THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

103/16

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Samuel Devlin

Appellant

JUDGMENT of the Court delivered on 6th day July of 2017 by Mr. Justice Birmingham

1. On the 1st March, 2016, following a trial before the Special Criminal Court, the appellant was convicted of the offence of possession of explosives in suspicious circumstances contrary to s. 4 of the Explosive Substance Act 1883, as amended by s. 15(4) of the Offences Against the State Act 1998, and was subsequently sentenced to a term of six years imprisonment. He has appealed against that conviction.

Background

2. The background to the trial and the present appeal is to be found in events that occurred on 11th May, 2014 at Finnstown House Hotel and Resort in Lucan. On that occasion Number 144 "Golf Suite", a chalet style structure, was searched by Gardaí pursuant to a warrant that had been issued in accordance with the provisions of s. 29 of the Offences Against the State Act, 1939, as amended. The Gardaí entered the premises at approximately 10.25 a.m. on Sunday, 11th March, 2014. The appellant was present in the apartment/chalet when the Gardaí entered and had been seen entering the premises minutes earlier. A large assortment of electronic items and most significantly 26 metres of detonator cord was found during the course of the search.

3. The detonator cord was hidden, wrapped in a towel inside a laptop case, located on a shelf within what was described as a "tallboy" unit. Within the laptop case there was a laptop and also a plug for a laptop. Fingerprint evidence connected the appellant with the screen of the laptop and DNA evidence provided a link to the plug for the laptop.

4. When the detonator cord was examined by personnel from the Technical Bureau it was found that the explosive substance Pentaerythritol tetranitrate (PETN) was located within the core of the cord. The cord had a bright orange label which said "Explos" with the balance of the word apparently torn off. The letters "Exp" were initially visible, and then when the label was unfurled the letters "Explos". The label was torn with the loss of the letters "ive". In the bedside locker was found a medical card, a library card and a bank card in the name of the appellant.

5. It was the prosecution case that the appellant was residing at Room 144 "Golf Suite" at that time. There was evidence before the Court that there had been a long-term booking in the name of "Joe Murphy" between 31st March, 2014 and 11th May, 2014. The appellant's fingerprint was found on a newspaper located at 144 "Golf Suite" and also on the door handle.

6. Other items found during the search of the suite included:

> (i.) a small remote controlled Quadcopter;
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> (ii.) a large white coloured remote control Quadcopter with a piece of timber attached to the plastic underside, two separate remote controls, a rucksack containing viewing goggles for a camera attached to one of the Quadcopters, batteries, tissues, a battery charger, duct-tape, spare blades for a Quadcopter, cable ties and wires;
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> (iii.) a smaller rucksack contained a Tesco bag which in turn contained disposable gloves, a red coloured dye, a plastic bag containing a roll of multi-core cable, a Conrad shopping bag containing a number of items including twin-channel touch contact memory switches, two packs of wires, a battery charger and a BC voltage supply, a second Conrad shopping bag containing items which included a miniature key switch, a mini relay, a model craft voltage supply, twin-channel switch, a USB cable, a micro and mini SD card, a Voltcraft battery charger, a Gortner receiver, two model craft server wiring looms, a USB adaptor in the plastic bag, a Maplin plastic bag containing items which included batteries, screwdrivers, glue, insulation tape, bell wire, bulb tester, roll of J-cloth and battery chargers;
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> (iv.) a second Maplin bag containing a black plastic project box, batteries, five glass test tubes wrapped in J-cloth and individually wrapped in cling film, a universal switch and two light-activated switches, a Stanley knife, long-nosed pliers and snips.

A drawer in a bedside locker contained a number of items, which included a soldering iron and solder, batteries, four bulbs, fishing line, a desk lamp, wire cutters and wire. Another contained a number of items including a multi-metre, a soldering iron, a phone charger, an A4 writing pad, a pen torch, a nail clippers and a pencil sharpener.

7. Some 24 grounds of appeal have been formulated but counsel on behalf of the appellant in his oral submissions has indicated that the appeal really boils down to a few fairly simple propositions and then proceeded to address arguments related to three core issues.

8. The first of these is a challenge to the s. 29 search warrant. Secondly there is a challenge to the DNA evidence that formed part of the case. Thirdly it is said that the Court erred in being satisfied beyond a reasonable doubt that the appellant was in possession of the explosives and that the appellant had the necessary knowledge that the explosives located in the apartment were in fact explosives.

