upstairs and that she was not enabled to check on him. Another of the gardaí did, however, and when he awoke, she was permitted to go to him and do what is necessary for infants of that age. She complained that she noticed that one of the detectives in the kitchen had a gun. This was in the usual way of carrying a firearm and there is no allegation that it was taken out or displayed or that she was threatened by it or that it was put to her that by reason of it she could not leave. Instead, she noticed it and had asked that the gardaí entering the

house for the purpose of the search to remove any garda 'raid jackets' they were wearing, as there were other members of An Garda Síochána living in the estate and she did not want to draw attention to her house. One of the purposes of the garda raid jacket is to conceal firearms. Instead, a section from the Garda Síochána Act 2005 was read to her and she was required to answer questions as to the duty she is sworn, and paid, to do. Such answers as might have been given as to her movements or as the activities of Edmond O'Neill are not understood to be part of the prosecution case because of the compulsion involved. But, that is not the same as being unlawfully questioned. A police officer, as Rule 1 of the Judges' Rules specifically states, is entitled to question anyone in order to find out whether an offence has been committed and by whom. No such question is unlawful.

31. Nor did anyone at the preliminary hearing ask for specifics as to when this supposedly false imprisonment began. All that is know is that it was presumed to end when, after about two hours, the search had been completed, together with any necessary paperwork or explanations, the gardaí left the house. When did it begin? That is what would have been a crucial finding of fact by the trial judge. There is no sign of any such finding.

32. It would be more than difficult, however, to justify such a finding in light of the wording of s 10 of the 1997 Act. Under authority of the warrant, a person in a premises to be searched may themselves be searched and anything found in the possession of any person present may be seized. Obstruction of a search is an offence under the section. Once there is cooperation there is no need to exercise that power. There is no evidence here that there was not such cooperation. Further, there is nothing to suggest beyond a feeling expressed by Anne-Marie Hassett, that she could not leave or might not have requested time to, for instance, go to a local shop. There is no evidence that anyone prevented that. It was a matter for her as to whether she chose or not to answer questions put to her in the ordinary way and, also, questions put to her as regards her knowledge of matters arising and her actions as a member of An Garda Síochána.

33. Obviously, it is obstruction to rove around a premises being searched. Hence, people are requested, as was Anne-Marie Hassett, to remain in a defined place. Reason being that there is no point in a search where the householder or the occupants can take items of interest and try to dispose of them. What was missing in this hearing was any straightforward examination whereby it was proposed to establish that more than the incidents of a search were taking place. This is an example from the judgment of this Court in *The People (DPP) v Twesigye* [2015] IECA 99, judgment of Edwards J:

> Q. Now, in the time he was in the house when you were searching it, was he free to leave?
> A. I'm unaware was he free to leave. Yes, he was free -- I imagine he was free to leave. He wasn't under arrest at that point.
> Q. Legally he wasn't under arrest?
> A. Legally he wasn't under arrest.
> Q. Would he have been allowed to leave?
> A. He was being questioned at the time -- well, not being questioned. He was present at the time of the search, he was legally free to leave from --
> Q. Would you have let him leave?
> A. Would I have let him leave? At that point, I hadn't made my decision to arrest. I can't really comment on that.

34. Had there been an attempt to go where the gardaí were searching, there might have been a direction to remain in the kitchen. Had there been a request to leave, for all anyone might know, there might then have been an arrest on the offence under investigation. Here, on the state of

knowledge as of that time, that is unlikely. None of that happened. In the *Twesigye* case, the argument made was that because there was questioning in the premises searched for drugs, but no arrest, that keeping someone away from places to be searched amounted to the beginning of imprisonment; thus making time run for later questioning on arrest. Edwards J rejected that argument:

> 64. It is necessary to comment that it is entirely reasonable for members of the gardaí who are about to conduct a search of a dwelling house to want the householder to be present and available to them, while at the same time to remain in one location within that premises or in the vicinity so as not to impede the search operation. They may wish to ask questions of him in connection with facilitating the ongoing search operation, or to explain items found in the search, or to provide assistance such as locating the key to a locked door, or some locked cupboard door, in the premises. There is nothing wrong with requesting a householder to remain while a search is being conducted. To do so will not, per se, amount to the detention of that person. A householder is not obliged in those circumstances to remain but as it is his home that is being searched it could hardly be regarded as remarkable if, as the evidence suggests occurred in the present case, such a request was readily complied with. It must also be appreciated that there is no obligation on a garda who possibly has grounds to perform an arrest, or who has in mind to perform an arrest, to proceed immediately to effect the arrest. Whether or not a person in whom the gardaí are interested is to be regarded as having been held in de facto detention during a search will depend on the circumstances of the particular case. In the present case the trial judge considered that the appellant was not in detention while the search was proceeding and this Court does not consider that the validity of that assessment has been impugned.
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> 65. The Court agrees with counsel for the respondent that the case of *The People (Director of Public Prosecutions) v Boylan* is readily distinguishable on its facts. The pre-arrest detention in Boylan was effected on a clear pretext, and was patently unlawful. Moreover, the fact that the applicant in that case was detained (i.e., held against his will in a shed) was beyond dispute. The purported justification of it on the basis of s.23 of the Act of 1977 was wholly untenable. There was nothing of the sort in the present case.
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> 66. The Court is satisfied that the trial judge's ruling was lawful, and that accordingly the appellant's first period of s. 2 detention ran from 2.58pm on the 28th August, 2012 when he was lawfully arrested by Sergeant Byrne. That being so, his detention was lawfully extended by Superintendent Mahon at 8.48pm on the same date, and the inculpatory responses that he made to questions asked of him in subsequent interviews were properly admissible before the jury.

