



**THE COURT OF APPEAL**

**UNAPPROVED**

**NO REDACTION NEEDED**

[86/19]

[2021] IECA 306

**The President**

**McCarthy J.**

**Kennedy J.**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**PATRICK QUIRKE**

**APPELLANT**

**JUDGMENT of the Court delivered on the 16<sup>th</sup> day of November 2021 by Birmingham**

**P.**

**Introduction**

1. Following a trial which lasted 71 days, the appellant was convicted of the offence of murder by a majority verdict of 10:2. He had stood charged that on a date unknown between 3<sup>rd</sup> June 2011 and 30<sup>th</sup> April 2013, at a location unknown within the State, he had murdered Bobby Ryan. Of note is the fact that during the trial, the jury was absent from the courtroom for more than half of the time. There were numerous *voir dires*. Over 100 witnesses were called, and objections were taken in the case of some two-thirds of those. Some sixty applications were made by the defence, and approximately half of those applications were successful either in whole or in part.

2. The appellant has now appealed against his conviction. 52 grounds of appeal have been advanced. For ease of reference, the grounds of appeal are appended to this judgment. The very lengthy written submissions that were filed by the appellant (which run to around 128 pages) deal with the issues under sixteen topic headings, though some of the topic headings in fact involve several sub-issues. By way of example, “ground R” relates to the judge’s charge and involves: (i) criticism of what the judge had to say in relation to how circumstantial evidence should be approached; (ii) criticism of the fact that at one point, the jury was told that they were required to decide what happened; and (iii) criticism of how the judge responded to requisitions.

*The central themes*

3. At the outset of this appeal, counsel on behalf of the appellant indicated that there are, in essence, two central themes in this appeal. He said that his first theme focuses on the fact that this was a circumstantial evidence case, where a verdict was returned after six days of deliberation by the lowest majority permitted by law for a conviction. He said that in those circumstances, if there was any piece of evidence considered by the jury that ought not to have been, it would be very difficult to “unscramble the egg”; that is to say, it would be difficult to determine what effect the presence of an inappropriate piece of evidence might have had. Counsel went on to say that he was making that point pre-emptively in circumstances where it might be said that some of his submissions may “seem to be somewhat marginal in terms of their substance”. However, he indicated that in a circumstantial evidence case such as this, there was a serious question to be asked if a particular building block of evidence should not have been present.

4. Counsel then explained that his second theme is what he described, no doubt with an eye on the then imminent US presidential election, as the “*e pluribus unum*” (out of many,

one) theme; in essence, that the multiple grounds of appeal (some 52), when viewed in conjunction, should lead to a conclusion that the trial was unsatisfactory.

*The grounds as topics*

5. The oral submissions of both sides were structured around the sixteen topic headings as set out in the appellant's written submissions and, in those circumstances, this judgment will be similarly structured.

6. Having first introduced the case (titled section A), and then having set out a summary of the evidence (titled section B), the appellant's submissions go on to describe the aforementioned topic headings in the following terms:

- C: General approach to the admission of evidence;
- D: Evidence by and related to Mary Lowry [a central witness at the trial];
- E: Evidence by and related to Dr. John Manlove [a forensic entomologist called by the prosecution at trial];
- F: Evidence by and related to Michael Reilly [an engineer called as a prosecution witness];
- G: The impeachment of Stephen O'Sullivan [a plumber called by the prosecution as a witness at the behest of the defence];
- H: Garda observations and related material;
- I: Search warrant;
- J: Various interview objections;
- K: Civilian witnesses [a shorthand reference to a number of witnesses including Emmet Kenny and Gary Cunningham, part-time employees of the appellant since each had completed a work/study placement; Breda O'Dwyer, an artificial insemination contractor; Sean Dillon, a young witness who helped out on the

farm; and Eddie Quigley, brother of witness Mary Lowry. Here, the appellant was content to rest on his written submissions];

- L: Computer and audio;
- M: Dr. Michael Curtis and pathology;
- N: Tusla and related matters;
- O: Applications to discharge the jury;
- P: Direction application;
- Q: *P.O'C.* application; and
- R: The judge's charge.

7. Before turning to address the issues raised on the appeal, it may be helpful to lay out the general background to the trial and to introduce some of the principal participants.

### **Background to the appeal**

#### *The relationships between the principal participants*

8. Patrick Quirke, hereinafter referred to as “the appellant”, is a dairy farmer with a holding in Breanshamore, County Tipperary. He also farmed land in the neighbouring townland of Fawnagowan. These lands had been held by Mary Lowry and her husband, Martin Lowry.

9. Mr. Lowry died in September 2007. The appellant is married to Imelda, Mr. Lowry's sister. There was evidence at trial that the appellant and Mr. Lowry, both of whom were dairy farmers, had worked together, had common investments and often shared machinery. The appellant held the lands at Fawnagowan on foot of a seven-year lease dating from 8<sup>th</sup> April 2008. The trial heard evidence that in or around January 2008, the appellant and Ms. Lowry entered into a sexual relationship of which nobody else was aware.

**10.** Towards the end of 2010, Ms. Lowry met the deceased, Bobby Ryan, for the first time, and began a relationship with him shortly thereafter. Ms. Lowry gave evidence that she ended the affair with the appellant, that the appellant did not take this well, and that he seemed to be quite depressed and very down. In August 2010, there was a meeting in Hayes Hotel in Thurles involving the appellant, the late Mr. Ryan and Ms. Lowry. In the end, Mr. Ryan and the appellant shook hands and parted amicably.

**11.** Ms. Lowry's evidence was that her relationship with Mr. Ryan continued into 2011 and he began to stay over in her home. She also gave evidence that, at the same time, her relationship with the appellant deteriorated. She referred to an occasion in January 2011 when she came home to find him hiding behind the door of her porch. On 14<sup>th</sup> February 2011, Ms. Lowry received a letter from Tusla stating that there had been reports that her children were not being adequately cared for. These reports emanated from the appellant.

*The "Dear Patricia" column*

**12.** Ms. Lowry's evidence then made reference to a letter that appeared in the "Dear Patricia" column, an agony aunt segment, in the Sunday Independent newspaper under the heading: "I'm bereft now affair with my best friend's widow is over". The letter outlined how the author fell "deeply in love", but that the relationship came to an abrupt end when his lover started seeing somebody else and forgot about him, and poured all her energy into developing her new relationship with a man "who promised everything I couldn't". The author of the letter wrote that he felt broken-hearted and angry at how well things had worked out for her, despite her lying and cheating on him. The author stated that he was still in love with his ex-lover, but accepted that the relationship was over and that she had shared the history of their relationship with her new lover. The details contained in the published letter enabled Ms. Lowry, when she read it, to identify its author.

*The disappearance of the late Mr. Ryan*

13. The trial court heard evidence that Mr. Ryan called to Ms. Lowry's house at approximately 9.30pm on 2<sup>nd</sup> June 2011 and stayed overnight. The next morning, he woke at 6.00am and left the house at about 6.30am. His van had been parked in its usual place in the farmyard behind the house. Ms. Lowry stated that there was some delay between Mr. Ryan leaving her company and exiting the house, and she speculated that he may have eaten or had something to drink in the kitchen before leaving. Shortly thereafter, she heard the grid on the driveway, indicating that the van was being driven away. It is worth noting that somewhat different time estimates were given at different stages of the investigation, but Ms. Lowry appeared to settle on an estimate of between three and ten minutes passing before hearing the grid.

14. Mr. Ryan did not appear for work on 3<sup>rd</sup> June 2011. As Mr. Ryan was someone who was very much a creature of habit, and, in particular, someone who was never late for work, concern on the part of his family soon began to develop, to the extent that Michelle Ryan, daughter of the late Mr. Ryan, went to Tipperary Garda Station at approximately 1.00pm on the day of his disappearance. An extensive search for Mr. Ryan was mounted and continued over some period. This included searching the farmyard at Fawnagowan where Gardaí emptied two slurry tanks that were on the farm with assistance from the appellant.

*The discovery of the late Mr. Ryan's body*

15. On 30<sup>th</sup> April 2013, the appellant was proposing to commence the task of slurry spreading. The version of events that he put forward was that in order to agitate the slurry, he required water, and sought to access it from an old run-off tank on the farm, believing that there would be water present there. In the course of pumping the water into a vacuum tanker, the appellant contends that he discovered the body of the late Mr. Ryan lying in the run-off tank. Gardaí were informed of developments and attended at the scene. Gardaí gave evidence

that they observed that the appellant was relatively clean in appearance, despite engaging in work that was ordinarily messy. When interviewed by Gardaí, the appellant stated that he not started the “dirty part” of the job at that stage.

*The cause of death*

16. Dr. Khalid Jaber opined that the death of Mr. Ryan had resulted from “blunt force trauma”. He did not attend at the crime scene and he was not available to the prosecution at trial. His report and findings were reviewed within the Office of the State Pathologist by Professor Marie Cassidy, the State Pathologist; Dr. Michael Curtis, the Deputy State Pathologist; and Dr. Linda Mulligan, the Acting Deputy State Pathologist. They were unanimously of the view that the cause of death was blunt force trauma, likely due to vehicular impact trauma. Then, apparently at the suggestion of Professor Cassidy, the prosecution approached Professor Jack Crane, the State Pathologist in Northern Ireland for many years. Professor Crane was also of the view that the cause of death was blunt force trauma. He felt that the severe head injuries which were present were due either to blows to the head or as a result of the head being crushed or compressed. He did not believe that the evidence was there to support the conclusion of vehicular impact trauma.

17. The prosecution called as a witness a forensic entomologist, Dr. John Manlove, who concluded that the insect infestation, which was observable on the body of Mr. Ryan, originated a minimum of eleven days earlier, but probably longer, and opined that the first time the tank was opened was not on 30<sup>th</sup> April (when the appellant says that he discovered the body in the run-off tank), as access must have been provided for the flies some time before this date.

*The search warrant*

**18.** A search warrant was sought and obtained in respect of the home of the appellant on 13<sup>th</sup> May 2013, and executed on 17<sup>th</sup> May 2013. Among the items seized was a computer, an examination of which revealed that the following internet search was conducted on 25<sup>th</sup> July 2012: “a human corpse post mortem: the stages of decomposition”. An internet search conducted prior to 11<sup>th</sup> September 2012 related to an article entitled “How DNA Works”. On 3<sup>rd</sup> December 2012, it appears that further internet searches on human decomposition were performed.

**19.** It should be noted that both at trial and subsequently on appeal, the validity of the search warrant has been challenged on various grounds.

*Garda interviews with the appellant*

**20.** The appellant was interviewed by Gardaí on a number of occasions during the course of the investigation. These included what were described as voluntary interviews, *i.e.* interviews when the appellant was not in custody, and interviews conducted with him when he was in custody, having been arrested and detained on two occasions. No admissions, as such, were made by the appellant, but he and his legal team take issue with the conduct of the interviews and the fact that the memoranda taken were not subjected to more extensive editing.

**21.** At trial, there were applications made for a directed verdict of not guilty, and an application was made by reference to the decision in *The People (DPP) v. PO’C* [2006] 3 IR 238.

**22.** On 23<sup>rd</sup> April 2019, the judge charged the jury and her charge was the subject of a number of requisitions.

**23.** As noted earlier in this judgment, the Court will now move on to address each of the grounds of appeal as grouped into topics by the appellant in his written submissions.



### **Topic C: General approach to the admission of evidence**

24. The appellant complains that on several occasions during the course of the trial, when called on to rule on issues of admissibility of evidence, that in so ruling, the trial judge had observed:

“It is a fundamental prerequisite that evidence be relevant in order to be admitted. The corollary is that all relevant evidence is admissible, unless specifically excluded by one of the exclusionary rules, such as the rule against the admission of misconduct evidence or the admission of nonexpert opinion.”

25. The appellant says that the formula used by the trial judge is indicative of an incomplete statement of the law, and is based on an incomplete and selective quotation from textbooks on evidence, including McGrath on *Evidence*, 2<sup>nd</sup> Edn., (Roundhall, 2014). In that regard, the appellant points out that while McGrath opines that all relevant evidence is admissible unless specifically excluded, the author goes on to say (at paragraph 1–25):

“[T]he trial judge enjoys a general discretion to exclude relevant evidence where its probative value is outweighed by its prejudicial effect.”

Again, it is pointed out that McGrath includes a statement as follows (at paragraph 1–28):

“The onus of establishing that evidence is admissible rests on the party that wishes to adduce the evidence. The party also bears the onus of proving any facts required to be proved in order to establish the admissibility of the evidence.”

26. The appellant says that the approach of the trial judge effectively reverses the onus and requires the defence to establish why evidence should not be admitted, when in fact, if the judge properly approached the task of ruling on admissibility, the onus would be on the party seeking to have the evidence admitted to establish why that should be so.

27. In response, the Director says that this is a point that might have some substance were it not for the fact that on numerous occasions during the trial, the judge showed that she was

very much aware of the fact that she had a discretion to exercise, and in particular, that there was a need to address the balance of the probative against prejudicial effect of evidence, and on many occasions, this resulted in evidence being excluded.

**28.** For our part, we think that the Director’s position is well made. In general, relevant evidence is admissible. Indeed, that much was recently re-stated by the Supreme Court (Charleton J.) at paragraph 7 of its judgment in *The People (DPP) v. Clement Limen* [2021] IESC 8:

“Relevant evidence is always admissible under our system of law. Evidence may be excluded but the burden of demonstrating that the law requires relevant testimony not to be heard with the jury, charged under Article 38.1 of the Constitution with trying fact, rests on the accused.”

However, that is far from the end of the story and the admission of evidence is clearly subject to a great number of qualifications – some specific, such as those instanced by the trial judge, but others more general, such as the entitlement of a trial judge to exclude evidence otherwise admissible if its probative value is exceeded by its prejudicial effect. This generally involves the carrying out of a careful balancing exercise, as stated by the Supreme Court (Charleton J.) in the decision of *The People (DPP) v. Zoltan Almasi* [2020] IESC 35 (at paragraph 13):

“What is perhaps not appreciated in the instructions given to the prosecution is that the law of evidence is a set of rules that apply to both sides in a criminal trial. There is an absence of any logical argument based on authority for substituting vague notions of fairness in place of the law. Certainly, issues can come up where despite the ostensible relevance of an answer given by the accused, the existing rules of evidence can require a statement to be edited. But, there has to be a rule of law to enable relevant evidence to be excluded. That relevance here is the requirement that where evidence does not substantially advance any side's version of a fact in issue but causes

marked prejudice against the accused, that evidence should not be admitted. This is a balancing exercise since relevant evidence is always admissible unless there is a countervailing rule which requires the exclusion of that evidence. Hence, the prejudicial effect must overwhelm the limited probative value of the evidence. Where the evidence, though prejudicial, is highly probative to the prosecution case it must be admitted.”

29. While it will be necessary, throughout the course of this judgment, to review a number of decisions of the trial judge on admissibility when considering the various grounds of appeal that have been advanced, we are entirely satisfied that her general approach was the correct one. Therefore, we have no hesitation in dismissing this ground of appeal.

#### **Topic D: Evidence by and related to Mary Lowry**

30. It is evident, even from the limited summary of the background facts set out above, that Ms. Lowry was a central figure throughout the trial – indeed, one might say she was *the* central figure.

31. The defence repeatedly sought to exclude her evidence or, at least, to substantially restrict its scope. Objection was advanced on multiple grounds and at multiple levels. Some of the objections were procedural, and, for that reason, all-encompassing.

#### *Evidence not video-recorded*

32. For example, it was argued that the taking of the statements of evidence from Ms. Lowry should have been video recorded. That argument was advanced notwithstanding that in the case of a witness, as distinct from a suspect who has been detained, there is no requirement for video recording. There are occasions when investigating Gardaí will record the taking of a statement from a witness. An example that comes to mind is when there would be a concern that a witness is likely to retract their evidence, or to resile from the evidence

given, and, accordingly, the prosecution and the Gardaí might wish to have a video recording lest the question of an invocation of s. 16 of the Criminal Justice Act 2006 arises at a later stage. The appellant acknowledges that it is not the case that all witness statements are required to be video recorded, but he contends that different considerations apply:

- (i) when the witness is of central importance to a prosecution;
- (ii) where there has been significant delay (it is said that this is such a case because some of the matters dealt with at interview, such as the renting of the land by the appellant, go back a considerable period in time); or
- (iii) where there are other special features which will require specific close reliance being placed on the account of a witness that in such circumstances, the statement of the witness in question should be video recorded.

**33.** For our part, we can see no reason why the Gardaí could have been expected to depart from the normal practice and video record the taking of statements from Ms. Lowry. This challenge is therefore rejected.

*Limited nature of the evidence*

**34.** Multiple objections were advanced to the evidence that Ms. Lowry proposed to give, and apart from the objections of a broad nature, many of the topics which it was contemplated her evidence would address were also the subject of objections at trial. All of these objections are rehearsed before this Court and there are also challenges to a number of individual rulings of the trial judge. However, before addressing the objections and challenges in any detail, it is appropriate to identify the general position of the appellant.

**35.** The appellant's starting point is that Ms. Lowry has very limited, if any, direct evidence which she is in a position to give. It is pointed out that she did not witness an assault or an act of violence, nor has she evidence to offer in relation to threats to kill or anything of that nature. It is said that she is being introduced into what was a circumstantial evidence case

to bolster a prosecution theory, but it is said, pointedly, that the fact that the prosecution has a theory does not render her evidence admissible.

**36.** This Court feels that the attitude taken by the appellant is an unrealistic one. It does not address the central significance of Ms. Lowry to the investigation, and then to the trial. It is her evidence that provides context for the violent death of Mr. Ryan. Her evidence is essential in determining the motive for the crime. On that point, the appellant says that if it is motive that is an issue, that was something that was capable of being addressed by way of the “Dear Patricia” letter. However, with respect, it is not for the accused to determine how the prosecution will present its case, and the accused is not entitled to insist that the prosecution should present its case by way of a sanitised version of events.

**37.** In contending that the evidence of Ms. Lowry should be very significantly restricted, objections were advanced, in the main, in relation to seven overlapping headings, these being:

- (i) that the proposed evidence was irrelevant;
- (ii) that the evidence was more prejudicial than probative;
- (iii) that the evidence was inadmissible misconduct evidence;
- (iv) that the proposed evidence dealt with collateral issues not relevant to the charges before the jury;
- (v) that the proposed evidence formed inadmissible expressions of opinion on what were issues of fact for the jury, *i.e.* expert opinion being given by non-expert witnesses;
- (vi) that there was an absence of an evidential basis upon which the jury could draw inferences; and
- (vii) that there was missing evidence.

**38.** In addition, the appellant has identified a number of specific areas that he contends were addressed in the evidence in an unsatisfactory manner. These include misconduct

evidence; the question of depression; the financial affairs issue, with reference to bovine viral diarrhoea (“BVD”); the single farm payment; the sexual relationship; and the complaint to Tusla.

**39.** So far as misconduct evidence is concerned, it said that the judge’s approach did not sufficiently identify the dangers associated with the admission of such evidence, nor did it sufficiently take into account the risk that admitting such evidence creates for the accused person. It said that while the ruling refers to the relevant authorities, it does not adequately address the concerns in this specific case. It said that it also suffers from the general infirmity of the judge’s approach which was that evidence was presumed to be admissible.

**40.** So far as the reference to depression is concerned, it said that, effectively, what happened was that a layperson with an established *animus* against the accused was permitted to offer an opinion on the issue.

**41.** In relation to the financial affairs aspect, it said that the Court should not have admitted evidence in relation to any financial details and/or dealings between Ms. Lowry and the appellant because this was a matter that was never properly investigated. Bank accounts had not been accessed, relevant documents had not been seized, and appropriate documents had not been served on financial institutions so that a clear and unambiguous picture could be put before the jury. Instead, what happened was that the issue was addressed through Ms. Lowry, and she provided a partisan and subjective account of her financial dealings.

**42.** So far as Tusla is concerned, this is a reference to the fact that the prosecution sought to put before the jury the fact that the appellant had reported Ms. Lowry to the HSE/Tusla, alleging that her children were not being properly cared for. Indeed, it is said that this involved the jury being asked to embark on a consideration of what was always a collateral issue, but one that was very emotive and prejudicial. It said that the evidence was more prejudicial than probative. Moreover, it said that the evidence proposed to be adduced

amounted to evidence of misconduct. It is said that there was an unfairness in how the prosecution dealt with this, in that the evidence was called at a time after the defence had essentially disclosed their hand when dealing with the question of misconduct evidence in the course of the first substantial *voir dire*.

43. This Court is not persuaded that any of these issues, either when viewed in isolation, or when viewed cumulatively, give rise to concern.

