An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Dunne J
Charleton J
O'Malley J
Baker J
Woulfe J
Murray J

Supreme Court appeal number: S:AP:IE:2022:000005
[2023] IESC 20
Court of Appeal record number: 86/2019
[2021] IECA 306
Central Criminal Court Bill CCDP0113/2017

Between

The People (DPP)
Prosecutor/Respondent

- and -

Patrick Quirke
Accused/Appellant

Judgment of Mr Justice Peter Charleton delivered on Friday 28 July 2023

1. In the principal judgment on this appeal, *Quirke no 1,* which challenged the search of the accused's home on 17 May 2013 in pursuit of a murder enquiry into the death of Bobby Ryan, this Court declared that the search warrant enabling entry therein was lawful but that the seizure therefrom of computer devices for the purpose of exploring their content was unlawful. In that ruling, it was reasoned that this seizure of these computer devices for the specific purpose of searching within the digital space was unlawful, since nothing in the sworn information or draft warrant, put before Judge Elizabeth McGrath on 13 May 2013, seeking judicial authorisation to search, justified the potential seizure of computer devices for the purpose of any exploration into the digital sphere to which these devices were a portal and nor did the draft search warrant, put before Judge McGrath, suggest that anything apart from that the personal effects of the victim of the crime might be found in the accused's home; *The People (DPP) v Quirke* [2023] IESC 5.

Prior judgment

2. The *Quirke no 1* judgment ruled that computers and akin devices, such as smartphones and tablets, operate so as to enable a major intrusion into the privacy of those from whom these are seized. This is of a magnitude and dimension that the intervention of a judicial analysis and authorisation, in accordance with this Court's judgment in *Damache v DPP* [2012] IESC 11 at [51], [2012] 2 IR 266 at 283, was and is required so that a proper balance could be mediated as between the rights of the accused to keep private this vast sphere of digital information and the public's right to investigate and prosecute serious crime. Only by laying down the foundation of a reasonable suspicion and specifying the need to potentially seize such devices, on the basis of a reasonable belief, might a judge be enabled to decide if a warrant should properly and proportionately be issued for that purpose as well as for a general search of a home or premises.

3. On the appeal, therefore, a situation has emerged from *Quirke no 1* whereby at trial an argument could have been proffered challenging admissibility on behalf of the accused to the trial judge, whereby the judge could have, on the basis of the law as this Court has now declared it to be, ruled that the seizure and digital analysis of the computer devices was contrary to law. What was found in consequence of the exploration of the digital space was a strand of circumstantial evidence proving that the accused had an interest in DNA and in the decomposition of bodies. It was the murder of the person, who had disappeared some two years previously, and whose remains were found on the farm rented by him, of which the accused was found guilty.

4. It should be recorded that, at trial, it was argued for the accused that the entire search of his home on this warrant had been unlawful. This was asserted to be so due to a lack of candour on the part of the gardaí in not specifying their undoubted intention to search for and access the digital space of the accused through seizing computer devices; it was further argued that there had been a failure to so specify before the issuing judge or to in any way seek judicial authorisation for such an intrusion. While less emphasis was focused at trial on the privacy issue, as elucidated by this Court in *Quirke no 1*, that general principle was closely related to, or incorporated by necessary implication, into what had been argued before the trial judge to seek the exclusion of the computer evidence.

Application

5. In consequence of this Court's ruling in *Quirke no 1*, that the computer evidence was illegally obtained by the gardaí, the accused now renews his application for all of the evidence resulting from the search of his computer devices to be excluded. Exclusion or admission of evidence, the accused contends, cannot be ruled on by this Court. In consequence of the prior judgment, the accused claims that the conviction is unsafe and that any issue as to the admissibility of the evidence resulting from the computer devices should be the responsibility of the trial judge in the Central Criminal Court; that no appellate ruling on admissibility is possible. According to the accused, therefore, this Court must order a retrial. While the prosecution argue to the contrary, that this Court may rule on whether the evidence should be excluded or admitted, the accused asserts that only an individualised enquiry, into the testimony of the officers responsible for the absence in the sworn information and the warrant, could possibly enable a judge to properly assess the nature of the defect which led to the absence of any reference to computer devices in the sworn information seeking the warrant and from the draft warrant presented by the gardaí to Judge McGrath. This Court, the accused asserts, is not entitled to embark on an enquiry whereby the evidence may be ruled to be admissible at a criminal trial; since an appellate court is not the trial court it is neither practical nor in accordance with law for such an appellate court acting on the basis of the transcript alone to properly analyse the evidential issues that arise.

6. Traditionally, as the analysis of the authorities which will follow demonstrates, a stricter rule applies potentially barring the admission of evidence in consequence of infringing the accused's constitutional rights, than is applicable where the merely a rule of law has been trespassed upon by the investigating authorities. Here, the prosecution argue, inventively, that while the Court has ruled in *Quirke no 1* that what was involved in the seizure and analysis of computer devices was an invasion of privacy, a right protected by Constitution, the manner of infringement here amounts only to an illegality. The accused disagrees.

7. Central to the proper disposal of this appeal is the nature of the test for the exclusion of evidence obtained in breach of an accused's constitutional rights. On the appeal there remained some dispute as to whether that test adumbrated by this Court remained that set out by the majority judgments in *The People (DPP) v JC* [2017] 1 IR 417; or was a re-analysis of the foundational judgments in *The People (AG) v O'Brien* [1965] IR 142 necessary; or did the law remain as set out in *The People (DPP) v Kenny* [1990] 2 IR 110 which eschewed any discretionary system for exclusion and moved to an absolute rule defining an intentional infringement of constitutional rights as any non-automatous action by agents of the State, it being irrelevant whether they were aware of any defect or not.

8. For the accused, it was asserted that a *JC* enquiry was necessary as a result of the judgment in *Quirke no 1*. Were the test to be one derived from *JC*, the accused argues that nothing in the Court's judgment on the main issue could possibly be construed as a change in the law which somehow might excuse what otherwise would be a situation where evidence was seized in breach of his constitutional rights. The prosecution counter by claiming that *Kenny* has been comprehensively overruled, and not just in relation to errors which deprive an accused wrongfully of his liberty and thus impact on the admissibility of confession statements, but constitutes what is, in effect a new code for the adjudication of issues where evidence results from unlawful action. Also, the prosecution contend that since, as they claim, the ruling in *Quirke no 1* could never have been anticipated by any member of An Garda Síochána that the judgment constitutes what may be slotted into *JC* as a change in the law or a novel ruling which should remove the deliberate nature of any breach, hence enabling admission of the evidence. For the accused, however, the reply is that responsibility for what they contend is slipshod conduct which they characterise as reckless, lies both on the gardaí and on the State authorities in general, thus removing any enablement of admission of evidence notwithstanding the breach of the accused's constitutional rights.

Significance of the evidence

9. While the Court is obliged to analyse the error identified in *Quirke no 1* and the effect thereof, the proviso under s 3(1) of the Criminal Procedure Act 1993 whereby, on appeal, a court may notwithstanding a legal error in a trial may refuse to overturn a conviction, may also come into play. The test there is that no injustice has been done. In *The People (DPP) v Behan* [2022] IESC 23, the analysis of the proviso following *The People (DPP) v Fitzpatrick and McConnell* [2012] IECCA 74 suggests that if the trial is found on appeal to have been so conducted, as to the legal error under consideration on appeal, 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.

10. Consequently, the security of this conviction must be judged in the context of the nature of the evidence presented, whether it should have been excluded, and whether that evidence is inescapably so integral to the jury's verdict of guilty of murder that a claim that no injustice has been done is impossible. Thus, it is necessary to approach any analysis on the basis that this case

was a circumstantial evidence presentation by the prosecution of various strands of evidence which were argued to amount to consistency only with the guilt of the accused and to be, therefore, inconsistent with any other analysis whereby the accused might reasonably be considered innocent of the crime.

11. Hence, the prosecution's evidence was wide-ranging as to facts, if accepted by the jury, which of themselves, or in combination with other facts, both enabled and compelled a deduction that the accused had murdered the victim. As to how interest by the accused in DNA, as a means of proof, or in the degradation of cell material and how that might undermine identification through tissue sampling, or in the process of the decay of human remains as degrading potential forensic pathology evidence, fits in to the prosecution case becomes important.

12. In concise form, the prosecution presented the accused's computer searches as part of a pattern whereby the jury formed an inescapable conclusion that the body found on the farm rented by him were the remains of the victim murdered by him. The prosecution pointed out that matters began with the renting of a farm in late 2007 from his wife's sister-in-law and that in April 2008 the accused began a relationship with her. That liaison ended in late 2010 and the prosecution presented evidence of the emotional toll which, it was said, this break-up imposed on the accused. Any reconciliation as between the victim and the accused, following the victim becoming close to this lady, was ineffective, according to the prosecution, in calming the accused.

