THE COURT OF APPEAL

Record No: 2020/246

Edwards J.
McCarthy J.
Kennedy J.

Neutral Citation Number [2022] IECA 148

Between/

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

RESPONDENT

V

MARTIN MORGAN

APPELLANT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 23rd of June, 2022.

Introduction

1. This is an appeal against a decision of the High Court on the 18th of November 2020, to issue a bench warrant in the exercise of the inherent jurisdiction of that court, to secure the attendance of the appellant before a sitting of the High Court at which he potentially faced being committed to prison for non-payment of a sum of €243,583 due on foot of a confiscation order made under s.9(1) of the Criminal Justice Act 1994 ("the Act of 1994").

2. The point at issue is a net one, and concerns whether the High Court in fact had jurisdiction to issue a bench warrant in those circumstances.

Background to the matter

3. On the 22nd of February 2008, the appellant was convicted by a jury in the Dublin Circuit Criminal Court of managing a brothel contrary to s.11(a) of the Criminal Law (Sexual Offences) Act, 1993 ("the Act of 1993"), and further of organising prostitution contrary to s.9 of the Act of 1993, in the period from August to October, 2005. On the evidence, the appellant had operated an extensive commercial brothel, with numerous employees and properties involved, including an apartment at 322 Bachelor's Walk which had been placed under garda surveillance. The Dublin Circuit Criminal Court had received evidence from a prosecution witness to the effect that, extrapolating from records and documents seized during the investigation into the appellant's crimes, the appellant's annual net income from his criminal sex trade operations was an estimated €4,000,000.

4. On the 7th of March 2008, the appellant was sentenced to three years' imprisonment and fined €24,000. The appellant appealed his conviction to the Court of Criminal Appeal but was unsuccessful.

5. On the 28th of June 2013, following the Court of Criminal Appeal's dismissal of the appellant's appeal against his convictions, the Dublin Circuit Criminal Court made a confiscation order pursuant to s.9 of the Act of 1994, requiring the appellant to pay to the State the sum of €252,980.33, this being the amount of benefit, calculated on the basis of documents and records seized during the garda investigation, believed to have accrued to the appellant during a 22 day period during which his brothel at 322 bachelor's Walk in Dublin 1 was under active garda surveillance.

6. On the 31st of July 2018, the Court of Appeal dismissed an appeal brought by the appellant against the confiscation order. See this Court's judgment bearing the neutral citation [2018] IECA 282. However, the amount of benefit found was varied to €243,583 to reflect the confiscation of €9,397.02 in the form of cash receipts earned by the brothel at the time of arrest.

7. On the 28th of May 2019, an Originating Notice of Motion was issued by the respondent, returnable for the 24th of June 2019, wherein the respondent sought to report to the High Court that the said sum of €243,583 being due and enforceable on foot of the said confiscation order remained unpaid. The respondent requested the High Court in exercise of its power pursuant to s.19(2) of the Act of 1994, to order that the appellant be imprisoned for a term of three years for non-payment of the sum due on foot of the said confiscation order. The said motion was grounded upon an affidavit of Garda Sean Walsh, sworn on the 28th of May 2019, deposing to most of the essential facts. He omitted, however, to explain that the sum the subject matter of confiscation had been varied from €252,980.33 to €243,583 by the Court of Appeal. This omission was addressed in a supplemental affidavit sworn on the 9th of June 2019, by the said Garda Sean Walsh, and subsequently filed.

8. The application for the reliefs sought in the Originating Notice of Motion of the 28th of May 2019, did not proceed on the 24th of June 2019 (the reason is unstated), and the application appears to have been adjourned.

9. On the 15th of October 2019, a further Notice of Motion was issued in the same matter, this one returnable for the 21st of October 2019, wherein the DPP sought an order for the attachment of the appellant, and in the alternative, an order directing the issue of a bench warrant. There was no separate affidavit grounding this motion, which stated that it was grounded on the affidavits of Garda Sean Walsh of the 28th of May 2019 and the 9th of June 2019 (alluded to at paragraph 7 above). Ostensibly this motion was seeking the attachment order/bench warrant prayed for therein, in further support of the earlier motion. Again, this further motion did not proceed on its stated return date, but rather was also adjourned.

10. Both motions ultimately proceeded and were heard together on the 18th of November 2020, before Coffey J. in a remote hearing conducted by video link. During this hearing counsel for the appellant disputed that the court had jurisdiction to make an order for attachment, or in the alternative, to issue a bench warrant, in circumstances where there was no statutory power to do so. However, the trial judge acceded to the application in an

ex-tempore ruling and opted to grant a bench warrant in the exercise of what he considered to be his inherent jurisdiction.

11. There is no transcript of the proceedings, or indeed of the trial judge's ex tempore ruling. However, there is a brief note of that ruling, agreed by counsel. The note is in the following terms:

> *"I am going to accede to the application to grant a bench warrant. This application has been brought on notice to the respondent and the respondent is represented. The respondent has not brought an application to reduce the sum as determined by the Circuit Court and on appeal. There is a prima facie entitlement on the DPP to bring enforcement proceedings. Considering the fairness to the defendant, his personal attendance should be secured and so I am going to avail of my inherent jurisdiction."*

12. The appellant now appeals against the granting of the bench warrant.

Grounds of Appeal

13. The appellant rests his appeal on the following grounds:

    (i) The jurisdiction to issue a bench warrant does not extend to proceedings in the nature of the proceedings before the Court.

    (ii) The issue of a bench warrant relates to the conduct of criminal proceedings. The appellant is not the subject of criminal proceedings.

    (iii) The appellant was not in breach of any requirement to attend court such as would warrant the issue of a bench warrant.

Intended Approach

14. The alternative reliefs sought from the trial judge were (i) the issuance of a bench warrant (ii) an order of attachment (the relevant Notice of Motion sought them in reverse order, but nothing turns on that). We think the best way of addressing the issues arising on this appeal in this case is to proceed as follows. First, we will consider the applicable legislative framework to determine the legal context in which these alternative reliefs were sought and offer some preliminary observations. Secondly, we will consider the nature of a bench warrant and the circumstances in which it may be granted. Thirdly, we will consider the nature of an order of attachment and the circumstances in which it may be granted. Fourthly, as it may bear upon the appropriateness of the relief, we will then consider whether the powers of the High Court under s.19(2) of the Act of 1994 involve the exercise of civil or criminal jurisdiction, and fifthly, we will examine the appropriateness of the relief that was actually granted.