The issue in relation to the s. 29 Warrant

9. To put the legal arguments that have been advanced in context it is necessary to say a little more about the circumstances in which the Gardaí entered the apartment, purporting to do so on foot of the authority of a s. 29 warrant. It was clear from the evidence of Detective Inspector Hanrahan, who is the member of An Garda Síochána in charge of the operation that was put in place at Finnstown House, that Gardaí were aware that Mr. Devlin was in occupation of a hotel apartment from 9th May, 2014. Detective Inspector Hanrahan was a long-serving member of the Special Detective Unit (SDU) and the presence of Mr. Devlin was a concern to

him because he believed him to be linked to bomb making. Late on Saturday, 10th May, 2014 the Gardaí felt the situation altered very considerably. On that evening at about 11 p.m. a car, which it was established had been stolen earlier in the border area, was located in the car park at Finnstown House Hotel containing a large homemade explosive device. The Garda case was that at that point it became urgent for them to obtain a search warrant and be in a position to search the premises that they believed to have been occupied by Mr. Devlin. Detective Inspector Hanrahan made enquiries through the Bridewell Garda Station as was the established practice, and was told that a court would be available to deal with an application for a warrant at 10.30 a.m. or 11 a.m. on the Sunday morning. Detective Inspector Hanrahan did not wish to wait until then and decided to seek a warrant from a senior Garda officer who issued a warrant at approximately 3.30 a.m. However, the warrant was not immediately executed and was not executed in fact until approximately 10.25 a.m. on the morning of Sunday the 11th. It was executed minutes after Mr. Devlin was seen entering the premises.

10. The validity of the warrant is challenged essentially on two separate grounds and it is contended that the warrant should have been condemned by the Special Criminal Court and the evidence of what was found in the bedroom excluded. In summary, the validity of the warrant was challenged on the grounds that the statutory precondition for the issuing of a valid warrant by a Garda officer were not met. Secondly, and separately, it was said that the Chief Superintendent to whom the application was made and who was the officer who issued the warrant was not independent of the investigation as he was a first cousin of Detective Inspector Hanrahan who was in operational charge of the Garda operation and that the warrant should be condemned for this reason.

11. The statutory provision for the issuing of warrants by Garda officers is to be found in the Criminal Justice (Search Warrants) Act, 2012. Section 29 of the Offences Against the State Act, 1939 is amended by the substitution for that section of the section set out in s. 1 of the Criminal Justice (Search Warrants) Act, 2012. The relevant provisions are as follows:

> "(3) Subject to subsections (4) and (5), if a member of the Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.
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> (4) A member of the Garda Síochána not below the rank of superintendant shall not issue a search warrant under this section unless he or she is satisfied—
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> (a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and
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> (b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.
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> (5) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under this section only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought."

12. The appellant says three conditions must be in place before a warrant issued by a Garda officer would be valid: (a) it must be necessary for the proper investigation of the offence that the warrant be issued, (b) there must be circumstances of urgency, and (c) it must be impracticable to apply to a judge of the District Court. The appellant says that there were no circumstances of urgency in this case and says that it has not been established that it was impracticable to apply to a judge of the District Court in this case. The Director responds that the urgency was in seeking and obtaining a warrant, that once Gardaí are in possession of a warrant it would be a matter for their professional judgement when to execute the warrant. In this case the decision was taken to enter the suite minutes after the arrival there of Mr. Devlin.

13. The Court is slightly surprised that these arguments should have been advanced on behalf of the appellant. It is almost impossible to imagine a situation of greater urgency than that triggered by the discovery of a car bomb in a hotel car park. This country, as well as its neighbours, and indeed countries across the world, have seen the devastation that can be caused by terrorists with access to explosives. In this case Detective Inspector Hanrahan had made enquiries through the Bridewell Garda Station, as is the standard procedure, as to when a judge of the District Court would be available and was told it would be 10.30 or 11 o'clock on the Sunday morning. In the situation of extreme urgency that existed, he did not deem it practical to wait until then and so decided to invoke the statutory power to obtain a warrant from a Garda officer. The Court is quite satisfied that he was entitled to make the judgment that he did.

14. Detective Inspector Hanrahan was then criticised for bringing his application before Chief Superintendent O'Brien on the basis that the chief superintendent was a cousin of his and so could not be said to be independent. The trial court dealt with this issue as follows:

> "There is no question as to his independence within the Gardaí because he had nothing to do with this operation, was unaware of it and had nothing to do with it since either. The only matter raised is the fact that he is a first cousin of Detective Inspector Hanrahan who applied for the warrant. We simply do not believe that this is a relevant consideration, in particular in light of the fact that being a fellow member of An Garda Síochána would be much more relevant and that is envisaged and allowed for in the Act."