13. In terms of events more proximate to the disappearance of the victim, on the day when he first went missing, the accused's milking operation on his herd was delayed, occurring at what was claimed to be an unusual time. It was of significance, according to the prosecution, that the relationship between the accused and the lady resumed, but only for a time, after the victim's disappearance. In December 2012, the lease on the farm was sought to be brought to an end and was to be delivered up shortly after. In April 2013, the remains of the victim were found by the accused in a tank that was part of a slurry-management system. That was what the accused claimed.

14. Emphasis was placed on the building blocks of the prosecution case which were contended to demonstrate familiarity by the accused with the tank where the body had been found and as to what were argued to be untenable excuses for both opening and exploring this part of the system. That tank was known, so the prosecution claimed, to only four people. The attire, actions and the ostensible excuses offered by the accused in the context of the supposed discovery were also claimed to be of significance, according to the prosecution. The analysis of insect activity pointed, on the case presented by the prosecution, to the anoxic atmosphere of the tank admitting such creatures only in the days prior to its supposed opening by the accused. In the accused's home were traces of notes concerning the disappearance of the victim.

15. Circumstantially, while the prosecution case was argued to have pointed to the accused as the perpetrator of the murder, it is inescapable that the computer evidence showing an interest in body decomposition is more than a throw-away strand incapable of carrying any significant weight. The reality is that even the clothing of the accused, his state of upset, his excuses in supposedly coming accidentally across the body and the ups and downs of his relationship with his wife's sister-in-law were brought into focus. Hence, it becomes impossible to claim on the basis of the proviso in the 1993 Act that the admission of the computer evidence as to the accused's interest, if unlawful at the trial, could not have caused any injustice. Rather, it was an integral strand to the circumstances presented by the prosecution as being proof of guilt. While, perhaps in other cases, a strand that could be characterised as insignificant might enable an appeal court to apply the proviso if wrongly admitted in evidence, this was a significant element of the prosecution case and incapable of

extraction from the web of proof which the jury accepted as enabling a guilty verdict against the accused.

Origin of the exclusionary rule

16. In essence the exclusionary rule, whereby the normal rule that all evidence that is relevant is admissible provided the witness themselves perceived the event, arose from the basic guarantees in the United States Constitution of freedom from arbitrary search and seizure. Fundamental rights, once declared, apply generally. Such provisions may be regarded as mere rhetoric, insubstantial and without merit unless breach leads on to consequences. Since those tried in criminal courts are often without means, actions seeking damages in civil courts in various forms of trespass may be an unrealistic proposition. Furthermore, judges are put in the difficult position of potentially admitting evidence that has been illegally obtained. Those enforcement officials, police and customs etc, charged with enforcing the law should not break that law. An argument may be made that judges, where they do not exclude evidence taken in violation of rights, can be regarded as somehow setting those rights aside. But, judges may also be moved by the balancing dilemma of enabling the violations of the rights of victims to be set at nought where valuable evidence that could convict those accused is excluded. This is a very difficult area of law.

17. In the United States of America, the origin of the exclusionary rule was in enforcement of the Fourth Amendment, which acknowledged in stark terms what we now recognise as the right to privacy save where a search proceeded through judicial authorisation and on reasonable and probable grounds:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18. In *Weeks v US* 232, US 383 (1914), federal agents suspected the accused of transmitting lottery tickets through the postal system, an offence, and visited his home where a neighbour pointed out where a key was conveniently kept. This was used to enter the premises and seize documents without a search warrant and was re-used later to seize further papers from an armoire. In excluding the evidence, Day J, at 291-2, stated the rational as one of shunning abuse and thus proceeding as if the violation had not occurred, and therefore as if the illegally seized papers were not before the court of trial:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

19. Limiting the abuse to the specific physical items, while the government agents could copy and use these in court or carry out enquiries based on knowledge thus illegally come by was repudiated in *Silverthorne Lumber Co v United States*, 251 US 385 (1920).

20. While *Weeks* was a lotteries case and *Silverthorne Lumber* was concerned with tax evasion, a legal principle is of general application, thus encompassing the exclusion of evidence in cases of sexual violence and of homicide and not merely where gambling legislation is apparently by-passed, or the government is at a loss for taxes. Instead of finding evidence of postage or fraudulent returns, an illegal search could yield a homicide weapon bearing the fingerprints of the suspect. But that too is covered by the principle. Perhaps the strongest statement justifying automatic exclusion was given by Carroll CJ in *Youman v Commonwealth* 189 Ky 152 158 (1920), where, again, a search violation was in issue:

> It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that Courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a Court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of those rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified.

21. The focus of these cases was summarised in *Mapp v Ohio* 368 US 871 (1961) a significant decision which applied the exclusionary rule to individual state courts in which most criminal law was applied. The rule of exclusion, as an automatic response to violation, however, was not the entire basis of the then existing and later analysis of this problem. Attraction to a rights-centred approach, or one geared to the philosophic wilful blinding of courts to the existence of evidence, may undermine the logic of what might be said to be the highest duty of a court where what common sense can only regard as truthful evidence is forced to yield to principle resulting in a trial based on only part of what a jury might be expected to have regard to in a criminal trial. Later focus on the community's rights and on those of the victims of crime might be interpreted as tending to soften the rule; in *US v Leon* 468 US 897 (1984) the Supreme Court held that evidence obtained "in good faith" through the use of a search warrant that a court later ruled invalid was admissible. A central argument was the unacceptable social cost of excluding such evidence, a reason subsequently given for creating further exceptions to the rule; *Davis v United States*, 564 US 229 (2011), the most fundamental of which is good faith error by those conducting a search.

Developments in this jurisdiction

22. Prior to *The People (AG) v O'Brien* [1965] IR 142, courts applied the general principle, reaffirmed by the High Court in that case, derived from the statement of Goddard LJ in *Kuruma v The Queen* [1955] AC 197, 207, that "the test to be applied in both civil and criminal cases in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the Court is not concerned with how it was obtained." See also *R v Leatham* [1861] 8 Cox CC 498 at 501, which is based on the principle that a court is entitled to the evidence of every person; see also *The People (DPP) v JT* (1988) 3 Frewen 141. An error as to the name of a road, a simple mistake due to inadvertence, as reproduced on a warrant was excused in that case. The evidence was admitted. No one argued that there had been a breach of constitutional rights. It was clear

that no one set out to violate the integrity of the accused's home or any other right. As a matter of principle, however, Walsh J in deciding *O'Brien,* and Kingsmill Moore J in agreeing with him, concurred that if there had been what was called a "deliberate and conscious" violation of constitutional rights, exclusion of evidence resulting from such a serious breach should follow.

23. But in the decision itself, outside of the particular phrase subject to later interpretation and perhaps not conscious that privacy rights were inherent in the Constitution, the dilemma faced by courts in upholding rights generally, was in formulating a rule based on a sensible balance whereby the trivial would not impede the proper disposal of criminal litigation. Speaking of illegality, Kingsmill Moore J spoke of it being "desirable in the public interest that crime should be detected and punished" but that it was also "desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its end by utilising the fruits of such methods." As to illegality, therefore, of which breach of constitutional rights is a very substantial sub-set, and nowhere considered as to the amplitude of that concept in the *O'Brien* judgments, it appeared to him that "in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal action, and that the answer to the question depends on a consideration of all the circumstances." Those circumstances are, most importantly, what was done by the gardaí, how that was gone about by the investigating team, what violation occurred, what caused it, what rights were infringed, the nature of the crime under investigation and an enquiry into whether the violation was due to a deliberate policy or was a simple mistake.

24. Coming to an "infringement of a constitutional right", as opposed to the wider set of illegality, such was said in *O'Brien* to assume "a far greater importance than is the case when the illegality does not amount to such an infringement." Since the "vindication and the protection of constitutional rights" was fundamental to the operation of the courts, such a duty could not "yield place to any other competing interest", the "defence and vindication of the Constitution of the right of a citizen" being, he said "a duty superior to that of trying such citizens for a criminal offence." It is perhaps in that context that the reference to "extraordinary excusing circumstances" informs what was meant by the calculated violation of constitutional rights. Hence, it could be excused that there was a pressing need to rescue a victim in peril. Or, where there is a need to save evidence from imminent destruction. Exceptions to the doctrine of exclusion in aid of the enforcement of constitutional rights were built in from the beginning. In *O'Brien*, however, only those two were mentioned.