The Legislative Framework

15. The legislation at the centre of this case is the Criminal Justice Act 1994. The long title to that act provides that it is:

> *"An Act to Make Provision for the Recovery of the Proceeds of Drug Trafficking and Other Offences, to Create an Offence of Money Laundering, to Make Provision for International Co-operation in Respect of Certain Criminal Law Enforcement Procedures and for the Forfeiture of Property Used in the Commission of Crime and to Provide for Related Matters."*

16. The scheme of the act is that it is divided into 8 parts, each designated by the Roman numerals I to VIII. Part I is concerned with *"Preliminary Matters"*, Part II is concerned with *"Confiscation"*, Part III is concerned with *"Enforcement, etc. of Confiscation Orders"*, and Parts IV to VIII, inclusive, are concerned with *"Money Laundering"*, *"Drug Trafficking Offences at Sea"*, *"Drug Trafficking Money Imported or Exported in Cash"*, *"International Co-operation"* and *"Supplementary matters"*. While we must have regard to the Act as a whole, and will do so, it is clear that those parts of it that are directly relevant to these proceedings are Parts I, II, and III, respectively.

17. Within Part I, s.3 comprises a lengthy interpretation section which sets forth detailed definitions of various terms that appear in the Act. We will have regard to these definitions to the extent necessary. However, s.3 (16)(f) may potentially be relevant, the respondent expressly placing reliance on it in supplemental written submissions filed in relation to the appeal, and it provides:

> "3. -(16) The following provisions shall have effect for the interpretation of this Act, namely,
>
> *(f) proceedings for an offence are concluded—*
>
> (i) (I) when the defendant is acquitted on all counts, or
> (II) where the provisions of section 23 of the Criminal Procedure Act 2010 apply to the proceedings –
>
> (A) when the time period for an appeal under that section has expired and no appeal has been made,
> (B) where an appeal has been made but no re-trial is ordered, at the conclusion of the appeal proceedings under the section, or
> (C) where a re-trial has been ordered, at the conclusion of the re-trial.
>
> (ii) if he is convicted on one or more counts, but no application for a confiscation order is made against him or the court decides not to make a confiscation order in his case; or
> (iii) if a confiscation order is made against him in connection with those proceedings, when the order is satisfied,"

18. Part II dealing with confiscation, comprises ss. 4 to 18 respectively. Sections 4 to 8, inclusive, relate to confiscation orders in the context of drug trafficking offences. Section

9, however, (as amended by s.23 of the Criminal Justice (Terrorist Offences) Act 2005 and amended with saver in s.6 of S.I. No. 540/2017 – European Union (Freezing and Confiscation of Instrumentalities and Proceeds of Crime) Regulations 2017) relates to confiscation orders in respect of offences other than drug trafficking offences and is therefore directly relevant. It provides:

"9.—(1) Where a person has been sentenced or otherwise dealt with in respect of an offence, other than a drug trafficking offence, an offence of financing terrorism or a relevant offence, of which he has been convicted on indictment, then, if an application is made, or caused to be made, to the court by the Director of Public Prosecutions the court may, subject to the provisions of this section, make a confiscation order under this section requiring the person concerned to pay such sum as the court thinks fit.

(2) An application under this section may be made if it appears to the Director of Public Prosecutions that the person concerned has benefited from the offence of which he is convicted or from that offence taken together with some other offence (not being a drug trafficking offence, an offence of financing terrorism or a relevant offence) of which he is convicted in the same proceedings or which the court has taken into consideration in determining his sentence.

(3) An application under subsection (1) of this section may be made at the conclusion of the proceedings at which the person is sentenced or otherwise dealt with or may be made at a later stage.

(4) For the purposes of this Act, a person benefits from an offence other than a drug trafficking offence, an offence of financing terrorism or a relevant offence if he obtains property as a result of or in connection with the commission of that offence and his benefit is the value of the property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this section as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(6) The amount to be recovered by an order under this section shall not exceed—

(a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made,

whichever is the less.

(7) The standard of proof required to determine any question arising under this Act as to—

(a) whether a person has benefited as mentioned in subsection (2) of this section, or

(b) the amount to be recovered in his case by virtue of this section,

shall be that applicable in civil proceedings."

19. Sections 10 to 18 of the Act of 1994 contain further provisions relating to: statements relevant to making confiscation orders; the provision of information by a defendant; supplementary provisions concerning confiscation orders; the power of the High Court where a defendant has died or is absent; the effect of conviction where the High Court has acted under s.13 (i.e., where a defendant has died or is absent); appeal against a confiscation order; variation of confiscation orders, including by virtue of s.13; and increase in the value of realisable property. None of these is directly relevant to the issue that we have to determine on this appeal, but we have had regard to the general legislative scheme provided for.

20. Part III dealing with "Enforcement, etc. of Confiscation Orders", comprises ss.19 to 30, inclusive. Section 19, as amended by s.105(d) of the Criminal Justice (Mutual Assistance) Act 2008, is directly of potential relevance to this appeal; and in its amended form provides:

"19.—(1) Where a court makes a confiscation order, then (without prejudice to the provisions of section 22 of this Act enabling property of the defendant in the hands of a receiver appointed under this Act to be applied in satisfaction of the confiscation order) the order may be enforced by the Director of Public Prosecutions at any time after it is made (or, if the order provides for payment at a later time, then at any time after the later time) as if it were a judgment of the High Court for the payment to the State of the sum specified in the order (or of any lesser sum remaining due under the order), save that nothing in this subsection shall enable a person to be imprisoned.

(2) Subject to subsection (3) of this section, if, at any time after payment of a sum due under a confiscation order has become enforceable in the manner provided for by subsection (1) of this section, it is reported to the High Court, by the Director of Public Prosecutions that any such sum or any part thereof remains unpaid, the court may, without prejudice to the validity of anything previously done under the order or to the power to enforce the order in the future in accordance with subsection (1) of this section, order that the defendant shall be imprisoned for a period not exceeding that set out in the second column of the table to this section opposite to the amount set out therein of the confiscation order remaining unpaid.

(3) An order under subsection (2) of this section shall not be made unless the defendant has been given a reasonable opportunity to make any representations to the court that the order should not be made and the court has taken into account any representations so made and any representations made by the Director of Public Prosecutions in reply.

(4) Any term of imprisonment imposed under subsection (2) of this section shall commence on the expiration of any term of imprisonment for which the defendant is liable under the sentence for the offence in question or otherwise, but shall be reduced in proportion to any sum or sums paid or recovered from time to time under the confiscation order.

TABLE

Amount outstanding under confiscation order	*Period of imprisonment*
Not exceeding €650	*45 days*
Exceeding €650 but not exceeding €1,300	*3 months*
Exceeding €1,300 but not exceeding €3,2504	*4 months*
Exceeding €3,250 but not exceeding €6,500	*6 months*
Exceeding €6,500 but not exceeding €13,000	*9 months*
Exceeding €13,000 but not exceeding €26,000	*12 months*
Exceeding €26,000 but not exceeding €65,000	*18 months*
Exceeding €65,000 but not exceeding €130,000	*2 years*
Exceeding €130,000 but not exceeding €325,000	*3 years*
Exceeding €325,000 but not exceeding €1,300,000	*5 years*
Exceeding €1,300,000	*10 years"*

21. The remainder of Part III, being ss. 20 to 30 of the Act of 1994, contains further provisions relating to: realisation of property; interest on sums unpaid under confiscation orders; application of proceeds of realisation; cases in which restraint orders may be made; restraint orders; registration of restraint orders; the exercise of powers by the High Court or by a Receiver; supplementary provisions as to Receivers; the bankruptcy of a defendant; property subject to a restraint order dealt with by the Official Assignee; and the winding up of a company holding realisable property. Once again, none of these provisions appears to be directly relevant to the issue that we have to determine on this appeal, but we have had regard to the general legislative scheme provided for.

