THE COURT OF APPEAL

NO REDACTION NEEDED

Neutral Citation Number [2020] IECA 334

[2020 No. 34]

The President
Kennedy J
Donnelly J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MICHAEL MURPHY

APPLICANT

JUDGMENT of The President delivered on the 30th day of November 2020 by Birmingham P.

1. This case raises the question of the circumstances in which a judge who is scheduled to preside over a criminal trial on indictment ought to recuse himself if he or she has made rulings in the course of an inconclusive earlier trial. The point is not only an interesting and significant one, but also a novel one. Despite the industry of counsel on both sides in seeking out relevant precedents, it does not appear that this particular issue has arisen for consideration previously. While several grounds of appeal have been advanced, they may appropriately be distilled to this one question of objective bias and whether the informed and reasonable bystander would conclude that the accused would not receive a fair or impartial retrial owing to the failure of the trial judge to recuse himself or herself from the matter.

General Background

2. The background to the case is as follows. The applicant stood trial in May 2019 in the Circuit Court in Waterford in respect of offences colloquially known as 'diesel laundering'. There were two counts on the indictment; a count contrary to s. 32 of the Waste Management Act 1996, and a count contrary to s. 94 of the Finance Act 1999 (as amended). The trial, which ended with a jury disagreement, was a lengthy one lasting 15 days. Eight days of those days were devoted to a voir dire concerned with the admissibility of evidence obtained as a result of searches of certain premises linked to the applicant. The focus of the challenge related to the powers of entry that were employed

by members of An Garda Síochána, officers of the Revenue Commissioners, and officers of the local authority.

3. Subsequent to the outcome of the voir dire, counsel on behalf of the now appellant applied to the trial judge to withdraw the case from consideration by the jury. Counsel relied in this regard on the decision in DPP v. J.C. [2017] 1 IR 417, contending that it would be an affront to the administration of justice to permit the case to be considered by a jury because of alleged unlawful acts by prosecution witnesses in seeking and obtaining evidence. The appellant has contended that because it was necessary for the trial judge, in considering the application to exclude evidence in the course of the voir dire, to make determinations of fact relating to the credibility, reliability, honesty, integrity and motivation of a number of witnesses (and having largely determined these issues in favour of the prosecution), that it would be inappropriate for the same judge to preside over a new trial where such issues were once again likely to be raised and where rulings on those issues were likely to be required.

4. In the course of the voir dire, one of the contentions had been that a member of An Garda Síochána had deliberately set out to mislead a judge of the District Court when seeking a warrant. Another issue that was raised was a contention that an officer of the Revenue Commissioners had sought to mislead the trial judge in the Circuit Court. These will be dealt with in further detail below.

5. In ruling on the issues raised on behalf of the applicant, the judge took the view that there was nothing in the evidence to impugn the honesty or good faith of the Garda in applying for the search warrant, or the truthfulness of the evidence she gave to the judge of the District Court. The Circuit Court judge stated that he was satisfied that there was nothing in the Garda's testimony to suggest that she was indifferent to the truth or that she displayed a willingness to convey a wholly untenable position to the District Judge. It must be said that the Circuit Court judge was forthright and unequivocal in rejecting some of the contentions that had been advanced to him. In relation to the application for a warrant by a member of An Garda Síochána, the judge commented:

> "[Counsel] put it to the Detective Garda that she not only misled the District Judge, but she did so deliberately, and that she did not convey the truth to him. These are quite astounding allegations. They appear to be based on a number of vague suggestions of mala fides, which, quite frankly, I find absurd."

6. In the course of his ruling on the voir dire, the trial judge stated that it was disingenuous (the word 'disingenuous' appears twice in the course of the ruling) for counsel to have stated that two questions asked by the judge in the District Court were in exactly the same terms as those disclosed in the sworn information. The judge observed:

> "That wording alone makes nonsense of the suggestion that the Detective Garda had misled the judge into thinking the information had been provided to her, either directly or impliedly, by [another person]."

7. The trial judge's use of the word 'disingenuous' has caused considerable distress on the part of members of the applicant's legal team. It must be said that the judge's choice of the word 'disingenuous' was not a felicitous one and might have given rise to a concern on the part of the applicant's legal team that the judge had concerns about how the defence was conducted. However, if there was any doubt about the matter, it was dispelled when the matter was relisted before the Circuit Court judge, after the decision in the High Court, in order to renew the application. We have been told that on that occasion, the judge was at pains to point out that he was not being and had never intended to be in any way critical of the manner in which the defence was conducted.

8. At a management list before this case was given a date, the question of the Court seeking out and accessing the transcript of that mention in February 2020 was canvassed. However, in a situation where it was not clear to me what would be the relevance of a transcript that comes into existence subsequent to the decision of the High Court, which was the subject of appeal, that issue was not pursued. For my part, I am happy to confirm (though in truth no such confirmation is really necessary) that there is nothing in the papers that I have seen that gives rise to the slightest concern that there was anything untoward in the manner in which the defence was conducted. On the contrary, the defence was a doughty one, advanced with considerable ability and determination.

