THE COURT OF APPEAL

[07/2017]

Birmingham P.

Mahon J.

Hedigan J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

RYAN GLENNON

APPELLANT

JUDGMENT of the Court delivered on the 28th day of June 2018 by Birmingham P.

1. On 11th November 2016, the appellant was convicted before the Special Criminal Court of the offence of membership of an unlawful organisation. The particulars of the offence being that he was within the State on 13th May 2015, a member of an unlawful organisation, being an organisation styling itself the Irish Republican Army, otherwise Óglaigh na hÉireann, otherwise the IRA. There were essentially four elements to the prosecution case, namely:

> (i) The belief/opinion evidence of Detective Chief Superintendent Peter Kirwan which was admitted to evidence pursuant to the provisions of s. 3(2) of the Offences Against the State (Amendment) Act 1972;
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> (ii) the Court was invited to draw inferences from the failure of the appellant to answer questions pursuant to s. 2 of the Offences Against the State (Amendment) Act 1998;
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> (iii) evidence relating to events in the Courtown area of County Wexford between the 9th May and the 13th May 2015 and
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> (iv) on 13th May 2015, premises at 19, Harbour Court, Courtown, Wexford were searched. In the course of the search a large amount of explosives and related materials were located in a water butt in a downstairs bathroom and in the kitchen area of the house. The premises were a holiday home owned by the parents of the appellant. On the 9th May 2013 the appellant, his brother: Sean Glennon, and Donal Costigan, otherwise Donal Ó Coisdealbha were observed at and around that address. As part of the surveillance in place on the 9th May some bags were seen being transferred between a black BMW and a Mondeo motor vehicle being driven by the appellant. One of the bags that was seen being transferred was a Lidl bag.

2. Some twelve Grounds of Appeal have been formulated and have been the subject of written and oral submissions. The written submissions, it may be noted, are somewhat more polemical in tone than is usual. Those twelve Grounds of Appeal can be summarised as follows:

> (i) The Special Criminal Court erred in finding the arrest of the appellant to be lawful (Ground 1);
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> (ii) The Special Criminal Court erred in deeming the extension of the appellant's detention to be lawful (Ground 2);
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> (iii) The Special Criminal Court erred in holding that the taking of certain evidence by Detective Superintendent Maguire (Grounds 3 and 4);
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> (iv) The Special Criminal Court erred in admitting evidence of the taking of forensic samples from Donal Costigan (Ground 5);
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> (v) The Special Criminal Court erred in failing to address the basis upon which Chief Superintendent Kirwan based his belief evidence (Ground 6);
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> (vi) The Special Criminal Court erred in finding that the surveillance and DNA evidence supported the belief evidence of Chief Superintendent Kirwan (Grounds 7,8, and 9);
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> (vii) The Special Criminal Court erred in finding there to be strong circumstantial evidence that the fingerprints marks/DNA evidence were deposited at a time when the appellant was present in 19 Harbour Court with Donal Costigan (Ground 10);
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> (viii) The Special Criminal Court erred in inferring that the appellant's failure to answer questions whilst in detention was consistent only with membership of the IRA and failing to consider the possibility that he may have done so for the purposes of protecting others (Grounds 11 and 12).

Grounds 2, 3 and 4

3. These grounds have in common that they relate to decisions taken in relation to the appellant by Gardaí of detective chief superintendent and detective superintendent rank. The position is that the appellant was arrested at approximately 15.20 on the Ongar Distributory Road on the 13th May 2015. He was brought to Ballymun Garda Station where he was detained under the provisions of s. 30 of the Offences against the State Act 1939. At 16.14 on the 13th May, Detective Superintendent Thomas Maguire authorised the taking of fingerprints, palm prints and photographs of and from the appellant pursuant to s. 7(1)(c) and (d) of the Criminal Law Act 1976 and s. 6(2) and s. 9 of the Criminal Justice Act 1984. At the same time, Detective Sergeant Maguire, pursuant to the provisions of s. 2(4) of the Criminal Justice (Forensic Evidence) Act 1990 permitted the taking of a saliva sample from the appellant.