44. In relation to misconduct evidence, we are not convinced that this was ever a proper categorisation. At this stage, the phrase “misconduct evidence” has become a term of art, and is usually used in the context of a trial for sexual offences where evidence is given in relation to matters veering outside the ambit of what is charged on the indictment. In this case, there was no question of evidence being led to suggest that the appellant was likely, by reason of his criminal conduct or his bad character, to have committed the very serious offence with which he was charged. The offence with which he was charged, the offence of murder, was of such seriousness that we cannot see how the individual acts – *i.e.* the reporting to Tusla; the trespassing on the porch; and the unauthorised recording, to name but some – could ever have prejudiced the appellant in the minds of the jury. That is not to say that they were not of probative value when viewed as part of the jigsaw that was being assembled, or the patchwork quilt that was emerging. They were potentially quite significant. Overall, we are of the view that the judge’s approach was careful and restrained.

45. So far as the question of depression is concerned, we do not see this as a point of substance. It is the case that Ms. Lowry referred to the appellant being very depressed at one stage in the course of her direct evidence, but it cannot be ignored that the appellant, in the course of a “Dear Patricia” letter, had described himself as being depressed and had admitted as much in his interview. Again, the limitations of what Ms. Lowry was saying have to be appreciated. She was not purporting to offer a clinical diagnosis of depression, but was

simply giving evidence of how someone well known to her presented to her. We see nothing objectionable in that regard.

46. In relation to the financial affairs issue, it seems to us that this was an area in which the prosecution had a legitimate interest. It was the prosecution case that the appellant was not only emotionally dependent upon Ms. Lowry at the time she entered into a new relationship, but that at that stage, he was also financially dependent upon her. What was involved were the financial interactions and transactions of two people, and the evidence of one as to what had occurred was *prima facie* admissible. Obviously, the account given by the witness did not have to be accepted and was open to challenge by way of cross-examination, or through the calling of other evidence.

47. Perhaps the unreality of the appellant's position is best exemplified by his views in relation to the evidence as to the existence of a sexual relationship between himself and Ms. Lowry. In the written submissions, it is baldly asserted that the material had no relevance whatsoever and was prejudicial as blackening the character of the accused. With respect, this submission is utterly lacking in reality. This trial was about an allegation that the appellant had murdered someone to whom he was deeply hostile because that individual had interfered with, and indeed, brought to an end his intimate relationship.

#### *Requests for specific rulings*

48. The appellant sought specific rulings from the trial judge on many aspects of the evidence. These included an allegation that the appellant had said he did not like Mr. Ryan and that "he smelled". The appellant says this was vague and more prejudicial than probative. In response, the Director says that this evidence was probative, in that it was evidence of an *animus* or a hostility on the part of the appellant towards Mr. Ryan. It involved the appellant making a false comment about Mr. Ryan – that "he smelled", when he did not – and its relevance and probative value was enhanced by the fact that the appellant sought, throughout



the investigation and the trial, to convey an impression that he bore no ill will towards the deceased.

49. Other examples raised included the “Dear Patricia” letter, admitted by the trial judge on the basis that it had been acknowledged by the appellant. Numerous such issues were raised and all were the subject of careful and conscientious rulings. Nonetheless, the adequacy of the reasons given by the trial judge for her rulings is criticised by the appellant, and it must be said that we find it surprising that such a criticism would be advanced. At trial, there was quite an extraordinary number of *voir dire*s. The trial judge dealt with each of these with care, and it must be said, considerable patience. If trials are to be kept within reasonable length, counsel need to consider carefully whether it is necessary to ask for a *voir dire* on an issue, and trial judges need to consider whether a request for a *voir dire* should be acceded to. Generally speaking, where what is in issue is a question of weight, or reliability, or credibility, this is a matter for the jury, and attempts to have a dry run in the absence of the jury is not a practice to be encouraged.

50. We therefore reject the challenge to the evidence of Ms. Lowry.

#### **Topic E: Evidence relating to Dr. Manlove**

51. This ground of appeal relates to a challenge by the defence to the admissibility of evidence which the prosecution sought to put before the jury from Dr. John Manlove, a forensic scientist and expert in forensic entomology. Forensic entomology involves the use and study of insects, and other arthropods or invertebrates, to assist in answering questions, particularly in relation to suspicious deaths. The issues that arise in relation to this ground of appeal are linked to the following ground, *i.e.* that relating to the evidence of Michael Reilly, engineer.

**52.** Dr. Manlove explained that he had examined a particular exhibit (titled “SL5”) at the Technical Bureau on 2<sup>nd</sup> May 2013. It was a single insect larva. He explained that the exhibit was 18mm in length and that he was satisfied that it was within the third instar larva stage, the first stage being after egg hatching and the third stage being full stage and full size. Dr. Manlove also examined the tank where the body of the late Mr. Ryan had been located and had access to crime scene photographs and post-mortem photographs. The photographs showed what appeared to be a number of large adult flies on the back of the body, as well as a number of blowfly larvae which appeared to be at the third instar stage within the chest cavity. It was not clear from the larvae photographs whether they were dead or alive.

**53.** Dr. Manlove concluded that the insect infestation that was observable on the body of Mr. Ryan had originated within a few weeks of the alleged discovery of the body on 30<sup>th</sup> April 2013. A conservative measure, based on an unrealistically warm temperature, of at least eleven days was given, although it was opined that it was quite possibly or almost certainly more. It was Dr. Manlove’s professional opinion that the first time the tank was opened was not on 30<sup>th</sup> April 2013, when the appellant stated that he had removed the lid, as access must have been provided for the flies weeks before that date. If the tank had been opened for periods of time allowing access to the body, Dr. Manlove would have expected to observe a number of different fly families which would normally infest decomposing bodies in a successional manner. If the entry point was still open, he would expect the flies to be able to exit as well.

**54.** There was objection to the evidence of Dr. Manlove on the basis that it was designed to offer support to what was described as a speculative prosecution theory that the appellant had physically interfered with the tank in the period prior to the appellant’s discovery – a staged discovery, on the prosecution theory – of the body of the deceased. It is said that the objection gains strength from the fact that the only hypothesis for which there was any

evidential basis whatsoever was one which was consistent with an explanation provided by the appellant in interview to the effect that there had been a leak in the milking parlour on or around 12<sup>th</sup> March 2013. The significance of this is that both sides were approaching the case on the basis that the body had, in all likelihood, been in the overflow tank between June 2011 and 30<sup>th</sup> April 2013. There was also agreement on two further aspects, namely: (i) that the tank could not have been open throughout that period as, if it had, there would have been a much greater level of insect activity than was observable; and (ii) that the tank could not have been completely sealed for the entire period because if it had, then no flies or maggots would have been found there at all.

**55.** The defence says that this was yet another example of an instance where the trial judge fell into error because of her view that relevant evidence was presumptively admissible. The prosecution contends that the proposed evidence was both probative and admissible for a number of reasons. First, it was circumstantial evidence which supported the prosecution contention that the tank, which had been sealed and not used for a number of years, had been opened on at least one occasion in the weeks before the discovery of the body. Second, it is said that the evidence was relevant and probative when taken in conjunction with the evidence of Michael Reilly (engineer) to the effect that the tank was sealed in part by mud deposits and animal droppings. Third, it is said that the evidence was highly consistent with the prosecution contention that the then accused was becoming concerned about the fact that he was losing control of the land where he had placed the body and that this resulted in him beginning to investigate, through internet searches, the issue of the decomposition of bodies. The prosecution contends that the fact that the evidence of Dr. Manlove lent support to a conclusion that the tank must have been opened some weeks prior to the “discovery” of the body was highly relevant and it was a matter that was properly put before the jury for consideration.

56. This Court is in no doubt that the trial judge was correct in concluding that this was a piece of evidence that was properly to be put before the jury. This was circumstantial evidence required to be considered in conjunction with the other evidence in the case. It was open to the jury to attach significance to the fact that there was strong evidence to suggest that the tank had been opened for a period given the interest that someone, or the appellant, as suggested by the prosecution, had in decomposing bodies. We therefore reject this ground of appeal.

**Topic F: Issues arising out of the evidence of Michael Reilly**

57. Michael Reilly was an engineer based in Mullinahone, Thurles, County Tipperary. He was asked by the prosecution to carry out various inspections, to report, and ultimately, to give evidence. He was not experienced in giving evidence in the context of criminal trials; in fact, this was his first involvement in a criminal trial. This gave rise to some issues between him and the legal team for the defence in relation to disclosure, and, in particular, whether drafts of a final report should have been disclosed.

58. In the context of the current controversy, the aspect of Mr. Reilly's evidence of significance is when he dealt with the capacity of the tank, where the body was located, to become a sealed tank. Mr. Reilly gave evidence that if the concrete covers were just placed on their own, they would not seal. He said that they needed some material around them, such as soil or animal droppings, to seal the tank fully. When he concluded his evidence, he was subject to a lengthy and, it must be said, robust cross-examination. However, the cross-examination focused largely on the witness's understanding of the obligations in relation to disclosure and the extent to which his report had evolved and how it had come to evolve. He was not challenged on what was, for present purposes, his central conclusion that once the covers of the tank were properly placed in position, and once soil and animal droppings were

placed on top of and around the tank covers, that the soil and animal droppings provided a perfect seal to the tank. On a number of occasions, when asked about the evolution of the report, he referred to his notes. At one stage, he was asked a question by counsel on behalf of the defence as follows:

“Q. So you're saying that you sent the report to Superintendent Hayes, and then you thought about it some more and of your own accord you went and changed the language and then sent it on?

A. That is correct, yes.

Q. It was an entirely self-directed change; is that right?

A. Yes.

Q. 100 percent?

A. 100 percent, *and if you look at my initial notes those were the questions that I was asked, it was if the soil -- it was would soil and that seal the tank, that was the question.*” (emphasis added)

At another point, the witness had said:

“A. It [an earlier draft of the report] wasn't clear enough, I mean you've already highlighted points on it that -- trying to take another meaning out of it. I mean what I was asked to determine was if the tank as it was discovered on the day with soil and that around it was capable of being sealed by the soil, that was -- that was one of the key questions.

Q. Yes. But that question isn't in the original report at all, isn't it?

A. Well, the question mightn't be in it, but that was what I was asked and it is in my handwritten notes.”

**59.** Following the conclusion of the cross-examination, counsel on behalf of the prosecution began a re-examination. Having dealt first with the question of the presence or

absence of a grate in the milking parlour in 2014 (which itself became the subject of some controversy), counsel on behalf of the prosecution then observed:

“Q. [...] I think that you referenced your notes; is that correct, do you have the notes, your own handwritten notes there with you?”

**60.** At that stage, counsel for the defence indicated that there was an issue arising and the jury was sent away. Counsel for the defence objected to the reference to the notes in re-examination and submitted that what was proposed would offend against the rule against narrative. Counsel on behalf of the prosecution says that the manner and tone of questioning was such as to seek to cast doubts on the independence of the witness. He says that the notes were referenced during the course of cross-examination on a number of occasions, and that in the circumstances, it was proper and appropriate to re-examine by reference to the notes.

**61.** The notes in question had been disclosed to the defence. The witness would have been aware of this. When he was questioned as to whether the changes in language were his own, it was quite understandable that he would seek to refer to notes, which, he would contend, put the correctness of his position beyond doubt. In the course of cross-examination, counsel for the then accused left the notes alone, and understandably so, but it seems to us that it was equally understandable that after there had been reference to the notes, that prosecution counsel would seek to reference them. We do not see anything wrong in that occurring and we do not think that the trial judge was in error in permitting prosecution counsel to pursue the issue.

**62.** The appellant says that even if he is incorrect in his view that it was not permissible for the notes to be referred to in re-examination, fair procedures required that he be permitted to address the issue through re-cross-examination. It seems to this Court that a trial judge must be afforded a considerable margin of appreciation in determining how to control the proceedings. The trial was a very lengthy one, far exceeding the estimates that had been

provided, and very considerable latitude was extended at all stages to the defence. Re-cross-examinations were not unusual. In this case, a line in cross-examination had been pursued which was always likely to see references to the notes and handwritten notes being introduced; certainly, that was always a possibility. Once that happened, counsel had a choice to make; he could move the cross-examination on and address the contents of the notes, or he could leave the notes aside. However, if the decision was taken to leave the notes aside, he had no entitlement to return to the issue once the notes were raised in re-examination. We are of the view that the judge was entitled to rule on this matter as she did. This ground of appeal is therefore dismissed.

### **Topic G: Issues arising from the evidence of Stephen O’Sullivan**

63. This issue emerged in the following context. Members of An Garda Síochána asked Stephen O’Sullivan, a local plumber, to examine the milking parlour at Fawnagowan with a view to probing the account of the leak in March 2013 that had been offered by the appellant in interview. Mr. O’Sullivan attended Fawnagowan on 22<sup>nd</sup> May 2013 and disconnected the pipes in the farmyard in order to determine where the water would go in the event of pipes disconnecting, or a leak occurring. He stated that the water ran into the old milking parlour and from there to the disused tank, where the body of the late Mr. Ryan was located.

64. In the course of his evidence, Mr. O’Sullivan told the jury that at the conclusion of the tests that he carried out, he told the Garda who had accompanied him that the appellant had “told the truth”. At a much later stage in the trial, the Garda who had accompanied him and had been present for the tests, Garda O’Keeffe, made a statement, was called by the prosecution, and gave evidence to the contrary. He said that he had not told Mr. O’Sullivan what the appellant had said in interview, and that Mr. O’Sullivan had not told him that the appellant had “told the truth”.

65. The defence categorise this exercise as the prosecution calling evidence to impeach their own witness.

66. Undoubtedly, what occurred was somewhat unusual, but if the prosecution had evidence available to it – in this instance, from Garda O’Keeffe – to the effect that evidence which had been presented before the jury was incorrect, then it seems to us that, unusual or not, there was nothing improper in the prosecution adducing this evidence. It has been suggested that an alternative approach would have been to seek to have Mr. O’Sullivan declared a hostile witness, but it does not seem to us that the basis existed for an application to treat Mr. O’Sullivan as hostile. It would have been a major stretch indeed to suggest that there was any basis for taking the view that this was a witness who was not desirous of telling the truth to the Court at the instance of the party calling him.

67. In relation to the discussion on hostile witnesses, in McGrath on *Evidence*, 2<sup>nd</sup> Ed., (Roundhall, 2014) at paragraph 3-77, it is stated:

“... if a witness called by a party turns out to be unfavourable, in that he or she fails to give the evidence expected or gives evidence that assists the opposing party, the only avenue open to the party is to call another witness to give evidence of the matters in respect of which the unfavourable witness has failed to come up to proof.”

68. It seems to us that that is, in effect, what happened in this case. This ground of appeal is therefore rejected.

#### **Topic H: Garda observations and related materials**

69. Two sub-issues feature under this heading: one relating to an interaction between the appellant and Gardaí on an occasion when the tanks at Fawnagowan were searched as part of a missing person investigation; and the other relating to observations by members of An



Garda Síochána about the appearance of the appellant and the state of his clothing on the day when the body of the late Mr. Ryan was “discovered”.

*The search of the tanks at Fawnagowan*

70. The issue relating to the search of tanks on the farm at Fawnagowan saw Garda Conor Ryan called to give evidence on 12<sup>th</sup> February 2019. At that stage, the defence indicated that there was an issue that they wanted to raise in the absence of the jury. Garda Ryan was tasked by his Superintendent with going to the farmyard at Fawnagowan and emptying the tanks there. We now know that there were three tanks on the farm.

71. In the course of the search for a missing person, two of these tanks were emptied; one of which is an open slurry tank, and the other is a unit beneath a slatted shed. The third tank, the one in which the remains of the late Mr. Ryan were located in April 2013, was not searched, and the existence of that tank was not known to Gardaí at the time of the missing person investigation.

72. Arrangements had been made for the appellant to assist in emptying the tanks, and he had a tractor and vacuum tanker available to him for that purpose. It was the intention of the prosecution that Garda Ryan would give evidence that after two tanks had been emptied, he had a conversation with the appellant and asked him whether they were the only two tanks on the farm. The appellant replied that they were. Objection was taken to the admissibility of the proposed evidence on the basis that no note of the conversation was recorded at the time.

This Court is not at all convinced that this was an appropriate issue for a *voir dire*. The witness claimed to have a clear and specific recollection of a conversation. He explained that it was not every day that, as part of his job, he was asked to go out and empty tanks, and for that reason, he would recollect a conversation. It seems to the members of this Court that in those circumstances, the proper course of action would have been for the prosecution to call

Garda Ryan, for him to give his evidence and to then be cross-examined on it. We do not see that there was any scope for a *voir dire*. Be that as it may, a *voir dire* did, in fact, proceed.

73. During the course of the *voir dire*, a controversy developed as the prosecution sought to put in evidence what had transpired during the course of an interview conducted with the accused on 20<sup>th</sup> June 2014. On that occasion, a number of questions were put to him in relation to the visit by Gardaí to empty the tanks, and he answered a number of questions, but as further questions were put, he indicated that he did not wish to comment. This caused the defence to intervene and to protest that what was happening was an infringement of his right to silence. The prosecution contended that it was admissible in circumstances where a *voir dire* was taking place about the reliability of the evidence of Garda Ryan and his recollection of the contents of a conversation that he had with the appellant.

74. While we are of the view that the prosecution approach was somewhat unorthodox, we do appreciate that at this stage, the prosecution's interest was not in the replies or non-replies of the then accused, but in the fact that there was an opportunity given, but not taken, to dispute the accuracy of Garda Ryan's account.

75. We are not prepared to uphold the ground of appeal to the extent that it relates to the evidence of Garda Conor Ryan. While it would have been preferable had the "no comment" section of the interview not been introduced into the *voir dire*, we do not believe that a reference to the questions asked, and that in respect of some, there was a no comment response, was determinative of how this issue was to be resolved. Quite simply, we cannot see any basis on which the evidence of Garda Ryan could ever have been excluded. The defence did make headway in their cross-examination of Garda Ryan in the absence of the jury as he accepted that he might have asked his questions in terms of slurry tanks (as distinct from tanks). This meant that the defence could address the jury to outline that it should approach matters on the basis that the appellant may well have answered accurately the

precise question that he was asked. However, even with that ground made, the issue would have remained of interest to the prosecution, in that it would have shown that when asked questions about a further slurry tank (or tanks – whatever the precise terms of the question), the appellant did not bring to the attention of Gardaí the fact that there was a third tank present on the property.

76. We are also of the view that the criticism of the absence of contemporaneous notes of the conversation is quite unrealistic. At the time, the conversation did not appear to be of any great consequence, though the circumstances in which it was taking place were unusual because, as Garda Ryan later commented, it was not every day that he was asked to empty tanks. However, had there not been a discovery later in a third tank, nobody would have thought twice about the conversation that occurred after two tanks were emptied. We are also of the view that attempts to construct a *PO'C*-type argument based on the absence of a contemporaneous record seem far-fetched in the extreme.

77. The defence also objected to a section of Garda Ryan's evidence which dealt with the day on which the body was discovered. In his statement of evidence, he had said:

“I noticed that there was a tractor and vacuum tanker also located near the tank. I walked around the tractor and vacuum tanker and noticed that the handle of the pump of the vacuum tanker was placed in neutral position which indicated that the tanker was not used for suction at the time.”

78. This was confirmed in the course of a later statement. Garda Ryan indicated that there was no visible sign of slurry having been removed from the tank, his statement of evidence saying:

“The pipe for the suction of water or slurry was in the tank where the body was located but there was no visible sign that anything had been sucked out of the tank as there was no fresh marks down the inside wall of the tank which would indicate

clearly if slurry had been removed from the tank. I also noticed that there was very little slurry in the tank where the body was located. I was then asked to move the tractor and vacuum tanker in order to gain entry to remove the body. I moved the tractor and tanker and I then emptied the contents of what was in the vacuum tanker. I was accompanied by Garda Canty at this time. I emptied the contents of the vacuum tanker which contained a small quantity of soiled water.”

**79.** The trial judge ruled that Garda Ryan could give evidence recounting his observations that the vacuum tanker was in a neutral position; that the pipe was in the tank; that no fresh marks were visible inside the tank; that there was very little slurry in the tank; and that he emptied the contents and that a small quantity of soiled water came out (the trial judge ruled that he could give his own estimate of volume in this regard). He could give evidence of his observations as to the heavily-crusting slurry, but could not offer any further opinions.

**80.** In that regard, it is submitted that the trial judge’s ruling permitted Garda Ryan to give evidence which trespassed upon areas of expertise. It said that this was particularly objectionable in circumstances where there had been, as it was contended was the case, an investigative failure to preserve the evidence from the tank. The trial judge’s ruling meant that Garda Ryan could give evidence as to his own actions – moving the tractor and tanker and so on – and evidence of his own observations as to what he saw and did not see, *i.e.* that he saw that the pipe was in the tank, but that there were no fresh marks visible on the inside wall of the tank.

