



THE COURT OF APPEAL

[100/15]

Bill No. SCDP 008/2013

The President
Birmingham J.
Edwards J.

IN THE MATTER OF A REFERENCE UNDER SECTION 34 OF THE CRIMINAL PROCEDURE ACT 1967

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

A. B.

RESPONDENT

JUDGMENT of the Court delivered by the President on 6th July 2015

Background

1. This is a reference by the Director of Public Prosecutions of a question of law for determination by this Court arising out of the acquittal of A.B. by the Special Criminal Court on the charge of membership of an unlawful organisation, namely, the IRA. The trial of A.B. and others began on 27th January 2015 and concluded on 13th March 2015.
2. It is an offence for a person to be a member of an unlawful organisation: s. 21 of the Offences Against the State Act 1939. A person who is arrested and detained on suspicion of having committed that offence and is released without charge cannot be arrested again for the same offence except under a warrant issued by a judge of the District Court. Before issuing the warrant, the judge must be satisfied on information on oath (as to the suspected participation in the offence for which his arrest is sought) given by a Garda Superintendent or a higher Officer, that further information has come to the knowledge of the Gardai since the person's release: s. 30A (1) of the Offences Against the State Act 1939 as inserted by s. 11 of the Offences Against the State (Amendment) Act 1998.
3. The charge on which A.B. was tried was that he was a member of an unlawful organisation, namely, the Irish Republican Army on 29th March 2013 contrary to s. 21 of the Offences Against the State Act 1939 as amended by s. 48 of the Criminal Justice (Terrorist Offences) Act 2005. Some 24 years before his arrest on the instant charge A.B. had been arrested and detained pursuant to s. 30 of the 1939 Act on suspicion of having committed the offence of membership of an unlawful organisation on the specified date. Charges were not preferred against him following that arrest.
4. The Special Criminal Court held that A.B. was not lawfully arrested in respect of the charge that he was facing because of the prohibition contained in s. 30A(1) of the 1939 Act/1998 (Amendment) Act.
5. The question for this Court that is referred under s. 34 of the Criminal Procedure Act 1967 is as follows:-

Was the Special Criminal Court correct in its interpretation of s. 30A of the Offences Against the State Act 1939, as inserted by s. 11 of the Offences Against the State (Amendment) Act 1998?

Under the terms of s. 34, the determination of the question of law by this Court is without prejudice to the acquittal of A.B. by the Special Criminal Court.

The Ruling by the Special Criminal Court

6. A.B. was arrested and detained, pursuant to s. 30 of the Offences Against the State Act 1939 on suspicion of having committed the offence of membership of an unlawful organisation on 29th March 2013. He had previously been arrested and detained pursuant to s. 30 of the Offences Against the State Act 1939 on suspicion of having committed the offence of membership of an unlawful organisation on 3rd March 1989. Charges were not preferred against him following that earlier arrest. The defence argued that the arrest was unlawful because it was prohibited by s. 30A of the Offences Against the State Act 1939. Membership of an unlawful organisation is a continuing offence and this was "the same offence" within the meaning of the Act.
7. The Court heard submissions on the issue and ruled that in the absence of a warrant from a District Court Judge authorising the respondent's arrest, the provisions of s. 30A of the Offences Against the State Act 1939 prohibited the arrest of the respondent on 29th March 2013 for an offence of membership of an unlawful organisation on that date, in light of the earlier arrest for a membership offence when no charges had been preferred.
8. Section 30A of the Offences Against the State Act 1939, as inserted by s. 11 of the Offences Against the State (Amendment) Act 1998 provides as follows:-

"(1)Where a person arrested on suspicion of having committed an offence is detained pursuant to section 30 of this 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 is 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 person's 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 person's 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."

In the course of its ruling, the Special Criminal Court said:-

"The prosecution argued that the offence of membership of an unlawful organisation was particular to the date specified in a charge or otherwise. This court, however, made a ruling on the 19th of March 2014 in the case of *DPP v. Vincent Banks* that the offence was a continuing offence."

9. The Court referred to a note of an obiter comment in an ex tempore judgment of the High Court that might have offered some support for the prosecution's argument, but the information about the case was not satisfactory:

"This court is of course entirely subject to any finding of the High Court; however, not having a full note of the judgment and reasons, this court feels obliged to follow its finding in the *Banks* case which was on all fours with the present."

The Court accordingly found that the arrest of the accused without warrant was unlawful and the events subsequent to arrest were inadmissible.

