APPROVED NO REDCATION NEEDED

An Chúirt Achomhairc

The Court of Appeal

Charleton J
Burns J
MacGrath J

Court of Appeal Criminal number: 111/2024
[2024] IECA 176
Central Criminal Court bill number: CCDP 51/2023

Between

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

- and -

Brian McHugh
Accused/Respondent

Judgment of the Court delivered on Thursday 4 July 2024

1. This judgment concerns the legal basis for the exclusion by a judge of identification evidence in a criminal trial. Identification of a suspect, whereby a witness testifies that they saw him or her either committing a crime, or close in time and proximity to the scene of a crime, or a chain of events leading to or from a crime, thereby potentially linking that person directly or by inference to the commission of a crime, is a question of fact. Identification is not a question of law. Hence, the circumstances whereby identification evidence becomes so infirm as to legally enable its exclusion from the consideration of a jury, are extremely rare. Jury trial, whereby citizens sworn to the task of deciding if the prosecution have proven a charge against an accused, find facts, is the

forum mandated for serious criminal cases by Article 38.5 of the Constitution. Respect for that constitutional arrangement informs the entire of the law of evidence.

Form of appeal

2. The form of this appeal is under s 7 of the Criminal Procedure Act 2021. That legislation, whether it was necessary at common law or not, provides at s 6 for a preliminary hearing, one prior to the swearing in of a jury to try the accused. Thereby, issues as to the admissibility of evidence may be ruled in advance of a trial date by either the same judge who would ultimately preside at the trial of the accused before a jury, or a different judge. Such rulings bind the trial court. None of the provisions of the 2021 Act, however, change the law of evidence. Nor is the legislation enabling of applications to examine witnesses on issues of fact in advance of trial whereby a dry run as to their testimony might take place to ascertain potential strengths or weakness as to their assertions. The rules of evidence remain unchanged by the procedure. That includes the rules as to when a *voir dire*, a trial-within-a-trial whereby it is necessary for a judge to hear evidence in order to ascertain if it is admissible, may appropriately take place. Nothing in the 2021 Act enables issues of fact for a jury to be transmogrified into issue of law requiring the ruling of a judge in advance of trial. The purpose of the legislation was to facilitate issues requiring judicial ruling to be decided in advance of the participation of a jury in a criminal trial. Thereby such matters as the admissibility of confession evidence and the admissibility of illegally obtained evidence might be decided so that the hearing before the jury, as tribunal of fact, might not be interrupted for substantial periods.

3. Appeals to the Court of Appeal during the currency of a criminal trial are not permitted. Since, however, preliminary hearings take place in advance of actual trial, and may result in the exclusion of legally admissible evidence, s 7 mandates a right of appeal where a judge "makes a relevant order at a preliminary trial hearing to the effect that evidence shall not be admitted at the trial of the offence". Where that happens, "the prosecution may . . . appeal the order" provided the order excluding the evidence is made "erroneously" and results in the jury not hearing "evidence which is (a) reliable, (b) of significant probative value, and (c) such that when taken together with the relevant evidence proposed to be adduced in the proceedings . . . that court, might reasonably be satisfied beyond a reasonable doubt of the accused's guilt in respect of the offence concerned."

4. Since this is such an appeal, one as to the exclusion of evidence by way of preliminary ruling as to admissibility of evidence at trial, decision of Greally J in the Central Criminal Court, 19 March 2024, what is herein said must be guarded. References to fact are of necessity preliminary, better stated in general than precise terms and, as such, are as to what assertions of fact the prosecution may put before a jury. It is the jury whose responsibility alone it is to accept or reject any fact.

Background

5. The accused is charged that he murdered Lisa Thompson at her home in Ballymun, Dublin 11, on 9 May 2022. An acquaintance of the accused, Deirdre Arnold, is charged with assisting an offender. The victim met her death, the prosecution allege, through strangulation and it is sought to identify a curtain cord at the deceased's home as the murder weapon and as being of evidential significance. The last witness for the prosecution to see the victim alive was an acquaintance who left her house after a social call at about 12h30 on the same day as the body of the victim was later discovered at around 15h15 by another witness. Banging was heard in the vicinity of the victim's house at about 02h20 and a neighbour looking out a window saw a man placing bags in a vehicle.