**81.** This Court cannot see any straying into the area of expert evidence here; the testimony related to the actions and observations of the witness. Accordingly, we see nothing objectionable in what occurred in this regard.

*The clean appearance of the appellant on 30<sup>th</sup> April 2013*

**82.** Two members of An Garda Síochána, Sergeant Powell and Detective Garda Buckley, had referred in their statements to the cleanliness of the appellant on the day of the discovery of the body of the late Mr. Ryan. Sergeant Powell had stated, “[w]hilst in the presence of Mr. Quirke I noted that his clothes and hands were clean”. In his statement, Garda Buckley had observed, “[w]hile speaking to Pat Quirke, I observed that his clothing and his person were clean and there was no sign of dirt on his hands, person or clothes”.

**83.** The defence drew attention to the fact that there were no contemporaneous notes in existence documenting that observation. Moreover, the statements dealing with this issue were made long after the event. Detective Garda Buckley conducted a voluntary interview under caution with the appellant on 30<sup>th</sup> April 2013, during which he put to him, “[y]ou’re fairly clean for a man that is spreading slurry”, to which the appellant was recorded as replying, “I was only getting into the dirty part of it, mixing it with water and that”. The defence contended that the interview was couched in relative or qualified terms, *i.e.* that it was put to the appellant that he was “fairly” clean, but that when Detective Garda Buckley came to prepare a statement some eighteen months later, this had been upgraded to, “while speaking to Pat Quirke, I observed that his clothing and his person were clean and there was no sign of dirt on his hands, person or clothes”. The defence objected on grounds of fairness and submitted that they were placed in a situation where any challenge was effectively impossible. The point was made that the appellant’s clothing could have been taken as evidence, or photographs could have been taken of his clothing and his hands.

**84.** The trial judge ruled that the evidence was admissible, and this Court is of the view that it would have been very surprising indeed if she had done otherwise. The evidence related to straightforward observations. Moreover, it does not seem to have been particularly contentious since, as we understand it, the appellant’s position was that he had not moved on to the messy or dirty phase of the task. This is yet another example of a situation where the

holding of a *voir dire* was neither necessary nor appropriate. Accordingly, we reject this ground of appeal.

**Topic I: Search warrants**

**85.** On 13<sup>th</sup> May 2013, the District Court Judge issued a warrant authorising the search of the appellant’s premises at Breanshamore, Co. Tipperary. The appellant was invited in for voluntary questioning on 16<sup>th</sup> May 2013, and the warrant was executed on 17<sup>th</sup> May 2013. During the search several items were seized including, *inter alia*, computers on the premises which were forwarded onto Garda Fitzpatrick, who on analysis found Google searches and emails.

**86.** During the trial, counsel for the accused took issue with the search warrant for several reasons, including:

- 1) that the warrant was bad or inadequate on its face (that there was insufficient evidence to satisfy the Court as to the adequacy of the information);
- 2) that the information given to the District Court Judge was too limited and deprived the District Court judge of making a proper determination thus depriving her of exercise of her independent jurisdiction;
- 3) that there was a very specific failure to inform the District Court judge of the intention of the Gardaí to seek out and seize computers;
- 4) that there was a failure to establish a reasonable belief about computers;
- 5) that the application for a warrant amounted to using the District Court as a rubber stamp and should be determined unlawful; and
- 6) that the warrant was executed and material retained in a manner which was unconstitutional, disproportionate and in breach of the European Convention on Human Rights (hereinafter “ECHR”).

**87.** The text of the warrant is set out hereunder:

“District Court area of Tipperary, district No. 8. The evidence of Sergeant John M Keane of Tipperary Garda Síochána Station, who says on oath. Whereas as 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 Station, 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 relevance is 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 Breanshamore, Tipperary, Country 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 related to the commission of the offence as aforesaid. Dated the 13th of May 2013.”

**88.** During the course of the *voir dire*, the trial court heard evidence from Superintendent Patrick O’Callaghan, Sergeant John Keane (who applied for the search warrant), Garda John Walshe (who took part in the search of the appellant’s house) and Garda Kieran Keane (the exhibits officer).

**89.** In an almost twenty-page ruling, the trial judge concluded that the warrant was valid as follows:

“This Court has very carefully considered the evidence put before it in respect of the issue to include the written information and search warrant, the oral evidence of the witnesses, the provisions of the relevant legislation and the case law and is satisfied, as a matter of law, that the search warrant is not bad or inadequate on its face for any of the reasons put forward by the defence. This Court is satisfied from the evidence put before it that the information is adequate to allow the District Judge to properly determine whether she should grant a search warrant, pursuant to the provisions of section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006, in respect of the offence of the murder of Bobby Ryan and rejects the defence assertion that it was limited or incorrect, such that it deprived her of making a proper determination, thus depriving her of the exercise of her independent jurisdiction.

The provisions of the legislation clearly sets out that the District Judge must be satisfied by information on oath by a member not below the rank of Sergeant, that there are reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence is to be found in a place and, if issued, allows a named member to search the place and to seize anything found as a result of those searches, that the member believes to be evidence of or relating to the commission of that offence. The Court is satisfied, as a matter of law, that there is no requirement that the information must contain a definitive list of all of the evidence to be seized or all of the locations at that place that evidence relevant to the offence may be found, as clearly that would not be possible and there is no requirement to specifically inform the District Judge of the intention of [G]ardaí to seek out or seize computers.



It is clear from the evidence that the potential relevance of computers was in contemplation by the investigation team but there is no evidence to suggest that there was any deliberate withholding of the intention to search computers from the District Judge or that the focus of the search was to gain entry for the retrieval of electronic devices and nothing more. Neither is there any evidence that the investigation team delayed the execution of the warrant as a deliberate tactic. The Court is satisfied that the application did not amount to using the District Court as a rubber stamp, that the search warrant is lawful and was validly executed in accordance with its terms and that the evidence obtained in the course thereof is properly admissible evidence.”

**90.** The submissions of the appellant in this regard may be divided into the following categories: (1) the lawfulness of the search warrant; (2) the lawfulness of the execution of the warrant; and (3) the lawfulness of the seizure of the materials from within Mr. Quirke's home.

**91.** The first issue relating to the lawfulness of the search warrant is that the warrant was bad on its face. In this regard, the appellant refers to *CRH Plc, Irish Cement Ltd v. Competition and Consumer Protection Commission* [2018] 1 IR 521 where MacMenamin J. considered the nature of a warrant:

“A search warrant is a document which permits the legal incursion into the property, privacy or personal rights of a citizen, or business entity, as defined by law. This warrant did not convey any information about the nature, timing, and location of the offences alleged or suspected. It did not identify any person as being involved in such activities, or disclose any basis for a reasonable suspicion that a criminal offence had been committed. The warrant simply stated, on its face, that there were reasonable grounds for believing that there was information necessary for the CCPC officials to exercise “functions” and “all or any of their powers” as conferred on them under the

2014 Act. These were not simply technical deficiencies, but went to the core of the jurisdiction involved. The purpose of such a warrant is to require a person, who is the subject matter of the search, to do something they would not otherwise be obliged to do. But, the recipient is entitled to know what the warrant actually entails. A reader of this warrant would be unable to know what actual limitations were placed on the scope of the warrant. It was, in that sense, free of any limits, or any identification as to what might be searched for, or which employees' data or material might be searched. The ICL's lawyers were placed at a significant disadvantage as a result.”

**92.** Counsel for the appellant further refers to the dicta of Carney J. in *The People (DPP) v. Henry Dunne* [1994] 2 IR 537:

“The constitutional protection given in Article 40, s. 5 of the Constitution in relation to the inviolability of the dwellinghouse is one of the most important, clear and unqualified protections given by the Constitution to the citizen. If it is to be set aside by a printed form issued by a non-judicial personage it would appear to me to be essential that that form should be in clear, complete, accurate and unambiguous terms. It does not seem to me to be acceptable that the prosecuting authority can place reliance on words crossed out by asserting that that was an inadvertence or a slip. Such an approach would facilitate the warrant becoming an empty formula. Reading this warrant many times I cannot make sense of it in terms of the English language without placing reliance on words which have been crossed out. Accordingly, I cannot find it to be an effective authority to breach the constitutional inviolability of the defendant's dwellinghouse.”

**93.** The second issue relating to the warrant is that the appellant contends that the information given to the District Court judge was too limited and deprived the judge of making a proper determination thus depriving her of jurisdiction. The appellant submits that

the judge ought to have been informed of the history of arrests and interviews, that the appellant was going to be requested to attend the station voluntarily before the execution of the warrant and that there was an intention to delay the execution of the warrant. In particular, the appellant takes issue with the lack of transparency relating to the intention to seize computers. Computers were not explicitly listed on the warrant and they were never mentioned to the District Court judge. During the *voir dire*, Superintendent O'Callaghan stated in cross-examination that his belief for seizing the computers was as follows:

“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 3<sup>rd</sup> of June 2011, that he may have been collecting the data on those computers.”

**94.** The appellant submits that this basis for belief was something established *ex post facto*, after the computers were examined, and it was certainly never shared with the District Court judge. As such, the appellant joins issue with the assertion of the trial judge that there is no evidence to suggest a deliberate withholding of the intention to search computers from the District Court judge.

**95.** The appellant refers to *Byrne v. Grey* [1988] IR 31, where Hamilton P., in considering search warrants, stated as follows:

“These powers encroach on the liberty of the citizen and the inviolability of his dwelling as guaranteed by the Constitution and the Courts should construe a statute which authorises such encroachment so that it encroaches on such rights no more than the statute allows, expressly or by necessary implication.”

Hamilton P. went on to quote from the judgment of Lord Salmon in *IRC v. Rossminster Ltd.*

[1980] AC 952:

“In my view, it provides only one real safeguard against an abuse of power. That safeguard is not that the Inland Revenue is satisfied that there is reasonable ground for suspecting that an offence involving fraud in relation to tax has been committed but that the Judge who issues the search warrant is so satisfied after he has been told on oath by the Inland Revenue full details of the facts which it has discovered. That is why I am inclined to the view that it is implicit in Section 20(c) that a search warrant signed by the Judge should state that he is so satisfied, that is, that the warrant should always give the reason for its issue.”

**96.** The third issue argued by the appellant is that the warrant was executed and material retained in a manner which was unconstitutional, disproportionate, and in breach of the ECHR. It is submitted that a warrant must be in conformity with constitutional principles and any invasion of constitutional rights must be proportionate and subject to judicial scrutiny.

**97.** The appellant refers to the judgment of Charleton J. in *CRH Plc, Irish Cement Ltd v. Competition and Consumer Protection Commission* [2018] 1 IR 521 wherein he stated:

“Central to the protections afforded to an undertaking or individual searched pursuant to warrant is that there should be judicial authorisation for such an intrusion and that the information grounding the search be sufficiently precise as to the target of the enquiry; Case T-135/09 Nexans France SAS v Commission, judgment of 14 November 2012. As the General Court observed at para. 39:

‘The obligation of the Commission to specify the subject-matter and purpose of the inspection is a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is

justified, enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence.”

**98.** The respondent, relying on the judgment of O’Donnell J. in *The People (DPP) v. Mallon* [2011] 2 IR 544, submits that a mere error on the face of the warrant is not sufficient to invalidate it. It is submitted that the trial judge made a finding of fact that there was no evidence to suggest that there was any deliberate withholding of the intention to search computers from the District Judge. It is not for the appellant to join issue with the trial judge in respect of a finding of fact by her.

**99.** In respect of a warrant, the issue for a trial judge is whether the warrant was lawfully issued. The respondent refers to *Blanchfield v. Hartnett* [2002] IESC 41 which makes clear that the purpose of a review by a trial judge is merely to determine the legality of such measures. The respondent further relies on *The People (DPP) v. Power* [2020] IESC 13 and accepts that it is a case concerned with an extension of detention, but it is submitted that the case is instructive because the issue raised therein was whether further evidence ought to have been put before the judge but the Court held that the issue is whether the order was lawfully made.

#### *The voir dire*

**100.** During the course of the *voir dire*, Superintendent O’Callaghan gave evidence that he met with Sergeant Keane to discuss the grounds for the search warrant on 12<sup>th</sup> May 2013. Superintendent O’Callaghan was satisfied with the information provided and no amendments were made. He was aware that the appellant had attended Tipperary Town Garda Station on a voluntary basis on 16<sup>th</sup> May 2013 from which a memorandum of interview emerged. On the morning of 17<sup>th</sup> May 2013, Superintendent O’Callaghan met with Sergeant Keane to assess the notes he had prepared with which to brief the search team:

“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 3<sup>rd</sup> 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.”

**101.** When asked in cross-examination about his reference to computers and his belief that the appellant may have visited sites on the internet in relation to the decomposition of bodies and/or murder, Superintendent O’Callaghan accepted that there was no basis for this belief and that it was simply part of his thought process.

**102.** Sergeant Keane was responsible for preparing the warrant. He gave evidence that he applied to the District Court on 13<sup>th</sup> May for the warrant. When asked about the application before the District Court Judge, Sergeant Keane answered as follows:

“Q. And just in terms of any other questions or queries that were raised, can you recollect anything else that was discussed?

A. Well, I know that we had a discussion with regard to the application and the judge would have asked me a number of questions. I can't remember the specific questions but I know -- I note here on the search warrant the judge got me to write in: ‘The dwelling house, outhouses and lands of Mr Quirke’ and she initialled that correction, I suppose, on the warrant, in the body of the warrant.”

**103.** Sergeant Keane was asked in cross-examination whether there was a deliberate decision not to inform the judge about certain information, specifically the appellant’s history with the Gardaí, including previous arrests and the fact that he had been interviewed on a voluntary basis. This information did not appear in the sworn information before the judge:

“Q. None of that detail about his previous history with the guards, the fact that he had been interviewed on these number of occasions, that he'd been arrested on a number of occasions, none of that detail appears on the face of the information. Why not?

A. He was arrested for burglary.

Q. Yes?

A. I was making an application in relation to evidence for a murder.

Q. The prosecution say that the burglary is relevant to the murder?

A. As to his state of mind.

Q. Yes?

A. Yes.

Q. So therefore it was something that was relevant but you didn't inform the District Judge; is that correct?

A. It's not contained in the information, Judge.

...

Q. Did you inform the District Judge that you intended to voluntarily interview Mr Quirke before you executed the warrant?

A. Did I inform the judge?

Q. That you intended to voluntarily interview Mr Quirke before you executed the warrant?

A. I don't know if I was aware that we had planned to -- you know, the interview on the 6<sup>th</sup> would have been a phone call to Patrick Quirke.”

**104.** Sergeant Keane was also questioned on the failure to specifically include computer evidence in the warrant:

“A. I can't -- you know, look, when I -- when I do out a warrant, you know -- I should have probably had computers and phone evidence because, you know, when you're applying for warrants for most searches you'd look for computers and phone evidence, you know what I mean? But I have at the end of it: ‘And any other relevant evidence.’

Q. But in terms of your state of mind, on the 13<sup>th</sup> of May as you were sitting making your application to Judge McGrath, are you saying that you had a state of mind that you did wish to take computers?

A. Possibly, yes, but, I mean, I don't -- I can't recall what my state of mind is was six years ago, to be fair.

Q. Well, did you -- presumably, because it's not there, you didn't discuss computers then with the District Judge?

A. The judge would have read the information and we would have had a talk about the information and about the case.



Q. What was your suspicion in relation to computers? Did you have a specific suspicion in relation to computers in this case?

A. Had I a specific?

Q. Yes?

A. Computers can contain evidence of all sorts in relation to what people look up or what people access.

Q. Yes, but that's what I'm asking you. Did you have a specific belief in relation to the computers in this case, or did you -- did you discuss that with somebody else afterwards?

A. I would have discussed the whole application of the warrant with Superintendent Patrick O'Callaghan, and I know -- I can recall that we did discuss the entire information and computers and phone evidence as well.

Q. Prior to you going to the District Court?

A. Possibly, yes, yes.

Q. And what was the belief about computers?

A. I can't recall the specific conversation now, to be fair. It was -- as I said, it was six years ago.

Q. But you didn't have any specific belief about computers in this case, correct?

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 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 it 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."

105. Sergeant Keane was further questioned on the decision to invite the appellant in for voluntary questioning on 16<sup>th</sup> May 2013 after the search warrant had been granted:

“Q. Absolutely. He wasn't arrested, but you asked him to come in without telling him that you had a search warrant for his home, correct? You sat through five hours of interview with him?

A. Correct, Judge. It wouldn't make sense for us to tell him that we had a warrant for his home.

Q. Yes, which is why I'm suggesting that you took a tactical decision?

A. Absolutely not.

Q. And that you finished when you were sitting with him through the hours of 8, 9, 10, 11, 12, 1 am into the 17<sup>th</sup>?

A. Yes.

Q. [D]id you know that you were going to be at his front door some few hours later with a warrant in your hand?

A. Yes.

Q. You did?

A. Yes.

Q. But you didn't tell Mr Quirke that, who was a volunteer at your garda station, correct?

A. Again, it wouldn't make sense to tell him.

Q. And so prior to Mr Quirke coming in on the 16<sup>th</sup>, it had been arranged that the warrant would be executed on the 17<sup>th</sup>, correct?

...

A. It was decided, yes, but

Q. Prior to him coming in, you had -- the gardai had decided to do that; correct?

A. I believe so, yes, yes.

Q. When had it been decided that the warrant would be executed on the 17th?

A. Well, I couldn't say for sure.

Q. Whose decision was it to execute the warrant on the 17th?

A. That would have been, you know -- like, there's a senior investigation team, so that would be a decision

Q. Not your decision, in other words?

A. No. But I would have been, you know, part of the decision-making as well, like.”

### *The search*

**106.** Garda John Walshe gave evidence of being part of the search team on 17<sup>th</sup> May 2013.

He outlined the briefing he received that morning:

“Q. Okay, and did anything happen in Tipperary Town Garda Station in advance of going out to the house?

A. Judge, that morning we were briefed by Superintendent Patrick O'Callaghan and Detective Sergeant John Keane in relation to searches to be carried out at the aforementioned property, Judge.

Q. Okay, and in terms of the briefing, was there anything of specific interest indicated or --?

A. Judge, we were told to search for any items relating to Mr Ryan, clothing, jewellery, car keys, Judge. Mobile phones, electronics, computers, Judge, computer hard drives.”

**107.** During the course of the search, Garda Walshe seized handwritten notes, documents, a computer monitor, a computer hard drive, an external hard drive, a photocopier, and two

memory sticks. These items were handed over to Detective Garda Kieran Keane who was the exhibits officer and subsequently analysed.

*Discussion of the issues*

**108.** The argument is advanced that the warrant was bad on its face, lacking explicit reference to the District Court judge being satisfied of the existence of reasonable grounds for suspecting that evidence was on the appellant's premises, and that the warrant is capable of the interpretation that it was in fact Sergeant Keane who was so satisfied. Furthermore, it is said that the warrant failed to specify the arrestable offence under investigation or any detail in relation to it and made no mention of the search for computers. Finally, it is contended that the warrant was executed and material retained in a manner which was unconstitutional, disproportionate, and in breach of the ECHR. Consequently, it is said that the warrant was invalid, as was the seizure of any items thereunder.

**109.** Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 was amended by the substitution of s. 6 of the Criminal Justice Act 2006 and the relevant portion for the purposes of this appeal 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.”

**110.** Section 2(1) of the Criminal Law Act 1997, defines an arrestable offence as:

“...an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.”

**111.** The offence of murder is an arrestable offence; there is no absolute requirement that the warrant specify the particular offence. The statute is clear, once the issuing authority is satisfied that there are reasonable grounds for suspecting that there is evidence of or relating to the commission of an “arrestable offence” to be found in a particular place, the criteria are met and it is not necessary (although it is undoubtedly preferable) to specify the particular arrestable offence. Obviously, if the offence were not an arrestable offence within the meaning of the 1997 Act, the warrant would be invalid. That is not the situation which presented itself in the instant case. In *The People (DPP) v. Martin Morgan* [2015] IECA 50, Edwards J. stated at paragraph 51 onwards:

“The Court accepts the submission of the respondent to the effect that a failure to state expressly, on the face of a warrant issued under s. 10 of the Act of 1997, as substituted, that it relates to evidence of or relating to an arrestable offence is not something that goes to the jurisdiction to issue the warrant, such that the absence of that information will automatically render it invalid.

