**THE COURT OF APPEAL**

**Record Numbers: 47/2017**

**46/2017**

**Edwards J.**
**McCarthy J.**
**Kennedy J.**

**BETWEEN/**

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

**APPLICANT**

**- AND -**

**F.R. AND A.R.**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 23rd day of July, 2019 by Mr. Justice John Edwards**

**Introduction**
1. In this case both respondents were acquitted by direction of the trial judge on the 1st February, 2017 in circumstances where they each faced trial on a count of keeping prohibited goods contrary to s. 102(3)(c) of the Finance Act 1999.

2. The Director of Public Prosecutions has applied to this court seeking an order quashing the acquittal by direction, and determining that the trial judge erred in law in excluding compelling evidence within the meaning of s. 23(14) of the Criminal Procedure Act 2010 (the Act of 2010) and an order directing that the accused be retried for the offence charged. Accordingly, what is before the court is a "with prejudice" appeal against the respondents' acquittal.

**Background to the matter**
3. Following the arraignment of the respondents, at which they each pleaded not guilty to the single charge preferred against them, the jury were given an uncontroversial opening address by counsel for the prosecution and they were then sent away on the basis that legal matters required to be canvassed in their absence. Once the jury had gone the trial judge was told that there was to be a challenge to a search warrant which was at the heart of the case and that it was proposed to hear evidence in relation to the obtaining of the warrant and the search on foot of that warrant in a voir dire.

4. The trial judge was told, by way of context, that the respondents in this case lived at Courtbane, Dundalk Upper, County Louth. Their premises comprised a family home in its own grounds and adjacent to which there was a shed, out house and yard. There was a driveway leading up to the house. A family home was to the right of the driveway and the driveway continued past the house into the yard. At the bottom right hand corner of that yard was an L-shaped structure comprising the shed and outhouse previously referred to. The shed was quite close to the kitchen of the dwelling house. There was a sixteen metre gap between the kitchen and the shed.

5. The court of trial heard evidence from Officer Mary Callan who told the Court that in October 2012 she was an officer of the Customs and Excise Service. She was also an authorised officer of the Revenue Commissioners and at the time was attached to the Special Compliance District of the Customs and Excise Service based at Dundalk. She told the court that while working in that role she received information from senior management in the Customs and Excise Service to the effect that there was an oil laundering operation on the aforementioned premises of the respondents.

6. Consequent on receiving that intelligence, covert surveillance was conducted on the premises in question. Officer Callan told the court that she personally conducted this surveillance accompanied by her colleague, Officer Deirdre Martin. The surveillance was conducted on the 11th September, 2012 and again on the 16th October, 2012. While initially unwilling to disclose the precise position where the surveillance had been conducted from, for understandable operational reasons, she confirmed to the court that they were near the premises and in a position to observe the shed adjacent to the dwelling house. It was later confirmed that they had in fact been in the vicinity of the hedge at the back of the shed. She stated there was a strong smell of diesel at the back of the premises. Pressed as to where exactly this smell of diesel was coming from, she stated that it was coming from where the hedge was at the back of the shed. She further stated that she had observed in the course of her surveillance that there was a timber opening in the back of the shed. It was like a door but it was a makeshift opening. There did not appear to be a proper door.

7. On the 16th October, 2012, which was the second occasion on which they conducted covert surveillance, there was a much stronger smell of diesel. Again, this appeared to be coming from where the makeshift door was.

8. In consequence of what the covert surveillance had revealed, Officer Callan applied for and obtained a search warrant. The application was made to the District Court in Drogheda on the morning of the 23rd October, 2012. Officer Callan told the court that prior to making the application she established who owned the premises. She looked it up in the Land Registry and got the Folio Number and established the names of the owners who were the first and second named respondents in this appeal. One of those owners, namely the second named respondent, was, in fact, a Revenue Official.

9. The evidence was that for the purpose of obtaining the required search warrant Officer Callan attended in person at Drogheda

District Court on the date in question. The District judge who was sitting was Judge Flannan Brennan. Officer Callan provided an information in writing, which she had verified on oath, otherwise known as a "sworn information", to Judge Brennan and she stated that Judge Brennan asked her some questions in relation to it. A copy of her sworn information was produced before the court of trial and exhibited. When pressed as to what exactly happened in the District Court she told the court of trial that she handed Judge Brennan the documentation she had prepared and he read it. He then asked her questions with regard to the information that she had provided. When asked what documentation she had handed to him she said that she handed to him the search warrant and her information.

10. Officer Callan was asked in the court below about the contents of her sworn information and it was read into the record. The information read:

An Chúirt Dúiche The District Court

INFORMATION

Under Section 136(5) of the Finance Act, 2001

*District Court Area of Dundalk District No 6*
*The information of Mary Callan attached to Revenue Anti Evasion Team, Revenue Hose, Coes Road, Dundalk, Co Louth, who says on oath:-*

*I am an Officer of the Revenue Commissioners and I have reasonable grounds to suspect that*

*(a) certain goods to wit, excisable products, mineral oil on which the appropriate rate of duty has not been paid, prohibited goods as defined in s. 94 of the Finance Act 1999, and vehicles and equipment relating to same, the same being goods which are liable to forfeiture under the law relating to excise,*

*and*

*(b) certain records relating to transactions in contravention of the laws relating to excise,*

*are kept or concealed on or at the premises or place of [F.R.] and [A.R], Courtbane, Dundalk Upper, Co Louth in the said District.*

*The grounds for so suspecting are as follows: Information received from a reliable source and surveillance effected by me on the said premises.*

*I hereby apply for a warrant to search the said premises pursuant to Section 136(5) Finance Act, 2001.*

*Signed:….. Mary Callan….. (Informant)*

*Sworn before me at Drogheda District Court this 23rd day of October 2012 and I am satisfied the grounds set out above are reasonable.*

*Signed: …. Flannan Brennan ….*

*Judge of the District Court assigned to the said District."*

11. The witness gave evidence that Judge Brennan questioned her, while she was under oath, as to whether she believed that the information that she was providing was correct and she replied, "yes". She stated that he further asked her if the signature on the document was her own and she had said "yes". Officer Callan confirmed in evidence to the court below that she had signed the information as informant and she identified her signature in court on the document. She stated that she had appended her signature in front of Judge Flannan Brennan. This was again while she was in the witness box and under oath. After she had done so, he then signed the warrant and gave it to her. A copy of the search warrant as signed by the District Judge was also exhibited before the Circuit Court. As no issue is taken with the form of the warrant there is no need to set out its terms.

