THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J,

No. 252/2015

The People (at the Suit of the Director of Public Prosecutions)

Respondent

V

R. McC.

Appellant

JUDGMENT of the Court delivered on the 9th day of March 2017 by

Mr. Justice Birmingham

1. On the 9th October, 2015, at Monaghan Circuit Court, RMcC was acquitted by direction of the trial judge of a charge of blackmail, extortion and demanding money with menaces contrary to s. 17 of the Criminal Justice (Public Order) Act 1994. He had faced a charge that he did on the 27th April, 2012, in the County of Monaghan, with a view to gain for himself or another or with intent to cause loss to another, made an unwarranted demand with menaces for a sum of money, more particularly €50,000 to €60,000 from one Michael Heelan.

2. The Director of Public Prosecutions has applied to this Court seeking an order quashing the acquittal by direction, determining that the trial judge erred in law in excluding compelling evidence within the meaning of s. 23(14) of the Criminal Procedure Act 2010 and an order directing that the accused be retried for the offence charged. In essence, therefore what is before the Court is a "with prejudice" appeal.

3. The background to the prosecution was an unusual one. The injured party was a veterinary inspector based in Co. Cavan. He had a controversial history of waste disposal. Over several years he dumped or by inadvertence left a number of bags of rubbish, containing used veterinary items (needles, surplus blood, empty bottles, full bottles, old pay slips, print outs about herd tests, personal belongings, official documentation and the like) at various locations in Co. Monaghan and on the side of a road in Co. Louth. In 2011, Louth County Council took a view that he had been involved in illegal dumping. This became known to a senior veterinary inspector in Co. Cavan, who asked Mr. Heelan to explain himself. In January 2012, Mr. Heelan then sought the assistance of a local politician, Francis O'Brien, who had, until shortly before that, been a member of Seanad Éireann, fearing that the matter would be investigated by the Department of Agriculture and that this could affect his employment.

4. What appears to have happened thereafter is that on the 13th April, 2012, Mr. O'Brien contacted Mr. Heelan to say that more products unlawfully dumped had been discovered in Carrickmacross by a Department of Agriculture official. In fact this was not the case. Mr. O'Brien offered to help Mr. Heelan. He said he did not want to see Mr. Heelan lose his job and mentioned a sum of money. Mr Heelan had further contact with Mr. O'Brien on the 16th, 18th 24th and 25th April, 2012 and during these conversations Mr. O'Brien mentioned smaller sums of money. Fearing the loss of his job, Mr. Heelan reported the matter to the gardaí at Carrickmacross garda station on the 26th April, 2012. An investigation into the matter was opened. A feature of the investigation was that telephone calls of Mr. Heelan were recorded and monitored with his consent. Specifically a telephone conversation between Mr. Heelan and Mr. O'Brien was recorded and members of the gardaí listened into it.

5. The summary of the prosecution case offered to the trial judge in the context of an application pursuant to s. 4E of the Criminal Procedure Act 1967 indicated that Mr. Heelan's evidence at trial would be that on the 27th April, 2012, he got into Mr. O'Brien's car on his invitation. While he was a passenger in that car Mr. O'Brien, who was driving, made a phone call using the car's Bluetooth device. Mr. Heelan's evidence would be that he saw the name of RMcC come up on the screen in the car and that Mr. Heelan heard the other party to the phone call direct Mr. O'Brien to a particular shed near an old graveyard. Mr. O'Brien drove to that shed where Mr. Heelan got out and found bags there containing his needles, blood bottles and veterinary items. Shortly after, members of An Garda Síochána intervened and arrested Mr. O'Brien. Of note is that during the course of the car journey Mr. Heelan was wearing a monitoring/recording surveillance device with which he had been supplied by gardaí and gardaí were listening in from garda headquarters in Dublin.

6. This surveillance operation had been authorised by a judge of the District Court to whom an application had been made pursuant to the provisions of the Criminal Justice (Surveillance) Act 2009. The issue that gave rise to controversy and is at the heart of the present application by the Director of Public Prosecutions is that the device picked up not just what was being said by the occupants of the car to each other but also picked up what was being said by Mr. O'Brien to the person on the other end of the call and what that individual was saying back to Mr. O'Brien. The prosecution case was that the person at the other end of the call was RMcC. The prosecution intended to establish that at trial in a number of ways. First of all by having Mr. Heelan give evidence that he had seen the name RMcC come up on the screen in the car, through telephone records which would establish that Mr. O'Brien's phone was in contact with a phone which the prosecution would link to RMcC at the time when the conversation in issue was taking place and most significantly through the evidence of then Inspector, now Superintendent Traynor who was listening to what was going on in the car. Superintendent Traynor's evidence would have been that he immediately recognised the voice of the person on the phone line because he had known RMcC in one capacity or another for decades. For the avoidance of doubt it should be made clear that prior to this incident RMcC was a person of impeccable character and the reference to the fact that Superintendent Traynor knew him for decades should not be misinterpreted as suggesting that Mr. RMcC was a person of interest to gardaí in the sense that phrase is sometimes used.

