



THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Record No: 25/2018

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

JIM SMYTH

Appellant

JUDGMENT of the Court (*ex tempore*) delivered on the 19th day of July 2018 by

Mr. Justice Edwards .

Introduction

1. The appellant in this appeal was tried in the Special Criminal Court on one count of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act, 1939, ("the Act of 1939") as amended by s. 48 of the Criminal Justice (Terrorist Offences) Act 2005. On the 1st of June 2017, after a trial lasting seven days, the appellant was convicted on the sole count on the indictment. On the 26th of June 2017, he was sentenced to three years' imprisonment on foot of this conviction.

2. The appellant now appeals against his conviction.

Background facts

3. Detective Chief Superintendent Thomas Maguire, of the Special Detective Unit of An Garda Síochána, testified to the trial court that, on the afternoon of the 25th of November 2015, he convened a meeting at Monaghan Garda Station with various Garda colleagues, some of whom were attached to the Special Detective Unit and others of whom were locally based. At that meeting, Detective Chief Superintendent Maguire gave an overview to those present concerning certain confidential information in his possession in respect of the appellant and his activities as a member of the Irish Republican Army ("IRA"), and with particular reference to the appellant's utilisation of lands close to his own home address at Aghalissabeagh, Scotstown County Monaghan, and also lands adjacent to his mother in law's house in Lenagh, Scotstown, County Monaghan. Privilege was claimed by all Garda witnesses at trial as to the source of this confidential information. Subsequent to the meeting, Detective Inspector Shay O'Leary, who was based at Monaghan Garda Station, sought and successfully obtained eleven search warrants pursuant to s. 29 of the Offences Against the State Act 1939 (the Act of 1939), as amended, at a special sitting of Monaghan District Court, presided over by Judge McLoughlin, for the purpose of searching the aforementioned lands.

4. Later, at around 8pm on the 25th of November 2015, a surveillance operation to be conducted by members of the Special Detective Unit was put in place in relation to the Aghalissabeagh lands, and a similar operation to be conducted by the same unit was also put in place at the Lenagh lands. Detective Chief Superintendent Maguire confirmed in cross-examination that at 8:50pm, the appellant was seen leaving the Aghalissabeagh lands and heading towards the Lenagh lands. Detective Sergeant O' Doherty of the Special Detective Unit received information via radio communication that the appellant was making his way up the laneway towards some derelict houses i.e. towards the place at which Detective Sergeant O' Doherty was stationed. Upon observing the appellant approaching the entrance of the derelict houses at around 9:30pm, Detective Sergeant O' Doherty confronted the appellant. He illuminated the appellant with his flashlight, pointed his weapon at him and shouted out "*armed Gardaí, show me your hands*", an instruction which the appellant complied with. The appellant gave his name and address. He was carrying a flash light and a pair of gloves. The Special Criminal Court heard that, after giving the appellant the usual caution, Detective Sergeant O' Doherty informed the appellant that he was arresting him under s. 30 of the Act of 1939 on suspicion that he was a member of an unlawful organisation, namely the IRA.

5. At trial, Detective Sergeant O'Doherty's evidence was that he formed the suspicion on foot of which the arrest was made by reason of the confidential information communicated to him by Detective Chief Superintendent Maguire, and also on the basis of the movements and behaviour of the appellant on the night in question. Detective Sergeant O' Doherty's evidence was that when he asked the appellant where he was coming from, he said "Mass", and that when asked what he was doing in that location, he said he was looking after his horses. Detective Sergeant O' Doherty formed the view that the information furnished to him by the appellant was false. Although nothing turns on it, it was accepted by the Detective Sergeant in cross-examination at the trial that horses were observed to be on the lands in the course of searches subsequently conducted, although not confined to any one particular place on the lands.