10. In *DPP v. Vincent Banks* (19th March 2014), the accused had been arrested pursuant to s. 30 of the Offences Against the State Act 1939, in September 2012 for membership of an unlawful organisation and was, at that time, released without charge. He was subsequently arrested pursuant to s. 30 on suspicion of the offence of unlawful membership of an illegal organisation in December 2012. It was submitted by Counsel for Mr. Banks that the second arrest was unlawful as it had been effected without an arrest warrant. Counsel on behalf of the Director of Public Prosecutions submitted that the arrest for membership in September was for a different offence of membership than that in December; that it was at a different time and place with a different set of circumstances in being. The Special Criminal Court rejected the prosecution's argument and held that:

"Membership of an unlawful organisation is, of its nature, a continuing offence and that the arrest, although involving a different date, was for the same offence and, being without a Warrant, was, therefore, unlawful."

Discussion

11. The point that arises is whether the Special Criminal Court was correct in its ruling concerning the arrest of the accused, A.B., on suspicion of commission of the offence on which he stood trial. Was he arrested again in connection with the offence to which the detention in 1989 related?

12. The legislative provision in s. 30A is not exclusive to subversive offences. When a person has been arrested under s. 4 of the Criminal Justice Act 1984 on suspicion of an offence, he may not be re-arrested for the same crime except on the authority of a justice of the District Court who must be satisfied on information supplied on Oath by a member of the Garda Síochána not below the rank of Superintendent "that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought". This is set out in s. 10(1) of the Criminal Justice Act 1984 which mirrors the provision in s. 30A.

13. The Court of Criminal Appeal held in *DPP v. Donnelly & McGarrigle* that the nature of the offence under s. 30 of membership of an unlawful organisation was a continuing one. It did not comprise a single event or set of events on a particular occasion, but rather something continuing over a period of time. Such is the nature of the concept of membership. There may be relevant evidence given, of course, as to what happened on a particular occasion but that is not the decisive question as to membership. Evidence could be given of activities consistent with or amounting even to direct evidence of membership of an unlawful organisation but it would not be fatal to the charge or the indictment if the events that were consistent or that were evidence of membership happened on a different day from the date specified in the charge.

14. It is clear that the offence of membership carries with it the notion of continuity, but continuity is different from permanence. A 24-year gap between arrests is a very different thing from a situation where the time period is three months. The offence of which A.B. was suspected in 1989 concerned a state of affairs in which he was allegedly involved at that time. The evidence grounding the suspicion was historical, in respect of events that had happened prior to the arrest.

15. The Special Criminal Court followed its own decision in *DPP v. Vincent Banks*. Mr. Banks had been arrested under s. 30 of the Offences Against the State Act 1939, on a date in September 2012 on suspicion of membership of an unlawful organisation, namely the IRA, and following questioning he was released without charge. He was once again arrested on 18th December 2012, and on that occasion he was charged and that was the matter that came before the Special Criminal Court. So the position was that in the space of three months, the accused man had been arrested twice. The Court held that since membership of an unlawful organisation necessarily connoted continued association or membership over a period of time, then it was essentially the same offence. He had, accordingly, been arrested for the same offence without the sanction of the judge of the District Court that was required under s. 30A. Here, the gap in time is some 24 years as opposed to the three months that occurred in Banks' case. The points of similarity between the two cases are merely that it was a charge by the same name in each case and that the accused person had previously been arrested for a charge in the same words. The Court was in error in thinking that this case was on all fours with *DPP v. Vincent Banks*.

16. Whether a suspicion or charge is based on information about events or the belief of a Chief Superintendent or on a combination of both, the source of each kind of material giving rise to the concept of membership on the part of the particular person is in facts that have allegedly happened at a time prior to the existence of the suspicion or charge.

17. It seems almost too obvious to say that the charges are different because of the long lapse of time and the implications of that for the nature of the charge before the Court. The concept of a continuing state of affairs representing membership of an organisation is different, as stated above, from the same conditions being permanent. It was legitimate for the Special Criminal Court to infer in the Banks case that the period of three months was insufficient to distinguish between the cases/charges but the much longer period of years is a wholly different matter.

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.

Conclusion

19. The answer to the legal question posed in this reference is that the Special Criminal Court was not correct in its interpretation of s. 30A of the Offences Against the State Act 1939, as inserted by s. 11 of the Offences Against the State (Amendment) Act 1998.