

An Chúirt Uachtarach**The Supreme Court**

Dunne J
Charleton J
O'Malley J
Baker J
Woulfe J

Supreme Court appeal number: S:AP:IE:2021:000106

[2022] IESC NN

Court of Appeal record number: 2020/77

[2021] IECA 200

Circuit Criminal Court record number: Bill No DUDP0676/2019

Between

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

- and -

**Joseph Behan
Accused/Appellant**

Judgment of Mr Justice Peter Charleton delivered on Monday 30 May 2022

1. Urgency has always been a reason for pursuing a legitimate purpose in the protection of the victims of crime or the prevention of the destruction of evidence. Where a situation is sufficiently pressing, the necessity to obtain judicial authorisation for trespass on any asserted constitutional rights of a suspect may render lawful what otherwise might be unlawful. In the development of the common law, experience dictated that pursuant to a legitimate arrest, a suspect could be searched to prevent the use of concealed weapons and that where an arrest took place within the residence of a suspect, such material as within that suspect's immediate possession might be seized, as might evidence relevant to the investigation of the crime for which the arrest power was invoked.

2. Hence, while there was initially a lack of clarity as to the exact parameters of the rule excluding unconstitutionally obtained evidence, first uncertainly introduced in *The People (DPP) v O'Brien* [1965] IR 142 and since modified in *The People (DPP) v JC* [2017] [2015] IESC 31, 1 IR 417, the wider entitlements of the community and of victims to be protected from crime were consistently acknowledged. Hence, *O'Brien*, in introducing a

rule to exclude relevant evidence where there was a conscious violation of the Constitution, excluded such situations of urgency, described as “extraordinary excusing circumstances”, as the rescue of a victim in peril and the imminent destruction of vital evidence; at 170. Walsh J noted that there was no constitutional right to “destroy or dispose of evidence or to imperil the victim.” In addition, he placed within the excusable category “evidence obtained by a search incidental to and contemporaneous with a lawful arrest although made without a valid search warrant.” Kingsmill Moore J, at 162, preferred not to make categorisations of what might be excused in advance of the facts which individual cases might bring to light, though he agreed with the principle of exception as enunciated by Walsh J.

3. At common law, protections against search of private premises grew up over time and included rules as to what might be seized on foot of a search warrant and what might be taken in consequence of a valid arrest. Hence, in *Dillon v O'Brien & Davis* (1887) 20 LR Ir 300, 16 Cox CC 245, books and documents in the same room as the accused might be validly seized and in *Jennings v Quinn* [1968] IR 305, 309 a rule was formulated that any evidence found on or in the possession of an arrestee which is material evidence on the charge arrested for, or one in the contemplation of the arresting officer, or which appeared on reasonable grounds to be stolen property or property in the unlawful possession of the arrestee might be retained for use in the trial of the person, or that of any other person on any criminal charge in which the property is to be used in evidence. In other jurisdictions, rules which both justified and limited the seizure of material for use in investigations would seem to have their origin in either the urgency of the situation or in the protection of the judicial process through the maintenance of items of potential proof that would otherwise be lost. Hence, in *Chimel v California* 395 US 752 (1969), while a valid arrest could not result in officers validly searching the entire of the accused's home, it was justified to search the arrestee “in order to remove any weapons that ... might be used to resist arrest or effect ... escape”, the justification being to protect safety. In addition, that “within the immediate control” of an accused was extended to “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence”; at 762-3.

4. As Walsh J says in *The People (DPP) v JT* (1988) 3 Frewen 141, 160:

Attention should also be drawn to the fact that the administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution itself “or other established and recognised privilege”. (See the judgment of this Court in *In re Kevin O'Kelly* (1974) 108 ILTR 97.) It was pointed out by the Supreme Court in the case of *Murphy v Dublin Corporation and the Minister for Local Government* [1972] I.R. 215 that it would be impossible for the judicial power under the Constitution, in the proper exercise of its functions, to admit any other body of persons to decide for it whether or not certain evidence should or would be disclosed or produced in Courts.