12. Officer Callan further testified in the course of the *voir dire* that on the 24th October, 2012 authorised officers of Customs and Excise, including herself, and two members of the Garda Regional Response Unit, went to the premises of A.R. and F.R., the respondents to this appeal. The officers of the Revenue Commissioners who accompanied Officer Callan were Officer Deirdre Martin, Officer John Heffernan, Officer Alan O'Cleary, Officer Vincent Drumm and Officer Anthony Keogh. The gardai from the Garda Regional Response Unit were Garda Mark Daly and Garda Robbie Keenan. The search party arrived at the premises at 5.55 a.m. Three members of the search party went to the front door of the house and rapped on the door and rang the doorbell a number of times. There was no response. They then rapped on the windows of the house. After a short while a young gentleman opened a window. Officer Callan explained to him that she was an officer of Customs and Excise and that she had a search warrant. She had her warrant of authority and the search warrant in her hand. She requested him to open the door. She told the trial judge that her reason for wanting to search the premises was because she believed there was an oil laundering plant operating there. She believed it to be most likely in the back shed of the premises close to where she had previously got the smell of diesel. She was asked about the relevance of the makeshift door, which she had described earlier in her evidence. She stated that based on her experience oil laundries would frequently have a makeshift opening at the back of the premises being used for that purpose in case the oil laundering activity was discovered. If somebody came in at the front of the premises, those involved could escape quickly through the back. She was asked where the border with Northern Ireland was in relation to this premises and she stated that it was approximately a mile further down the road.

13. She was asked what she would expect to find at an oil or a diesel laundering facility. She stated that she would expect to find green diesel – possibly being laundered diesel – a bleaching earth to launder the diesel, pumps, hoses, tanks and possibly an oil tanker for removing the oil. She was further asked to describe the process by means of which diesel was laundered and she did so. In the context of this case nothing turns on that and it is unnecessary to describe her evidence as to the process.

14. It was later established that the person who had opened the window was C.R. who was a son of F.R. and A.R. After Officer Callan had spoken to C.R., she also spoke to A.R. A.R. was in an agitated and distressed state and it was decided not to interview her after caution at that point in time. The search party nevertheless spent some time both in the family house and in the buildings close to the house. In particular, they went to the shed adjacent to the house which was described in evidence as the laundry shed. There they found an ERF oil tanker, pumps, hoses, bleaching agent, sock filters, a very large 21,000 litre storage tank and sludge. Officer Callan stated that this sludge was the by-product of the processing of green diesel into white diesel.

15. Under cross-examination Officer Callan was asked about the first part of her information in writing, in which she had said that it was received from a reliable source. It was put to her that that was just a bald statement and she agreed. It was then put to her that *"you latch that on with 'and surveillance effected by me on the said premises'."* Again, she agreed to that. It was suggested to her that these were *"the two keys"* to obtaining the warrant insofar as she was concerned and again she agreed with that. She was asked if she had told Judge Brennan that she did not personally know anything about the information that she had received from her superiors. She replied that she did not tell him that. However, she stated, *"I trust management."* Her management had given her that information and as far as she was concerned it came from a reliable source. It was put to her that she was not an automation and that she was capable of independent thought. She reiterated that she believed what management had told her, and was satisfied on the basis of being told it by her management that it came from a reliable source. Pressed on this she stated *"I trusted that management knew where the information had come from and I acted on what management had told me to do"*. She was asked what she had done to act on it and she indicated that she had conducted surveillance operations. She added that if the surveillance indicated that the information which had come in was correct, then she would seek a search warrant. Her evidence was that that was how events had, in fact, unfolded.

16. Officer Callan was then further cross-examined at some length concerning where she had conducted her surveillance from and concerning the nature and strength of the smell that she had detected at the time. It was suggested to her that there was nothing particularly unusual about a smell of diesel in a farmyard. It was suggested that this sort of smell came from tractors and from combine harvesters and other farm machinery. She replied *"I presume so"*. As regards the smell she stated that it was excessively strong, particularly on the second night, and that she did not think it would be the same smell as you would get from the normal type of farm machinery that one expects in a farmyard. Counsel for the second named respondent asked her some further questions with respect to her knowledge, or lack thereof, concerning where the intelligence about a diesel laundering operation had come from. She again reiterated that her information had come through senior management and that they had said to her that it had come from a reliable source. In those circumstances, she was satisfied with the information. It was suggested to her that the judge would not have picked up from the way in which she answered the question *"are you satisfied with the information supplied"* that she had acquired it second-hand, or possibly even third-hand. Officer Callan was not prepared to accept that suggestion and re-iterated that she had told the judge that she was satisfied that the information was reliable because she believed that to be the case in circumstances where it had come through her senior management.

**The Application for a Direction**

17. Following the evidence heard on the *voir dire* there were lengthy submissions by counsel on behalf of both respondents (applicants for the direction) and in response from counsel on behalf of the applicant (the Director of Public Prosecutions).