6. Since there is no direct evidence of the accused killing the victim, the case which the prosecution hope to build is based on circumstance. It is not appropriate here, in advance of the trial by jury and where this judgment requires to be published, to detail any of that potential evidence beyond what is essential. The prosecution propose to prove that at a particular time in that early morning, the victim activated her mobile phone. Video evidence which the prosecution assert is from? around the time of death, and which this Court has seen, purports to show a particular vehicle approaching the neighbourhood where the victim resided and a man, which the prosecution propose to identify as the accused, visible on CCTV in that vicinity as he walks past the camera. One of the arguments at the preliminary hearing before the trial judge was that the quality of this evidence was poor. It is a matter for the jury as to the quality of the image; suffice to note that it is not so poor as to enable its exclusion. The prosecution then seek to track what is asserted to be a relevant vehicle and its two occupants through other CCTV images and included in that is what is asserted to be the accused availing of a service station near Dublin Airport. This latter footage may or may not be contested at trial, that is a matter for the accused, but it is less proximate to the offence and the arrival of a car at a service station might require a particular context to admit of a sinister interpretation.

Ruling excluding the identification

7. Hence, the focus is on the proposal of the prosecution to identify the male near the victim's house at a time asserted to be proximate to the murder. Two members of An Garda Síochána testified before the trial judge that this person captured by video image is the accused; these are Sergeant Michael Harkin and Detective Garda Cathal Connolly. That evidence was excluded from consideration of the jury by the trial judge based on an inventive argument that members of police forces identifying suspects had to be independent of the investigation and that the non-immediate, and non-specific as to the moment in viewing that led to recognition, manner in which one purported to identify the suspect as the accused, together with the difficulty in cross-examining such witnesses as to their prior acquaintance with him, created unfairness. No aspect of that argument has any basis in law. The trial judge excluded the purported identification from the consideration of the jury, ruling it inadmissible thus:

> 69. The objections are based on a lack of independence in each case and also on the basis that, to differing degrees, Sergeant Harkin and Garda Connolly were involved in the investigation and knew Brian McHugh to be a person of interest. Sergeant Harkin was one of the officers tasked with conducting the inference interview with he accused on the 12 of July 2022. It is evident from the content of the interview that Sergeant Harkin was centrally involved in the investigation and therefore was acquainted with many important aspects of the evidence implicating Brian McHugh. Sergeant Harkin was not a suitable candidate for the provision of recognition evidence. In addition, Sergeant Harkin acknowledged in his evidence that he was unable to pinpoint when or from which piece of CCTV footage he ultimately made his recognition. His evidence on this point is vague and unsatisfactory. The combination of these factors and the prejudice which would arise in seeking to test his recognition necessitate the exclusion of his evidence identifying the accused as the person in the footage.
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> 70. The evidence of Garda Connolly suffers from the same infirmities but to a lesser degree. Garda Connolly had prior knowledge of Brian McHugh. He was no longer attached to Ballymun Garda Station but as a member of the Airport Gardai Station he was part of the investigation into the murder of Lisa Thompson and had taken a statement from Sharon Mulcahy. He accepted in evidence that he was aware before he made his identification at Clontarf Garda Station on the 15 of May 2022 that Brian McHugh was a person of interest.

71. The procedure which was put in place by D/Inspector Maguire was a carefully crafted exercise to address some of the difficulties which arise in trials involving Garda recognition evidence. The procedure adopted is not standard or even recommended garda procedure, but I consider the steps taken by Inspector Maguire were a commendable attempt to conduct and record a procedure which would stand up to scrutiny. However, Garda Connolly was not a wise choice of candidate to conduct the exercise in circumstances where he had knowledge of the investigation and knew Brian McHugh to be a person of interest. Because he was stationed close to Ballymun, and the timing of the procedure was proximate to the events of the 9th of May 2022, there was a likelihood he would be aware of who was of interest to the investigation. Further, the footage which was shown to Garda Connolly could only be described as low quality. It is not at all surprising that on his first attempt Garda Connolly did not recognise the accused. On his second viewing of the first clip "JD-ID" Garda Connolly made a recognition of the person from his side profile and gait. While it is possible to say that the person in the footage shares physical characteristics with the accused, I am not at all convinced that Garda Connolly would or could have made a recognition without his prior knowledge that Brian McHugh was a person of interest. I reach this conclusion in circumstances where there is other CCTV footage from which an identification could safely be made and from which inferences may be drawn.

72. Garda recognition evidence from Gardai stationed in large urban or suburban areas carries inherent prejudice and cross-examination is fraught with difficulty from the defence perspective. In order to be admissible, the Garda recognition evidence should, in my view, come from a source outside the investigation and be based on footage or photographic stills of acceptable quality. Therefore, the recognition evidence of Garda Connolly should be excluded.

73. This ruling has a knock-on effect for the inference interview in respect of Location 1 and no inference may be drawn from the accused failure to account for his presence at Location 1.