9. At the risk of over-simplifying the issues in the voir dire, the position taken by the defence was essentially that they challenged the lawfulness of the initial entry by Gardaí and contended that if they were successful in that regard, that had a knock-on effect in relation to the entry by officers of the Revenue Commissioners and the local authority, because they said that these later arrivals were 'invited' onto the premises by Gardaí. The prosecution position was that the entry by Gardaí was lawful and was authorised by a valid warrant issued by a judge of the District Court, and that there were statutory powers available to the Revenue Commissioners and local authority officials which were exercised by them.

Detective Garda Jennifer Ryan

10. Central to the aspect of the voir dire that related to the entry by Gardaí on the premises at an industrial estate in Portlaw, County Waterford was the evidence of Detective Garda Jennifer Ryan. It was Detective Ryan who travelled to the District Court, sitting in Cashel, on 14th November 2013, and swore information before Judge Finn. It should be explained that Detective Garda Ryan had been tasked by a superior with investigating the reported theft of a red tipping trailer valued at approximately €28,000 from a Mr. Bohanna in May 2013. She was subject to detailed, one might say, intense cross-examination, during the course of the voir dire. In the course of his ruling delivered on 15th May 2019, Judge O'Kelly dealt with the issue as follows:

> "She prepared an information [sic], which she swore before Judge Finn, sitting at Cashel District Court on the 14th of November 2013. The application took place in the judge's chambers. While Mr Ó Lideadha [Senior Counsel on behalf of the then accused] characterised that as an application made in secrecy, I have no doubt that as an experienced criminal silk, he well knows that s. 26 of the Criminal Justice

(Amendment) Act of 2009 provides that all such applications must be heard other than in public.

Mr. Ó Lideadha put it to the [D]etective [G]arda that she not only misled the district judge, but that she did so deliberately, and that she did not convey the truth to him. These are quite astounding allegations. They appear to be based on a number of vague suggestions of mala fides, which, quite frankly, I find absurd. For example, Detective Garda Ryan could not say, because she had not met Mr. Bohanna, '[i]f he could even keep a straight face when he made the allegations'. Without one piece of supporting evidence, Mr. Ó Lideadha hints at some prior history that may suggest a man whose €28,000 trailer was stolen was making a malicious complaint against Michael Murphy. What more credible a source of information could one have than the victim of a theft, so desperate to locate his property that he engaged in his own investigation? To support his allegation that the [D]etective [G]arda was intentionally misleading the judge, he refers to her sworn information, in which she stated that 'John Joseph Bohanna has given [G]ardaí information'. The suggestion that he was putting to her was that she was untruthfully – that is, dishonestly – inferring that Mr Bohanna had given the information directly to her. Detective Garda Ryan stated that she had reasonable grounds for her suspicion. She set out those grounds factually, and without embellishment. She was entitled to rely on hearsay statements made to a superior officer.

There is nothing in the evidence to impugn Detective Garda Ryan's honesty, or good faith,in applying for the search warrant, or in the truthfulness of her evidence to Judge Finn.

[. . .]

Judge Finn engaged with the contents of the sworn information, in addition to asking the Detective Garda to confirm that Mr Bohanna had made his own inquiries, giving rise to his suspicion as to where the stolen trailer might be. Judge Finn asked the Detective Garda if she had personally visited the site, a fact that was not referred to in the Detective Garda's sworn information.

It is disingenuous for Mr Ó Lideadha to state that the two questions asked by the district judge were 'in exactly the same terms' as what was disclosed in the sworn information. What the Detective Garda actually swore was: '[t]he information he had provided went into good detail about the unit, and this has been verified by myself, Detective Garda Jennifer Ryan'. That wording alone makes nonsense of the suggestion that the Detective Garda had misled the judge into thinking the information was provided to her, either directly or impliedly, by Mr Bohanna. Detective Garda Ryan draws a clear distinction between the information given by Mr Bohanna to [G]ardaí and the information about the unit which she, herself, had verified. There was certainly no requirement on Detective Garda Ryan to embark on a fanciful enquiry as to whether Mr Bohanna had some improper motive for wasting

[G]arda time, giving false information concerning the whereabouts of his trailer stolen six months previously, or discounting the vague suggestion of impropriety put to her as to the relationship between Mr Bohanna and Garda O'Flynn, the evidence of which was that they were no more than acquainted.

The [D]etective [G]arda's information went far beyond the usual formula of 'confidential information has received [sic]'. It named the informant. I am perfectly satisfied that the questions asked by the district judge show that in exercising his discretion, Judge Finn was assessing the evidence before him. In seeking further information, it is clear that he was not allowing himself to be used as a mere rubber stamp, but that he was acting judicially, and with appropriate detachment. Judge Finn formed his own opinion as to the existence of a reasonable basis for suspicion."

Having read the transcript of Detective Garda Ryan's evidence, I do not find anything there that causes me to believe that an observer, sitting at the back of the Court, would have found the conclusions by the trial judge surprising or disquieting. In making that observation, I acknowledge the limitations of a transcript and I recognise that different judges may decide an issue differently, and indeed, that the same judge might, if the issue is presented slightly differently, decide the same issue differently on different days.

