THE COURT OF APPEAL

Record No. 279 2016

Mahon J.
Edwards J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

GAVIN TIERNEY

APPELLANT

JUDGMENT of the Court delivered on the 23rd day of February 2018 by Mr. Justice Mahon

1. The appellant pleaded not guilty to three counts at Dundalk Circuit Criminal Court on the 14th June 2016, namely:-

- Count No. 1:

  Making an unwarranted demand with menaces contrary to s. 17 of the Criminal Justice (Public Order) Act 1994 as amended by the Intoxicating Liquor Act 2008.

- Count No. 2:

  Making an unwarranted demand with menaces contrary to s. 17 of the Criminal Justice (Public Order) Act 1994 as amended by the Intoxicating Liquor Act 2008.

- Count No. 3:

  Criminal damage contrary to s. 2 of the Criminal Damage Act 1991.

2. In respect of count 1, the appellant was found not guilty by direction of the Court. In respect of count 2, the appellant was found not guilty by a unanimous jury verdict, and in respect of count 3, he was found guilty by a unanimous jury verdict. He was sentenced on the 10th of October 2016 to three months imprisonment. The entire term was suspended on conditions.

3. The appellant has appealed against his conviction on count 3.

4. The charges against the appellant arose from incidents which were said to have occurred on the 16th May 2013 and the 23rd May 2013 at Five Oakes Village, Drogheda, County Louth, the home of Mr. Martin O'Brien. It was alleged that the appellant on both dates attended at Mr. O'Brien's home and demanded the re-payment of a debt said to be due to him by Mr. O'Brien's son in the sum of €15,000. The demands are said to have been made with menaces. On the second occasion, the 23rd May 2013, it was alleged that the appellant broke a pane of glass in Mr. O'Brien's front door. This incident is the subject matter of the third count in respect of which the appellant was found guilty.

5. The grounds of appeal filed by the appellant are as follows:-

> (i) The learned trial judge erred in law in her rulings and directions and failed to properly defend and to vindicate the appellant's constitutional rights.
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> (ii) Without prejudice to the generality of the foregoing, the learned trial judge erred in law in ruling as admissible in evidence at his trial the purported memorandum of the appellant's cautioned interview with gardaí notwithstanding that the memo was taken whilst he was in unlawful detention following his unconstitutional arrest and deprivation of liberty.
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> (iii) Further, and without prejudice to the generality of the foregoing, the learned trial judge admitted as evidence at the appellant's trial a memorandum of cautioned interview taken in such circumstances of unconstitutionality, as are outlined above, even though the original memorandum had been mislaid and it was not available to the Court.
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> (iv) Further to the foregoing the learned trial judge erred in law in failing to balance the competing rights and obligations of the parties and erred in her assessment and application of relevant legal principles and authorities.
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> (v) Such further or other grounds as may be permitted.

6. On the 24th May 2013 a search warrant was issued by the District Court pursuant to s. 29 of the Offences Against the State Act 1939 and which authorised a search of the appellant's home at 66, Park Grange, Grange Rath, Drogheda, County Louth. The reason for the granting of the search warrant was on the basis that *"as the holder of a licensed firearm, (the appellant) may have had other firearms as it is usual in this area for persons to use firearms in enforcing the payments of drug offences".* The appellant's home was duly searched. No unlawfully held firearms were found. At the conclusion of the search, Det. Sgt. Kearns arrested the appellant under s. 17 of the Criminal Justice (Public Order) Act 1994 for the alleged offence of demanding money with menaces and extortion. He was then detained at Dundalk garda station pursuant to s. 4 of the Criminal Justice Act 1984, and interviewed after caution. A memorandum of that interview was the sole exhibit in the book of evidence in the appellant's trial.

7. It is contended on behalf of the appellant that his arrest was unlawful and that his constitutional rights had been breached. It was argued that the memorandum of his interview related to an interview conducted while he was in unlawful custody and should

therefore be excluded.

8. In the course of the first day of the trial a voir dire took place in which the issues of the contested search warrant and the admission into evidence of the memorandum were considered.

9. In relation to the search warrant, the learned trial judge ruled as follows:-

> *"…I am absolutely quite satisfied…from the evidence of Det. Gda. Kelly…that he was fully entitled to get the warrant. And I say that for the following reasons, that it is clear to me that he had gathered all the appropriate information to allow him to go under reasonable suspicion, and he set out the grounds comprehensively.. (he) didn't just use the few lines that were available to him. But gave a full assessment as to why he was looking for the warrant. Went further than that, insofar as that he indicated that he had discussions with the District Judge in that regard…he was aware of the existence of a licence for this firearm for Mr. Tierney. Mr. Tierney hadn't been identified, the guards having carried out reasonable enquiries. And in putting two together where Det. Gda. Kelly was of the view that monies were been demanded of these people and threats being made, added with the fact that there was a legally held firearm, then it seems to me, I absolutely agree with Mr. Seagrave there would have been criticism of them had he not gone looking for a search warrant to see if there were any other firearms on the premises and indeed to seize what firearms were there."*