7. Charges were preferred against the respondent RMcC, against Mr. O'Brien and against a third man Mr. Marron. The cases of Mr. O'Brien and Mr. Marron were disposed of before Mr. R.McC's case came on for trial.

8. The respondent to this application initially faced four charges but following an application under s. 4E of the Criminal Procedure Act 1967, three of the four charges preferred were dismissed. The trial therefore concerned a single charge only relating to events that

occurred on the 27th April, 2012. After the jury was empanelled a voir dire was held in relation to the admissibility of a number of aspects of the prosecution case.

9. A number of issues were canvassed during the course of the voir dire, including points about the procedure followed when seeking surveillance authorisation from the Judge of the District Court, issues about the voice identification by Superintendent Traynor, a point relating to the Communications (Retention of Data) Act 2011 and the so called "Digital Rights Ireland Case", a point about the call data records sought to be relied on and a point about the fact that the phone conversation between Mr. O'Brien from his car and the person he called, according to the prosecution RMcC, was listened into by Superintendent Traynor in a situation where no authorisation pursuant to the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, had ever been sought or was in existence. A number of these points were decided in favour of the prosecution and against the defence. However, two issues were decided against the prosecution namely the point about call data records and the point about the interception of telecommunication messages.

10. So far as the call data records point is concerned, it should be noted that in many cases where the prosecution seek to make use of such records they have an interest in establishing not only the fact of contacts between specific phones, but also in establishing where the phone was, and by implication where the user of that phone was at the time when a particular call was made. However in this case the prosecution interest was confined to the records of calls made and the location from which calls were made was never expected to feature in the trial. On this issue the trial judge acceded to a submission that it was necessary that there be evidence that the computer that generated the records was working properly. He was told that this was a view that had been taken by a colleague in the Circuit Court, Judge Mary Ellen Ring, in a recently decided case, though there was no record of her decision available. This issue of call data records was recently considered by this Court in the case of *DPP v C.C. and M.F.* [2016] IECA 263 which was an application brought by the Director arising from the decision of Judge Ring to exclude the telephone evidence in the case to which reference was made. It is in effect conceded by Mr. RMcC that in the light of the decision of this Court that the approach to this issue by the trial judge in requiring evidence that the computer was working properly was erroneous. Accordingly, the substantive issue in the case relates to the fact that Mr. O'Brien's telephone call from the car, was listened into by gardaí in the circumstances described.

11. In the trial court and again on this appeal it has been argued on behalf of Mr. RMcC that the authorisation issued in the District Court did not grant carte blanche to An Garda Síochána. It is said that the circumstances in which surveillance devices can be used by An Garda Síochána are strictly delineated by the terms of the authorisation and the terms of the statute. Attention is drawn in particular to s. 2(3) of the Criminal Justice (Surveillance) Act 2009, which provides as follows:-

> "(3) An authorisation or approval under this Act may not be issued or granted in respect of an activity that would constitute an interception within the meaning of the Act of 1993." [The Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993]

12. On behalf of Mr. RMcC is it argued that there can be no doubt that Inspector Traynor, as he then was, used the surveillance device to engage in activity that constituted an interception within the meaning of the 1993 Act. Section 1 of the 1993 Act, as amended, it is pointed out defines an interception as an act that consists of:-

> ". . . the listening or attempted listening to, or the recording or attempted recording, by any means, in the course of its transmission, of a telecommunications message other than such listening or recording, or such an attempt, where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording."

13. On behalf of the Director of Public Prosecutions the argument is made that no interception took place, that there was no attempt to listen to or record, the attempted recording by any means in the course of its transmission as a telecommunications message. The Director placed emphasis on the phrase *in the course of its transmission*. In those circumstances the Director submits that the transmission was not listened to in the course of its transmission, but rather that what occurred was that the call having been completed was then broadcast. The argument is that the call was transmitted between the accused's phone and Mr. O'Brien's phone and then released into free air in the car and that what was listened to and overheard was a broadcast of that call.

14. Rather than proceed immediately to consider the arguments that arise from the circumstances in which gardaí came to listen into the conversation between Mr. O'Brien and the other individual, alleged to be the respondent in the present application, it is appropriate to consider in a little more detail the legislation pursuant to which this "with prejudice" appeal is brought and the procedure that was actually followed. Section 23 of the Criminal Procedure Act 2010, so far as material, provides as follows:-

> "23(1) Where on or after the commencement of this section, a person is tried on indictment and acquitted of an offence, the Director . . . may, subject to subs. (3) and s. 24 , appeal the acquittal in respect of the offence concerned on a question of law to (i) the Court of Appeal . . .
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> . . .
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> (3) An appeal referred to in this section shall lie only where –
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> (a) a ruling was made by a court –
> (i) during the course of a trial referred to in subs. (1) or
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> (ii) during the hearing of an appeal referred to in subs. (2), which erroneously excluded compelling evidence, or
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> . . .
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> (11) On hearing an appeal referred to in subs. (1) the Court of Appeal may –
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> (a) quash the acquittal . . . and order the person to be re-tried for the offence concerned if it is satisfied –
> (i) that the requirements of subs. (3)(a)(i) or (3)(b), as the case may be, are met, and
>
> (ii) that, having regard to the matters referred to in subs. (12), it is, in all the circumstances, in the

interests of justice to do so

Or

(b) if it is not so satisfied, affirm the acquittal.

