Neutral Citation Number: [2006] IEHC 74

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 424 JR]

BETWEEN

FERGAL McNULTY

APPLICANT

AND
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
HIS HONOUR JUDGE MICHAEL WHITE

NOTICE PARTY

Judgment of Mr. Justice Roderick Murphy delivered on the 15th day of March, 2006

1. Application
By notice of motion seeking judicial review dated 15th June, 2004, the applicant sought an order of prohibition or injunction prohibiting or restraining the respondent (D.P.P.) from pursuing the prosecution of the applicant as set out in indictment bill no. 203/03 and for a declaration that the applicant was entitled to be acquitted in the trial of the said indictment which took place between 8th and 10th July, 2003 on the basis of the amended statement grounding the application for judicial review and the affidavit of Robert Purcell, solicitor for the applicant as sworn 17th May, 2004. Peart J. had granted the applicant leave to proceed on 20th May, 2004.

The applicant had been charged with the offences of possession simpliciter and possession for supply of a controlled drug, MDMA, contrary to ss. 3 and 15 of the Misuse of Drugs Act, 1977.

The particulars of the offence was that the applicant, on 20th July, 2002, had in his possession a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993, made under s. 5 of the Misuse of Drugs Act, 1977 (Count 1) and that on the same date he had in his possession the same controlled drug contrary to ss. 3 and 27 of the Misuse of Drugs Act, 1977 as amended by s. 6 of the Misuse of Drugs Act, 1984.

2. Application to the Circuit Criminal Court
At the trial, on 8th July, 2003, Mr. Ó Lideadha, counsel for the applicant, had put the prosecution on proof in respect of all matters grounding the admissibility of evidence of the alleged controlled drugs and submitted that the search was unlawful and that the main issue was in relation to the warrant.

Mr. Foley, for the prosecution, examined Garda Fionnuala Monaghan, who said that she together with Detective Sergeant O'Sullivan, Detective Gardaí Murray and Carney and Garda Maria Murphy went to the applicant's flat with a warrant issued under s. 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 and, having shown the warrant to the applicant, were admitted into the flat and proceeded to search it, finding a number of white tablets in a cigarette box, which he suspected to be MDMA ecstasy tablets.

Inspector Timothy McCarthy was aware of the investigation. He went before Judge Dunne of the District Court and made an application for a warrant and information. He presented to the Court signed information and a warrant was issued in respect of the flat which he identified. The warrant was handed over to Detective Sergeant O'Sullivan to execute.

In the absence of the jury, Detective Sergeant O'Sullivan stated that he had received the warrant from Inspector McCarthy, which he identified. He produced the warrant to the applicant and informed him that his officers would be conducting a search of the dwelling. His colleague, Garda Murray, arrested the applicant who was detained in Mountjoy Garda Station.

Mr. Ó Lideadha made a submission to the notice party in relation to the statutory provisions grounding the issue of the warrant and sought a ruling as to the admissibility of evidence subsequent to the entry and search.

3. The Warrant
Section 10(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997 (the Act of 1997) provides that a warrant may be issued under the said section by a judge of the District Court "on hearing evidence on oath", "if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of" certain specified offences is to be found at a particular place.

The warrant to search recites that:-

> "WHEREAS it appears to me as a result of information on oath of Inspector Timothy McCarthy…that there are reasonable grounds for suspecting that evidence of, or relating to the commission of an offence stated in the warrant (which offence does not include that of possession for use or supply of any drug)."

The warrant to search was duly signed by one of the judges of the District Court, assigned to the district.

Counsel submitted an appearance ("WHEREAS it appears to me") is not equivalent to "I am satisfied" and that information on oath is not evidence on oath.

The form entitled Information for a Search Warrant sworn by Inspector Timothy McCarthy on 20th July, 2002, states as follows:-

> "I have reasonable grounds for suspecting that evidence of or relating to the commission of an offence referred to in subs. (1) of s. 10 of the 1997 Act, to wit, (certain items not including any drugs) is to be found in a place, namely (the flat of the applicant)."

The basis for such grounds was stated to be the investigation of a complaint of rape at the premises on 17th July, 2002.

The document contains the following concluding paragraph:-

> "Sworn before me on the 20th day of July, 2002, at ( ) and I am satisfied the grounds set out are reasonable.

