THE COURT OF APPEAL

252/14

Birmingham J.
Sheehan J.
Mahon J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MARK MULLIGAN

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Mahon on the 18th day of February 2016

1. The appellant was convicted of one count of Production of Child Pornography contrary to s. 5(1)(a) of the Child Trafficking and Pornography Act 1998 on 16th October 2014, following a two-day trial at the Circuit Criminal Court in Dublin. He was sentenced on 20th November 2014 to a term of imprisonment of four years and six months, to date from 7th July 2013, and with the final 12 months of that sentence suspended on certain conditions. On that date, he was also sentenced in relation to other offences in respect of which he had earlier pleaded guilty.

2. The "Particulars of Offence" as put to the jury at the conclusion of the trial was as follows:

> *"You, Mark Mulligan, between 9th March 2013 and 17th day of March 2013 at Station Way, Clongriffin, Dublin 13, did knowingly produce child pornography."*

3. The appellant has appealed against his conviction on the above count, and also against severity of sentence in relation to all three counts. This judgment relates solely to the conviction appeal.

4. Gardaí sought and obtained a search warrant for the appellant's residence at Apartment 4, Block 10, Railway Road, Clongriffin, Dublin 13 on 5th July 2013. Two days later, the gardaí entered the apartment on foot of that warrant and conducted a search, whereupon a computer and a computer storage device were seized.

5. When analysed, the computer hard drive and storage device were found to contain photographs of children and an electronic record of a conversation between the appellant and a third party on Skype. This appeal is concerned only with the latter, being the electronic record of a conversation that took place between the appellant and a third party and which commenced on 9th March 2013.

6. The Skype software programme (called SkypeAlyzer) automatically recorded the conversation and stored it within that programme. While it was possible for the appellant, or indeed a third party, to retrieve and reproduce and/or copy into document form the said recorded content there was no evidence to suggest that the appellant or anyone else had in fact done so, (with the exception of the investigating gardaí). Indeed, it was, and is, the appellant's stated position that he was unaware that the material in question had been recorded within his computer and could be retrieved or printed in document format as indicated.

7. The content of the recorded conversation was particularly graphic. It referred, in the crudest detail, to acts of the gross rape, sexual assault and severe torture of young children in terms which can only be described as extremely depraved, disturbing and horrific.

The Grounds of Appeal
8. Grounds of appeal have been lodged on behalf of the appellant and they are:

> *(i) That the learned trial judge erred in law in finding that the material, the production of which the appellant was convicted, was capable of being considered "child pornography" within the meaning of the Child Trafficking and Pornography Act 1998;*
>
> *(ii) that the learned trial judge erred in law in finding that the search warrant issued on 5th July 2013 was valid in law;*
>
> *(iii) that the learned trial judge erred in law in admitting evidence that was seized during a search of the appellant's home on 7th July 2013;*
>
> *(iv) that the learned trial judge erred in law in the manner in which she charged the jury in respect of the intent required by the Child Trafficking and Pornography Act 1998 for the production of child pornography to be an offence.*

(i) What Constitutes 'Child Pornography'?
9. It is appropriate at this juncture to consider the relevant provisions of the Child Trafficking and Pornography Act 1998:

"5(1) Subject to section 6(2) and section 6(3), any person who

"(a) knowingly produces, distributes, prints or publishes any child pornography . . . shall be guilty of an offence and shall be liable –

> *(v) on some reconviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or both, or*
>
> *(vi) on conviction on indictment to a fine or to imprisonment."*

10. The expression *"child pornography"* is defined in section 2 of the Act in the following terms:

"child pornography" means—

"(a) any visual representation—

> *(i) that shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity,*
>
> *(ii) that shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or*
>
> *. . .*
>
> *irrespective of how or through what medium the representation, description or information has been produced, transmitted or conveyed and, without prejudice to the generality of the foregoing, includes any representation, description or information produced by or from computer-graphics or by any other electronic or mechanical means . . . "*

11. The 1998 Act defines "document" as including:

> *"(a) any book, periodical or pamphlet, and*
>
> *(b) where appropriate, any tape, computer disk or other thing on which data capable of conversion into any such document is stored"*

12. It was submitted on behalf of the appellant that the material in question was not *"child pornography"* within the meaning of the 1998 Act, or in the ordinary sense in which that word is commonly used. Central to this contention is the suggestion that the material was not the conventional visual representation of a child being abused or engaging in sexual activity; it did not use images of children, nor did it show or suggest that any particular child had actually been abused. It was submitted that *"the material might best be described as a fantasy conversation between the appellant and the other party".*