25. Searches where the warrant was mistaken perhaps came before trial judges over the decades since *O'Brien*, but the case provided a clear path whereby a lack of knowledge, as in an honest mistake, even though what was violated was protection of the dwelling under Article 40.5, declared to be "inviolable and shall not be entered forcibly except in accordance with the law", could be excused. An example is *The People (DPP) v Lawless* [1985] 11 JIC 2081, where the search warrant slightly varied from the formula in s 26(1)(a) of the Misuse of Drugs Act 1977; with another error describing the place to be searched as "60, Rathland Flats, Dublin 12" rather than the premises at "60, Rathland Road Flats" in the same district. It was the latter which was in fact searched. McCarthy J for the Court of Criminal Appeal dismissed an appeal against the trial judge's admission of the evidence, stating:

> The act of Detective Sergeant O'Malley and his colleagues in entering the premises was, of course, a deliberate act. The omission of the necessary statutory foundation for the issue of the search warrant was a pure oversight; there was no evidence of deliberate deceit or illegality, no policy to disregard the provisions of the Constitution or conduct searches

> without a warrant (see the observations of Kingsmill Moore J *The People (AG) v O'Brien* [1965] IR 14 at 161).

26. Ignorance of the law did not constitute unawareness or lack of deliberation within the meaning of the rules; *The People (DPP) v Walsh* [1980] IR 294. While that much was clear, it was in a series of arrest issues that the exclusionary rule came most sharply into focus. Hence, it was custody cases in the 1970s which determined that the doctrine was of general application. In *The People (DPP) v Madden* [1977] IR 337, it was O'Higgins CJ who in ruling out an apparent confession to a terrorist killing, adopted the justification, quoted above, of Carroll CJ in *Youman v Commonwealth*. In *Madden*, the accused had been validly arrested and that arrest had been subject to a valid extension of time but it was only towards the end of that period that the suspect began to confess to his involvement in the crime. The gardaí, however, conscious as they must have been of the passing of time from one of lawful custody into a tranche where there was no legal warrant to continue to hold the accused, failed, in breach of their duty as declared by the Court of Criminal Appeal to uphold the right to liberty, to inform him that he was no longer under any compulsion to stay in their custody. In *The People (DPP) v Farrell* [1978] IR 13 the failure was one of proof: that the superintendent had been authorised to extend detention. This was not to be presumed, so scrupulously were the courts to guard the constitutional right to liberty. Voluntarily accompanying gardaí to "help with their enquiries" had also to be subject to the safeguard that while nothing was to stop a person going to a police station and spontaneously confessing, a situation equivalent to arrest required protection; in *The People (DPP) v O'Loughlin* (unreported, 13 November 1978, Court of Criminal Appeal. O' Higgins CJ discounted any element of discretion where a deliberate deprivation of liberty had occurred in order to facilitate a confession being made by a suspect:

> The trial judge, even on the basis of there having been a deliberate and conscious violation of the constitutional rights [of the suspect] was prepared to exercise his discretion in favour of admitting the statement. He was prepared to do so because in his view it would serve the public interest in the circumstances. This Court cannot agree with this view. There are no circumstances in this case which can excuse what took place, and it would ill-serve respect for the Constitution and the laws if this Court, by allowing evidence so obtained, were to indicate to citizens generally of the obligations on the State to safeguard and vindicate constitutional rights, could in the circumstances of a criminal investigation be dispensed with or eased.

27. Since it is not just upon the courts that the duty to uphold constitutional rights falls, but that duty is cast as well upon those investigating crime, there remains an obligation upon gardaí to ensure that liberty is only taken where the law authorises detention; the earliest example of this principle is to be seen in *State (Quinn) v Ryan* [1965] IR 70. Thus there is an attendant duty to watch the clock and to monitor the details of custody, and to extend custody, where care is required to attend to the processing of suspects. Where an officer genuinely went to the trouble of making out an information and of preparing a draft warrant on the basis of pooling both the suspicions of the investigation team and in trying to describe where a search was to take place, the written nature of the process and the perhaps chaotic circumstances of necessity would mean that mistakes could genuinely be made. And these were, under the *O'Brien* ruling, regularly excused where honest error was found by the trial judge.

28. That changed on a reference to this Court from the Court of Criminal Appeal as to what degree of particularity of suspicion constituted sufficient grounds to lay before a judge of the District Court to seek a search. On one view, in *The People (DPP) v Kenny* [1990] 2 IR 110 the Supreme Court overturned the pre-existing law. In the US cases and more generally, exclusion was based on a rights-centred approach; see Dimitrios Giannoulopoulos *Inproperly Obtained Evidence in Anglo-American and Continental Law* (New York, 2019). Finlay CJ, p 133, speaking for the majority, justified

a rule of exclusion where the only fault on the part of the gardaí was inadvertence on an apparently disciplinary basis:

> As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication for the right concerned.
>
> To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not constitutional.
>
> To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.
>
> It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.

29. But it was acknowledged in that judgment, p 133-4, nonetheless, that an absolute exclusionary rule based on a mere mistake would impede the administration of justice:

> The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.
>
> I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.
>
> The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen".

30. Hence, in contrast to the cases which had come before while the Court "would accept that neither of the two gardaí concerned had any knowledge that they were invading the constitutional rights of the accused" and furthermore had acted in "obtaining and executing a search warrant in a manner" which had "been customary over a long period", what was involved was a deliberate action. The prior law that actions could not be regarded as deliberate without advertence to the defect was implicitly regarded as incorrect. The kind of effects apparent in *Curtin v The Clerk of Dáil Éireann* [2006] IESC 14 [2006] 2 IR 556 suggested in *Director of Public Prosecutions (Walsh) v Cash* [2008] 1 ILRM 433; [2007] IEHC 108, a case was stated for the High Court as to the valid retention of fingerprint evidence which the prosecution sought to use as proof of an offence, the possibility of re-analysis of the rule. A full consideration of these developments is to be found in *Criminal Assets Bureau v Murphy* [2018] IESC 12, which while not a criminal case, pursues an analysis of the authorities to the effect that State authorities have a duty of obeying the law in the prosecution of crime. These remarks by O'Malley J are of general import and inform also the analysis which follows:

> 121. Having regard to the range of Irish authorities cited above, it seems clear that the exclusionary rule is not a free-standing rule that evolved or exists purely for the benefit of

> defendants in either criminal or civil proceedings. While it originated in the context of a criminal trial (*O'Brien*), its broader purpose is to protect important constitutional rights and values. It will have been seen that, at different times and dealing with different issues, individual judges have laid greater or lesser emphasis on particular aspects of those rights and values. However the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.
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> 122. These rights and values are not confined to criminal trials and their effect is not confined to the exclusion of evidence. The underlying principles have been found to be applicable in Article 40.4 inquiries (*State (Quinn) v. Ryan* and *Trimbole*); in extradition proceedings (ditto); in civil proceedings between private parties where the coercive power of the State was used in breach of the rights of individuals (*Universal City Studios* {[1999] 3 IR 407}); in civil proceedings initiated by the individual concerned seeking the return of property taken by agents of the State (*Simple Imports*, *Creaven*); in civil proceedings taken to protect privacy rights in seized material (CRH);and in judicial review proceedings challenging an unlawful eviction by a housing authority (Moore). They have also been found relevant, albeit to a lesser extent, in civil proceedings relating to disciplinary or administrative tribunals (*Kennedy v Law Society*); and to a lesser extent again in planning enforcement proceedings (*Meath County Council v Murray*). The proposition that the principles apply only in relation to evidence sought to be deployed against the individual is therefore not borne out by authority.