Martin Coleman (Revenue Officer)

11. The testimony of the accused during the voir dire was not confined to the heavy criticism of the Detective Garda who had applied for the warrant. It was also suggested to the trial judge that he ought to conclude that a retired Revenue Officer had deliberately given false evidence during the course of the voir dire. To put this issue in context, it should be explained that a party of some six Gardaí entered onto the premises on the morning of 15th November where they observed tanks, pumps, and containers. Detective Garda Ryan asked Mr. Murphy about it and she records him as saying that he was cleaning off burnt diesel. However, she was suspicious that it was something else; suspicious that it was diesel laundering equipment. Having discussed this suspicion with Garda Slevin, another member of the search party, contact was made with Customs. A phone call was made by Garda Slevin to Mr. Martin Coleman, Revenue Officer, causing Mr. Coleman and a Revenue colleague, Ms. Loretta Dwyer, to make their way to the premises in Portlaw.

12. Mr. Coleman's evidence was that when he received the phone call from Garda Slevin, he told him that he believed that he and his Revenue colleague had the power to enter the premises as they believed or suspected it to be an oil laundering plant, but that he would want to confirm with his line manager that it was permissible to go onto the premises. His evidence was that he had power to enter onto the premises under s. 136 of the Finance Act 2001. Mr. Coleman and Ms. Dwyer made their way to the premises in question, Unit 8, Highfield Business Park, Portlaw. On arrival, they spoke to Detective Garda Ryan who had entered onto the premises on foot of a warrant issued under s. 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and had found what appeared to be a diesel laundering plant. Mr. Coleman's evidence was that he established that the Detective

Garda did not have a difficulty with Revenue Officials entering the premises under the statutory powers under s. 136 of the Finance Act.

13. For completeness, it should be noted that later, on 18th November, Mr. Coleman applied to Judge Finn, sitting in the District Court in Youghal, for a search warrant in respect of the premises in order to provide an authority for the removal of goods from the premises. He, too, was the subject of detailed, and indeed, forceful cross-examination. The thrust of the cross-examination was to suggest to him that he had not entered on foot of any statutory powers, and that the suggestion that he had done so was a recent invention, and that he and his colleague had entered on the premises on foot of an invitation from the Gardaí, specifically, Detective Garda Ryan, the warrant holder.

14. The judge dealt with this as follows:

> "Mr. Coleman, the now retired, authorised Revenue officer, was on other duties on routine mobile patrol when he received a telephone call from Garda Slevin, advising him that [G]ardaí had found what they believed to be a fuel laundering operation. Mr.Coleman's evidence was quite clear. He assessed the description given by the [G]arda, and from that description, he told the [G]arda that he believed the Revenue/[C]ustoms had the power to go onto the premises. Of course, at that stage, from what the [G]arda had told him, he now had his own suspicion that an oil laundering plant was to be found there. Yet Officer Coleman did not leave it at that. He stated in his evidence that he would confirm with his line manager that it was okay to go onto the premises. This clearly shows that he was conscious of exercising his own statutory powers. He went with his colleague, authorised officer Loretta Dwyer, to the premises, and met Detective Garda Jenny Ryan, and he established that she was the warrant holder.
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> A lot of time was spent with the witnesses on the question of whether they entered under their own statutory power, or under the invitation of Detective Garda Ryan. Mr Ó Lideadha argues forcefully that he won concessions from each of the relevant witnesses that they did not exercise their statutory powers, but entered simply at the invitation of Detective Garda Ryan. I find that argument unpersuasive, and it does not affect the legal position. The fact that Detective Garda Ryan indicated that the Revenue could come onto the premises did not remove the statutory right of entry which they enjoyed as authorised officers under section 136 of the Finance Act, 2001, and which I am satisfied they exercised when they went onto the premises on both the 15th and the 18th of November 2013.
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> When Officer Coleman used the expression, 'I was invited onto the premises on foot of a [G]arda search warrant', I have no doubt that he did so to explain in a succinct manner the reason why he happened to be at the premises. Prior to being contacted by the [G]ardaí, he did not have any grounds to suspect that Unit 8 was being used for illegal purposes. The expression, 'invited on', avoided the necessity of going into an elaborate explanation of how he came to be at Unit 8. I do not accept the proposition that as a matter of law, he was there under his statutory

powers, but as a matter of fact, he was not. I see no difficulty in principle with somebody being invited into a premises and saying so, while simultaneously being conscious that they were there in exercise of statutory powers. Indeed, because of the fact that Detective Garda Ryan was the warrant holder, she may have not considered this. She may have had the possibility to exclude the officers from entering if, for example, what was there had been a crime scene or a designated crime scene. That is not an issue that arises in this case.

