THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

[73/2017]

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

- AND -

MARTIN MCHALE

APPELLANT

JUDGMENT of the Court delivered on the 31st day of July 2018 by

Mr. Justice McCarthy

1. This is an appeal from the conviction of the accused for the offence of membership of an unlawful organisation (the IRA) on the 2nd November 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, the judgment of the Special Criminal Court having been given by Kennedy J. on the 22nd February 2017.

2. As found by the trial court, the accused travelled from Cork to Co. Monaghan on the 1st November 2013 and the van which he was driving, in the company of a younger man, one Mr. Roche, was seen parked in the forecourt of a garage in Monaghan at around 11.30 pm. Detective Garda Emmet Ryan on stopping near the van and approaching the accused, announced he was a garda and displayed his identification as such. Upon enquiry as to his name, Mr. McHale gave it, and Cork address, but did not reply when it was first enquired of him as to why he was in Monaghan. When asked again, he said "We're just driving around, like" and "We came to Monaghan for a spin". The van was registered in Cork. He thought that the accused was hesitant and nervous. He refused to tell him the identity of the owner of the vehicle, merely saying that it was owned by a friend. It was established by Detective Garda Ryan that in any event it was not registered to the accused or his passenger. The Garda then carried out a search of the vehicle, as he was entitled to do. There was no partition between the front seats and the rear. Inside, he found a considerable number of bags of fertiliser (subsequently established in evidence by Dr Hannigan of Forensics Ireland to be a substance capable of being used for the production of explosives). On a later search of the vehicle a pair of gloves was found in the passenger foot-well and it is not in dispute that the substance found on the outside of the gloves was of the same kind as that contained in the bags: the accused had given bodily samples when in Garda custody, in as much as he was arrested on the occasion in question, from which his DNA was extracted. Tape lifts having been taken from the gloves and cell samples thereby obtained were found, similarly, to contain the accused's DNA. No one has raised any issue about the finding of Dr. Connolly (for it was she who performed the relevant tests) to the effect that the chance of someone other than the accused having the same profile as that obtained from the gloves was less than one in 1,000,000,000. Thus clear connection was made between the accused and the fertiliser which is an explosive within the meaning of the Explosive Substances Act 1883.

3. The accused was interviewed on seven occasions after his arrest. The first two interviews were conducted in what one might describe as the ordinary way, under caution, and he informed them *inter alia* that he had agreed with his companion Mr. Roche to go to Cavan to meet the latter's cousins and had obtained a loan of the van from a friend whom he refused to identify. He gave different times of departure from Cork and whilst he accepted he had seen the bags, he denied handling or touching them subject to the fact that he may have pushed a bag of blocks when the Gardaí opened the rear door. He did not use his own car for the journey as he did not feel it was reliable, needed a service and the diesel was cheaper but when the car was subsequently inspected by the Gardaí it was found to be in good working order and to have a valid NCT. He denied membership of the IRA or association with any member thereof with one exception.

4. On enquiry of Garda O'Driscoll at his local headquarters as to the ownership of the van it was established that it did not belong to either of the occupants he was told that there were certain Garda intelligence entries in the Garda PULSE system (7 in number) as to meetings the accused had with third parties including a member of the IRA.

5. In the five subsequent interviews the provisions of s. 2 of the Offences against the State (Amendment) Act 1998 were invoked. This provision is to the effect that when a person is questioned in relation to an offence of membership of an unlawful organisation and he "failed to answer any question material to the investigation of the offence" a court may draw inferences from it and the failure on the basis of such inferences can be treated as, or as capable of amounting to, corroboration of any (other) evidence." The conditions precedent to its invocation were fulfilled. The prosecution successfully contended that certain answers given were demonstrably false or misleading or that there was no effective answer to others notwithstanding the fact that he may apparently have done so. Those which appear to be of relevance are a refusal to identify the person from whom the accused had obtained the van, and, so far as the gloves were concerned, a denial that they were his with an assertion that he had not even seen them. The court in its decision, so far as s. 2 and those five interviews was concerned, in its judgment, said that they were satisfied beyond reasonable doubt that questions pertaining to the ownership of the van and the gloves constituted a failure to answer material questions, in as much as the answers given were false and misleading.

6. They took the view, on analysis of the contents, that interviews 1 and 2 bore no detailed scrutiny and lacked credibility insofar as he sought to explain, by reference to the "supposed un-roadworthy condition and the absence of a valid NCT Certificate of and for his own vehicle" in explanation for the use of the van. The court further concluded that the accused lied to Detective Garda Ryan in what he had said in or about the time of his arrest. The trial court also concluded that the accused was fully aware of the contents

of the van, that is to say the fertilizer.

7. Assistant Commissioner Finn gave evidence pursuant to s. 3(2) of the Offences Against the State (Amendment) Act 1972 of his belief that on the relevant date the accused was a member of the unlawful organisation in question, the IRA, and that his belief did not depend on the circumstances of the arrest, the arrest itself or anything that he may or may not have said in custody. The court accepted this evidence and rejected a challenge to a claim of privilege made by that officer, when probed as to his sources of information or grounds of the belief.