Evidence as an exercise in discretion

8. The law of evidence, whereby evidence relevant in a civil case or in a criminal prosecution, may be excluded is rarely a matter of discretion. Evidence which is relevant is admissible unless a rule

of law prevents such evidence. Hence, evidence which is relevant is required by the laws of evidence to be admitted unless a rule of law requires that it be excluded. It is part of the function of a trial in due course of law under Article 38.1 and 38.5 of the Constitution for the jury to consider all relevant and admissible evidence. Otherwise, the jury function may be stripped away in favour of some amorphous concept of what seems vaguely fair or unfair. That undermines the rule of law. In that regard, the case cited of *The People (DPP) v Meleady (No 3)* [2001] 4 IR 16 does not support the proposition contended for on behalf of the accused. The lengthy history of that case involved a series of applications alleging a miscarriage of justice arising out of the identification of the accused in consequence of the stealing of a car where the owner had clung to the bonnet while the thieves engaged in vicious manoeuvres to throw him onto the roadway. A newly emerged fact was of a positive identification by photograph by the victim where the identification relied upon at trial was what had seemed at first to be one uninfluenced by prior image. Geoghegan J did not identify any new rule of law that enabled exclusion on a discretionary basis. Instead, he based his ruling, however, squarely on the duty of a trial judge to exclude testimony where evidence has a prejudicial effect that outweighs any probative value:

> It is well established that although there is no authority to permit a criminal court to admit, as a matter of discretion, evidence which is inadmissible under an exclusionary rule of law, the converse is not the case. A judge, as part of his inherent power, has an overriding duty in every case to ensure that the accused receives a fair trial and always has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value. Mr. Comyn referred the court to the famous references to that discretion, given by Lord du Parcq, in the advice of the British Privy Council in *Noor Mohamed v. the King* [1949] AC 182. That was an instance of the obvious example where the prejudicial effect of fairly trivial and only barely admissible evidence may be weighed against the probative value. In this particular case there is no question of a quantitative comparison. Obviously, evidence of identification in Rathfarnham District Court is substantial evidence. But if there was a real danger that Mr. Gavin, senior had been shown photographs before the identification it would be right to exclude it. This court is of the view that any trial judge in such a voire dire would, on the present information, have to form a view that there was a danger, notwithstanding the denial by Mr. Gavin that photographs were shown to him. Given that neither Mr. Walker nor anybody from the D.P.P.'s Office or anywhere else is able to give any plausible explanation for the existence and contents of the Walker Memorandum, which could be

> consistent with no such photographs having been shown this court is of the view that a trial judge would consider it unsafe to allow the identification evidence by Mr. Gavin, Senior in Rathfarnham District Court go to a jury. Mr. MacEntee concedes that there would be nothing wrong in principle with identification evidence based on photographs, but that case has never been made. Far from it, Mr. Gavin, Sergeant Thornton and all the apparently relevant guards deny that photographs were ever shown to Mr. Gavin. Unlike the issue of the fingerprint which is clearly a jury issue, it would seem to this court to be completely inappropriate that a jury should be left to decide and effectively speculate as to whether possibly there could be some alternative explanation for Mr. Walker's Memorandum, which was consistent with the evidence of Mr. Gavin. There is, however, a further point which this court had to consider. There is no suggestion in the Walker Memorandum that the photographs were shown to Mr. Gavin's son who made an identification of one of the applicants in the premises housing Rathfarnham District Court. But the court considers that the case could not be allowed to go to the jury on his identification evidence only, as it was done on the same morning and in the same place as the purported identification by his father and in circumstances where there would have been plenty of opportunity for conversation between himself and his father, between taking him out from school and bringing him to the courthouse. Mr. MacEntee argues that the two separate pieces of identification evidence, that of the father and the son, are so inextricably bound up in time and place that if the father's evidence was to be excluded the same exclusion would have to apply to the son's even though there is no evidence suggesting that he might have been shown photographs. The court accepts this submission. The court considers that a trial judge in a voire dire would have to exclude all the identification evidence. There would then be no evidence against the applicants that could go to a jury. In the circumstances, one of the newly discovered facts, that is to say the Walker Memorandum, shows that there has been a miscarriage of justice. The Court will certify accordingly.