Current law

31. At issue here is the applicability and nature of the current law, in circumstances where the trial judge has ruled as a matter of fact that such errors as occurred in applying for and in formulating this search warrant were made through mistake, and not out of some unfathomable seeking of advantage where it seems impossible to discover what that might be. In that regard, it is worth repeating the ruling of the trial judge. Creedon J ruled thus:

> This Court has very carefully considered the evidence put before it in respect of the issue to include the written information and search warrant, the oral evidence of the witnesses, the provisions of the relevant legislation and the case law and is satisfied, as a matter of law, that the search warrant is not bad or inadequate on its face for any of the reasons put forward by the defence. This Court is satisfied from the evidence put before it that the information is adequate to allow the District Judge to properly determine whether she should grant a search warrant, pursuant to the provisions of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006, in respect of the offence of the murder of Bobby Ryan and rejects the defence assertion that it was limited or incorrect, such that it deprived her of making a proper determination, thus depriving her of the exercise of her independent jurisdiction.
>
> The provisions of the legislation clearly sets out that the District Judge must be satisfied by information on oath by a member not below the rank of Sergeant, that there are reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence is to be found in a place and, if issued, allows a named member to search

> the place and to seize anything found as a result of those searches, that the member believes to be evidence of or relating to the commission of that offence. The Court is satisfied, as a matter of law, that there is no requirement that the information must contain a definitive list of all of the evidence to be seized or all of the locations at that place that evidence relevant to the offence may be found, as clearly that would not be possible and there is no requirement to specifically inform the District Judge of the intention of [G]ardaí to seek out or seize computers.
>
> It is clear from the evidence that the potential relevance of computers was in contemplation by the investigation team but there is no evidence to suggest that there was any deliberate withholding of the intention to search computers from the District Judge or that the focus of the search was to gain entry for the retrieval of electronic devices and nothing more. Neither is there any evidence that the investigation team delayed the execution of the warrant as a deliberate tactic. The Court is satisfied that the application did not amount to using the District Court as a rubber stamp, that the search warrant is lawful and was validly executed in accordance with its terms and that the evidence obtained in the course thereof is properly admissible evidence.

32. What is important to note in the context of this appeal is that the trial judge did analyse the evidence and did conclude that there was no advertent trespass on constitutional rights. Rather, that what occurred was down to inadvertence and, as later will be referred to, adherence to the law as the law then appeared to stand in both statute and case precedent. While case decisions are binding precedent, legal rulings within judgments are specific to fact. Thus, if analysed similarly to statutory provisions, a risk arises of using words specific to the actual situation in which they are applied in a general sense to which these may not be intended. Hence, the actual ratio of *The People (DPP) v JC* [2017] 1 IR 417 is inescapably the clarification and overturning of *Kenny*. Furthermore, there is no principle of analysis whereby, as argued on this appeal on behalf of the accused, the decision is confined to its facts. Cases apply principles. It is not the task of the courts to endlessly re-analyse the same cases. Since cases establish principles, it is in discerning the principle that is the task of judges in adhering to precedent. Here the principle is clearly established and not simply on the basis of particular facts. Nor can the principle in *JC* be seen as confined to search warrants, which was the point of the case, since the historical thrust of the case-decisions has been clearly to identify, and then to apply, a general principle. What had arisen from search warrants, as in *O'Brien*, was invariably applied to custody cases. In principle, as exemplified in *Madden*, not only the courts but also the gardaí had a duty to be mindful of, and to uphold, constitutional rights. Thus the principle arising in warrant cases has been applied in custody cases as it is generally as the fundamental proposition remains the same.

33. The principle within the decision emerges from the analysis of O'Donnell J, of MacMenamin J and of Clarke J. O'Donnell J considered it appropriate to deal only with the area of search warrants, though he recognised that the decision could be applicable in cases involving unlawful arrest or detention, though he preferred "to withhold definitive determination of that issue" until a relevant case on appeal required decision. The principle was nonetheless stated although, rightly, the analysis was confined to the facts in issue. The general applicability of the decision, however, also emerges from the judgment of MacMenamin J, who supported the majority analysis. His view was that the consequences of the adoption and application of the exclusionary rule, as it had been developed in *Kenny*, were disproportionate. This was because an absolute rule of exclusion, based on willed action, as opposed to a realisation that a legal step in investigation was defective, mandated its application as much in cases of trivial and unintended infringements as in cases where a deliberate policy had been pursued. According to MacMenamin J, the phrase "deliberate and conscious" should not encompass steps properly taken on foot of Acts of the Oireachtas in a

genuine and grounded belief as to their legality. MacMenamin J, at [959] stated that the test arrived at in *Kenny* was "significantly higher than that to be found elsewhere in the common law world." As reformulated by the majority, according to MacMenamin J at p 793, the decision in *JC* was to bring the test back to a workable analysis which "redresses the balance so as to encompass community interests, while ensuring that egregious breaches of a suspect's rights and police misconduct are checked."

34. O'Donnell J at [410] stated that the approach of Walsh J in *O'Brien* was limited to deliberate and conscious breaches of constitutional rights: if culpability was required, it was arguable that capturing only deliberate breaches was insufficient. Any constitutional justification for the "extraordinary excusing circumstance" exception was unclear. Exceptions under US law are very different, in fact. O'Donnell J noted that the near absolute exclusion rule in *Kenny* was "the most extreme position adopted in the common law world". As to how the formulation of the rule in *Kenny* might apply, "the exceptions allowed for in *Kenny* have little or no scope for practical application particularly in the case of warrants"; [486]. In practice, the existing law always resulted in the exclusion of evidence. Whether viewed as a near absolute rule, or as a rule subject to extremely limited exceptions, the statement of Finlay CJ in *Kenny* was not sufficient to justify either conclusion. Any rule of exclusion should also exclude evidence obtained in reckless or grossly negligent disregard of the Constitution. For O'Donnell J, the essential question was the point where a trial could truly be said to fall short of being one in due course of law, as guaranteed by Article 38.1 of the Constitution, because of the manner in which the evidence was obtained. This analysis parallels some of the Canadian decisions, albeit under a different formulation of the obligation. Concurring with the test proposed by Clarke J, a test was preferred which would allow for evidence to be admitted in cases of a technical and excusable breach, but would exclude it where it was obtained as a result of a deliberate, in the sense of advertent and wilful, breach of the Constitution.

35. Thus it is important to restate the test with which the majority concurred, which is at [871] of the judgment of Clarke J:

> (i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned;
>
> (ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-
>
> > (a) that the evidence was not gathered in circumstances of unconstitutionality; or
> >
> > (b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.
>
> The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted and also to establish any facts necessary to justify such basis;
>
> (iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt;
>
> (iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the

acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned;

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments;

(vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

36. An aspect of these considerations is whether there was or was not a means of constitutionally gathering the evidence in question.

37. What is argued on behalf of the accused here is that a rule of complete exclusion can be the only response to what is an error. Since, the contention is formulated, no judge had the chance to consider this balancing exercise, the good faith of the gardaí involved becomes irrelevant since excusing such conduct undermines the rights of the accused. This argument may be considered in the context of how other jurisdictions, particularly Canada and the United States, deal with inadvertence.

Good faith

38. Section 24(2) of the Canadian Charter of Rights and Freedoms states that where a court "concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." The earliest analysis is that of Larmer J in *R v Collins* [1987] 1 SCR 613, who sought to set out factors that are relevant to Charter applications to exclude evidence:

- What kind of evidence was obtained?
- What Charter right was violated?
- Was the Charter violation serious or was it of a merely technical nature?
- Was it deliberate, wilful or flagrant, or was it inadvertently committed in good faith?
- Did it occur in circumstances of urgency or necessity?
- Were there other investigatory techniques available?
- Would the evidence have been obtained in any event?
- How serious is the offence?
- Is the evidence essential to substantiate the charge?
- Are other remedies available?

39. Particularly relevant on that series of tests, and as the law in Canada then stood, was whether actual physical evidence was discovered, as in fingerprints or DNA or trace connections to the crime, or whether by some form of unfairness or trick, an accused was unfairly manoeuvred into

self-incrimination. Hence, Larmer J in *Collins* [284-285] considered that what he called real evidence, meaning physical evidence, "was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone." That was because it "existed irrespective of the violation of the Charter and its use does not render the trial unfair." More serious was where "the accused is conscripted against himself through a confession or other evidence emanating from him." In *R v Grant* [2009] 2 SCR 353 police officers had driven past the accused, whereupon he stared at them and began to fidget with his clothes prompting them to stop to determine if there was any cause for concern. The accused's nervous conduct escalated and when asked whether he was in possession of anything of which he should not be, an admission was made to having cannabis and holding a gun. At this point he was arrested and brought to the police station. A complex analysis at trial followed with the judge holding that the accused had not been detained, admitting what was found by the police and enabling a firearms conviction. On the initial appeal, it was held that the fidgeting activity described did not constitute reasonable grounds to detain the accused but, nonetheless, admitted the evidence found on him on the balance test under the Charter. The Supreme Court of Canada held that there had been a psychological detention, due to the suspect being told to keep his hands in front of him and through the police officers stopping him from walking away. This arbitrary detention was ruled to be a violation. The majority of the Supreme Court replaced the *Collins* criteria, instead refining a three-part test, [71], to determine whether admitting evidence obtained by a Charter breach would affront the system of justice:

1. The seriousness of the Charter-infringing state conduct: The court examines the seriousness of the violation, including the nature of the right infringed upon and the gravity of the state conduct that led to the violation. Serious violations may weigh against admission of the evidence.