5. While the purpose of this judgment is not to reaffirm any of the decisions as to powers upon arrest, much less to move in any way towards such reasoning as exemplified in amplifying police powers at common law, as in *Jeffrey v Black* [1978] 1 All ER 555, the concentration of dicta on both urgency and the need to preserve evidence demonstrate that the integrity of the court system is founded on a search for truth and the assertion of

rights to detract from a shrewd and complete appraisal of what can be known about a justiciable controversy must be justified by some clearly overriding principle.

6. The Constitution has never contained a principle that only upon a judicially issued warrant may a person's home be entered. Instead, Article 40.5 declares the inviolability of the dwelling of the citizen, "Is slán do gach saoránach a ionad cónaithe", providing that forcible entry, "dul isteach ann go foréigneach", may only occur in accordance with law, "de réir dlí." In contrast, the Constitution of the United States of America extends to a "right of the people to be secure in their persons, houses, papers and effects" and enables only reasonable searches and seizures by declaring "unreasonable searches and seizures a violation" and requiring warrants "upon probable cause" supported by oath or affirmation and "particularly describing the place to be searched, and the persons or things to be seized." As in common law jurisdictions, individual decisions have enabled arrests for disturbing the peace and the pursuit of remedies based on urgent situations, such as the pursuit of a fleeing felon caught in the act of crime. Those apart, the approach in administrative law as developed in terms of jurisdiction being limited by what is reasonable, and criminal law which requires reasonable suspicion before a citizen is put through the intrusion of an arrest or a search, the nature of the law affirmed in Article 40.5 requires reasonable action to accord with its inherent principle. But nothing in the Constitution prohibited an urgent legislative power to search in pursuit of legitimate objectives of social order.

7. Hence, in *Damache v DPP & Others* [2012] IESC 11, [2012] 2 IR 266 the examples cited by Denham CJ as to circumstances where legislation enabled a non-judicial intervention legally enabling a dwelling or business premises to be entered were, at [20]:

- (i) Section 16 Official Secrets Act 1963 (allows a search warrant to be issued by a District Judge or, if immediate action necessary, by a Chief Superintendent or higher);
- (ii) Section 14 Criminal Assets Bureau Act, 1996 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher);
- (iii) Section 8 Criminal Justice (Drug Trafficking) Act 1996 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher);
- (iv) Section 5 Prevention of Corruption (Amendment) Act 2001 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher).
- (v) Section 7 of the Criminal Justice (Surveillance) Act 2009 provides that in cases of urgency a surveillance warrant can be issued by a Garda Superintendent, a Colonel in the Defence Forces, or a Revenue Principal Officer.

8. At issue in *Damache*, however, was a lengthy investigation into an alleged conspiracy to murder a cartoonist on the basis of a deeply discourteous depiction of a religious figure; Qur'an 5.33-4 and as to respect for other religions; Qur'an 6.108. This police enquiry had gone on for six months and yet, despite there being no pressing need to pursue a violent individual, imminent danger, or suspicion as to the need to intervene to protect evidence potentially integral to a later trial, it was a Superintendent of An Garda Síochána who issued the warrant to search the home of the plaintiff for evidence as to involvement in this suspected murder conspiracy. Denham CJ regarded the existing law as establishing

two principles of independence and of reasonable foundation for any suspicion before a warrant could be lawfully issued:

36. There are two aspects of the issuance of a search warrant which are important. First, that a search warrant be issued by an independent person. Secondly, that such a person must be satisfied on receiving sworn information, that there are reasonable grounds for a search warrant.

37. In exceptional circumstances, such as urgent situations, provision has been made in statutes for a member of An Garda Síochána to issue a warrant, which usually has a short duration. The requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right.