9. Without the existence of a rule enabling exclusion, there is no basis whereby discretion can take the place of law and overturn the central rule that what is relevant is admissible. Over centuries, the court system kept that principle as a cornerstone. That is why witnesses are summoned to court. The system of justice has traditionally necessarily resorted to compulsion to ensure that all relevant evidence is to be adduced before the tribunal of fact at a criminal trial. In *The People (DPP) v JT* (1988) 3 Frewen 141, 145 Walsh J stated that: "the administration of justice itself requires that

the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution" itself "or other establishedl and recognised privilege". That which render more or less improbable any fact in issue is relevant; *The People (DPP) v Almasi* [2020] IESC 35 [23]-[29]. The rule used in exclusion by the trial judge was that of prejudicial effect outweighing any probative value. That is a matter of judicial assessment and not of discretion. Relevance renders evidence admissible unless a rule of law requires exclusion. Cole, *Irish Cases on Evidence* (2nd edition, Dublin 1982) puts the matter succinctly at pages 1-2 thus:

> It must be borne in mind that in its ordinary meaning "relevance" denotes something which is variable and elastic: variable because a particular fact may be relevant in one context and irrelevant in another, elastic because the relevance of any relevant fact may vary in degree from being only minimally of interest to being highly or compulsively persuasive. Facts which are only minimally relevant maybe excluded on that ground alone.

10. In *The People (DPP) v AC* [2021] IESC 78, [2022] 2 IR 49 the issue was the extension by statute of the hearsay rule. A submission was made that evidence could be excluded through the exercise of discretion generally. Charleton J noted the occasions where discretion was validly part of the law of evidence:

> 28. Balance may on occasion be part of the law of evidence but the reception of testimony is rarely dependant on discretion. Here, there may be a misunderstanding manifest in the submissions on both sides. Evidence is receivable when, as in a civil case, it is part of the pleaded issues. Outside of that, where defamation is pleaded, negligence in sourcing material has nothing to do with the issues. In a criminal case, reasonable notice of fact is given in a book of evidence or by disclosure and a notice of additional evidence may be necessary to supplement, and make receivable in court, the facts notified as part of the prosecution case. Relevance is thereafter the criterion whereby evidence is admitted: what proposed fact tends to further the proof of a fact in issue? There is no discretion to exclude relevant evidence. Where prejudice is the effect of evidence, a balancing exercise is called for whereby the trial judge may need to exclude evidence, for instance of prior bad conduct, because it adds little to a case even though it may be logical in some weak way to further the proof of a fact in issue. But highly prejudicial evidence may be very probative; as to methods of murder and opportunity, for instance, as in *R v Scarrott* [1978] 1 All ER 672, or where a skill learned in jail accounts for the professional dismemberment of a

> victim's body after death, as in *The People (AG) v Kirwan* [1943] IR 279. When an illegality has been the foundation of the finding of evidence, regard may be had to the gravity of the wrong and the consequences; what Clarke J refers to in *The People (DPP) v JC* [2017] 3 IR 417 as an "assessment". There may, in addition, be circumstances where the protection of the fairness of taking a confession statement requires the judiciary to protect a suspect from a trick, such as a false statement of the confession of an accomplice or deceit over a fingerprint or DNA which does not exist. That is a common law exception related to the maxim *nemo tenetur se ipsum prodere*.
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> 29. Warnings are another example of discretion. But there, there is no effect on the admissibility of the evidence. Rather, particular attention in the judge's charge is drawn for the jury to issues which judicial experience, or legislative intervention, has identified as requiring particular care: the evidence of an accomplice; an uncorroborated confession – both require a warning as a matter of law. For the victims of sexual violence, usually referred to as complainants because consent is, except in the rarest cases, the issue and usually contested, the form of warning and whether it be made to the jury has evolved into one of apparently untrammelled discretion.
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> 30. There are other forms of discretion, or adjudication of balance, in the law of evidence; but these are rare and in no way set up a general discretion. These principles are exceptional to the overall rule that all relevant evidence is admissible.

11. The 2021 Act cannot have the purpose of excluding from the province of jury fact-finding that which is properly within the province of their assessment. Increased efficiency is the objective of the legislation, which it is the duty of judges to give effect to. It could not be argued that, for instance, where a person makes an allegation of sexual violence, a *voir dire* should be held to ascertain the strength of their evidence so that an application for exclusion might be made to stop a trial before it had even begun. As to what weight is to be attached to evidence is a matter for the jury. In *May and Powles on Criminal Evidence* (6th edition, London, 2015) at 16.07, footnotes omitted, the distinction is clearly drawn:

> A trial-within-a-trial is not an appropriate procedure when the question to be determined is not one of fact for the judge but is purely within the province of the jury, for example whether the evidence is true or not, fabricated, or whether the defendant's signature has

been forged on notes of an interview. In *Walshe* the Court of Appeal said that a trial-within-a-trial was not an appropriate procedure for deciding the admissibility of evidence relating to an identification parade. In *Flemming* the Court came to the same conclusion when considering the admissibility of a disputed identification.