2. Impact on the Charter-protected interests of the accused: The court assesses the impact of admitting the evidence on the Charter-protected rights of the accused, such as the right to be free from unreasonable search and seizure. If the impact is significant, it may weigh against admission.

3. Society's interest in the adjudication of the case on its merits: The court considers the societal interest in the determination of the truth and the proper administration of justice. If excluding the evidence would undermine this interest, it may favour admission.

40. The effect of excluding the evidence on the administration of justice is also to be considered according to *Grant*. The court evaluates the impact of excluding the evidence on the fairness of the trial process. If the exclusion would seriously undermine the truth-seeking function of the trial or the integrity of the justice system, it may favour admission. On a consideration of these factors, the court pursues, as in *JC*, a balancing exercise to determine whether admitting the unlawfully obtained evidence would bring the administration of justice into disrepute. If the admission of the evidence would not bring the administration of justice into disrepute, it may be admitted even though it was obtained in violation of the accused's Charter rights. Cases are determined on their individual merits while the criteria have withstood later analysis and application; see *R v Harrison* [2009] SCC 34 where a search without reasonable suspicion that discovered cocaine, an action that "can only be described as brazen and flagrant" allied to incredible testimony led to the admission being characterised as an affront.

41. The United States cases also centre around the principle that where officers do what they consider is reasonable, and where those actions are backed up by an objective analysis which shows

good faith, the balance shifts away from exclusion. Delivering the majority judgment, White J in *US v Leon* 468 US 897 (1984) questioned why the excision of apparently credible evidence would always operate as a deterrent to breaches of the Fourth Amendment, especially where enforcement officers made genuine efforts at compliance. In that instance, reliance was on an informer whose identification of the offender was regarded as being sufficient for the issuance of a valid warrant by a judge whose analysis was later overturned on the basis of insufficiency of probable cause. On the face of it, the warrant was valid and capable of being relied on by enforcement officers. White J, 467-468, in setting out the state of the existing law, doubted that an automatic exclusion rule without consideration of whether enforcement officers had acted in good faith represented the proper balance of rights:

> The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, supra, at 414 U. S. 348. Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois v. Gates*, supra, at 462 U. S. 223. Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.
>
> The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truthfinding functions of judge and jury." *United States v. Payner*, 447 U. S. 727, 447 U. S. 734 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truthfinding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Stone v. Powell, 428 U.S. at 428 U. S. 490. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." Id. at 428 U. S. 491. Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, supra, at 414 U. S. 348; see *Stone v. Powell*, supra, at 428 U. S. 486-487; *United States v. Janis*, 428 U. S. 433, 428 U. S. 447 (1976).
>
> Close attention to those remedial objectives has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule. The Court has, to be sure, not seriously questioned, "in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate. . . ." *Franks v. Delaware*, 438 U. S. 154, 438 U. S. 171 (1978); Stone v. Powell, supra, at 428 U. S. 492. Nevertheless, the balancing approach that has evolved in various contexts -- including criminal trials -- "forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good faith belief that a search or

> seizure was in accord with the Fourth Amendment." *Illinois v. Gates*, 462 U.S. at 462 U. S. 255 (WHITE, J., concurring in judgment).

42. In that instance, there had been objectively reasonable reliance by the enforcement officers on what appeared to be a valid warrant. White J, at 468, noted that sufficient safeguards remained whereby deceit or reckless disregard of the truth in engineering the issuance of ostensibly valid warrants would undermine guarantees in the Fourth Amendment and could thus still lead to the suppression of evidence:

> We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," *Illinois v. Gates*, 462 U.S. at 462 U. S. 267 (WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." *United States v. Ross*, 456 U. S. 798, 456 U. S. 823, n. 32 (1982). Nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. *Harlow v. Fitzgerald*, 457 U. S. 800, 457 U. S. 815-819 (1982), and it is clear that, in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.
>
> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware*, 438 U. S. 154 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U. S. 319 (1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. at 422 U. S. 610-611 (POWELL, J., concurring in part); see *Illinois v. Gates*, supra, at 462 U. S. 263-264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid. Cf. *Massachusetts v. Sheppard*, post at 468 U. S. 988-991.
>
> In so limiting the suppression remedy, we leave untouched the probable cause standard and the various requirements for a valid warrant. Other objections to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial. The good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

43. In keeping with the archetypal maxim of the common law, that fraud unravels every transaction, it remains clear that where a judge is used as an instrument in furtherance of deception, an ostensibly valid warrant issued through deceit may be declared at trial to be invalid. What is at issue here, however, is the exercise in good faith of an application for a search warrant which the trial judge found as a fact was pursued honestly.

Legal development

44. There is no doubt that the judgment in *Quirke no 1* represented a reconsideration of existing authorities with a view to analysing whether the digital space required constitutional protection in a way which marked out the search of that space from the physical searches of premises and of objects retrieved in police operations, such as seizure upon arrest. The answer from this Court sharply differentiated the degree of privacy intrusion as between the seizure of the physical metal box within which the computerised technology is housed, and which may of itself as an object yield fingerprints or DNA traces or blood spatter for analysis, and the taking of a device for analysis as to the use that has been made thereof in the digital sphere. That distinction did not exist in the law of this jurisdiction prior to that judgment. Officers seeking warrants would have relied on the law set out in the judgment and considered that establishing a connection in terms of reasonable suspicion as between the suspect or crime scene and the place to be searched sufficed without at the same time being required to inform the judge, to whom application for a search warrant was to be made, that in addition to a physical search for objects or for the taking of trace samples, such as dusting for prints or swabbing surfaces for DNA or the photography of spatter or other markings, and their seizure, it was specifically required that the digital space beyond physical objects also required to be analysed. A reason would also have to be given to justify that search.

45. It happens that the law develops. The prediction of the outcome of difficult cases which have justified a second appeal on the ground of general public importance under Article 34.5.3º or 4º of the Constitution is beyond any burden which this Court could rationally place on law enforcement officers. In the United States, the law has developed in recognition of factors which are inherent in the judgment in *JC*. Hence, since abiding by the law, even in the investigation of crime, is a paramount consideration, and since the doctrine of precedent and secure reliance on existing legislation are the central supports for legal certainty, where an existing statute is overturned or modified as to its application by judicial decision, as in *Damache v DPP* [2012] IESC 11 at [51], [2012] 2 IR 266 at 283, or where the common law develops so as to recognise privacy rights as requiring protection in a previously overlooked area, as in *Quirke no 1*, there can be no deliberate disregard of the legal order in law-enforcement officers standing on the firm ground of what the law then was. This is recognised in existing precedent. In *JC*, reference is made to both a complete absence of a legal mechanism for obtaining evidence, Clarke CJ at [871](vi), which cannot excuse the conscious violation of rights in order to circumvent a path that does not exist, and legal developments which change the path to a compliant result, which enable reliance on the existing state of the law. Hence, Clarke CJ at [871](v) refers to it being excusable that a "breach of rights was due to inadvertence". What is beyond advertence is the prediction that a section of a statute may be struck down or that the common law will develop in reliance on existing authority, here as to privacy and the security of the dwelling, into a new sphere, here the digital space. Hence, what can and should be excused are what is not realisable because the breach at a particular time "derives from subsequent legal developments" which have yet to occur.

46. In that respect, *Illinois v Krull* 480 U.S. 340 (1987*)* is illustrative. There, statute enabled officers to enter car dealers' premises and inspect records and vehicles. The provision was later struck

down on Fourth Amendment grounds because "it permitted officers unbridled discretion in their warrantless searches". Every law is based on a principle and what the underlying focus is will inform the manner in which legal rules are applied. Hence Blackmun J based the exclusionary rule on the principle of deterrence, that law-enforcement officials should also be bound by the law and that breaches not otherwise actionable could undermine the justice system by the admission of the fruits of illegality. Deterrence, being a conscious turning away from illegal action, cannot be furthered by reliance on a statute being condemned because of its later being struck down. Hence, at p 347-8:

> As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus, in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process. See, e.g., *United States v. Janis*, 428 U. S. 433, 428 U. S. 454 (1976) (evidence obtained by state officers in violation of Fourth Amendment may be used in federal civil proceeding because likelihood of deterring conduct of state officers does not outweigh societal costs imposed by exclusion); *United States v. Calandra*, 414 U.S. at 351-352 (evidence obtained in contravention of Fourth Amendment may be used in grand jury proceedings because minimal advance in deterrence of police misconduct is outweighed by expense of impeding role of grand jury). evidence may be admissible if officers rely on a statute that by later legal action is found to be invalid on constitutional grounds. Similar considerations apply where there is an existing precedent which sets the law on a basis that the officers follow in good faith.