6. In the days following the arrest of the appellant, the lands concerned were thoroughly searched. Amongst the items found were pieces of mortar launcher, an improvised firing pin, spent shells, a timer power unit, a gun stock and barrel support, rifles, a magazine and ammunition, two AK 47's and detonators. None of the items found were connected by forensic or other evidence to the appellant. However, a square plastic container was recovered from a stone wall on one part of the lands. This item was secreted behind a loose stone and when opened contained assorted items, including four bulbs, a tube bearing black tape, two half tubes, and two tablet bottles one of which contained powder which, when analysed, was found to be an explosive substance. Detective Garda Damien Carroll, a Garda in the fingerprint section of the Garda Technical Bureau, gave evidence at trial that he conducted an analysis of a latent finger mark found on the empty tablet bottle which, when examined, was found to have been made by the right thumb of the appellant.

7. At his trial before the Special Criminal Court, the case against the appellant was based upon three core components. Firstly, it relied upon the belief evidence of a Chief Superintendent (Chief Superintendent Mangan). Secondly, it relied upon circumstantial evidence arising from the circumstances of the arrest, and the paraphernalia found in the follow up searches, one significant item of

which, namely a tablet bottle, could be linked to the appellant by means of a fingerprint; and, thirdly, upon inferences to be drawn from the appellant's failure to answer material questions in circumstances where s. 2 of the Offences Against the State (Amendment) Act 1998 ("the Act of 1998") had been invoked.

8. It was confirmed in evidence that the appellant had been arrested on previous occasions in 1992, 2009 and the 29th of January 2015 for membership of the IRA, but was released on each occasion without charge. On foot of this evidence, counsel for the appellant challenged the legality of his arrest on the 25th of November 2015 on the basis that s. 30A of the 1939 Act, as inserted by s. 11 of the Act of 1998, provides that:

"(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to Section 30 of the Act and is released without any charge having been made against him, he shall not –

(a) be arrested again in connection with the offence to which the detention related, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested, suspected, or ought reasonably to have suspected, him of having committed,

except under the authority of a warrant issued by a judge of the District Court who was satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that either of the following cases apply, namely –

(i) further information has come to the knowledge of the Garda Síochána since the persons release as to his suspected participation in the offence for which his arrest is sought,

(ii) notwithstanding that the Garda Síochána had knowledge, prior to the persons release, of the person's suspected participation in the offence for which his arrest is sought, the questioning of the person in relation to that offence, prior to his release, would not have been in the interests of the proper investigation of the offence."

9. The direct evidence of Detective Chief Superintendent Maguire was that he was aware that the appellant had been arrested on the 29th of January 2015 under s. 30 of the Act of 1939 as inserted, and that he was detained at Monaghan Garda Station. When asked if that previous arrest was linked to the confidential information on foot of which the November arrest had taken place, the witness replied: *"No, Judges, it was not. It was totally separate and the confidential information in my possession did not arise from or did not flow from or had nothing to do whatsoever with that arrest on the January 2015."*

10. The witness accepted in the course of being cross-examined that there was an *"institutional obligation"* upon him to also be aware of the 2009 arrest.

11. Detective Chief Superintendent Maguire also reiterated under cross-examination that the January and November 2015 arrests were completely unrelated and his evidence was that the earlier arrest was unplanned and impromptu and that it "came about as a result of a call that went into Monaghan Garda Station." Moreover, Detective Chief Superintendent Maguire was re-examined, in the course of which there were the following exchanges:

"Q. Was there an intention to arrest Mr Smyth prior to attending at the scene on the night on the 25th of November 2015?

A. No, Judges. The object of the exercise on the night of the 25th of November 2015 was to conduct a search operation to seek out evidence in respect of Mr Smyth's suspected commission of a scheduled offence, which was evidence relating to the commission of that scheduled offence, membership of an unlawful organisation, the IRA, and it wasn't planned that Mr Smyth would be arrested on that night."