Some preliminary observations

22. It seems to us that having regard to the scheme of, and what we believe to be the proper construction of the Act of 1994, a confiscation order made by a court under s.9 of that Act is equivalent to a court civil judgment obtained by the State against the defendant in question for the payment of a money sum (being the amount assessed as being liable to be confiscated) to the State. It may be enforced (per s.19(1) of the Act of 1994) *"by the Director of Public Prosecutions … as if it were a judgment of the High Court for the payment to the State of the sum specified in the order (or of any lesser sum remaining due under the order), save that nothing in this subsection shall enable a person to be imprisoned."*

23. It is therefore to be expected that the Director of Public Prosecutions would seek to avail of the normal processes of execution in the first instance, assuming that is possible. In that regard Order 42 Rule 3 of the Rules of the Superior Courts provides *that "a judgment for the recovery by or payment to any person of money may be enforced by execution order or by any other mode authorised by these Rules or by law."* There are various execution orders that may be sought. The term *"execution order"* is a legal term of art which, per Order 42, Rule 8 of the Rules of the Superior Courts, includes *"orders of fieri facias, sequestration and attachment and all subsequent orders that may issue for giving effect thereto."*

24. It is important to appreciate that the "attachment" spoken of in this context relates to the possible attachment *in rem* of property or income of the debtor (to the extent permitted in law) rather than the attachment of the debtor himself *in personam*, to answer for an alleged contempt, which represents the more usual legal context in which attachment is spoken of. In Ireland, absent a contractually created lien, the law does not otherwise provide for the attachment *in rem* of a debtor's physical property, whether real or personal. Rather there are analogous remedies that may be availed of, which we will describe momentarily. Irish law does, however, provide to a very limited extent for the attachment *in rem* of an income stream, e.g., s.10 of the Family Law (Maintenance of Spouses and Children) Act 1976 as amended which allows for a maintenance debtor's earnings/income to be attached. Further, once it is commenced, the Civil Debt Procedures Act 2015 will provide for the enforcement of civil debts more widely by attachment of earnings or in appropriate cases deduction from social welfare payments.

25. The processes of execution that might typically be available to an unsecured judgment creditor are to seek to register the judgment in the first instance; then if there is real property in the name of the debtor, to seek to have the judgment declared well charged on the property, so that the judgment debtor can seek an order for the sale of the property and the application of the sale proceeds towards discharge of the judgment debt; in so far as personalty is concerned, by obtaining an *Order of Fieri Facias* so that the Sheriff can levy distress against the debtors goods, or possibly seek an *Order of Sequestration* so that a court appointed sequestrator can receive into his/her hands and detain the goods and chattels of the judgment debtor until the debt is discharged or until a further court order; by seeking the appointment of a receiver by way of equitable execution over the debtor's assets with a view to collecting income/profits from those

assets to be applied in discharge of the debt; by obtaining an instalment order under the Enforcement of Court Orders Acts 1926-2009 and Order 53 of the District Court Rules (and in default of payment on foot of such an instalment order pursuing the, admittedly limited steps that are open at law to be taken in respect of that); by seeking to attach/garnish a debt owed to the debtor by a third party; or by seeking to have the debtor declared a bankrupt. This list, which although reasonably comprehensive may not be exhaustive, is offered in circumstances where the Civil Debt Procedures Act 2015, although enacted, has yet to be commenced.

26. Returning to our consideration of the terms of s.19(1) of the Act of 1994, we would further observe that the clause at the end of that subsection which says *"save that nothing in this subsection shall enable a person to be imprisoned"* merely reflects the long standing position in Irish law that imprisonment as a direct consequence of debt is outlawed, both under international conventions to which Ireland is a party and under domestic legislation (See Article 1, Protocol 4 of the European Convention on Human Rights; Article 11 of the United Nations International Convention on Civil and Political Rights, and s.5 of the Debtors (Ireland) Act, 1872). The possibility, strictly controlled by statute, of imprisonment in some situations as an indirect consequence of debt remains, although it is imprisonment not for the existence of the unpaid debt itself but for conduct on behalf of the debtor that has essentially been contemptuous of the court and/or of its order(s). In that situation, the imposition of imprisonment for its punitive and/or coercive effect is directed not at the fact of the debtor having unpaid debt *per se*, but to punish the contemptuous conduct that has occurred and to deter further contemptuous conduct.

27. A clear example of the situation just described arises under s.6(7) & (8) of the Enforcement of Court Orders Act 1940, as substituted by s.2 of the Enforcement of Court Orders (Amendment) Act 2009. Under those provisions imprisonment for up to three months may be imposed for failure to comply with an instalment order in circumstances where the court is satisfied (i) that the failure has been due to either the debtor's "wilful refusal" or "culpable neglect", and (ii) the court is further satisfied that the debtor has no goods which could be taken in execution under any process.

28. Conceivably, a debtor might be imprisoned for committing some other contempt of court in other debt related proceedings, but again his/her imprisonment would not be for the debt, but for the contemptuous behaviour in question.

29. This brings us to the status of the power of the High Court under s.19(2) of the Act of 1994 to imprison a person who is the subject of a confiscation order for a sum, all or part of which remains unpaid. It is expressed to be *"without prejudice to the validity of anything previously done under the order or to the power to enforce the order in the future in accordance with subsection (1)."* It is a power given, not to the creditor seeking execution i.e., the State (although the DPP as its representative may initiate the procedure by making a report to the High Court), and not to the criminal court that made the confiscation order (in this case the Circuit Criminal Court), but rather to the High Court with its full original jurisdiction. It does not create a criminal offence of non-

compliance *per se* with a confiscation order, and the imprisonment provided for does not constitute the sentence for such a crime. Rather it seems to us to be designed to punish in an appropriate case what is considered to have been essentially, criminally contemptuous behaviour by the person concerned in respect of non-compliance up to that point with the confiscation order. To the extent that it may be accepted that any penal measure comprising hard treatment such as the deprivation of a person's liberty may, in addition to having a punitive effect, also have a secondary deterrent effect, it may also be intended to have a degree of coercive or behaviour modifying effect, in so far as possible future compliance is concerned. The far- reaching nature of the power, impinging as it does on personal liberty, suggests that it is not lightly to be exercised but that it is available to be exercised where the exigencies of the case (including those of justice, proportionality and the need to ensure respect for and compliance with court processes) may require it, such as where the failure to comply with the confiscation order has been due to the person's wilful refusal or culpable neglect, as opposed to inability to pay for some cogent reason. It can only be exercised by the High Court (regardless of what court made the underlying confiscation order), following upon it having *been "reported to the High Court, by the Director of Public Prosecutions that any such sum* [due on foot of a confiscation order] *or any part thereof remains unpaid."* Importantly, s.19(3) goes on to say that an order under subsection (2) *"shall not be made unless the defendant has been given a reasonable opportunity to make any representations to the court that the order should not be made and the court has taken into account any representations so made and any representations made by the Director of Public Prosecutions in reply."*

