

THE HIGH COURT

Record No. 2012/2052 SS

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA PETER BROWNE)

Prosecutor/ Respondent

AND

MIHAIL PETKOV

Accused/ Apellant

-AND-

Record No. 2012/2051 SS

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA PETER BROWNE)

Prosecutor/ Respondent

-AND-

MUHAMED DELIC

Accused/ Apellant

Judgment of Ms Justice Iseult O'Malley delivered the 2nd May 2013

Introduction

1. These are two appeals by way of case stated. The appellants are co-accused and were both on the 17th April, 2012 convicted in the District Court of the offence of unlawfully possessing stolen property, to wit parts of a stolen car. To avoid confusion I shall refer to them throughout as Mr. Petkov and Mr. Delic.

2. The issues in the case are the lawfulness of a search of certain premises carried out by Gardai and, in Mr. Delic's case, the adequacy of the evidence adduced against him.

The case in the District Court

3. Each of the appellants was charged that he:-

On the 22nd June 2010 at Wotton, the Ward, Ashbourne, County Meath did without lawful authority or excuse possess stolen property, to wit, motor vehicle parts form Mercedes ML registration number 02D62023 knowing that the property was stolen or were reckless as to whether it was stolen contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001

4. Copies of the charge sheets are attached to the cases stated.

5. The prosecution witnesses were Garda Peter Browne of Ashbourne Garda Station and the owner of the stolen vehicle. There does not appear to be any issue arising from the evidence of the owner.

6. The learned District Judge found the following facts proved in evidence before him:

(i) A Mercedes ML motor car registration number 02D62023 was stolen on the 15th June 2010.

(ii) On 22nd June 2010 Garda Peter Browne applied to a District Judge by way of a sworn information for the issue of a search warrant pursuant to section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and the warrant was duly issued [by] authorising Garda Browne to search "The Wotton, The Ward, Ashbourne, County Meath, property owned and controlled by the Joyce Family."

(iii) On the 22nd June 2010 Garda Browne attended at the Wotton, The Ward, Ashbourne, County Meath for the purpose of executing the search warrant where upon arrival he was met by a member of the Joyce family, who informed him that a number of the units at that location were leased by the Joyces to third parties.

(iv) Garda Browne executed the search warrant at the Wotton, The Ward, Ashbourne, County Meath and during the course of his search at that location Garda Browne met Michael Petkov, the Accused, who advised the Garda that he leased one of the units on the property and he had a key for this locked garage shed. He opened the unit and admitted

Garda Browne on foot of the Warrant produced by Garda Browne.

(v) Garda Browne proceeded to search this unit opened by the Accused and therein he detected and recovered a number of motor parts in the shed. The motor parts so recovered, were from the stolen Mercedes ML motor car registration 02D62023.

7. The following findings are specific to Mr. Petkov:

(vi) The Accused was arrested and detained and at interviews with the Gardai on 22nd June 2010 he claimed that he and his co-accused resided in the unit in which the stolen parts were found and that other people also used this garage to repair cars.

Copies of the memoranda of the Accused's interviews were attached to the case stated.

8. The following findings are specific to Mr. Delic.

(vii) Mr. Petkov the co-accused claimed that he resided in the unit at The Wotton, The Ward, Ashbourne, County Meath, in which the stolen parts were found.

(viii) The Accused was arrested, detained and interviewed by Gardaí and at an interview commenced on 23rd June 2010 commencing at 14:28 the Accused admitted that he had been on premises of Mr. Delic but he explained that he had engaged in panel beating there.

A copy of the memorandum of interview was attached.

(ix) Mr. Delic's fingerprints taken during his detention were sent for analysis and found to be a match with fingerprints found on the motor vehicle parts found at The Wotton, The Ward, Ashbourne, Co. Meath.

9. At the close of the prosecution case counsel on behalf of Mr. Delic applied for a direction in his case. No application for a direction was made in the case of Mr. Petkov.

10. Counsel for Mr. Delic submitted that the warrant grounding the search that led to the recovery of the stolen parts was not valid in that it did not authorise the search of property rented by Mr. Petkov. It was contended that the premises were at the time owned but not controlled by the Joyce family. This argument was grounded on the contention that there was evidence before the court that the property where the stolen parts were found was rented by Mr. Petkov and that he resided there.