12. In a submission to the trial court, counsel for the appellant argued that the arrest was unlawful as an arrest warrant had not been obtained pursuant to s. 30A of the Act of 1939, as inserted. He submitted that membership of an unlawful organisation is a continuing offence and that, therefore, the various arrests, and in particular the arrest in January 2015 and in November 2015, had to be regarded as being for the same offence. As there had been no application for a s.30A warrant, the arrest, and all that followed from it, had been unlawful.

13. In ruling on this issue, the trial Court held:

"Having considered the evidence and the submissions made by counsel for the prosecution and counsel for the defence, this Court is satisfied that whilst the offence of membership is a continuing condition, this does not mean that the offence for which the accused was arrested on any prior occasion is the same offence for which he was arrested on this occasion in November 2015. This is in accordance with the decision in DPP v. AB, a question of fact to be determined by a court in any given case. Simply because membership, the offence of membership is a continuing state of mind does not mean that the offence alleged is the same offence.

The Court is satisfied on the evidence of Detective Chief Superintendent Maguire that there was no connection vis à vis the confidential information he held in November 2015 and the information or the arrest in the information available or the arrest in January 2015. Furthermore, when one examines the circumstances giving rise to the arrest in November 2015, the search warrant issued to search the areas in question, the gardaí went to the particular area, albeit late in the evening of the 25th of November 2015. The accused man materialised unexpectedly on the evidence in the laneway. And as a consequence, the arresting officer decided to arrest him on the basis of the confidential information he had in his possession. But significantly also on the basis of the prevailing circumstances and the replies to questions he asked of the accused man.

The Court is satisfied on the evidence that the confidential information was unconnected. The confidential information in relation to this particular matter on the evidence of Detective Chief Superintendent Maguire was unconnected to the arrest in January 2015. And this alone entitled the gardaí to affect an arrest without the necessity to seek an arrest warrant. The Court is also satisfied on the evidence that the arrest in 2009 was unconnected to his subsequent arrest in November of 2015. And in fact, Chief Superintendent Maguire gave evidence that he had no detail at all in relation to that particular matter."

14. The appellant was convicted at trial and now appeals against his conviction. Although three grounds of appeal were initially advanced, it was indicated to this Court at the oral hearing this morning that only one ground was being pressed, namely that the Special Criminal Court had erred in their determination that the Gardaí were entitled to arrest the appellant without an arrest warrant, and that s.30A of the Act of 1939 as inserted did not preclude such an arrest without warrant in the circumstances of the case.

Submissions on behalf of the appellant

15. Counsel for the appellant accepts that the test with respect to whether there is a need for a s.30A warrant in any particular case before a lawful arrest can be made, is that set out in a judgment on behalf of this Court delivered by the former President in the case of *The People (Director of Public Prosecutions) v A.B.* [2015] IECA 139, where he stated:

"18. It is a question of fact whether the membership that was suspected on the previous occasion is the same offence for which the person has been subsequently charged. It cannot be presumed simply because membership is by its nature a continuing condition or state that the offence alleged is the same. One way of approaching the issue is to examine whether the circumstances, facts or events that gave rise to the suspicion on which the later arrest was based had happened or come about at the time of the previous arrest. This is a matter of evaluation and judgment by the Court."

16. However, counsel has submitted that the Special Criminal Court misapplied the test in the *A.B.* case. When pressed by this Court to particularise in what manner the trial court had misapplied the test, he submitted that it had failed to adjudicate and consider whether it was appropriate for the Chief Superintendent to in effect ignore the requirements of s.30A of the Act of 1939. In response to further questioning from the bench, he conceded that he was in effect submitting that there had been a failure by the trial court to engage with the evidence on the issue, and in particular was complaining that inadequate account had been taken of the fact that it was impossible, by reason of the claim of privilege, to effectively test the Chief Superintendent's assertion that the arrest of the appellant on this occasion, i.e., in November 2015, was not for the same offence as that for which he had been arrested in January 2015 or indeed on earlier occasions.