18. The case made on behalf of both respondents was that the warrant was invalid arising from the failure of the witness who applied for it to put all relevant material before the District Judge at the time of the application. In particular, it was submitted that the witness had not properly informed the District Judge that she personally had not received the relevant information from a confidential source or that she did not know anything about the person who was the source of the information. The witness had taken no steps to personally evaluate the information and, in effect, she operated on the instruction of a senior officer.

19. Further, there was implicit criticism of the surveillance conducted by the witness and the failure to explain what had happened to the Judge.

20. In any case, it was submitted, where a person is applying for a search warrant the person to whom the application is made must necessarily rely on the *bona fides* of the applicant. This is because such applications are usually made on an ex parte basis and the execution of a search warrant invariably affects the rights of the citizen. It was submitted that in any case where a person is applying for a search warrant the application should be made setting out the relevant information available to the applicant and he should be candid or frank in giving the information. This requires a plain statement by the applicant of the nature of the information that is available to him at that time and he should be able to explain why or provide some specific reason as to why the judge should grant that particular warrant. There is no need for precise or detailed information but it must go beyond the use of generic and well-worn phrases of the type that were set out in the sworn information in the present case.

21. It was submitted that in the present case the evidence given on the *voir dire* raises real concerns regarding the transmission of information to the applicant for the warrant. The witness's own investigations were very limited and this may not have been apparent to the District Judge when he was considering the witness's comments regarding surveillance that she had conducted. Further, the use of the expression "covert surveillance" might give an erroneous impression as to the extent and nature of the investigation conducted by the witness.

22. In support of their arguments the respondents referred the trial judge to *Walsh v Fennessy* [2005] 3 IR 515; *People (DPP) v Tallant* [2003] 4 IR 343*; People (DPP) v Tyndall* [2005] 1 IR 593; and *Byrne v Grey* [1988] IR 31. It was contended that the judgments in these cases demonstrated that a judge who is issuing a search warrant cannot rely on a bald statement from the applicant simply setting out the most bare facts. In a case where the applicant is not the recipient of the information that is of critical importance in the application process, sufficient details must be given to the applicant for a warrant by her informant, by briefing or otherwise, so as to enable that applicant, in turn, to satisfy the judge who is being asked to issue the warrant that the information grounding the application is reliable and should be acted upon.

23. It was submitted that in the present case, the key intelligence was seemingly in the possession of management in the Customs and Excise service for over a month before an application was made for a warrant. It was submitted that no attempt was made to particularise the nature of the intelligence, or the source of same, and no attempt was made to evaluate it. Moreover, it was submitted that the investigation took place at a leisurely pace. The only surveillance conducted involved the two night-time visits to the vicinity of the respondents' farm yard and nothing further.

