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 5
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

- with -

The Attorney General
Intervenor

- with -

The Irish Human Rights Commission
Amicus Curiae

Judgment of Mr Justice Peter Charleton delivered on Monday 20 March 2023

1. Bobby Ryan, a busy man of wide interests, went missing on 3 June 2011. There was no apparent reason for him to stage his disappearance. With no kind of message or call from him, family and friends became alarmed. Searches uncovered not a sign. On 30 April 2013, 22 months later, the accused Patrick Quirke notified the gardaí that he had found human remains in a tank on a farm he had been leasing for some years at Fawnagowan. These badly decomposed remains turned out to be the body of Bobby Ryan.

2. The prosecution case is that circumstantial evidence validly established at trial that Patrick Quirke had murdered the deceased. The accused was tried before a jury in the Central Criminal Court. After a lengthy trial of 71 days, he was convicted of murder on 1 May 2019.

Issues

3. The defence appeals this conviction on the basis that it was unsound because a computer and other digital devices taken from Patrick Quirke's home were not mentioned in the sworn information upon which Judge Elizabeth McGrath granted a search warrant to enter his home and to seize potential evidence. That warrant was granted on 13 May 2013, the search taking place on 17 May 2013. In the interval, meanwhile, the accused had attended and been interviewed at a garda station. He denied any involvement in the death of Bobby Ryan. Through forensic analysis of the computer hard drive, it emerged that the accused, subsequent to the disappearance of the deceased, had researched the decomposition of human remains. That interest was a strand in the prosecution case whereby circumstances were said to point to his guilt. These internet searches were proximate to other events that were argued at trial to make the accused's interest more than academic.

4. There is also a second point. The defence contends for possible unsoundness in the conviction on the basis of a theory from analysis of the much-decayed remains by a forensic pathologist which posited that the deceased may have died in a collision with a vehicle. At trial, the prosecution declined to lead that evidence, which they considered not at all plausible in the context of the injuries and the interpretation put forward of blunt force trauma causing death. Creedon J, the trial judge, did not exercise her prerogative to call the relevant witness to the collision hypothesis and so the defence opted to call evidence from the pathologist offering that possible opinion.

Appeal and leave to appeal to this Court

5. The accused appealed to the Court of Appeal on fifty-two diverse grounds, which were categorised into sixteen different topic sub-headings, as set out in the judgment of Birmingham P at paragraph [6] of his judgment of 16 November 2021, [2021] IECA 306, dismissing the appeal. By a determination dated 26 April 2022, [2022] IESCDET 51, leave to appeal to this Court was granted on the two limited grounds just mentioned:

> The Court is of the opinion that this case does involve two matters of general public importance, first, regarding the extent of any requirement to identify what might be searched for when applying for a search warrant, and, second, regarding the extent of the discretion vested in the [Director of Public Prosecutions] as to what witnesses she calls at trial, with particular reference to expert witnesses. The Court notes that these issues may arise in other criminal trials in the future, and it would be in the public interest to obtain further clarity. In these circumstances it considers that the constitutional threshold specified in Article 34.5.3 of the Constitution is thereby satisfied.

6. The grounds of appeal are thus limited by that determination. It is contended for the accused, firstly, that the search warrant granted by the District Court judge was defective as the gardaí failed to make any reference in seeking the warrant to an intention to seize computers in the appellant's home and only referred to "any other relevant evidence";

thereby, on this argument, precluding the District Court judge from conducting a proportionality analysis between a right to privacy in this respect and the community's right to investigate and prosecute crimes. The second contention concerns the extent of the discretion of the Director of Public Prosecutions as to what witnesses are called at trial, with particular reference to expert witnesses. The dispute in this regard arises because the prosecution did not call the evidence of Dr Michael Curtis, the Deputy State Pathologist, which the appellant alleged contained evidence crucial to the defence case. The defence argument is that the DPP did not exercise her discretion to call or not call particular witnesses appropriately, and that this decision had a prejudicial effect on the jury's consideration of the evidence given at trial.

Background

7. Since this is a circumstantial evidence case, where the defence contention is that the absence of evidence before the jury that the accused had an otherwise inexplicable interest in researching the decomposition of human remains may have weakened the threads of circumstantial evidence so as to denature the prosecution case, some background is necessary.

8. On 3 June 2011, at Tipperary town Garda Station, the family of Bobby Ryan reported that he had inexplicably vanished. They were deeply worried. The deceased had not turned up for work, was not answering his phone and had neither messaged nor called any of his regular contacts. The deceased's final known contact with anyone, that is anyone who cared to come forward, was at Mary Lowry's home in Fawnagowan, a townland close to Tipperary town and accessible from the N24 road. Bobby Ryan and Mary Lowry were in a relationship. He had stayed that night at Fawnagowan and had left for work early at about 06.30. Some three years previously, towards the beginning of 2008, the accused and Mary Lowry had entered into a relationship. She had been widowed since the previous year. The accused was married to her sister-in-law, her late husband's sister. That relationship did not endure. Subsequently, she entered into a relationship with the deceased around the end of 2010. The relationship with the accused had by then been ended. Mary Lowry owns farmlands beside her home in Fawnagowan and these lands were the subject of a seven-year leasehold agreement between Mary Lowry and the accused, beginning on 8 April 2008. This meant the accused was in occupation of the farm where the deceased's body was found at the time he went missing some 22 months previously. Since there was no known reason for Bobby Ryan to disappear, an extensive search had been mounted in the local area and with particular focus on areas close to Mary Lowry's home. That included the farmland at Fawnagowan, contiguous to her home and leased to the accused. That farm was searched on 11 June 2011. No evidence of Bobby Ryan's whereabouts was discovered at that stage. It is not known if trained dogs were used, but nothing of the body or of the disused water tank that may already have been the resting place of the deceased was found. Apparently, the disused water tank was not searched. It is understood that it was not visible to gardaí, and they otherwise had no knowledge of it. The area inside the tank had been rendered anoxic as the entrance, by design or accident, was covered with earth.

9. Part of the prosecution case potentially related to the manner of the apparent discovery of the body on 30 April 2013. The accused had claimed that he was working on spreading, or preparing to spread, slurry from a tank at Fawnagowan and had consequently needed the water tank to dilute and agitate the slurry. This tank he had otherwise not used for a considerable time. His clothes were not soiled, according to the

gardaí to whom the discovery of the remains of Bobby Ryan was alerted by the accused. The accused's narrative was that he had been preparing to spread slurry from the main tank onto land that morning and consequently required water to agitate and liquify it. As a result, he said that he had accessed one of the run-off tanks to draw in water to dilute the slurry mix. To do this, he used a pump to draw water into a vacuum tanker and, to his surprise, he claimed, discovered the body of Bobby Ryan at the bottom of this supplementary tank.

10. Dr Khalid Jaber, the Deputy State Pathologist at the time of the discovery of the body, conducted the post-mortem examination on 1 May 2013. He did not, however, attend the scene of the crime. In his report, dated 25 July 2013, Dr Jaber concluded that the cause of death was "blunt force trauma (evident by multiple skeletal fractures in a body showing marked post mortem changes)". Dr Jaber was not available to testify at trial. Dr Jaber's report, in ordinary course, was the subject of two independent reviews. Professor Marie Cassidy, Dr Michael Curtis, and Dr Linda Mulligan of the Office of the State Pathologist conducted the first of these reviews. On 29 September 2015, Professor Cassidy delivered the conclusions of their review to Inspector Patrick O'Callaghan of Tipperary Garda Station. They were in agreement that the cause of death resulted from blunt force trauma. They opined that the cause of the trauma was "likely due to vehicular impact trauma." The second review was undertaken later by Professor Jack Crane, who was previously the State Pathologist for Northern Ireland. He concluded that the cause of death was from blunt force trauma, but Professor Crane could not hold with the opinion that there was evidence that this trauma was caused by a vehicular impact; he accepted that it could have been, but his clear opinion was that there was no available evidence to support such a finding.

11. The accused attended for a number of voluntary interviews at Tipperary Garda Station. No admissions were made, rather denials. A search warrant was obtained by the gardaí in respect of the accused's family home in Breanshamore, somewhat further west of the N24 road from the leased farm at Fawnagowan, on 13 May 2013. It was executed on 17 May 2013. A number of items were seized in the course of the search, including a computer found in the home and a hard drive. A forensic examination of the computer devices revealed that internet searches on the computer included: "a human corpse post mortem: the stages of decomposition", "How DNA works", and other searches relating to the rate and extent of body decomposition following death. These were discovered through forensic analysis of the computer and follow-up tracking of the sites searched.

Circumstantial evidence

12. No admissions were made by the accused to homicide. He denied any involvement: the discovery of the body on land leased by him was a coincidence, he asserted. There were no witnesses, apart from the killer, to the death of Bobby Ryan. He had simply disappeared, and his corpse being concealed on a farm occupied by the accused was merely a circumstance: as was the report given of the uncovering, as was the issue of how the body got there, as were the injuries still discernible from his remains, essentially only skeletal fractures, as was a series of interactions potentially establishing a possible motivation, as was the interest of the accused in decomposition.

13. Circumstantial evidence, according to Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd edition, Dublin, 1951) at p 177, "is very often the best evidence the nature of the case permits. It is evidence of surrounding circumstances which by undesigned

coincidence is capable of proving a proposition with the accuracy of mathematics." Very often cases may comprise multiple kinds of evidence; eye-witness testimony as to the commission of the crime by the accused, admissions by that accused, and circumstances that otherwise point to guilt. Of these three kinds of evidence, each on their own suffices to enable a secure conviction. Any of these types of evidence may, where there is a warning of acting on a confession alone or on the percipient testimony of an accomplice, be corroborated by circumstantial evidence; see the judgment of Denham J in *The People (DPP) v Gilligan* [2005] IESC 78, [2006] 1 IR 107 at 142. That merely means some evidence independent of the accomplice or of the confession which tends to demonstrate, but not necessarily prove on its own, the accused's commission of the crime. Hence, if corroborative evidence is through facts which point to the accused's involvement, of themselves these do not have to constitute complete proof. Nor does any item of corroboration. When evidence is entirely circumstantial, that is where no one can testify to an admission or to actually witnessing the accused's involvement, the strands of proof must be woven individually so as to constitute together a convincing narrative of guilt to which there is no reasonable innocent explanation. As Sandes at p 177 puts the rule:

> It is no derogation of evidence to say that it is circumstantial, *R v Taylor*, 21 CAR 21. A jury may convict on purely circumstantial evidence, but to do this they must be satisfied, not only that the circumstances were consistent with the [accused] having committed the act, but also that the facts were such as to be inconsistent with any other rational conclusion than that he [or she] was the guilty person. *AG v O'Brien* CCA 11-7-32; *R v Hodge* 2 Lew 227; Halsbury, First Ed, Vol IX, Art 1190, page 558.

14. Where corroboration of guilt by independent circumstance or other testimony is sought, the acceptability in terms of fact should be considered by a jury (or judge if a judge or judges alone are the tribunal of fact) prior to the accomplice evidence or the contested confession and then the weight to be attached to both considered. For purely circumstantial evidence (absent admission or percipient witness) the task of the jury is to assess each piece of what is presented and see if that is proven and if it tends to further the proposition that the accused committed the crime, but then analysing together each and every such strand of evidence in terms of the weight that is borne individually and collectively in the context of all of the evidence accepted by them. There is nothing technical in this process. It is a task mentally engaged in in ordinary life as to the proof of a supposition which by circumstance is logically divined to be fact. It is all the proven strands of circumstantial evidence which, considered as a whole, or as some prefer to put it, as woven-together strands of a rope, may enable a jury to assess the accused as guilty where those circumstances are collectively consistent with that proof but which admit no rational scenario whereby the accused might be innocent of the crime because mere happenstance has unluckily pointed a finger at him or her.

15. Hence, the argument of the accused can be seen in context. It is asserted on his behalf that had his interest in human decomposition not been revealed, the strands of evidence would have been weaker and perhaps consistent with the coincidence of a concealed body on the farm of an uninvolved person. On the issue as to the necessity for the accused to call a pathologist on the vehicle collision theory, remembering that being knocked down by a car or tractor could be accidental or might involve the use of a vehicle as a weapon, the accused asserts that his being forced, by the prosecution refusal to offer such evidence, into offering an analysis of an alternative scenario led to an

unfairness in the trial process; claiming that this is no part of the function of an accused and that it might appear to set up some kind of legally incorrect impression to the jury that an accused bore a burden of presenting, or even proving, any rational hypothesis on the proven circumstances that was inconsistent with guilt.