47. Thus in *Davis v US* 564 U.S. 229 (2011), it logically followed that searches conducted in objectively reasonable reliance on binding existing precedent could not be subject to the exclusionary rule. There, the good faith exception was explained on the basis that deterrence was not required by the Fourth Amendment but was the basis of an enforcement doctrine whereby without exclusion the constitutional guarantee would be set at nought. Lack of consciousness of fault, determined pursuit of the existing law and exclusion of judicial error were thus all justified exceptions as thereby enforcement officers were abiding by the law and not breaking it in any knowing way.

48. There would be good reason, why application to and knowledge of existing precedent would enforce and uphold the law, rather than undermine respect for the principle that searches would comply with constitutional guarantees. Hence, the reliance on binding precedent was in a category of judicial error similar to good faith reliance on a warrant issued in judicial error but genuinely relied on as legal authority.

49. It must also be remembered what the result was in respect of the more important authorities cited in *Quirke no 1*. In *R v Fearon* 2014 SCC 77, [2014] 3 SCR 621 the seizure and examination of a mobile telephone was in issue on a warrantless arrest and search. There, as in this case, a new analysis of privacy rights required judicial safeguards. Cromwell J, for the majority of the Canadian Supreme Court, and applying the three tests in *Grant*, admitted the evidence. His analysis was:

> [94] Of course, the police cannot choose the least onerous path whenever there is a gray area in the law. In general, faced with real uncertainty, the police should err on the side of caution by choosing a course of action that is more respectful of the accused's potential privacy rights. But here, if the police faced a gray area, it was a very light shade of gray,

> and they had good reason to believe, as they did, that what they were doing was perfectly legal.
>
> [95] In my view, the first factor favours admission of the evidence. There is not here even a whiff of the sort of indifference on the part of the police to the suspect's rights that requires a court to disassociate itself from that conduct. The police simply did something that they believed on reasonable grounds to be lawful and were proven wrong, after the fact, by developments in the jurisprudence. That is an honest mistake, reasonably made, not state misconduct that requires exclusion of evidence.
>
> [96] The second factor concerns the impact of the breach on the Charter-protected interests of the accused. Any search of any cell phone has the potential to be a very significant invasion of a person's informational privacy interests. But, in the particular circumstances of this case, the trial judge found, in effect, that Mr. Fearon had not established that the invasion of his privacy had been particularly grave. This conclusion is supported by the fact that Mr. Fearon did not challenge the warrant that was subsequently issued for the comprehensive search of the cell phone. This amounts to a concession that, even if the findings of the initial search were excised from the information to obtain that warrant, reasonable and probable grounds were still made out. As the trial judge noted, "[t]he unchallenged warrant mitigates against both the seriousness of the assumed earlier breach and the impact on [Mr. Fearon's] Charter-protected interests": Ruling, at para. 54. So we are not here concerned with a search that could not have been legally conducted at all. Mr. Fearon's privacy interests were going to be impacted one way or the other, and the particular breach of his s. 8 rights in this case did not significantly change the nature of that impact: see, e.g., *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 84. While this factor favours exclusion, it does so weakly.
>
> [97] The final factor is society's interest in the adjudication of the case on its merits. The evidence here is cogent and reliable. As the trial judge found, its exclusion "would undermine the truth seeking function of the justice system": Ruling, at para. 55. This factor favours admission.
>
> [98] I conclude that the evidence should not be excluded.

50. It should also be remembered that in *Riley v California* 573 US 373 (2014) the final disposition, following on the analysis that required particular privacy rights to centre on the vast reaches of the digital space, was to return the case for further argument before the trial court.

Mode of decision

51. There is, on this analysis, a definite test for the exclusion of illegally obtained evidence where constitutional rights, whether to privacy, to the security of the dwelling or to liberty, are trespassed upon by agents of the State. That test is as set out in *JC* and is of general application. Like the Canadian test in *Grant*, it is capable of analysis at trial level and application to facts as put before a judge. What would be in issue at trial is as to fact: what occurred, what sort of infringement, with what level (if any) of consciousness of a legal defect, was there a deliberate policy of using illegal methods in gathering evidence, how grave was any culpability to be attached, what effect on a fair and true disposal of the case does exclusion have, whether the prosecution have proven a balance whereby the evidence may be admitted. These are among the questions, noting that the rights of victims to a fair disposal of their case is also a consideration. But, while these may be issues of fact upon which a trial judge may make a ruling, meaning on some of those issues of fact, the principles

derived from *JC* remain: if there is no constitutional path to obtaining the evidence, and constitutional rights of the accused have been infringed, the evidence must be excluded as to the direct result of that infringement; if there was a constitutional path to obtaining the evidence but this was tainted by an incidental illegality, where that illegality was used deliberately and consciously to infringe the constitutional rights of the accused, then such evidence as results from that abuse should be excluded; where there has been an illegality in consequence of which the constitutional rights of the accused have been infringed, then such actions, while not being condoned by the court, may enable the admission of the evidence where what was done proceeded without "knowledge of the unconstitutionality of the taking of the relevant evidence" in contradistinction to the test in *Kenny* "rather than" consciousness or deliberation "applying to the acts concerned". Upon careful analysis, the onus of proof being on the prosecution, a trial judge may admit evidence obtained illegally which also infringes the constitutional rights of the accused "where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments".

52. What is the pivot of the formulation in *JC* is the duty of the courts to mark abuses of the Constitution and to deter any deliberate policy whereby, as in *Madden* or as in *McLoughlin*, the duty of the executive branch of government is either tailored towards the deprivation of rights or the duty to uphold those rights is set to one side. What cannot be gainsaid is that both logic and experience drive the development of law and inform the sense and application of decisions on individual cases. There is a deterrent effect in the *JC* formulation of the exclusionary rule, requiring compliance with the law as thereby the Constitution is also upheld; but there is also a practical requirement that the fundamental journey of the criminal process towards the issue of whether the prosecution have been able to prove the case against the accused beyond reasonable doubt should be based on truth. There can be no deterrent effect where, as in *O'Brien*, some officer makes a genuine mistake, which may often coincide with an understandable mistake. The journey towards adjudication on the basis of truth remains a fundamental principle and is not justifiably departed from where a trial judge does not find a policy of disregard of law or where there has been no consciously reckless abuse of the rights. The minds of those agents of the State in enforcing the law are not focused on, to return to the formulation in *O'Brien*, upholding the law where there has been an honest pursuit of abiding by the law as it stands but that law has changed, as in *Davis* or as in *Krull*, where the statute relied upon is subsequently condemned or where binding precedent turns out to be infirm because of legal development.

Summary

53. In that regard, given the extensive analysis that has been necessary and the duty of appellate courts to state legal principles clearly in the context of assisting the difficult day-to-day work of trial courts, where there is neither time for the citation and analysis of multiple cases and nor is there the necessity given the statement of clear principles, it is important to summarise what has gone before. Hence, it may be useful to offer this as a compendium:

> (1) The decision in *JC* reverses *The People (DPP v Kenny*). On this analysis, that decision can no longer be regarded as having any binding effect as an authority.
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> (2) That decision in *JC* does not simply reinstate the decision of the Court in *The People (AG) v O'Brien* insomuch as that case held that evidence obtained in a deliberate and conscious breach of the Constitution, in the sense of an intentional breach rather than merely where the action leading to the breach was itself was deliberate, must be excluded; but subject to extraordinary excusing circumstances. For the reasons set out in the majority judgment and discussed in the judgments of O'Donnell J at [423-431], Clarke J at [823]

and MacMenamin J at [956-960] of the report in *JC*, that test, while a significant advance at the time, did not constitute a final analysis. Accordingly, while the test in *JC* restates the rule that evidence obtained in deliberate and conscious breach of constitutional rights must be excluded save in extraordinary excusing circumstances, that is now only a component of the applicable rules.

(3) The majority judgments in *JC* expressly approve the decisions given in respect of unlawful detention in breach of a right to liberty in *The People v Madden* (which was clearly stated in 1977), *The People v O'Loughlin* (which followed *Madden* in 1979), and in *The People (DPP) v Healy* (reaffirming the relevant principles in 1990). In *JC* the applicability of the exclusionary principle in those cases was described as "plainly correct, and … examples of the court performing the function of ensuring that constitutional rights are respected, upheld and vindicated" at [429]. Those cases rejected explanations that gardaí were, for example, unaware that a period of detention had expired. The proposition that to admit evidence in such circumstances would, as McCarthy J observed in *The People (DPP) v Healy*, "put a premium on ignorance, indeed ignorance of the law by law enforcement officers" was expressly approved in *JC* [431]. Such matters as not knowing that there is a legal obligation or not making genuine efforts to abide by the law cannot be considered as mere "inadvertence".