12. Where exclusion as to the manner of obtaining evidence, as opposed to the factual assessment of that evidence, is in issue, a rule enabling the ruling out of evidence may be engaged. Other than that, the circumstances whereby an issue of fact may be treated as an issue of law are not engaged. Safeguards within the trial process itself exist in order to ensure that those against whom a reasonable case of guilt cannot properly be made are excused from assessment by the jury. Thus, as early as *The People (DPP) v O'Shea (No 2)* [1983] ILRM 592, 594 an accused working on packing a lorry, which packages contained controlled drugs, validly had that case withdrawn from a jury on the basis, according to Finlay CJ, that it was a function of the trial judge "to reach a conclusion at the conclusion of the evidence tendered on behalf of the prosecution as to whether there is evidence which if accepted by a jury could as a matter of law lead to a conviction." Cases of gaps in proof arise, where an element of the offence placed on the prosecution is not proven, or where "an apparent link in the chain of proof is so tenuous that it would clearly be perverse for a jury properly directed as to the onus of proof upon the prosecution to act upon it." That safeguard extends to a judge withdrawing a case from the jury where there is no proof and to where evidence is inherently so tenuous that a jury could not properly convict; *The People (DPP) v Lacey* (unreported, Court of Criminal Appeal, 3 July 2002, Geoghegan J). Where there is proof of deceit so great as to compel a conclusion of rejection, that assessment may be engaged so that the jury is relieved of assessment; *The People (DPP) v Buckley* [2007] 3 IR 745, but this is necessarily rare; *The People (DPP) v M* [2015] IECA 65. Other than those exceptional circumstances, the case is left to the jury to decide.

Duty of trial judge

13. The useful exercise of a preliminary hearing is not there to oppose the elements of a criminal trial into one where a judge decides on credibility or strength. Were that so, there would be no limit on the witnesses to be called prior to swearing the jury. The duty of the trial judge is to ensure a fair trial and such a trial, excluding issues as to delay or the unavailability of witnesses, is to be conducted within the rules of evidence.

14. Another point forcefully made on behalf of the accused is that since the trial judge made rulings as to fact whereby the reliability of the two identifying Garda witnesses are excluded, these have become unappealable findings of fact; that it is not for the Court of Appeal to correct even error. That is not correct. The issue in this case is as to province of judge and jury, lines clearly distinguished in the law of evidence: since the assessment of this evidence could never have been within the judicial sphere, there can be no valid finding of fact. The surprising deployment of *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 and *Hay v O'Grady* [1992] 1 IR 210 in this context is resolved on the basis that, apart from necessarily and validly finding facts on a trial-within-a-trial as to the manner of gathering evidence or the treatment of a suspect resulting in the exclusion of evidence on the basis of either inducement, oppression or the deployment of an undermining trick, judges do not find facts save in the special and limited circumstances where the law of evidence requires their intervention; see *The People (DPP) v Doyle* [2018] 1 IR 1, *The People (DPP) v BK* [2023] IESC 23.

15. Rare cases may very occasionally occur, as in *Meleady*, where evidence of identification is so tainted as to require exclusion. Such cases should clearly be capable of discernment from the trial documents; for instance, a video shows no image or the image shown is of a person all of whose features are distorted by disguise and where there is not, at the same time, any other means of identification such as through distinctive marks or by voice. These are merely examples. The basic principle is of trial judges not being empowered to do other than prior to the 2021 Act procedure and of the constitutionally mandated functions of judge and jury being correctly maintained. In *The People (DPP) v Larkin* [2009] 2 IR 381, an objection similar to that posited before the trial judge was raised in the Court of Criminal Appeal. The argument was to exclude an identification on the surprising basis that what was involved was recognition: that since the police officers knew the accused that this created an odour of criminality around the person recognised. Identification of the accused as the person who tried to kill the victim by gunfire was given both by the person he attacked and by gardaí who knew him, as it happened, due to both general and specific police work. Again, the only objection raised, as in *Meleady*, was an allegation that prior knowledge had to mean involvement with crime and that for any Garda officer to identify a person sent a signal to the jury that the person in the dock was a career criminal. There the analysis was the only one available in the law of evidence in this context; that the prejudicial effect of evidence on a jury would outweigh the probative value of the testimony offered. That was rejected. There is a time-honoured manner of introducing such evidence and that is what De Valera J as trial judge had correctly adopted.

Suspects and the police

16. Even though in oral argument before the Court, the proposition was abandoned that members of the gardaí had to be seen to be unbiased, in fact utterly detached from an investigation, in making an identification, the reality is that it was on this unsupported contention that the trial judge based her ruling excluding the CCTV identification by the two officers.