Signed: (the same judge of the District Court)."

4. Statement of Inspector Timothy McCarthy
In a statement made on 26th January, 2004, Inspector McCarthy had formed the opinion that it was necessary to make an application for a warrant to search the flat and believed there was evidence to be found in relation to the commission of the (rape) offence at that address. He had instructed Detective Sergeant O'Sullivan to draft an information search warrant and a warrant to search which was done in his presence. He had checked the contents and found the information to be correct and signed the information to search. On Saturday, 20th July, 2002, at a sitting of Dublin Metropolitan District Court he swore an information for a search warrant before Judge Dunne by taking the oath and swearing that he would truly answer all questions put to him touching on the application. He outlined to Judge Dunne the nature of the investigation and offence complained of and that he had read the statement of the complainant. Judge Dunne asked him if he was satisfied with the information at hand that evidence was likely to be found at the address on the information and warranted a search. He replied that he was and he believed the complaint to be genuine. The judge then asked him whether it was his signature on the warrant, to which he replied in the affirmative. Judge Dunne then handed him the signed warrant to search for legal execution, which Inspector McCarthy then handed to Detective Sergeant O'Sullivan.

5. Circuit Criminal Court Proceedings

5.1 Submissions by the applicant/defendant to the Notice Party
In the Circuit Criminal Court counsel for the defendant referred to *D.P.P. v. Kemmy* [1980] I.R. 160 at p. 164 in relation to the particular form of proof of evidence and compliance with certain provisions. It was submitted that there was no suggestion that the District Judge heard evidence. The information on oath was not put in evidence. The judge's name was not clearly legible. Moreover there was no suggestion whatsoever that the evidence in the case of 160 tablets of alleged MDMA had any connection with any of the offences mentioned in s. 10(1) of the Act of 1997, which specifies three particular types of offence and also refers to offences in the first schedule.

Reference was also made to *Simple Imports Limited v. Revenue Commissioners and Ors*. [2000] 2 I.R. 243 at pp. 250-251 and 255.

5.2 Submissions by the respondent/prosecutor
In reply, Mr. Foley referred to the operative part of the warrant authorising Detective Sergeant O'Sullivan to search the premises.

Evidence had been given that the warrant was issued by Judge Dunne. The judge had complied with the statutory duty.

The evidence was that the inspector had given information on oath which was synonymous with evidence. Oral evidence was given in the witness box. The contents were omitted because it was viewed by both sides that it was highly prejudicial and not probative in the matter which came before the Circuit Court. It was quite clear that they were not investigating the drugs offence. There was nothing to suggest that the items which turned out to be drugs were seized in connection with the offence that was originally being investigated.

The notice party had properly dealt with the submissions made.

The notice party said it was a clear presumption in law that a document issued by a court was valid on its face.

A search warrant issued pursuant to the provisions of s. 10 of the Act of 1997 gives powers to the gardaí in respect of certain generalised serious offences set out in subs. 1 thereof. The notice party was satisfied that once the warrant shows the specific section and sub-section on which it is issued then it is a valid warrant and does not need to specify the serious offence. The notice party required arguments in relation to law in the context of the gardaí being entitled to go in on foot of a warrant to search for specific items whether they are then entitled to seize other matters which they may rely on as being evidence of a criminal offence.

Having summarised the submissions made, the notice party referred to s. 9 of the Criminal Law Act, 1976, which gives quite wide powers to the gardaí in the course of a search to seize evidence which is believed to be evidence of any offence or suspected offence. In the *People, Attorney General v. O'Brien* [1965] I.R. 142, at 170, Walsh J. placed in the excusable category evidence obtained by search incidental to and contemporaneous with lawful arrest although made without a valid search warrant. In his view evidence obtained in deliberate conscious breach of the constitutional rights of an accused person should, save in the excusable circumstances outlined, be absolutely inadmissible. It therefore follows that evidence obtained without a deliberate violation of the accused's constitutional rights is not excludable by reason only of the violation of this constitutional right.

The notice party referred to the scope of the power under s. 9 of the Criminal Law Act, 1976, which authorises the seizure of anything which the garda believes to be evidence of any offence.