9. There was thus nothing in the Supreme Court judgment which did anything other than affirm that even where there was an involvement in an investigation, circumstances of urgency, as exemplified in *O'Brien* and in other cases, would not prevent a police officer from issuing a warrant. That, however, is not the choice which the legislature made in reforming the statutory power at issue in the *Damache* case; namely s 29(1) of the Offences against the State Act, 1939 (as inserted by s 5 of the Criminal Law Act, 1976). Hence, the statute contended not to have been complied with in the circumstances of an astonishing violation of the human rights of the victim of a shooting, where a bullet passed right through the victim's body in answer to an attempt to foil the robbery of a fast-food take-away business, is now that section as now amended by substitution of the text by s 1 of the Criminal Justice (Search Warrants) Act 2012. This provides for a judge to issue a warrant where firearms, explosives or Offences Against the State type crimes are under investigation, but only on reasonable grounds set out under oath, and for a Superintendent to be so empowered, but only in circumstances of urgency and where that officer is not in charge of the investigation or involved in it.

10. In the case that a District Court judge is contactable and there is no matter of urgency to warrant the approval of a search warrant by a Superintendent of the Garda Síochána, a power to grant a search warrant is outlined under s 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, which provides that

10. —(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—

- (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,

is to be found in any place, issue a warrant for the search of that place and any persons found in that place.

11. Section 10(4) of the 1997 Act also provides that 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.” In a separate judgment, Woulfe J makes

the point that no particular superintendent, who may carry any particular responsibility, is excluded from the list of those who may in urgency substitute for a judge.

12. Thus, to quote, in a way whereby the interaction of the various subsections may establish a narrative: “if [a Superintendent] of the Garda Síochána [independent of the investigation] ... is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.” That may only be done if the Superintendent “is satisfied — (a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and (b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.” The issuing of the warrant must “either at the time the warrant is issued or as soon as reasonably practicable thereafter, record in writing the grounds on which the warrant was issued, including how he or she was satisfied as to the matters referred to in subsection (4).” And the concept of independence is expressed thus: ““independent of”, in relation to the investigation of an offence, means not being in charge of, or involved in, that investigation.”

13. The invocation of canons of construction is not necessary for the interpretation of this section. Normally a judge issues the warrant. But if, unlike in *Damache*, urgency is a pressing circumstance, and it may acutely be so where evidence may be destroyed or a victim imperilled, provided there are reasonable grounds, which is not a requirement of applying the law of evidence but instead may take suspicion based on hearsay into account, a Superintendent may take the place of a judge and issue a warrant because he or she is independent of the investigation.

14. It is hard to find a better exemplar of urgency than the circumstances here: a worker shot and saved only because the ambulance paramedic was trained in battlefield responses; perpetrators fleeing the scene of a crime but caught on CCTV apparently returning by bicycle to their dwelling; a gun that might be discharged again (in fact it was spirited away and never recovered); a pressing necessity to test the suspects for residues and DNA to establish a link, that otherwise might be less strong, to the crime scene; and a lethal weapon that required to be taken in and destroyed ultimately. But, here, the argument turns on whether the Superintendent telephoned shortly after 1 am on New Year’s Day 2019 by the Superintendent in charge of the investigation was involved.

15. The issuing officer was not in charge of the investigation and nor was he in any way involved. Accepting as pertinent the dictum of Keane J in *Simple Imports v The Revenue Commissioners* [2000] 2 IR 243 at 250 that clear parameters and intelligible definitions are demanded when police powers, relevant to intrusion into rights, to this effect:

These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society; but since they authorise the forcible invasion of a person’s property, the court must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met.

16. The issuing officer has duties as a detective of Superintendent rank within the North Dublin Division, comprising four districts, each headed by an officer of similar rank. The

difference is that this issuing officer has the potential to be involved in any serious crime within the division. Experience also demonstrates that officers with specialist knowledge, for instance in gathering DNA, lifting fingerprints or with a good record in interviewing on video recorded systems, may move from district to district or division to division. Here, the transcript is construed as demonstrating that where a serious crime occurs, the issuing officer would as a matter of course be informed, in due course, that the offence was under investigation and would in consequence perhaps give advice or come in and engage in hands-on work to further that investigation's progress. But, there was nothing on the transcript to say that where a person was shot, the detective issuing the warrant would be interrupted in his sleep in the middle of the night and just informed that this crime had happened. That is contrary to the nature of his duties as investigated in the transcript.