17. Some fundamental principles need to be stated. It is perfectly legitimate, based either on explicit instructions from the accused or because the issue reasonably arises on the prosecution case, to ask in cross-examination before a jury if a witness identifies the accused by reason of expecting him or her to be either on CCTV footage or in a line-up or other form of a suspect. It is just as legitimate to question the means of sight in identification, distance, lighting, length of observation and whether, in truth, what is asserted is really the recognition of a person already known or identification by reflex from the scene of a crime or some associated video footage. In this respect, members of the gardaí are neither in a better nor worse position as observers than any other person. What can, however, happen with gardaí, as it can happen with non-police witnesses, is that where a witness already knows a person and then happens to be, for instance, attacked by them or finds them in their house committing a burglary or sees them on relevant video footage, common sense may indicate that such identification may be more reliable than a once-off encounter of the same kind. But, that is not to indicate any principle. In all such cases, the assessment is one of fact for a jury. The only potential basis for exclusion in the law of evidence is if there is, in fact, prejudicial effect of that identification and, as a matter of judicial assessment, the probative value is so weak as to require exclusion.

18. A police officer is a person who is bound by law to act on the basis of suspicion: once such suspicion is reasonably held, serious intrusions into privacy, liberty and the protected status of the dwelling may be taken. Hence, arrest may take place only on the basis of suspicion that an arrestable offence has been committed and that it was the arrestee who committed the offence; Criminal Law Act 1997 s 4 containing the general power. Similarly, the general power to issue search warrants is based upon the existence of a suspicion that is reasonably held that "evidence of, or relating to" the commission of serious offences may be found in a dwelling or business premises; Criminal Justice (Miscellaneous Provisions) Act 1997 s 10. In arrest, a police officer acts of his or her own initiative, gathering information and following through on suspicions to the

point where there is reason to consider that a particular suspect may have committed the crime. At that point, arrest powers for serious offences are triggered. With searches, judicial intervention means that the nature of the suspicion must be presented before a judge so that he or she may decide if the intrusion into a home or other premises can reasonably be justified on the basis of information laid before the bench; *The People v Quirke (Number 2)* [2022] IESC 19.

19. It has been emphasised in numerous cases, that the task of the police is to search for evidence which may incriminate a particular suspect or which may rule that suspect out of consideration. It is legitimate for police to suspect people and to gather information that furthers their enquiries. By no legal principle, however, is it appropriate for the police to act by way of intrusion into liberty or the privacy of a dwelling merely on the basis of an unsupported hunch. But, it is legitimate to have hunches, to hold mere suspicions and to follow through in gathering information so that a clearer picture that may firm up into a reasonable basis for action can emerge; *DPP (Walsh) v Cash* [2008] ILRM 433, [2007] IEHC 108 [11].

20. Prior to *Damache v DPP* [2012] IESC 11, [2012] 2 IR 266, the Offences Against the State Act 1939, as amended, in s 29 enabled "an officer of the Garda Síochána not below the rank of chief superintendent" where satisfied that there were "reasonable ground for believing that documentary evidence of or relating to the commission or intended commission of an offence under any section or sub-section of this Act or any document relating directly or indirectly, to the commission or intended commission of treason is, to be found in any particular building or other place" issue a warrant. Both under the Constitution of the United States of America, and through a series of common law decisions, the role of issuing search warrants in respect of homes, and where sought to be analysed, computer devices, had been seen as an intrusive power which required judicial intervention to be legitimately exercised; *The People (DPP) v Quirke*. Absent a pressing contingency, that power can no longer be used without resort to the judicial power. Part of the reasoning which underlies both the common law power to issue search warrants and also the motivation behind constitutional provisions protecting the dwelling is both that the space where a person lives is set apart and that in the ordinary way, even controlled suspicions may require objective control. In many continental systems, the task of issuing any form or warrant that intrudes into liberty or the privacy of a dwelling space is reserved to the *corps judiciare*.

21. But, contrary to the submission made to the trial judge, there is nothing to prevent a police officer, in contrast to a judicial personage or one tasked with acting judicially such as a chief superintendent under the 1939 Act, being suspicious, following leads, or pursuing lines of enquiry

based on intuitions or hunches. It is the job of the police to be suspicious. Equally, it is a legitimate line of enquiry in cross-examination, where that reasonably arises on the prosecution case or in consequence of specific instructions from the accused, to enquire if a recognition might have been influenced, even to the point of being undermined, through an expectation that a suspect should be spotted in a particular place or be captured on CCTV at a particular time. What needs emphasis here is that this question is one of fact. It is nothing which engages any rule of evidence, even in potential.

Prejudice

22. It might also be mentioned that one of the identifying officers conceded that because of prior friendship with the victim, the accused might be seen to be of interest in an enquiry. While that may be true, given the danger of violence to women from those who are, or immediately were, romantically involved with them, it stretches credulity to breaking point to place an allegation of bias, or even of expectation of identification, merely on the basis of some past relationship between a suspect and a murder victim. It is to be doubted that a jury might accept such a bald assertion but that this it is a matter for a jury to assess, as opposed to a judge ruling out evidence on basis of prejudice outweighing proof, is beyond doubt.