10. In relation to the issue as to the true intent and purpose of the search warrant, the learned trial judge ruled as follows:-

> *"Well in my view, the true intent and purpose of executing the search warrant was clearly to search for unlawful arms, having regard to the threats received by the O'Brien family and in circumstances where the gardaí were already aware that the accused has one legally held firearm. As I have already indicated, I am satisfied that the gardaí entered on foot of a valid search warrant and indeed the accused operated fully in this regard. Clearly, the purpose of carrying out the search was premised on the basis of the complaints by the O'Brien family in relation to threats made against them and the concern of the gardaí that a firearm would be used to carry out such threats. Whilst no unlawful firearm was found on the premises the gardaí (seized) other items to assist them in their investigations, namely the accused's phone, laptop etc. After the search was complete, Det. Gda. Kearns's concerns arrested Mr. Tierney for an offence pursuant to s. 17 of the Criminal Justice Public Order Act 1994 for demanding money with menaces. When asked what power he involved to carry out the arrest he replied that he had invoked the powers pursuant to s. 24 of that Act. There is no dispute that no such power of arrest was available to Det. Gda. Kearns pursuant to that section. However it is clear from his arrest that he explained to the accused the offence for which he was been arrested and indeed duly cautioned him. It is clear that Det. Gda. Kearns was of the view that he had the power to arrest the accused and indeed this is not disputed. The issue relates to the power invoked by him. Clearly, Det. Gda. Kearns was in error in relation to the matter but there was no question of any mala fides on his part. Indeed, given that the accused is not a lawyer it is difficult to see how this in any way negatively impacted on him where it was explained to him in layman's terms the reasons for his arrest, albeit the wrong power being invoked. Clearly, the objection being taken here by the (defence) is that there was a breach of the accused constitutional rights in circumstances where the arresting guard invoked the wrong power of arrest and contends therefore the exclusionary rule ought to apply. I am satisfied from the evidence that there was no deliberate or conscious violation of the accused's constitutional rights and clearly there is no allegation of mal fides on Det. Gda. Kearn's part. In all the circumstances I am satisfied that this is a classic class of inadvertence on the part of Det. Gda. Kearns wherein there could have been no prejudice to the accused, Det. Gda. Kearns having explained to him the reason for his arrest. In all the circumstances therefore, I must refuse the application."*

The issue of the warrant

11. Evidence was given in the course of the voir dire that the following information was provided to the District judge to whom the application was made for the issue of a search warrant of the appellant's address:-

> *"Garda enquiries have established a suspect for threatening the families' lives as Gavin Tierney who lives at 66, Park Grange, Grange Rath, Drogheda. He has a licensed firearm and I suspect he may have other firearms as it is usual in this area for persons to use firearms in enforcing the payments of drug offences."*

12. Evidence was also given that the appellant's suspected involvement in the incidents which occurred at the home of Mr. O'Brien in May 2013 were not isolated incidents. Threats, including death threats, had been made to a son of Mr. O'Brien in the previous year. The gardaí had information to the effect that the appellant was attempting to extort money from Mr. O'Brien in relation to a €15,000 drugs debt supposedly owed by Mr. O'Brien's son. It was alleged that there was a threat to damage family cars, and that ultimately, that the appellant would force his way into the O'Brien home. The culmination of these threats on the 23rd May 2013 involved the appellant attempting to punch Mr. O'Brien and shattering a pane of glass at the side of the door in the process. The gardaí also had information that the car which conveyed the appellant to Mr. O'Brien's address at the time the threats were made was a vehicle registered in the appellant's name at his address in Drogheda.

13. In the course of the search conducted in the appellant's home on foot of the search warrant, a legally held firearm, cartridge belt, ammunition and some other items were seized by the gardaí.

14. In *DPP v. Tallant* [2003] 4 I.R. 343, the Court of Criminal Appeal considered the sufficiency of information provided to a District Court judge to ground the issue of search warrants which, when exercised, resulted in the illicit drugs being found at a Dublin address. In the course of the judgment of the Court delivered by Fennelly J., the following was stated:-

> *"In these circumstances, one has to look at the quality of the evidence that the District Judge is entitled to act on in this situation. This is not an inter partes matter; it is not a criminal prosecution in itself. It is an administrative procedure in the first instance insofar as An Garda Síochána set it in motion. It is a judicial procedure of a very particular kind, namely one where An Garda Síochána has to satisfy the District Court that there is sufficient reason to search the premises of the person named in the warrant and, just to make it absolutely clear, in Byrne v. Grey [1988] I.R. 31 and The DPP v. Kenny [1990] 2 I.R. 110, and it is accepted by this court, the constitutional protection of the integrity of the home of the individual immediately comes into play and the court must be vigilant to ensure that there is not any undue or improper invasion of that constitutional right to the sacrosanct character of the home of the person who is an individual citizen. On the other hand, of course, the gardaí are engaged in carrying out their public duty to investigate crime and a proper balance has to be struck between these two objectives. So, in collecting evidence all proper respect has to be accorded to the protection of the constitutional right of every individual citizen in respect of*

his home and, therefore, any invasion of that must take place only on the basis that proper judicial procedures have been carried out."