However, as the *Mallon* case makes clear, the mere fact that the deficiency complained of in this case does not go the jurisdiction, and is therefore to be regarded as non-substantive, does not *per se* justify a conclusion that the deficiency did not invalidate the warrant. Accordingly, the finding that the deficiency did not go to jurisdiction is not necessarily dispositive of the appellant’s complaint.

The Court accepts that it ought to be clear from the warrant that the suspected offence is an arrestable one, so that the person(s) to whom it is relevant, and whose constitutional rights it may have the effect of abrogating, may know the basis on which it has been issued. It is certainly desirable that the warrant should expressly refer to an arrestable offence, and indeed that the specific offence in question should be identified. However, the Court is also satisfied on the jurisprudence opened to it

that if the arrestable nature, and/or the specifics, of the offence can be inferred from the information of the warrant that will suffice, although for persons whose constitutional right may be affected to have to rely on inferences is a sub-optimal situation.”

**112.** In the present case, the sworn information refers to the weapon used to murder the late Mr. Ryan, as does the warrant. Additionally, Sergeant Keane gave evidence before the trial court that he explained to the District Court judge that the Gardaí were investigating the murder of Mr. Ryan. It can readily be inferred that the arrestable offence was one of murder.

*Alleged errors*

**113.** Entrance onto a person’s private dwelling must be in accordance with law, which, in the present case, requires compliance with the terms of the statute. A warrant may only be issued if the judge is satisfied that there are reasonable grounds for the necessary suspicion. There must be evidence, whether by way of the sworn information and/or oral evidence, that the belief held by the person applying for the warrant is based on reasonable grounds.

**114.** Insofar as it is said that there were errors on the face of the warrant, we have scrutinised the document, and we are not persuaded that the warrant is unclear concerning the necessary satisfaction, on the part of the judge, of the presence of the necessary reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence was to be found at Breanshamore, Co. Tipperary. The sworn information was very detailed and set out the background, the relevance of the appellant’s property to the investigation, and the basis upon which Sergeant Keane held the requisite suspicion. This was complemented and supported by the oral evidence adduced before the District Court judge. The warrant on its face demonstrates the statutory provision pursuant to which it was issued; it is dated and signed by the District Court judge, the name of the property is specified on the face of the

warrant, and various items which are the object of the search are specified. It is true that there is no mention of computers on the face of the warrant – we will return to this issue presently.

**115.** The fact that the District Court judge was not informed of the past arrests of the appellant, or of the fact that he would be invited to attend the station voluntarily, or that the Gardaí refrained from executing the warrant until 17<sup>th</sup> May 2013, has no bearing on the validity of the warrant nor does it serve to deprive the judge of the jurisdiction to issue the warrant.

**116.** Whilst the content of the warrant is not within the precise terms of the District Court form, it is nonetheless readily apparent that the judge expressly stated in the warrant that she was satisfied that there were reasonable grounds for suspecting that evidence relating to the commission of an offence was to be found in the relevant location. She expresses herself so satisfied as a result of the evidence on oath of Sergeant Keane.

**117.** Insofar as there is any error in the warrant, in that it is not in the precise terms of the District Court form and did not specify a suspected offence, such omissions did not deprive the judge of the jurisdiction to issue the warrant. Moreover, the warrant on its face demonstrates compliance with the necessary jurisdictional components. The statutory preconditions for the issue of the warrant are apparent on its face. Furthermore, any individual reading the warrant would have been entirely clear as to its contents and purpose. The warrant did not have the capacity to mislead or misinform the reader.

**118.** As stated by O’Donnell J. in *The People (DPP) v. Mallon* [2011] 2 IR 544 at para. 44: “It is now clear that a mere error will not invalidate a warrant, especially one which is not calculated to mislead, or perhaps just as importantly, does not mislead. Indeed, the fact that warrants perfectly regular on their face may be invalidated if it can be demonstrated by evidence that there was no jurisdiction to issue them, demonstrates that error alone is not the critical factor. This latter fact illustrates the important

feature that those warrants which have been found invalid are most clearly those where there was no jurisdiction to issue the warrant because a statutory precondition had not been fulfilled.”

*The absence of any reference to computers in the sworn information or on the warrant*

**119.** When Sergeant Keane was cross-examined on the issue, the following exchange took place:

“A. I can’t -- you know, look, when I -- when I do out a warrant, you know -- I should have probably had computers and phone evidence because, you know, when you're applying for warrants for most searches you’d look for computers and phone evidence, you know what I mean? But I have at the end of it: ‘And any other relevant evidence.’

Q. But in terms of your state of mind, on the 13th of May as you were sitting making your application to Judge McGrath, are you saying that you had a state of mind that you did wish to take computers?

A. Possibly, yes, but, I mean, I don't -- I can’t recall what my state of mind is -- was six years ago, to be fair.

Q. Well, did you -- presumably, because it's not there, you didn't discuss computers then with the District Judge?

A. The judge would have read the information and we would have had a talk about the information and about the case.

Q. What was your suspicion in relation to computers? Did you have a specific suspicion in relation to computers in this case?

A. Had I a specific?

Q. Yes?



A. Computers can contain evidence of all sorts in relation to what people look up or what people access.

Q. Yes, but that's what I'm asking you. Did you have a specific belief in relation to the computers in this case, or did you -- did you discuss that with somebody else afterwards?

A. I would have discussed the whole application of the warrant with Superintendent Patrick O'Callaghan, and I know -- I can recall that we did discuss the entire information and computers and phone evidence as well.

Q. Prior to you going to the District Court?

A. Possibly, yes, yes.

Q. And what was the belief about computers?

A. I can't recall the specific conversation now, to be fair. It was -- as I said, it was six years ago.

Q. But you didn't have any specific belief about computers in this case, correct?

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 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 it 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."

**120.** The essential issue for a trial judge is whether the warrant is lawful, and the issue arises as to whether the failure to inform the District Court judge of the intention to search for computers goes to the heart of the jurisdiction of the judge to issue the warrant. It is said on

the part of the appellant that this deprived the judge of her capacity to discuss, consider and determine whether to issue the warrant. It is contended that the absence of this information was crucial as a District Court judge retains a discretion to refuse to issue a warrant even if he/she is satisfied on the information. Where it is said that information is incomplete, the judge is deprived of the proper exercise of his/her discretion and judicial scrutiny is not capable of being fully engaged. Moreover, does the absence of computers as a search item from the warrant render the warrant unlawful?

**121.** Having heard the evidence, the trial judge ruled:

“The Court is satisfied, as a matter of law, that there is no requirement that the information must contain a definitive list of all of the evidence to be seized or all of the locations at that place that evidence relevant to the offence may be found, as clearly that would not be possible and there is no requirement to specifically inform the District Judge of the intention of [G]ardaí to seek out or seize computers.

It is clear from the evidence that the potential relevance of computers was in contemplation by the investigation team but there is no evidence to suggest that there was any deliberate withholding of the intention to search computers from the District Judge or that the focus of the search was to gain entry for the retrieval of electronic devices and nothing more.”

**122.** There is no doubt that when an individual’s home is the subject of a search, it involves an intrusion on a person’s right to privacy and engages the constitutional rights of those whose dwelling it is. As said by Charleton J. in *CRH Plc, Irish Cement Ltd v. Competition and Consumer Protection Commission* [2018] 1 IR 521, which concerned searches under the Competition Act 2002, at page 636:

“But issuing a search warrant is not to be confounded with any analogy with the criminal trial process. That is not the task. Facts are not being found: facts are being

gathered. It necessarily follows that what is involved is an exercise in the pursuit of what is potential, essentially an exercise which may yield no information or limited information. It is of the nature of a criminal enquiry that a warrant may authorise an intrusion into someone's privacy to little or no effect. This is of the nature of what is required in the course of information gathering and a negative result does not upset the validity of what was done if, after the event, information that may serve towards displacing the presumption of innocence happens not to have been gleaned. The power to issue the search warrant, therefore, does not in this instance inform the nature of the powers that may be exercised pursuant to it."

**123.** The fact that a search breaches a person's privacy and engages the constitutional protection in accordance with Article 40.5 of the Constitution, however, does not render the search unlawful if the warrant is issued in accordance with law. However, the argument made is that as a search involves an intrusion of an individual's privacy, it is essential that all material be placed before the District Court judge to enable the proper exercise of the Court's discretion whether or not to issue the requested warrant.

**124.** Reliance is placed on *The People (DPP) v. Power* [2020] IESC 13 on the part of the respondent, while the appellant argues that this decision is not apposite as it involved a challenge to the lawfulness of the extension of a detention pursuant to s. 50 of the Criminal Justice Act 2007. However, reference is made to the decision of *Blanchfield v. Hartnett* [2002] IESC 41 and therefore, the respondent says *Power* should be read with that in mind. At paragraph 22 of *Power*, O'Malley J. says:

"As already noted the issue as to the legality of the extension was dealt with in the course of a *voir dire* in the trial. In cross-examination in the *voir dire*, Chief Superintendent Roche confirmed that he had not been informed, as of the time of his application to the District Judge, that the appellant had confessed to involvement in

the shooting. Counsel for the defence, in arguing that the detention was unlawful, submitted on this aspect that the extension had been obtained on an incomplete, or factually unsound, basis, because the fact that the appellant had begun to make admissions had not been taken into account. Counsel characterised this as a “hugely relevant fact,” that the officer should have been aware of and which should have been brought to the attention of the District Judge. He queried whether the information might have been deliberately withheld from the Chief Superintendent, out of a concern on the part of the investigators that the judge would not grant an extension if he knew that an admission had been made. It was submitted that if the District Judge had known that certain admissions had been made, he would have looked at the application in a different light, although counsel conceded that it could not be said that he would necessarily have made a different decision.”

**125.** O'Malley J. observes that this situation was the subject of discussion by Fennelly J. in *Blanchfield v. Hartnett* [2002] IESC 41. The respondent argues that the real issue is whether the warrant was lawfully issued and asserts that the decision in *Power* is instructive in this regard. Particular reliance is placed on the following:

“The obligation of the District Judge under the statute, and having regard to the constitutional right to liberty of the individual concerned, was to make a decision based on the evidence and submissions put before him in an *inter partes* hearing. If he came to a rational conclusion, having regard to that material, it is difficult to see how the decision could be characterised as unlawful, simply on the basis that there was some other piece of evidence that might, theoretically, have cast a different light on the issue.”

*Conclusion on the search warrant ground*

**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.

**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.

**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.

**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.

**131.** This ground therefore fails.

#### **Topic J: Various interview objections**

**132.** The appellant says that interviews formed a significant part of the prosecution case. In that regard, it is said that the memoranda were not properly presented to the jury in a fair manner, but on the contrary, were presented in a manner that was prejudicial to the appellant in important respects.

**133.** It should be noted that the interviews were the subject of significant editing, both as a result of agreement reached between the parties, and as a result of rulings by the trial judge when agreement could not be reached. It is said that in the form the memoranda went to the jury, it contained an unacceptable degree of editorial comment on the part of the Gardaí; that the memos communicated the fact that Gardaí were committed to the view that Ms. Lowry was vulnerable and that the appellant was controlling Ms. Lowry; and had referred to the fact that the accused was in a jealous rage. It is said that the manner in which the memos were presented to the jury conveyed the message that the Garda view was that Ms. Lowry was the party wronged, and that the appellant was the wrongdoer.

**134.** It is said that there were particular topics which were dealt with in an especially unsatisfactory manner. The appellant instances contracts for difference payments, single farm payments and Ms. Lowry's financial position.

**135.** The appellant also says that when the judge was required to make rulings, the rulings she provided were inadequate and did not disclose the basis of the ruling. We can say immediately that we do not see any substance in this criticism. As has been said many times before, there is no requirement on the part of a judge to provide a discursive ruling. That is particularly so in relation to an issue such as the editing of a memorandum, as distinct from ruling on an issue after lengthy submissions, perhaps involving the opening of authorities and the like.

**136.** Prior to the appeal hearing, the appellant's legal team provided a supplemental submission on behalf of the appellant. The document contained two appendixes: the first, titled "Appendix 1", consisted of relevant extracts from interviews over which there was objection, with the arguments and rulings summarised, and the second, titled "Appendix 2", contained full copies of the exhibited interviews which went to the jury with sections highlighted to which objection had been taken.

*Interview of 30<sup>th</sup> April 2013*

**137.** The first issue identified was the observation by a Garda on 30<sup>th</sup> April 2013 who commented, "[Y]ou're fairly clean for a man doing a dirty job" and the response. We have already dealt with this issue at Section H and we will not repeat what we have said.

*Interview of 16<sup>th</sup> May 2013*

**138.** The next objection is taken to aspects of a voluntary interview conducted with the appellant on 16<sup>th</sup> May 2013. Objection was taken to the fact that questions were asked about the method of milk collection. The objection seems to have been on the basis that a milk

collection issue was never investigated by the prosecution. In the course of the appeal hearing, this Court pressed counsel to elaborate on how it was contended that this issue was damaging to the appellant. We were, and remain, of the view that the questions are quite innocuous.

**139.** The other topic raised during the interview of 16<sup>th</sup> May 2013 related to the fact that the appellant was reporting that his first reaction on coming across the body was to inform his wife. The relevant extract of the memo was as follows:

“Q. If that was me, I’d rather my wife wouldn’t see a body in a tank

A. Possibly crossed my mind, when I saw her looking at him but look I know what

Imelda is like in a crisis, I know she would know what to do

Q. Did you know what you should do

A. I don’t, what

Q. Ring the guards

A. I don’t see the issue with ringing the guards

Q. Why did you ring Imelda

A. That is what I did, I rang Imelda, [you] can pick holes in it if you want, I needed her”.

In relation to this extract, it was submitted that the questions involved non-expert opinion and were therefore inadmissible.

**140.** The trial judge dealt with the matter as follows:

“Secondly, the question posed by [G]ardaí to the accused re allowing his wife to see the body in the tank and the question as to why he did not immediately ring the [G]ardaí. The prosecution offered to take out, ‘would you agree’ and the defence consider that that is not enough. The Court was referred to rule 7 of the Judges’ Rules. The circumstances surrounding the discovery of the body of the deceased is relevant.



The accused answers the questions put to him comprehensively. There is nothing necessarily prejudicial in this as it can be considered completely normal to make first contact with one's partner in stressful or shocking situations and Imelda Quirke immediately contacted the [G]ardaí without interference from the accused. This is a matter for the jury to assess and the Court will allow it in."

**141.** This Court cannot see how it can be suggested that it was impermissible for Gardaí to probe with the accused what his first reaction was. We see nothing objectionable whatsoever in the question.

*Interview of 21<sup>st</sup> May 2013*

**142.** Two issues were raised in relation to a further voluntary interview conducted on 21<sup>st</sup> May 2013. The first issue related to the fact that the appellant was asked, "[w]as it yourself that collected the grants and payments in relation to the land"? The second issue related to the fact that the appellant stated that he went to a doctor and told him about the affair that he had been having, and how he was feeling, and the doctor recommended that he go and speak to a local counsellor.

**143.** Objection was raised by the defence in respect of these extracts on the ground that there was no expert evidence in relation to the technical area of farm grants and payments, and therefore no mechanism by which the jury could determine what the normal practice was. In relation to the medical reference, it was said that the trial court should ascertain the parameters of the medical evidence that was admissible.

**144.** The trial judge ruled as follows:

"With regard to farm grants the prosecution are offering to take out the normal practice part of the question. The defence say that this is not enough. The Court does not consider that there's anything in this that warrants exclusion. This refers to the particular mechanism around payment of farm grants in a situation where land is

leased and the [G]ardaí asked the accused about this, which he answers comprehensively, which shows him to have acted completely appropriately and the Court will allow it in”.

**145.** Dealing with the medical issue, and having referred to the fact that there was going to be an issue in relation to search warrants in respect of the general practitioner and counsellor, the trial judge then commented:

“With regard to this portion of the voluntary cautioned statement the Court is satisfied that these are responses given by the accused himself, that it stands apart from whatever evidence may flow from the search warrants and that it is both relevant and admissible and the Court will allow it in.”

**146.** Again this Court sees no reason whatsoever to disagree with the approach of the trial judge in this regard.

*Interview 1 of 20<sup>th</sup> January 2014*

**147.** A number of issues are raised arising out of an interview conducted on 20<sup>th</sup> January 2014, following the arrest of the appellant on suspicion of harassment of Ms. Lowry. At one stage, the interview turned to the issue of discussions between the appellant and Ms. Lowry about the fact that some of the animals in his herd had BVD, and it was suggested that the disease might have been introduced by an infected animal which he had taken in from Ms. Lowry and her late husband. At one point, the question was asked:

“Q. At any point did these discussions become physical?

A. No”.

Objection was taken to the following question and answer:

“Q. You are certain of that[?]

A. Yes, I’m certain of that”.

The defence contended that once the previous question, which asked if the discussions had become physical, had been answered “no”, the inclusion of the following question – asking the appellant if he was certain – involved an expression of scepticism by Gardaí, and involved the communication of Garda opinion which had no probative value and was unfair.

**148.** This Court does not believe that the objection is one of substance. Gardaí conducting an interview are under no obligation to accept the first answer they get at face value. In this case, Gardaí had information which suggested that the discussions had become physical and they were entitled to probe whether the detainee was maintaining his denial.

**149.** A little later, the following question was asked:

“Q. Would you be a forceful man Pat, if you believed that you were entitled to it [compensation,] would you keep at it[?]”

A. No”.

**150.** It would seem that there was another question which asked, “[a]re you a violent man, Pat?”, which the prosecution had agreed to having removed. The defence protested that the question was prejudicial on the basis that it communicated that the person being asked the question was thought of as a violent or forceful person. It was said that it would have a prejudicial effect by raising questions in the minds of the jury. Again, this Court does not see the question as objectionable, particularly in circumstances where it was asked soon after the accused had commented that the discussions between himself and Ms. Lowry had not gotten heated, but that he was persistent in getting the problem sorted out.

**151.** Later in the interview, the following exchange took place:

“Q. Can I go back for a second Pat [,] you say that you didn’t want to come up with a figure and Mary had no knowledge [,] would [it] not have been in your best interest to get an intermediary to sort it out[?] The loss of 12 cows is considerate [*sic*] for any

farmer and when there is money involved, the best option would have been to get a third party. You have family relations to think about.

A. I said from day one that no one was going to fall out over this[.]”

**152.** It was submitted by the defence that the extract was essentially argument, or a submission by the Garda interviewers. It was said that the question involved inadmissible opinion which trespassed on the function and independence of the jury.

**153.** It must be said that this Court sees little substance in this submission. A sense one has is that the defence was anxious to sanitise the memorandum but, in our view, the issue raised was a proper one and there was nothing objectionable in the question.

**154.** A little later, the interview turned to the question of Ms. Lowry making a will which would deal with the question of a role for the appellant in looking after her children if anything happened to her and what financial arrangements should be made in that regard. The following extract was recorded:

“Q. Pat I have to put it to you that it was your way of controlling her affairs

A. No how could I control her affairs like that[?]

Q. This was you [*sic*] way of controlling it with the will

A. If that’s what you are suggesting, that’s fine

Q. Would you agree that Mary was vulnerable at the time[?]

A. No. Mary was very proactive about what she should do if anything happened to her[,] we discussed it.”

**155.** Later, the question of the involvement of the appellant with investments of the late Mr. Lowry was discussed. The following exchange took place:

“Q. In around the same time as the will, did you take over control of Martin Lowry’s investments[?]

A. I wouldn't say I controlled them. Some of the investments didn't need any control.

I was asked to look after them

Q. Which you did look after them, control them is not the same thing[?]

A. I was asked to look after them

Q. Which you did[?]

A. Yes

Q. Would you have been aware of Martin Lowry's investments prior to his death[?]

A. Yes

Q. All of them[?]

A. Yes

Q. Inside and out[?]

A. Yes I think so

Q. Would he have had considerable investments[?]

A. Define considerable".

The defence submitted that these extracts were not admissible and that it was for the jury to determine the nature of the relationship, uninfluenced by expressions of Garda opinion. The prosecution contended that they had identified areas where Ms. Lowry had given evidence of the fact that she was vulnerable at the time, and that she felt that the appellant was attempting to control her. It was said that the Garda interviewers were entitled to address these themes and that doing so was not oppressive.

**156.** This Court sees nothing untoward in the nature of the questions asked. The nature of the relationship between the appellant and Ms. Lowry was central to the case. Gardaí had information that the relationship may have been one that involved the appellant exercising control. It seems to us that they were entitled to probe that issue.

**157.** There followed a discussion about contracts for difference (hereinafter “CFDs”) which focused, in particular, on an account which Ms. Lowry had, and which it was agreed between Ms. Lowry and the appellant that he would control/manage it with any profits shared. This led to Gardaí suggesting to the appellant that he was in “a win[-]win situation”, and that he was not going to lose as Ms. Lowry had put up the money, to which the appellant responded, “[a]nd I had to manage it”.