11. Counsel for Mr. Delic made the further submission that the prosecution had not proved the case against his client beyond reasonable doubt. It was acknowledged that his fingerprints were found on the stolen parts but he had given an innocent explanation as to how they came to be there and this explanation had not been challenged by the prosecution. It was further submitted that statements made by Mr. Petkov in interview had no evidential value as against Mr. Delic.

12. No replying submissions were made by the Inspector prosecuting the case.

13. The learned District Judge considered but ruled against the submissions. In all the circumstances he held that a *prima facie* case had been made out. He was also satisfied that a *prima facie* case had been established in respect of Mr. Petkov.

14. Mr. Petkov elected to give evidence, which is summarised in the case stated as follows:

"[H]e denied his involvement in or knowledge of any criminal enterprise in relation to the stolen vehicle parts. However, when he was asked by Inspector Smethers how long he had allegedly been residing in the unit at the Wotton, The Ward, Ashbourne, County Meath, he indicated that he did not know how long he had been residing there. When asked how the stolen property happened to be on the premises he did not answer and when asked how fingerprints of his co-accused happened to be on the stolen property he did not answer. Furthermore he did not disagree with the suggestion put to him that he was in possession of a key to the shed and that he had voluntarily opened the lock of the shed when Garda Browne asked him on foot of the Warrant."

15. At the conclusion of the evidence it was submitted on behalf of Mr. Petkov that there was insufficient evidence to prove the case against him beyond a reasonable doubt. On behalf of the prosecution Inspector Smethers submitted that at the very least the case had been made out that the accused was reckless as to whether the property found on the premises had been stolen.

16. The learned District Judge says in relation to that application: -

"I considered the submissions made to me and I further reviewed the evidence and in the end I was satisfied that the prosecution case had been established beyond a reasonable doubt. I had no doubt about the guilt of the accused.

In reaching my determination *inter alia* I had the opportunity to observe and assess the Accused in his direct evidence and on cross-examination and I found him to be less than convincing and having regard to my observation, assessment and consideration I found that:

(i) Despite the evidence of the Accused that the unit in which the stolen motor-vehicle parts were found by the Gardai was rented to him by the Joyce family, I held it was still both owned and controlled by the Joyce family.

(ii) The search executed by Garda Browne was valid.

(iii) It was open to me to admit the evidence of the stolen motor vehicle parts.

(iv) I was satisfied beyond reasonable doubt as to the guilt of the accused."

17. He therefore convicted Mr. Petkov of the charge contrary to section 18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 as preferred against him.

18. At the conclusion of the evidence it was also submitted on behalf of Mr. Delic that there was insufficient evidence to prove the case against him beyond reasonable doubt. It was contended that the fingerprint evidence was not sufficient to find that he had been in possession of the property.

19. The Inspector submitted that at the very least the case had been made out that the accused was reckless as to whether the property had been stolen.

20. In relation to this application the case stated says as follows:-

"Having heard the prosecution case and after my ruling that there was a *prima facie* case to be tried and given that the defence did not go into evidence and upon further assessing the entire matter in the light of the evidence, I had no doubt about the guilt of the accused.

In coming to my determination I had the opportunity to observe and assess the evidence of the co-accused and I found and ruled that:

(i) Despite the evidence of [Mr. Petkov] that the property was rented to him by the Joyce family I held it was still both owned and controlled by the Joyce family as stipulated in the search warrant and the search warrant was valid and no proof of any Lease or rent paid was produced.

(ii) The search executed by Garda Browne was valid.

(iii) In any event in light of the circumstances it was open to me to admit the evidence of the stolen motor vehicle parts.

(iv) The fingerprints of the accused as found on the stolen motor vehicle was relevant probative evidence.

(v) The interview and testimony of [Mr. Petkov] was of no evidential value as against [Mr. Delic]."

21. He therefore convicted Mr. Delic.

22. The case stated poses the following questions in the case of Mr. Petkov:

(i) Was I correct in law in my ruling that there was sufficient admissible evidence before me to prove the case as against the accused beyond a reasonable doubt?

(ii) Was I correct in convicting the accused?

(iii) Was I correct in finding that the warrant was valid in law to allow the search of the premises?

23. The questions posed in the case of Mr. Delic are as follows: -

(i) Was I correct in my ruling that the evidence of the stolen motor parts recovered by the Gardai in the course of the search could lawfully be admitted in evidence as against the accused?

(ii) Was I correct in law in ruling that the accused had a case to answer on the basis that his fingerprints were found on the stolen motor vehicle parts?