**The Trial Judge's Ruling and it's Consequences**
24. The trial judge ruled as follows:

> *"JUDGE: I've been asked to rule on a voir dire on the validity of a warrant issued by Judge Flannan Brennan of the District Court on the 23rd of October, 2012. The warrant was issued by the Judge on foot of sworn information from Mary Callan, a revenue official who recorded in the information her suspicion that goods and records were being maintained at the premises of the accused persons in this case which would have relevance to the issue, if I could use the colloquial expression diesel laundering. The grounds upon which the information was based from the deponent was, "information received from a reliable source and surveillance affected by me on the said premises". The application was made to the District justice under section136, subsection 5 of the Finance Act of 2001, and during the course of the application the deponent, who attended in person, was asked by the District judge whether she had signed it to which she replied she had and did she believe the information to be true, to which she replied she did. The warrant was then issued by the District judge. Now in warrants of this type, as is common case, they do involve an interference with the constitution and property rights of the person to whom the warrant is directed and the property which they occupy. And it is also common case that the applicant for these warrants must present evidence to the district judge to satisfy him as the issuing authority that he should do so. Of course my view is, and I think it's reflected in the authorities, that when a person makes this application on affidavit, they are under a duty to make full disclosure of relevant matters which would assist the district judge in coming to a decision on the application and in particular, to ground their suspicions which they have referred to in the information. It must be remembered that a judge is relying on what he's been told in the course of the document and he does so rely because of course what he's doing in issuing the warrant is he's interfering with the rights of citizens and this requirement that the judge relies on information that it's fully disclosed to him is of course a protection in law from the individual citizen.*
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> *On my reading of the authorities, the District judge and in this case Judge Brennan, had to be satisfied that facts existed which constituted reasonable grounds for the suspicion and I refer in this case to the DPP v. Kenny and the decision in Byrne v. Grey. In this particular case, the information which is recorded in the document is deficient in that it does not make clear that Ms Callan was relying on her superiors for the first aspect of the information and in my opinion, this is a breach of the uberrima fides rule. Full facts would have to be given to Judge Brennan so make a decision and it may well have been the case that had Judge Brennan had explained to him the actual facts of the case, that he may have had pause for thought and required an affidavit from a second party in the Revenue to ascertain the level of the information from the reliable source and as to whether or not that would satisfy him. That was entirely of course a matter within Judge Brennan's discretion as the issuing judge acting judicially, but he wasn't given that choice because he wasn't told. It is my view that had Judge Brennan been given the correct information in the document, that he would have reasonably asked further questions about it and I think had the position been known to him as to what in fact the truth was, I doubt he could have reasonably been satisfied which is the test formulated by Mr Justice Fennelly in the DPP v. Tallant case. It is the law that the accused people in this case have an onus to satisfy me that there is a deficiency in the warrant and I believe that that onus is discharged by them in the particular circumstances of this case. The information that is sworn is misleading in an important respect. I have indicated what in my view it is; it is the fact that Ms Callan herself had no knowledge, other than what she was told by superiors, in relation to the first part of her grounds for her suspicion. It's not stated and any reasonable reading of the document by a judge who's asked to do this application had indicated that she had some knowledge; it became apparent from cross examination that she in fact had no such knowledge whatsoever and was solely relying on what her superiors said to her.*
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> *I would reserve for another day whether it should also be attacked on the basis that it constitutes the exercise of an official duty on the say so solely on the superior officer without any detail or background being explained to the investigating officer which I've described as the Walsh v. Fennessy argument which was made by both counsel for the defence. I have to say that there may be some merit in that position, but I'm not deciding the case on that basis. I'm deciding it on the basis, at this particular juncture anyway of it, that it was a significantly deficient in the information conveyed to the judge.*
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> *I would point out that where affidavits are required for judicial decisions, I would expect that they are full and frank and I am surprised that there appears to be a certain lack of that in this particular case. I think it has to be understood that when a judge is faced, often in a very truncated form of application in the District Court, with a document, he has to take it on face value what he gets and it has always been my understanding of the approach where courts are asked to invoke their jurisdiction, be it in injunctive or otherwise, over citizens, that there is a full and frank disclosure in the affidavits upon which that application is based. These are not administrative matters, they are seriously important occasions when full disclosure has to be made.*
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> *Consequently, there is a difficulty with the warrant on the basis of the information. That's not of course the end of the argument because it has also been suggested to me that the JC decision saves the warrant on the basis that this is inadvertence and is inadvertence in the sense envisaged by Judge Clarke in the Supreme Court in the decision that's been opened to me. I'm satisfied from my review of the decision and from the facts of this particular case that this is not inadvertence as envisaged by Judge Clarke. In particular, firstly, ignorance of the rules relating to affidavits is not an excuse that should be tolerated by the Courts as constituting mere inadvertence. There is a firmness in the civil courts for example in dealing with these issues. People can be refused injunctions where they have left out significant detail in their affidavits irrespective of the justice of whether an injunction should be granted or not. It's not to be taken lightly and in my view, an ignorance of the rules and a failure to comply with them and follow them should not be excused or tolerated and should not be regarded as inadvertence. Nor do I believe that's what was envisaged by Mr Justice Clarke in his judgment.*
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> *Secondly, this was classically a systems failure. I do not ascribe any personal blame to Mary Callan who was simply doing her job as she was directed. But there is a systems failure. Sometimes these things occur where there is a regular apparent procedure which is adopted and appears to be successful over a period of time and which involves a minimalist approach to the duties that you have to a court. That's what's happened in this particular case. I believe that is a systems failure within the authority in this particular case, and is not inadvertent in the legal sense, or just a mere technical failure.*
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> *Thirdly, the absence of deliberation and I accept that there was no intention to mislead or to understate in the affidavit, is in my opinion irrelevant. I will not I certainly don't apply the dictionary definition of deliberation sorry, of inadvertence referred to me. I think we need a higher standard than that when dealing with this type of application and while I accept, as I say, it wasn't deliberate, it certainly should not be excused.*

*Now, finally I want to say, I'm aware of the public interest that arises in this case and I have obviously taken account of it. But I'm strongly of the view that where judges are involved in the protection of the constitutional rights of citizens, full and frank explanation and disclosure is required of any authority seeking the assistance of the judiciary. Consequently, therefore I accede to the application to strike down the warrant."*

25. As a consequence of this ruling the prosecution were not in a position to offer any further evidence. In the circumstances the trial judge considered that he was obliged to withdraw the case from the jury and he granted a direction to both respondents.

**The Grounds of Appeal**
26. The appeal is brought on the grounds that:

(1) A ruling was made by the court of trial during the course of the trial of the accused persons, which erroneously excluded compelling evidence (within the meaning of section 23 (14) of the Criminal Procedure Act 2010;

(2) When the court of trial excluded this compelling evidence, there was insufficient evidence to place before the jury and in those circumstances the court of trial directed a Not Guilty verdict. This direction arose by reason of the erroneous exclusion of the evidence to the effect that the accused had in their possession various items and material by way of paraphernalia associated with operating a diesel laundering plant.

(3) It is in the interests of justice that the orders sought should be so granted.

**The Relevant Legislation:**
27. Section 23 of the Act of 2010, to the extent relevant to this appeal, provides as follows:

"(1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General as may be appropriate, "may, subject to subsection (3) and section 24, appeal the acquittal in respect of the offence concerned on a question of law to—

(i) the Court of Appeal, or

(ii) in the case of a person who is tried on indictment in the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution,

(2) Where a person's conviction of an offence on indictment is quashed on appeal by the Court of Appeal and the Court makes no order for the re-trial of the person in respect of the offence, the Director, if he or she is the prosecuting authority in the trial, or the Attorney General, as may be appropriate, may, subject to subsection (3) and section 24, appeal the decision of the Court of Appeal not to order a re-trial of the offence concerned on a question of law to the Supreme Court under Article 34.5.3° of the Constitution.

(3) An appeal referred to in this section shall lie only where—

(a) a ruling was made by a court—

(i) during the course of a trial referred to in subsection (1), or

(ii) during the hearing of an appeal referred to in subsection (2),

which erroneously excluded compelling evidence, or

(b) a direction was given by a court during the course of a trial referred to in subsection (1), directing the jury in the trial to find the person not guilty where—

(i) the direction was wrong in law, and

(ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

(14) In this section "compelling evidence", in relation to a person, means evidence which—

(a) is reliable,

(b) is of significant probative value, and

(c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned."