(4) The first limb of the test in *JC* therefore, restates the approach in *The People (AG) v O'Brien*, which is that of exclusion of evidence where there has been a deliberate and conscious breach in gathering it, but the full test as set out in *JC*, goes further.

(5) Hence, where evidence is obtained in breach of a constitutional right, even though the breach is not deliberate and conscious in the *The People (AG) v O'Brien* sense, there is a presumption that such evidence must be excluded; see Clarke J at [871](v).

(6) Such evidence can only be admitted when the breach can be excused. Such admission can occur either (1) where the breach has been occasioned in consequence of a subsequent legal developments, or (2) has occurred due to inadvertence. Reality demands the adoption of the rule in this form, through acknowledging that Garda officers or other persons conducting searches or obtaining evidence cannot be expected to anticipate the future decisions of the courts. Law enforcement officials are entitled to take the law as it stands as of the time of their actions. Factual errors and understandable human errors fall under the heading of the second class of case. Both classes of case can be understood by reference to the decided case law. *JC* itself was an example of subsequent legal development; namely the ruling in *Damache*. The evidence there had been obtained pursuant to a warrant which was valid according to the law as it then stood and it was only because of the subsequent decision of this Court in *Damache*, that it could be contended that the warrant was invalid. The gardaí and other law enforcement officials are entitled, and in some instances obliged, to take the law as it stands. Consequently, evidence obtained as a result may be admitted. The decision in *The People (AG) v O'Brien* illustrates the second category. The difference between Cashel Road and Captain's Road, was clearly a simple human error, indicative that there had been an honest attempt to obtain a warrant, but that this was a process required to be undertaken sometimes under pressure of circumstances that can lead to error. The decision is explicable as an instance where there had been a clear intention to respect the constitutional rights involved and to obtain a warrant in respect of the premises and no objection was made when the warrant was executed.

(7) *JC* also establishes the principle that even where evidence is obtained illegally, without breach of constitutional rights, there is an obligation on the Court to consider whether it is necessary to exclude the evidence because otherwise if to admit it would render the trial unfair. An example is *The People (DPP) v Lawless* where the premises searched on a warrant that was in error was not that of the accused but was the dwelling of another person. Hence, there had been an illegality but not a breach of the accused's right to the inviolability of what was not his constitutionally protected dwelling.

(8) *JC* is authority that any rule of exclusion should "also exclude evidence obtained in reckless or grossly negligent disregard of the Constitution" [487]. Hence, the law does not support a systemisation where inadvertence may be deliberately chosen, as in seeking out an officer, in execution of a warrant or an arrest or the extension of detention, who knows nothing of the investigation, or in flagrant disregard of legal rules, or in doing what suits through advertent blindness to what is required. In considering any question of inadvertence, or deliberate and conscious breach of a constitutional right, consequently, the state of mind under consideration is not only that of individuals, as it were, at the coalface, [850], but also of any other senior official or officials within the relevant enforcement or investigation authority who are involved in a material way in the process. The test also, therefore, necessarily looks to any question of systemic failure within an investigating team and not just the absence of any deliberate and conscious breach on the part of the executing officer.

(9) Finally, the test under which evidence obtained in breach of constitutional rights may be admitted, does not permit the evidence to be admitted if it could never have been lawfully obtained; see [863]. This, it should be understood, is a further qualification on the admission of evidence. It would be a significant misunderstanding of the test in *JC* to invite a court merely to consider whether the evidence could have been lawfully obtained, and if so, to admit the evidence. To do so assumes compliance with the Constitution, when the issue arises precisely because there has been a breach. This is, therefore, a backstop test, and a further qualification which may usefully be understood as addressed to circumstances that where evidence was obtained in breach of constitutional rights, and although there was inadvertence or a subsequent legal development, it would nevertheless render the trial unfair to admit such evidence.

Approach to analysis

54. In *The People (DPP) v Behan* [2022] IESC 23 evidence was ruled as having been illegally obtained on appeal to this Court, where a warrant was issued in emergency circumstances following a shooting. A Garda officer who was found by the majority to not have sufficient independence in terms of the *Damache* formulation. This, however, was a situation where any officer, or any judge, because of the circumstances, would inevitably have issued a warrant to search for the gun used against people in a fast-food outlet. Perhaps too much was made in argument as to the effect of this judgment which, in terms of what all members of the Court agreed, was to the effect that any officer would have issued the warrant and so no finding of injustice could possibly arise. That passage from O'Malley J, speaking for the majority, and in terms of this issue assented in by Charleton and Woulfe JJ dissenting who dissented as to a different question:

> 65. Woulfe J., further, regards this interpretation a wrongly excluding a category of superintendents who are intended by the legislature to be empowered to issue warrants in urgent circumstances. I do not consider this to be the effect of the view I have come to –

there would be nothing to prevent a division detective superintendent from issuing a warrant in respect of a matter outside his own district where he is not otherwise involved.

66. I would be inclined to conclude therefore, that there was a breach of the statutory requirements. Such a finding, however, would by no means dispose of the case.

67. Section 3 of the Criminal Procedure Act 1993 provides that the Court may affirm a conviction, notwithstanding that the appellant raises an argument that could be determined in his favour, if it is satisfied that there has been no miscarriage of justice. The appellant says that the Court should not exercise this power, because a *J.C.* inquiry could have led to the exclusion of the evidence of the glove, in which circumstances he might have been acquitted.

68. The Court has not been referred to any authority setting out the general principles to be considered in applying the proviso, perhaps because the circumstances in which an appellate court will apply it are highly case-specific. However, certain judgments are of relevance to the issue now before the Court. In *People (DPP) v Fitzpatrick and McConnell* [2013] 3 I.R. 656 ("*Fitzpatrick & McConnell*") the Court of Criminal Appeal considered that one of the appellants had not been afforded a reasonable opportunity to consult his solicitor before the invocation of ss. 18 and 19 of the Criminal Justice Act 1984 (which permit the drawing of adverse inferences in certain circumstances). Delivering the judgment of the Court, O'Donnell J. said the following: "The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of the first appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the first appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed. However, it cannot be said here that the proceedings were fundamentally flawed. The significance of any inference to be drawn under s. 18 of the Criminal Justice Act 1984 may depend upon the particular facts of individual cases. Most often, as the section itself recognises, its main effect will be to provide corroboration where that is required either by a rule of law, or by the general practice of the courts in respect of particular offences. Here, however, there was no question of the evidence against the accused requiring corroboration either as a matter of law or practice. It was direct and compelling evidence of involvement in the preparation of bombs."

69. Accordingly, the Court was satisfied that no miscarriage of justice had occurred.

70. In *People (DPP) v. Sheehan* [2021] IESC 49 this Court approved the formulation in Fitzpatrick & McConnell as representing the correct approach where an appellate court is dealing with the wrongful admission of evidence, in another case where the evidence in question did not play a legally necessary role in the verdict of the jury. However, in both of those cases the outcome was clear, in that it was only necessary for the appellate court to determine whether there would, in truth, have been a chance of an acquittal if the respective juries had not been invited to draw inferences from particular material that was, in itself, properly admissible.

71. The question now before the Court is somewhat more complex. It is not open to the appellant, in this appeal, to make a direct argument to the effect that the trial judge should

have excluded the evidence. Rather, he complains of the loss of an opportunity to argue in the trial, in the context of a *J.C.* inquiry, that it should have been excluded. The issue, then, is whether the decision of the trial judge that the warrant was valid and that a *J.C.* inquiry was therefore not necessary, could be described as a fundamental error, or a departure from the essential requirements of the law, that resulted in a lost chance of an acquittal. It will, in many if not most appeals, be difficult for an appellate court to be certain what might have transpired if a *J.C.* inquiry was conducted since, by definition, it does not have the necessary evidence before it. However, certain matters can, I think, be legitimately taken into consideration. One is that it was only the position of Superintendent Scott that was relevant. If, for example, the trial judge had concluded that Superintendent Donnelly had made his request to him merely for the sake of convenience, that would not have the effect of leading to a conclusion that the evidence should be excluded. However, it is clear from the evidence that was given that Detective Superintendent Scott shared the view of Superintendent Donnelly that "independence", under the Act, meant not having already taken any steps in the investigation. While I consider that interpretation to be mistaken, it is one shared by two members of this Court and is certainly a tenable one in circumstances where the courts have not previously given an authoritative view of the section.