In *D.P.P. v. Balfe* [1998] 4 I.L.R.M. 61, Murphy J., for the Court of Criminal Appeal stated:-

> "…Neither counsel on behalf of the applicant nor counsel on behalf of the Director of Public Prosecutions could find any authority as to the effect of omitting to identify the goods, subject matter of a search warrant. In principle, it might seem important to confine the search to particular goods believed to have been stolen in an identified burglary, but any such limit has been eroded and has been rendered virtually irrelevant by the provisions of s. 9 of the Criminal Law Act, 1996, … [which] render[s] less important the identification of the particular goods the immediate subject matter of the search. It is however the opinion of this Court, notwithstanding the paucity of authority, that the very concept of an application for and the granting of a warrant to search for stolen goods involves the provision of some description of the goods stolen and the goods for which it is intended to search. We are satisfied that the description provided of the goods in the present case in the information was adequate but the failure to transpose that description in the warrant involved a serious error with the resultant defect in the warrant."

On this basis the notice party held that it was clear that in the course of a genuine search the Gardaí saw something which they suspected was linked with another criminal offence and they considered they had the power to seize it and that power is vested in them in accordance with s. 9 of the Criminal Law Act, 1976.

6. Subsequent Developments
The jury had been unable to reach a verdict on 10th July, 2003, and the matter was adjourned to consider whether there should be a retrial. The respondent required more time to consider the matter and on 14th November, 2003, indicated he had not yet decided

whether the matter should be retried. A trial date was fixed for 8th March, 2004. On 12th and 16th February, 2004, solicitors for the respondent purported to serve notice of additional evidence as to the oral evidence given by Inspector McCarthy and statements of other witnesses. The matter did not proceed on 8th March, 2004. The Circuit Court made critical remarks as to the manner in which the court had been adduced to fix the hearing date without a positive decision from the respondent to retry the applicant.

The applicant had instructed his legal advisors that he was not guilty of the offences with which he had been charged and in particular that he had not been aware of the presence of any package containing illegal drugs in his dwelling. If the applicant had been convicted of the offences he would have appealed the convictions and applied for bail pending such appeal. If a determination had been made that the legal submissions were well founded it was likely that the convictions would be quashed and that no retrial would be ordered by the Court of Criminal Appeal.

In the circumstances the applicant was entitled to an order prohibiting a restraining the prosecution.

7. Statement of Opposition
By notice of opposition dated 9th July, 2004, the respondent stated that it was the function of the trial judge to ensure the fairness of the trial and to adjudicate on the evidence placed before the jury and its admissibility. This remedy was available to the applicant at the retrial and the Court in its discretion should decline the relief sought.

It was further submitted that the warrant to search dated 12th July, 2002, was lawful and properly issued by the District Court judge and was valid and not bad on its face. The search subsequently carried out at the applicant's premises was in accordance with law and/or was not carried out in violation of any of the applicant's constitutional rights and accordingly the evidence obtained should be admitted. The prosecution were entitled to seize the evidence obtained by virtue of the provisions of s. 9 of the Criminal Law Act, 1976.

The notice party did not err in law in refusing to rule inadmissible the evidence obtained on foot of the search warrant. Moreover the matters of which the applicant complained are moot.

The matter of validity of the search warrant was not determinative of the admissibility of evidence obtained on foot of same. The matter of the admissibility of the additional evidence was a matter within the discretion of the trial judge and was not a matter which entitles the applicant to apply for an order restraining his further trial. If the applicant were prejudiced by the service of additional evidence, the applicant could apply to the trial judge to exclude same.

The further trial of the applicant was not an abuse of process and was not in breach of any of the applicant's rights to fair procedure and was not unconscionable.

8. Submissions of the Applicant
Mr. O'Higgins, S.C., having outlined the facts and evidence given made legal submissions in relation to s. 10(1) of the Act of 1997, which provides that the warrant may be issued by a judge of the District Court "on hearing evidence on oath" if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of certain specified offences is to be found at a particular place. The warrant was bad on its face in that it failed to show jurisdiction for its issuance and purported to show such jurisdiction on the basis of sworn information as opposed to the hearing of evidence and on the basis of the existence of reasonable grounds for the requisite suspicion "appeared" to the District Court as opposed to such judge being "satisfied" as to the existence of such.