35. That authority was not opened to the trial judge. Also, it is worth noting that Anne-Marie Hasset's mother was present during this alleged detention or for the last 25% or so. How is that a detention? While there is a plethora of authorities on this point, all of them establish a principle and regrettably this authority seems to have been overlooked by all parties in Court. This Court considers that authority sound and would follow it for the reasons stated. There is a difference in principle between being told validly on foot of search powers that one should remain away from those who are searching and the further, and clear, step of telling a suspect that they cannot leave that premises or that they are under arrest. Questioning such a suspect is lawful, though they should be cautioned if the officer has made up his or her mind to charge them with an offence, which was not the case here as the information as to any possible involvement had not gotten to that point. Apart from the statement of principle and the citation of authority, the trial judge would have been helped by a case made other than through vague insinuation.

36. That finding cannot stand.

Duty to put case

37. There are very few protections for witnesses who are not also parties to a case. It may be, for instance, that an expert is called in a civil case, or on a *voir dire* in the rare circumstances where that is appropriate, and the judge will not accept that person's evidence. While judicial restraint holds back comment that might damage a witness's character, even when faced with disbelief, there are times when this is unavoidable.

38. It is part of the responsibility of a trial judge to focus the hearing so that the time of the court is used wisely. As with the citation of multiple authorities in substitution for principle backed by authority, confusion can be brought about where no clear position emerges from either an examination-in-chief or a cross-examination. That can undermine the process of adjudication, especially where the point of questions is not directly put. In the case of a witness, at least some protection against inappropriate findings comes from the rule that where an allegation exists against the person testifying, after an appropriate lead-in, that should be put. The law, in this regard, is not to be bypassed by a claim that the defence do not have any burden. Since evidence is admissible once it is relevant, and while the prosecution can be put on proof of the voluntariness of a confession statement, the rules of evidence are to be adhered to. There is a positive benefit to a judge asking counsel: what case are you making? Or: what scenario or what allegation are you putting to this witness?

39. It was during closing submissions that the trial judge was invited by the defence to find, in effect, deceit, but put as lack of candour accompanied by bad faith towards the court. Unlawful decisions, it was urged on the trial judge, were made on the days before and on the day the warrants to search were applied for. This had not been put to the witnesses as a proposition which they could answer. Further, no one said to any of the senior officers giving evidence that a witness was, in effect, being hidden from the court; and that, it is clear now, for an ulterior purpose of deceit.

40. If an allegation is put in terms to a witness, there is a benefit beyond fairness to a person who may end up the subject of criticism. It is more than possible that the witness could have an actual explanation, for instance for the decision only to call a particular witness. That could range from the possibility that the witness is away, is superfluous because of duplication or was less centrally involved than may be posited or that the idea of hiding a witness might be removed by his or her production. This is a matter of fairness to the court.

41. In *McDonagh v Sunday Newspapers Ltd* [2018] 2 IR 1 [184], the rule was described as an aspect of fairness to the process:

> The extent to which fairness requires cross-examination is essentially dependent on how a trial runs. Fairness, however, is what the law requires both in relation to procedures that are dedicated towards achieving a correct conclusion in a trial and in relation to the right of a witness to be given a real opportunity to comment on a verdict the implication of which may only be interpreted as adverse.

42. The rule is grounded in the decision in *Browne v Dunn* (1893) 6 ER 67 at 71, where Lord Herschell LC stated:

> it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him that to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach his credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity to give an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

43. See also the judgment of Laffoy J in *Macnamee v Revenue Commissioners* [2016] IESC 33 which applies this principle.

Continuity of evidence

44. The trial judge also ruled out a vital piece of evidence consisting of a memory drive whereby it became possible to transmit, to the investigating team, results from analysis of computer drives and kindred devices expertly conducted.