. . .

(14) In this section "compelling evidence", in relation to a person, means evidence which –

(a) is reliable,

(b) is of significant probative value, and

(c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned."

15. It will be apparent from the extracts quoted that the key issue on this appeal is whether a ruling was made in the Circuit Court which erroneously excluded compelling evidence and that in turn raises the question of whether the evidence excluded, assuming for this purpose that it was erroneously excluded, was compelling evidence within the terms of subs. 14.

16. The matter was listed before Monaghan Circuit Court on the 7th October, 2015. Before the jury was empanelled a s. 4E application was dealt with. Initially, the appellant was facing a four count indictment that was a result of rulings made by the trial judge, which are not the subject of an appeal. When the jury came to be sworn, there was only one count on the indictment. By agreement the judge then embarked on a *voir dire*, the outcome of which was that two elements of the prosecution case were excluded, the telephone call records and the telephone conversation between Mr. O'Brien and another which was audible in the car that Mr. O'Brien and Mr. Heelan were travelling. When the judge ruled as he did, matters were put back until the following morning to allow the prosecution consider their position. On the following morning the prosecution sought to re-open the adverse rulings and to rely on a number of additional authorities. They were not permitted to do this and when refused a chance to re-open matters, did not call any evidence and as a result the judge directed the jury to acquit.

Compelling evidence

17. The respondent, Mr. RMcC makes two points in relation to this issue. First, on his behalf it is said that no evidence was adduced before the jury and only very limited evidence was adduced on the *voir dire* which does not add to the evidence excluded. Evidence adduced is not to be equated as adducible evidence or evidence to be adduced.

18. Secondly, it is said that the Director has failed to engage with the available evidence. While the telephone records were excluded, in the circumstances of the case this was not of any real practical significance because the prosecution could have availed of XRY data analysis and have put exactly the same evidence before the jury. The point is made that the prosecution's only interest was establishing a pattern of contact between phones and it was no part of the prosecution case to seek to establish the location from which particular calls were made.

19. It is said that while the prosecution would obviously prefer to have the evidence of then Inspector Traynor about recognising the voice as well as having the transcript of the call that the prosecution might have been able to survive without the excluded evidence. It is accepted that it is surprising to find the defence arguing that the evidence at trial was arguably sufficient to resist an application for a direction.

20. In *C.C.* and *M.F.* this Court pointed out that the statutory definition of compelling evidence could present difficulties in future cases and might require the prosecution to call their evidence even after key evidence had been excluded in order to preserve their position for the purpose of considering an appeal.

21. In a situation where no other evidence was actually adduced and in particular where the complainant and injured party was never called to give evidence, this Court finds it difficult to say that the evidence excluded which now had to be taken in isolation could be regarded as compelling evidence. Without evidence from the injured party it is hard to see how the evidence in relation to the phone conversation, even if supported by evidence of contact between relevant phones, would or could have been sufficient. That conclusion is arrived at with regret, because the arguments made by the Director in relation to the circumstances in which the call came to be overheard or listened into are substantial. Section 1(b) of the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, defines "interception" as follows:-

"(b) An act –

(i) that consists of the listening or attempted listening to, or the recording or attempted recording, by any means, in the course of its transmission, of a telecommunications message, other than such listening or recording, or such an attempt, where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording,

And

(ii) that, if done otherwise than in pursuance of a direction under section 110 of the Act of 1983, constitutes an offence under section 98 of that Act."

It does not seem that what occurred here could readily be regarded as an interception.

22. Counsel on behalf of Mr. RMcC has drawn attention to the provisions of s. 2(3) of the Criminal Justice (Surveillance) Act 2009, which provides that an authorisation or approval under this Act may not be issued or granted in respect of an activity that would constitute an interception within the meaning of the Act of 1993, and contends that what occurred was therefore a breach of both the 2009 Act and the 1993 Act. However if what occurred was not in fact an interception then neither Act was breached.

23. This Court does not agree with the trial judge that what occurred was an interception or that the evidence sought to be put

before the Court was inadmissible. While the issue that the judge was required to consider was an unusual one and perhaps not one that fell neatly within any of the statutory provisions it is in fact the case that there was no attempt on the part of the Gardaí to intervene, or to involve themselves in any way in the conversation between Mr. O'Brien and the person that he called. There was in fact no actual interference or involvement with that call, there was no interception of the call. Were it not for the issue in relation to whether the evidence excluded can truly be said to be compelling evidence, the Court would have been prepared to hold with the Director of Public Prosecutions. However, by reason of the issue in relation to the definition of compelling evidence the Court is unable to accede to the application by the Director and so must affirm the acquittal pursuant to s. 23(11)(b) of the Criminal Procedure Act 2010.