13. Allied to this submission is the case that the appellant maintained that he was unaware that the material was being stored within his computer and that it was never intended that it be so stored or produced or be capable of being produced into document form. It was not suggested by the respondent that this was not the case. The learned trial judge ruled that the material stored on the hard drive was capable of being downloaded into document format and therefore capable of satisfying the relevant provisions of the Act of 1998. She ruled as follows:

> *"Alright, the Court is dealing here with the Child Trafficking and Pornography Act 1998, and the Court has been told that we are dealing here with, in effect, text messages over the Internet which were electronically stored data on two computers. The Court is asked whether they come within the definitions as set out in the Child Trafficking and Pornography Act 1998. The Court is concerned here with the interpretation section of that Act. The Court has heard from the prosecution witness as regard to the storing of these messages on Skype and has been advised that they can be converted into a document, pamphlet and is capable of conversion into a document. The defence submits that here is a vague discussion between people and it does not come within the definition of a document. The Court determines that these messages were stored on hard drive that are capable of being converted into a document, therefore it can be a document under the Child Pornography legislation and will admit the evidence."*

14. There can be no doubt whatsoever but that the content of the retrieved material is pornographic, and extremely so, and that it relates entirely to young children. It describes in lurid and violent detail the sexual exploitation and torture of children. However, in order for such material to be classed as *"child pornography"* within the meaning of the 1998 Act, it is necessary that it come within the confines of the definition of *"child pornography"* in s. 2 of the Act

15. *"Child pornography"*, as defined in the 1998 Act, covers a multitude of material. An essential requirement is that it involves and/or refers to sexual activity with, or sexual exploitation, of children. Section 2 of the 1998 Act identifies the means by which such sexual activity or sexual exploitation may be conveyed, thereby bringing it within the definition in s. 2 of the Act, and they include visual and/or audio representation, computer graphics, electronic or mechanical means, print publication, video recordings and film. It potentially captures almost every conceivable means of conveying information or imagery, other than, possibly, a private oral conversation between two people unheard by others and, of course, the private thoughts of an individual which are not disclosed to any third party.

16. Section 2(1)(a) of the 1998 Act includes in its *definition "child pornography"*

". . . any visual representation . . . that shows . . . in the case of a document relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity . . . (and) . . . is depicted as being a child and who is or depicted as witnessing any such activity by any person persons."

17. Section 2(1) defines the expression *"document"* as including:

> *"(a) any book, periodical or pamphlet, and*
>
> *(b) where appropriate, any tape, computer disk or other thing on which data capable of conversion into any such*

document is stored"

18. In this case, the material in question clearly constituted the storage of *"data capable of conversion into any such document"*. It is a fact that the data in question was stored in such a way that its retrieval in the form of a document was possible, and was in fact so retrieved by the investigating gardaí. The contention that it was never retrieved by the appellant, or that he was unaware that it could be retrieved, or that he did not personally have the expertise to retrieve it in document form are all irrelevant considerations in so far as the commission of the offence in question is concerned, although they may of course be relevant to the issue of mitigation of sentence.

19. The learned trial judge was therefore correct in her finding that the material in question was capable of being considered "child pornography" within the meaning of s. 2(1) of the Act of 1988, and in those circumstances this first ground of appeal fails.

(ii) and (iii) The Search Warrant Issue

20. A search warrant issued pursuant to the provisions of s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. It was issued on the sworn information of Sergeant Brendan Meagher on the basis that the gardaí wished to search the appellant's premises for a mobile phone that had been linked to him, and which was relevant to their harassment investigation (and which was the subject of the first count to which the appellant pleaded guilty). The warrant was executed on 7th July 2013, some two days after its issue, when the appellant's residence was searched and a number of items of computer equipment seized.

21. In the course of the trial, it was argued on behalf of the appellant that because the warrant did not specify the arrestable offence that was being investigated, the warrant was invalid, as was the seizure of any items thereunder. It was contended on behalf of the plaintiff that in these circumstances, the evidence relating to the child pornographic material found to have been stored on the computer hard drive ought not to have been admitted into evidence.

22. Section 10 of the Criminal Justice Act 1997 (as substituted by s. 6 of the Criminal Justice Act 2006) states as follows:

> *"10.— (1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place."*

23. Section 2(1) of the Act of 1997, defines "arrestable offence" as meaning:

> *". . . an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, e punish by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence . . ."*

24. The offence with which the appellant was charged and which is the subject matter of this appeal, is *an "arrestable offence".*

25. A crucial prerequisite for the issue of a search warrant is that *"there are reasonable grounds"* for suspecting that evidence of, or relating to, the commission of an *"arrestable offence"* is to be found in a particular place. It is not necessary that the particular offence be identified. There are many instances where the actual offence or offences may not be capable of precise identification at the point where it is deemed necessary to conduct the search of the premises.

