



THE COURT OF APPEAL

[166/2014]

Birmingham J.

Mahon J.

Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Nathan Killeen

Appellant

ADDENDUM TO JUDGMENT of the Court delivered on the 10th day of May 2018 by Mr. Justice Birmingham

1. On 19th October 2017, this Court delivered a judgment dismissing appeals by the appellant, Nathan Killeen, and co-appellant, Wayne Dundon, against their conviction for murder by the Special Criminal Court.
2. On the 12th January 2018, Mr. Killeen brought a notice of motion contending that the reserved judgment delivered on that day was based on a false premise that no oral argument had been made with respect to two grounds of appeal. The notice of motion sought an order setting aside the dismissal of the appeal against conviction and that the appeal be reheard by a differently constituted court. Alternatively, Mr. Killeen sought an amended judgment dealing with the two issues in question, being the challenge to evidence arising from the execution of a number of search warrants and evidence linked to a DNA swab provided by the appellant on an occasion other than the arrest in issue in the present proceedings.
3. When the motion first appeared in a management list, it was adjourned to the next List to Fix Dates, and provision was made for a further mention listing scheduled prior to same. This was in circumstances where the judge taking the management list was proposing to make a transcript of the appeal hearing available to the parties for their observations. Said transcript was subsequently made available accordingly.
4. In fact, the planned mention listing fell foul of the extreme weather conditions that caused the cancellation of court sittings, with the result that the motion appeared in a list to fix dates, before the mention listing. At the List to Fix Dates, the judge taking it indicated that the Court would be minded to provide an addendum or postscript. After the matter was let stand for a few minutes at the request of the appellant's lawyers, it was indicated that that would be a satisfactory basis on which to proceed. The Court now follows through with that proposal.
5. As is clear from the judgment of this Court, the appeal was a very substantive one, with three days being allocated to it and a number of grounds of appeal were argued by each appellant. Counsel for the appellant marshalled his arguments by reference to several topics or grounds. At an early stage of the oral submissions Counsel for the appellant indicated that the focus of his oral submissions would be insufficiency of reasons, forensic evidence, and gang evidence. The Court was informed that the remaining grounds would only be argued by way of a basic outline. Counsel did, however, make it clear that he was standing over and not resiling from the written submissions with respect to those remaining grounds. [See the transcript of the 4th April, pp. 30-1]. This Court adverted to this at para. 52 of its earlier judgment.
6. In the course of its judgment, the Court did not highlight the fact that oral arguments were addressed on a number of other issues. These were the issuing of warrants, the use of the swab for comparison purposes as referred to in the Notice of Motion, and, indeed, to an issue in relation to alleged non-disclosure. Non-disclosure did not feature in the notice of motion, but it is suggested that similar issues arise.
7. Unusually, in addition to sitting through the oral appeal, the Court had the benefit of access to the transcript. The members of the Court had full regard to each and every issue that was raised in oral and written submissions. The Court, at all stages, was aware that what was described as admissibility issues were the subject of oral submissions. Indeed, those submissions provoked some lively exchanges with members of the Court, who expressed some bemusement at the submissions that were advanced in relation to the issuing of the warrants. [See, by way of example, some of the exchanges occurring between pp. 68 – 83 of the transcript of the 4th April 2017]
8. The Court takes the opportunity of confirming that it is rejecting the three grounds of appeal now in issue i.e. those relating to the issuing of search warrants, relating to the swab and the issue of alleged non-disclosure. This is notwithstanding that the third ground was not included in the notice of motion. It does so, having full regard to the written and oral submissions. With respect to the issue raised concerning the warrants, the focus was on the fact that they had been issued in respect of a large number of properties over and above the warrants relating to the two properties of primary interest i.e. Nos. 5 and 7 Crecora Avenue. They complained that this had the effect of issuing a general warrant. This was an issue that was carefully addressed by the Special Criminal Court which ruled on the matter on 28th May 2014.
9. This Court is in no doubt that the response of the Gardaí to the developing situation was an appropriate one and rejects the notion that evidence be excluded because warrants were issued for houses other than those directly linked to the appellant's. Such a

suggestion would be fanciful and ignores the geographical layout of the area and the circumstances in which the warrants were issued. This Court is satisfied that there was no misconduct on the part of Gardaí in acting as they did, and certainly no misconduct of such a conscious and serious nature as could possibly justify the Court taking the action contended for. Rather, the Court's view is that the actions of the Gardaí cannot be said to be unjustified when seen in terms of the circumstances that prevailed, namely, their arrival at Crecora Avenue and the time in which the warrants were issued.

10. So far as the buccal swab point is concerned, it should be explained that this arose in circumstances where the sample taken as part of the Collins murder investigation was excluded by the trial court. The prosecution sought to make use of a sample obtained during the course of an unrelated investigation. Their entitlement to do so was fully litigated and was the subject of a detailed ruling by the Special Criminal Court on 25th June 2015 (Day 26 of the trial).

11. In the Court's view, the conclusions of the trial Court in relation to the taking of the sample were clearly correct, as was its ruling on the related issue of whether Mr Killeen had been arrested or had voluntarily got into a Garda car. The Special Criminal Court was entitled to accept the Garda explanation as to what had transpired in relation to the taking of the sample. We agree with the trial Court that the procedures followed and the caution administered were appropriate. We are also in agreement with the trial Court that the fact that the consent form referred to s. 18(1)(9) of the Treatment of Persons in Custody in Garda Station Regulations 1987 rather than to Regulation 18 does not provide any basis for invalidating the taking of the swab.

12. We confirm that we are rejecting this ground of appeal and are doing so having had full regard to the oral and written submissions that were made to us.

13. For completeness, the Court will refer to the issue raised about non-disclosure although it was not referred to in the notice of motion. During the course of the appeal, it emerged that the issue was not so much about non-disclosure of records or documents that were in existence, but rather a complaint about a failure to maintain and create records. In the Court's view, the fact of context between Gardaí and gang members/members of the Collins family was fully explored at trial. Insofar as the defence contended, more meticulous record keeping would have been appropriate, this was a point that they were fully entitled to urge upon the Court and which they were entitled to ask the Court to take into account when assessing Garda evidence and indeed assessing the evidence of Collins family members. Such criticisms as the defence have to make do not call into question the fairness of the trial or the safety of the result.

14. In summary then the Court confirms that having considered all arguments advanced, oral and written, that the Court is rejecting the appeal by Mr. Killeen.