16. Since the interpretation of the signs of injury, such as remained on the decomposed body of the deceased, were central to the prosecution case, it is appropriate to deal with the point related to the refusal of the prosecution to lead the collision interpretation theory and to then proceed to the appeal in relation to the computer searches.

Duty in calling contradictory evidence

17. There were two potential theories as to the cause of death. These came from different pathologists but the one favouring the second theory was not called by the prosecution. The first theory was an attack, but the second theory did not rule out an attack theory on any sensible view of the injuries. Essentially, the deceased had multiple skull fractures and there was in addition a fracture of the femur. The latter injury, in particular, could have arisen when, on opening the concealed water tank, either by the accused or, later on the discovery being reported, by the gardaí, part of a smashed concrete cover dropped on the remains of the deceased. By this stage, 22 months after disappearance, these remains had been rendered close to skeletal. For bone injuries, since vital reaction takes time to set in, it becomes impossible to determine if injuries were before or after death where the demise of the victim is instantaneous or occurs rapidly. These are specialist matters and essentially ones where the tribunal of fact, here the jury, are to be assisted by expert evidence.

18. The second theory set out another potential source, apparently, of the injuries as a road traffic incident. That did not necessarily exclude an attack since a car or tractor can be used, and has been used in other homicides, as a weapon of offence. But one theory was that the deceased had been hit by a vehicle and turned by the impact so that he landed on his head causing the skull fractures that were beyond difference of opinion by the various experts. It is not for the Court to express a view as to what report might carry more weight.

19. By submissions made at trial on behalf of the accused, seeking that the trial judge require the prosecution to call pathologist witnesses to each theory, or that the court itself call the pathologist the prosecution was refusing to call, it was asserted that with a death by motor collision, there would be a bloody scene; that the body being placed in the tank was a theory more consistent with the findings of the post-mortem than it falling or being thrown in; that more properly a pathologist should have examined the scene to engage with the signs there; and that concrete fell, perhaps impacting on the remains to cause bone injury. These ideas, however, were all presented as evidence in chief but through the pathology evidence that ruled out vehicle collision in favour of blunt force trauma, meaning an attack with a weapon. Therefore, through the prosecution evidence, all of these matters were before the jury, albeit with the expert opinion favouring blunt force trauma.

20. The deficit claimed on behalf of the accused is that with a circumstantial evidence case, one wholly depending on this class of proof and with no direct evidence such as eye-witness testimony or an admission by the accused, the defence does not have to engage but rather may eschew any engagement with any theory. While the defence, in

this instance, has no burden of proving anything and may remain silent, the debate at trial in a circumstantial evidence case is twofold: do the various strands of evidence prove guilt when considered together, firstly; and, secondly, is there any other theory based on such facts as the jury accepts which might show an unfortunate concatenation of events whereby the accused might be innocent?

21. It is more theoretical than real, and certainly in terms of advocacy not a helpful approach, for the defence to decline to participate in examining evidence which may build towards circumstantial evidence of proof of guilt. While the defence does not have to come up with any alternative theory, the engagement at the trial, sensibly, is in seeking to undermine by cross-examination or alternative evidence, that any strand of evidence should be accepted in evidence, firstly; and, secondly, if the jury finds such strands proven, to argue that there are or may be other explanations as to why what seems to point to the accused's guilt is in fact capable of another reasonable hypothesis.

22. Nothing in terms of calling alternative pathology evidence undermines the burden of proof on the prosecution or tends towards confusion whereby the jury might come to believe that any burden of proof is with the accused. That did not happen in this case. The accused was allowed to cross-examine the prosecution witness and the alternative theory was presented in evidence with no interruption from the prosecution of the defence evidence positing the vehicle collision theory.

23. It is unnecessary to consider the principles set out in R *v Russell-Jones* [1995] 3 All ER 239, [1995] 1 Cr App R 538 since not all are essential to this decision and were not, in any event, argued. Since *The People (DPP) v Tuite* (1983) Frewen 175 at 180-181, the principles are clear. As McCarthy J put the matter:

> The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parole or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so.
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> There is, however, a limit on the duty of the prosecution, apart from the testimony being irrelevant, - in a given case the prosecution may answer such a request by saying that such evidence cannot add anything to the evidence already given by another witness or witnesses. The request must also be made with reasonable notice.

24. This statement of principle remains the law. The analysis of McCarthy J is not contradicted or qualified by subsequent cases, but rather affirmed. In R *v Brannigan* [2013] NICA 61, a statement taken from an individual who was not later called was served on the defence, as part of ordinary disclosure obligations to seek such evidence as might both establish or undermine the accused's guilt, but there was no obligation to call such a witness; see also *O'Regan v DPP* [1999] IESC 59. While *The People (DPP) v Casey* [2004] IECCA 49 is argued as a limitation on the entitlement of the prosecution to call a witness, only if the testimony is regarded as wholly unreliable, that is merely an instance. The principle remains that, in general, the prosecution should call such relevant evidence as is in the book of evidence served on the accused but may decline to call a witness. The trial remains fair once the defence has notice and may call that witness, if available. The trial judge retains a discretion to call a witness. Essentially, that might be done to enable

both sides to cross-examine, but more usually, experience tells us, to diffuse any issue. This is not obligatory.

Disposal on the pathology evidence

25. Hence, the ruling of the trial judge accorded with the law. The discretion of a trial judge to call a witness or to refuse to do so is exercisable in the context of the trial. It is now appropriate to turn to the search and seizure and examination of computer devices at the home of the accused.

Appellate arguments on searching

26. The statutory power to issue a warrant enables the search of a premises. As will be specified below, items related to the deceased Bobby Ryan were particularised on oath by the gardaí before Judge Elizabeth McGrath as potentially being within the accused's home at Breanshamore. Had personal items of the deceased been found there, the investigation would have been furthered in terms of circumstances and perhaps the accused might have offered a, potentially incriminating, explanation. The statutory power, it is contended on behalf of the accused, does not enable a virtual search, that is to say the interrogation of the hard drive of any computer devices or of mobile phones.

27. The accused argues that the gardaí were at all times interested in computer devices but did not inform the issuing judge of this. Nor were computer devices belonging to the accused, or potentially present in the house, set out in the draft of the warrant put before the judge. They thus failed, it is claimed, in an asserted duty of candour. That duty would not be met, on the accused's contention, were a mistake made as to any item in which a potential search party expressed interest that resulted in it being left off the warrant draft as to what the gardaí were interested in or in it not being specified in the sworn information setting out the evidence on which they proposed to seek legal authorisation to search. Hence, the warrant is argued to be illegal. In any event, computers, the accused asserts, cannot be seized unless there has been a process whereby a judicial authority can assess and balance the inevitable and major intrusion that the search of a computer device involves. It requires, it is argued, a judge to judicially conclude if that trespass into the private life of a suspect is justified by information as to reasonable suspicion placed before a court.

28. The Irish Human Rights and Equality Commission, acting as *amicus curiae*, emphasises this latter argument. Since people increasingly live their private and their business lives through their computer devices, the Commission asserts that an invasion of that space is as serious an intrusion, and even more so, than an intrusion upon the constitutionally protected inviolability of the dwelling under Article 40.5. From the viewpoint of protection of rights under the Constitution and under Article 8 of the European Convention on Human Rights, guaranteeing private and family life, the Commission argues that there must be a judicial intervention separately considering entry into the virtual space recorded in computer devices. Absent statutory intervention, the principle of constitutional protection requires, on the Commission's submissions, the existing legislative regime to be read so as to uphold such rights through a double construction device that does not, it was asserted, amount to the courts breaching the separation of powers through amending and rewording legislation.

29. The Attorney General, in his oral presentation before the Court, described those arguments as legally unsustainable, wrong in principle, as based on a hypothetical and as bypassing the facts of the case. The contentions against the validity of the warrant were inconsistent with the statute under which it was issued and were furthermore, he argued, unnecessary as the existing protections of the rights of the accused were ignored. A computer, he said, was neither a Constitution- nor a Convention-protected space, and nor was it a separate location from a place, meaning a location on the express statutory language, in respect of which a valid search warrant had been issued in this case.

30. The Director of Public Prosecutions asserted that the trial judge had made a decision which was within her jurisdiction, one based on fact and thus not ordinarily subject to review on appeal. The argument also emphasised the statutory framework which, it was contended, could not be bent into something it was not. The legislative power, the DPP reminded the Court, related to a time when home computer devices were commonplace; this was not a statute that was from another age or in any way out-of-date. A judge, argued the DPP, might expect that gardaí searching a home would be interested in what the accused was concerning himself with at a time when a victim of homicide had disappeared and may then have been concealed on a farm leased by him. There had been, it was claimed, no deception. Any contention, it was asserted, drawing back into the criminal law an admissibility barrier based on mistake was without legal authority and was retrograde. The case law, the DPP submitted, in the context of the Constitution and the legislative provisions could not support a double-construction that would amount to rewriting the legislation.

The ruling of the trial judge

31. Creedon J, dealing with an application to declare that the search for and seizure of the computer devices was unlawful, did not accede to the defence arguments. She 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.
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> 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.
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> 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.

Court of appeal

32. In dealing with this issue as one of dozens raised on appeal, the Court of Appeal upheld the validity of the actions of the gardaí in taking and analysing the computer pursuant to the search warrant granted to them. Birmingham P, after reviewing the authorities and the legislation stated:

> 126. The issue for consideration is whether the District Court judge was apprised of all necessary information so as to enable her to properly exercise her discretion in respect of the issuing of the warrant. A failure to incorporate reference to the computers in the body of the warrant may be categorised as inadvertence and would not in our view invalidate the warrant, but the appellant's contention is more nuanced.
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> 127. Before we proceed to address the former issue, in our opinion, the absence of computers from the sworn information and, as a consequence, from the warrant, was certainly sub-optimal. A warrant should be prepared with care and, of course, this is dependent upon the sworn information and the oral evidence adduced before the District Court judge. However, in the present case, the absence of any reference to computers on the warrant was not in the nature of a fundamental error. It is also correct to say that a warrant is not a complicated document and should be subjected to sensible scrutiny by a court. The trial judge did not err in this respect.
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> 128. We now consider whether the fact that the District Court judge was not informed of the intention to search and seize computers deprived her of jurisdiction to issue the warrant. Undoubtedly, while she ought to have been fully apprised of this fact, it cannot be ignored that computers and electronic devices (mobile phones etc) are very much a feature of criminal investigations. The fact that the District Court judge was not informed of the intention to seek out such material did not in itself deprive her of jurisdiction to issue the warrant. She was fully advised on the basis of the sworn information and the evidence on oath of the nature of the investigation and items were listed for which the Gardaí

intended to search. If some of those items were not found, would that have deprived the judge of jurisdiction to issue the warrant? We think not.

> 129. Moreover, the sworn information refers to "any other evidence". As this is non-specific, it certainly would include items such as mobile phones or computers or indeed anything else which the Gardaí considered relevant to their investigation. However, greater specificity is to be preferred.
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> 130. In conclusion, while we consider it sub-optimal that the warrant did not include any reference to computers, this is not fatal to the validity of the warrant, nor are we persuaded that the failure to inform the District Court judge of the intention to search for computers deprived her of her jurisdiction to issue the warrant. Material was before the Court to enable her to properly exercise her discretion and the absence of this information did not impact on that. We are not persuaded that the warrant was issued without jurisdiction.

33. Since what is argued on behalf of the accused is a development whereby the common law should develop so that a computer becomes in itself a space, the limits of judicial authority to apply and augment existing rules at common law comes into focus. What is significant here becomes not what the law is sought to be developed into but what the specific statutory power defines itself to be.