15. In *Ryan v. O'Callaghan* (Unreported High Court delivered 22nd July 1987) Barr J. described a search of premises pursuant to a search warrant in the following terms:-

> *"The search of premises by the police officer under the authority of a search warrant is no more than part of the investigative process which may or may not lead to the arrest and charging of a person in connection with the crime under investigation or any other crime. In my view, the prosecution of an offence commences when a decision is made to issue a summons or prefer a charge against the person in respect of the particular crime alleged."*

16. In *Byrne v. Grey* [1988] I.R. 31, Hamilton P. (as he then was) when considering issues relating to a search warrant granted under s. 26(1) of the Misuse of Drugs Act 1977 said that, before a warrant could issue under the provision, "..the District Justice or Peace Commissioner should himself be satisfied by information on oath that facts exist which constitute reasonable grounds for suspecting that an offence has been or is being committed."

17. It is well settled that it is necessary therefore that the District judge be satisfied that there are reasonable grounds for suspicion of involvement in criminality on the part of an occupant of the premises to be searched indicated by the gardaí.

18. Evidence given by Det. Sgt. Kelly was to the effect that the District judge to whom the application was made considered the content of the information provided to him and asked him, Det. Sgt. Kelly, if the contended facts were true. The evidence of Det. Sgt. Kelly was not seriously challenged in this respect, nor was there any evidence before the trial court which suggested that the District judge had not very fully considered the information provided to him before issuing the warrant. There was no evidence to suggest, to use the words of Fennelly J. in *Tallant*, that the District judge had engaged in a *rubber stamping operation* in authorising the warrant.

19. The reason provided to the District judge in support of the application for a search warrant was a belief or suspicion that the appellant who was a licensed gun holder might also have an unlicensed firearm on his premises. The perceived association between firearms and demanding money with menaces could in no way be described as far fetched or unreasonable. If, for example, the same reasoning was put forward, namely a suspicion that an individual might have in his possession an unlicensed firearm, in circumstances where the crime being investigated involved the misappropriation of company funds, a search warrant issued in such circumstances might be questionable. It was noteworthy that Det. Sgt. Kelly specifically referenced the belief that the use of firearms was *usual in this area* when payments for the supply of drugs were being enforced. The *area* being referred to was the area of Drogheda and such belief was based on the experience of a seasoned garda officer dealing with similar type criminality in his area of operation.

20. The learned trial judge clearly carefully considered the evidence of Det. Sgt. Kelly in the circumstances in which the application for a search warrant had been made and dealt with by the District judge before concluding that the search warrant was lawfully authorised and acted upon. This Court is satisfied that this ruling was, in all the circumstances, correct, and will therefore dismiss this ground of appeal.

The arrest of the appellant

21. It is argued on behalf of the appellant that the appellant was unlawfully arrested and detained.

22. The appellant was arrested by Det. Gda. Kearns pursuant to s. 24 of the Criminal Justice Public Order Act 1994. It is agreed and accepted that no such power of arrest was available to Det. Gda. Kearns under that particular section. It is also not in dispute that Det. Gda Kearns did have available to him at the time of arrest a power to arrest the appellant under s. 4 of the Criminal Justice Act 1997 which permits the arrest *with reasonable cause* on the basis of a suspicion *that an arrestable offence has been committed*, and to do so without a warrant. There was no suggestion that there was any *mala fides* behind the decision to invoke a power of arrest which did not, in fact, exist. The learned trial judge noted the fact that Det. Gda. Keane had, at the time, explained to the appellant the reason for his arrest. Everything strongly indicated that an innocent, or even a technical or careless error, had occurred.

23. The learned trial judge correctly identified the basis of the objection taken by the defence in relation to the arrest issue to be a breach of the appellant's constitutional rights.