23. Another submission made was that difficulties in cross-examining witnesses in a precise manner arose by reason of the occluded nature of how the gardaí knew the accused and because one officer identifying the accused on the CCTV could not say at which precise point in viewing footage, he apparently came to a firm realisation that the person shown could be identified as the accused. There are two points to be made here. First, it is a matter of fact whether a person was being careful, and therefore might be regarded as more reliable, in slowly considering video evidence to see if recognition of a suspect was possible, or was uncertain, and therefore potentially infirm, by reason of taking time. That is a matter for cross-examination in front of a jury.

24. Secondly, assistance to the accused, properly engaged in by the prosecution by way of not prejudicing an accused through the revelation of a criminal background (if it exists, and there is nothing to say that is so here), is not to be turned into a prejudicial effect in testimony. It is not. In *Larkin*, and in other cases such as *The People (DPP) v Foley* [2007] 2 IR 486 and *The People (DPP) v Allen* [2004] 4 IR 295, a practical way of overcoming any such supposed difficulty has been worked out. Over decades, experience demonstrates that this has been deployed in criminal courts

to the prejudice of no accused person. It is for the accused should he or she wish, as in *Larkin*, to introduce a question as to whether there is a prior conviction, or a criminal career-path, in their background. Some counsel may feel that such an affirmation, if given by a Garda witness in answer to their specific question, may assist in some aspect of the defence: but, that kind of question is usually met by a statement such as "I am not sure the answer to that may assist your client" and is a dangerous strategy. Normally, however, it is ordinary experience that the general public interact with An Garda Síochána on a regular basis, whether while they are on patrol, or in seeking the stamping of passport, lost licence, or other, forms in Garda stations, through being called to assist victims of crime or through involvement in community groups such as Neighbourhood Watch. There is nothing sinister in a Garda knowing anyone. If the accused feels it advisable to go beyond the kind of formula deployed in *Larkin*, and more generally, that a recognition of an accused in person or on CCTV is based upon community work and living and interacting within a neighbourhood over years, that is a matter for decision by defence counsel. But what is proposed here is not prejudice, much less the kind of prejudice that enables exclusion through overwhelming probative effect.

25. Many inventive arguments as to identification have been deployed over many years. That does not change the principle that it is only where actual prejudice cannot be avoided, and invariably it can, as for instance related to prior criminal activity, which outweighs any probative value that the evidence rationally carries, can identification evidence be excluded. In *Larkin*, the argument was that CCTV evidence was somehow inherently prejudicial and that only where there was no other evidence by direct identification, in this case the victim who was nearly murdered by gunfire, could it be used. As in the argument presented here, this assertion completely lacks authority. The Court of Criminal Appeal disposed of that submission thus:

> 25. The Court is satisfied that the ruling to admit the evidence of the two garda witnesses who identified the applicant from the video in this case was correctly made. In the course of the *voir dire*, it was clear from the evidence adduced by the various garda witnesses that they could recognise the applicant from their community work in the local area. The admission of the evidence of the two gardai was in the circumstances, and subject to appropriate warnings being given, entirely unobjectionable in the view of the Court. Counsel on behalf of the applicant, argued that such evidence should not be given where other evidence of identification is available to the prosecution, such as in the present case where the prosecution had available to it the evidence of Mr. Alquasar which was

corroborated in part by the evidence of two other civilian witnesses. She submitted that in such circumstances the evidence of two garda officers, who were both aware that the applicant was suspected of the crime, was both superfluous and as those witnesses were likely to be prejudiced in the subjective sense of the term. The Court rejects these contentions. If identification evidence is available from police officers and the same can be given in circumstances where the probative value of the evidence outweighs the prejudicial effect, the Court sees no reason why such evidence should not be given. It is difficult to conceive of a greater affront to the community's interest in the prosecution of crime than to deny to the prosecution the opportunity of calling such evidence, all the more so in modern social conditions where gun crime and intimidation of witnesses has regrettably become all too frequent.

26. That is not to say that an endless stream of police witnesses should be paraded through court, each of whom would successively provide recognition evidence of an accused person from a video or photograph. As the cases indicate, there is a balancing exercise to be performed in this sort of situation by the trial judge. It is important that witnesses who are called should wherever possible be able to point to some non-criminal background context whereby the identification or recognition has been made. In a situation where this is not possible (a situation which does not arise in the present case) a very real difficulty may arise, the resolution of which is beyond the purview of this judgment. In the present case, the Court is satisfied that this balancing exercise was carefully and properly carried out by the trial judge after careful review of the relevant legal authorities. His ruling at the conclusion of the *voir dire* is, in the view of the Court, impeccable. Equally his charge at the conclusion of the trial, in the course of which he warned the jury that both the garda witnesses knew that the applicant was "in the frame" for the particular offence constituted a graphic and direct warning to the jury to take this factor into account when weighing the evidence. In the opinion of the Court, the appeal against conviction must fail.