**158.** The defence objected to this section of the memo, saying that it should not be included when the prosecution did not prove, or seek to introduce into the case, details of Ms. Lowry’s accounts, her tax returns and the like. It is said that the manner in which the issue was probed by Gardaí saw further introductions of Garda opinions relating to the exercise of control and vulnerability.

**159.** This Court is of the view that this was a legitimate area to be probed. We do not attach significance to the fact that there was no expert evidence about the operation of CFDs. The questions were put to the appellant about his role and he showed no difficulty in answering them.

**160.** There followed questions about the single farm payment (hereinafter “SFP”), beginning with the question of whether the payment is made to the owner of land or the person farming the land.

**161.** The defence objected to this line of questioning, contending that it required a jury who understood EU SFPs in order to correctly determine entitlements, such as who was entitled to payment and the proprietary or otherwise of any contract to lease land featuring the payments. The defence contended that this line of questioning created an undertone of impropriety and suggested malpractice by the appellant. The prosecution denied that an expert was required and submitted that what was relevant was that the appellant was engaged in a transaction whereby he leased some fifty acres of land for €12,600 a year, and was

simultaneously receiving €8,000 by way of an EU SFP. Again, this Court cannot see how it can be suggested that this was not a proper matter to be explored by Gardaí. The significance, if any, to be attached to the answers obtained was for the jury to determine.

**162.** After some brief references to some other transactions, the following exchange took place:

“Q. You were basically taking Mary Lowry to the cleaners[?]

A. No I was not. If I wanted to do that I would have looked for a lot higher figures. She offered me the me [*sic*]

Q. You pressurised her for the money. You kept coming at her looking for the money [,] putting her under pressure and [s]he finally gave in and she gave a cheque for €50,000

A. No [n]o she never did give me a cheque for €50,000. If I was putting her under pressure for this money, why didn't she enter into agreement or if she felt in any way pressured[?]

Q. You said earlier in relation to the lease on the land that you advised her to get the lease so that you weren't seen to be taking advantage but here why didn't you do the same in relation to the money borrowed[?] Did you suggest any agreement in relation to these so it would be seen again that you weren't taking advantage[?]

A. No I was comfortable with them

Q. Yes but you could be seen to be taking advantage. You didn't suggest to her a payment plan on an interest rate so you would not be seen as taking advantage[?]

A. I made no suggestion no

Q. There aren't too many people that would give you a loan and tell you to give it back to me when the kids were going to college

A. That's what she said

Q. Were you not getting cash on demand and sex on demand?”

The defence objected to the above extract on the basis that it perpetuated the well-established themes of control and vulnerability. They submitted that the above line of questioning was oppressive and that it was ultimately prejudicial as it formed an argument or a commentary for the jury to consider.

**163.** This Court would observe that the prosecution had evidence which suggested to them that the relationship was a controlling one and not one of financial equals. We are of the view that these were proper matters for exploration. We accept that the question, “[w]ere you not getting cash on demand and sex on demand?” was rhetorical in tone, but it seems to us that just as counsel when cross-examining may (within limits) seek to unsettle a witness, so may Gardaí when conducting an interview. The phrase was undoubtedly a pithy one, and indeed, was something in the nature of a soundbite, but it did reflect the prosecution position that the relationship was satisfying the appellant’s sexual desires and his financial needs.

*Interview 2 of 20<sup>th</sup> January 2014*

**164.** Issues were also raised arising from a further interview conducted on 20<sup>th</sup> January which commenced at 3.45pm. The interview began with the appellant being asked to tell the interviewers about himself. He spoke about his domestic situation, his farming activities and his other business interests. The discussion then turned to his involvement with Fawnagowan following the death of Mr. Lowry. There was a discussion of an outbreak of BVD and the payment of compensation by way of the writing off of a loan of €20,000. The defence objected to this portion of the interview as it was said that it was of little or no probative value but was prejudicial to the accused. The prosecution contended that the section was relevant, that the issue of compensation was particularly important, and that the appellant had the capacity to explain and answer the questions put to him.



**165.** This Court has to observe that in the context of the case that was being advanced and the contention that the appellant had committed the offence of murder in particular circumstances, it seems to us that this was a legitimate line of enquiry for interviewing Gardaí. We do not see any reason why it should have been excluded. We do acknowledge that having discussed the question of compensation, the interviewer commented, “[t]his was putting in the boot in on Mary Lowry”. We agree that this was implicitly the expression of an opinion, but it was being put to the appellant for a response and he did respond by saying that he did not agree.

**166.** Later, the focus of the interview turned to the development of an intimate relationship between the appellant and Ms. Lowry. The defence took objection to the inclusion of this material on the basis that it was not probative and was yet highly prejudicial. It was contended that Garda questions regarding sex and the affair were “essentially mockery and argument”, and that the nature of the questioning advanced the theme of control and vulnerability. It was said that questions and suggestions about jealousy and rage were highly prejudicial and yet repeatedly made. In response, the prosecution referred to the “Dear Patricia” letter, and pointed out that the trial judge had ruled that the relationship between the parties was both relevant and admissible.

**167.** This Court does not accept that the questions addressed to this topic were “essentially mockery”. Gardaí were investigating the alleged harassment of Ms. Lowry. A man had been murdered. The theory being investigated was that harassment had occurred, and indeed, that a man had been murdered because the deceased and Ms. Lowry had entered into a relationship, in effect, supplanting the appellant. Clearly, these were matters that had to be explored, and this Court can see no basis why questions directed to this topic should have been excluded.

**168.** The next matter addressed in the interview was occasions when Ms. Lowry might have paid money to the appellant. In his response, the appellant made reference to a cattle

crush and the writing of a cheque for €2,000 in relation to the CFD account. The defence objected to these extracts contending that there was no foundation in evidence.

**169.** Having considered the matter, the trial judge delivered a ruling which dealt with the contents of both interviews of 20<sup>th</sup> January. The judge began by reminding the parties that she had already ruled that the overall financial relationship between the parties was closely and inextricably linked to the relations between the parties so as to form part of the overall body of the evidence to render it coherent and comprehensible to the jury. She said that the evidence was acknowledged by the accused and did not require the forensic proof suggested by the defence. The accused acknowledged what passed between the parties in terms of loans and BVD compensation. The trial judge continued on to say that insofar as the BVD payments were concerned, she had already ruled that this formed part of the financial evidence, and similarly with regard to the SFP. She said that the court had also already ruled that the sexual affair between the parties, and the relationship as it continued after the breakup and the disappearance of Mr. Ryan, was closely and inextricably linked to the relations between the parties so as to form part of the overall body of the evidence to render it coherent and comprehensible to the jury. The trial judge pointed out that in her evidence, Ms. Lowry went in some detail in respect of the financial and sexual relationship that she had with the appellant, and gave evidence of her vulnerability and of feeling controlled. The trial judge said it was in that context that she had considered the morning's arguments in respect of the two interviews. She then ruled on the individual extracts, admitting most but excluding some.

*Interview 3 of 20<sup>th</sup> January 2014*

**170.** A third interview was conducted that evening which commenced at 9.48pm and lasted some three hours and 32 minutes, finishing at 1.20am. The memo prepared came to some eight pages, though the transcript of the interview ran to 118 pages. In those circumstances,

the defence indicated that they were objecting to the admissibility of the interview in its entirety. However, in the course of argument in the trial court, counsel indicated that the questions themselves did not seem to him to add very much and that he was not overly concerned by the interview, and if it were possible to put it in a form that was understandable, he would not have the most significant problem with it. That being said, at other stages, counsel did refer to his usual objections about references to rage or anger. This Court has not seen the transcript to which there had been reference. However, there does not seem to be any dispute about the fact that the relevant material was extracted and condensed very significantly.

171. In conclusion, this Court has not been persuaded that the manner in which the judge dealt with this interview was inappropriate. Indeed, in a trial where very little could be described as uncontroversial, this interview was perhaps one of the least controversial aspects of the trial.

### **Topic K: Civilian witnesses**

172. This is another section which contains a number of sub-issues. Five witnesses are the subject of comment in the written submissions, but not all of these were the subject of oral submissions on behalf of the appellant, and it was made clear that even in the case of the witnesses where the appellant was resting on his written submissions, the objection was being maintained. It is, therefore, necessary to consider the issues raised in respect of each.

#### *Emmet Kenny*

173. The first witness in this group is Emmet Kenny. He is a young farmer. He has been an occasional employee of the appellant since undertaking a sixteen-week work placement with the appellant as part of his agricultural college studies in February 2009. A number of issues were raised by the appellant in relation to his evidence in the course of a *voir dire*. In a

statement made to Gardaí on 19<sup>th</sup> May 2013, Mr. Kenny referred to the fact that the appellant had asked him on one or two occasions to fence around a septic tank at the front of the property at Fawnagowan. In the course of the statement, Mr. Kenny commented:

“My understanding of the reason for fencing around the tank was because a heifer damaged its leg in a gap on the tank before I started in 2009. The heifer got its leg caught between two slabs on the covering of the tank, that tank is in the field in front of the house facing the road. I remember when I started the heifer that damaged its leg calved down. Its leg was swollen and infected.”

**174.** The defence objected to the admissibility of this proposed evidence on the basis that it was not direct evidence dealing with an incident that had been witnessed by Mr. Kenny, but rather he was proposing to give evidence of his understanding of an event which had occurred before he commenced his work experience. A further statement was taken from Mr. Kenny on 17<sup>th</sup> October 2018 dealing with the fact that he had accompanied a member of An Garda Síochána, Sergeant Keane, to Fawnagowan, and had been asked to point to the tank that he was asked to fence around and where he believed the heifer had injured its leg. The defence also objected to this statement on the basis that it was taken some five years after the original statement and some nine years after the witness began his work experience. The judge ruled on the matter on 5<sup>th</sup> March 2019 as follows:

“With regard to Emmet Kenny, the defence object to the admission of part of the statement made by Mr Kenny on the 19<sup>th</sup> of May 2013 and all of a further statement made by him on the 17<sup>th</sup> of October 2018. With regard to the portion of the statement of 19/5/2013, the defence say that the witness is expressing an understanding of an issue that he wasn't present for; that it is not direct evidence. With regard to his second statement that there has been a considerable lapse of time since the events and the making of his previous statement; that the statement lacks specificity and is filled

with generalised commentary. The prosecution say that this has to be viewed in context, firstly that the accused was asked two specific questions in respect of the tank in the interview of the 16<sup>th</sup> of May 2013 and gives answers to those questions, which the prosecution say contextualises the significance of this evidence; that on a full reading of the statement the understanding can only come from the accused; the evidence of this witness contradicts that of the accused; that the detail around the description indicates that it was the same incident that has been referred to; that this evidence is relevant to the issue in this trial, in particular the tank where the body was recovered and the explanation given by the accused that others knew about the tank. The prosecution says that in the memo of interview of 16/5/2013 that the accused links the incident with the calf to knowledge by Mary Lowry of the location of the tank where the body was recovered. The prosecution say that the additional evidence clarifies issues in the first statement. They refute the challenge in respect of the lapse of time and say that the first statement was taken in 2013 after the matter became a murder investigation.

Having read both statements in full and considered the arguments, the Court is satisfied this evidence is both relevant and admissible and will allow it in.”

**175.** This Court would express some doubts about whether this was ever an appropriate matter on which to seek a *voir dire*. When interviewed, the appellant had dealt with the question of the extent to which others knew about the run-off tank. When addressing that issue, he referred to an incident involving a heifer injuring its leg. That Mr. Kenny had been instructed to carry out a fencing operation at a different tank, and had been led to believe that he was being asked to undertake that task because of an incident involving a heifer injuring its leg, was relevant and admissible evidence and, in the Court’s view, was evidence that was properly admitted by the trial judge. We reject this ground of challenge.

**176.** A second sub-issue involving Mr. Kenny related to the fact that, in October 2013, he had shown Gardaí where bales of silage had been stacked in June 2011. The information he provided was that the bales were not on or beside the tank where the remains of Mr. Ryan were discovered, but rather that they were on the other side of the farmyard beside a slatted shed. On 26<sup>th</sup> October 2013, when Mr. Kenny went with Gardaí to Fawnagowan, he was accompanied by Detective Inspector Buckley who took photographs on the station camera of the area identified by Mr. Kenny, but sometime later, the camera was misplaced and the photographs were lost. The appellant complains that this involved a failure by the Gardaí to seek out and preserve evidence. Undoubtedly, it would have been preferable if the photographs had not been misplaced. However, we cannot see that this was a matter of any consequence. This was not a question of photographing an accident scene or a crime scene so that if photographs were lost, the scene could not be replicated. Mr. Kenny was merely pointing out a geographic location and the Detective Inspector was simply photographing that geographic location. The fact that the camera was misplaced (meaning that the photographs were not available), while unfortunate, did not impact in any way on the fairness of the trial and did not disadvantage any of the participants in the trial.

*Gary Cunningham*

**177.** Gary Cunningham is another farmer who worked with the appellant from time to time having undertaken a fifteen-week work placement with him as part of his studies in September 2011. Mr. Cunningham lives in Bansha, close to the home of the appellant. Mr. Cunningham was interviewed by Gardaí and provided a number of statements.

**178.** In the course of his first statement, Mr. Cunningham addressed the alleged leak incident. This reference to a leak relates to the version of events offered by the appellant as to how he discovered the body of the late Mr. Ryan. As set out in the “background events” section of this judgment, on 30<sup>th</sup> April 2013, the appellant was proposing to commence the

task of slurry spreading, and in order to agitate the slurry, he required water and sought to access to it from an old run-off tank on the farm, believing that there would be enough water there as a result of a leak which he said had occurred in the milking parlour over a 48 hour period in March 2013. It was in the course of pumping the water into a vacuum tanker that the appellant contends that he discovered the body of the late Mr. Ryan lying in the run-off tank. Mr. Cunningham, however, in his first statement, said that while working for the appellant he was not aware of any water leak on the farm at Fawnagowan and that the appellant did not mention any leak to him.

**179.** In a later statement, he made reference to the fact that while on work placement from agricultural college, he was required to keep a work experience diary recording his daily activities. This diary would be reviewed and signed off on by the appellant from time to time. In the latter statement, the witness referred to a conversation that he had with the appellant towards the end of April 2013 regarding the proposed spreading of slurry at Fawnagowan. Referring to the amount of slurry in the slatted tanks requiring spreading, Mr. Cunningham in his statement said: “I said to him [the appellant] that it must [be] some dose as the water would have run off that tank to the open tank. He said it was and that he must get it agitated.”

**180.** In the later statement, he refers to the tank where the remains of Mr. Ryan were recovered, observing, “I was never asked to fence around that tank because I wasn’t aware of the existence of that tank and Pat Quirke never told me about that tank”. In a subsequent statement, Mr. Cunningham commented;

“Further to my previous statements, I mentioned to ye after I had made that last statement that I could recall having a conversation with Pat Quirke in the jeep one day with him going over to the farm in Bansha in Barnlough. We would have had this conversation maybe a week or two after the body of Bobby Ryan was found. Pat Quirke asked me did I hear anything about Bobby Ryan as there were a lot of rumours

going around. I kind of brushed off what he asked me and said not really. Pat Quirke told me that he had heard a rumour that Polish people were involved in the murder of Bobby Ryan.”

**181.** At trial, the defence objected to different sections of the proposed statements of evidence. They complained that sections would appear to have been prompted by what they contended were leading questions, and that the absence of the agricultural college diary prevented the defence from effectively testing for accuracy conversations and events recalled (or not recalled) in cross-examination. It was said that had this been pursued as an issue when there was first contact with Mr. Cunningham rather than at a point in time close to the trial, that the diary might have been located. There was also objection to the section of the later statement where the witness said what he thought was going to happen in relation to slurry spreading.

**182.** The prosecution said that the issue in relation to Mr. Cunningham was comprehensively addressed by the trial judge. It was the subject of a *voir dire* and, in ruling on the matter, the judge set out that she had considered the statement in full and the arguments of both sides before allowing the evidence to be admitted. Furthermore, the prosecution contends that the statement of proposed evidence was relevant because this was a witness who had a detailed knowledge of the farm and might be expected to have knowledge of a leak, and also that it was the case that contrary to the then accused’s version, there was a large volume of slurry, thus requiring a large volume of water to be agitated. The prosecution also says that some significance is to be attached to the fact that a week or two after the body of Mr. Ryan was recovered, the appellant was found to be speculating about the involvement of Polish people in his murder. This, the prosecution contends, is relevant, as it demonstrates an interest or curiosity on the part of the appellant in events concerning Mr. Ryan, despite the fact that the appellant never suggested to Gardaí that he had heard anything about the fact that



Polish people might have been responsible during the lengthy interviews conducted in the immediate aftermath of the discovery of the body. The Director says that if this was a genuine belief, it was a matter that one would expect to see canvassed with Gardaí.

**183.** The judge ruled on the matter as follows:

“With regard to Gary Cunningham, again the defence objected to specific marked portions of the statement. The defence say that this statement appears to have been taken by [G]ardaí in a question and answer format, the first portion that they are objecting to, which references Gary Cunningham’s awareness of the tank, the defence say was likely to be a response to a leading question. They say further that the unavailability of the work-placement diary places them at a disadvantage in the accuracy of the evidence and the impeaching of the witness. With regard to the further statement they say that evidence around fencing the tank was likely to be a response to a leading question. With regard to the reference to the Poles being involved, the defence question its probative value. They say that these interviews were not taped; that the accused only says “probably” and “maybe” in respect of asking that the tank be fenced; that there is an unfairness in admitting this evidence; that Gary Cunningham’s not an expert and that the burden of proof re. the leak remains with the prosecution.”

**184.** It must be said that this Court is very dubious indeed as to whether this was ever a proper issue on which to seek a *voir dire*. Mr. Cunningham had evidence to give which was both relevant and probative. In those circumstances, it would be a matter for the jury to assess any limitations of the evidence and to decide what weight, if any, to attach to it.

**185.** This Court does not see the challenge to the admissibility of this witness as being made out.

*Breda O’Dwyer*

**186.** Breda O’Dwyer is an artificial insemination (“AI”) technician. She provided AI services to the appellant over a twelve-year period. The prosecution’s interest in her proposed statement of evidence was that it suggested that there was a significant departure by the appellant from his normal routine on the day that the late Mr. Ryan was last seen alive. It appears that it was Ms. O’Dwyer’s practice to keep a diary or a log recoding her interaction with farmers. It seems that the log was kept so that it would be available to the Department of Agriculture in the event of an outbreak of disease. Unless there was such an outbreak, the log was not submitted to the Department, but Ms. O’Dwyer was supposed to keep the logbook for a period of two years so that it would be available to the Department if required.

**187.** The basis of the defence objection to the admissibility of her evidence was that this diary was never copied, photocopied or retained by An Garda Síochána, and was not available at trial. In the circumstances, it was submitted by the defence that it was “impossible” to challenge the witness on the accuracy of her evidence in relation to her routines around the time of Mr. Ryan’s disappearance.

**188.** This Court is not at all convinced that this is a matter of any great moment. In her first statement, Ms. O’Dwyer gives her arrival time at the Breanshamore farm on 3<sup>rd</sup> June 2011 as 9.30am. In the course of that statement, she makes reference to the fact that she keeps a record of farm visits but that she was unable to locate her diary for 2011 when making that statement on 10<sup>th</sup> May 2013. She made a second statement on 4<sup>th</sup> June 2013, in which she makes reference to the fact that she had consulted her log and, by reference to it, was stating that she had arrived at the farm in Breanshamore between 9.15am and 9.30am. A further statement made on 24<sup>th</sup> March 2016 provides that she called to the farm of in Breanshamore at 9.30am. She says that the reason she knows this is because she had a route that she stuck to most mornings and that her logbook confirmed her route of visits.

**189.** There does not seem that there was any disagreement about the fact that Ms. O’Dwyer visited the farm on the day of Mr. Ryan’s disappearance, nor was there any significant disagreement about the timing of her visit. The appellant dealt with the timescale for the visit during the course of an interview conducted on Thursday 16<sup>th</sup> May 2013 in the following terms:

“A. I went back to the yard[,] we dropped off the bulls, we finished the milking, and we went for breakfast [at] approximately 9.30, we came out from breakfast[,] Sean started bringing the bales ... I went to the house and I got ready. Imelda was waiting and we literally headed off then.

[...]

A. Well Sean wasn’t quite finished so I think there was about 5 minutes more work to do maybe to wash down. Breda, the AI woman arrived around that time.”