(iii) Was I correct in law in convicting the accused?

(iv) Was I correct in finding that the warrant was valid in law to allow the search of the premises?

The search warrant and the premises

24. Section 48 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 authorises the grant of search warrants in relation to offences under that Act. In relevant part it reads: -

48.-(1) This section applies to an offence under any provision of this Act for which a person of full age and capacity and not previously convicted may be punished by imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.

(2) A judge of the District Court, on hearing evidence on oath given by a member of the Garda Síochána, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of, an offence to which this section applies is to be found in any place, issue a warrant for the search of that place and any persons found there.

(3) A warrant under this section shall be expressed and shall operate to authorise a named member of the Garda Síochána, alone or accompanied by such other persons as may be necessary-

(a) to enter, within 7 days from the date of the issuing of the warrant (if necessary by the use of reasonable force), the place named in the warrant,

(b) to search it and any persons found there ...

25. The warrant was granted by a Judge of the District Court on the 22nd June, 2010, the same day as the search. The Information, sworn by Garda Browne, referred to the unauthorised taking of the vehicle on the 15th June and recited that he had received information from a previously reliable source that component parts of the vehicle were to be found

"on the premises owned and controlled by members of the Joyce family, Wotton, The Ward, Ashbourne, Co. Meath."

26. The warrant itself recites that the District Judge is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of, the offence of the theft of the car

"is to be found at a place, namely, Wotton The Ward Ashbourne Meath, property owned and controlled by members of the Joyce family".

27. The place itself is sometimes referred to as Wotton and sometimes The Wotton but nothing seems to turn on that.

28. According to Garda Browne's evidence there were a number of what appear to have been self-contained sheds or units at the location. He met a member of the Joyce family who told him that some of the units were let to third parties. He did not gain entry to the unit in question until Mr. Petkov arrived with a key.

The interviews - references to the premises

29. Mr. Petkov was interviewed twice on the evening of the search. He made no admissions in relation to the stolen property. He said that he had been renting the garage or shed from David Joyce for the previous five years, paying him €750 per month. He fixed cars there. A friend named Eric also used the shed and paid part of the rent. Mr. Petkov said that Eric had been living in the garage at the time. In response to a question as to whether he himself lived there he said "Yes" and agreed when the interviewer asked "So it's your residence and place of work?"

30. Mr. Petkov referred to a Bosnian man who, he said, had a garage in the same yard. He drew a map of the yard and marked his own garage and the Bosnian man's garage. He said that this man brought the parts to his garage.

31. Mr. Delic was interviewed once, on the following day. He said that he had a garage in the yard, for which he had keys. Asked who opened and closed it, he said that he did. Asked what other nationalities had garages in the yard, he said "Moldovan and Lithuanian". He said that he had been in Mr. Petkov's garage because Mr. Petkov was "showing him panel-beating". He had moved items that were on the floor because they were in the way.

Submissions in relation to the search

32. On behalf of Mr. Petkov, Mr. Dwyer S.C. submits that the issue is whether the warrant was sufficient to authorise the search of units controlled by persons other than the Joyces. There was no dispute but that Mr. Petkov was renting his shed. He says the learned District Judge did not make an express finding that he was not residing there, but did make the express finding that the premises were still owned and controlled by the Joyces. Mr. Dwyer says that in so finding the judge erred, in that on the evidence it was not within the gift of the Joyces to give the Gardai permission to enter and indeed the Joyce to whom the Gardai spoke did not give such permission. It is contended that when the Gardai realised what the situation at the yard was, they should have gone back and got fresh warrants.

33. Mr. Dwyer relies upon the following authorities in relation to the Constitutional status of the dwelling- *People (DPP) v Barnes* [2007] ILRM 350; *People (DPP) v Laide and Ryan* [2005] 1 IR 209; *People (DPP) v Dunne* [1994] 2 IR 537; *People v O' Brien* [1965] IR 142; *People v O'Brien* [2012] IECCA 68; *People (DPP) v Lawless* [1984] 3 Frewen; *People (DPP) v Lynch* [2010] 1 IR 543 and *People (DPP) v McCann* [1998] 4 IR 397.

34. On behalf of Mr. Delic, Ms. Donnelly S.C. adopts the arguments of Mr. Dwyer and relies on the same authorities. She stresses the fact that the warrant specified property "owned" and "controlled" by the Joyces. It was clear that it was Mr. Petkov's premises- he had the key. The finding of the District Court that the garage was both owned and controlled by the Joyces is not binding on this court, since that was the legal issue that the District Judge had to determine.