**Jurisprudence to which we were referred**
28. The first case to which we were referred was the case of *Walshe v. Fennessy* [2005] 3 I.R. 516. In this case, which was an action for wrongful arrest tried in the High Court before a judge and jury, the two plaintiffs had been arrested and detained under section 30 of the Offences against the State Act 1939 (the Act of 1939) on suspicion of membership of an illegal organisation, namely the IRA. The arrests took place as part of an investigation into the infiltration of the ranks of the Gardaí in Limerick by the IRA. The first named plaintiff was arrested by the first named defendant on foot of the direction given to him by his superior officer. Section 30 of the Act of 1939, which created the power of arrest, empowers a member of An Garda Siochána, inter-alia, to interrogate and arrest any person whom the member suspects of being concerned, as principal or accessory, in the commission of an offence under the Act, or an offence which is for the time being as scheduled offence under Part V of the Act. In the High Court, Quirke J ruled that the arrests of the plaintiffs were unlawful on the grounds that the first defendant did not have the requisite suspicion for the purpose of section 30 of the Act of 1939, and the jury awarded damages to both plaintiffs.

29. The state appealed with partial success to the Supreme Court, which held, inter-alia:

> (1) That in the exercise of a power of arrest pursuant to section 30 of the Act of 1939, the suspicion which the arresting garda was required to have must be founded on something more than a mere order of a superior to carry out that arrest;
>
> (2) That in order to form the requisite suspicion required by section 30 of the Act of 1939, the arresting officer must have some understanding of the underlying rationale or basis for the arrest;
>
> (3) That the relevant suspicion was that of the arresting officer alone which must find some objective justification from the surrounding circumstances and information available to the arresting officer.

30. In that regard, our attention was drawn in particular to paragraph 56 of the judgement of Kearns J. where he states: –

> *"Without in any way trying to fix or lay down a template of what is appropriate in all cases, these authorities clearly demonstrate that the relevant suspicion is that of the arresting officer alone. It is not the arresting officer's subjective belief which is the critical or determining factor. It is a suspicion which, to be found " not unreasonable', must find some objective justification from the surrounding circumstances and the information available to the arresting officer. It is a suspicion which in my view may be informed by a direction to arrest given by a superior officer, particularly in the circumstances of this case where the direction must be seen against the background of all the other background circumstances found to have been proven at the time when the direction to arrest was given. Even if a direction alone is never to be taken as sufficient, and I don't wish to be taken as so holding or deciding, the authorities establish that something quite small in addition will suffice to constitute the material from which a bona fide and reasonable suspicion may be formed. It may be a briefing session or document. It may be hearsay material coming by way of confidential information. It may be no more than a short verbal account given by a superior officer to the officer who will make the arrest. It may also derive and be inferred from the surrounding circumstances as this court recently emphasised in D.P.P. v Tyndall [2005] 1 I.R.593 per Denham J)."*

31. The appeal was partially successful because the Supreme Court went on to hold that although the reason for making the arrest was the direction given by the superior officer, this did not mean that the arresting officer did not have his own reasonable suspicion based on information already in his possession. In this particular case the arresting officer had testified that he had, quite separately from the direction given to him by his superior officer, formed his own reasonable suspicion in respect of the first named plaintiff based on his perusal of a document, marked C 77, which was an intelligence assessment. However, in the case of the second plaintiff there had been no additional material available to inform the mind of the arresting officer. The appeal was therefore allowed in respect of the first named plaintiff but dismissed in respect of the second named plaintiff.

32. In the present case the respondents rely upon *Walshe v. Fennessy* in support of their contention that Officer Callan had produced nothing to objectively justify her claim of reasonable grounds to suspect the existence of the circumstances said to justify the issuance of a warrant. Conversely, the appellant relies on *Walshe v. Fennessy* as supporting her contention:

> (a) that it was legitimate and objectively justified for Officer Callan to rely on the third-party intelligence which her superiors claimed to be in possession of – the "C 77" containing the intelligence assessment that the arresting Garda had relied upon in the Walsh v. Fennessy case had not been prepared by him personally;
>
> (b) that in any case there was also additional material, comprising the covert surveillance conducted personally by Officer Callan, which objectively justified her claim.

33. We were also referred to the *People (Director of Public Prosecutions) v. Tyndall* [2003] 1 I.R 593, to which Kearns J had referred in the quotation cited from *Walshe v. Fennessy*. This was another case involving an arrest under section 30 of the Act of 1939. In this case it led to the accused's conviction of robbery and of intentionally or recklessly causing serious injury, for which he was sentenced to imprisonment. During the trial in the Circuit Court the arresting garda did not give evidence that he had a suspicion prior to arresting the accused. The trial judge, in holding the arrest valid in the absence of this evidence, inferred from the evidence that the arresting garda had at that time a reasonable suspicion and the mere omission in evidence of the words *"because I had a reasonable suspicion or the suspicion of his unlawful possession [of a firearm]"* did not render the arrest incomplete or unsatisfactory. The Court of Criminal Appeal also held the arrest to be valid and refused the accused leave to appeal against his conviction. It subsequently certified pursuant to section 29 of the Courts of Justice Act 1924 that its decision involved a point of law of exceptional public importance and that it was desirable that an appeal be taken to the Supreme Court. It was submitted on behalf of the accused that evidence of the suspicion of the arresting Garda was an essential proof that did not exist in this case. It was submitted on behalf of the prosecutor that although there was no direct evidence of suspicion by the arresting garda there was circumstantial evidence from which the suspicion could be inferred.

34. The Supreme Court held, in allowing the appeal, that section 30 of the Act of 1939 required that the arresting member of An Garda Siochána have a suspicion as set out in the section. This was an essential condition precedent to arrest. Proof of this fact, i.e., of the suspicion, might be by direct evidence. There was no such direct evidence in this case. The court went on to hold that the omission of direct evidence of the suspicion did not render the arrest unsatisfactory if the suspicion might be inferred from the circumstances, but evidence must exist from which it may be inferred. In this case there was no such evidence.