**190.** In the course of ruling on the matter on 6<sup>th</sup> March 2019, the trial judge commented that:

“The duty, which rests with the prosecution, to seek out and preserve evidence is clear from the authorities. The diary in this case could have been preserved. Having considered the jurisprudence to include the most recent jurisprudence, the Court is satisfied that this duty must be interpreted realistically on the facts of each case. The focus of the trial court in considering this issue must be a fair trial in accordance with law and the court must consider the impact of the missing evidence in the context of the overall trial to ensure justice and fairness. The statement gives the witness’s dealings with the accused in general over 12 years and specifically on the 3<sup>rd</sup> of June 2011. Most of the statement is independent of and not referable to the diary of the witness. As stated above, there are three references in her statements to the diary, which are referable to her time of arrival at the farm. The accused confirms his own

recollection of her visiting the farm that morning around 9.30 in his memo of interview with [G]ardaí. The time she gives in her first statement accords with the accused's own recollection in his memo of interview with [G]ardaí. Having considered the arguments, the law and the facts, to include the statement in its entirety, the court is satisfied to allow her statement in full to be put into evidence."

**191.** The appellant has suggested that the trial judge should have excluded all the evidence that flowed from the witness consulting her diary and that, in essence, her evidence should have been limited to the first statement that she made wherein she said that she made the statement without her diary.

**192.** This Court does not believe that what is suggested could ever have been appropriate. The notion of limiting or rolling back on evidence is a strange one. Much of the witness' evidence was in general terms about the nature of her interactions with the appellant over a period of many years. Another section dealt with her recollection of her interaction with him on 3<sup>rd</sup> June 2011. In truth, we cannot see that the diary, even had it been retained or photocopied, would have been of significant assistance. We are quite satisfied that the trial judge dealt with this issue in an appropriate fashion.

*Sean Dillon*

**193.** In the case of this witness and the witness that follows, Eddie Quigley, the appellant was content to rely largely on his written submissions.

**194.** So far as Mr. Dillon is concerned, the appellant takes issue with the fact that when he gave evidence, counsel during cross-examination prefaced questions with phrases such as, "[j]ust what you actually remember", and on other occasions, asked the question, "[a]re you sure of that?"

**195.** Counsel for the prosecution submitted that the statement of evidence from the witness was couched in cautious terms and, on occasions, in terms of lack of certainty. It was

contended that there was nothing impermissible in seeking to identify the areas in respect of which the witness was uncertain and to identify those areas in respect of which he was certain when giving evidence. The trial judge ruled on the matter as follows:

“I’ve read Mr Dillon’s statement in full and I’ve listened to the arguments and of course agree that the rules of examination-in-chief must be adhered to by the prosecution. But I’m not going to stand this witness down, nor am I going to give a separate warning to the jury at this stage in respect of this witness. I will give any appropriate warning in respect of this witness or any other witness in my charge. I understand that this witness has himself expressed himself to be unsure of certain matters and it was in this context that this language was used by the prosecution, who will of course have to accept the answer given and will have to adhere to the rules of examination-in-chief. I will go on to say that this is a young and nervous witness and I do intend to speak to him before the jury come out to reassure him that all that is expected of him is to tell the Court what he remembers and, if he doesn’t remember something, he is simply to tell the Court that he doesn’t remember. And I will speak to the witness in that regard before the jury come out.”

**196.** This Court is not of the view that counsel for the prosecution transgressed in the course of the examination-in-chief, and we are satisfied that the trial judge’s response to the issues raised in relation to this witness was an entirely appropriate one. In the overall context of the run of the trial, this Court does not have a sense that the controversy in relation to this witness was of great moment. The efforts on the part of the prosecution to have the witness give the evidence that they were hoping for came to naught and then in cross-examination, the witness agreed that he might have met the appellant milking and might have finished off the milking, which was the outcome that the defence had been seeking. While this issue has not been the subject of extensive submissions, whether oral or written, this Court, having read

the trial judge's ruling, does not have any concerns about the manner in which the issue was dealt with.

*Eddie Quigley*

**197.** Eddie Quigley is the brother of Ms. Lowry. By reference to his proposed statement of evidence, the defence contends that what was involved was in the nature of testimonial evidence rather than objective statements of evidence. While the issue was not pressed in the course of the appeal hearing, this Court has looked at how the evidence of this witness was dealt with and that exercise has given rise to no concerns.

**Topic L: Computer and audio**

**198.** As the title of the topic might indicate, and similar to many of the other aspects of the trial with which issue is taken, a number of sub-issues feature under this heading. In broad terms, the issues arise out of the fact that a computer and USB stick were seized in the course of the search of the appellant's home. These items were then interrogated by Detective Garda Fitzpatrick who is attached to the Garda National Cybercrime Bureau. The prosecution sought to call Detective Garda Fitzpatrick and there was a challenge to the admissibility of his evidence which was the subject of a *voir dire*.

*The evidence of Detective Garda Fitzpatrick*

**199.** The proposed evidence of the Detective Garda dealt with internet searches and with audio recordings. So far as the internet searches were concerned, the evidence focused on a nine-minute period on 3<sup>rd</sup> December 2012 when a particular website titled "forensics4fiction", which was linked to Facebook, was accessed from a results page generated by a Google search of the term "human body decomposition timeline". Other webpages were then visited. These were "suite101 how a human body decomposes after

death”, “wikimedia decomposition stages” and “environmentalgraffitinews afterlife human corpse stages decomposition”. There was evidence of further search results, though whether this was as a result of the search term being re-entered, the Google search page being refreshed, or the hitting of back key by the computer user was not apparent.

**200.** Detective Garda Fitzpatrick stated that within the same time window (the nine minutes on 3<sup>rd</sup> December 2012), he found that there were links to three YouTube videos, the first of which was titled, “the body farm, study of human decomposition”. Seconds later, a link to the video “Body Farm and beyond” appeared. There was also a third video, but this had been removed due to copyright infringement. The title of this video started with “decomposition of the” but Detective Garda Fitzpatrick was unable to determine anything further about the video.

**201.** Audio recordings identified by Detective Garda Fitzpatrick included recordings of an intimate nature involving Ms. Lowry and the appellant. It was argued that these had no probative value since the fact of an intimate relationship had already been established by the evidence of Ms. Lowry and also by the “Dear Patricia” letter. One audio recording was of Ms. Lowry and Flor Cantillon, with whom she commenced a relationship after the death of Mr. Ryan. There was specific argument in relation to this based on a contention that it was not of probative value and on the fact that when the appellant was interviewed by Gardaí, it was not put to him that he had access to a recording involving Mr. Cantillon and Ms. Lowry.

**202.** In general, the defence objected to the admissibility of the evidence of Detective Garda Fitzpatrick on a number of grounds, including that the prosecution could not establish who was using the computer at a particular time; that the evidence was more prejudicial than probative; that the overall tenor of the evidence was unsatisfactory; but perhaps most pointedly, on the basis that Detective Garda Fitzpatrick should not be classified as an expert whose opinion evidence was receivable. The issue in relation to Detective Garda Fitzpatrick’s

expertise was linked to an error or misstep on his part. Initially, the Detective Garda had been of the view that there had been numerous searches in relation to human body decomposition and cognate matters performed on 10<sup>th</sup> May 2013. However, he later retracted this aspect of his evidence when it emerged that the records generated in respect of 10<sup>th</sup> May 2013 were caused by a new browser, Mozilla Firefox, importing files from a previous internet browser due to installation and updates. These were not the only criticisms of the prosecution expert.

**203.** At one stage, Detective Garda Fitzpatrick indicated that he had compared the “hash values” of the audio recording files to determine if they were the same or not. As we understand it, this was a reference to the multiple bit characters in the metadata of each file, referred to as a digital fingerprint, but when pressed on the issue, Detective Garda Fitzpatrick accepted that he had operated on an assumption that they were the same based on the same folder file name on each recording. There was also an issue relating to contact with the operator of the website “forensics4fiction”. Initially, the witness’ evidence was that he had filled in a form on the website to contact him, submitted it, but received no response. However, on review of his emails, it emerged that a reply had been received which indicated that the operator could not answer the queries, but suggested the possibility of contacting WordPress, the host of the website. This suggestion was not followed up on.

**204.** The trial judge gave a detailed ruling in respect of this matter on 13<sup>th</sup> March 2019. In essence, the trial court rejected the overall challenge advanced by the defence but agreed to exclude some specific material, including the third YouTube video (which had apparently been taken down for copyright reasons), an audio file involving intimacy between Ms. Lowry and the appellant, and searches that had taken place in respect of Joe O’Reilly, Siobhan Kearney, and Jo Jo Dullard. Notwithstanding that the ruling appeared to us to be a detailed and comprehensive one, the defence requested that the judge review the ruling on the basis that inadequate reasons were given. In response, the trial judge provided an elaboration,



though it must be said that the elaboration focused as much on the matters that it had been decided to exclude as anything else.

**205.** This Court is in no doubt that the material in question was correctly admitted. That there were limitations to the evidence, such as the fact that the prosecution could not prove the user of the computer at a particular time, was a matter of weight. While it was a point that the defence were entitled to highlight to the jury, the evidence remained of probative value and it was for a jury to determine what weight was to be attached to it. The criticisms of the performance of Detective Garda Fitzpatrick were criticisms that the defence were entitled to make. However, they went to what were essentially collateral matters and left intact his core evidence, which was that when he interrogated the computer and USB stick, he accessed material that was potentially probative to a significant degree.

**206.** We are not prepared to uphold the arguments advanced in this regard.

*The “wayback machine”*

**207.** A separate issue arose in relation to the use of software known the “wayback machine”. This was the subject of additional evidence at trial. It arose in circumstances where the defence cross-examined on the basis that there was nothing to say that websites viewed by Gardai as part of the investigation were displaying the same material at the time of the original viewing. In response, Detective Garda Fitzpatrick and a member of the investigation team made use of software known as the “wayback machine”. The defence objected to the admissibility of the additional evidence on the basis that it was coming into existence after there had been a *voir dire* on the issue and that it constituted documentary hearsay.

**208.** It seems to this Court that any trial is organic in nature, and as issues emerge during the course of a trial, either or both sides may look to improve their position. In principle, there is nothing objectionable about that. However, there may be limitations on what can be permitted if unfairness is to be avoided. It does not seem to us that the arguments advanced

on the basis of documentary hearsay or that there was a mandatory requirement to invoke the Criminal Evidence Act 1992 (which was not done) raise any point of substance. This was not a question of hearsay in the sense of somebody saying, “I have been told that this was what was viewable on a particular date”. Rather, it was a question of investigators accessing an archive that was there to be accessed. Therefore, we are not prepared to uphold the arguments that have been advanced in relation to the computers and audio issue.

**Topic M: Dr. Curtis and pathology evidence**

**209.** This issue arises in circumstances where the first pathologist to have an involvement in the matter, by way of conducting a post-mortem and opining thereafter, was Dr. Khalid Jabbar, the former Deputy State Pathologist.

**210.** By 2015, it had become apparent that Dr. Jabbar was very unlikely to be available to give evidence as a prosecution witness at trial. In those circumstances, the then State Pathologist, Professor Marie Cassidy, was approached and she reviewed the file in conjunction with Dr. Michael Curtis, the Deputy State Pathologist, and Dr. Linda Mulligan, the Acting State Pathologist. Their review took as its starting point the fact that the post-mortem examination conducted by Dr. Jabbar on 1<sup>st</sup> May 2013 had not been subject to peer review, nor had it been presented at a “case review” meeting. The reviewing pathologists indicated that they were in agreement with Dr. Jabbar that death had resulted from “blunt force trauma”. Significantly, they went on to add:

“Regarding the mechanism of trauma we are unanimous in opining that the pattern of injuries to the head, ribs and femur is most likely due to vehicular impact trauma”.

**211.** At that stage, the prosecution decided to contact Professor Jack Crane, Northern Ireland’s celebrated State Pathologist. It appears the decision to do so emanated from a suggestion by Professor Cassidy. Professor Crane subsequently opined as follows:

“The severity of the head injury was such that it could not have been caused as a result of a simple fall into the concrete tank. It was due to either blows to the head or as a result of the head having crushed or compressed...

... I note that the pathologists reviewing Dr [Jabbar's] postmortem report suggested that the injuries sustained by the deceased could have occurred as a result of an impact with a motor vehicle. Whilst I accept that this is possible there is, in my opinion, no real evidence to support this contention.”

**212.** As a result of the opinion of Professor Crane, the prosecution found themselves in a situation where the pathologists available to them offered opinions which were, in certain respects, in agreement, and, in other respects, in disagreement. Professor Cassidy and her colleagues and Professor Crane were all in agreement that this was a case of blunt force trauma. However, they diverged in opining what might have caused the trauma; Professor Cassidy and her colleagues felt that the injuries were most likely due to vehicular impact trauma, while Professor Crane was of the view that while that was possible, he opined that there was no real evidence to support that contention. Counsel for the defence felt that in those circumstances, the appropriate course of action was that both experts, Dr. Curtis (on behalf of Professor Cassidy's team) and Professor Crane, should be called by the prosecution. The prosecution team was not open to this course of action – indeed, they went further and indicated that if requested by the trial judge to call Dr. Curtis, they would decline.

**213.** In the event, a degree of compromise was achieved, though from the defence perspective, the formula arrived at was definitely sub-optimal. What occurred was that the prosecution called Professor Crane in the usual way and the defence opted to call Dr. Curtis. It was agreed that he would be called out of turn and would give evidence directly after Professor Crane. The defence complain that the difficulties in which they had been placed were compounded by the fact that when they called Dr. Curtis, the prosecution took

advantage of the situation to canvass and explore theories for which there was no real evidential basis.

**214.** The trial judge ruled on the request that she should call Dr. Curtis in these terms:

“The Court finds no evidence to suggest that the DPP is not properly and correctly fulfilling her duty in the manner in which she has chosen to present the medical evidence in this case. This is a discretion that should be sparingly used, as otherwise the Judge might give the appearance of acting in a partisan manner. Dr Curtis is a compellable and available witness to the defence and the Court is not convinced that the defence arguments provide a sufficient basis for the Court to exercise its discretion to invite the DPP to call Dr Curtis or should she decline for the Court to call Dr Curtis. It is, of course, open to the defence to call the witness should they wish.”

**215.** What occurred was undoubtedly unusual, between the original pathologist becoming unavailable; his work then being reviewed by his former colleagues in the Irish pathology service; their suggestion that an eminent and indeed celebrated pathologist from outside the jurisdiction could be consulted; and then the emergence of a divergence between the Irish pathologists and the expert consulted from Northern Ireland. It seems to this Court that the judgment by the Director that it would not be appropriate to present diverging, conflicting opinions was a responsible and conscientious one. Once that view is taken, the scope for the trial judge to request the prosecution to call a further witness, or to herself call a further witness, was very limited, more particularly because the prosecution was making clear that its position was that they would not comply with a request, as distinct from a direction.

**216.** This Court has no hesitation in rejecting any suggestion that there was anything untoward or improper in the prosecution exploring matters with Dr. Curtis once he was called to give evidence. Any party to a trial, be it civil or criminal, knows that calling a witness

means that the other side will have an opportunity to cross-examine and that there may be downsides for the party calling the witness in that regard.

217. We are not prepared to uphold this ground of appeal.

**Topic N: Tusla and related matters**

218. To a large extent, this issue mirrors and repeats what was raised in the context of the evidence of Ms. Lowry and what issues she would be permitted to deal with. There are, in essence, two sub-grounds here: a substantive ground contending that the evidence in relation to the complaints to Tusla should not have been admitted; and a subsidiary ground relating to the manner in which former HSE/Tusla social worker, Deirdre Caverly, was allowed give her evidence from Boston.

219. So far as the substantive issue is concerned, it is said on behalf of the appellant that this involved the jury being required to address an entirely collateral matter and that it was entirely inappropriate that this should happen in the course of a murder trial. Echoing what was said when considering the parameters of Ms. Lowry's evidence, it is said that this was misconduct evidence, because, in substance, it amounted to allegations of significant wrongdoing involving serious dishonesty on the part of the appellant. The appellant says that there was a certain unfairness in the prosecution advancing this in a situation where the defence had disclosed their hand in the context of an earlier *voir dire*. Finally, it is said that this is another example of where there was inadequate consideration of the need to balance the prejudicial effect against the probative value of the evidence.

220. The Director rejects any suggestion that this is an area where the prejudicial effect of the evidence exceeds its probative value. The Director says that the relationship between Ms. Lowry and the appellant and, more particularly, the appellant's reaction to the fact that a relationship had developed between Ms. Lowry and Mr. Ryan, was central to the case. She

says that the contact with Tusla by the appellant is evidence of an unbalanced and obsessive reaction on the part of the appellant.

**221.** In this Court's view, the contact with Tusla did form a significant part of the narrative and potentially assisted the jury in forming a view as to the relationship between the appellant and Ms. Lowry and, by extension, Mr. Ryan, and the extent to which, if any, the appellant was motivated by *animus*. The subsidiary aspect to this is that the appellant says that if Ms. Caverly was to give evidence, then it was necessary that the prosecution would invoke s. 67 of the Criminal Justice (Mutual Assistance) Act 2008, whereas instead, the prosecution purported to proceed pursuant to s. 13 of the Criminal Evidence Act 1992. The trial judge dealt with this by outlining that she was satisfied that the relevant provisions of the Criminal Evidence Act 1992 had not been overtaken or superseded by the provisions of the 2008 Act, and that the provisions of the earlier 1992 Act were still available to the prosecution.

**222.** In this Court's view, the trial judge was entitled to so conclude. However, even if we were of a contrary view, this would not avail the appellant because, in our view, it would be a classic case for applying the *proviso*. If there were two statutory routes by which evidence from Ms. Caverly could be put before the jury and the prosecution opted for the wrong one, or at least the less desirable one, then this did not and could not give rise to any prejudice.

**223.** Accordingly, we are minded to dismiss this ground of appeal.

**Topic O: Two applications for a discharge of the jury**

**224.** This ground of appeal relates to two applications for a discharge of the jury, one made on 20<sup>th</sup> March 2019 and the other on 1<sup>st</sup> April 2019. While each application was triggered by a particular and specific event, both involved a general complaint about the prosecution's approach to issues of disclosure.

*The application of 20<sup>th</sup> March 2019*

**225.** The application of 20<sup>th</sup> March 2019 came about in circumstances where an issue in relation to a reconstruction exercise undertaken by the prosecution was being debated. When the trial court rose on 20<sup>th</sup> March, three videos were disclosed by the prosecution.

**226.** While the specific issue in relation to the admissibility of the reconstruction exercise was decided in favour of the defence, the fact that videos were disclosed only after the trial court had been debating the issue for some time precipitated an application to discharge. In the course of the application, a number of matters to which reference has already been made, were rehearsed, such as draft reports of the engineer, Michael Reilly, and the Emmet Kenny photographs, to name but two.

**227.** It is clear that the trial court took the application seriously, pointing out that it should not be necessary for the court to remind the prosecution of its disclosure obligations. The trial judge stated specifically that she took seriously the concerns raised by the defence. The prosecution was told in no uncertain terms that it had to fulfil its disclosure duties in a thorough and careful manner, adding – correctly, in the view of this Court – that the fact that the material in question was voluminous did not relieve the prosecution from the duty but only went to illustrate the enhanced care that had to be taken. The trial judge pointed out that if the prosecution failed to fulfil this duty, they put the trial in jeopardy.

**228.** The trial court was of the view that on the facts up to that point, there had been no prejudice to the defence which was incapable of remedy such as would warrant the discontinuation of the trial.

*The application of 1<sup>st</sup> April 2019*

**229.** The second application was triggered by the decision of a prosecution witness, Garda Fiona Conneely, to resile from language that she had used in her witness statement. She was giving evidence about the taking of statements from the children of Ms. Lowry. Originally,

she had referred to the fact that Ms. Lowry was angry during this process. However, when giving evidence, Garda Conneely indicated that she now felt that the word “angry” was not the appropriate one.

**230.** This Court would observe that the occasions when a decision to change a choice of language could ground a serious application for a discharge of the jury are likely to be few and far between, and we cannot see how the fact that Garda Conneely had second thoughts about the choice of the word “angry” could ever have resulted in a discharge. However, while it was contended that what Garda Conneely had done would provide a standalone basis for a discharge, the application was broadened into a wider complaint about the process of disclosure. This Court would like to repeat what it has said many times in the past that discharging a jury is very much a last resort. In this case, the applications were dealt with very seriously by the trial judge and we cannot see how that it was not open to her to come to the conclusions that she did. Indeed, we would go further and say that in our view, her approach was clearly the correct one. Therefore, we dismiss this ground.