Limits of common law development

34. Common law is bounded by rules, and it may apply new situations to those rules, but it may not invent law so as to intrude a judicial policy into the province of the Oireachtas as the "sole and exclusive law making" power of the State under Article 15.2.1° of the Constitution; *The People (DPP) v McNamara* [2020] IESC 34 at [26]. In his article marking the 24th anniversary of *Donoghue v Stephenson* [1932] AC 562, '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, Professor RFV Heuston describes the background whereby the common law had built up a sufficient foundation of precedent to constitute the well from which the general statement of law that marked the recognition of the separate tort of negligence was drawn:

> Attempts to state in simple and comprehensible language the fundamental principles of the common law, to rationalise a host of single instances, have always been met with hostility. It is not easy to explain why a legal system which in its law of real property displays some of the most intricate concepts ever conceived in the human mind, should show itself so hostile to speculative analysis.

35. The responsibility of giving words a plain meaning is part of the cornerstone doctrine of certainty of law; a fundamental principle whereby the law is known from a reading of what is intended to be a statutory formula using ordinary words to achieve a particular and tangible meaning. That does not differ from the European formulation. The issue of how a national court ought to interpret domestic legislation giving effect to EU law was considered in *Marleasing SA v La Comercial Internacional de Alimentación SA* (C-106/89) [1990] ECR I-4135. Here the European Court of Justice made it clear:

> [7] It is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls

> within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
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> [8 In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v. Land Nordhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.
>
> [9] It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

36. Here, what is argued for the accused is that the word "place" in the 2006 Act as the locus of a search should be, in effect, re-written and distorted into something which the Oireachtas was aware of but chose to exclude from the legislation: making a computer a place and, furthermore, a place separate from the physical space in which it must of necessity be as an object, and separate from the wall of the home from which it derives necessary electricity. That argument invites the court into a breach of its function. As a principle of interpretation, this is beyond impossible, even were it to be the case that the Court were to follow principles of construction derived not from the plain words of the statute but from the application of some supervening doctrine. That word was used for a purpose. It is presumed that the legislature intended that each word in a provision should contribute to its meaning. As such, words used in a statute are not to be approached as if they are rhetorical or reiterative. Where possible, each word must be given a meaning because it is only by that approach that effect is given to the intention of the legislature. The use, for instance, of different words in the same context, implies that a variation in meaning is required to be taken by a judge construing the statute. As Egan J remarked in *Cork County Council v Whillock* [1993] 1 IR 231 at 239:

> There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or to say anything in vain.

37. Distortion cannot enter into the construction of the primary function under Article 15.2 of the Constitution for the Oireachtas to be the sole and exclusive law-making body for the State. It would be contrary to principle, further, to change such plain words into something which they are not. That is outside the scope of the double-construction rule.

Where two interpretations of a statute are possible, one of which is in conformity with the Constitution and the other of which is not, the courts must opt for the constitutional interpretation; *McDonald v Bord na gCon* [1965] IR 217. An impossible interpretation is not to be forced onto the wording of a statute, however, in order to keep its effect within constitutional boundaries; *Colgan v Independent Radio and Television Commission* [1998] IEHC 117, [2000] 2 IR 490. A partial severance of words from an enactment in order to bestow constitutional conformity on it should not be undertaken where the result is that the courts are in effect legislating – bringing into force a provision that the Oireachtas never intended; *Maher v Attorney General* [1973] IR 140.

38. Even more seriously, the courts are obliged to uphold the separation of powers doctrine whereby the function of the judicial arm of government respects the exclusive right of the legislature, subject to the Constitution, to make laws. In *The State (P Woods) v Attorney General* [1969] IR 385, at 399-400 per Henchy J:

> The necessity for the Courts to exercise self-restraint in the exercise of their constitutional jurisdiction to review legislation is due in part to the inherent limitations of the judicial process. When a court is presented with the question of the constitutionality of a legislative enactment, it can do only one of two things; it can find it to be constitutional, or it can strike it down as unconstitutional. If it finds it to be constitutional, it merely gives to an already valid law a judicial *imprimatur*. If it declares it to be unconstitutional, it holds it to be a nullity; it leaves a void where what purported to be a statutory provision was; but it cannot fill that void. It unmakes what was put forth as a law by the legislature but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government: *Rescue Army v. Municipal Court* (1947) 331 US 549. The desirability that the Courts, the Legislature, and the Executive should be punctilious in observing their constitutional functions has been referred to as follows by the Supreme Court in *In re Art. 26 of the Constitution and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470:- "The People, by the Constitution, have provided for the setting-up of three great Departments of State – the Oireachtas, the Executive, and the Judiciary – and it is essential for the harmonious working of the machinery of State that each Department should confine itself to its own constitutional functions. If the Oireachtas enacts a law within the scope of its legal and constitutional powers, it is for the Courts to construe and apply such law. Any criticism by the courts of the manner in which the Oireachtas exercises the discretion and powers vested in it would be as much open to objection as would any suggestion, in either House of the Oireachtas, that a decision of a Court, within the scope of its authority, was not in accordance with law." Because of the constitutional proprieties involved in the judicial review of legislation and the inherent limitations of the judicial process, the rule has been evolved that a court should not enter upon a question of constitutionality unless it is necessary for the determination of the case before it.

39. Between any usurpation of the "sole and exclusive" law-making power of the Oireachtas, as declared by Article 15.2.1° of the Constitution, and the judicial duty of declaring what the law is, there is a gulf that should not be crossed. Judges do not legislate. Nor do judges add sections or take away sections from legislation, but interpretation so as to avoid absurd results where there is ambiguity was part of the common law and has been expanded into a wider power by s 5 of the Interpretation Act

2005. Litigation and legal argument are about what the law is and not what the law might ideally become: that is the task of legislators. The courts do not infringe the principle that revenue statutes carry no equity. In *L v L* [1992] 2 IR 77 the issue was whether Article 41.2.2° could be used as a vehicle for advancing the existing equitable share of spouses in the family home even where no identifiable financial contribution had been made by her to purchase or mortgage the property. Finlay CJ at 107, reversing the High Court decision introducing joint ownership, concluded that this would not be permissible:

> I conclude that to identify this right in the circumstances ... is not to develop any known principle of the common law, but is rather to identify a brand new right and to secure it to the plaintiff. Unless that is something clearly and unambiguously warranted by the Constitution or made necessary for the protection of either a specified or unspecified right under it, it must constitute legislation and be a usurpation by the courts of the function of the legislature.

40. Henchy J in *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436 at 450 considered an argued-for change in defamation law through the invention of a new form of privilege. He rejected the proposition that finding and applying new defences to libel that were then unknown to the law was the task of judges, stating that:

> ... the suggested radical change in the hitherto accepted law [of qualified privilege] should more properly be effected by statute. The public policy which a new formulation of the law would represent should more properly be found by the Law Reform Commission or by those others who are in a position to take a broad perspective as distinct from what is discernible in the tunnelled vision imposed by the facts of a single case.

41. Similar points can be made in relation to *R v An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 IR 533 which concerned the definition of "mother". Similarly, *Attorney General v Paperlink Ltd* [1984] ILRM 373 involved a reshaping of the exclusive privilege of An Post to carry mail and parcels throughout Ireland in favour of an open competition policy not found in existing legislation, a proposition which Costello J felt the courts incompetent to engage in and which was beyond the scope of judicial authority.

42. Even in the field of common law which often throws up categories of applicability that seem capable of expansion, such as hearsay or warnings in respect of potentially infirm testimony, unless an underlying rationale can be identified from existing precedent with clarity and applied to a new situation, the law cannot be expanded, because such an expansion would mean change. This has been seen in the case of nullity of marriage where the existing common law grounds could not embrace failure to cause pregnancy or be expanded to allow dissolution because of emotional instability; *MM v PM* [1986] ILRM 515 and *UF v JC* [1991] 2 IR 330. Perhaps the case law demonstrates that a workable test is one which asks if law is being clarified or is being amended. Incremental changes to the common law through experience remain possible, since this is a tradition inherited under Article 50 of the Constitution, but only by drawing on what already exists and using fundamental principles to carefully etch applicability onto a new situation.

Two fundamental principles of police powers

43. Two further principles should be borne in mind. Firstly, police powers are not granted simply for individual officers to decide to annoy those they may dislike by, as can

happen, arresting people repeatedly and in the absence of reasonable suspicion, or exercising powers under the Road Traffic Acts or Misuse of Drugs Acts to stop and search people. A power is granted for a purpose and is limited to reasonable use in accordance with the statutory remit and within its confines, and not for harassment or titillation or any other improper purpose. A search is for the gathering of criminal evidence or leads to assist the investigation of crime, and the power to search is not granted for the purpose of annoyance through the arbitrary invasion of the privacy of the home.

44. Secondly, where articles are seized and an issue arises as to the improper seizure of irrelevant evidence, a civil application is a necessary fetter on police power whereby a judge may decide that it is no longer necessary to hold property since a suspicion justifying a search has dissipated or a belief as to connection with crime has dissolved; *Ghani v Jones* [1969] 3 All ER 1700, along with the other relevant authorities.

Legislation and granting of the search warrant

45. The text of the legislation is central to the contentions on behalf of the accused and to the responding arguments of the Director of Public Prosecutions and of the Attorney General. The year it was passed, social conditions and the level of protection considered sufficient by the Oireachtas inform its construction. The search warrant on foot of which the computer material was seized and later analysed was issued under s 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by s 6(1)(a) of the Criminal Justice Act 2006. The 2006 Act constituted a self-contained power: one that is the most widely used legal instrument for search since it covers a reasonable suspicion as to evidence related potentially to an arrestable offence, meaning one that might on indictment attract a potential penalty of five years' imprisonment or more. That section provides:

> (1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.
>
> (2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—
>
> > (a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,
> >
> > (b) to search it and any persons found at that place, and
> >
> > (c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.

> (3) A member acting under the authority of a search warrant under this section may—
>
> (a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and
>
> (b) arrest without warrant any person who—
>
> (i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,
>
> (ii) fails to comply with a requirement under paragraph (a), or
>
> (iii) gives a name or address which the member has reasonable cause for believing is false or misleading.
>
> (4) A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(a) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

46. Under subsection (5), this power to issue a warrant is "without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person." Hence, the intention of the Oireachtas was to not disturb existing powers of search, for instance on arrest or under other statutory powers (of which there are many), or to override and substitute any new requirement in a search for any existing statutory power of search, for instance under s 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, or of stop and search of vehicles, for instance under the Misuse of Drugs Act 1977 as amended. There is nothing in the statute to suggest the overriding of common law powers; here relevant is search of a person upon a valid arrest. Subsection (6) of the 2006 Act states the definition of an arrestable offence under this section. Here, on behalf of the accused, it is contended that a computer is a separate place from the location in which a computer device may be found. The Act of 2006 has a specific definition which cannot admit of the express language, buttressed by examples, being bent. But that language is specific to what are physical spaces. Further, the examples given by way of what a place includes are, again, all instances of what constitute places under the legislation and extend only to the examination of what is found in terms of physical objects. A computer, just like a knife or a diary or a bloodstained rag, is a thing and is found in a physical location. As such, it may legitimately be searched for. Objects are examined as to the quality of what they tell in themselves. Hence, the rag may yield DNA links to the crime of the victim; there may be the victim's blood on the knife; and a diary may record an account of events or of intentions. A computer may be examined as a physical object – the box or screen or keyboard it represents – and its qualities are as to fingerprints or blood spatter or DNA that may be found physically on it. It must be remembered that in the legislation, a place is defined as meaning "a physical location". A place is not defined as a virtual space. When a computer is sought outside of what physically it may yield, it is an item whereby a virtual space is to be accessed quite apart from the nature of the quality of the object itself. What is then sought is to use a computer as a portal into a non-physical but virtual space. While seizure of objects in the course of search is of the essence of seizure under a search warrant, seizure for the

purpose of moving from the physical nature of such objects, and their qualities or trace elements on them, towards an examination of the digital space to which the computer is a portal, is of a different nature. Further, the definition in the legislation is given in terms of what is physical. Under the legislation, a place includes:

> (a) a dwelling, residence, building or abode,
>
> (b) a vehicle, whether mechanically propelled or not,
>
> (c) a vessel, whether sea-going or not,
>
> (d) an aircraft, whether capable of operation or not, and
>
> (e) a hovercraft.