35. Ms. Donnelly says that the action of the Gardaí in carrying out the search was deliberate and conscious, or at best was a reckless decision to proceed after being told what the situation was. It is not, therefore, comparable with the cases involving minor slips or typing errors in a warrant.

36. In response to the suggestion that her client, not being the occupier of the premises, did not have the standing to make the case that the warrant was invalid, Ms. Donnelly submitted that, firstly, evidence in a joint trial, if inadmissible against one, is inadmissible against all. Secondly, she argued that her client had privacy rights in the premises as his workplace, based on his statement that he worked there as a panel-beater.

37. On behalf of the respondent in both cases, Mr. Kieran Kelly submits that the court is bound by the findings of the learned District Judge including the finding that the property was owned and controlled by the Joyces. There was no finding that Mr. Petkov was renting it. Mr. Kelly accepted that if he was renting, the terms of the tenancy would have governed the question of control.

38. As far as Mr. Petkov's evidence of residence was concerned, there was a finding that he was unconvincing and could not say how long he had been residing there. He did not, in his evidence, deal with the issue of "control". There was nothing to suggest that he had a lease. It was therefore open to the learned District Judge to find as he did in relation to "ownership and control". However, Mr. Kelly concedes that this may not be a question of fact and that it is more likely to be a mixed question of law and fact.

39. Mr. Kelly points to the fact that the issue of admissibility was not raised on Mr. Petkov's behalf in the District court and that he was attempting to adopt submissions made on behalf of Mr. Delic. However, Mr. Delic, he says, had no rights in the property. It is not "wholeheartedly" accepted that Mr. Delic could benefit from a finding in favour of Mr. Petkov on the search issue. At best, it is said, it would be a finding of illegality giving rise to a discretion.

Submissions in relation to the evidence against Mr. Delic

40. Ms. Donnelly submits that the fingerprint found on one of the car parts cannot give rise to a finding beyond reasonable doubt that Mr. Delic had been in possession of it and that such possession was accompanied by knowledge that it was stolen or recklessness as to that fact. Mr. Delic had given an exculpatory explanation of innocent contact to the Gardai, having told them that he had been working in the shed.

41. Mr. Kelly, on this issue, says that Mr. Delic admitted that he frequented the shed and did not dispute the fingerprint. This, he says, is "clear evidence" of possession. In his written submissions he says:

"Even if the Court was not satisfied that the Appellant intentionally possessed the stolen parts there was ample evidence for the Court to conclude that he was at least "reckless" in relation to whether or not the motor vehicle parts were stolen and recklessness is sufficient to ground liability. "

Conclusions in relation to the warrant

42. As this is an appeal by way of case stated, this court is bound to answer the questions of law raised on the basis of the District Judge's findings of fact. However, this statement of principle may need to be qualified in certain respects. The adequacy of the evidence underpinning a conviction is a question of law. Furthermore, the characterisation of an issue as a question of fact may be incorrect. In this instance, the learned District Judge has said that he found as a fact that the premises were "owned and controlled" by the Joyce family but I think that Mr. Kelly is right to concede that this is really a mixed question of law and fact.

43. The issue as argued in the District Court was whether the prosecution had discharged the burden of proving beyond reasonable doubt that the warrant was valid for the search of this particular garage. Ownership was not in issue. Apart from the (hearsay) evidence relating to what one of the Joyces is alleged to have told Garda Browne, there was the admissible evidence of Mr. Petkov's statement that he was renting from David Joyce. The argument centred on the concept of "control".

44. It seems to me that use of the word "control" in the factual context of this case carries connotations of both a legal right to, and physical means of gaining, access to the property in question. Looking at the case stated, there does not appear to have been any evidence of the former. The evidence in relation to the latter was that, despite the presence of Mr. Joyce at the site, entry was not gained until Mr. Petkov arrived with the key. The learned District Judge remarks on the fact that no lease and no evidence of rent paid was produced. However, with respect, and quite apart from the fact that the Gardaí did not appear to be disputing the fact of a tenancy, that seems to suggest that the accused bore some burden of proof in relation to the issue. That is not the case. It was for the prosecution to prove that the warrant entitled the Gardaí to enter into this particular property and to do so it had to be proved that the property came within the description set out in the warrant.