Each of the witnesses were excluded so that they could not hear what the previous witnesses had said. Then, in turn, it was put to them that a previous witness had accepted that they had been invited onto the premises by [G]arda invitation. It was disingenuous, in circumstances where the earlier witnesses had also claimed that they were exercising statutory powers of entry, but this was not referred to in the later cross-examination. This problem became so acute by the cross-examination of Paul Carroll [an official of the local authority] that I was worried that there was a real risk of unfairness, so I intervened, and had to take the unusual and unfortunate step of interrupting the cross-examination until agreement was reached between counsel as to what exactly the previous witness -- in this case, Maria Gough [local authority official] -- had actually said. Even then, the DAR had to be played and replayed to establish what was said, and when a short transcript was prepared, it was not put in full to the witness. The distinction between invitation and power can be seen in everyday life, and to know exactly how language is used, one needs to know the context in which the words are chosen. For example, if a visiting cleric, on holidays in Tramore, meets the local parish priest, who invites him to celebrate mass the following day in the local church, and he does so, and if, afterwards, a parishioner in the congregation comes up to him and says '[h]ow come you said the mass today?', it would be absurd to think that the priest would answer because he had power vested in him by right of ordination under episcopal authority. He would simply reply, '[b]ecause I was invited to do so by your parish priest'. It is not the invitation that gives the power. The opportunity to exercise the power vested in officer Coleman under section 365 arose because of the invitation of Detective Garda Ryan. He was asked why he had not made a notebook entry of it, and he replied that it was not something that he needed to remind himself of. Indeed, he said that the power to enter a business premises without a warrant was something ingrained in his mind. Nothing turns on the fact that he did not have a lawyer's knowledge of what private property was, in circumstances where he was perfectly clear that he knew that he did not have power to enter a residential property without a warrant. Nor do I accept that Mr Coleman gave false evidence, or, indeed, [that] he fabricated evidence because he was present in court when counsel indicated that there was a problem with the [G]arda warrant.

My experience from this side of the bench is that there is nothing more certain to turn off the attention of persons sitting in the body of the courtroom than when counsel start pressing the judge on legal issues. I believe Officer Coleman when he

said that he heard there was going to be an argument about the [G]arda warrant but he was not particularly concerned about that, because he was dealing with his own statutory powers. He also stated he did not become aware that there could be an issue with his search if there was an issue with the [G]arda warrant. Mr Ó Lideadha is, of course, free to characterise this as false claims to this Court, but I do not accept his proposition in this regard. Mr. Coleman was perfectly clear what section 136 entitled him to do. The section is very straightforward: '[a]n officer may, at all reasonable times, on production of the authorisation of such officer, if so requested by any person affected, enter a premises other than a dwelling."

Once more, having read the transcript, I do not believe that a reasonable observer at the back of the Court would have found the judge's conclusions surprising, nor do I think that a reasonable observer would have had any doubts about the fact that the issue was being addressed by the judge in a fair and careful manner. It seems to me that to the notional, reasonable observer, the idea that someone who had been a Customs Official for in excess of 30 years and an authorised officer for 18 years, would have his statutory powers to the forefront of his mind when entering a premises would seem a reasonable and far from surprising conclusion.

Loretta Dwyer

15. The most controversial aspect of the evidence related to the testimony of Loretta Dwyer, an authorised officer of the Revenue Commissioners, who was accompanying Mr. Coleman when he received a phone call about what Gardaí had discovered, or believed they had discovered, at a premises in Portlaw. In her direct evidence, she dealt with the matter as follows:

"A: […] When we arrived at the premises in Unit 8 of Highfield Business Park in Portlaw, it was approximately around 11 o'clock. We met with Sergeant Jenny Ryan, whom I was aware had a search warrant in her possession. We entered into a warehouse and --

Q: You might just -- what basis did you enter into the warehouse?

A: We went in under section 136(1) of the Finance Act 2001, statutory right of entry onto the business premises."

Again, there was a searching cross-examination, the starting point of which was that her statement in the book of evidence recorded as follows: "on arrival at the warehouse, I met Detective Sergeant Jennie Ryan, who was in possession of a search warrant, and whom [sic] invited me onto the premises". When asked whether that was the truth, she said, yes. The cross-examination then addressed the fact that she had made a supplemental statement on 26th April 2019, which statement had begun:

"I say that on the 15th of November 2013 and the 18th of November 2013, I entered the premises at Unit 8, Highfield Business Park, Portlaw, County Waterford,

under statutory power of entry on both Friday the 15th of November 2013, between approximately 13:20 and 13:30, and on Monday the 18th of November 2013, between approximately 12.00 and 12.30pm."

The circumstances in which Ms. Dwyer came to make a supplemental statement were probed in great detail and, it may be said, very effectively indeed. Defence counsel said that he had obtained a significant concession as to the basis of the entry onto the property. In re-examination, counsel on behalf of the prosecution sought to have the witness restate that she had entered under statutory powers. Following a debate between counsel and discussions with the trial judge, prosecution counsel discontinued his re-examination and defence counsel was permitted to relaunch the cross-examination. The procedure followed was unusual, but was perhaps indicative of the judge's anxiety to be scrupulously fair and not to trammel on the rights of the defence.

16. The resumed cross-examination was highly effective, with the defence making very significant headway. Words such as 'devastating' would not be out of place. The criticisms of Ms. Dwyer went beyond a suggestion that the Court should not accept that she had entered the premises at Portlaw under statutory powers, but it was suggested that she had made multiple false statements. It was submitted that such was the extent of her transgressions, that the Court was required to protect itself against an abuse of process by halting the trial. The trial judge dealt with this aspect as follows:

> "I have not found anything unlawful for [sic] the entry by [G]ardaí, customs or environmental officers, for either the 15th or the 18th of November 2013, yet there is another and discrete objection to the admission of any of the evidence herein. Indeed, it goes farther than that. Mr Ó Lideadha claims that arising out of the evidence of authorised Revenue officer, Loretta Dwyer, whom he claims admitted she made a number of false statements, the Court, he urges, must protect itself against abuse. He has argued that to allow this trial to proceed would bring the very administration of justice into disrepute. He has variously described what transpired in relation to officer Dwyer's evidence as truly shocking and deeply shocking.
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> Having so far found nothing that would justify the prohibition of continuance of this trial or the exclusion of the evidence lawfully gathered on the 15th and 18th of November 2013, I will now examine what exactly transpired with Loretta Dwyer to suggest that the administration of justice has been brought into disrepute by her. Authorised Officer Dwyer was very clear in her direct evidence. She stated that she worked as a customs officer and authorised officer of the Revenue Commissioners, and had done so at all relevant times. She gave evidence that while accompanying Officer Coleman on mobile patrol on the 15th of November 2013, she heard him receiving a telephone call. It was the [G]ardaí, requesting their presence at a commercial unit where the [G]ardaí felt there was some kind of fuel laundering operation or facility. Officer Dwyer stated that they arrived at the location at approximately 11 am, and met Detective Sergeant Jenny Ryan there. It appears

that the witness was not familiar with the [D]etective [G]arda's rank, but nothing turns on that. She stated in evidence that she and Officer Coleman entered the premises under 'our statutory rights of entry of business premises under section 136 of the Finance Act, 2001'. While there, she drew a rough sketch of the equipment that was located there, and in evidence gave a detailed account of what that sketch showed.

She also stated that she took a number of photographs, and left the premises at approximately 2 pm. She returned at approximately 11 am on Monday the 18th of November, and again stated that she got into the premises under statutory rights of entry of business premises under section 136. She stated that she met Mr Murphy, and identified herself to him, and showed him her authorisation. She gave evidence of what she did for the day, which included making another sketch, a detailed sketch, of the filtration system contained within the blue tank which she identified by reference to the photographs. She left the premises at approximately 11 pm.

In cross-examination, Ms [Dwyer] acknowledged the importance of keeping a record of important aspects of her work in her notebook, including the exercise of statutory rights. She acknowledged that these notes must be accurate and comprehensive. She stated that she could not recall if she had mentioned the exercising of her power under section 136 in her statement about events on the 15th of November, but on being afforded the opportunity to examine her statement, she confirmed that she had not mentioned it for the 15th, only for the 18th. She also confirmed that she had been invited onto the premises that day by Garda Ryan, who had a warrant. This was put to her as a narrative, and she was asked if it was an accurate description of what had occurred on that date, and she confirmed that it was. Ms [Dwyer] also confirmed that the return to the unit on the 18th of November was a continuation of the investigative process, but she was adamant that she had exercised her power under section 136 to enter the premises. Indeed, she had referred to the specific power in her statement made shortly after the events of the 18th of November 2013. At the end of Mr Ó Lideadha's cross-examination, Mr O'Doherty [counsel for the prosecution] sought to re-examine Ms Dwyer on the powers of entry she had exercised. Mr Ó Lideadha objected on grounds that he had obtained a concession from her, and that she had not used any statutory powers but had gone in on the invitation of Detective Garda Ryan. I pointed out that it was my function to assess the evidence, and draw whatever conclusions were appropriate from same. It was up to me to form my own views as to what the witness had said.

Mr Ó Lideadha then complained that if he had realised I was not accepting this concession had been made, he would have continued with his cross-examination to deal with other issues. Out of absolute concern for fairness to the accused, I allowed Mr Ó Lideadha to resume his cross-examination. What then transpired was nothing short of extraordinary, as the witness became completely confused in her

evidence. It transpired that she was working off a different version of her statement of the 26th of April 2019 to that which was in the hands of both the prosecution and defence legal teams. An application for a full copy of email correspondence between the Revenue law office and Officer Dwyer was made by the defence, and I acceded to this, subject to certain redactions necessitated by legal privilege. What this further correspondence disclosed, and Officer Dwyer's evidence on it, has given rise to Mr Ó Lideadha's further ground of objection, namely that the administration of justice has been brought into disrepute. He has very forcibly argued that the trial judge must not only uphold the accused's right to a fair trial, but also protect itself against its abuse by excluding all of the evidence.

Ms [Dwyer] was asked last month to prepare a supplementary or supplemental affidavit, following on from advice on proofs received from prosecuting counsel. There is nothing unusual about such a request, particularly in complex or technical trials. Very often, the defence will receive a large volume of additional proposed evidence in the days before a trial. It is not ideal, but so be it. In this case, Ms [Dwyer] received a request five-and-a-half years after the events for a further statement to clarify certain matters. She received a draft of what type of statement that was being sought of her. It is very clear that she was not directed to state anything specific in the statement. In fact, in the cover email sent at 15:03 on the 26th of April 2019, from Aine Bergin [of the prosecution unit], it was expressly stated: '[p]lease amend or update your statement as you see fit'. Unfortunately, Ms Dwyer appears to have made a clumsy attempt to expand on the draft by inserting the following words: '[o]n the 15th of November 2013 and the 18th of November 2013, I entered the premises at Unit 8, Highfield Business Park, Portlaw, County Waterford, under section 136, [of the] Finance Act, 2001'. She did this by slotting these words into an existing sentence in the draft, which originally read: 'I state that on both Friday the 15th of November 2013 (between approximately 12:30 and 13:30) and on Monday the 18th of November 2013 (between approximately 12 and 12.30), I took photographs of the scene and contents at Unit 8, Highfield Business Park, Portlaw, County Waterford.' Hers was already a complex statement with a number of sub-clauses. Ms [Dwyer] simply slotted the new sentence into that complex sentence after the first three words, 'I state that'. This was done by her without any change to punctuation, or any regard for the overall syntax or meaning of what had now become a most cumbersome sentence. On one reading, it gives the impression that the stated times of the original sentence now referred not to the times of taking the photographs, but to the times of entry. To make matters worse, Ms [Dwyer] then exchanged the reference to section 136, [of the] Finance Act, 2001 to a reference to statutory powers of entry. Why she did this, she could not say, but she signed a second statement to effect that change. This however, left the overall, unwieldy, ambiguous nature of the sentence in the same confusing condition as the first statement she had made on 26th April last. Ms. [Dwyer] obviously saw herself that she had effectively prepared something that was verging on the incomprehensible. Accordingly, and to make a bad situation even worse, she prepared and signed a third statement by attempting to clarify the times of entry to