47. While this does not mean that a computer cannot be searched for, and seized and later examined beyond the physical space, there should be focus on what the extent of the warrant authorised in those terms and the interposition of the judicial mind as a necessary protection in that process. Central to the argument posited by the accused that the warrant, as issued by the judge, was of itself unlawful is that the gardaí had it in mind that computer devices would be at the accused's home place in Breanshamore but did not tell the judge that fact or inform her of their suspicions as to what might be yielded by an analysis of what the accused might have searched. Their intention, in other words, was not just to search the physical space that constituted the accused's home and to take from that physical space any objects that might connect the accused with the death of the deceased, but to go further and to seize computer devices and to thereby leave the physical location and to search in the digital space to which the computer devices might give access.

48. Counter contentions proceeded apace before the trial judge in the Central Criminal Court. She heard oral evidence in the absence of the jury from a number of gardaí involved in the preparation of the warrant; including Inspector Patrick O'Callaghan, Sergeant John Keane (who applied for the search warrant), Garda John Walshe (who took part in the search of the accused's house) and Garda Kieran Keane (the exhibits officer). Most significantly, Inspector Patrick O'Callaghan testified that he had met with Sergeant John Keane prior to the application for the search warrant to discuss what within the physical space of the accused's home was of interest to the investigation team. Inspector O' Callaghan gave evidence that he met Sergeant Keane prior to the search of Breanshamore and discussed with him the items that were to be searched for and seized. An extract from the trial transcript of 20 February 2019 suffices:

> I basically discussed with him – I discussed with John Keane that the premises at Breanshamore consisted of a home, house, sheds, farmhouses, milking parlours and lands and I would have been of the belief at that stage at approximately 50 acres. We spoke about what we had intended searching for. That was missing property belonging to Bobby Ryan and that would have been clothing, jewellery, keys, mobile phone, the possible murder weapon, which was obviously unknown at that stage, clothes with blood and perhaps overalls. I also informed John Keane that I would have expected that all vehicles located at the property, including the jeep, Pat Quirke's jeep and quads, would have been swabbed, they would have been examined. Items to be seized, I would have requested John

Keane to ensure that computers that were located on the premises were searched. The reasons that I gave for that was that I believed that evidence in relation to the murder of Bobby Ryan may be located on them, in such that I believed that Pat Quirke may have visited sites on the internet in relation to researching for decomposition of bodies and/or murder, and also that there may – the computers may contain information in relation to milking of cattle at Pat Quirke's on the morning of the 3rd of June 2011, that he may have been collecting the data on those computers. Any relevant records or transactions between Lowry farm and Pat Quirke, that they were to be seized and viewed, any other items of interest.

49. Relevant notes were also produced. Extracts of these notes were read in the process of the cross-examination of Inspector O'Callaghan on 20 February 2019:

> Q: But you were keeping notes, because you have notes on the 12th in your notebook. Well, it's not a notebook, actually, it's the Inspector's record, I think?
> A: It's just a diary here, yes
> Q: There is a reference on the 12th of the 5th to you meeting with Sergeant Keane and going over the grounds for the search warrant for lands at Breanshamore, correct?
> A: Yes
> ...
> Q: [It reads] "warrant organised"... "Spoke with D/Superintendent Hayes"?
> A: Yes.
> Q: Then there is a reference to other steps being taken ... "Phones, search house to house, identity, jobs and planning"? ... "Searchers. Tie down searchers John O'Regan, Cathal Godfrey." ... "Search of farm." ... "A tech team to accompany search team." ... "Milk yield. Look for three to six. Look for computer at Quirkes."
> A: That was a reference to the milk yield for the morning of the 3rd of June 2011.
> Q: Yes, and that was to be on a computer, isn't that so?
> A: Yes, well the presumption was that that was to be on a computer.
> ...
> Q: "CrimeCall staff, movements of Bobby Ryan on the night before."?
> A: Yes, those notes are in relation to preparation for CrimeCall, I think, which was on the 21st and I was in constant contract with Dermot Lynch who is on the CrimeCall staff.
> ...
> Q: Then it says on the 17th [of May] "0900 hours, brief search time, Breanshamore, house of Patrick Quirke" and then the other things that you've gone through with Mr Bowman?
> A: That's correct.
> ...
> Q: And then there are notes of the briefing. I see. And what is said, that the items to be seized include computers. It says: "Computer relevance 1); sites visited et cetera and research for decomposition of bodies et cetera; 2) milk info for morning of 3rd of June..." –and then- "...any relevant records, any other items and Garda Keane to be exhibits officer"?
> A: Yes.

50. Detective Sergeant Keane, in cross-examination, testified as to the absence of any mention of computers from the sworn information upon which the issuing judge was to be satisfied to grant a warrant:

> Q: But, you didn't have any specific belief in relation to computers in this case?
> A: I could have. I don't know. That's what I'm saying, I don't know.
> Q: But the fact that there isn't "computers" written on this [sworn information] specifically, was that a deliberate decision that you didn't want to put it there or was that an oversight, was that a mistake?
> A: Do you know, I can't you know, like, when I, when I was doing this out, look, I should have had computers on it, obviously, and phones, you know what I mean? They would, they would be potential sources of evidence in any search really.

51. It is particularly to be noted that the sworn information seeks judicial intervention to authorise a search in a physical space. The emphasis is on what exists in actual and tangible form. It does not extend beyond into what other statutes specifically refer to as data stored electronically and indeed is expressly limited to what is physical; the most obvious example here is the Data Protection Act 2018 and the various references to documents in the Criminal Evidence Act 1992 as including "information in non-legible form ... reproduced in the normal operation of the reproduction system" and how "document" is defined in the sense of what is legible and what is electronically stored. This, as explained below, does not enable the interposition required by law of judicial authorisation to search beyond such physical spaces and into the virtual space that seizure of a computer might authorise:

> I Sergeant John Keane being a member of the Garda Síochána not below the the rank of Sergeant have reasonable grounds for suspecting that evidence of or relating to the commission of an offence referred to in subsection (1) of Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 as substituted by Section 6 of the Criminal Justice Act, 2006, to wit, clothing and footwear belonging to the deceased Mr. Bobby Ryan, jewellery belonging to the deceased Mr. Bobby Ryan, keys belonging to the deceased, mobile phone belonging to the deceased Mr. Bobby Ryan, a weapon used to murder Bobby Ryan is to be found in a place, namely, Breansha More, Tipperary, Co. Tipperary in the said District Court Area of Tipperary No. 8.
>
> The basis for such grounds is the remains of M bobby Ryan were located at Fawnagowan Tipperary, Co. Tipperary on the 30/04/2013. Preliminary post mortem results indicate that Mr Ryan met his death in a violent manner. The property at Breansha More Tipperary belongs to Pat Quirke. Pat Quirke is connected to the scene at Fawnagowan as he rents the farm from the owner and he works the farm on a daily basis. Pat Quirke was on the land at Fawnagowan the morning that Mr. Bobby Ryan disappeared. He admits this in a statement and Gardaí are in possession of supporting statements. Pat Quirke is the only person known to Gardaí who had knowledge of the existence of the location where Bobby Ryan's remains were located and had access to that location at that time. Prior to the disappearance of Bobby Ryan Pat Quirke showed animosity towards Mr Bobby Ryan, these feelings emerged from jealousy of a relationship between Mr Bobby Ryan and the owner of the property at Fawnagowan, Mary Lowry. Pat Quirke previously had an affair with Mary Lowry. Investigating Gardaí believe

> that the following items may be located at Breansha More, Tipperary, Co. Tipperary the home and surrounding lands of Pat Quirke. (i) Clothing and footwear belonging to the deceased (ii) A mobile phone belonging to the deceased (iii) Keys belonging to the deceased (iv) Jewellery belonging to the deceased (v) A weapon used to murder Mr. Bobby Ryan (vi) any other relevant evidence., and I hereby apply for a warrant to search the said place and any persons found at the said place 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.

52. Turning to the warrant actually issued, this again concerns itself exclusively with physical objects, particularly those that might establish a connection with the deceased, but what stands out is that while relevant physical objects were of concern, on this document, there was no notice whatsoever to the judge from whom the warrant was sought that there was any interest by the gardaí in the digital space that computer devices enable entry to. On the evidence of Sergeant John M Keane, the warrant issued, as drafted by the gardaí, read exclusively in terms of the physical space and of physical objects that might be recovered on a search of the accused's home. The relevant part of the warrant reads as follows:

> Whereas I am satisfied as a result of hearing evidence of Sergeant John M Keane, a member of the Garda Síochána not below the rank of sergeant of Tipperary Garda Síochána Station, that there are reasonable grounds for suspecting that evidence of, or relating to the commission of an offence referred to in subsection (1) of Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 as substituted by Section 6 of the Criminal Justice Act, 2006, to wit clothing and footwear belonging to the deceased, Mr. Bobby Ryan, jewellery belonging to the deceased Mr. Bobby Ryan, keys belonging to the deceased, mobile phone belonging to the deceased Mr. Bobby Ryan, a weapon used to murder Bobby Ryan and any other relevant evidence to found in a place, namely Breanshamore, Tipperary, County Tipperary. In the dwelling house, outhouses and land of Mr Pat Quirke, I hereby authorise Sergeant John M. Keane of Tipperary, accompanied by any other members of the Garda Síochána to enter, within one week of the date hereof, (if necessary by use of reasonable force) the place situated at Breansha More, Tipperary, Co. Tipperary in the said Court District, to search the place and any persons found therein and to seize anything found at that place or anything found in possession of any person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to the commission of the offence as aforesaid. [Dated the 13th of May 2013]

53. Thus, as can be seen, at the centre of this appeal is the contention that the gardaí failed to inform the District Court judge of their intention to seize computers and electronic devices from his home, should such be found. By inference, an intention to seize computer devices as set out in an information grounding a warrant would enable a judge to consider if a search should reasonably be authorised beyond the physical space. Crucial to the proper exercise of police powers to search is the intervention of an independent mind: one which can think through a proposed intrusion not only into the physical space authorised by the 2006 Act but also the virtual space which the seizure of computer devices represents. The plea of the accused is that the District Court judge in issuing the search warrant did not have adequate information about computers so that

she could satisfy herself that there existed reasonable grounds that evidence would be found on any computer. The obvious point was made on behalf of the accused that the execution of a warrant involves significant curtailment of, and trespass on, the constitutional rights to privacy, respect for the dwelling place, marital privacy, children's rights, and family rights.

54. Bearing all of that in mind, the accused argues that a warrant must communicate to its reader at least an outline as to the extent to which it authorises access to a premises and seizure for examination of personal belongings. Further, such requirement, the accused argues, is lacking where the seizure and examination outside the physical space and into the virtual space is contemplated but no mention is made of that line of potential intrusion. The Director of Public Prosecutions and the Attorney General counter that the warrant was not defective as there is no requirement under the 1997 Act as reiterated in 2006 to specify the materials that are contemplated potentially to be seized in the course of a search.

55. Part of what is argued by the accused is that a computer is a separate location or space from the physical space on which every actual device may be found. The real question, however, is whether the definition as meaning "a physical location", as defined in terms of concrete palpable instances, extends into what is virtual and beyond what might be read, for example, in picking up a diary in which a suspect may have described or recorded plan or deeds as to the commission of crime. To read in a computer is to go outside that physical space. Since the common law as to search, and various and targeted powers by statute, are specifically preserved by the 2006 Act, this argument can be considered fully only in the context of an analysis of the law that forms the historical backdrop to the police power under consideration.

Common law powers of search

56. At common law, there is no general power to issue a warrant. This stands in sharp distinction to the general common law power of arrest (exercisable by a citizen where a felony has been committed and the arrester has reasonable suspicion that the arrested person committed it, or by a constable where the officer reasonably suspects a felony has been committed and that the person to be arrested committed it) which inured in respect of serious crimes. In contrast, no general power to search the premises or the homes of suspects was ever developed through judicial action. Judicial intervention was required at common law and by statute in all cases. Further, specific statutory intervention was required to enable a magistrate to issue a warrant to search.