4. On the 14th May 2015 Detective Chief Superintendent John McMahon extended the period of detention of the appellant pursuant to the provisions of s. 30(3) of the Offences against the State Act 1939. The appellant says that the validity of the decisions taken ought to be considered in the light of the decision of the Supreme Court of Damache v. the Director of Public Prosecutions [2012] 2 IR 266. The appellant points out that a suspect is usually detained by a member in charge and that the Criminal Justice Act 1984 requires that the member in charge should as far as practicable not be a member who is involved in the arrest of the person or the investigation of the offence. It is said that this goes to the very heart of an accused's person's constitutional right to fair procedures. Here, significant decisions affecting the appellant were taken while he was in custody by Garda officers who were not independent of the investigation.

5. The Court begins its consideration of this issue by pointing out that there is no statutory requirement that a Garda officer of appropriate rank performing the duty must be someone independent of the investigation. What is sought therefore is to read into the legislation something that is not there. The Court then calls to mind the well-known observations of Oliver Wendell Holmes that the life of the law has not been logic; it has been experience. The Court is not at all persuaded that there is any analogy to be drawn between the position of a member of an investigation team issuing a warrant to search a dwelling and the position of officers involved in the investigation taking decisions in relation to somebody who, on this scenario, has been lawfully arrested and validly detained. It seems to us that it would be destructive of the efficiencies required and expected of An Garda Síochána to exclude from decision making those who are best equipped to form judgments; those who are most familiar with the investigation. As the case of DPP v. Gary Howard [2016] IECA 219 establishes, where what was essentially the same argument was advanced in the context of s. 50 of the Criminal Justice Act 2007, the argument would find favour only if abstract logic were to be preferred to the experience of the law. The Court does not see this as a point of substance and has no hesitation in rejecting this Ground of Appeal.

Ground 5

6. This relates to the fact that late in the trial, on Day 7 (which was the last day that evidence was heard during the trial) the prosecution was permitted to call evidence relating to the taking of a sample from Donal Costigan. The appellant argues in permitting this evidence to be admitted the Court failed to fulfil its duty to ensure that the trial was a fair one. It is said that the Special Criminal Court was very critical of the prosecution's decision to do so and noted that the service of the additional evidence was "very, very late" but still permitted the prosecution to call the evidence. It is fair to say that the Special Criminal Court was not pleased that the prosecution was making such a request so late at trial and they asked the defence whether they wanted time to deal with it. While the defence may have been surprised at the lateness of the application, they cannot have been surprised that the prosecution would have sought to put that evidence before the Court. The defence did not seek time and instead merely repeated their protest about the late service of the material.

7. This is in a situation where it was clear from the outset that the prosecution were intent on adducing evidence relating to the presence of both Mr. Costigan's DNA and the appellant's DNA on an item of interest, gardening gloves, located close to where the explosives were. The Court is in no doubt that the Special Criminal Court was entitled to permit the prosecution to adduce the additional evidence. The defence had been on notice from the earliest days that the prosecution case was that DNA from the appellant and Mr. Costigan was found on the garden gloves. They cannot have been surprised that the prosecution would have sought to put that before the Court. In the Court's view, the ground of appeal is without merit and accordingly is rejected.

Grounds 6,7,8 and 10

8. Grounds 6,7, 8 and 10 are all related to the opinion/belief evidence offered by Detective Chief Superintendent Peter Kirwan. It is accepted by the appellant that by statute, the Detective Chief Superintendent was entitled to give such evidence. However, it is said in this case the Chief Superintendent claimed privilege very broadly, in effect over everything upon which the formation of his belief was based. It is said that such was the extent of the claim of privilege that there was in effect no "examinable reality" in the language of Redmond v. Ireland [2015] 4 IR 84. It is said that the decision of the trial court was defective in that it merely accepted the belief evidence without addressing the impact of the very broad claim for privilege. The Detective Chief Superintendent is also criticised for what is described as an "enthusiastic solo run" into which he "dived". This issue arises in circumstances where prosecution counsel asked Detective Chief Superintendent Kirwan why he wished to claim privilege. The witness responded;

> "The main reason is protection of live, security of the State and the protection of ongoing Garda invaginations, but it comes against a backgrounds of the organisation that we are talking about. An organisation that is a secret organisation, is an oath bound organisation, is an organisation that is divided into cell structures, both to restrict information that is available to other members but also it restrict the opportunities for law enforcement to penetrate the organisation. It is an organisation that is involved".