### **Topic P: Direction application**

**231.** On 9<sup>th</sup> April 2019, counsel on behalf of the accused applied to the trial judge for a directed verdict of not guilty. Alongside this application, there was also a so-called *P.O’C* application (*The People (DPP) v. PO’C* [2006] 3 IR 238). That will be the subject of separate consideration in the course of this judgment; however it should be noted that its consideration will not be lengthy as, for the most part, the issues raised in the course of the *P.O’C* application involved the rehearsing of issues that had already been raised, either in the context of applications to exclude evidence or for the discharge of the jury.

**232.** So far as the application for a directed verdict of not guilty is concerned, it was what might be described as a classic *Galbraith* application, with reference to other well-known



cases in this area such as *DPP v. M* [2015] IECA 65, *R v. Shippey* [1988] Crim LR 767, *DPP v. Taylor* [2018] IECA 74 and *The People (DPP) v. Barnwell* (Unreported, Central Criminal Court, Flood J., 24<sup>th</sup> January 1997), to name but some. It should be noted at the outset that this application was advanced by reference to both limbs of *Galbraith*.

**233.** The approach to applications for directions to acquit were dealt with by the English Court of Appeal (Criminal Division) in *R v. Galbraith* [1981] 1 WLR 1039. In that case, Lord Lane CJ. commented:

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

**234.** In this case, at the direction stage, the position taken on behalf of the then accused was that there was no evidence that the crime of murder had been committed by the then accused, and if, contrary to that submission, the view had been taken that there was some

evidence, then that evidence had to be regarded as being of such tenuous character that even taken at its height, it could not see a jury properly return a verdict of guilty.

**235.** Counsel began his application for a direction by stating in bold terms that the essential matter in the case was the killing of Mr. Ryan, and on that essential matter, there was “actually no evidence, good, bad or indifferent”. He said that in contrast to *Barnwell*, where the trial judge was prepared to concede that the evidence in that case established a degree of proof, but proof which could best be described as tenuous in the extreme, in the present case, there was no proof, only speculation or suspicion at most. He referred to the fact, and in this regard he was undoubtedly correct, that this was a circumstantial evidence case. He referred to the emphasis on establishing motive. However, he suggested that the prosecution had not gone very far along that road. He said that it might be a case where there was a motive to continue a relationship, but was there established a motive to kill? Counsel suggested that of itself, motive does nothing more than establish that there is “some interconnection of personality”.

**236.** Counsel went on to say that taking the prosecution case at its height, even if it was accepted that a motive to kill had been established, that still would not “prove the killing”. He said, not entirely accurately, that to achieve a murder conviction, the prosecution would have to establish beyond reasonable doubt that the appellant had killed Mr. Ryan and that at the time he killed him, he intended to kill him. It was said that establishing motive would bring the prosecution very little distance along the road of establishing that Mr. Ryan was killed by the appellant. Apart from establishing a motive, nothing more would be achieved and what would remain would be large doses of speculation.

**237.** Counsel continued on to say that there was a chasm in terms of evidence of what occurred on 3<sup>rd</sup> June 2011. He said, using a phrase which he attributed to Hardiman J., that the case was “forensically barren” as revealed, he contended, by the efforts of the prosecution

in the course of cross-examination to invite Dr. Curtis to engage in speculation that the deceased might have been lured to a milking parlour. Counsel pointed to the very narrow time window of three to ten minutes on the morning of 3<sup>rd</sup> June 2011 for something untoward to occur, and said that the prosecution evidence had singularly failed to paint the picture of what occurred. There was no evidence as to the process that resulted in the death of Mr. Ryan. He, again, used the phrase, “a completely barren landscape” when focusing on the paucity of evidence as to when and how the body came to be in the tank. Counsel said that the height of the prosecution evidence in relation to the death of Mr. Ryan is that he died as a result of blunt force trauma, but the trial court did not know the mechanism which gave rise to the blunt force trauma. He referred to the issues about the possible involvement of a car and the divergences of opinion in that regard between the pathologists. With some force, repeating the point, he said to the trial court, rhetorically, “if you cannot say anything about the killing, you cannot say it was murder”.

**238.** In resisting the application for a direction, counsel on behalf of the prosecution made the point that this was a circumstantial evidence case and, in that regard, the defence approach of isolating separate strands of the prosecution case and asserting that each of them established no more than suspicion was not appropriate. Counsel acknowledged that the prosecution could not put a particular implement into the hands of the accused, but went on to say that the state of the evidence was such that it called for one reasonable inference to be drawn, which was that this was a violent death, and then pointed to the circumstances in which the body was discovered. He contended that it was quintessentially a matter for a jury.

**239.** In ruling on the matter, the trial judge said that she was satisfied that taking the prosecution case at its height and having regard to the evidence of Dr. Curtis, the state of the evidence was not such that there was no evidence, nor was the evidence that was there so infirm that a jury, properly directed, could not convict upon it. The trial judge added that

while a jury could reasonably reach an alternative inference, in her view, it was open to the jury to reach the inference contended for by the prosecution. Further, the trial judge was of the view that the prosecution evidence was such that its strength or weaknesses depended on the view taken of it by the jury, which was a matter within the province of the jury.

**240.** The case facing the trial judge at the time of the application for a direction was undoubtedly an unusual one. The prosecution was not in a position to say precisely how the deceased met his death; they were not in a position to put a weapon in the hands of a suspect; and they did not have direct evidence as to the time of death, though they undoubtedly had a theory in that regard. The case was described, with some justification, as “forensically barren”. There were no direct admissions, though answers had been given during the course of interviews which were damaging from a defence perspective. In the circumstances, it was to be expected that there would be an application for a direction which would be pressed very strongly. It was an application which gave the trial judge much to think about and indeed, it must be said that the application having been refused and a conviction having resulted, it was an issue that gives an appellate court much to consider.

**241.** While the factual situation was unusual, the battleground between prosecution and defence was the standard one in a circumstantial evidence case. The defence contended that the furthest that the prosecution had been able to go was to raise a degree of suspicion, and the prosecution asserted that the stated evidence was such that a jury, properly charged, could return a verdict of guilty that would be a safe and proper one.

**242.** Therefore, it is necessary to consider what the state of the evidence was. The starting point for such an exercise has to be a recognition of the fact that there was undoubtedly evidence from which a jury could safely conclude that the deceased met a violent death, and that it could be concluded that the individual inflicting the fatal injuries must have intended to kill, or at the very least, have intended to cause serious harm.

**243.** The place where the body was located then becomes a matter of very considerable significance. The location was one the existence of which very few people were aware – four in all it would seem. If a jury was prepared to accept that Mr. Ryan was murdered and that his body was located and retrieved from a concealed location, that would be a matter of considerable significance. It is at that point that the evidence regarding the relationship between the appellant and Ms. Lowry, and the relationship that then developed between Ms. Lowry and the late Mr. Ryan, becomes highly significant. The evidence of an emotional or romantic involvement, and the difficulty in accepting that the relationship had ended (perhaps expressed most clearly in the “Dear Patricia” letter), coupled with the fact that the appellant was under financial pressure and was financially dependent on Ms. Lowry, also becomes significant. It offered powerful evidence of motive, and while evidence of motive of itself would not be sufficient from the prosecution perspective, the evidence they were in a position to lead on the topic was very significant indeed in the context of the case.

**244.** At this stage, a number of actions of the appellant which seemed strange or bizarre entered the picture, such as: (i) taking the phone of Ms. Lowry; (ii) sending text messages to Mr. Ryan; (iii) ringing Mr. Ryan (activity which went close to breaking up the Lowry/Ryan relationship); (iv) being found on the Ms. Lowry’s porch in January 2011; (v) taking Ms. Lowry’s passport and disrupting her travel plans; and (vi) contacting the HSE, alleging that Ms. Lowry was guilty of child neglect.

**245.** The evidence in relation to 3<sup>rd</sup> June 2011 and 30<sup>th</sup> April 2013 provides further pieces of the jigsaw. In the case of 3<sup>rd</sup> June 2011, there is the conflict between the account of his actions provided by the appellant and what Breda O’Dwyer, the AI technician, has to say, which is not of itself significant, but certainly adds to the quilt of emerging evidence.

**246.** After the disappearance of Mr. Ryan, the relationship between Ms. Lowry and the appellant resumed. Thus, it would appear that the appellant has benefited from the fact of Mr. Ryan's disappearance.

**247.** At this stage, Ms. Lowry meets Flor Cantillon and begins a relationship with him. She offers the jury evidence of an inappropriate response on the part of the appellant, asking inappropriate questions and so on. More unusual is the fact that when the Gardaí searched the premises of the appellant on 17<sup>th</sup> May 2013, they came across an audio file on an external hard drive featuring Ms. Lowry and Mr. Cantillon which indicates a continuing fixation with Ms. Lowry.

**248.** In relation to the events of 30<sup>th</sup> April 2013, the prosecution were able to point to a number of very curious features. There is, firstly, the fact that the slurry spreading was being undertaken at a time when the appellant's occupation of the farm was coming to a close. Perhaps more curious than that was the decision to utilise a tank which he had not had any reason to access for a number of years. Then, there is the divergence between the quantity of water which, on his account, he would have expected to be there, and the limited amount that actually was there. There was also the issue about whether the slurry operation had actually commenced and why someone who would be working with slurry would not have dressed in an appropriate fashion.

**249.** The significance of the fact that the appellant was one of a handful of people who knew of the location of the tank where the body was retrieved is enhanced by the evidence that he had sought to link Ms. Lowry to knowledge of the tank as an observer of work carried out by Sean Dillon in the aftermath of a heifer getting caught, when it appeared that the heifer had gotten caught at a different tank altogether. This is notwithstanding that when the appellant was giving his account of that incident, he appeared to describe the dimensions of

the tank and the depth of sludge in the tank where the body was located, rather than providing a description of the tank where the heifer got caught.

**250.** Added to this was the evidence in relation to computer searches. The prosecution team was in a position to say that a jury could take the view that the significance of the evidence was enhanced by timing – for example, internet searches occur on 3<sup>rd</sup> December 2012, the day when the prosecution say they can put the appellant at the premises of Ms. Lowry. The significance of the evidence is then further heightened by the fact that the explanation offered when questioned relates those searches to a family tragedy, even though some of the most significant searches predate that tragedy.

**251.** We have not sought to identify all of the elements of the prosecution case. Doing so would involve replicating the lengthy closing speech of prosecution counsel which was delivered on 11<sup>th</sup> and 12<sup>th</sup> April 2019. However, we believe that even this limited survey of the evidence makes clear that this was a circumstantial evidence case where there were many strands to the prosecution case. After careful consideration, we have concluded that the multiple strands were such that a properly directed jury could conclude that the various strands, when taken in conjunction, formed a very sturdy rope, such that this was a case where a verdict of guilty could properly and safely be returned. We acknowledge that this case was not a straightforward one, and indeed, it could be said with some truth that it was quite a finely balanced one, but after careful consideration, we are firmly of the view that it was a case which was properly left to the jury.

#### **Topic Q: The *PO'C* application**

**252.** The *P.O'C.* application was presented in tandem with the direction application on *Galbraith* grounds. It was advanced at two levels: firstly, as a standalone *P.O'C.* application; and secondly, on the basis that the issues raised were also relevant in the context of the

*Galbraith* application and might, indeed, be regarded as determinative if it was accepted that the decision to direct, or refuse to direct, was a borderline one.

**253.** The *PO'C* application involved a rehearsal of the large number of applications that the trial court had heard to exclude various portions of the evidence. We have already expressed some unease at an over-readiness to resort to the device of seeking a *voir dire*.

**254.** The issues raised in the course of the *PO'C* application had arisen for consideration at earlier stages in the trial. The trial judge ruled on the matter as follows:

“With regard to the *POC* application, the Court has dealt with these issues in the course of the trial, but accepts that the defence are entitled to draw the issues together at this stage with a view to the Court taking an overall view of the issues. All of the Court’s previous rulings will be on the transcript. The issue of ongoing and late disclosure has been raised by the defence since the very beginning of the trial and addressed by the Court both in the course of the trial and in its rulings. As the prosecution have argued, these issues have been ventilated in front of the jury; other matters have been ventilated through *voir dire* and ruled on. The overarching duty of the trial court is to ensure that the accused receives a fair trial and it is this duty which informs the Court's rulings to include the instant application.

Having considered the overall evidence and the running of the trial, the Court is further satisfied that the accused’s right to a fair trial has been maintained. The Court therefore declines the application for a directed verdict of not guilty on foot of either application and will allow this matter to go to the jury.”

**255.** Many of the individual issues to which reference was made have featured in the course of this appeal and have been referred to already in the course of this judgment. We have already stated in relation to the application for a direction that it was to be entirely expected that an application for a directed verdict of not guilty would be advanced and



strongly pressed, and we made the point that the application was one which gave the trial judge much to consider. However, we would, not make the same observation in relation to this *PO'C* application. As an appellate court, we are constantly called on to review transcripts and it is evident to us that *PO'C*-type applications are now being made with greater regularity; indeed, it can be said that they are now being made as of course. We take this opportunity to deprecate such a developing practice. The trial judge to whom a *PO'C* application is made will stop the trial only if satisfied that there is a real risk of an unfair trial.

**256.** In the present case, we do not believe that a repackaging of already rejected applications could possibly provide the basis for halting the trial on *PO'C* grounds. We have no hesitation in rejecting this ground out of hand.

### **Topic R: The judge's charge**

**257.** We turn now to the judge's charge of which a number of criticisms are made.

#### *The charge and requisition in relation to circumstantial evidence*

**258.** As is common, the judge's charge was effectively divided into two parts – the first dealing with matters of law, and the second dealing, in the main, with the evidence. The trial judge dealt with the issue of circumstantial evidence in both. Having dealt with what we might call the core elements of the law applying to all criminal trials, the trial judge proceeded to refer to the topic of circumstantial evidence, stating:

“Now, reference has been made to the type of evidence which you've received in this case. Sometimes a jury is asked to find some fact proved by direct evidence, for example if there is evidence from a reliable witness who actually saw a defendant commit a crime or if there's a video recording of an incident which plainly demonstrates his guilt or if there is a reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against an accused

person. It is often the case that direct evidence of a crime is not available and the prosecution relies on circumstantial evidence to prove guilt. That means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. Circumstantial evidence does not give rise to direct evidence but rather to inferences and I've already told you what inferences are. It is difficult to list every category of circumstantial evidence but some common examples would be evidence that establishes motive, evidence that establishes opportunity to commit the offence, evidence as to the state of mind of the accused at the time that the offence took place, the commission of preparatory acts, the possession of items that would be used to commit the offence, evidence of identification, fingerprinted [*sic*], DNA records, mobile phone records, establishing presence at a place or a connection to an object, evidence of the commission of similar acts at a point close in time to the commission of the offence in question.”

The trial judge went on to say:

“Circumstantial evidence is any fact from the existence of which the jury may infer the existence of a fact in issue. The jury is entitled to draw inferences from circumstantial evidence where the jury is satisfied beyond a reasonable doubt of the truth of that evidence. You should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation.

Speculating, as already explained, amounts to no more than guessing or making up theories without good evidence to support them and you cannot do that.

Circumstantial evidence is a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but taken together may create a conclusion of guilt with as much certainty as human affairs can require or

admit of. You, as the jury, must consider the cumulative weight of the circumstantial evidence.”

Later in the charge, in the body of that part wherein she dealt primarily with the evidence, the trial judge added the following:

“I would ask you then to consider the weight to be attached to each piece of circumstantial evidence and then consider the whole and it is the cumulative weight of each piece of circumstantial evidence which you have accepted as being true to your satisfaction beyond all reasonable doubt and if the cumulative weight of the evidence is such as to prove to your satisfaction beyond all reasonable doubt that the accused committed the crime then you may convict. You must be sure that when you apply your mind to all of the facts that you accept as being true beyond reasonable doubt that you come to the conclusion that to treat the matter as pure coincidence is an affront to common sense. So, you have to be satisfied that not to find him guilty would be an affront to common sense. You must, of course, keep in mind at all times the presumption of innocence in favour of the accused which is only displaced when you are satisfied beyond reasonable doubt that he is guilty. Accordingly, you must be satisfied that you can accept the circumstantial evidence as being credible or true beyond all reasonable doubt. You must consider whether the inference suggested to be drawn from the evidence is warranted or not. It is the combined or cumulative effect of the evidence that is of importance in considering whether the accused’s guilt has been proved beyond a reasonable doubt. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of

sufficient reliability and strength to weaken or destroy the prosecution case. You have to consider all of the evidence and remember that with these pieces of circumstantial evidence, as with almost every piece of evidence, there is usually more than one way of looking at it. Part of a jury's deliberation will involve looking at all of the evidence from both sides. If there's another rational explanation which can point to innocence the jury must adopt the inference in favour of the accused. A jury may convict on purely circumstantial evidence but to do this they must be satisfied not only that the circumstances are consistent with the accused having committed the crime, but also that the facts are such as to be inconsistent with any other rational conclusion than that he is guilty.”

**259.** It is hard to see how any judge could have been more thorough in charging the jury on the topic of circumstantial evidence. This topic has been dealt with on many occasions and contrary to the proposition that it is an area of complexity, we are of the view that it can readily be explained to a jury since the combination of several facts as a matter of common sense may lead inexorably to a conclusion of guilt. The charge here was based upon that approved in *The People (DPP) v. Nevin* [2003] 3 IR 321. The crucial passages of the charge in the present case were in accordance with those used by the trial judge in that case and so approved. Notwithstanding this fact, counsel for the appellant says that the charge was deficient and his requisition was in the following terms:

“... Now, the Court used a portion of... [and]... read out the quotation from Ms Justice Carroll at first instance in *Nevin*, which is the comment about it being an affront to common sense. I have a problem with that line actually and [...] it wasn't adopted ultimately by the Court of Appeal which simply said [...] the Court had no problem with the entirety of the Judge's Charge in circumstantial evidence but it didn't specifically deal with that phrase. The problem was the line that the Court added in:

‘But keep in mind all the time that there is, in this, a presumption of innocence... which is only displaced when you are satisfied beyond a reasonable doubt ...’.

**260.** Counsel had then made what he himself characterised (and this, we think, is to put the matter benignly) as “an unusual requisition”. He submitted that the trial court should re-charge the jury without reference to what was said by Carroll J., being part of the charge approved in its entirety by the former Court of Criminal Appeal (presumably on the basis that the reference to “common sense” was not, in his submission, explicitly dealt with and approved). In that regard, counsel submitted that:

“... there is a risk that the jury does, in fact, look at it and say for want of a better reason we can convict. In other words, common sense tells us someone killed him, so for want of a better...a better option we will convict..”.

**261.** It is contended that the consequence was that the burden was essentially reversed or “shifted” to the defence. Counsel then referred to the use of the term “common sense” as “a very graphic phrase”, and one which “essentially says find him guilty unless it is an affront to common sense” and interferes with the necessity of proof beyond reasonable doubt. Ultimately, he suggested that it was a “confusing phrase” or an “unfortunate phrase”.

**262.** We are of the view that there is no basis for this criticism of the charge. It has long been accepted, and, indeed, was the law prior to *The People (Director of Public Prosecutions) v. Nevin* [2003] 3 IR 321, that the form of words impugned correctly states the approach a jury should take to circumstantial evidence or as to its nature and purpose. The form of words in question was approved notwithstanding the fact that it was not “singled out”, so to speak, from the remainder of the charge in that case for approval.

**263.** It was also submitted that by “emphasising” (there was no “emphasis” on the word as such) that it would be “an affront to common sense”, there are “significant risks that the burden and standard of proof are in effect reversed”. It was said that it was an “emotive

phrase which has no place being deployed in a criminal trial”; that, effectively, the use of that term was not “the correct statement of the burden and standard of proof”; and that “no jury would ever be directed that an acquittal is only available if the defence show that a conviction would be an affront to common sense”.

**264.** We will pause there. We cannot understand how it could be suggested that the use or the form of words in question could give rise to any risk of reversal of the obligations of proof on the prosecution in the minds of the jurors; we regard the proposition as having no basis in the evidence or the charge even if one were to exclude all references to any part of it other than that this impugned element. The phrase is not emotive. The jury are required to use their common sense. The jury were not told that an acquittal was “only available if the defence show that a conviction would be an affront to common sense”.

**265.** It was also said that “the test is for the prosecution to establish that there is no reasonable doubt as to guilt”; that “[i]ntroducing novel approaches or concepts to the burden and standard of proof is unhelpful and indeed contrary to long established principles and authority”; that the forms of words used could never be permitted; and that the judge erroneously omitted to say that “each piece of evidence should be analysed in the ordinary way, bearing in mind the burden and standard of proof”.