45. It is not necessary to consider this in detail. The first principle is that under Article 38 of the Constitution in the trial of a case that is non-minor, absent the jurisdiction of a special court or a military tribunal, issues of fact are for a jury. As to whether an exhibit is the same as that transmitted for expert analysis can be presented as a matter of mathematical and perfect continuity. Within memory, that had been taken to the lengths of calling all undertakers to say that the body taken from a murder scene was that delivered to the forensic pathologist was one and the same, and that no accident to the hearse had occurred along the way.

46. No more proof than the exclusion of reasonable doubt is needed in establishing the identity of a victim's remains or the samples from a post-mortem examination. The same applies to exhibits: is this the same as what was taken from the scene or was transmitted for examination elsewhere outside of garda custody? That can be established in any of a number of ways, including markings on containers or by testimony. There was no basis for ruling out this evidence. If there is a basis for believing that there was some deficiency in the chain of custody, such deficiency could only have gone to weight, not to admissibility.

Pleading another's rights

47. Given the decision already given, it is not necessary to deal in any detail with the proposition put forward by some of the accused which is this: that even though their rights were in no way affected, if any breach of the law is found by the court of trial, those whose rights were not impacted may plead in aid of the exclusion of evidence against them the legal breach against a co-accused or a third party. It seems to be conceded that no accused whose own constitutional rights were not directly infringed may call such rights in aid. For instance, as in *The People (DPP) v Lawless* (1985) 3 Frewen 30, where a person who was not dwelling in a flat was merely present when found in possession of controlled drugs together with the occupants, only the person who lives in the flat may call in aid a breach of the constitutional inviolability of the dwelling. That case establishes that proposition. There is, however, no further step taken in the caselaw whereby the constitutional breach against the occupant, which the visitor cannot plead, is downgraded into a subset of illegality and thereby becomes available to any third party or co-accused.

Decision

48. Here it is necessary to apply s 7 of the 2021 Act. That was recently analysed by this Court in *The People (DPP) v McHugh* [2024] IECA 176. The test is a legal one and not a matter of independent factual assessment as to whether evidence wrongly excluded through legal error by a trial judge on a preliminary hearing ought to be reinstated. In that case, this Court commented:

> 26. The test under s 7 of the 2021 Act should not be read beyond its terms. It requires no gloss. Where a ruling excluding evidence to be presented at trial has been made on a preliminary examination which is erroneous, and demonstrated as such on appeal to be such, that is a fundamental condition for whether that ruling should be corrected. Here, the ruling was erroneous for the reasons set out in this analysis…
>
> 29. … Again, without trespassing on areas of fact constitutionally reserved to jury assessment, apart from the possibility of trial by court martial or before the Special Criminal Court, perhaps the best way to assess the importance of excluded evidence is by asking a conditional question. Here it is this: if two people recognise the accused at a time and place proximate to a crime, would that influence a jury as to whether that evidence, taken with such other evidence as is available in the case, advances in a material way the contention of proof? Another way of considering s 7 is to ask whether the evidence ruled out would have made no difference to the assessment of the jury? It is important to be careful here. The Court is not tasked with finding fact, merely with assessing potential impact where evidence is wrongly excluded. This evidence would be impactful on any jury's assessment; though it is for that jury to decide all issues as to weight, credibility and reliability. This Court is not engaging in that task. Rather, it is considering, as s 7 requires, an abstract assessment as to whether a building block of the prosecution case which was excluded from a jury's consideration was potentially probative, potentially reliable and of moment in the context of the entire case. This evidence should not have been excluded and is such that the s 7 test applies.

49. This is not a question of the Court proving to itself what a jury is empowered to find as fact. What is involved is whether the corrected ruling is such that the trial should take place with that evidence, in effect, reinstated. Great care must be exercised in any comment that may be mistaken for a finding of fact. This is a legal question where the court must exercise care in commenting. As was stated in *McHugh*:

> 28. Legally, therefore the question to be asked is whether the erroneous ruling has removed a significant building block in the prosecution case which ought, in terms of the law of evidence, be restored as part of the case which the State reasonably proposes to make against the accused. It is for the jury to say if that evidence is reliable. But, from the point of view of pre-trial analysis, there is nothing in the quality of the video footage or in the nature of the recognition which would render this proposed evidence so frail as to require its exclusion. Much has been made by the prosecution in written submissions as to the place of this evidence in their case.

50. Again, the Court must be careful. This evidence which the trial judge ruled out is the very core of the case. On it a decision was responsibly made to prosecute. Depending on the view that the jury may take, it may be taken to be probative. On face value it may seem so, but it is for the jury

to consider if it is so reliable that weight can be placed on it and as to what potential explanations may be adduced in evidence.

51. The evidence is of sufficient potential cogency as to require the reversal of the trial judge's decision and the admission of the evidence. Once again, it is necessary to state that evidence which is relevant is admissible unless a rule of law requires its exclusion. The reason for that rule is surely founded on the need of society to have regard to what is sensibly to be considered as establishing or undermining facts where criminal litigation is conducted.