It was submitted that there was no presumption in law that a court document is valid on its face: *D.P.P. v. Owens* [1999] 2 I.R. 16; *Byrne v. Grey* [1988] I.R. 31; *Simple Imports Limited v. Revenue Commissioners* [2000] 2 I.R. 243 and *D.P.P. v. Byrne* [1987] I.R. 363 at 371 applied.

It was submitted that the notice party did not appear to address the submissions to the effect that while several Acts provide for the issuance of warrants on foot of the sworn information, the relevant Act in the applicant's case does not do so but provides that the District Judge "on hearing evidence on oath" may issue the warrant.

It was further submitted that on any retrial the respondent intended to attempt to cure the situation by leading evidence that in fact oral evidence was given in the District Court.

Counsel analysed the text of s. 9 of the Criminal Law Act, 1976 and s. 10 of the Act of 1997, together with the relevant case law.

In relation to the grounds of opposition the applicant's submission rested on the jurisprudence of the courts in relation to the failure to vindicate the right to an expeditious trial, the failure to preserve potentially exculpatory evidence and the rule against double jeopardy and in that regard relied on the *State (O'Callaghan) v. Ó hUadhaigh* [1977] I.R. 42; *Eviston v. D.P.P.* [2002] 3 I.R. 260 at 295; *Murphy v. D.P.P.* [1989] I.L.R.M. 71, and the *State (McCormack) v. Curran* [1987] I.L.R.M. 255.

9. Submissions on Behalf of the Respondent
Ms. Suniva McDonagh, on behalf of the Director, submitted that judicial review was not the appropriate remedy and that the search warrant was fully obtained and valid.

Moreover, any matters arising in relation to the first trial, are now moot.

In relation to that trial, the matter having gone to the jury, it was peculiarly within their competence to disagree on the verdict. It would be inappropriate for the High Court to substitute its views for that of the jury. In the circumstances the applicant was not entitled to the declaratory relief sought; that the applicant was entitled to be acquitted in the trial which took place on 8th to 10th July, 2003.

The second relief sought by the applicant, that of prohibition, is not available in certain circumstances as outlined in *McLoughlin v. D.P.P.* (Supreme Court, ex tempore, 8th November, 2001, per Keane C.J.).

It is clear that judicial review is not appropriate where the matters are in the remit of the trial judge. Counsel referred to *Blanchfield v. Hartnet* [2002] 3 I.R. 207.

Counsel notes that the applicant was not seeking to quash the warrant. In her submissions there was no risk of an unfair trial given that the retrial had not taken place.

The applicant was on notice by virtue of the service of a notice of additional evidence in February, 2004, of the circumstances surrounding the issuing of a warrant.

Even if the Court were to embark on an inquiry in relation to the issues raised at the first trial and concluded that there were any infirmities attaching to either the issuing of the warrant or the execution of the same, the Court should in its discretion, decline to grant the relief sought. The respondent would in this regard relied on *Byrne v. Grey* [1998] I.R. 31.

11. Decision of the Court

11.1 It seems that the statutory power of entry, search and seizure are exercisable only on foot of a warrant. There would appear to be no requirement that the sworn information is required to be shown in relation to the exercise of those powers. Such sworn information is, of course, necessary for the issuing of such a search warrant. The search warrant is generally issued, not just for the purpose of furthering a garda investigation, but also to secure evidence for the prosecution.

Walsh: *Criminal Procedure* at 8-09, is that:

> "Unfortunately, the current statutory powers to issue warrants constitute an unwieldy collection of disparate provisions which have been developed in a piecemeal fashion over the past two centuries. Each authorises the issue of a search warrant only when its own peculiar requirements have been satisfied. Inevitably these requirements can differ widely from one provision to another. For example, some statutory provisions permit the issue of warrants to search premises for items, property or purposes which are defined in very broad terms. Others confine the scope of the search to a very narrowly defined type of property or purpose. Some provisions are limited to a search of premises alone, while others can extend to persons found on those premises. This haphazard arrangement means that the application that the applicant for a search warrant must be careful to proceed on foot of a statutory provision which meets his or her own specific needs. Because a warrant of entry, search and seizure constitutes a serious encroachment on the property rights of the citizen the courts will enforce the statutory requirements for their safely strictly:
>
> > 'Search warrants…entitle police and other officers to enter the dwelling house or other property of a citizen, carry out searches and remove material which they find on premises and, in the course of so doing, use such force as is necessary to gain admission and carry out the search and seizure authorised by the warrant. These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met." (*Simple Imports Limited v. Revenue Commissioners* [2000] 2 I.R. 243 where the majority seemed to take the view that the warrant itself constituted the authority to enter).