30. As it is not to be assumed that merely because a person has been convicted of a crime, and has been assessed as having benefited from the proceeds of that crime, leading to the making of a confiscation order against them, that such a person would be unwilling to comply with a confiscation order, there can be no presumption that a failure to pay has been deliberate and motivated by either a lack of respect for, or contempt for the court that issued the confiscation order, and/or its process, and that there has been wilful refusal/culpable neglect. On the contrary, whether the default has been contemptuous will only be established following due inquiry.

31. Implicit in the subsection is that once in receipt of a report by the DPP of non-payment of a sum due on foot of a confiscation order, the High Court is placed upon inquiry as to whether it is appropriate in all the circumstances of the case to exercise the exceptional power which the statute confers to imprison the person concerned.

32. At a minimum, before exercising the power, we believe the High Court would require to be satisfied that:

    (i) the person in question knew of the existence of the confiscation order, including the amount due and the date by which it was required to be paid;

    (ii) that the person concerned knew of the possible consequences of not paying the amount due under the confiscation order, including the possibility of being imprisoned by the High Court pursuant s.19(2) of the Act of 1994.

(iii) *the person concerned knew that the DPP had reported to the High Court that an amount due under the compensation order remained unpaid. Moreover, where, as here, the procedure adopted to make the report, was the issuance by the DPP of an originating motion seeking relief under s.19(2) of the Act of 1994, that the person concerned was duly served with the relevant Notice of Motion and was aware of the return date, place and time (or, if not, that there was reason to believe that he/she was evading service);*

(iv) *there was compliance by the moving party with the procedures specified in Order 136 Rule 17 of the Rules of Superior Courts (as inserted by the Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism) 2018, SI 316/2018);*

(v) *the person concerned knew that he/she had an entitlement to make representations to the High Court under s.19(3) as to why he/she should not be imprisoned, and that a reasonable opportunity had been afforded to him/her to make such representations. In that respect, the High Court could reasonably require to be satisfied that the person concerned was aware of his/her right to appear in person before the High Court (and be legally represented there, if desired) and to be heard in response to the application;*

(vi) *if the procedures involved constituted in substance, if not in form, the trial of the person concerned on a criminal charge, the person concerned had been afforded the benefit of certain minimum procedural safeguards, to render the proceedings compliant with the Constitution, e.g., being afforded the presumption of innocence, having the criminal standard of proof beyond reasonable doubt applied in their case, and being afforded the possibility of trial by jury if the proceedings would not constitute the trial of a minor offence (to mention but some).*

33. Further, at the crux of the present case, is the reality that it has long been the law in this country that, save in very exceptional circumstances, a person should not be deprived of their liberty for penal or coercive purposes, by order of a court made in the absence of the person concerned, i.e., *in absentia*.

34. By way of example, in the context of a court exercising its criminal jurisdiction, it is widely understood that in any case where a prison sentence is reasonably possible, an accused who fails to appear should not be tried (which includes being sentenced) *in absentia*. The right to a trial in due course of law as guaranteed in Article 38 of the Irish Constitution, includes the right to be present in person at one's trial (including sentencing) if one's liberty is at stake. The practice of the Irish courts, where an accused fails to appear and is at peril of receiving a custodial sentence, is to issue a bench warrant for the arrest of the accused in the absence of a reasonable excuse, and adjourn the trial and/or sentencing, pending execution of that warrant. See *Brennan v. Windle* [2003] 3 I.R. 494 in illustration of our point.

35. Similarly, on the civil side, and by way of a further example, where it is complained that a person has committed a contempt of court by failing to comply with a court order, such as a court injunction, a person will not be imprisoned for contempt without at least having been attached (in personam) and brought to court to answer for their contempt (we will consider the process of attachment in more detail later in this judgment).

36. The general rule being as we have stated it, before proceeding to make an order under s.19(2) of the Act of 1994 for the imprisonment of a person who has not complied with a confiscation order, a High Court judge concerned should ensure that the subject person is present before the court and, if not, should take such steps as might be open to the court to secure the attendance of that person, if necessary adjourning the matter for a reasonable period to allow that to happen.

37. Again, it is not to be assumed that merely because a person has been convicted of a crime, and has had a confiscation order made against them, and for whatever reason has not complied with that, that such a person would be unwilling to attend before the High Court voluntarily. The first step therefore must be, where it is possible and practicable to do so, to request that the defaulter should voluntarily attend court. If the defaulter attends, then well and good. The High Court's enquiry can then proceed, and any order deemed appropriate can be made in his/her presence. However, it may well turn out that any such invitation is spurned, and that the defaulter is prima facie exhibiting a wilful refusal to engage with the s.19(2) proceedings, in which event it begs the question as to what options are then open to a High Court judge to secure the defaulter's attendance. The Act of 1994 does not provide a statutory mechanism for doing so. An overarching question therefore arises, what can a High Court judge do in that situation?

38. Notably, in both of the examples we have cited (at paragraphs 34 and 35 above), the court concerned could have recourse to an existing procedural mechanism to ensure that the person who was at risk of being imprisoned would be brought to the court. In the first example, the judge concerned could issue a bench warrant. In the second example, he/she could issue an order for the attachment (in personam) of the person concerned. As it happens, these were the reliefs sought in the alternative in the respondent's Notice of Motion dated the 15th of October 2019. Moreover, neither side in this case has sought to suggest that any other existing or novel procedural option might have been open to the High Court judge. It may therefore be helpful to examine the circumstances in which each of these options is in principle capable of being availed of.

The Bench Warrant option

39. A "bench warrant" is the name given in law to a judicial arrest warrant issued by a court in the exercise of its criminal jurisdiction, directing the person or persons to whom it is addressed (invariably in this jurisdiction a member or members of An Garda Siochána), to arrest the subject person(s) whose attendance is required before the court, and to bring him, her or them before the court to be dealt with as might be required in the context of criminal proceedings. When the term is used in its widest sense it covers all judicial arrest warrants (to be distinguished from arrest warrants that may be issued by other appropriate persons) including warrants issued to secure an accused person's initial

attendance before the court to answer a criminal charge. The term "bench warrant" is sometimes also used in the narrower sense as referring to a judicial arrest warrant issued in respect of a person who has already been charged and released on bail, but who has failed to appear when required to do so or is otherwise considered to have breached the terms of their recognizance at some later stage of the criminal proceedings in question. However, it is notable that the District Court (Bench Warrants) Rules 2008, S.I. No. 498 of 2008 uses the term in its wider sense.