24. The Court's attention was drawn to the case of *DPP v. J.C.* [2015] IESC and the relevance to the instant case of the constitutional exclusionary rule as pronounced by the Supreme Court in that case. In Walsh on *Criminal Procedure*, 2nd edition, the following paragraph (12/186) provides a useful summary of the effect of the decision in *J.C.* as follows:-

> *"In his construction of the new exclusionary rule, Clarke J. gave very little consideration to the treatment of unlawfully (as distinct from unconstitutionally) obtained evidence. Nevertheless, there is a strong implication that he envisages the admissibility of such evidence being determined in accordance with the same general criteria as evidence obtained by an inadvertent breach of constitutional rights. He expresses the view that just as there is an onus on the Court's to discourage unconstitutionality and to vindicate constitutional rights, there is also an obligation on the Courts to uphold the law and to discourage illegality. Indeed, he makes it clear that where the failure to comply with the relevant legal requirements can be described as reckless or grossly negligent, the evidence in question should be excluded. At one point, the learned judge said:-*
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> > *"It should not, therefore, be taken that evidence obtained in circumstances of illegality should readily be admitted. Where the absence of legality arises in circumstances properly described as reckless or grossly negligent, then the relevant evidence should be excluded even if the illegality concerned does not result in a breach of constitutional rights."*
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> *The implication is that lesser degrees of inadvertence will not prevent the evidence been admitted, but they will leave the judge with discretion to exclude."*

25. In the instant case, there is no evidence of recklessness or gross negligence on the part of the gardaí in their decision to conduct an arrest pursuant to a statutory provision which did not exist or was not applicable. The learned trial judge considered the circumstances in which the arrest was conducted and concluded that there had been *"no deliberate or conscious violation of the accused's constitutional rights.."* and that the error in the arrest procedure was down to a *"classic case of inadvertence"*. It was within the discretion of the learned trial judge, having heard relevant evidence and having considered submissions made to her, to so find.

The interview memorandum
26. The final ground of appeal relates to the absence of the original memorandum of a cautioned interview on the appellant, and the decision of the learned trial judge to admit into evidence typed up memorandum of what was contained therein. It was submitted that this was one of 'a catalogue of errors' in the trial and ought not to have been excused as mere inadvertence.

27. At the commencement of the second day of the trial Mr. Kelly BL made an application on behalf of the appellant in relation to a memorandum of an interview by gardaí of the appellant while in custody referred to in the book of evidence but the original of which had gone missing. Mr. Kelly applied to the learned trial judge to either discharge the jury or deem the copy of the memo still available to be inadmissible as evidence. It was pointed out to the trial court by Mr. Seagrave BL, on behalf of the respondent, that the original document had been seen by the defence before it went missing and that the typed up memorandum of same remained available. He contended that no prejudice therefore arose. There was also available a video recording of the interview. Mr. Seagrave suggested that the missing original was due to inadvertence and that, in reality, the fact that it was missing was no more than a technical deficiency in the circumstances.

28. Having considered the matter, the learned trial judge ruled in the following terms:-

> *"Well, it is somewhat incredible that having spent the day yesterday dealing with the issue of the inadmissibility or otherwise of the interviews, that as of 11 o'clock this morning it becomes apparent that the original is not available. However, I am conscious that at that stage before this became a issue that Mr. Kelly had indicated that (he was) ready to proceed and that was operating on the basis of the DVD that had been made available to him, as I understand it, of this interview and working off the exhibit that was contained in the book of evidence, which is a typed version in the ordinary course of what the handwritten note would be and indeed is the usual practice between counsel for the prosecution and defence, that they work off that typed copy unless an issue arises. I understand that the only issues that arose in relation to Mr Kelly was that he was dissatisfied that some of the typed versions were not in fact in accordance with what he had viewed on the DVD. I'm satisfied that the best practice available to Mr Kelly and indeed to all involved in the trial is, in fact, the DVD. Clearly, a contemporaneous note of the interview is of assistance to all parties but it is not unusual during the course of a trial that those contemporaneous notes have to be redacted in circumstances where it becomes clear that the member who was involved in taking those notes in fact makes errors having regard to what I say is the primary and principal evidence, which is in fact the DVD recording. So, as I've already indicated, firstly, I'm not satisfied there's any prejudice to the defence. Certainly, it is highly unsatisfactory that the Court be informed at this late stage that the only exhibit in the case, which of course is the primary evidence in the case at this stage, is not available. So whilst it's highly unsatisfactory and whilst I'd expect that the matter would be looked into and properly investigated to ensure that systems are put in place so that this does not arise again, it is not the first time during the course of a trial that the Court has been informed that evidence has gone missing or is not available. Such inadvertence is unacceptable. But in the particular circumstances of this case, I'm satisfied there is no prejudice to the defence…"*

29. The learned trial judge satisfied himself that no prejudice arose in relation to the appellant in the particular circumstances where the original of the interview memorandum was missing. This court is satisfied that this issue was correctly dealt with by the learned trial judge and no unfairness arose in the circumstances. This ground of appeal is therefore dismissed.

Conclusion
30. As none of the grounds of appeal have been allowed, the court will dismiss the appeal.