**266.** It was further submitted that the judge failed to engage in the matter sufficiently; with this we simply cannot agree. There is no basis for suggesting that anything said by the judge undermined the proposition that the prosecution had to establish proof beyond reasonable doubt. The approach adopted was not novel, as alleged, nor could it be characterised – as contended – as unhelpful or contrary to principle or authority. Furthermore, it is quite plain from the charge that the jury was required to consider each piece of relevant evidence and to decide whether or not each fact regarded relevant to a conclusion based on circumstantial evidence was proved to the requisite standard of proof.

**267.** We therefore reject this ground of appeal.

**268.** This leads us to a further observation of general application: every charge must be considered in its entirety. We cannot set out here the entirety of the charge, but, in the most comprehensive way, the trial judge referred to the presumption of innocence, the onus and burden of proof, the manner in which the jury should address evidence where more than two views were possible, the fact that the accused was entitled to the benefit of any reasonable doubt and the obligation of the jury to acquit unless they were satisfied of the guilt of the accused beyond a reasonable doubt. In respect of each piece of (relevant) evidence, it was clear from the charge that the jury had to be satisfied beyond a reasonable doubt of the fact in question. No juror could have been in any doubt as to the manner in which the evidence should be approached, with particular reference, in the immediate context of this ground of appeal, to the manner in which a jury should address circumstantial evidence in order to give effect to the necessity of the prosecution to prove the case beyond a reasonable doubt if they were to convict.

**269.** We think that the appellant under this head and otherwise has failed to have regard to that fundamental point that the charge must be taken as a whole. We think it is also necessary to emphasise again, and this has repeatedly been done, that a party is not entitled in a charge to insist upon what has been called a “shopping list or “wish list” of *desiderata* and cannot choose the form of the charge, as here, as to the form of words impugned.

#### *Misconduct evidence*

**270.** Criticism is also made of the charge insofar as it dealt with the subject of misconduct evidence. What is meant here is evidence of background or circumstance, which is, of course, admissible in principle if relevant, even if it shows misconduct, or even criminality, on the part of an appellant. All relevant evidence is admissible. Generally speaking, evidence, for example, of misconduct, whether of the type alleged in the charge before the Court or

otherwise, is not admissible because it is irrelevant to proof. Evidence of motive, background and circumstance do not fall into this forbidden category but may, notwithstanding that, be excluded in a particular case on the basis that the probative value of the evidence is exceeded by its prejudicial effect. Extensive reference has already been made to that evidence herein. The trial judge addressed the topic as follows:

“As part of the background narrative of this case you will have heard evidence of misconduct of the accused. This evidence is of limited value and is admitted to assist you as to the sequence of events. I must warn you that you cannot use that evidence to reason that the accused must be guilty of the charge of murder, being the only charge on the indictment. Further, you will have heard that evidence has been given of the accused's good character, that he has no previous convictions and as with any man of good character it supports his credibility. This is a factor which you should take into account when deciding whether you believe his evidence given through interviews. The fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime. These are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this, you are entitled to take into account everything you've heard about the defendant. Having regard to what you know about the defendant you may think that he's entitled to ask you to give considerable weight to his good character when deciding whether the prosecution has satisfied you as to his guilt. This is a matter for you.”

**271.** It will be seen here that the judge explained the “limited value” of such evidence before reminding the jury of the evidence of the appellant’s good character. The judge pointed out that the fact that the appellant was “of good character may mean that he is less likely than otherwise might be the case to commit this crime” and elaborated somewhat on



the significance of such evidence. She need not, of course, have done anything of the kind in the light of the decision of this Court in *DPP v. Sherlock* [2019] IECA 223, and accordingly, the appellant was the beneficiary of an uncovenanted bonus in the latter regard. That decision was delivered subsequent to the trial so no criticism can be made of the trial judge.

**272.** Notwithstanding the fact that the trial judge had made clear the reason why the misconduct evidence had been correctly placed before the jury, and the fact that it could not be used to reason that the appellant must be guilty of the offence, she drew the teeth, so to speak, of the most remote, adverse implication by referring to that evidence of good character. The appellant was not satisfied with this, however, and a requisition was made in the following terms:

“The Court gave a short and I think correct statement of the law but I just wonder if the Court would consider it beneficial to expand ever so slightly in terms of saying to the jury, because the Court said to the jury that as part of the background I think it said it was limited value to assist and you cannot rely on that evidence as part of the charge of murder, that the Court would indicate that this was in reference to any evidence of wrong doing on the -- alleged against the accused, that this is what you were talking about in relation to misconduct. But the Court just said in relation to misconduct evidence and we as lawyers might be familiar with what misconduct evidence is but, in fact, the jury might not be completely clear about it.”

In the course of argument, counsel went on to say that:

“...I said at the outset of my requisition that I think it's -- my submission is that it's absolutely correct in law. It is merely whether or not it ought to be expanded on and I'm suggesting and submitting to the Court that it would benefit from -- the jury might benefit from just a greater expansion on that issue, that it cannot be used as evidence of guilt in murder and that what the Court was dealing with was evidence of wrong

doing or ways of -- or other allegations of wrong doing against the accused. I'm not submitting -- I think the Court is probably -- the Court is correct, I think, on that and it dealt with propensity, that it isn't evidence that because somebody is accused of wrong doing on another occasion that they are guilty of murder.”

**273.** The position of the appellant accordingly is that even though what the trial judge said was correct, the decision of the judge not to elaborate before the jury is a misdirection and gives rise to a good ground of appeal. We have already addressed the question of admission of that evidence above. We are of the view that the trial judge simply did what she said she would do when admitting the evidence, that is to say (using the words of the appellant in his written submissions) that she would give a “full and clear charge on the issue” when admitting the evidence “as a necessary protection”. In this regard, it was contended in submissions that “[t]he charge on this issue was insufficient and inadequate in all the circumstances of this case.”

**274.** We cannot see any basis for this submission; the law was stated clearly on this topic by reference to the facts and it is inconceivable that it was unclear to the jury to what evidence the trial judge was referring when she said that misconduct evidence could not be relied upon in proof of the charge especially having regard to the reference to the good character of the appellant. We accordingly reject this ground also. No trial judge could have done more and the appellant was not entitled to any elaboration.

*Instruction to jury to decide what happened “and subsequent events”*

**275.** Under this heading, the appellant seeks to deal with the issue of whether or not the judge was right in referring to the fact that the “job” of the jury was to decide the facts of the case and come to a verdict without making it clear that the jury might, as counsel for the appellant put it, “decide to not decide [what happened]”. It is contended that this error on the part of the judge was, as it is put in the submissions, “further complicated” by the trial

judge's re-charge where she dealt with the fact that the prosecution was not contending that the homicide occurred in a nominated or identified place. It was submitted that the jury was being asked to themselves "solve" the crime. This submission accordingly conflates two issues raised at trial, *viz*, the reference to the role of the jury, and that one pertaining to the place of death because on the day after the charge, counsel for the appellant sought a discharge of the jury on the basis that what had been said by the judge in her re-charge pertaining to the *locus* of the homicide fundamentally undermined (our words) the defence.

**276.** We first address the issue of the supposed error by the trial judge when she told the jury that it was for them to decide what had occurred. The appellant's requisition at trial and the contention on this appeal that there was some error in this context is yet another unambiguous example of an attempt to single out or isolate something from the remainder of charge and seek to condemn it. Towards the commencement of the charge, the trial judge explained the role of the various participants in the trial in these terms:

"They [counsel for the prosecution] are the prosecution team instructed by the chief prosecution solicitor. It is not their job to get a conviction at any cost. Their job is to present to you all the relevant and admissible evidence so that you, in fact, can do your job and decide what the facts of the case are, decide what happened in the case and come to a verdict in the case. The role of the defence [...] is to represent the interests of the accused person..."

**277.** Later, the trial judge elaborated and that extended to telling them that:

"Our system assumes, and I think correctly, that 12 people brought from diverse backgrounds, different ages, different genders, different experiences of life can come together bringing with them their common sense, their knowledge and experience of life and they can look at the evidence in a particular case and decide what happened

here, decide what are the facts of this case. When you retire to your jury room that is precisely what you are going to do.”

And:

“You'll decide what evidence you accept, what evidence you'll reject and you'll come to a conclusion on the evidence and that's your job and it's solely your job.”

**278.** Later again, the trial judge went on to assist the jury by saying to them that:

“I think it may be helpful to you in your work if, first of all, you find the facts -- you attempt to find the facts in the case, decide what happened and then, having decided that, you apply the law to the facts and again I must remind you that when finding the facts they must be established to your satisfaction beyond a reasonable doubt.”

**279.** The contention advanced is that this instruction to the jury, or perhaps more properly these instructions, gave rise to a difficulty because they might not actually be able to say what occurred and that the trial judge should have emphasised to them that when the court referred to the fact that they should decide what happened, that did not mean that they actually had to come to a conclusion. It was contended that there was a risk that the jury would:

“... sits down and decides [*sic*] what happened, they will find as a fact what happened up at Fawnagowan specifically on the 3<sup>rd</sup>. They may not be able to do that and they're entitled to not be able to do that and if they're not able to do it they may wonder well, do we now have to decide the facts but there must be left open -- this is one of those cases -- in a lot of cases if there's an armed robbery or something the Court can -- a jury can decide what happened from all the available evidence, but this is one of those cases where they might actually not be able to decide what happened and if they can't that's the whole -- a very large part of my defence and a very large part of my defence is that they can't say on the evidence that's available what happened...”

**280.** In oral argument here, counsel for the then accused said that this was the “principal issue in relation to our concerns” (about the charge).

**281.** It is perfectly plain that in the context in which the impugned forms of words were used, the judge was merely telling the jury what their role was; namely, to decide the case for which purpose they had to decide what occurred in accordance with the principles of law which she had elaborated correctly; that is the role of a jury. There is no basis for telling a jury when charging them that they may disagree or need not bring in a verdict or are not compelled to bring in a verdict. The complaint made here comes perilously close to the proposition that the jury must be told that they can disagree. It is said that the issue (or perhaps we would say the non-issue) in question is compounded by the manner in which the judge dealt with a requisition by the prosecution when recharging the jury. This equally seems to arise as a free standing ground of complaint.

**282.** In any event, the two requisitions were made by the prosecution, one of which is relevant. The judge told the jury that it was part of the prosecution case that the defendant was killed in the yard; in fact, the prosecution in strictness never contended that they could identify any particular (perhaps precise or exact are better adjectives ) location. Counsel for the prosecution raised this issue on requisition, and, in that context, stated that he had “close[d] the case on the basis that the body was retrieved 50 yards from where [the deceased’s] car was parked and I think 60 yards from where he slept that night ”. The judge had, in dealing with the offence charged, quoted in part from the particulars to the effect that the allegation was that the appellant “on a date unknown between the 3<sup>rd</sup> day of June 2011 and the 30<sup>th</sup> of April 2013, both dates inclusive, in the county of Tipperary, murdered Bobby Ryan.”

**283.** It is perfectly plain from the evidence that the prosecution case was that the appellant murdered the deceased near the house, the yard or his vehicle (or, indeed, where it was

parked) at the farm at Fawnagowan; nobody had any doubt about what the prosecution was saying as to the *locus*. There are cases, perhaps the overwhelming majority, where the precise place at which the homicide occurred can be proved (*e.g.* in a bedroom of a particular house or on the street adjacent to a particular shop or the like). Here, there was a want of exactitude or precision – it was to this the judge was referring - but it is by no means uncommon that this might be the case. The case was met by the appellant on this basis. The very idea that the approach taken on behalf of the appellant and any emphasis it may have placed upon the want of direct evidence as to locations, times, the sequence of events, or in any other respect whatsoever, was undermined or prejudiced is insupportable and the discharge was rightly refused. The judge merely corrected herself to remind the jury of the undoubted fact that the prosecution could not precisely or exactly pinpoint the immediate *locus* of the death. We need hardly say that the general rule is that the prosecution do not necessarily have to prove where death occurred. How it could have compounded the supposed error as to what the judge said about the role of the jury is inexplicable.

**284.** There is no question of “compounding” some error; there was none. We did not understand counsel on behalf of the appellant to press the proposition in argument that the jury should have been discharged in connection with what the judge said pertaining to the prosecution stance about the location of the homicide, but rather to rely upon what she so said as a misdirection and to contend that it, whether alone or with other elements, would necessitate the quashing of the verdict; this is perhaps a distinction without a difference because the core issue is whether or not the judge was right or wrong in what she said.

**285.** We accordingly reject this ground of appeal also.

### **Conclusion of this Court**

286. The Court has considered each of the grounds of appeal advanced, and we have not upheld any of them. We have asked ourselves whether anything we have heard during the course of the appeal hearing, or anything we have read, has caused us to have doubts as to the safety of the verdict or the fairness of the trial, and we have concluded that is not the case. We, therefore, dismiss the appeal against conviction.

## APPENDIX

### **GROUNDS OF APPEAL:**

1. The trial was unsatisfactory given the disclosure issues which arose and the manner in which these issues were dealt with by the prosecution and learned trial judge such that in all the circumstances the verdict of the jury should be set aside.
2. The learned trial judge erred in law or a mixed question of law and fact in admitting the evidence of Mary Lowry to the extent that she did following legal argument at the commencement of the trial.
3. Without prejudice to the generality of ground 2 above the learned trial judge applied the wrong legal test in approaching the issue of admissibility of the evidence of Mary Lowry.
4. Without prejudice to grounds 2 and 3 above the learned trial judge erred in law in applying the wrong standard of proof to the issue of admissibility or exclusion of the evidence of Mary Lowry.
5. Without prejudice to the forgoing much of the said evidence which was so admitted was done on the basis of the fact that the purpose of admitting much of the evidence was to establish motive, but much of the evidence related to events that post dated the purported date of the killing or was otherwise utilised in the course of the trial inappropriately, incorrectly or unfairly.
6. The learned trial judge erred in law or a mixed question of law and fact in admitting the evidence of Dr. Manlove.
7. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she dealt with the evidence of Garda Conor Ryan.



8. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she dealt with evidence that the accused was “clean” or “relatively clean” on the 30<sup>th</sup> April 2013.
9. The learned trial judge erred in law or a mixed question of law and fact in the manner [in] which she refused further cross examination of Michael Reilly arising from the re-examination of Michael Reilly.
10. The learned trial judge erred in law or a mixed question of law and fact in ruling that the search warrant issued on 13<sup>th</sup> May 2013 was valid and admissible.
11. The learned trial judge erred in law or a mixed question of law and fact in admitting into evidence at all issues of or reference to depression and/or mental health or failing to limit such references or the use thereof as appropriate.
12. The learned trial judge erred in law or a mixed question of law and fact in refusing to accede to defence objections relating to interviews with the accused of the 16<sup>th</sup> and 21<sup>st</sup> of May 2013.
13. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Emmet Kenny and the manner in which she failed to accede to defence obligations
14. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Gary Cunningham and the manner in which she failed to accede to defence objections.
15. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Breda O’Dwyer and the manner in which she failed to accede to defence objections.

16. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Sean Dillon and the manner in which she failed to accede to defence objections.
17. Without prejudice to ground 13 the learned trial judge failed to adequately deal with the failure of An Garda Síochána to seek out and preserve evidence in relation to Emmet Kenny.
18. Without prejudice to ground 15 the learned trial judge failed to adequately deal with the failure of An Garda Síochána to seek out and preserve evidence in relation to Breda O'Dwyer.
19. The trial was unsatisfactory in circumstances where An Garda Síochána failed to properly and adequately deal with and preserve the scene at Fawnagowan, County Tipperary on the 30<sup>th</sup> April 2013.
20. Further the trial was also unsatisfactory where An Garda Síochána failed to properly and adequately deal with and preserve the exhibits and materials available at Fawnagowan, County Tipperary on the 30<sup>th</sup> April 2013.
21. The trial was unsatisfactory in circumstances where An Garda Síochána failed to properly and adequately search Fawnagowan, County Tipperary in the immediate aftermath of Bobby Ryan being reported as missing on the 2011.
22. The learned trial judge erred in law or a mixed question of law and fact in admitting the evidence of Garda Fitzpatrick in the manner which she did and to the extent which she did.
23. The learned trial judge erred in law or a mixed question of law and fact in permitting the prosecution to call Garda O'Brien to augment the evidence of Garda Fitzpatrick notwithstanding defence objections.

24. The learned trial judge erred in law or a mixed question of law and fact in permitting the prosecution to produce exhibits pertaining to computer searches in the manner in which they did.
25. The learned trial judge erred in law or a mixed question of law and fact in failing to accede to defence objections to portions of the interviews with the accused of the 20<sup>th</sup> and 21<sup>st</sup> of January 2014.
26. The learned trial judge erred in law or a mixed question of law and fact in refusing the defence application for the Court to call Dr. Curtis.
27. The learned trial judge erred in law or a mixed question of law and fact in permitting Dr .Crane’s additional notes be admitted notwithstanding defence objections.
28. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Eddie Quigley and the manner in which she failed to accede to defence objections.
29. The learned trial judge erred in law or a mixed question of law and fact in the manner in which she admitted the evidence of Jack Lowry and the manner in which she failed to accede to defence objections.
30. The learned trial judge erred in law or a mixed question of law and fact in admitting into evidence at all issues of or reference to Tusla or complaints to Tusla or failing to limit such references or the use thereof as appropriate.
31. The learned trial judge erred in law or a mixed question of law and fact in permitting evidence to be given by live television link of the witness Deirdre Caverley.
32. The learned trial judge erred in law or a mixed question of law and fact in admitting into evidence at all issues of or reference to Flor Cantillon or failing to limit such references or the use thereof as appropriate.

33. The learned trial judge erred in law or a mixed question of law and fact in admitting into evidence recordings purporting to be of Flor Cantillon.
34. Without prejudice to grounds 32 and 33 above the learned trial judge failed to satisfactorily resolve the failure of An Garda Síochána to investigate any such recordings found on the computer of the accused in a timely, expeditious and fair manner.
35. Without prejudice to grounds 32, 33 and 34 above the learned trial judge failed to exclude the recordings purporting to be of Flor Cantillon as being unfair in all the circumstances.
36. Without prejudice to grounds 32-35 inclusive, the learned trial judge ought to have excluded said recordings on the grounds that any such evidence was more prejudicial than probative.
37. The learned trial judge erred in law in refusing to discharge the jury on application by the defence on the 20<sup>th</sup> March 2019.
38. The learned trial judge erred in law or a mixed question of law and fact in admitting the evidence of the deposition of Rita Lowry in the manner in which she did.
39. The learned trial judge erred in law in refusing to discharge the jury on application by the defence on the 1<sup>st</sup> April 2019.
40. The learned trial judge erred in law or a mixed question of law and fact in refusing to accede to defence objection to portions of memorandum of interview with the accused whilst he was in custody under arrest for murder.
41. The learned trial judge erred in law or a mixed question of law and fact in refusing to discharge the jury on application by the defence on the 5<sup>th</sup> April 2019.

42. The learned trial judge erred in law or a mixed question of law and fact in permitting evidence to be given by Garda O’Keeffe regarding another witness Stephen O’Sullivan in the manner in which she did and notwithstanding defence objections.
43. The learned trial judge erred in law or a mixed question of law and fact in refusing to direct a verdict of not guilty at the close of the prosecution case.
44. The learned trial judge erred in law or a mixed question of law and fact in refusing to withdraw the case from the jury at the close of the prosecution case on the application of the defence under the jurisdiction of the court as identified in the Supreme Court decision of *DPP v. PO’C* [2006] 3 IR 238.
45. The learned trial judge’s charge in relation to circumstantial evidence was unsatisfactory.
46. Without prejudice to ground 45 above the learned trial judge failed to charge the jury adequately properly and fairly in relation to circumstantial evidence.
47. The learned trial judge erred in law or a mixed question of law and fact in refusing to discharge the jury on application by the defence on the 23<sup>rd</sup> April 2019 in light of comments she made about the locus of the unlawful killing in this case.
48. The learned trial judge erred in law or a mixed question of law and fact in refusing or failing to adequately deal with defence requisitions and also in the manner with which she dealt with prosecution requisitions and also in the manner with which she dealt with prosecution requisitions at the close of her charge to the jury.
49. Without prejudice to the foregoing the learned trial judge erred in law or a mixed question of law and fact in failing to respect the burden of proof in relation to the admission of evidence.

50. The trial was unsatisfactory given the manner the prosecution were permitted to re-examine witnesses and the extent to which same was permitted which caused difficulties on many occasions during the course of the trial.
51. The learned trial judge failed to adequately correct opinions expressed by prosecution counsel in closing speech.
52. The verdict of the jury in this case in all the circumstances was perverse and/or contrary to the weight of the evidence.