It was at that stage there was an interjection by counsel for the accused.

9. The Court cannot really see that the Detective Chief Superintendent said anything very extraordinary. In truth, most people in the country would be aware of the fact that the IRA is a secret organisation, an oath-bound organisation, one that is divided into cells. The purpose of this structure is to restrict information internally and to make more difficult the opportunities for law enforcement agencies to penetrate it. Certainly, anyone who had attended trials in the Special Criminal Court or had practised in the area of criminal law would have been aware of the situation. Nobody can have been surprised that the Detective Chief Superintendent was claiming privilege and nobody can have been surprised as to the reasons why he would claim privilege.

10. In the course of cross-examination, counsel for the accused first dealt with the question of when the witness was approached with a view to offering opinion/belief evidence. He was told that had occurred on 5th October 2016. It appears that the Detective Chief Superintendent had taken on additional responsibilities in relation to the Special Detective Unit on 3rd October 2016. The reason for this was that the previous Head of the S.D.U., Detective Chief Superintendent McMann, had retired on 30th September of that year. In response to questions from counsel, Detective Chief Superintendent Kirwan confirmed that the documentary material available to him included observations of Mr. Glennon at or about the house at Harbour Court in Courtown. However, he made clear that that had not formed the basis of his belief. When asked to confirm that he was claiming privilege as to how long he had held that view the witness responded that there were two matters of which he was conscious. First, Detective Chief Superintendent Kirwan stated that he did not want to the prejudicial to the accused and secondly that he did not want to give anything that would be tantamount to going behind the privileged claim. Counsel submitted that a date could not be a privileged matter. This Court finds that submission somewhat surprising. Information as to the date on which An Garda Síochána or in this instance the particular witness formed the view that a particular person was a member of an unlawful organisation might be highly significant. If, for example, the date was linked to the attendance of the suspect at a particular safe house, that would certainly be of interest the organisation that was under investigation. In further exchanges, the Detective Chief Superintendent made clear that the material that he had viewed covered a period of time pre-dating the 13th May 2015. The Court would repeat its view that it can readily understand why no senior Garda officer would ever want to provide such information. It is true that there may be cases where it would be possible for a Detective Chief Superintendent to volunteer that he has been of that view for a great number of years or word to like effect. However, if that evidence was given it is likely that it would provoke protest from the defence that the effect of the evidence was to blacken the character of the accused and to alleged serious wrongdoing in respect of which he had not been charged.

11. In response to further questions, the Detective Chief Superintendent stated that the matters that he relied on came from diverse sources, and in the Court's view, the Detective Chief Superintendent was entitled to advance a claim of privilege and the trial Court was entitled to uphold that claim. It has been suggested that the breadth of the claim goes beyond what was envisaged by the Court of Criminal Appeal in the case of Director of Public Prosecutions v. Donnelly & Ors. The Court does not agree. The extent of the claim to privilege may vary from case to case. There may be cases where chief superintendents or officers of higher rank are prepared to answer questions, when those same questions would be seen as off limits in other cases. No doubt, in deciding whether to advance the claim of privilege or not, Detective Chief Superintendents will be conscious of the fact that the more information they can give about the opinion that they have informed, the more likely it is that a Court will be impressed and prepared to act upon the opinion/belief.

12. The Court would observe that the criticisms that are made of Detective Chief Superintendent Kirwan and the criticisms of the approach taken in this case by the Special Criminal Court have to be seen against the background that s. 3(2), with its provision for Detective Chief Superintendent's being permitted to give opinion/belief evidence, has been part of our law since 1972. It has survived numerous challenges. Those challenges have failed even though the Court considering them was fully conscious of the fact that privilege is almost invariably claimed and almost invariably upheld.

13. This Court sees nothing out of the ordinary in the way in which Detective Chief Superintendent Kirwan approach the task of giving his opinion/belief evidence. The grounds of appeal related to this issue are therefore rejected.