17. In counsel for the appellant's written submissions on this point, it was further contended that there was no evidence or sufficient evidence to support a distinction between the arrest in November of 2015 and the arrest in January of 2015. It was contended that there was such proximity in time between the arrest in January and the arrest in November that no realistic and meaningful distinction could be upheld in the absence of compelling evidence of which, it was said, there was none. In the circumstances there was no evidence to negative the defence contention that the offence committed in November 2015, if indeed one was committed, was a continuing one.

18. We were referred to various authorities in addition to *The People (Director of Public Prosecutions) -v- A.B.*, concerning how s.30A of the Act of 1939 has been construed and applied, and in particular to *The People (Director of Public Prosecutions) -v- Birney and Ors* [2006] 1 IR 337; *The People (Director of Public Prosecutions) -v- Donnelly, McGarrigle and Murphy* [2012] IECCA78 ; *The People (Director of Public Prosecutions) -v- M.C.* [2014] 3 I.R. 279; *O'Brien -v- The Special Criminal Court and Director of Public Prosecutions* [2008] 4 IR 514, and; *The People (Director of Public Prosecutions) -v- Vincent Banks* (Court of Criminal Appeal, ex tempore, 19th March 2014).

Submissions on behalf of the respondent

19. In response, counsel for the respondent relied on the passage quoted above from this Court's decision in *The People (Director of Public Prosecutions) v A.B.* [2015] IECA 139, The respondent submits that the trial court had to assess, by reference to the evidence, whether or not the January and November arrests were for the same or separate offences. Counsel for the respondent contends that the trial court was entitled to, and indeed was correct to, accept Detective Chief Superintendent Maguire's evidence that the two arrests "*stemmed from a total and complete different set of circumstances and the confidential information in my possession grounded that operation and it didn't flow in any shape or form from the January '15 arrest.*"

The Court's Decision.

20. We have no hesitation in dismissing this appeal. We consider that the Special Criminal Court engaged fully with the issue raised by the defence and with the evidence relevant to that issue. There is no basis for saying that it misapplied the test indicated in *The People (Director of Public Prosecutions) v A.B.* The ruling delivered by the Court expressly acknowledges the *A.B.* case, thereby confirming that the trial court was aware of it. The evidence was, it seems to us, comprehensively and accurately reviewed, and the conclusions and inferences drawn from it, and in particular that the arrest in November 2015 was not for the same offence(s) as had prompted the arrests in January 2015, and on earlier occasions, was justified.

21. There was nothing to suggest that the Special Criminal Court had failed to take into account some material factor, or that it had taken into account some factor that it ought not to have taken into account. The Court's decision was, as the decision *A.B.* indicated it should be, a decision on a matter of fact. There was clearly evidence to support it, and in the circumstances it seems to us that it is unassailable.

22. We do not consider that the Court's decision was undermined by the fact that privilege was claimed in respect of the confidential information discussed at the briefing meeting in Monaghan Garda Station, or in respect to that underpinning the Chief Superintendent's belief. Despite the privilege asserted it was possible to cross-examine with respect to the different circumstances obtaining relating , in particular, to the arrest in January 2015 and that in November 2015. The circumstances giving rise to these arrests were entirely different. The January 2015 arrest had come about in consequence of an unsolicited report made to Monaghan Gardaí. The arrest was by local Gardaí in consequence of following up upon that report, but there had been no specific operation underway at the time. On this occasion there was an operation underway, but what was envisaged was a series of searches on foot of search warrants that had been obtained. There was no pre-determined intention or advance decision taken to arrest the appellant on the basis of suspicion of membership of an unlawful organisation. That only came about due to the fact that the surveillance team happened to encounter the appellant, in circumstances that were suspicious, at a location that was under surveillance and on lands that were due to be searched on the evening in question. The evidence does not support the suggestion that this was a second arrest for the same matter, or that, as suggested by counsel for the appellant, the Chief Superintendent has chosen to cynically ignore the requirements of s. 30A of the Act of 1939.

23. We therefore have no hesitation in concluding that the single ground of appeal relied upon is unfounded. We dismiss this appeal.