26. In this case, the learned trial judge ruled on the search warrant issue as follows:

> *"Alright, I have carefully considered the authorities open to me by the defence: the Tyndall case, Veronica Balfe case and Rooney case, and I have carefully considered the information and the contents of this warrant to search the premises. I have been advised by the members of An Garda Síochána that the warrant was obtained for the purpose of searching the premises regarding a harassment allegation concerned about a text message on a phone. I have carefully considered the contents of the warrant, and the warrant does not say particularly the offence which is being investigated, but shows power to search the premises and Mr. Mulligan was advised of that power and they were there to investigate the harassment allegation and it was reasonable in the investigation of that offence for the laptop to be seized and the seizure of that laptop is admissible."*

27. The relevant wording on the search warrant was as follows:-

> *"Whereas on information on oath and underwriting under s. 10(1) of the above mentioned Act as substituted, sworn before me on this day by Sergeant Brendan Maher, I am satisfied that there are reasonable grounds for suspecting that evidence off, or relating to, the commission of an arrestable offence in the meaning of s. 2(1) of the Criminal Law Act 1997, amended by s. 8 of the Criminal Justice Act, is to be found at a place within the meaning of s. 10(2) of the Criminal Justice Act."*

28. The basis of the objection by the appellant to the search warrant is that it did not specify the precise *"arrestable offence"* in question. In the course of his submissions to the learned trial judge on the issue of the search warrant, counsel of the appellant conceded that, on its face, the warrant met the criteria for the issuing of a search warrant pursuant to s. 10 of the Criminal (Miscellaneous Provisions) Act 1997.

29. The search warrant was obtained in the course of an investigation by the gardaí relating to the receipt of a text message sent by mobile phone in the name of the appellant to a third party. That mobile phone was clearly the main object of their search of the appellant's home. In the course of the search, the appellant's computer equipment was seized.

30. In the case of *DPP v. Morgan* [2015] IECA 50, this Court considered a ground of appeal broadly similar to that (in relation to the search warrant) which arises in this case. In the Morgan case, the appellant asserted that the warrant was defective on its face and therefore invalid, on the basis that the warrant did not specify an *"arrestable offence"* for which the warrant was granted. In that case it was argued that the absence to a specific *"arrestable offence"* on the face of the warrant went to the root of the warrant's validity, and was not a mere technical defect.

31. In *Morgan*, Edwards J. in delivering the judgment of the court stated the following:-

> *"The Court accepts the submission of the respondent to the effect that a failure to state expressly, on the face of a*

warrant issued under s. 10 of the Act of 1997, as substituted, that it relates to evidence of or relating to an arrestable offence is not something that goes to the jurisdiction to issue the warrant, such that the absence of that information would automatically render it invalid.

However, as the Mallon case makes clear, the mere fact that the deficiency complained of in this case does not go to jurisdiction, and is therefore to be regarded as non-substantive, does not per se justify a conclusion that the deficiency did not invalidate the warrant. Accordingly, the finding that the deficiency did not go to jurisdiction is not necessarily dispositive of the appellant's complaint.

The Court accepts that it ought to be clear from the warrant that the suspected offence is an arrestable one, so that the person(s) to whom it is relevant, and whose constitutional rights it may have the effect of abrogating, may know the basis on which it has been issued. It is certainly desirable that the warrant should expressly refer to an arrestable offence, and indeed that the specific offence in question should be identified. However, the Court is also satisfied on the jurisprudence opened to it that if the arrestable nature, and/or the specifics, of the offence can be inferred from the information on the warrant that will suffice, although for persons whose constitutional right may be affected to have to rely on inferences is a sub-optimal situation."

32. The court in *Morgan* concluded as follows:-

"The Court is satisfied that there was prima facie evidence before the trial court to support the view that the warrant had been validly issued by a District Court Judge in accordance with s.10 of the Act of 1997, as substituted, and that it was duly executed and validly acted upon in accordance with its terms. In the Court's view, the trial judge was correct to allow the fruits of the search to go before the jury as evidence."

33. In *Simple Imports Limited v. Revenue Commissioners* (Unreported, Supreme Court, 19th January, 2000), Keane J. (as he then was), stated the following:-

"Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by the statute."