Application

26. The test under s 7 of the 2021 Act should not be read beyond its terms. It requires no gloss. Where a ruling excluding evidence to be presented at trial has been made on a preliminary examination which is erroneous, and demonstrated as such on appeal to be such, that is a

fundamental condition for whether that ruling should be corrected. Here, the ruling was erroneous for the reasons set out in this analysis.

27. Thereafter, it is important to be careful in the way this kind of appeal expresses whether the corrected ruling is such that the trial should take place with that evidence, in effect, reinstated. Since the gravamen of this decision is that identification evidence from two Garda officers should not have been excluded, since the reliability of such evidence is a matter of fact for a jury and no principle of prejudice outweighing probative value, or empty notion of a requirement of un-involvement in an investigation, could possibly intrude, or any resort to some general principle of fairness, a guarded view of what may merely be the potential of this evidence is all that can properly be expressed. Under s 7 it becomes a matter of legal assessment on appeal as to whether evidence is sufficiently strong that the prosecution case has weakened by its exclusion. It may be, that if the jury regard the CCTV footage, which the prosecution may be able to prove is proximate in time and space to the murder of the victim, as reliably having been identified as showing the accused, that this could have a major impact on the proof of the case. The reason for guarded expression is that the Court does not wish to follow the attractive chimera of finding fact on a matter which is for assessment under the Constitution by a jury. Rather, what is involved here is a legal assessment as to "probative value" and as to "reliability" in the context of any other potentially "relevant evidence proposed to be adduced"; the test in s 7 of the 2021 Act.

28. Legally, therefore the question to be asked is whether the erroneous ruling has removed a significant building block in the prosecution case which ought, in terms of the law of evidence, be restored as part of the case which the State reasonably proposes to make against the accused. It is for the jury to say if that evidence is reliable. But, from the point of view of pre-trial analysis, there is nothing in the quality of the video footage or in the nature of the recognition which would render this proposed evidence so frail as to require its exclusion. Much has been made by the prosecution in written submissions as to the place of this evidence in their case.

29. Again, the Court must be careful in commenting. It suffices to note that where circumstantial evidence is involved, evidence may cross-support other evidence and the removal of a significant thread from the case of guilt which the prosecution propose on a rational basis to prove can have a significant weakening effect on the nature of that case. The Court has in mind the other strands of evidence which, again, may or may not be proved and the reliability and weight of which is a matter for the jury. This evidence is far from being so trivial as to not have a potentially genuine

effect on any argument as to whether the prosecution have met the burden of proof. Further, in a circumstantial case, the prosecution must out-rule by analysis, usually through a closing speech following on the entire of the evidence, any scenario that the jury may consider could reasonably be consistent with the accused being the innocent subject of unfortunate coincidence. That is why the evidence that was excluded by the trial judge was of sufficient significance to meet the test. Again, without trespassing on areas of fact constitutionally reserved to jury assessment, apart from the possibility of trial by court martial or before the Special Criminal Court, perhaps the best way to assess the importance of excluded evidence is by asking a conditional question. Here it is this: if two people recognise the accused at a time and place proximate to a crime, would that influence a jury as to whether that evidence, taken with such other evidence as is available in the case, advances in a material way the contention of proof? Another way of considering s 7 is to ask whether the evidence ruled out would have made no difference to the assessment of the jury? It is important to be careful here. The Court is not tasked with finding fact, merely with assessing potential impact where evidence is wrongly excluded. This evidence would be impactful on any jury's assessment; though it is for that jury to decide all issues as to weight, credibility and reliability. This Court is not engaging in that task. Rather, it is considering, as s 7 requires, an abstract assessment as to whether a building block of the prosecution case which was excluded from a jury's consideration was potentially probative, potentially reliable and of moment in the context of the entire case. This evidence should not have been excluded and is such that the s 7 test applies.

Order

30. The evidence of identification, asserted by the prosecution to be proximate in time and place to the murder of the victim, should be restored for the consideration of the jury. The Court avoids any comment on the reliability or strength of that evidence. That is not for judges. It is for the jury to consider that evidence, its reliability, any factors which might lend it more or less weight and how it interacts with the other strands of testimony which may be argued to demonstrate the guilt of the accused and to be inconsistent with any other rational hypothesis that may be based on such facts as the jury accept as having been proven.