57. The only common law exception was the power of a magistrate to issue a warrant authorising the search of a house for stolen goods and, even then, not after nightfall; Hale, *Pleas of the Crown* (London, 1736) 113, 149-150. Search warrant powers were dependent on specific authorisation through legislative authority; examples being the Frauds by Workmen Act 1777 and the Metropolitan Police Courts Act 1839. With the legislative attempt to codify existing common law offences of larceny and offences against the person and to provide for precise upper limits on sentencing, it became habitual for the drafter to introduce search powers into new legislation from 1861; examples include s 103 of the Larceny Act 1861 and s 65 of the Offences Against the Person Act 1861. Some legislation specified that a search could occur at any time by day or by night, thus addressing the common law prohibition against night-time searches, but even still the breaking of doors was legally uncertain if not specified, supposing

admittance had been refused. The continuance in modern search powers of wording referring to enablement at any time and the use of force find their origin in ancient litigation.

58. Prior to 1765, it was rare indeed for any legislation to authorise the search of a house. An exception was s 2 of the Disorderly Houses Act 1751, legislation "for the better preventing thefts and robberies, and for regulating places of [public] entertainment, and punishing persons keeping disorderly houses". In *Entick v Carrington* (1765) 19 St Tr 1030, the rule of law was affirmed whereby not even agents of the Crown might enter a dwelling without specific legal authorisation, making them just as liable in trespass as those who acted in a private capacity and not in the official investigation of suspected offences. There, the warrant had been issued by a cabinet minister (secretary of state) for the purpose of finding evidence as to the authors of seditious publications. While the judgment of Lord Camden focuses on the protection of property, more appropriately the case is to be viewed as setting limits to the arbitrary use of power, the protection of the liberty to keep documents privately, and, as it has developed, the necessity to interpose a specific rule of law as applied by a judge as between the individual and the state. At p 1066, the confirmation of the social pact to preserve property inviolable became the origin of the requirement of a specific legal instrument whereby the physical space might lawfully be rendered immune from trespass:

> That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

59. Amendment IV of the United States Constitution differs in form from the development of the common law after *Entick v Carrington*. Specifically, the words forming that fundamental law, while guaranteeing the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures", put that guarantee into effect through acceptance of the common law position then extant. No warrant was to issue "but upon probable cause", an affirmation of the reasonable suspicion standard derived from common law, or more, and only where "supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Of course, that wording has come to be necessarily viewed in the context of contemporary society, whereby it is not places as entities which could never of themselves attract rights, but the people who use places who are protected; *Katz v United States* 389 US 347 (1967) concerning electronic surveillance of a telephone booth conversation. The persons to be searched and the category of goods must be specified

where a police officer seeks a warrant from a magistrate. Statutory warrant powers were not limited by the common law to searches only of the owner or occupier of premises but could extend to persons found thereon.

60. The early common law powers of search, limited to warrants to seek out stolen goods, limited the trawl to those goods listed in the warrant; *Price v Messenger* (1800) 2 Bos & P 158, (1800) 126 ER 1213. That extended to such other items as were likely to furnish evidence of the identity of the goods stolen; *Crozier v Cundy* (1827) 6 B & C 232. While the common law developed that principle of reasonable connection so that warrant powers enabled the seizure of items reasonably thought to provide evidence of other crimes, the limitations required specification generally; *Elias v Pasmore* [1934] 2 KB 164. The authorities were overthrown in favour of a wide doctrine established in *Ghani v Jones* and *Chic Fashions (West Wales) v Jones* [1968] 1 All ER 229, which enabled a constable who enters a house on foot of any statutory search warrant to seize not only the goods which they reasonably believe to be covered by the warrant, but also any other goods which they believe on reasonable grounds to have been stolen or to be evidence of any other crime.

61. Formerly, only goods which were reasonably thought material to the investigated crime could be seized. The common law as to specificity, which had not been bypassed in this jurisdiction through any judicial intervention approving the *Ghani v Jones* line of authority arguably survived. Intervention by statute was, in consequence, prudent. Any doubt as to the final position of the authorities was bypassed through the intervention of the Criminal Law Act 1976 which enabled wide stop and search powers in respect of gardaí and members of the Defence Forces. While these powers were conferred in the context of violence through subversion of State authority and in the main related to the detection of explosives and munitions travelling by road, other interventions in clarification of the common law rules of search were also made. These include in s 8 of the Act, stopping and searching vehicles. In the interests of ensuring clarity in contra-distinction of potential common law authority, persons therein could also be searched. Section 9(1) deals with a situation where acting in good faith on a warrant in respect of a reasonable suspicion as to a particular crime, for instance theft, articles such as machine guns or timing devices or improvised explosive materials are found. At common law, the targeted search might have enabled only the seizure of the materials related to the theft under investigation, potentially requiring those searching to seek out a fresh warrant on firearms or explosives charges under specific legislation in that regard; Firearms Act 1925 s 21, as amended and the Dangerous Substances Act 1972, s 40.

62. Hence, and again on the basis of ensuring common law authority did not operate as a potential hindrance to an investigation, s 9(1) enables seizure within a validly searched premises subject to a warrant where there was any belief that what is found is evidence of any crime, in respect of the index crime or outside the ambit for which a power was used, which on general authority must of course be reasonable:

> Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are

> commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.

63. While what is now at issue are specific statutory powers to search "a physical location", the common law in the context of search and seizure upon a lawful arrest of a person had developed to a point where wider powers had seemed to be deemed lawful. A suspect is of course a human being and has constitutionally protected rights to the dignity and inviolability of their physical body and to their autonomy of decision as to where they may go or what they may do. Where a valid arrest is effected, a general power to search comes with the valid exercise of that police power. Thus, in *Jennings v Quinn* [1968] IR 305 at 309 O'Keeffe J, giving the judgment of this Court, stated:

> In my opinion the public interest requires that the police, when effecting a lawful arrest, may seize, without a search warrant, property in the possession or custody of the person arrested when they believe it necessary to do so to avoid the abstraction or destruction of that property and when that property is:-
>
> (a) Evidence in support of the criminal charge upon which the arrest is made, or
> (b) Evidence in support of any other criminal charge against that person then in contemplation, or
> (c) reasonably believed to be stolen property or to be property unlawfully in the possession of that person;
>
> and that they may retain such property for use at the trial of the person arrested, or of any other person or persons, on any criminal charge in which the property is to be used as evidence in support of the charge or charges; and that thereafter they should return the property to the person from whom it was seized, unless the disposal of the property otherwise has been directed by a court of competent jurisdiction.

64. Earlier, however, in *Dillon v O'Brien and Davis* (1887) 20 LR Ir 300, 16 Cox CC 245, Palles CB had admitted only of search and seizure upon lawful arrest of books and documents in the same room as the arrestee that were under his control. It is unnecessary to detail refinements of the grab area doctrine, whereby an entire house might be searched, for instance *Agnello v United States* 269 US 20 (1925), or whereby houses which are streets away may not be searched, as in *Chimel v California* 395 US 752 (1969) and goods could not be lawfully seized, no matter how strong the suspicion, where Stewart J, at 762-3, stated:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of someone who is arrested can be as dangerous to the arresting officer as

> one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

65. A later justification for a search upon arrest of a house, "a cursory inspection of those spaces where a person may be found", based on the suspicion of lurking third parties who might attack officers was based on the traditional doctrine of self-protection but did not extend to complete search where persons could not hide (meaning rooms could be searched but drawers in a desk as not capable of harbouring human beings could not); *Maryland v Buie* 494 US 325 (1990) at 334. Again, a return to the historical position is instructive. The original common law rule had been that a constable may search a prisoner if he behaves with such violence of language or conduct as to make prudent a search for weapons with which the prisoner might do mischief; *Leigh v Cole* (1853) 6 Cox CC 329 at 332. But in the *Dillon* case that was developed into a search of goods generally in the suspect offender's possession where such property is likely to afford material evidence for the prosecution in respect of the offence for which the offender had been arrested. Hence, at common law a constable should not take possession of property not in any way connected with the offence charged against the person arrested; *R v O'Donnell* (1835) 173 ER 61. That is not to speak here of exceptions related to what is heard or smelt or as to hot pursuit or of intervention to prevent the percipient destruction of evidence.

66. The origin of the common law rule was in the sensible necessity to protect the arresting officer. That law, as set out in Halsbury's *Laws of England* (1st edition, 1909, Volume IX at 309), found expression in the decision of Keane CJ in *The People (DPP) v McFadden* [2003] 2 ILRM 105, that on arrest a wallet might not be searched, and in the decision in *United States v Chadwick*, 433 US 1 (1977) that an arrested and secured suspect could not have his luggage opened and searched without a warrant. The *McFadden* decision turned, however, on the use of an intrusive police power (arrest, search) being valid only on informing the subject of the reason in law. However, the Court of Criminal Appeal approved a passage from Walsh, *Criminal Procedure* (1st edition, Dublin, 2002) at [4.73] that the purpose of a search on arrest was to take possession of anything in the nature of a dangerous weapon or item to facilitate an escape or which may be of evidentiary value, which in most cases would be confined to "a body frisk and examination of the suspect's outer garments." Out of caution, perhaps, the statutory power is now s 7 of the Criminal Law Act 1976, where applicable, as to what may be done with an arrested person. Hence, the physical search of a person upon the valid arrest of a suspect was such as differentiated as between that person's physical presence and that space in which he or she might interfere with the safety of police officers or engage in the destruction of vital evidence. What is to be noted is that the common law authorised a particular form of search as to what might harm officers of the law or undermine a fair trial from the point of view of the proper investigation of an offence. In that respect, the common law delineates both the area of search and the physical nature of that exercise.

67. In the context of analysing powers and their limitations, search prior to arrest by statutory authorisation is not relevant, since all of these derive from specific legislation and not from any underlying principle; for instance, see ss 23, 24 and 26 of the Misuse of Drugs Act 1977, as amended. A further early example is s 29 of the Dublin Police Act 1842 which confers powers to stop and search in respect of "any thing stolen or otherwise unlawfully obtained." Where something is seized lawfully, it is subject to inspection and later analysis. That is why it is taken in the first place, because of the reasonable belief that it may assist in the police investigation; *The People (DPP) v Hannaway & Others* [2021] IESC 31.

68. These rules were all subject to statutory reform. But that reform, or legislation inclusive of the extension of search powers into the virtual space in consequence of a valid search of "a physical location" has not developed. Search for specific items carrying a suspicious aura may be specifically authorised by warrant and legislation has enabled a specified and definite suspicion as to a particular crime to extend into the seizure of physical items related to another crime that was outside the contemplation of the searching police officers when they applied for a search warrant on a particular basis. Legislation has not enabled the search of a virtual space upon the seizure of a computer where the desire to search outside "a physical location" has not been put forward for potential judicial authorisation.

69. In other jurisdictions, reform of the law as to warrants has stripped away the potential uncertainty whereby common law authorities might be called in aid by a suspect at trial towards declaring a particular search unlawful or the seizure of particular goods to be outside either statutory authority or the authorisation to search that had been judicially granted. This is notwithstanding the reforms recommended by the Law Reform Commission towards codifying search powers and gathering together within accessible legislation a general and necessary set of powers of search, including for computers: Report on Search Warrants and Bench Warrants (LRC 115-2015) or also see https://www.lawreform.ie/news/report-on-search-warrants-and-bench-warrants.599.html. It is also useful to compare the bare wording of s 6 of the 2006 Act, inserting a new s 10 into the 1997 Act, with s 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, where the focus only some years before this legislation manifested a consciousness of the use of the digital space for property crime and specifically addressed the step beyond seizure of physical objects which the interrogation of computer involves. Hence, s 48 provides:

> (1) This section applies to an offence under any provision of this Act for which a person of full age and capacity and not previously convicted may be punished by imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.
>
> (2) A judge of the District Court, on hearing evidence on oath given by a member of the Garda Síochána, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of, an offence to which this section applies is to be found in any place, issue a warrant for the search of that place and any persons found there.

(3) A warrant under this section shall be expressed and shall operate to authorise a named member of the Garda Síochána, alone or accompanied by such other persons as may be necessary—

(a) to enter, within 7 days from the date of issuing of the warrant (if necessary by the use of reasonable force), the place named in the warrant,

(b) to search it and any persons found there,

(c) to examine, seize and retain any thing found there, or in the possession of a person present there at the time of the search, which the member reasonably believes to be evidence of or relating to the commission of an offence to which this section applies, and

(d) to take any other steps which may appear to the member to be necessary for preserving any such thing and preventing interference with it.