34. In *DPP v. O'Leary* (Unreported, Court of Criminal Appeal, 29th July, 1998), it was contended that a warrant issued under s. 29 of the Offences against the State Act 1939 was invalid on the basis that it did not specify the actual offence for which the warrant was issued. In his judgment, upholding the warrant, McCarthy J. stated:-

"The warrant is a printed form which allows for the insertion of the name of the authorising officer, the address of the premises to be searched, the officer authorised to search, the description of the property and the name of the individual to be searched with a provision for signature, rank and dating. The offences envisaged are under the Act of 1939, the Criminal Law Act 1976, the Schedules of Offences provided for under Part V of the Act of 1939 and the offence of Treason. This may cover a range of hundreds of offences. The applicant argues that such an unrestricted form of warrant has too broad a sweep, that it is a warrant "at large". No authority in support of this proposition was cited. The court saved the point by analogy to the more limited form of a warrant that is permitted to be issued under a variety of statutes as, for example, the Larceny Act 1916, or the Misuse of Drugs Act 1984, . . . Section 29, as cited, does permit entry under a valid warrant; the section states a variety of circumstances under which the appropriate garda officer may validly issue a search warrant; there may be circumstances under which offences under all of the several categories are suspected; the warrant accords with the wording of the section and the entry of the dwelling was, thus, in accordance with the law."

35. In this case, the form of wording used was in compliance with the provisions of s. 10 of the Act of 1997, as substituted by s. 6 of the Criminal Justice Act 2006, and importantly, O. 34, r. 17 of the District Court Rules 1997 (IS 93/1997) as amended by the District Court (Search Warrant) Rules 2008 (IS No. 322/2008) as being that set out in specimen Form 34.38 annexed to the said rules.

36. It is useful to refer briefly to the majority decision of the Supreme Court in the case of *DPP v J.C.* [2015] IESC 31, albeit that decision post-dated the trial which is the subject matter of this appeal. In his judgment, Clarke J. stated as follows:-

". . . it seems to me that the elements of the test to be applied to the question of exclusion of evidence taken in circumstances of illegality or unconstitutionality are those identified in that section of the judgment.

In summary, the elements of the test are as follows:-

(i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.

(ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or

(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.

(iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.

(iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be

excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

(vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority."

37. The court is therefore satisfied that the search warrant was valid, and that the evidence obtained in the course thereof is properly admissible evidence. The second and third grounds of appeal are therefore rejected.

(iv) The Learned Trial Judge's Charge in Relation to Intent

38. As has earlier been indicated in the course of this judgment, the material which is the subject of this prosecution was capable of constituting *"child pornography"* within the meaning of the 1998 Act.

39. It is submitted on behalf of the appellant that the learned trial judge's refusal to recharge the jury in relation to a requisition on behalf of the appellant was an error. That requisition was to the effect that the learned trial judge ought to have informed the jury that the appellant *"knowingly produced it knowing that it was child pornography".* The learned trial judge stated her reasons as follows:

"Well, I am not going to go there because that would not be fair on the accused. He knew what he was doing, he said, and for you now to say that be satisfied that he knew that it was child pornography when in a memorandum of interview he is saying that he wishes that he didn't have these fantasies, and asks them to draw the distinction between the fact that he knew what he was doing wasn't appropriate, to use an expression, and whether it was an offence under an Act or not. Sure, I am not going there."

40. The learned trial judge proceeded to give the jury a precise definition of *"child pornography"* as provided for in the Act of 1998. As to what was meant by *"knowingly",* the learned trial judge addressed the jury as follows:

"Alright, on the issue paper the allegation is that he knowingly produced child pornography, right. I have given you the definition of what child pornography is, right. You have to be satisfied beyond a reasonable doubt that he knowingly produced child pornography. The Act is silent on whether he has to be aware that it can be reproduced, alright."

41. It was contended on behalf of the appellant that the learned trial judge ought to have advised the jury that the evidence must satisfy them beyond reasonable doubt that the appellant had produced material *"that was child pornography, knowing at the time that it was child pornography".*

42. Ignorance of the law is generally no defence to a criminal charge. It could be said, (and possibly reasonably and accurately in this case), that an individual who had not studied the relevant provisions of the Act of 1998 would be unaware as to what material is capable of constituting child pornography, but it cannot be suggested that such ignorance could itself amount to a defence to a criminal charge relating to the production of child pornography. Furthermore, and in any event, the extremely graphic, sexual and violent content of the material in question, and its obvious association with young children was, by any stretch of the imagination, and irrespective of what might be contained in any legislation, pornographic and extremely so. In this case, the appellant could not but have been aware that it was pornographic, and furthermore, that it constituted child pornography in the ordinary (as compared to the statutory) meaning of that term. This ground of appeal is therefore dismissed.

43. The Act of 1998 does not provide for a basis for defending a charge of knowingly producing child pornography because the producer of same was unaware that the material in question automatically stored itself in a computer in a manner capable of being downloaded into document format, or that he was incapable, due to lack of skill to so do, and had not done so.

44. This ground of appeal must also fail.

45. The appeal is therefore dismissed.