14. The appellant is very critical of the trial Court's treatment of the finding of the appellant's DNA and fingerprints at 19, Harbour Court. The appellant, in particular, criticised the trial Court for, in effect, concluding that there was circumstantial evidence linking the appellant with the large quantity of explosives found on 13th May 2015. Attention is drawn to a sentence in the judgment of the Special Criminal Court where it is stated:

> "[w]hilst it is not possible to say when the fingerprint evidence were deposited, or when the DNA was deposited, nevertheless, there is strong circumstantial evidence to suggest that it was around the time the accused have been surveyed in the house with Donal Costigan that the DNA would have been deposited. The appellant says that the court couldn't have been more wrong in its conclusion that the evidence in the case was the direct opposite, that the evidence was that it was impossible to know when the fingerprints were made and impossible to know when DNA was deposited. Again, he said that the trial court fell into error when dealing with the question of bags".

15. On 9th May 2015, bags were observed being transferred between a Black BMW and a Mondeo driven by the appellant. The trial court in its judgment commented that the bags "were later found in the house". It said that this went way beyond where the evidence would go.

16. The prosecution say that the approach taken on behalf of appellant fails to engage with the reality of the evidence at trial. The prosecution says that the trial court was entitled to attach very considerable significance to the finding of the appellant's DNA, along with that of Donal Costigan, on a pair of gloves left with a quantity of explosives in the holiday house. Further, that was not to be seen in isolation from the fact that the appellant's fingerprints were on a trolley which held a water butte containing an enormous amount of explosives.

17. While the Court is prepared to accept that the trial Court may have gone further than strictly justified in referring to the bags as "having later being found", in the Court's view, the evidence in relation to the house was of enormous significance when seen in the context of the opinion/belief evidence that was being offered, which was specifically stated not to be based on anything to do with Courtown.

Grounds 11 and 12

18. The Court erred in holding that it was entitled to infer that the failure of the appellant to answer questions in detention was consistent only with membership of the IRA specifically in relation to the following matters:

> (a) The failure of the appellant to answer questions posed to him in respect of his alleged presence in Courtown on 9th May 2015, his being in the company of one Conor Augusta and the transfer of bags to the appellant's car. This is in circumstances where contrary to the court's finding, there was not any evidence of the said bags being found at 9 Harbour Court and where the court did not receive any evidence in respect of the character of Conor Augusta.
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> (b) The failure to provide an innocent explanation in respect of the appellant's fingerprints and DNA being found on items in his parents' house in 9 Harbour Court, which house was used by the appellant and his family and

(c) The failure of the appellant to challenge the assertion by gardaí that he was a member of the IRA.

19. The Court erred in law and in fact in failing to address the possibility that the appellant had declined to answer questions in order to protect friends and family, in circumstances where this possibility had been raised in the closing address on behalf of the appellant.

20. In the course of written submissions, the appellant submitted "it cannot seriously be suggested that the appellant's silence means that the presence of his DNA or fingerprints, on items themselves utterly innocent and unexceptional, within his parents' home, becomes evidence consistent only with guilt. He categorises the evidence as "skimpy".

21. The prosecution says that this submission is divorced from reality and ignores the fact that what was being categorised as utterly innocent and unexceptional involved DNA on gloves retrieved among a panoply of explosives and related paraphernalia.

22. The Court is no doubt that the questions asked were material, is in no doubt that the Gardaí asking the questions were painstaking in ensuring that there was no room for error or misunderstanding or confusion. The Court is in no doubt that the trial court was entitled to conclude that the failure to answer questions supported the prosecution case. The Court does not believe that there was any obligation to specifically reference and reject the suggestion in defence Counsel's closing speech that perhaps the motivation was to protect others including members of the family. That was simply a theory canvased in a course of a closing speech, it was one for which there was no evidential basis.

23. Overall, the Court's assessment of the situation here is that the prosecution mounted a particularly powerful case. The Court has not been persuaded to uphold any ground of appeal. Having rejected all grounds of appeal advanced in both the written and oral submissions, as we do, the Court must dismiss the appeal.