the unit, but unfortunately, by this stage, she appears to have completely forgotten that these times were serving a different purpose, namely to establish the times she photographed the scene.

To add to her disorganisation, Officer Dwyer was not sure if she signed that third statement on the 26th of April 2019 or on the following Wednesday. If it was the following Wednesday, she did not alter the date to the 1st of May, but left it at the 26th of April 2019. There is no question that Officer Dwyer engaged in anything underhand, for example by tippexing out times or doctoring existing statements. Nevertheless, it raises serious concerns that an authorised officer of the Revenue Commissioners could get herself into such a tangle of confusion. I am satisfied, however, that there is nothing in the disorganised state of her evidence to suggest she was being deliberately deceitful, or attempting to pass over as factual anything that she knew to be untrue. Careful examination of the sequence of changes she made to the draft of the 26th of April, on that date and possibly on the 1st of May, shows that she was ham-fisted in the extreme, but not corrupt or deceitful. I do not accept that Ms Dwyer's confusion and incompetence is indicative of deliberately trying to mislead the Court with false statements. She passed on these statements, each duly signed and bearing [the] date the 26th of April 2019, and did so without having first sat back, and in a detached way considered exactly what information it was she was attempting to convey. I have no doubt that she was trying her best to convey the truth of what had happened five-and-a-half years ago. Unfortunately, instead of preparing a draft and reworking it until she arrived at a point where she was satisfied that it represented the correct position, she appears to have signed each one as a separate statement, when in fact she should only have signed the final version.

Mr Ó Lideadha also complains that there was inadequate disclosure of these statements, and of the email correspondence between the law office and Officer Dwyer. I am satisfied that in the particular circumstances where this correspondence contained sections of legal advice which I deemed appropriate to redact, it would not have been appropriate for the correspondence to be disclosed at first instance. This was correspondence being generated at the very last moment, following advice on proofs from the consultation process with prosecuting counsel. There should have been disclosure of each of the different versions of the statement dated the 26th of April 2019. Certainly, some versions were disclosed, but it may be that the differences may not have been spotted in the law office.

The whole confusion of the statements of the 26th of April 2019 is certainly not of such toxic effect that it contaminates the entire prosecution case or the trial process. While the case of [J.C.] has been much mentioned, together with [O'Brien v. Kenny], it is not so relevant to this discrete issue, unconnected with legal evidence gathering. Nevertheless, I find some of the reasoning, particularly in the majority judgment of O'Donnell J and Clarke J, now the Chief Justice, to be helpful

as to how best a trial judge should approach a problem such as presented itself in this voir dire. In the judgment of O'Donnell J, he states:

> 'A central function of the administration of justice is fact finding and truth finding. Anything that detracts from the Court's capacity to find out what occurred in fact detracts from the truth finding function of the administration of justice. As many courts have recognised, where cogent and compelling evidence of guilt is found, but not admitted on the basis of a trivial technical breach, the administration of justice, far from being served, may be brought into disrepute. The question is at what point does the trial fall short of a trial in due course of law because of the manner in which the evidence has been obtained? When does the admission of that evidence itself bring the administration of justice into disrepute?'

This is not a problem with how or why the evidence was gathered five-and-a-half years ago. This is a problem with Officer Dwyer committing to statement [sic] form the evidence which she wished to communicate some days before the trial began. What I find disturbing about Officer Dwyer's evidence in cross-examination last week is not her ability to remember what she did over half a decade ago, but rather her inability to explain what she did less than two weeks ago. Last Wednesday, the 8th of May, Ms Dwyer told us she had made a supplementary statement on the 26th of April last. She said she had been requested to make this by Aine Bergin, of the Revenue prosecution unit, to indicate what powers she was exercising. Officer Dwyer stated that she typed up a supplementary statement, setting out her statutory powers. She said she did not think she had prepared a draft, but admitted that she had signed two statements on the 26th of April, and had handed both statements to Aine Bergin. As the cross-examination intensified, Ms [Dwyer] could not explain in what circumstances she had come to make three statements, all dated 26th of April 2019, and why she had substituted the reference to section 136, [of the] Finance Act, 2001 with a reference to the more general and broader phrase '[u]nder statutory powers of entry'.