40. In appropriate circumstances, i.e., where a court has received pertinent information on oath, a bench warrant may be issued by a court of its own motion, but more usually upon the application of an interested party such as the prosecutor. A bench warrant may be issued on the basis of a statutory provision, or a provision in the Rules of Court, conferring the power to do so, or in the absence of a statutory/rules based power, on the basis of an underlying and inherent jurisdiction vested in every criminal court to control its own process, including securing the attendance of a party required to answer a charge before the court in the context of criminal proceedings of which it is seised.

41. Examples of the former would include s.11(1) & (2) of the Petty Sessions (Ireland) Act 1851 ("the Act of 1851") and s.49 and s.51 of the Dublin Police Act 1842 ("the Act of 1842"), discussed by Herbert J. in *Judge v. Scally* [2006] 1 I.R. 491. The District Court Rules 1997 make further provision for the issue of judicial arrest warrants, at least in respect of indictable offences – see Order 16, District Court Rules 1997 as amended by *(inter alia)* the District Court (Order 16) Rules 2006, S.I. No. 238 of 2006; and in respect of the contravention of a condition of bail recognizances - see Order 20, District Court Rules 1997 as variously amended by the Arrest Of Persons In Contravention Of Conditions Of Bail Recognisances Rules 2001, S.I. No. 194 Of 2001; the District Court (Criminal Justice (Miscellaneous Provisions) Act 2009) Rules 2010, S.I. 260 of 2010; and the District Court (Bail) Rules 2018, S.I. 565 of 2018. Also, see Order 22, District Court Rules 1997 as amended by the District Court (Bench Warrants) Rules 2008, S.I. No. 498 of 2008, which prescribes the procedures to be followed upon an accused's failure to appear in a variety of circumstances, including failure to appear in answer to a summons or failure to appear after release or remand on bail.

42. Curiously, although, as just illustrated, several statutory provisions (both primary and secondary) provide for the issuance of judicial arrest warrants, or at least acknowledge the existence of a power to do so, the term "bench warrant" is a term or label rarely to be found in such provisions. We have only found one express reference to it in primary legislation, namely in subsection (4) of s.62 of the Courts of Justice Act 1936 (the said s.62 having since been declared incompatible with the Constitution in *Costello v. DPP* [1984] I.R. 436, for reasons unrelated to bench warrants and therefore not necessary to go into). Apart from that, we have only found the term used occasionally, but relatively rarely, in secondary legislation. In so far as we have been able to ascertain, the term is to be found in just four statutory instruments, i.e., (1) in S.I. 68/1949, - An tOrdú Téarmaí Dlíthiúla Gaeilge (Uimh. 4), 1949; (2) in S.I. 93/1997 - the District Court Rules 1997 (specifically in Order 26, Rule 11 thereof); (3) in S.I. 73/2007 - the District Court (Bench

Warrants) Rules 2007; and (4) in S.I. No. 498 of 2008 - the District Court (Bench Warrants) Rules 2008. However, none of these legislative instruments offers a definition of the term "bench warrant".

43. Occasionally, the power to issue a bench warrant may not be expressly provided for by a statutory provision but the existence of the inherent power to do so may be expressly or impliedly acknowledged by the provision in question. An example of the latter would be s.13(4) of the Criminal Justice Act 1984.

44. As regards the inherent jurisdiction of a criminal court to issue a bench warrant this is discussed at some length by Finlay Geoghegan J. in *Stephens v. Governor of Castlerea Prison* [2002] IEHC 169. This case involved an inquiry under Article 40.4 of the Constitution into the legality of the detention of the applicant, a Mr Stephens, who had been returned to Ireland by the United Kingdom on foot of a rendition request under Part III of the Extradition Act 1965, to face sentencing in respect of a criminal damage charge, to which he had pleaded guilty before the District Court on the 4th of December 1996. (He had also pleaded guilty on the same date to a public order offence but was not extradited for that). Following the entry of his pleas of guilty his sentencing was adjourned to the 18th of December 1996, and then again from time to time until the 2nd of April 1997, to allow a probation report to be prepared and to consider payment of compensation. When Mr Stephens failed to appear on the 2nd of April 1997, a bench warrant was issued for his arrest (covering both the criminal damage and public order offences). This was executed on the 30th of July 1997, and he was brought before Athlone District Court where he was re-admitted to bail, with his sentencing being further adjourned to the 3rd of September 1997. He again failed to appear, and a second bench warrant (again, as we understand it, covering both the criminal damage and the public order offences) was issued for him but before it could be executed the applicant had absconded to the United Kingdom and initially his whereabouts were unknown. Mr Stephens was subsequently nominated by gardaí as a suspect in respect of a murder which had been committed in the Ballinasloe area in August 1997. In mid-1999 the gardaí learned of the applicant's location in the United Kingdom. Armed with this information they sought, and obtained a further bench warrant, from Ballinasloe District Court on the 21st of July 1999, (this time covering only the criminal damage offence, as only that offence was extraditable) for the arrest of Mr Stephens as a person who had been remanded on bail but who had failed to appear. That bench warrant was granted.

45. Mr Stephen's rendition was sought on foot of this warrant, and he consented to his rendition and was duly returned. Moreover, the UK's Secretary of State for the Home Office waived speciality and consented to Mr Stephens being restricted in his freedom or otherwise dealt with in connection with the investigation by gardaí into the aforesaid murder.

46. Having been returned to Ireland, Mr Stephens then challenged the lawfulness of his detention on various grounds, one of which was that the purported bench warrant of the 21st of July 1999, which had backed the request for his rendition, had been invalid.

47. The claimed invalidity of the bench warrant was asserted on the basis that it was in the form of a warrant provided for under Order 22 of the Rules of the District Court 1997 for use in a case where an accused has failed to appear. While the form, as completed, correctly recited the criminal damage charge, and his admission to bail in respect of that offence upon a recognizance, conditioned that he would appear at Ballinasloe District Court on the 3rd of September 1997, and his failure to so appear, it had continued:

> *"…and whereas the recognisance has on this day been produced to me at a sitting of the Court before which the accused was bound to appear."*

48. The applicant's complaint was that the latter recital was technically incorrect because he was not bound to appear before Ballinasloe District Court on the 21st of July 1999, and accordingly the bench warrant issued on that date was on its face, invalid. In addition, it was suggested that, for further technical legal reasons which it is unnecessary for present purposes to outline, the District Court Judge had had in any event no jurisdiction in the circumstances of the case to issue a bench warrant under Order 22. The High Court judge, Finlay Geoghegan J. rejected Mr Stephen's challenges to the bench warrant issued on the 21st of July 1999 that had underpinned the request for his rendition and held that that bench warrant had been issued by the court in the valid exercise of its inherent jurisdiction to secure the attendance of Mr Stephens before the court. In doing so, she made the following pertinent remarks concerning a court's inherent jurisdiction to issue a bench warrant:

> *"The jurisdiction of the District Court to issue a bench warrant is not based on 0. 22 above but appears to be part of the inherent jurisdiction of the Court which flows from the jurisdiction to try the offences in question and also to release an accused on bail by recognisance to appear before a subsequent sitting of the Court. I find support for this proposition in the judgment of Gavan Duffy P. in The State (Attorney General) v. Judge Roe [1951] I.R. 172 where at p. 193 he stated:-*
>
> > *'If a defendant, duly summoned, does not appear, I think he can be arrested on a bench warrant issued by the Circuit Court Judge.*
> >
> > *Mr. Serjeant Hawkins says:- "Also it seems clear, that wherever a statute gives to any one justice of the peace a jurisdiction over any offence... it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence ... for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him" (Hawk. P.C., 8th ed., vol. 2, book 2, c. 13, s. 15). Chitty's Criminal Law, 2nd ed., 1826, vol. 1, c. 8, pp. 337-8, says:- "Wherever the king grants an authority of oyer and terminer, the power to issue process is incidentally given; for as there can be no inquiry respecting offences, without the presence of the party, wherever the power is entrusted of determining the former, there must also be authority to compel the latter. For the same reason, justices of the peace, whenever they are authorised to*

inquire, hear, and determine, may thus compel the defendant to appear; and, indeed, this is expressly declared by the words of their commission. The same observations apply, of course, to all magistrates whatsoever, who are invested with the power to try offenders."'

Davitt P. in The State (Attorney General) v. Judge Fawsitt [1955] I.R. 39 at p. 52 considered that the above passages 'contain a clear recognition and acceptance of the principle that where a statute confers upon a Court a substantive jurisdiction to try a person charged with a criminal offence it impliedly confers likewise the adjective or ancillary jurisdiction necessary to compel that person to attend the Court to take his trial.'

I would respectfully agree with the above statements of principle. Order 22 is not, in my view, intended to limit such inherent jurisdiction. Hence I consider that a District Judge having issued a bench warrant under 0. 22, r. 2 which includes a reference to both an extraditable and non-extraditable offence has an inherent jurisdiction to issue a warrant referring only to the extraditable offence, upon being informed that the accused may be in another country. If he did not he would have no way of compelling the attendance of an accused to face trial for an extraditable offence.

Accordingly, I conclude that District Judge O'Sullivan did have jurisdiction on 21st July, 1999 to issue a warrant for the arrest of the applicant referring only to the criminal damage charge. Further that any defects in the recitals to the warrant issued are not of such fundamental nature on the particular facts of this case to justify a finding of illegality of the current detention of the applicant."

49. Before leaving this section of our judgment dealing with the jurisdiction to issue a bench warrant, we note that Professor Thomas O'Malley observes in his work *The Criminal Process* (2009) (Dublin: Round Hall, Thompson Reuters) at para 10:21, that the general rule is that the method *"to secure an accused person's attendance before a court should be that which is least restrictive of the person's liberty."* Accordingly, save where there might be cogent reasons to the contrary (in which eventuality a judicial arrest warrant may be issued at the outset), a *"summons represents the most appropriate method of securing attendance before the District Court of a person charged with a summary offence."* This has been the accepted position since *O'Brien v Brabner* (1885) 49 J.P.N 227. However, if an accused, having been duly summonsed, has failed to answer the summons, a judicial arrest warrant, i.e., a bench warrant, may be issued for him/her pursuant to either s.11(2) of the Petty Sessions (Ireland) Act of 1851, or s.49 of the Dublin Police Act of 1842 (the correct provision depending on whether the court's jurisdiction is within or without the Dublin Metropolitan District), and in any case in accordance with Order 22, Rule 1 of the District Court Rules, which provides:

"Where a summons is issued requiring the appearance before the Court of a person against whom a complaint has been made or an offence has been alleged and such person fails to appear at the required time and place or at any adjourned hearing of

the matter, and it is proved to the Judge there present that such person has been served with the summons, or where at any time either before or after the date on which such person is required by the summons to appear an information, in the Form 22.1, Schedule B, is made that he or she is evading service or is about to abscond or has absconded, the Judge may issue a warrant, in the Form 22.2, Schedule B, for the arrest of such person."

The Order for Attachment option

50. An Order of Attachment directs that the person against whom the order is served shall be brought before the court to answer an alleged contempt (which may be civil or criminal contempt) in respect of which the order is issued. It can only be issued with the leave of the court and must be applied for by motion on notice to the party against whom the order is to be directed. The Order of Attachment in this context operates *in personam*. It is issued with the intention that the person who is the alleged contemnor should forthwith be apprehended and brought before the court. The relief is sometimes referred in the same breath as a separate but related relief called an Order for Committal, the two Orders being frequently applied for at the same time and conjunctively referred to in pleadings or court documents as "an Order of Attachment and Committal of [the subject person]". An Order of Committal directs that, upon his arrest, the person against whom the order is directed is to be lodged in prison until (s)he purges her/his contempt and is discharged pursuant to a further order of the court. While both attachment and committal are often applied for on the same Notice of Motion, committal cannot occur in practice until the subject person has been adjudged guilty of contempt. That requirement does not obtain in the case of attachment. An Order for Attachment may be issued in respect of an alleged contemnor, although before a court would proceed to grant an Order of Attachment it would require to have had placed before it, cogent evidence suggestive of actual contempt having been committed. The first stage is usually therefore to attach the subject person and have them brought before the court to answer or show cause as to why they should not be committed for contempt. However, the court may make an order of attachment where the application is for an order of committal, and vice versa.

51. The modern-day procedures to be followed where attachment and/or committal is being sought are set out in Order 44 of the Rules of the Superior Courts. An application to the High Court for either or both orders has to be applied for by motion on notice to the party against whom the attachment and/or committal is to be directed. If an order of attachment is granted, the rules provide that it shall be directed to the Commissioner and members of An Garda Síochána whose function then is to execute it.

52. While it is only of historical interest at this stage, in times past such orders were executed by different agents. The former position is described in the following passage from Borrie and Lowe on *The Law of Contempt* (2nd ed, 1983), cited by the Law Reform Commission in their Consultation Paper on Contempt of Court (LRC CP 4 – 1991) at p.166:

"Formerly, courts of common law and Chancery proceeded summarily in cases of criminal contempt either by attachment or by committal. The main difference between the processes lay in the means of execution: in the case of an attachment

the person is seized by the sheriff's officer acting under a writ of attachment issued by leave of the court, but in the case of a committal the process was less formal and more direct, the offender being seized by the tipstaff acting under the orders of the judge.[123] *In R v Lambeth County Court Judge and Jonas 36 WR 475 (1887), Wills J commented that there was no practical difference between a committal and an attachment: 'One was enforced by the tipstaff of the Court, and the other by the Sheriff. That is all the distinction, and it comes to little if anything'."*

53. In Ireland today Orders of Attachment and/or Committal may be used to enforce solemn undertakings, injunctions (both mandatory and prohibitory), and other court orders. In that respect they may be deployed, in the context of civil contempt, in aid of coercing future co-operation with the court's process and/or, in the context of criminal contempt, in order to punish some act or acts of past disobedience of the court's order(s) /disregard for the court's process.