(4) The authority conferred by subsection (3)(c) to seize and retain any thing includes, in the case of a document or record, authority—

(a) to make and retain a copy of the document or record, and

(b) where necessary, to seize and, for as long as necessary, retain any computer or other storage medium in which any record is kept.

(5) A member of the Garda Síochána acting under the authority of a warrant under this section may—

(a) operate any computer at the place which is being searched or cause any such computer to be operated by a person accompanying the member for that purpose, and

(b) require any person at that place who appears to the member to have lawful access to the information in any such computer—

(i) to give to the member any password necessary to operate it,

(ii) otherwise to enable the member to examine the information accessible by the computer in a form in which the information is visible and legible, or

(iii) to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible.

(6) Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.

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

(8) In this section, unless the context otherwise requires—

"commission", in relation to an offence, includes an attempt to commit the offence;

"computer at the place which is being searched" includes any other computer, whether at that place or at any other place, which is lawfully accessible by means of that computer;

"place" includes a dwelling;

"thing" includes an instrument (within the meaning of Part 4), a copy of such instrument, a document or a record.

70. Hence, specifically contemplated is copying data in electronic form from the digital space into a tangible form, operating a computer and gaining access through relevant passwords. Section 6 of the 2006 Act might be argued to be only capable of being construed in restrictive terms. In contrast, other jurisdictions have proceeded apace with necessary reforms. In England and Wales, the Police and Criminal Evidence Act 1984 replaced the uncertain ground of case analysis with definite rules. In this jurisdiction, it is a specific but necessarily self-limiting statutory power that is in question. That power enables entry "at any time" (thus bypassing controversy from early statutes as to day and night and the common law prohibition of searching at night), the use of reasonable force (which again the common law was less than certain on), the search of premises "and any persons found at that place" (uncertain at common law), and "to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence" (completely removing any controversy as to limitation only in relation to specified goods or only in relation to the offence in contemplation of the search party). Further, it must be repeated, while rights inure to persons and not to places, it is a search of a place that the legislation authorises and that place, notwithstanding that computers of a desktop and personal variety were almost as common as television sets at that time, is specifically defined as "(a) a dwelling, residence, building or abode, (b) a vehicle, whether mechanically propelled or not, (c) a vessel, whether sea-going or not, (d) an aircraft, whether capable of operation or not, and (e) a hovercraft." What is not authorised outside judicial intervention is the seizure for search of computer devices for the purposes of a virtual search outside that physical space.

71. General words, derived through drafting practice to address negative potential common law prohibitions, enable and extend a search to anything once those seizing the item reasonably believe it to be evidence, not just of the offence in contemplation, but any serious offence, thereby again addressing common law constrictions. In *Application of Quinn* [1974] IR 19, this Court ruled on the construction of statutes which demonstrate the deliberate use of general words. That case concerned the renewal of dance licences in the context of s 2(2) of the Public Dance Halls Act 1935, which enabled the refusal of a licence on the basis of such criteria as financial soundness, character, rival facilities, parking, supervision by gardaí, age of patrons and hours of operation. Those were the

factors to be considered by a judge, but in context of "any other matter which may appear to him to be relevant". General words are general words and are not to be squeezed into particular meanings. The issue for decision was disorderly conduct by patrons coming to and going from the dancehall. While this was not within the examples given, according to Henchy and Griffin JJ in their judgments, general words were not to be forced into an *ejusdem generis* construction by the use of particular examples or criteria.

72. While there is no legal basis for claiming that a computer is outside of the term "place" under the 1997 Act, as substituted by the 2006 Act, or is a place in itself, it is not a physical space. It is a virtual space. Proper developments based on the applicability of privacy rights confirm through authorities from other jurisdictions that where searches are conducted in the virtual space that this is to be differentiated from the physical space in which a computer may be found.

The virtual space as a focus of suspicion

73. Rights equivalent to the Fourth Amendment of the US Constitution and of Article 40.5 of our Constitution whereby the "dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law" are to be found in other democratic legal systems. From these, the differentiation as between the physical location enabled to be searched pursuant to the 2006 Act crystallise to set a virtual space apart. These authorities are founded upon, and emphasise, the nature of computer devices as a portal through which something other than physical space, often located outside the actual device seized, and instead accessed on remote servers or on the cloud. It follows that this significantly different intrusion into the rights of the person searched requires the interposition of the judicial mind before such a virtual search can be authorised.

74. *R v Vu* 2013 SCC 60, [2013] 3 RCS 657 was decided under the Canadian Charter of Rights and Freedoms, introduced under the Constitution Act 1982. Section 8 simply provides: "Everyone has the right to be secure against unreasonable search or seizure." It is on the reasonableness doctrine that the decision is based. A right without enforcement is like a building without a foundation. Hence, s 24 enables enforcement through judicial remedy, in subsection 1, and the exclusion of evidence where the manner in which that testimony was sourced affronts justice:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), 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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

75. In *Vu* the charge was production and possession of marijuana for the purpose of trafficking. The warrant, however, was in respect of the theft of electricity. Since, in order to thrive indoors, plants need light and, as energy is expensive, a link to what the real suspicion was might or might not be inferred. During the search, the police found two computers and a cellular telephone, as well as an abundant crop of illegal plants. The information to obtain a warrant (ITO) mentioned "computer generated notes" but did

not specifically refer to computers or seek to have the search of digital devices authorised by the issuing magistrate. While there was sufficient information in the ITO to justify the search, the scrutiny of the computers found was regarded as a different and especial category. One of the arguments in this case for computers not to generate any specific obligations on those seeking a search warrant or in the analysis of a seized device, has been that searches by police remain lawful despite beds being turned over, floorboards being lifted if necessary, cupboards being opened, and books of account and personal diaries and letters being taken and read. The latter is perhaps the closest analogy to a computer.

76. But as digital communications and searches have come to dominate modern life, the keeping of diaries and the sending of anything other than essential business letters as to, for instance, bank charges through legal imperative, have waned to the point of disappearance. Experience demonstrates that in the past those suspected of child abuse or fraud or homicide may have recorded their experiences, explicitly or cryptically, in diary form or corresponded as to their actions, but nothing prevented the scrutiny of such intensely private documents as part of the lawful and reasonable conduct of a search. Accepting, for these purposes, that rights of privacy may be situation-based and have not been found to extend to the organisation of criminal activity outside of legally protected rights generally promulgated, as to communication for instance, is a computer different to diaries or correspondence?

77. According to Cromwell J at [40], giving the judgment of the court, there is nothing more intrusive "than the search of a personal or home computer" because they constitute "a multi-faceted instrumentality without precedent in our society". It is important to examine his reasoning in the context of the contention that a computer constitutes a place, requires a separate search warrant to a premises in which it reposes, and is of the nature of a place or state of super-privacy demanding judicial intervention geared to its nature. Since that judgment is the foundation of that attitude, quotation is demanded as to the reasons:

> [41] First, computers store immense amounts of information, some of which, in the case of personal computers, will touch the "biographical core of personal information" referred to by this Court in *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293. The scale and variety of this material makes comparison with traditional storage receptacles unrealistic. We are told that, as of April 2009, the highest capacity commercial hard drives were capable of storing two terabytes of data. A single terabyte can hold roughly 1,000,000 books of 500 pages each, 1,000 hours of video, or 250,000 four-minute songs. Even an 80-gigabyte desktop drive can store the equivalent of 40 million pages of text: L. R. Robinton, "Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence" (2010), 12 *Yale J.L. & Tech.* 311, at pp. 321-22. In light of this massive storage capacity, the Ontario Court of Appeal was surely right to find that there is a significant distinction between the search of a computer and the search of a briefcase found in the same location. As the court put it, a computer "can be a repository for an almost unlimited universe of information": *R. v. Mohamad* (2004), 69 O.R. (3d) 481, at para. 43.
>
> [42] Second, as the appellant and the intervener the Criminal Lawyers' Association (Ontario) point out, computers contain information that is automatically generated, often unbeknownst to the user. A computer is, as A. D.

Gold put it, a "fastidious record keeper" (para. 6). Word-processing programs will often automatically generate temporary files that permit analysts to reconstruct the development of a file and access information about who created and worked on it. Similarly, most browsers used to surf the Internet are programmed to automatically retain information about the websites the user has visited in recent weeks and the search terms that were employed to access those websites. Ordinarily, this information can help a user retrace his or her cybernetic steps. In the context of a criminal investigation, however, it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly: O. S. Kerr, "Searches and Seizures in a Digital World" (2005), 119 Harv. L. Rev. 531, at pp. 542-43. This kind of information has no analogue in the physical world in which other types of receptacles are found.

[43] Third, and related to this second point, a computer retains files and data even after users think that they have destroyed them. Oft-cited American scholar O. S. Kerr explains:

> . . . marking a file as "deleted" normally does not actually delete the file; operating systems do not "zero out" the zeros and ones associated with that file when it is marked for deletion. Rather, most operating systems merely go to the Master File Table and mark that particular file's clusters available for future use by other files. If the operating system does not reuse that cluster for another file by the time the computer is analyzed, the file marked for deletion will remain undisturbed. Even if another file is assigned to that cluster, a tremendous amount of data often can be recovered from the hard drive's "slack space," space within a cluster left temporarily unused. It can be accessed by an analyst just like any other file. [p. 542]

Computers thus compromise the ability of users to control the information that is available about them in two ways: they create information without the users' knowledge and they retain information that users have tried to erase. These features make computers fundamentally different from the receptacles that search and seizure law has had to respond to in the past.

[44] Fourth, limiting the location of a search to "a building, receptacle or place" (s. 487(1) of the Code) is not a meaningful limitation with respect to computer searches. As I have discussed earlier, search warrants authorize the search for and seizure of things in "a building, receptacle or place" and "permit the search of receptacles such as filing cabinets, *within* that place . . . . The physical presence of the receptacle upon the premises permits the search": Fontana and Keeshan, [The Law of Search and Seizure in Canada, 8th ed. Markham, Ont.: LexisNexis, 2010.] at p. 1181 (italics in original; underlining added). Ordinarily, then, police will not have access to items that are not physically present in the building, receptacle or place for which a search has been authorized. While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer.The intervener the Canadian Civil Liberties Association notes that, when connected to the Internet, computers serve as portals to an almost infinite amount of information that is shared between different users and is stored almost anywhere

> in the world. Similarly, a computer that is connected to a network will allow police to access information on other devices. Thus, a search of a computer connected to the Internet or a network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized.
>
> [45] These numerous and striking differences between computers and traditional "receptacles" call for distinctive treatment under s. 8 of the Charter. The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it — simply cannot apply with respect to computer searches.

78. Essentially the reasoning is that privacy interests are markedly stronger in the case of computers, because of the manner in which modern society lives through devices which record every communication and passing thought that inspires a search, than the protections required for any receptacle, document or diary casually inspected in the course of search in pre-digital and pre-Internet human history. However, the Canadian Supreme Court at [54] was not prepared to treat computers as a separate place of search whereby the manner of searching was set out in advance. But, the statutory power on which the search proceeded did not limit searches, as in the 2006 Act, to a particular physical location. Searching of computer devices required judicial intervention whereby, at least, the judicial mind could decide in issuing a search warrant that intruded into that space was authorised. In that case, as in others, it was argued that once a computer had been validly seized for the purpose of search, the vastness of the information potentially at hand required limitation through judicial intervention of what could be searched for. A common theme in these cases, and a motif that is reiterated through arguments as to lawfulness, is that without limitation huge amounts of private material may be stumbled upon. In that context, however, practical common sense requires that it be recalled that in the search of a dwelling in pursuit of an investigation into, for instance, firearms, through the very act of entry into a home, myriad impressions of family and private life outside of what is sought, guns and ammunition or evidence related thereto, are inescapably revealed to those searching.

79. It is the same with computer searches; at least as the law now stands. Requiring search protocols upon the valid seizure of a computer for the judicially authorised purpose of search into virtual space is not demanded by any aspect of the right to privacy. Such protocols, subject to disputation and finely-parsed analysis, would "add significant complexity and practical difficulty" at the stage of authorisation, per the judgment at [57]. While, therefore, a computer might be seized, if authorisation for search was not judicially authorised, a later search warrant for the device was needed: but protocols for search are not required either in Canada or in the United States since the practicality of limiting in advance what might be relevant is as difficult and more so than in a house search, per *Vu* at [58], *United States v Burgess* 576 F.3d 1078 (10th Circ 2009) and *United States v Christie* 717 F.3d 1156 (10th Cir 2013).