This Court would endorse the approach of the trial court. The statute provides that in particular circumstances a member of An Garda Síochána not below the rank of Superintendant may issue a warrant. However, the statute requires that the officer be independent of the investigation. Beyond any question Chief Superintendent O'Brien was independent of the investigation, knowing nothing about the operation at Finnstown House until contacted by Detective Inspector Hanrahan. That the Chief Superintendent and the Detective Inspector were cousins is quite irrelevant. In the circumstances that existed it is hard to imagine how any Garda officer presented with the information that was laid before Chief Superintendent O'Brien in the early hours of Sunday morning, 11th May, 2014, could or would have acted any differently. The Court therefore rejects the challenge to the warrant.

DNA Evidence

15. The challenge to the DNA evidence in the case was a significant aspect of the trial and has also been raised on the appeal. Before addressing the grounds of challenge it is worth noting that DNA was a much more significant aspect of the case at the time when the challenge was raised in the Special Criminal Court. At trial there was evidence in relation to the knot of a plastic bag found

in a waste bin on Adamstown Ave near the back entrance to the hotel, and also on gloves found in the plastic bag in the bin on the same occasion. The prosecution had sought to rely on surveillance evidence to connect Mr. Devlin to the bin, to which they contended he had travelled by bike while subject to surveillance. Gardaí then had subsequently gone to the bin and retrieved a plastic bag and amongst the items found in the bag were plastic tubing which had been cut lengthways, plastic fibres which were brown and white in colour, a J-cloth, plastic gloves and a newspaper. However, the evidence in relation to the placing of a plastic bag in a bin on Adamstown Ave by Mr. Devlin was one of two elements of the prosecution case that was specifically rejected by the Special Criminal Court and did not form part of the Court's consideration of the evidence.

16. In the light of the Court's ruling, the only DNA evidence that remained relevant was that relating to the plug which was in the laptop case. Given that the prosecution was in a position to link Mr. Devlin to the laptop which was in the case by way of a fingerprint, the plug evidence was of marginal significance at best.

17. The challenge to the DNA evidence arose from the evidence of Sergeant Birchall. He gave evidence on 9th February, 2016, day 4 of the trial. On 11th May, 2014 Sergeant Birchall was acting as member in charge at Lucan Garda Station where Mr. Devlin was detained after his arrest. He gave evidence that he was informed by Detective Sergeant Boyce that Detective Sergeant Maguire had authorised the taking of Mr. Devlin's fingerprints, photographs, explosive residue swabs and also his DNA. He said that he informed Mr. Devlin of the fact that the authorisation had been given. He said that in respect of the authorisation that had been given by Detective Sergeant Maguire regarding the taking of a DNA sample, that at around 12.15 p.m. on the day in question he brought Mr. Devlin to the "privacy room" and informed him that the authorisation had been given and the reason for the authorisation was to "either prove or disprove that he had been involved in the offence for which he had been arrested: namely the possession of explosive substances, unlawful possession of an explosive substance." Asked by counsel whether he had informed the appellant of what use would be made of any results, he responded "from the results, they were used to prove or disprove the fact that he had been arrested for, namely the possession of explosives". He then gave evidence that he took a buccal swab.

18. On behalf of the appellant it is argued that what Sergeant Birchall said was insufficient to comply with the provisions of s. 2(6) of the Criminal Justice (Forensic Evidence) Act, 1990. The section provides:

> "(6) Before a member of the Garda Síochána takes, or causes to be taken, a sample under subsection (1) of this section, or seeks the consent of the person from whom the sample is required to the taking of such a sample, the member shall inform the person—
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> (a) of the nature of the offence in which it is suspected that that person has been involved,
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> (b) that an authorisation has been given under subsection (4) (a) of this section and of the grounds on which it has been given, and
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> (c) that the results of any tests on the sample may be given in evidence in any proceedings."

The appellant says that nothing was said about the results of any tests being given in evidence in any court proceedings. The respondent accepts that there was no specific reference to court proceedings, however on her behalf it is submitted that the thrust of the obligation was complied with in that it is only in court that Mr. Devlin could be proved to be guilty of the offence of possession of explosives.

