



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Edwards J.**

345/12

The People at the Suit of the Director of Public Prosecutions

V

Michael Kearney

Appellant

Judgment of the Court delivered on the 5th day of February 2015, by Mr. Justice Sheehan

1. On the 28th November, 2012, the appellant Michael Kearney was convicted on two counts of possession of stolen property contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001, following an eight day trial before the Circuit Criminal Court sitting at Clonmel, Co. Tipperary, when he was tried along with two co-accused. A sentence of four years imprisonment, with the final two years suspended, was imposed by the learned trial judge on both counts.

2. The appellant now appeals the said convictions only to this Court and contends that these convictions should be set aside on the following grounds:

1. The learned trial judge erred in law and in principle in admitting into evidence the surveillance of Det. Sgt. Calmey.

2. The learned trial judge erred in law and principle in deeming the search of the appellant's motor vehicle a lawful and constitutional search.

3. The learned trial judge erred in law and principle in deeming the arrest of the appellant to be lawful and constitutional.

Background

3. The background to this case is that there was an ongoing investigation by members of An Garda Síochána into an aggravated burglary on the 31st October, 2007, at the premises of Securispeed, Brook Lodge East, Glanmire Co. Cork. During the course of the burglary some members of staff were tied up and different products that were being stored there were loaded onto a lorry and driven away.

Relevant Evidence

4. Det. Sgt. Calmey told the jury that he took up duty at 8.25 am on the 27th November, 2007 at Heuston Station, where he observed Christopher Sheehan and Barry Hayes getting off the Cork to Dublin train. He observed these two men taking the Luas to The Square at Tallaght and observed them a short time later in a white Mercedes van being driven by a third man. They drove to an address in Tallaght, where the van was parked for 15 minutes. He then saw Christopher Sheehan driving this white van with Barry Hayes as his passenger. He observed them going from there to Newlands Cross, leaving Newlands Cross at about 12.50 pm and arriving in Carrick on Suir, where they parked the vehicle near the SuperValu car park. He said that both men walking to the car park and the next observation he made was that he saw the two men in a Ford Focus (vehicle registration No. 00 TS 3145) being driven by a third male. He observed that they travelled a short distance before returning to where the white Mercedes van was parked. Christopher Sheehan then drove the white Mercedes van in close proximity to the Ford Focus and both vehicles entered Unit E4 of the Mill River Business Park.

5. Det. Sgt. Calmey said that a short time later he observed the Focus, with three persons in it, leave the Unit. The Focus returned later in the afternoon at around 4.30 pm. He said he also saw an Opel Cadet van go into the Unit after this. A short time later he observed the Focus motor vehicle leaving the Unit and at about 5.55 pm he observed the white Mercedes van leaving the Unit behind the Opel Cadet van. Both these vehicles were stopped by the gardaí and the appellant was driving the white Mercedes van at the time when it was stopped.

6. Chief Superintendent Hayes gave evidence that on stopping Michael Kearney in the white van, he told him what the garda business was. Chief Superintendent Hayes identified himself to the appellant Michael Kearney. He had a short conversation with him, in the course of which the appellant gave his name and address, but said nothing further. Chief Superintendent Hayes told the court that the appellant was taken from the van, that the rear door was opened and that he saw that it contained property similar in content and make up to the property that had been stolen three weeks earlier.

Ground 1

7. The appellant submits that the surveillance evidence ought to have been excluded on grounds that it breached the appellant's right to privacy and further that its prejudicial effect outweighed its probative value.

8. The respondent submitted that the evidence was both relevant and admissible and, in particular, that it contextualised the appellant's possession. In support of the submission, the respondent drew the court's attention to s. 18(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001, which provides:-

"Where a person has in his or her possession stolen property in such circumstances (including purchase of the property at a price below its market value) that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this section to have so known or

to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless.”

9. This Court holds that the evidence of Det. Sgt. Calmey did not breach any privacy right of the appellant. The evidence demonstrated the connection between the vehicles excluding any suggestion that the vehicles driving in close proximity to each other was coincidental and also demonstrated a connection between the three co-accused. The court holds that the evidence was clearly relevant in contextualising the circumstances in which the appellant was found to be in possession of stolen property and that the learned trial judge was correct in admitting the said evidence.

Grounds 2 and 3

10. The second and third grounds of appeal advanced by the appellant are interconnected in the sense that the third ground is dependent on this Court finding that the act of opening the doors of the white Mercedes van and looking into it amounted to an unlawful and unconstitutional search. The appellant argues that since the suspicion grounding the arrest is based on the fruits of this unconstitutional search, it follows that the arrest itself is unlawful and for this reason the conviction must be set aside.

11. The appellant contended that the opening of the doors of the vehicle and looking into it amounted to an unlawful search. It was further contended that any evidence gathered in the course of such an unlawful search was inadmissible and ought to be excluded. In response, the respondent contended that what was done amounted to no more than a lawful inspection.

12. The learned trial judge, in ruling that what was done was lawful, held that an element of thoroughness was required to constitute a search. Having considered the evidence and authorities opened to him, he further stated:

“What happened here, was that the gardaí opened two rear doors of the vans in question. From standing outside and without examining anything, they were enabled to see that goods of a similar description to those taken in the aggravated burglary were to be found. I am satisfied that in the circumstances of this case that does not constitute a search.”

13. The first issue that this Court has to decide is whether the opening of the doors of the vehicle was simply an inspection or constituted a search. It also seems to this Court that even if the actions of the gardaí amounted to no more than an inspection, the question arises as to whether the opening of the doors of the vehicle was a legal act in the absence of the invocation of any power to do so and further, assuming that there was a legal power to do so (i.e. the obligation to seize evidence connected to a crime), was there any onus on the gardaí to communicate the fact that they were exercising this power to the person who was in control of the vehicle before the doors were opened and in particular before the rear door was opened. It was the opening of the rear door which resulted in the gardaí identifying the stolen property and which they said grounded their suspicion justifying the arrest.

14. The respondent contended that the actions of the gardaí did not amount to a search and that the learned trial judge was correct in holding that the legal elements of search required entry and greater thoroughness than was found in this case.

15. The respondent further submitted that even if Chief Superintendent Hayes was involved in a search, it was one acquiesced to by the appellant. The respondent further submitted that none of the appellant’s constitutional or legal rights were infringed. The search did not take place within the curtilage of his dwelling and he had no proprietary right in the land or premises where the van was intercepted. The respondent went on to say that in so far as any possible proprietary right to the van was concerned, it was a commercial vehicle not owned by the first appellant. The appellant had never previously driven this vehicle and was one of a number of people who drove it that day.

16. Given that Chief Superintendent Hayes had explained his business to Michael Kearney, he was perfectly entitled to open the rear door of the vehicle. Once he saw what goods were there, there was no need to search the vehicle and, in the particular circumstances of this case, the learned trial judge was correct in holding that the actions of the gardaí did not constitute a search. Accordingly, the court holds that the inspection of the vehicle was lawful.

17. Moreover, irrespective of whether the actions of Chief Superintendent Hayes amounted to an inspection or a search, as a result of Chief Superintendent Hayes explaining to Michael Kearney what his business was, along with the failure of Michael Kearney to express any objection, the learned trial judge was entitled in any event to conclude in the particular circumstances of this case, that the appellant had acquiesced to what occurred and that what followed, be it a search or a simple inspection, was lawful.

18. It follows from this finding that the arrest also was lawful.

19. Accordingly, the court, having rejected all three grounds of appeal as being without merit, dismisses the appeal.