As the questioning became more robust, Ms [Dwyer's] confusion became more evident, she making the admission: 'I feel a bit confused as to how matters are progressing', and later: 'I'm just a bit confused over the last few days'. At first, she said did not know if she had had a phone conversation with Aine Bergin, but later acknowledged that she had. Her evidence became more unsatisfactory, and less credible. Its integrity and probative value has been significantly diminished, and her inability to explain clearly why she made numerous statements dated the 26th of April last is unacceptable. In those circumstances, a point has been reached whereby I must express the Court's disquiet by excluding from the trial the evidence which she sought to give about the events on the 15th of November 2013 and the 18th of November 2013, together with the exhibit evidence of her sketches and the photographs which she took on these dates. I am doing this despite my findings that the sketches and photographs were both lawfully made, and at least

insofar as the sketches are concerned, as I have not seen the photographs, they were genuine attempts to accurately depict the scene she found.

However, that is all that I am doing. Officer Dwyer may have had some other involvement with this investigation beyond those two dates that this ruling relates to, and I am not extending the sanction to exclude any such further evidence at this stage, only the evidence on the two dates referred to in the statements of the 26th of April 2019. Having carefully observed Ms Dwyer's demeanour throughout her time in the witness box, and particularly her manner during the most uncomfortable parts of her cross-examination, I am satisfied that she was not deliberately deceitful or reckless of the oath which she took, nor was she acting in reckless or grossly negligent disregard of Mr Murphy's right to a fair trial. She was confused, and her competence and credibility was badly damaged. I believe my ruling to be a proportionate and robust response to this. It would be quite wrong to direct the jury to acquit Mr Murphy because of the incompetence of one witness in the voir dire, or prohibit the trial from continuing on such a narrow issue. To adopt the words of Clarke J, as he then was in [J.C.], '[i]t should not, in my view, be assumed that diverting the criminal process into the side roads of issues not materially connected with guilt or innocence is always an appropriate course to follow'. To prohibit this trial or exclude all of the evidence gathered on the 15th and 18th November 2013 would be striking a totally inappropriate balance between the right of Mr Murphy to have a fair trial and the right of society to have the question of his guilt or innocence determined by a proper examination of the remaining evidence gathered herein. I do not accept the proposition put forward by the defence that there is an enormous crisis of truth in this case. Subject to the exclusion of Ms Dwyer's evidence for the 15th and 18th of November 2013, the State are entitled to lead the remainder of the evidence contested in this voir dire."

Again, bearing in mind the limitations of the transcript, I think that the approach taken by the trial judge was a careful and conscientious one which sought to balance the individual's right to a fair trial with broader considerations concerning the administration of justice. This delicate consideration can be seen in the critical terms used by the trial judge in describing how Ms. Dwyer conducted herself and the consequent exclusion of certain categories of evidence while also allowing other categories to be admitted.

The Application for Recusal

17. By letter dated 7th October 2019, the solicitors for the applicant wrote to the State Solicitor for Waterford. The letter was in the following terms:

"We understand that you intend to retry the above matter.

Please confirm that you consent/support the application that a Judge other than His Honour Judge O'Kelly should hear the trial.

In this regard you will note that the trial judge will be required to hear evidence from various prosecution witnesses in [voir] dire and to make determinations on matters of law and fact including as to the credibility of witnesses.

As in all such circumstances, there is a risk that a trier of fact might be unconsciously influenced by evidence, impressions of witnesses or prior determinations by that trier of fact. In such circumstances, if the same trial judge were to make similar determinations after hearing similar or different evidence from the same witnesses there would be grounds upon which a reasonable observer could reasonably conclude that the trial judge was influenced by or unconsciously acted in accordance with previous determinations.

If Client were convicted, such a conviction would not be in accordance with law or with the right of an accused to [be] tried in circumstances in which justice is seen to be done.

Please confirm that you will support the application for a different judge to hear the retrial."

18. Following oral submissions to Judge O'Kelly on 14th November 2019, which saw the judge refuse to recuse himself, the solicitors for the applicant wrote once more on 25th November. That letter, so far as relevant, stated:

"Please note that we have been instructed to seek judicial review arising from the refusal by His Honour Judge Eugene O'Kelly to recuse himself from hearing the retrial in the above matter.

We expect to make the application for leave on Monday [2nd December 2019]. If granted leave, we intend to seek a stay pending the full hearing of the proceedings. That stay would be sought only in respect of the Director seeking to prosecute the accused before His Honour Judge O'Kelly in the retrial.

We understand that the criminal session in Waterford has concluded. In the circumstances it is our intention to write to the Registrar to request that as a courtesy, His Honour Judge O'Kelly be informed of our intention to seek leave. In addition, we intend to enclose the further authorities set out below which were not referred to in oral submissions made on [14th November 2019] and to offer to appear with counsel before His Honour Judge O'Kelly on a convenient date in the week of [25th November 2019] should that be deemed appropriate or required by the Judge.

Midnight Entertainment Ltd v DPP [2019] IEHC 429

EPI v Minister for Justice, Equality & Law Reform [2009] 2 IR 254

P v McDonagh [2009] IEHC 316

Stubbs v The Queen [2018] UK PC 30, [2018] 3 WLR 1638"

The letter also cites, by way of a footnote, a number of cases that were referred to in oral submissions before Judge O'Kelly, including: The Commissioner of An Garda Síochána v. Penfield (Phoenix Magazine) [2016] IECA 141; O'Reilly v. Cassidy [1995] 1 ILRM 306; and Dublin Well Woman Centre Ltd. v. Ireland [1995] 1 ILRM 408.