17. In addition, it has not been demonstrated, and here the burden is on any appellant, that the trial judge's ruling was incorrect that as and of about an hour and a half after being telephoned, having come in and viewed the CCTV, this officer was doing anything different to what a judge would do. Furthermore, in the course of argument it was correctly conceded by counsel on behalf of Joseph Behan that the correct point at which to assess whether or not the issuing officer was involved in the investigation was as and of the moment of issuing the warrant.

18. As the trial judge said, and here we are in a *Hay v O'Grady* [1992] 1 IR 210, 217 situation of the assessment of fact being undisturbed unless vitiated by an entire absence of evidence, "did he know anything about the investigation at all? All he knew is what he saw. And it seems to me he granted a warrant on that basis. ... when he granted the warrant, Superintendent Scott, wasn't aware of the investigation. All he was aware of was what was being put before him. The video or the CCTV footage." See also *The People (DPP) v McKevitt* [2009] 1 IR 525.

19. The term "involved" is explained by the Cambridge Dictionary Online as "being part of an activity or event". And while resorting to dictionaries in the context of a simple concept is a dangerous form of statutory analysis, sometimes it helps to clarify what is meant in itself by the use of a form of words. This officer was not involved at the time he issued the warrant in this investigation. Considering what an investigation is also matters. It is a process whereby, on the occurrence of a crime, police officers piece together objectively a narrative of fact through interviewing live witnesses, gather forensic connections to the scene or the methods of commission for the purposes of proof of connection as between a suspect and a crime scene, or weapon or tool of commission such as computers, for the purpose of eliminating suspects or of building up a case whereby suspicion may be turned into a provable case that may be sustained in court. In no sense was Superintendent Scott, in coming from his bed in consequence of this emergency, doing any such thing. Nor did his role transmogrify when he was briefed as to what had happened for the purpose, and the intention is important since to be involved is a purposive act and not a static situation, of seeing if there was enough to justify going to the suspect's dwelling and attempting to link what might reasonably be thought to be there with the occurrence and with the means of its commission.

20. As Birmingham P comments, it would be unwise, having issued a warrant, to later, even minutes later or months later, to become involved, but that does not undermine the statutory test. This is not to be equated with a judicial action; it is an administrative one but subject to safeguards. Besides, on this appeal all the parties are agreed that the test

for involvement is as to the moment when the warrant was signed and that subsequent actions are neither here nor there.

21. In the majority judgment of O'Malley J, because of a difference of view, it has been necessary to analyse the application of the proviso under s 9 of the Courts of Justice Act 1924 whereby no injustice has been done. Her analysis that any sensible police officer would in this instance have issued a warrant is compelling. Since reasonableness is a fundamental requirement derived from administrative law whereby only reasonable suspicion, as opposed to a mere hunch, may justify such a fundamental intrusion as arrest or the search of a home, which reasonable suspicion is founded on human enquiry and not on the rules of evidence, O'Malley J's reasoning is upheld by her analysis that reason would require a warrant to be issued in these circumstances. The analysis on the proviso derived from *People (DPP) v Fitzpatrick and McConnell* [2012] IECCA 74 suggests that if the trial is found on appeal to have been so conducted that there has been a departure from the essential requirement of the law that goes to the root of the proceedings, then the appeal must be allowed and the proviso cannot be applied. Shortly, that might be described as a fundamentally flawed trial. This was not such an event. Looked at rationally, a warrant would have been issued given the connection as between the shooting and the place to which resort was had by those involved. Even though there might have been some argument about the application of balance in the admission of such evidence, supposing for the sake of the argument that the issuing superintendent was involved, on no rational analysis could such evidence have been excluded. Such a result would affront ordinary sense.

22. Hence, this judgment concurs in the analysis of the application of the proviso. In consequence, this dissent is not as to the result.