80. In the context of search upon arrest, moving from the physical space of the person of the suspect and into the virtual space of a smartphone constitutes a development that the common law does not authorise and which, potentially, infringe privacy entitlements. That difference is inescapable on the authority of *The People (DPP) v Sheehan* [2021] IESC 49, [2021] 1 IR 33, where O'Malley J distinguished as between a digital communication and a physical mark. Section 18 of the Criminal Justice Act 1984, as substituted by s 28

of the Criminal Justice Act 2007, was in issue whereby "any object, substance or mark or any mark on any such object" may be made subject of a requirement by a garda for the accused to account for same. At [127] that distinction is sharply drawn in the context of being asked to account for mobile telephone messages drawn up by operating the device:

> It seems to me that an object in this context must mean a thing that has a physical existence, since it must be possible to physically mark it or leave a substance adhering to it. Clearly, a text message displayed on the screen of a phone is not itself an "object". It is an electronic communication, converted digitally into a readable display on ascreen. The message itself cannot be picked up, looked at from the other side or handled in any physical way. It is no more an "object" than the sounds captured on a recording device, although such a device itself is an object. The phone, similarly, is undoubtedly a material object. However, its function in this context is to provide access to electronic information stored electronically on it, by means of apps such as a messaging app. Such information can be stored or deleted, but the phone does not "contain" it the way a bag contains objects that can be taken out or put back in. Objects in a bag are just that –objects. Nor do I think that a message can be considered to be a "mark" on the phone within the meaning of the section. A "mark", again, is something that has a physical existence on some surface of an object. The digital display is not written or scratched on any surface of the phone, whether exterior or interior.

81. On decisions from other common law jurisdictions, such a distinction is axiomatic. Hence, in *R v Fearon* 2014 SCC 77, [2014] 3 SCR 621, which concerned a body and grab area search incidental to arrest and where a mobile device was seized and examined, the prosecution had argued that all that was necessary to make a search reasonable was: that the arrest must in itself be lawful (pursuant to a power granted by law and where the suspect was aware by being told or from the circumstances of the exercise of that power); that a search must be prompt to the arrest; that the search be tailored to its purpose, meaning that only recent messages, texts, photos and call logs may be accessed; and that the police take notes of their examination of the mobile phone. This was rejected by the Supreme Court. Karakatsanis J, dissenting in part as to the result, again referred to the particular sensitivity of devices which may record much more of life than even the most accomplished and obsessive diarist:

> [105] The intensely personal and uniquely pervasive sphere of privacy in our personal computers requires protection that is clear, practical and effective. An overly complicated template, such as the one proposed by the majority, does not ensure sufficient protection. Only judicial pre-authorization can provide the effective and impartial balancing of the state's law enforcement objectives with the privacy interests in our personal computers. Thus, I conclude that the police must obtain a warrant before they can search an arrested person's phone or other personal digital communications device. Our common law already provides flexibility where there are exigent circumstances — when the safety of the officer or the public is at stake, or when a search is necessary to prevent the destruction of evidence.
>
> [106] In this case, the appellant was arrested in connection with an armed robbery. Upon arrest, the police searched his cell phone and discovered incriminating evidence. The police had no grounds to suspect there was an

> imminent threat to safety and no grounds to believe there was an imminent risk of the destruction of evidence. Consequently, I conclude that the search was unreasonable and unconstitutional. The police were required to obtain a warrant before searching the phone, although they were entitled to seize the phone pending an application for a warrant. I would exclude the evidence so obtained.

82. In *Riley v California* 573 US 373 (2014), the Supreme Court of the United States reasoned similarly as to the exceptional nature of digital devices as requiring an approach to the protection of private interests that went beyond the existing safeguards around the search of premises. There, a routine stop by police for expired vehicle registration uncovered that the driver had been suspended; consequently, the car was impounded. A search uncovered "two handguns under the car's hood." That search was lawful. But during the search incidental to the arrest, a mobile phone was taken from "Riley's pants pocket" having "a broad range of other functions based on advanced computing capability, large storage capacity and Internet connectivity." Scrutiny of messages on that device placed the arrestee as part of the "Crip Killers" or "Bloods" gang. A distinction was drawn, at pp 20-21 as between searching a man's pockets on arrest, from the *Chimel* case, and ransacking a house, but there was also a distinction as between a search yielding physical evidence consequent to arrest and the examination of a cell phone or other computer device. Again, the reasoning of Roberts CJ at pp 17-19 coincides:

> Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.
>
> One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. See Kerr, Foreword: Accounting for Technological Change, 36 Harv. J. L. & Pub. Pol'y 403, 404–405 (2013). Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.
>
> But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. See Kerr, *supra*, at 404; Brief for Center for Democracy & Technology et al. as *Amici Curiae* 7–8. Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. See *id.*, at 30; *United States v. Flores-Lopez*, 670 F. 3d 803, 806 (CA7 2012). We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labelled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. See Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013). A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. See, e.g., *United States v. Frankenberry*, 387 F. 2d 337 (CA2 1967) (*per curiam*). But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. See *Ontario v. Quon*, 560 U. S. 746, 760 (2010). Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones*, 565 U.S. (2012) (Sotomayor, J., concurring) (slip op., at 3) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking

> pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life. See Brief for Electronic Privacy Information Center as *Amicus Curiae* in No. 13–132, p. 9.

83. What is emphasised here is the huge range of data that is encompassed in computer devices and how it is way outside the range of material protected even within the most extensive family, or criminal, archive. That emphasis also reoccurs in *Dotcom, Batato, Ortmann and van der Kolk v* R [2014] NZSC 199, where the court considered an application to overturn a warrant to search in the context of mutual assistance as between the United States and New Zealand. There the issue arose as to the necessary specificity of a warrant, particularly where the warrant resulted in the seizure of computerised information. Challenging that seizure was an argument as to particularity: that the warrants authorised the seizure of material likely to be both irrelevant and private because, in essence, warrants did not impose conditions such as would have permitted a court to supervise sorting for relevance. In New Zealand, the applicable legislation at the time of the case, s 45 of the Mutual Assistance in Criminal Matters Act 1992, provided that every warrant be "subject to such special conditions (if any)" as the judge may impose but had to contain particulars of the place "or thing" to be searched, the offences on which it was issued, and, most importantly "a description of the articles or things that are authorised to be seized". The level of specificity which the warrant in *Dotcom* was required to reach highlights the absence of any reference to the computer devices which were on the minds of the gardaí in respect of this appeal. In the former case, all "digital devices", "central processing units", several kinds of computer including personal "digital assistants" were specified and in relation to offences which were laid out with similar precision of aim in the warrant. Rejecting the submission that a protocol as to search should be imposed, the court reasoned that prior confinement of the modality of search would hamper a genuine investigation. Further, as in the context of this jurisdiction, there is a general obligation on police to use powers only for the purpose granted; not, for instance, for prurient prying but only to sort what might be relevant as evidence or as leads to evidence in a potential sense. While accepting the decision in *Vu* and in *Riley*, this was not a case where the lack of specificity point enabled the condemnation of the warrant, according to the majority judgment delivered by McGrath and Arnold JJ:

> [202] How do the principles discussed above apply in the present case? In *Vu* the search warrant did not refer specifically to a computer. Despite that, the Canadian Supreme Court accepted that the police could, if they reasonably thought a computer discovered while executing the warrant might contain relevant material, seize the computer and do what was necessary to preserve the integrity of its data. However, if the police wanted to search the computer in those circumstances, they needed specific judicial authorisation, which in that case required obtaining another search warrant. Prior judicial authorisation to search the computer was required because of the particular privacy issues computers raise.
>
> [203] In the present case, the material put before the District Court Judge in the application for the warrants set out the basis for the belief of the police that the

> computers and other electronic items in respect of which warrants were sought would contain material relevant to the alleged offending, which was, of course, internet-based offending. As a consequence, unlike *Vu*, the warrant made specific reference to computers and other electronic devices. It was not disputed that the warrants authorised (subject to the general warrant argument) the search of the computers and, in any event, it was implicit that search would follow seizure. The police took the computers offsite in order to be cloned and searched. It is difficult to see that any other course was practically open to them, particularly given security concerns arising from the fact that the contents of the computers were protected by way of passwords and encryption, so that without Mr Dotcom's co-operation, access would be difficult or impossible. Indeed, there was no challenge to the need to take the computers offsite.
>
> [204] Despite the need to take the computers offsite to search their contents, we do not consider that this was the type of case where the issuing Judge was required to set conditions as part of the process of issuing the warrants. The warrants authorised searches of the computers' contents for material relevant to the alleged offending, and the seizure of any relevant material. If the police acted unlawfully in carrying out the search, that would be addressed in the normal way, after the search was completed. In the particular circumstances of this case, sending clones of the seized computers overseas may have been the only practical way of effecting the search, but that is not something on which we should express any view as it is the subject of separate proceedings.

84. The *Dotcom* case emphasises the ancient principle of common law stated above: that of the need for candour in the form of putting before the judge who is asked to issue the warrant such highlights of material as will enable a proper analysis of the reasons for and the extent of the invasion of the dwelling, as to physical space and privacy as protected by Article 40.5 of the Constitution, and the privacy rights derived from Article 40.3.

85. In this search warrant application, these rights were not respected. That was by reason of the failure in duty by those applying to at least mention that computerised searches for a particular purpose were central to the concerns of the proposed search party.

Duty in a search warrant application

86. What requires emphasis here is that a search warrant is an essential police instrument in uncovering the truth whereby a reasonable suspicion may either be dissolved through the discovery of material tending towards the demonstration of the innocence of a suspect or be made to build towards a prosecution case whereby those responsible for crime may be indicted and proven guilty. Victims of crime are properly to be characterised as looking to the national police force, An Garda Síochána, and to the courts for protection and for vindication. They have been subjected to a violation of their human rights and the nature of the State as a democratic institution based on the rule of law, one promulgated by the people for the attainment of true social order according to the Preamble to the Constitution, empowers such instruments of investigation as are necessary. These powers of search and of arrest also trammel on rights, such as the right to the integrity of family life and the inviolability of the dwelling, and therefore cannot be unlimited or subject to arbitrary exercise. That is inescapable. But protections are also needed. For centuries, our polity has required the intervention

not only of a positive legal power specifically conferred by statute but also the objective evaluation by the judicial arm of government to ensure that a balanced use of such powers conforms with the fundamental requirement of reasonable suspicion and that police powers be only used for the purposes for which they are granted. Hence, while victims have the most fundamental of interests in the vindication of their human rights, it remains a duty on investigators to be conscious of the need for the presentation of a fair summary of the facts and of their interest to whatever judge is engaged in issuing a search warrant. Of the essence of any such intervention is independence, a point emphasised both in the majority judgment and in the minority analysis in *The People (DPP) v Behan* [2022] IESC 23, where the divergence was not on the principle that such independence was necessary but on whether the officer issuing the warrant in an emergency had that necessary cloak because of his particular and senior role.

87. In this jurisdiction, the law has shifted towards requiring that reasons be given to establish that a reasonable suspicion exists on any application and a reasonable belief for seizure of any item found. Warrants require only a reasonable suspicion, which, to quote Professor O'Malley, *The Criminal Process* (1st edition, Dublin, 2009) at [11-20] is a somewhat lower threshold, more "in the nature of an apprehension" than an acceptance of the truth of a proposition. In *The People (DPP) v Cull* (1980) 2 Frewen 36, Gannon J held that simply stating that a reasonable belief was held was insufficient. The requirement that reasons be given as to the existence of such a reasonable suspicion was set out. The point being that there is, in effect, no judicial function beyond a rubber stamp, for a police officer to come into a court and tell a judge "I have a reasonable suspicion justifying search." That informs the judge of nothing. What is needed, according to ancient common law authority limiting search powers and requiring specificity, is that material be put before the judge whereby that judge will issue a warrant only where the judicial mind is satisfied that the officer holds that reasonable suspicion and that this objectively is founded on material which would enable that suspicion to be held:

> It would seem probable also that the Legislature would expect an officer of that rank to reach, in a responsible manner, an opinion in accordance with principles of justice in relation to the guilt of a person in whose favour there is a presumption of innocence.
>
> The requirement for an issuing judge to be satisfied that there are reasonable grounds for suspicion was also set out by Hamilton P in *Byrne v Grey* [1981] IR 31 at [38]-[39], holding that an issuing District Judge or peace commissioner, there in the context of the Misuse of Drugs Act 1977 and 1984, "is not entitled to rely on the suspicion of the member of the Garda Síochána applying for the warrant", and must instead have sufficient information to determine that there are reasonable grounds for suspicion.