The Application for Judicial Review

19. The application for judicial review came on for hearing in the High Court on 10th December 2019 before MacGrath J. who delivered judgment on 20th December 2019, refusing to grant an order of certiorari. The judge commented, not without some hesitation, that he was of the view that the trial judge had not erred in law and that he did not believe that objective bias had been established. Between paras. 13 and 20 of the judgment, MacGrath J. reviewed the various authorities that had been opened to him. I hope I may be excused if I do not repeat that exercise, but it is not a case where I have found the authorities that have been opened of particular assistance. Essentially, the reason for this is that the precise situation of whether a judge who has presided over a criminal trial and made rulings in the context of a voir dire is obliged to recuse himself when an application is made to him to do so has not previously arisen for consideration. I would highlight, however, the decision in Midnight Entertainment v. DPP [2019] IEHC 429, discussed at paragraph 17 of the High Court's judgment – the facts of which were described by MacGrath J. as "instructive". The case in question concerned a judicial review of the refusal by a District Judge to recuse herself in a prosecution of a limited company for selling alcohol without a licence. The District Judge had convicted a director of the company two years previously of the same offence and that conviction was set aside on appeal. The application for judicial review arose in circumstances where the District Judge had made comments referencing "the same people coming in time and time again". While the application was acceded to in the High Court, attention must be drawn to the fact that it was the subject of a successful appeal to this Court on 2nd March 2020 with the judgment being delivered by McCarthy J.

20. While not engaging in a full review of the authorities that were opened, I would draw some attention to certain passages from the case of Stubbs v. The Queen [2018] UKPC 30:

> "…the fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. However, different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal."

21. It does seem to me necessary to bear in mind the context in which the application for a recusal was advanced. A judge of the District Court had issued a warrant following an application made to him. Prima facie, the entry of Gardaí onto the premises was authorised by that warrant. As to the arrival of the Revenue officials and the local authority officials, it is true that at one level, they were invited to Portlaw by Gardaí, but

those involved were public servants of considerable experience and would be expected to have their own statutory powers to the forefront of their minds. The application by reference to the J.C. decision was a very radical one, and as the High Court judge pointed out, the reality was that the defendant was required to discharge a heavy burden if he was to succeed in contending that the case ought to be withdrawn from the jury on the basis contended for. Consideration of this issue cannot ignore the fact that certain evidence was excluded by the trial judge.

22. In something of a finessing of position, attention has been drawn to some of the language used by the trial judge and it is suggested that this heightens the concern that would be experienced by the reasonable observer. In response, the respondent points out that the judge did not hold back in his criticism of Revenue Officer Dwyer. However, I would express the view that the clear impression that I got from the portions of the transcript that have been made available to the Court is that any observer would have formed an impression of a judge who was engaged with the issues and was dealing with them in a particularly careful and conscientious manner. I do not believe that any reasonable objective observer would have any doubts about the fact that the judge would approach the task of presiding at a retrial, including conducting a voir dire if called on to do so, with complete fairness. However, that is not necessarily the end of the matter. The fact that the judge would strive to be fair does not dispose of the issue. The question is whether his involvement in the earlier trial would mean that he could not bring an open mind to bear. Counsel on behalf of the applicant has been careful throughout to point out that it has never been his case that any involvement in an earlier trial would disqualify a judge from sitting on a retrial. Rather, he says that different considerations arose when the question of credibility is in issue. Even in that restrained form, it is a proposition not without difficulty. It would seem a very surprising conclusion if it was the case that because a judge had, for example, delivered a ruling on a voir dire, having heard evidence, that he was necessarily, or even presumptively, precluded from sitting on a retrial. It cannot be the case that a litigant can say, 'I didn't like how the judge who dealt with my last case ruled, so I want a different judge to see if I can do better next time round'. In the present case, it must be pointed out that the credibility in issue is not that of Mr. Murphy, but rather, that of prosecution witnesses. While the distinction might seem a fine one, it is not without significance. It could sometimes be the case that someone whose credibility has been rejected, perhaps in strong and clear terms, would have concerns that the same judge would be unable to put that out of his mind and would likely come to the same conclusion again such was the force and clarity of the earlier ruling. It does not seem to me that the same consideration applies with equal force where the complaint is that the credibility of the other side's witnesses was the subject of an attack which did not succeed.

23. Overall, the view I have formed is that the objective bystander would not have any reasonable basis to have concerns about the fairness or impartiality of any retrial presided over by the same judge. It is true that the observer might feel that he could predict the outcome with some confidence, however, that would not be unique to the present situation. Confident predictions might arise in a situation where a judge had dealt with a

similar issue in another trial, perhaps involving completely unconnected parties, or it might be suggested that the judge, across a range of cases, had shown an inclination to admit or exclude particular kinds of evidence. The fact that one can make an informed assessment of what an outcome is likely be is far from saying that the judge will not bring a fair and open mind to bear.

24. Accordingly, I would dismiss the appeal. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Kennedy J:

I agree.

Donnelly J:

I also agree.