54. However, there is no entitlement under the Rules of the Superior Courts to seek the reliefs of attachment and/or committal with the primary objective of coercing future compliance with a court order or judgment for the recovery by or payment to any person of money. This is because the law provides for numerous separate processes for the enforcement of such orders, e.g., those outlined at paragraph 25 above. Indeed, Order 42, Rule 7 of the RSC expressly precludes it by providing, as it does, that:

> *"A judgment requiring any person to do any act* ***other than the payment of money****, or to abstain from doing anything, may be enforced by order of attachment or by committal." (Emphasis added by the Court)*

55. Accordingly, it is not possible in civil contempt proceedings to seek an Order of Attachment (and/or Committal) with the primary objective of coercing future compliance with an order requiring the payment of money in discharge of a debt.

Is a s.19(2) application civil or criminal in nature?

56. An unusual feature of the procedure provided for in s.19(2) of the Act of 1994 is that, although it refers to a power to imprison for non-compliance with a confiscation order, it grants the power to do so not to the court whose order has been breached, but to the High Court (which might or might not have been that court). The statute does not explicitly state whether, in acting pursuant to s.19(2) of the Act of 1994, the High Court will be acting in the exercise of its civil or criminal jurisdiction.

57. Criminal jurisdiction will have been exercised by whatever court was concerned with the trial, conviction, and the sentencing / being "otherwise dealt with", of the subject person for the underlying offence, and the relevant confiscation order will also have been made by that court as provided for in the Act of 1994. However, the legislature has decided that enforcement of payment on foot of the confiscation order is not to happen in those underlying criminal proceedings but in separate proceedings in the High Court. Thus, while the underlying criminal proceedings may, by virtue of s.3(16)(f), be regarded as not having been fully concluded, in circumstances where a confiscation order has been made

but has not yet been satisfied, the High Court, if it sees fit to act upon a report made to it as contemplated in s.19(2) of 1994, will not be acting in those ongoing underlying criminal proceedings, but in separate enforcement proceedings running in parallel with those underlying criminal proceedings. It was presumably on that understanding that the application in this case seeking s.19(2) relief was commenced by the respondent by an originating Notice of Motion in accordance with Order 136 Rule 17 of the Rules of Superior Courts (as inserted by the Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism) 2018, SI 316/2018).

58. An issue for us is whether the High Court exercises criminal or civil jurisdiction during enforcement proceedings under s.19 of the Act of 1994, and in particular when exercising its power to imprison a defaulter under s.19(2) of the Act of 1994. The High Court has full original jurisdiction and is capable of exercising both civil or criminal jurisdiction. We are in no doubt that when its jurisdiction is called on in aid of the normal processes of execution pursuant to s.19(1) of the Act of 1994, the High Court will be exercising its civil jurisdiction. However, the position with respect to the power to imprison arising under s.19(2) is perhaps less obvious and requires some analysis.

59. As we have pointed out, the failure to comply with a confiscation order is not per se a crime. However, where there has demonstrably been wilful refusal or culpable neglect to comply with such an order, it may be regarded as behaviour manifesting contempt for the court that issued the confiscation order and of that court's processes, and such contempt is a crime. However, as we have seen, it is often considered more appropriate to address certain types of contempt through coercive measures intended to ensure future adherence to the order in respect of which there has been default, than to punish past contempt in the exercise of the court's criminal jurisdiction. Such coercive measures are applied in the exercise of the court's civil jurisdiction, in what are known as civil contempt proceedings. Conversely, penal measures intended to punish past contempt are applied in the exercise of the court's criminal jurisdiction, in what are known as criminal contempt proceedings. However, since imprisonment may feature in both civil and criminal contempt proceedings the distinction is not always a 'bright line' one and as to where the line is to be drawn between civil and criminal contempt has often been the source of controversy. It has to be said, however, that the nature and far reaching extent of the penalties that may be applied pursuant to s.19(2), i.e., imprisonment for a term of up to 10 years in some circumstances as provided for in the s.19(4) Table, is strongly suggestive that the nature of the procedure is criminal.

60. A leading authority in this area is *Keegan v. de Burca* [1973] I.R 223. In that case, during the course of a civil action by the plaintiffs, the High Court made an interlocutory order restraining the defendant and others from entering upon or occupying the plaintiffs' property. The plaintiffs later brought a motion seeking an order of attachment because of the defendant's alleged breach of the interlocutory order. At the hearing of the motion the defendant refused to answer a relevant question which the judge had asked. The judge thereupon sentenced the defendant to be imprisoned *"until she purge her said contempt."* On appeal by the defendant, it was held by the Supreme Court (Ó Dalaigh C.J. and Walsh

J; McLoughlin J. dissenting) that the defendant had been guilty of criminal contempt in the face of the court and that, accordingly, punishment by imprisonment should be imposed by sentencing the defendant to imprisonment for a period of definite duration. In the circumstances the matter was remitted to the High Court for sentence. In his majority judgment, O'Dalaigh C.J. stated (*inter alia*):

> *"In my opinion the defendant's first point is well taken. The distinction between civil and criminal contempt is not new law. Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt in facie curiae, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of habeas corpus by the person to whom it is directed — to give but some examples of this class of contempt. Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this Court in In Re Haughey [1971] I.R. 217. Civil contempt, on the other hand, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made. In the case of civil contempt only the court can order release but the period of committal cannot be commuted or remitted as a sentence for a term definite in a criminal matter can be commuted or remitted pursuant to Article 13, s 6, of the Constitution."*

61. While it would not necessarily be determinative of the issue on its own, we regard the fact that s.19(2) of the Act of 1994 provides for the imposition of imprisonment for determinative periods, rather than for open-ended imprisonment, as being strongly indicative of the legislature's intention that the measure is intended to be primarily penal, rather than coercive. It seems to us that our legislators intended s.19(2) of the Act of 1994 to be used to sanction contemptuous behaviour that has already occurred, rather than seeking to modify or influence future behaviour. However, to reiterate a point made earlier, to suggest that is not to say that a measure which is primarily penal may not have a secondary coercive effect, but what is important is the primary intended effect.