88. There is a duty when an application is made in the absence of the person impacted as to their rights by an order which a court may make, to address the issue with appropriate care as to that person's rights. Such a duty does not, of course, change the principle, explicit in s 6 of the 2006 Act, that on searching in good faith if gardaí come across evidence as to another crime (one other than the crime for which the warrant was issued), be that a drug-cultivation plant in a house or a bloodied knife or a computer thought related to that separate crime, that object or those objects may also be seized; *Jennings v Quinn*. The computer, as a physical object may be examined but the entry

thereby into a digital space personal to the suspect, or to others, should be the subject of a search application before a judge so that the portal that it represents may be entered in pursuit of evidence of that separate and not previously suspected crime. That computer, if genuinely believed to be evidence of a separate crime to the one on which the warrant was applied for and granted through a sworn information justifying such intrusion, may be taken by the gardaí both as a matter of common law and under the legislation, but a computer device may be opened and interrogated as to the digital space through an application to a judge on a separate search warrant application justifying such intrusion through a sworn information, even though the physical location is by this stage in a Garda station. What must also be made clear is that the principle in *Jennings v Quinn*, and in s 6 of the 2006 Act, authorises wider enquiries where a computer device is validly seized by reason of justifying on a sworn information why a digital search is needed for that particular crime. Where a computer seizure was justified by a sworn information in advance of a search on a particular criminal investigation, thus authorising the access to its contents, that lawful seizure also enables the gardaí, in searching that digital space, to uncover evidence of other crimes for which a warrant was not granted because the gardaí were proposing in good faith to search in respect of a different crime.

89. What the common law authorities cited above emphasise are: the intervention of a judicial mind; the need for a statutory power; the conformance with the parameters of such power; the need to specify what is in reality sought; and the duty to use a power only for the purpose for which it is granted by statute. Such an approach is necessary to ensure that the manner in which a warrant is obtained, authorising a significant but proportionate and necessary infringement on privacy rights, remains a legitimate balancing exercise carried out by the issuing judge. The significance of maintaining the meaningful nature of the process by which a warrant is applied for was set out by Denham CJ in *Damache v DPP* [2012] IESC 11 at [51], [2012] 2 IR 266 at 283 and subsequently in *Behan*. In the *Damache* judgment, the factors that must be present for such an application to constitute a valid balancing of privacy rights and the public interest in investigating and prosecuting offences were set out by Denham CJ, emphasising the need for the judge to have all relevant information provided to her by the gardaí:

> For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search.

90. While the authorities on the duty to specify the main points for seeking to search and for stating what is generally sought are legion, what is most fundamental is that the intervening judicial mind, having authority to authorise the search of "a physical location" cannot be exercised in a way that is meaningful in the protection of rights unless the intention to seize and search in the virtual space is part of the application to grant a search warrant. To be clear, what a meaningful intervention of an independent judicial process, or in the case of emergency where authorised then by an independent officer, is about is enabling not only the seizure of physical objects but their potential seizure should there be a reasonable belief that what is seized may yield evidence as to the commission of serious crime. Since a computer device is a portal from the physical world and into the digital space even beyond the storage capacities of that device and

since such devices encapsulate the potential for searches outside the physical and into a significantly different intrusion, seizing a computer for the purpose of running searches in the digital space and why that may be reasonably believed to potentially yield information as to suspected crime requires that matter to be addressed before the judge in the sworn information.

This case

91. The gardaí were at all times interested in computers and what such digital devices might disclose as to the activities of the accused. Apart from their legitimate and fully justified interest in "a physical location" where physical items such as items personal to the deceased might be found, they were acutely interested in the digital location. Were such items as those which the deceased wore on his person found, and it is clear that there was confidence that they could be, there would be physical evidence found in a physical location.

92. However, within the digital space, which both on the authorities cited and on the application of the canon of construction requiring ordinary words to be given a plain meaning, a proposed search in the digital location is different. It is correct that enquiry into the searches undertaken by the accused might reasonably be believed to disclose, as such searches had in other previous homicide cases, the movements of the accused, his relationship with, or thoughts about, the deceased, potential confessions or musings on the disappearance and the gathering of scientific materials as to the investigation of homicide and the connections that forensic analysis may enable as between a suspect and a victim's body or the endurance of such signs with the passage of time. It is the latter that was found and that is precisely and obviously that which was on the mind of the investigating gardaí but which was not brought to the attention of Judge McGrath. That was a search outside the remit of the "a physical location" for which authorisation was not sought.

93. On the authorities cited, the difference as between the physical location where the computer might be found and the digital space to which it was a portal required the gardaí to enable judicial intervention to permit authorisation into that space through bringing the attention of the judge issuing the search warrant to their intention to search outside the physical location authorised by seeking authorisation to seize computer devices and justifying in the sworn information the reasonable suspicion whereby such a seizure might reasonably be believed to be necessary. For this search, there was a valid warrant and there was also ample justification presented in the information for searching the physical space (all that was specified, it should be noted). That justification, on a reasonable basis, was not however presented for the search for computer devices and for seizing them for the purpose of entering the digital space. That was not even mentioned. Hence, the search remained lawful as did the seizure of all of the items of physical evidence believed to constitute reasonable potential lines for further enquiry. What was not authorised by the judge was seizure of a computer for search outside of that physical location. Had the judicial mind been so directed, the seizure of the computer would have been lawful since then, as required by *Damache*, there would have been the intervention of judicial authorisation whereby entry by the gardaí though the computer into the digital space would have been authorised. Hence, without directing the mind of the judge to that virtual world, the seizure of the computer was unauthorised.

Dishonesty argument

94. It is contended by the accused that the application for this search warrant was dishonest. This argument, that, somehow, the officers involved in seeking the warrant were either dishonest or somehow dissembling or diffident, and the consequences contended to arise from same, becomes impossible in the light of the ruling of the trial judge. That ruling is a finding of primary fact; *Hay v O'Grady* [1992] 1 IR 210 at 217. Having heard the evidence, and in the absence of any established error of law, the assessment of the motivation and honesty of the evidence from the trial judge, thus, stands:

> 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.

95. A similar contention was made in *The People (DPP) v Balfe* [1998] 4 IR 50 at 62, where it was submitted that errors in a warrant rendered possible, and required, a finding discounting the credibility of the officer involved. For the Court of Criminal Appeal, Murphy J based the dismissal of this ground of appeal squarely on the findings made at trial. The approach here cannot be different:

> The defects in the documentation might reflect upon the competence of the parties by whom the same were drafted or executed or they could reflect, as the garda said they did, an error or errors in the information given to him by his informant. The only manner in which they might reflect upon the credibility of the garda is that he did assert that the information which he was given was reliable, and to the extent that changes were made and in particular that the number of the house on the road given to him as the address of the applicant was incorrect, it might be said that the information was inaccurate. However, to categorise the information as a whole as unreliable or the garda's defence of it as in some way affecting his credibility, is not in our view supported by the facts.

Disposal of search warrant issue

96. The law cannot be distorted whereby the clear terms of a statutory search warrant power are altered so that a computer becomes a separate physical space from the dwelling in which it may be found. What is a place is, however, defined in the 2006 Act. A computer is not a place. It is, instead, a repository and recording of vast stores of information, beyond the capacity of even some public libraries, of the deeds, thoughts, obsessions and activities of a person, of the persons communicating with that person and of what is stored outside the computer on servers, on cached sites by service providers and more widely on the utilization of multiple computers through the cloud. Consequently, not only is a computer not a place; it is in a different category to a place under the careful delineation of the legislation from 2006 enabling the search of "a

physical location". Since seizing something on reasonable belief means seizing it for analysis, it is within the powers of a judge issuing a search warrant, the physical nature of objects for forensic testing imply that all that is necessary to uncover their nature and relationship to the allegations against the accused may proceed in the ordinary way; *Hannaway*.

97. A computer or other digital device must of necessity be found in a place but the seizure of it for testing involves the entry into the digital space and departure from the physical location seizure powers authorised by the 2006 Act. This difference necessarily requires authorisation for the search of the digital space outside the physical location enabled by the statutory power. When, in contrast to this case, a judge is told that computer devices, which includes mobile phones and akin digital instruments, are to be searched for and potentially seized, the judicial mind is entitled to infer that the purpose of search is to enable entry into the non-physical space controlled by the accused or to be found within the physical location to be searched. That search may be justified by appropriate information in the sworn information accompanying an application for a warrant. But the lawful search for and seizure of a computer requires judicial intervention on the settled authority of *Damache*. The seizure for entry into the digital space involves the automatic loss of privacy rights on a vast scale. Without judicial scrutiny, seizure for the purpose of a non-physical search into mobile phones and other computer devices of vast memory and carrying the private dimensions of a human life over years or months no balancing of rights can be undertaken whereby a court may authorise such a search and seizure.

98. Put in terms: a search warrant authorises a physical search of a location; what is found at that location may be seized where those searching reasonably believe that items found may further the investigation into crime; the physical seizure of items enables testing with the physical sphere of what those items consist of and what connection they may have to a crime scene, to a victim or to the accused; the physical seizure of computer devices enables a departure from such physical testing and entry into a digital space where the thoughts and experiences of a suspect may be accessed; such access is not physical, though contained in digital form on a device; just as the entry into and search of a physical location and seizure of physical items may be authorised by a search warrant, a digital search may also be authorised under the 2006 Act; such a search and seizure is not authorised where a computer is potentially to be seized and yet no justification for such a seizure and examination as to what may be reasonably suspected is put before a judge. That is what happened here.

99. An information was sworn before the issuing judge seeking physical items only. As granted, the search warrant for such items was therefore valid. But, entry into the digital space apart from the physical space to be searched was on the minds of the gardaí seeking that warrant. In the manner in which the warrant was sought, this need to search in the digital space was not brought to the attention of the judge. Since the foundation of the common law, and under democratic constitutional systems, judicial analysis is required before searches of homes and premises become lawful, similarly in seeking entry into the digital space, a similar judicial intervention is required.

100. It would have become a matter of inference for the judge, had computers been brought to the judge's attention as a space requiring seizure, that analysis within the digital sphere was sought to be authorised. Instead, there was no mention of any kind as to this purpose of the search, one different to the search of a physical space. An

information stating that it was proposed to search for computers and to analyse the digital content of same would have enabled the judge to agree or disagree that a search outside the physical location was justified. Simple averments as to why that might assist the investigation were all that were required of the gardaí. These were absent. Hence, while the search was lawful, the search of the computer, as a search within the digital space, had not been authorised.

101. Experience teaches that as an investigation develops, the necessity to explore and the imperative to rule out particular issues also becomes clear. It must be affirmed that where the gardaí wish to obtain a search warrant pursuant to a reasonable suspicion or to seize a computer in a house in respect of which a valid warrant was issued, that headline and necessarily blunt particularisation of that interest must be brought to the judge's attention on applying for legal authority to authorise such an invasion of privacy. Thereby, on the authority of *Damache*, a judicial mind is enabled to intervene in a way that assists the investigation and protects rights. Beyond that authorisation, the principle that police powers may only be used for the purpose for which same are granted, does not limit the extent of the search but ensures that analysis is geared towards a forensic purpose. As in a physical search, stumbling on personal material is inevitable. Though more extensive in terms of potential, search protocols are not required by law to limit a search within the digital sphere.

Order

102. The only order which may be made at this stage is one declaring the seizure of computer devices from the accused's home to have been unlawful in the context of a valid warrant and otherwise lawful search. Further argument is required as to any consequences which may flow from this ruling and as to the manner and jurisdiction for the proper decision thereon.

No redactions needed

Approved 20 March 2023

Peter Charleton