While there are statutory provisions authorising the issue of a search warrant in relation to controlled drugs and substances under the Misuse of Drugs Act, 1977, s. 26 and under the Criminal Justice (Drug Trafficking) Act, 1996, s. 8, it is clear that in this case the search warrant related to s. 10(1)(c) of the Act of 1997 and the seizure of the drugs was incidental to that power.

11.2 The Criminal Justice (Miscellaneous Provisions) Act, 1997, provides as follows:-

> "10.-(1) A judge of the District Court, on hearing evidence on oath given by a member, not below the rank of inspector, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of –
>
> > (a) an indictable offence involving the death or serious bodily injury to any person,
> >
> > (b) an offence of false imprisonment,
> >
> > (c) an offence of rape, or
> >
> > (d) an offence under an enactment set out in the first schedule to this Act, is to be found in any place, issue a warrant for the search of that place and any persons found at that place.
>
> (2) A warrant under this section should be expressed to and shall operate to authorise a named member, accompanied by any other member, to enter, within one week of the date of the issuing of the warrant (if necessary by the use of reasonable force), the place named on the warrant, and to search it and any persons found at that place and seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to an offence referred to in sub-s. (1).
>
> …(5) The power to issue a warrant under this section is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.
>
> (6) In this section –
>
> > 'commission' in relation to an offence, includes an attempt to commit such offence; and
> >
> > 'place' includes a dwelling."

The Criminal Law Act of 1976 provides as follows:-

> "s. 9-(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the things so seized in the same manner as the Act applies to property which has come into the possession of

the Garda Síochána in the circumstances mentioned in that Act."

11.3 In *Blanchfield v. Hartnett* [2002] 3 I.R. 207, the applicant argued that the trial judge did not have the requisite jurisdiction to rule on a number of warrants for the inspection of bank accounts belonging to the applicant. The respondent submitted that the trial judge had jurisdiction to judge on the validity of the orders and had jurisdiction to admit such evidence, even if the orders were invalid. The applicant failed in the High Court and appealed to the Supreme Court, which dismissed the appeal. Fennelly J. referred to the obligation on the trial judge to ensure fairness of the trial and to adjudicate on the validity of orders authorising his detention. He could not find any support in the authorities cited for the proposition that the trial judge did not possess the authority to pass judgment on the validity of orders or warrants which authorise the collection of evidence.

Fennelly J. then considered whether the court could grant the relief sought by way of judicial review notwithstanding that the trial court had the necessary jurisdiction to deal with the issues. He held it would not be appropriate to intervene. He stated, at p. 226, as follows:-

> "Once the judge at trial possesses any necessary powers and once, as in *Clune v. D.P.P.* [1981] I.L.R.M. 17, it must be presumed that he will exercise those powers fairly and justly, there is no need for the High Court to intervene. It is usually preferable to allow the trial judge to hear evidence concerning all the elements bearing on the issue of whether evidence should be admitted than to take one issue such as the validity of an order to be dealt with in isolation. It should also be borne in mind that the illegality of such an order is not, in any event, determinative of the issue of admissibility. Taking the issue out of its proper context may create a misleading impression as to its impact."

11.4 The District Court has jurisdiction to deal with the issuing of a warrant where there was reasonable grounds for suspecting that evidence in relation to an offence of rape was to be found.

Given the constitutional and conventional protection in relation to searching, in particular a dwelling, the power to search must be exercised by the hearing of evidence on oath given by a member not below the rank of inspector and requires that the District Judge is satisfied that there are reasonable grounds for suspecting that such evidence is to be found in any place.

The warrant to search was adduced in evidence in the trial before the notice party. It appears that the form of Information for a Search Warrant was not. Moreover it is clear that the respondent was put on proof in relation to the warrant to search.

The warrant to search recites that "it appears to the District Judge as a result of information on oath" that the items were to be found at the flat of the applicant. The reasonable grounds for suspecting the evidence of or relation to the commission of an offence were referred to in the form in the Information and not in the warrant to search itself.