35. While the respondents in the present case rely on the *Tyndall* decision, it is difficult to see how it has any direct relevance in circumstances where Officer Callan had expressly deposed in her sworn Information, and further stated in oral evidence, that *"I have reasonable grounds for suspecting …etc"*. In those circumstances the prosecution were not seeking to have resort to, or recourse to, an inference to that effect.

36. We were also referred to the much earlier case of *Byrne v. Grey* [1988] I.R. 31. Unlike the cases of *Walshe v. Fennessy* and *People (Director of Public Prosecutions) v. Tyndall*, the *Byrne* case was concerned with the validity of a search warrant. In that case the first respondent, a peace commissioner, had issued a warrant pursuant to section 26 of the Misuse of Drugs Acts 1977 and 1984 authorising a garda to enter and search a house. The warrant recited that the first respondent was satisfied by the information on oath of the garda in question that there was reasonable grounds for suspecting that cannabis was being cultivated at the premises. Following the issue of the warrant the house was searched and some heroin was found. The applicant obtained leave to apply for an order of certiorari by way of judicial review to quash the search warrant on various grounds, including inter-alia that the respondent could not have been satisfied that there were reasonable grounds for suspecting any of the matters referred to in section 26 of the Acts of 1977 and 1984, because no sufficient proper information had been laid before him. The High Court, although it refused the relief sought as being inappropriate in the circumstances of the case, held nevertheless:

(i) that the statutory powers encroaching on the liberty of the citizen and the inviolability of the dwelling should be construed in the manner which is least restrictive of individual rights;

(ii) that it was a condition precedent to the exercise of the power to issue a search warrant conferred by s. 26 of the Acts of 1977 and 1984, that the District Justice or Peace Commissioner concerned should himself be satisfied that facts existed which constituted reasonable grounds for suspecting that an offence was being committed;

(iii) that in deciding whether or not to issue a warrant the first named respondent was obliged to act judicially, and

(iv) that the first respondent had acted without jurisdiction in issuing the search warrant because he personally had no information before him which would have enabled him to be satisfied that there were reasonable grounds for suspecting that an offence has been committed.

37. Reliance was placed by the respondents on *Byrne v. Grey* as supporting their case that the district judge in the present case had insufficient information before him on foot of which he could have lawfully issued the search warrant. The appellant seeks to distinguish the facts of the present case from those in Byrne v. Grey on the basis that in *Byrne v. Grey* the Detective Garda merely stated: *"I am a member of the Garda Siochana and I have reasonable grounds for suspecting that a plant of the genus cannabis is being cultivated et cetera et cetera"*. Other than stating that he had reasonable grounds for suspecting that which he claimed to suspect, the Detective Garda did not provide the court with any indication as to what those grounds might be. On the contrary, in the instant case Officer Callan had stated that her grounds for holding her asserted reasonable suspicion were twofold; namely that she was in possession of information received from a reliable source, and also because of information obtained during surveillance effected personally by her on the premises which she wished to search.

38. We were further referred to the case of *The People (Director of Public Prosecutions) v. Tallant* [2003] 4 I.R. 343. In that case the accused was convicted on a number of counts of possession of controlled drugs which had been retrieved during two searches of the accused's dwelling house. The searches had taken place on foot of search warrants obtained from the District Court on foot of two sworn informations. One was grounded on *"confidential information received and inquiries carried out"*. The other was on *"information received and inquiries carried out"*. The District Judge made enquiries as to whether the respective gardaí believed their information is to be correct and both gardaí replied that they did. At trial, counsel for the accused challenged the basis on which the said search warrants were issued on the basis that there was insufficient evidence before the District Court to entitle the District Court Judge to issue the warrants. The trial judge dealt with this challenge as a preliminary issue and found that the warrants were validly issued. The accused was subsequently convicted of possession of drugs for sale or supply and received a prison sentence. Having been refused leave to appeal by the trial judge he then applied directly to the Court of Criminal Appeal for such leave.

39. The Court of Criminal Appeal, in refusing the application, held that the search warrants were validly issued as there was evidence that the District Court Judge had made reasonable enquiries into the facts grounding the informations of the respective gardaí and, in doing so, the District Court Judge addressed the minimum question of reasonable basis for belief and had acted judicially. The case of *Byrne v. Grey* was distinguished on precisely the basis on which the appellant asks this court to distinguish it.

40. Particular reliance is placed by the appellant in this case on the following passages from the judgment of the Court of Criminal Appeal in *Tallant*, which was delivered by Fennelly J.:

> *"Now what should be the standard to challenge an order of the District Court in these circumstances since it is an order made by a court of record and verified by a warrant issued, in each case, under the hand of the District Judge on behalf of the District Court? The court must look at the totality of the evidence given in the District Court at the time and that is what the Circuit Judge did and it is quite apparent that he did it very carefully and discriminated and decided that he was not satisfied that a second part of the sworn evidence of Garda Gavin had, in fact, been given because there was a variation between the evidence that he gave in court and the statement of evidence that he had given in the book of evidence.*
>
> *In these circumstances, one has to look at the quality of the evidence that the District Judge is entitled to act on in this situation. This is not an inter partes matter: it is not a criminal prosecution in itself. It is an administrative procedure in the first instance insofar as An Garda Síochána set it in motion. It is a judicial procedure of a very particular kind, namely, one where An Garda Síochána has to satisfy the District Court that there is sufficient reason to search the premises of the person named in the warrant and, just to make it absolutely clear, in Byrne v. Grey [1988] I.R. 31 and The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R. 110 and it is accepted by this court, the constitutional protection of the integrity of the home of the individual immediately comes into play and the court must be vigilant to ensure there is not any undue or improper invasion of that constitutional right to the sacrosanct character of the home of the person who is an individual citizen. On the other hand, of course, the gardaí are engaged in carrying out their public duty to investigate crime and a proper balance has to be struck between those two objectives. So in collecting evidence all proper respect has to be accorded to the protection of the constitutional right of every individual citizen in respect of his home and, therefore, any invasion of that must take place only on the basis that proper judicial procedures have been carried out.*
>
> *It is not suggested, nor could it be, that the gardaí are not entitled to go before the District Courtand ask for a warrant on the basis of confidential information, that is to say that they cannot go before the District Court and tell the District Court Judge that there is confidential information on which they have acted or there is information upon which they have formed a suspicion that there is a controlled drug in a particular premises. Nor is it suggested and, of course, it is a corollary of that, that hearsay evidence and it is in effect hearsay evidence, may not be given in that particular situation. Therefore, the position in this case is that the District Judge had before him evidence and there is the further indication that he acted judicially. He did not simply take it and rubber stamp it which is, I suppose, in effect the complaint made in the case of Byrne v. Grey [1988] I.R. 31. He asked the officer in each case whether he believed the information to be correct or words to that effect. That is not a rubber stamping operation; that is a District Judge taking care in ensuring that he will not issue a warrant unless the minimum question of reasonable basis for belief is addressed and he is entitled to take the evidence of a member of An Garda Síochána. In order to quash the decision of the District Court on this sort of basis, it would be necessary to show that no reasonable District Judge could reasonably have formed the opinion that there was a basis for suspicion which entitled him to form the opinion which caused the warrant to be issued. For those reasons, the court is not satisfied that any ground has been shown to challenge the validity of the warrants issued by the District Court and that being in effect the only ground of appeal, the court refuses leave to appeal."*

41. We were also referred to an unreported High Court decision in *Ryan v O'Callaghan* (unreported, High Court, Barr J. 22nd of July 1987) but do not consider that it adds very much to the discussion. In so far as it decides that *"the issue of a search warrant prior to the commencement of a prosecution is part of the process of criminal investigation and is executive rather than judicial in nature"*, the point that was being made is repeated in substance, but is indeed amplified and nuanced, in the *Tallant* judgment. The exact same point as was made by Barr J in *Ryan v. O'Callaghan* was repeated by Hamilton P in *Byrne v. Grey* using identical language, and indeed *Ryan v. O'Callaghan* was expressly applied by the late President. To the extent that the *Tallant* judgment moved things on, it identifies correctly that the process is in fact a two stage one involving in stage one the application by the gardaí for a warrant, which may be characterised as an administrative function (or executive function, as it was labelled in the earlier cases) whereas the actual issuing of the warrant, which occurs in stage two, is a judicial function, but one of *"a very particular kind"*. The point that the Court of Criminal Appeal was manifestly seeking to emphasise, however, was that even to the extent that the procedure involved a judicial function it was *"not an inter-partes matter"* and accordingly was not to be treated as such.

**Discussion and Decision**

42. Counsel for the appellant has argued that the trial judge conflated the sworn information presented to the District Judge by Officer Callan, setting out that she had, and also her basis for having, *"reasonable grounds for suspecting"* the existence of the circumstances which were said by her to justify the issuing of a search warrant, with an affidavit offering evidence in proceedings in a contentious *lis* or cause, *i.e.*, an *inter partes* matter. He contends, and we agree, that they are not the same thing and that the rules as to affidavits in contentious matters simply do not apply to a sworn information used to ground an application for a warrant. It is in this context that the *Ryan v. O'Callaghan*, *Byrne v. Grey* and *People (Director of Public Prosecutions) v. Tallant* line of jurisprudence is particularly relevant. As already stated, those cases emphasise that an application for a search warrant prior to the commencement of a prosecution is, in the words of the learned judges who gave judgment in *O'Callaghan's* case and in the *Byrne* case, respectively, *"an executive rather than a judicial function"*; and as it was put in more nuanced terms in the *Tallant* case *"[i]t is an administrative procedure in the first instance insofar as An Garda Siochána set it in motion. It is a judicial procedure of very particular kind, namely, one where An Garda Siochána has to satisfy the District Court that there is sufficient reason to search the premises of the person named in the warrant"*.

43. Where, in contentious litigation, a person deposes on oath by way of affidavit as to some matter of fact or facts they must in general do so from within their own knowledge and state their means of knowledge. This is in order to respect the hearsay rule. Where they cannot do so, and it *"otherwise appears"*, then assuming they can demonstrate that the proposed evidence can be brought within some exception to the hearsay rule, thereby rendering it admissible notwithstanding that it is not within the deponent's own knowledge, they must aver that they *"believe the same to be true and accurate."* On interlocutory applications statements of belief, with the grounds thereof, may be admitted notwithstanding the hearsay nature of them, although the fact that statements are hearsay may go to weight.

44. However, says the appellant, a sworn information to ground an application for a warrant is different. The application for a warrant is, in effect, a *sui generis* procedure. The rule against hearsay has no application in that scenario, and means of knowledge does not require to be demonstrated. The rule against hearsay only governs the admissibility of evidence in contentious *inter partes* litigation. The procedure on foot of which a warrant is applied for merely requires that information in writing, verified on oath, be provided concerning the existence of reasonable grounds on the part of the informant for suspecting the circumstance(s) said to justify issuance of the warrant. The level of enquiry to be conducted by the District Judge is confined to whether the applicant has *"reasonable grounds for suspecting"* that which she asserts. We agree with this submission.