72. Secondly, a J.C. inquiry would have to have taken into account the fact that, while there was a breach of the statute insofar as the role of Detective Superintendent Scott was concerned, the actual manner in which he considered the question of the warrant was not open to any real criticism. He viewed the footage and made up his own mind, without reliance upon the assessment of others. Furthermore, it was entirely clear (and, indeed, this has been part of the case made by the appellant) that a valid warrant could easily have been obtained from any other superintendent in the District, or indeed any one of a large number of superintendents in the Dublin area. In J.C., Clarke J. described the significance of this factor in the following terms (at paragraph 862): "There is one further refinement which, in my view, ought to be added. It is important to distinguish between evidence gathering which occurs in circumstances where same could not have been constitutional in any circumstances, on the one hand, and evidence gathering which was capable of being lawful and would have been lawful were it not for the absence of some appropriate form of valid authorisation specific to the facts of the case in question. In the latter category, cases would also arise where there was an authorisation, but where there was some defect in the authorisation concerned. In that context, there is a difference between prosecuting authorities being able to rely, on the one hand, on evidence, the gathering of which was not authorised, but which could have been authorised, and where the absence, inaccuracy or invalidity of or in the relevant authorisation was not adverted to, and, on the other hand, evidence gathering which could never have been authorised at all."

73. The test agreed upon by the majority in J.C. would therefore distinguish, to some extent, evidence that could have been obtained lawfully but that was in fact gathered by a procedure that was in some way defective from evidence that could never have been gathered lawfully. It seems to me that a single fact is inescapable in this particularly unusual case – no other person, whether a member of the Garda Síochána or a judge, could have rationally declined to issue a search warrant in the circumstances as they pertained. The argument made by the appellant is that the evidence should be excluded because the wrong person was asked, but he has not explained how any other person might have assessed the matter differently.

74. I would accordingly be inclined to agree with the Court of Appeal view that the error in this case was one that made no practical difference. Further, since the Court has now

> ruled upon the interpretation of the section, it is an error that should not be repeated and should not arise in future cases.
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> 75. However, on the assumption that a *J.C.* inquiry could, for some reason, have led to the exclusion of the evidence, it is necessary to consider whether the appellant could then have been acquitted. In my view, this could not have been much more than a remote possibility, even without the glove. There was incontrovertible evidence that the raider came from, and returned to, the home of the appellant. Once the youngest of the brothers was eliminated from inquiries, the other two were the only realistic suspects. The appellant told the gardaí that he was at home, but there is no suggestion that the CCTV footage showed a different man leaving and returning to the house. The raider was wearing the clothes and shoes that the appellant had been wearing earlier in the day, and his DNA was on the plastic bag thrown onto the counter during the attempted robbery. It is apparent from the jury verdict that they were satisfied from the footage that Anthony was the man who received the bicycle from the perpetrator outside the house, after the shooting. That left the appellant as the only possible raider. The evidence against him was more than sufficient for a conviction, even without the glove.
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> 76. In the circumstances, I do not consider that the conviction amounts to a miscarriage of justice. I would dismiss the appeal.

55. There has to be more to such an analysis, as *Behan* illustrates than merely approaching a case on the basis that a warrant would have been granted anyway. That approach is not sufficient. Building on this analysis, it is important to state that there will be circumstances where the evidence is such that exclusion is corrected on appeal; or where a finding of lack of conscious deliberation is found to be unsupported by evidence; or where at trial a legal path to the obtaining of evidence is incorrectly identified; or where it cannot be ascertained on the basis of the findings of the trial judge as to what the situation was as to advertence or as to reckless disregard of the law.

56. What is certain is that there are some categories of ruling that can be corrected on appeal; while there are others where there has been insufficient factual analysis. In this case the trial judge heard an issue concerning the legality of the search and seizure. She determined that there had been no breach of rights. The information should have specified computers and the intention to search within the digital space but the failure to do so was honest inadvertence. The trial judge therefore did not move on to a *JC* inquiry. In *Quirke no 1*, this Court has found that there was a breach, but that this case fits within the category where an appellate court has sufficient information to know, as in *Behan*, what the result of a *JC* inquiry would have been; that is, a finding of honest inadvertence. While the accused contends that his cross-examination was limited to establishing the fact of the inadequacy of the information, and that he didn't get to cross-examine about the reasons for that inadequacy, on appeal it is not just possible to say, but the ruling is required out of respect for the fact-finding rule of the trial judge, that there was no deliberation in terms of breach of the rights of the accused. Hence, there are two stages: what is the nature of the breach and how did it occur; and what consequences must flow on a *JC* analysis in consequence of such breach.

57. In some cases it will be possible to consider these two stages on appeal. An example would be where both issues will involve the same witnesses. This was one such case. The relevant witnesses were the gardaí involved in the decision to seek a warrant. In so far as relevant, these were called and a clear ruling based on an analysis of available evidence was made by the trial judge. Other cases might require a two-step approach: the trial judge finds at the first stage that there has been a breach, but other witnesses will be needed to deal with the *JC* consequences of that finding, for

example where gardai acted on the orders of superiors. Counsel are entitled to canvass this with the trial judge when an issue arises and to consider the appropriate approach.

The circumstances of this case

58. The particular circumstances of this case enable both stages of the approach on appeal to be considered. Here, the basis for this decision is that:

1. The issue arises from the execution by the gardaí of a warrant which has been found by the trial judge, and affirmed on appeal to this Court, to have been lawfully granted.

2. The trial judge has rejected the claim that there was that any deliberate withholding of the intention to search computers from the Judge McGrath and, on the evidence, there is no basis on the facts for an appellate court to interfere with this finding.

3. On the face of the statutory provision on foot of which the warrant was granted (which was neither said, nor found, to be invalid) and on the face of the warrant, which was and remains lawful, the gardaí were entitled to seize any physical item which might be reasonably believed to provide evidence as to the commission of the crime of murder.

59. Hence, the question here is whether, on this combination of fact, this Court can decide as an appellate court that the exception set out within *JC* applies as a matter of law, thereby obviating the need to direct a re-trial. This is not a case of subsequent legal development: this case is the legal development. There will be cases where an accused raises a point and, on appeal, succeeds in establishing the validity of a new legal issue. There will be cases, therefore, on appeal where on this an accused will be entitled to a retrial because, by definition, the trial court will not have had an opportunity to match the state of knowledge of the gardaí against the development.

60. This is not such a case. That is clear not only because of the finding of fact by the judge, at point 2 above, but critically because of the fact that the warrant remained lawful and the provision pursuant to which it was granted on its face authorised the seizure. In substance, the application is that described by MacMenamin J in *JC* at [958] where he says that: "'the phrase 'deliberate and conscious' as now applied should not, and cannot, encompass steps properly taken on foot of Acts of the Oireachtas, or otherwise, in a bona fide genuine and well-founded belief as to their legality." Hence, it is also to be recalled that Clarke J in *JC* stated [874]:

> The substance of the factual underlay to this case is that the evidence in question was gathered on foot of a warrant which was prima facie valid on the basis of the law as it stood when that warrant was issued and where the warrant was issued in furtherance of a statutory provision which enjoyed the presumption of constitutionality. In those circumstances it seems to me that this case comes clearly within the category of case where the evidence should properly be admitted on the basis of the test which I propose.

61. Here, the gardaí executed a warrant that was and is fully lawful, issued on a foot of a statutory provision which was and which remains constitutional, in circumstances in which the trial judge has found they acted in good faith and in circumstances in which the basis on which the seizure has been found to be in breach of the accused's constitutional rights lies in an omission which has already been found to be inadvertent. It would offend any sense of logic to suggest that such a seizure was a 'deliberate and conscious' violation of constitutional rights. Such a finding would, in itself, be an error of law.

62. It is inescapable, therefore, that this case fits into the category where the trial judge, having heard the evidence, clearly made findings that inadvertence resulted in an unconscious mistake. She did so in circumstances where the statutory regime shows no relevant constitutional or legal frailty. In terms of the application of the law, there is no doubt that there has been in consequence of the decision in *Quirke no 1* a subsequent legal development, but that development did not change the status of the statutory provisions or the validity of the warrant. The question then became whether the seizure of goods on foot of that valid warrant was done honestly.

Result

63. In the result, the admission by the trial judge of the evidence of what was on the computer devices seized from the home of the accused can and should be affirmed since the illegality attaching was due expressly to a new legal development in the law related to digital-space privacy. There was, on the trial judge's ruling, no dishonesty. The mistake in the application on oath for the warrant and the resulting search warrant was due to honest inadvertence.

64. The conviction of the accused for the murder of Bobby Ryan should therefore be affirmed.