62. What persuades us ultimately that the measure is designed to address criminal contempt is its place within the overall scheme of the Act of 1994. To paraphrase O'Dalaigh C.J. in the *Keegan* case, we are convinced that, unlike a case involving private parties where an order such as an injunction has been breached, this is not the type of case in which, to quote O'Dalaigh C.J., it can be said that *"the court has generally no interest to interfere unless moved by the party for whose benefit the order was made."* The confiscation order represents an important tool in the fight against crime. Such an order is made not primarily for the financial benefit of the State but in the public interest of deterring crime and ensuring that those who commit crime should not enjoy their ill-gotten gains. There

is a significant general public interest in ensuring that confiscation orders are complied with by those who are subject to them, and that they are not contemptuously disregarded. It would be inimical to the objectives of the legislature in giving power to the courts to make confiscation orders that they could then be simply disregarded or ignored without the possibility of attracting sanction. Moreover, it would be an undermining of the process of the criminal courts generally, of respect for the gardaí, the prosecuting authorities and other agencies charged with upholding the criminal law, and of overall confidence in the criminal justice system, if a confiscation order could be contemptuously disregarded. While the legislature has confined the power to initiate the s.19(2) procedure to the Director of Public Prosecutions, it is clear that this is entrusted to her not as the representative of a financially interested party who might otherwise have been expected to benefit from the making of the order, but rather in her capacity as the independent statutory officer with the entitlement to initiate criminal proceedings on behalf of the people of Ireland. We are satisfied in all the circumstances that proceedings initiated by the DPP under s.19(2) of the Act of 1994 seeking the imprisonment of a party who is alleged to have failed to comply with a confiscation order are fundamentally criminal in nature, being in substance proceedings for criminal contempt.

63. In expressing this view we are conscious of the observations of the Supreme Court in *Murphy and Gilligan v Criminal Assets Bureau* [2001] 4 IR 113 to the effect that if the procedures involved constitute in substance, if not in form, the trial of the person concerned on a criminal charge, they will be invalid having regard to the provisions of the Constitution unless the person concerned is afforded certain minimum procedural safeguards, e.g., being afforded the presumption of innocence, having the criminal standard of proof beyond reasonable doubt applied in their case, and being afforded the possibility of trial by jury in circumstances where the proceedings would not constitute the trial of a minor offence, and so on (our list does not purport to be exhaustive. However, we are not being asked in these proceedings to consider the constitutionality of s.19(2), and must proceed on the basis that it is presumed to be constitutional.

The Bench Warrant option v the Order for Attachment option

64. It is clear to us from our review of the law on bench warrants that such a warrant may only be exercised by a court that is exercising criminal jurisdiction. That requirement was met by the nature of the s.19(2) proceedings. However, that alone does not mean that the issuance of a bench warrant was otherwise appropriate to compel the attendance of the person concerned before the court.

65. As to what might constitute appropriate circumstances, we recall in the first instance the point made by Professor O'Malley, alluded to at paragraph 49 above, that the general rule is that the method to secure an accused person's attendance before a court should be that which is least restrictive of the person's liberty. We have already suggested that a defaulter (such as the appellant here) should, where possible and practical, be requested to attend before the court voluntarily in the first instance. There is no evidence that that was done in this case, nor is there any evidence as to whether it was possible or practical to do so. (We do note that the appellant, although not in attendance, was legally

represented at the hearing of the motion but our papers are silent as to his attitude and as to whether he would have been willing to attend voluntarily if requested).

66. At any rate, even if the appellant in this case had been invited to attend voluntarily but had simply not been willing to do so, there is no evidence that there was any legal process commanding his attendance that he was in default of. As our earlier review demonstrates, a bench warrant is normally issued (whether pursuant to statutory authority or on the basis of inherent jurisdiction) only where there is default in responding to a summons to attend court, or a court order (e.g., a remand upon recognizances) requiring an appearance before the court on a certain date and at a certain time and place. It is potentially problematic that in the case of a s.19(2) application, the DPP may not be able to point to a default on the part of the subject person in responding to a summons, or to non-compliance with a court order requiring his/her appearance, such as would normally justify the issuance of a bench warrant. That was the position here, and accordingly a bench warrant does not immediately suggest itself to us as having been the appropriate option to be availed of. This problem might or might not have been insurmountable in circumstances where the person concerned was potentially in peril of imprisonment, and his attendance was required in the interests of respecting his rights and ensuring that he was afforded due process and fair procedures – however in circumstances where we have not received arguments directed to these issues, we can express no view at this time.

67. At this point it is appropriate to consider whether the alternative option might have been more readily availed of, i.e., the possibility of securing the subject person's attendance by order for attachment (*in personam*). The first thing to be said is that a motion seeking an order for attachment may be sought both in civil and in criminal contempt proceedings. While a motion seeking an order of attachment (and/or committal) is the invariable way in which proceedings for civil contempt are commenced, it is also possible to seek the relief in criminal contempt proceedings on foot of a similar motion. Where it is done in the latter context some procedural adaptation and drafting modifications may be required. The Notices of Motion in both instances will seek to attach the person in question to show cause why they should not be committed to prison for contempt, although in the case of civil contempt it will likely be worded *"should not be committed to prison until such time as you purge your contempt for (the specified act or failure)"*, or similar; and in the case of criminal contempt *"should not be found to have been in contempt of court for (the specified act or failure) and committed to prison for such period as the court may determine in accordance with law in punishment of such contempt"*, or similar.

68. We think that it would have been open in principle to the High Court judge on foot of the DPP's Notice of Motion dated the 15th of October 2019, seeking *(inter alia)* "an order for the attachment of the respondent" (i.e., the respondent to the motion, the appellant in this appeal) to have issued an order so as to have the appellant brought before the court to show cause as to why he should not be found to have been in contempt of court for failing to comply with the confiscation order in this case and committed to prison in punishment of such contempt for such period as the court might determine in accordance

with law. There might, had the court given serious consideration to the attachment option, have been room for argument in the circumstances of this case as to the adequacy of the drafting of the actual Notice of Motion in question, and the evidence in support of it. But it is academic in circumstances where the court below opted instead to issue a bench warrant. What we can say is that, assuming the said Notice of Motion were to be regarded as adequate, and further assuming that appropriate evidence had been presented in support of it, it would in principle have been open to the court to have made an order for the appellant's attachment (*in personam*).

69. Moreover, in our view this was the preferable of the two options, as it did not require any demonstration that the appellant was in default of a process that had commanded his attendance before the court. Unfortunately, it was not the option that was availed of by the High Court judge.

The Court's Decision

70. In circumstances where it had not been demonstrated that the appellant was in default of a process that had commanded his attendance before the court, we are not satisfied that the decision of the High Court judge to issue a bench warrant for the arrest of the appellant to secure his attendance before the court in the context of an application under s.19(2) of the Act of 1994 was appropriate in the circumstances of this case. We will therefore allow the appeal.

71. In doing so, we wish to make clear that the DPP remains at liberty to bring a fresh and appropriately drafted Notice of Motion in the existing s.19(2) proceedings, or in any further such proceedings, seeking the attachment of the appellant so as to have the appellant brought before the High Court to show cause as to why he should not be found to have been in contempt of court for failing to comply with the confiscation order in this case and committed to prison in punishment of such contempt for such period as the court might determine in accordance with law.