45. Another way of looking at the issue of "control" relates to the nature of the offence with which Mr. Petkov was charged. If the Joyces had control over the garage, and Mr. Petkov did not, there was never any basis for charging him with possession of its contents. If one asked the rhetorical question "Why were the Joyces not charged?" the obvious and compelling answer would be that they did not have sufficient control to ground a charge of possession.

46. I therefore hold that the question "Was I correct in law in finding that the Warrant was valid in law to allow the search of the premises" (Question No. (iii) in the case of Mr. Petkov and Question No. (iv) in the case of Mr. Delic) should be answered in the negative.

47. It is unusual in this jurisdiction for a warrant to describe the premises to be searched by reference to the concepts of "ownership and control" of named individuals. I do not know whether the Gardaí were aware that the yard they wished to search had a number of self-contained units occupied by third parties.

48. In the United Kingdom there is legislative provision for the so-called "all premises warrant", which can cover "any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified" - s. 8 of the Police and Criminal Evidence Act, 1984 as amended by the Serious Organised Crime and Police Act, 2005. I have some doubt as to whether such a warrant can be issued under the terms of s. 48 of the Criminal Justice (Theft and fraud) Act, 2001 or under any other provision in this jurisdiction in the absence of any legislation making specific provision for it. However, I accept that this issue was not raised in the case and it would, therefore, be inappropriate to determine the point.

49. The next issue to be addressed is the implications of a finding that the search was not validly authorised by the warrant.

50. The case made on behalf of Mr. Petkov is that there was evidence that he resided in the garage and he can therefore claim constitutional protection for his dwelling. The evidence for this is sparse. Looking at the memoranda of his interviews it is apparent that he gave a different garage, in a different location, as his home address. However, there is no finding of fact in relation to the issue, presumably because the learned trial judge held that the warrant was valid.

51. Counsel for Mr. Delic has made the case that the garage was his workplace - this appears to be based on a single line in his interview where he says "I only moved parts in the shed with Michael because he shows me a bit about panel beating". Mr. Delic also said that he had his own garage in the yard. I do not think that the line quoted can bear the weight ascribed to it. Again, however, there is no finding of fact on the matter.

52. If the garage were found to have been Mr. Petkov's dwelling, a ruling against the validity of the warrant would have the effect of automatically excluding the fruits of the search. If it is not his dwelling, then admissibility in his case and Mr. Delic's is governed by the rules applicable to the judge's discretion in relation to illegally obtained evidence.

53. There is a difference between the two cases in the language used by the learned District Judge. In the case of Mr. Petkov he said "It was open to me to admit the evidence of the stolen motor vehicle parts" while in Mr. Delic's case he said "In any event in light of the circumstances it was open to me to admit the evidence of the stolen motor vehicle parts." However, I do not think it likely that he intended to give the impression that he was distinguishing between the two cases in a significant fashion. I think that the reality is that having found the warrant valid he did not find it necessary to consider the factors that come into play in determining the admissibility of unlawfully obtained evidence. In a case involving a search warrant these factors include the reasons why the Gardaí acted as they did. This is not a case of mistake as to the address, or a typing error. There would have to be evidence as to why this very specifically worded warrant was sought for these premises. However, because of the course the case took, this was never considered.

The case against Mr. Delic

54. Leaving aside all issues relating to the search the question is whether the accused could be convicted on the evidence that his finger-print was found on one of the car parts.

55. I am of the view that he could not. The offence requires proof beyond reasonable doubt of possession and knowledge or recklessness as to the fact that the property was stolen. There is simply nothing in the case to indicate the presence of either knowledge or recklessness as to this fact. The fingerprints establish contact but no more. This was a garage, where it is not disputed that cars were worked on. The items in question were car parts. They were not the sort of items that are manifestly contraband such as drugs or firearms, where innocent physical contact might be difficult to assert. An exculpatory explanation was given and where that is done, the trier of fact should reject it only if he thinks it could not reasonably be true. Mr. Delic did not bear a burden of proving that explanation.

56. I therefore consider that Question No. (iii) in Mr. Delic's case- whether the Learned District Judge was correct in convicting him - should be answered in the negative. It is unnecessary to answer the other questions in his case.

57. Because of the course the trial took, the factors to be considered in determining the admissibility of the unlawfully obtained evidence were not canvassed. It is therefore not possible at this stage to answer Questions (i) and (ii) in Mr. Petkov's case.