Does this necessarily have to form part of the proof of the warrant to search?

The grounds for issuing a warrant requires the District Judge to be satisfied that there are reasonable grounds for the suspicion. Walsh at 8 – 12 comments:-

> "Accordingly, it will not be sufficient if the applicant swears that on the basis of information which has come to his attention he has reasonable grounds to believe that relevant items are to be found in a specified place. The applicant must also present evidence to satisfy the issuing authority that his belief is based on reasonable grounds."

In *Byrne v. Grey* [1988] I.R. 31, Hamilton P. (as he then was) explained the correct approach in relation to s. 26(1) of the Misuse of Drugs Act, 1977, as follows at p. 38:-

> "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."

Accordingly, before a warrant could issue under this provision Hamilton P. stated at p. 39:-

> "…The District Justice or Peace Commissioner should himself be satisfied by information on oath that facts exist which constitute reasonable grounds for suspecting that an offence has been."

The recital to the search warrant signed by the judge of the District Court states "WHEREAS it appears to me" rather than "I am satisfied" that there are reasonable grounds for suspecting the evidence of an offence…is to be found in a place.

The concluding paragraph, signed by the learned District Judge, provides the statutory compliance:

> "Sworn before me on the 20th day of July, 2002 … and I am satisfied the grounds set out are reasonable."

This evidences that the information was sworn. It cannot be considered as anything other than evidence of the Inspector's reasonable grounds of suspicion.

Moreover, it is evidence that the learned District Judge was satisfied that the grounds set out in the sworn information of the Inspector are reasonable grounds.

It is clear that this complies with the wording of s. 10(1) of the Act of 1997. The learned District Judge was satisfied that there were reasonable grounds for suspecting that evidence of an offence of rape was to be found at the applicant's dwelling.

The absence of a reference to the place where the learned District Judge signed the warrant is not, in my view, fatal, as it is not a statutory requirement.

There is no requirement that the validity or proof of a warrant requires evidence of the formal sworn information. It is sufficient that the matter is sworn before a District judge who is satisfied that the grounds are reasonable.

It follows that the standard form warrant to search pursuant to s. 10 of the Act of 1997 corresponds to the requirements in s. 10 of the Act of 1997, that the District Judge be satisfied as a result of the information on oath of the inspector.

This does not, of course, determine the matter as the additional evidence given by Inspector McCarthy before the proposed retrial states that:-

> "Judge Dunne asked me if I was satisfied from the information at hand that evidence was likely to be found at the address on the information and warrant to search. I replied that I was and that I believed the complaint to be genuine."

The net issue is, of course, whether there was information that evidence would be likely to be found at the address indicated on the information and warrant to search.

11.5 The final consideration is whether this is a matter for the Circuit Court trial judge or for the High Court on a judicial review application.

It is clear that the scope of judicial review whereby the High Court may interfere in an imminent criminal trial is limited. Keane C.J's decision in *McLoughlin v. D.P.P.* (Supreme Court, ex tempore, 8th November, 2001) is apposite:-

> "…The court would like to point out the circumstances in which the High Court will interfere and is entitled to interfere by way of prohibition in a criminal trial which is imminent are limited. They can certainly do so when the delay by the prosecution is such as to violate the accused's right to an expeditious trial, a right guaranteed under the Constitution as an essential feature of a 'trial in due course of law'."
>
> …

If there is a question of any possibility of evidence being admitted, or a defendant being prejudiced in any way by a trial, the trial judge should be entrusted with the task of ruling on that in general. It should not be a matter for judicial review.

Hamilton P. in *Byrne v. Grey* [1988] I.R. 31 at 41, referred to above, held:-

> "In my view, the objective of achieving a just resolution of this matter [the impugning of a warrant] is in the course of his trial. It is a matter for the trial judge to decide whether the evidence sought to be admitted is admissible or not. Consequently, I will refuse the application made on behalf of the applicant."

Whatever the technical merits are in relation to the applicant's case, it is not, accordingly, appropriate that they be dealt with by way of judicial review. A date was fixed for the trial on 8th March, 2004, and the matters could have been dealt with more properly, and certainly more expeditiously, by the trial judge.

In the circumstances the Court refuses the relief sought.