45. If an informant asserts on oath that he/she is in receipt of intelligence or information that a state of affairs exists, and on which the informant is placing reliance, and further that they believe it to be reliable, then that should be sufficient in the absence of some manifest and cogent evidence to the contrary. It doesn't matter whether information or intelligence relied upon was received first hand, second hand or third hand. The fact that the informant may be relying on hearsay is irrelevant in this type of procedure. What is important is not whether the intelligence being relied upon is hearsay, but rather whether it is considered reliable. Moreover, it would not have been within the District Court Judge's remit to treat the application for a warrant as though it were a trial, and in the absence of some red flag suggesting a serious problem with reliability to seek to rigorously stress test the actual reliability of that which was asserted in the information in writing. It is sufficient in such a case if the District Judge satisfies himself/herself that the informant believes the intelligence relied upon to be reliable, in circumstances where it is not manifestly unreasonable that the informant should so believe. As occurred in this case, where intelligence is being relied upon in whole or in part, a simple question to the informant seeking confirmation that he/she believes what is stated in the information to be correct, should suffice in most cases. There will, of course, and from time to time, be cases in which, because of their particular or unusual circumstances, some greater level of enquiry would be justified. However, the appellant contends that that was not true here. In this case, the District Judge had evidence that the grounds for suspecting the existence of the circumstances that were said to justify the issuance of a warrant were based both on intelligence received, which the informant believed was correct, and also based on surveillance conducted by the informant personally. There was more than an adequate basis for him to be satisfied that the informant had reasonable grounds for suspecting that which she was asserting.

46. As to the alleged duty of candour, it was argued by the respondents that had the District Judge been specifically advised by Officer Callan that she was not privy to the precise details of the intelligence about which she had been informed by her management, and that she had only been told in general terms about the potential import of it, there was every likelihood that the District Judge would have wished to ask further questions. The appellant rhetorically asks: to what end? The District Judge was not required to be satisfied that the second hand intelligence relied upon was in fact reliable, merely that the informant believed it to be reliable. The District Judge was able to ascertain the position in that regard. He asked her whether she believed that the information she was providing was correct, and she said *"Yes"*.

47. The appellant disputes that there was any lack of candour by Officer Callan. She did not deliberately withhold any information from the District Judge. She simply was not asked whether she had personally gathered the intelligence at issue. The appellant disputes that Officer Callan was obliged in the circumstances of the case to point out to the District Judge that the intelligence on which she was partially relying had not been gathered by her personally. Again, we agree with this submission.

48. In our judgment the trial judge was unjustified in ruling the warrant to have been unlawfully or improperly obtained due to *"a systems failure"*, such that it was issued in excess of jurisdiction and accordingly invalid. There was no systems failure and no evidence to justify a finding that the warrant had been issued in excess of jurisdiction. There was sufficient evidence before the District Judge to enable him to be satisfied of that about which he was required to be satisfied, namely that the informant had formed a suspicion, upon reasonable grounds, that the circumstances said to justify the issuing of a warrant existed. He had the informant's sworn testimony that she held the required suspicion, and the grounds upon which she had formed it, namely that she was in receipt of intelligence that she believed to be reliable and, moreover, on the basis of matters observed in the course of her own personally conducted covert surveillance of the subject premises.

49. In so far as there was an error, it was an error on the part of the trial judge in believing that the information provided by Officer Callan was misleading, and that the District Judge had to be personally satisfied not merely that Officer Callan *bona fide* believed it to be correct and reliable, but that it was in fact correct and reliable. All the District Judge had in fact to be satisfied of was that his informant had formed a suspicion upon reasonable grounds that the circumstances said to justify the issuing of a warrant existed. We do not believe that any further level of enquiry was mandated or justified. The District Judge was not required to be satisfied as to the *"truth"* of the matters relied upon by the informant, or that the information relied upon was not hearsay; merely that his informant believed them to be correct, in circumstances where there was nothing to suggest that it was manifestly unreasonable that she should do so.

50. Both *Walshe v Fennessy* and *People (Director of Public Prosecutions) v Tallant* confirm that an informant may rely on hearsay. Moreover, even if reliance on hearsay intelligence alone might possibly have justified criticism in circumstances where it lacked specificity, and we are not to be taken as so holding, *Walshe v Fennessy* suggests that *"something quite small in addition will suffice to constitute the material from which a bona fide and reasonable suspicion may be formed"*. Officer Callan was also relying on her personally conducted surveillance, which provided a significant additional basis for her suspicion. While *"something quite small"* would have sufficed, this additional matter was not something small by any measure or yardstick. Even on its own it would have justified issuance of the warrant. However, it was combined with intelligence received (albeit received second hand and lacking in specifics) which the informant had reason to trust.

51. In so far as the trial judge expresses the view that *"I think had the position been known to him as to what in fact the truth was, I doubt he could have reasonably been satisfied which is the test formulated by Mr Justice Fennelly in the DPP v. Tallant case"*, we strongly disagree with this view. We interpret the reference to the "truth" to be the fact that the intelligence being relied upon was second hand and lacking in specifics at least in terms of what had been passed on to Officer Callan. However, this remark by the trial judge completely ignores the informant's personally conducted covert surveillance which was an *"additional matter"* of the type spoken of by Kearns J. in *Walshe v Fennessy*.

52. In conclusion, we are satisfied that the warrant should not have been regarded by the trial judge as having been invalidly issued, and in our view evidence concerning the obtaining of the warrant and concerning evidence obtained on foot of it was wrongly excluded.

53. We are satisfied that the excluded evidence was compelling evidence within the meaning of s.23(14) of the Act of 2010, in as much as we consider that it was (a) reliable,

(b) of significant probative value, and (c) was such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

54. In the circumstances we are disposed to allow the appeal. We will quash the acquittal by direction and hear submissions concerning whether or not a re-trial should be directed at this point.