19. The Special Criminal Court dealt with the matter as follows:

> "The Act requires that he be told that the samples could be used in evidence. There is no requirement that a particular formula should be used. It is very clear that he was told that they could be used to prove or disprove something. How does one prove or disprove something other than by due process in court.
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> It was very clear to him and we are satisfied that the statutory requirement was properly complied with in that connection."

This Court feels that the approach of the Special Criminal Court was a proper one and a realistic one. Accordingly, the Court is not prepared to uphold the challenge to the admissibility of the DNA evidence based on the information that was provided to Mr. Devlin while in custody. We turn then to the argument that the evidence should have been excluded as hearsay and specifically that the evidence of Dr. Connolly, the forensic scientist, should have been excluded as hearsay. The argument was made that there were other people who were involved in the creation of the DNA profile, and the exercise also involved a computer and there was no evidence as to the method of operation of the computer or of what was inputted into the computer. The Court sees this argument as in reality more one relating to the chain of evidence rather than an argument grounded on the hearsay rule. However, whatever way the argument is formulated, the Court does not see it as an argument of substance. Dr. Connolly's evidence established that DNA matches were established in the State Laboratory. Accordingly, the Court rejects the challenge to the admissibility of the DNA evidence, while again pointing out that the DNA evidence is now much less significant than was believed to be the case when the debate took place at trial because of the exclusion of the Adamstown Lane evidence.

Possession of the Explosives

20. The third ground argued related to the question of possession. The appellant contends that the evidence in the case was insufficient to allow the Court conclude that the prosecution had proved beyond a reasonable doubt that Mr. Devlin was in possession of the explosives found in the suite. It is said that the evidence was insufficient to establish that he knew the object wrapped in the towel in the laptop case which was on the third shelf of the "tallboy" unit was in the suite or that he knew that the object that was in the laptop case in the suite was an explosive substance. In assessing this issue it is necessary to recall once more that the Special Criminal Court rejected two aspects of the prosecution case, the evidence in relation to the waste bin on Adamstown Avenue and also rejected the suggestion that inferences could be drawn from the attitude taken by Mr. Devlin at interviews. At a late stage of the trial the prosecution conceded that it was not an appropriate case for the drawing of inferences.

21. The appellant says that the Special Criminal Court erred in equating occupation of the suite with possession of the PETN. The evidence at trial did not establish any forensic link between the appellant and the PETN found in the laptop case located on the third shelf of the "tallboy". The appellant says that while there were a number of items in the suite which appeared to connect the appellant to it, it was not established that Mr. Devlin was actually in occupation but in any event occupation was not to be equated with knowledge of the PETN. The explosives in the case were contained within three rolls of white cord, which were packaged separately, wrapped in a towel and then secured in the laptop case. It is pointed out that there was no evidence that Mr. Devlin was carrying a laptop case as he made his way to the suite minutes before it was entered by the Gardaí. The explosives were hidden.

Moreover they had the appearance of white electrical cord and were not easily recognisable as explosives. It is pointed out that only the letters "Exp" of the partial word "Explos" were visible and many words, apart from the word "Explosives" start with those letters including the word "Expiry".

22. The respondent argues that there was ample evidence to support the conclusions of the trial court. The evidence adduced established a clear connection between the appellant and the suite which had been booked in a false name from 31st March and was in continuous occupation until 10th May, 2014. Documentation in the name of the appellant, including a current passport, a social welfare card and a social welfare receipt in respect of a payment for job seekers allowance relevant to the period 30th April, 2014 to 6th May, 2014 were located in the room. In passing it may be noted that the judgment of the Special Criminal Court refers to a driving license rather than a passport, this is an error but an error without consequences. It should, though, be noted that the passport was on the top shelf of the "tallboy" unit where the laptop case was.

23. This was essentially a circumstantial evidence case. The explosives were found in a hotel suite which had been in continuous occupation since 31st March, 2014. There were a number of links between the appellant and the suite, the appellant was linked to the laptop case in which the explosives were located, while not referred to specifically in the ruling and judgment of the Court there were a number of other items located in the suite which would not be usually found in a hotel bedroom such as quadcopters, cable ties and wires, disposable gloves, glass test tubes and so on. In the view of this Court, even with the evidence relating to Adamstown Lane and the drawing of inferences excluded, there remained ample evidence to support the findings of the trial court. The Court therefore rejects this and the other grounds of appeal that have been argued. The Court has also had regard to the contents of the notice of appeal and to the written submissions filed. The Court is not persuaded that the trial was in any way unsatisfactory or that the decision is in any way unsafe. The Court will therefore dismiss the appeal.