8. The appellant also places reliance on the proposition that Mr. Roche was not prosecuted for membership of an unlawful organisation. We cannot see how this could be relevant to the opinion of Assistant Commissioner Finn or indeed how the issue of whether or not Assistant Commissioner Finn believed he was a member could be relevant to the charge against Mr. McHale. The Director is entitled to lay such charges as she sees fit and we do not presume to speculate as to why no charge was laid against Mr. Roche a course which in the present case was perfectly in order.

9. There are 12 grounds of appeal, some of which overlap or are repetitious, as follows:-

> "1 The Special Criminal Court erred in law and/or in fact in determining that the arrest of the Appellant on 2nd November 2013 was lawful;
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> 2. The Special Criminal Court erred in law and/or in fact in determining that the question of whether or not Assistant Commissioner Finn had formed the opinion that the person stopped with the Appellant was a member of the IRA was irrelevant in circumstances where, despite the evidence against that person being of a similar nature to that against the Appellant, the Director of Public Prosecutions had directed no prosecution;
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> 3. The Special Criminal Court erred in law and/or in fact in determining that it was safe to act upon the evidence of opinion given by Assistant Commissioner Finn pursuant to section 3 of the Offences against the State (Amendment) Act 1972 to the effect that he believed the accused was a member of the IRA on the relevant date;
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> 4. The Special Criminal Court erred in law and/or in fact where the evidence was of such a tenuous nature it entered a nolle prosequi for possession explosive substance yet relied upon the Appellants 'knowledge' of such substance for the membership charge;
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> 5. The Special Criminal Court erred in law and/or in fact in determining that no weight could be attached to the denials by the Appellant in interview that he was a member of the IRA;
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> 6. The Special Criminal Court erred in law and/or in fact in determining that the Applicant had in interviews 3,4'5 '6 and 8 failed to answer material questions for the purposes of section 2 of the Offences against the State (Amendment) Act 1998;
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> 7. The Special Criminal Court erred in law and/or in fact in determining that the inference to be drawn from the Appellant's failure to answer material questions in interviews 3,4,5,6 and 8 was capable of amounting to supporting evidence;
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> 8. The Special Criminal Court erred in law and/or in fact in determining that the explanations offered by the Appellant in interview did not bear up to detailed scrutiny and that his replies to answers lacked credibility;
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> 9. The Special Criminal Court erred in law and/or in fact in determining that the Appellant had lied when arrested and during interview;
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> 10. The Special Criminal Court erred in law and/or in fact in drawing the inference from the evidence that the Appellant was aware of the contents of the van;
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> 11. The Special Criminal Court erred in law and /or in fact in determining that when the individual pieces of evidence regarding the overall circumstances leading to the Appellant's apprehension and the search of the van, together with the Appellant's memoranda of interview, are viewed cumulatively, the only inference to be drawn was that the items in the van were to be used and the Appellant's actions were taken as a member of an unlawful organisation;
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> 12. The Special Criminal Court erred in law and/or in fact in determining that the evidence referred to above was capable of lending additional support to the belief evidence."

10. These were refined somewhat in the appellant's written submissions and to a somewhat greater degree by Mr. O'Carroll and might be summarised as follows:-

> (i) That the trial court was wrong in its determination that the accused was lawfully arrested by Detective Garda Ryan.
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> (ii) That the trial court was wrong in its acceptance of, and reliance upon, the evidence of Assistant Commissioner Finn.
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> (iii) That the trial court erroneously concluded that the accused had failed to answer material questions within the meaning of the Offences Against the State (Amendment) Act 1998 because they were demonstrably false or untrue and that the memoranda and that the rejection of the veracity of what the accused said in the first two.
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> (iv) That the trial court erroneously concluded that the accused was in possession of the explosives.

11. With respect to the first issue, the law is well established to the effect that before an officer can arrest an accused, and in this instance the arrest was pursuant to s. 30 of the Offences against the State Act 1939 for membership of an unlawful organisation, the arresting officer must himself hold an objectively reasonable belief that the accused is guilty of the offence for which he is arrested. A number of authorities are quoted in this regard and we think that the most helpful decision here as to the state of the law is that of *Troci v. Governor of Cloverhill Prison* [2012] 1 IR 514 in which Hogan J. quoted with approval a passage from *O'Hara v. Chief Constable of the RUC* [1997] A.C. 286:-

> "It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be

judged at the time when the power was exercised.

This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

12. Whether or not the belief of Detective Garda Ryan at the time of the arrest was objectively reasonable is a question of fact for the trial court and we think that on the evidence it properly reached the conclusion that this was so. It is plain from the evidence that Detective Garda Ryan had regard to the circumstances in which the accused was found, his conversations with him, the fact that neither he nor his passenger were owners of the vehicle, the contents of the vehicle and the fact that there were entries in Garda records indicative of his association with a member of the IRA over time. It is plain also that as he gathered more information on the occasion in question Detective Garda Ryan's view hardened or suspicions grew and the trial court was entitled to accept his evidence (indeed it was overwhelmingly supportive of the proposition) that he was not acting on the basis of the belief of another but rather on his own reasonably-held belief. We reject this ground of appeal accordingly.

13. With respect to the evidence of Assistant Commissioner Finn, we cannot see the basis on which it is asserted that the court attached undue weight to it or were in error in accepting it. This was a question of judgment on analysis of the evidence and having heard the witness. Effectively it is submitted that because there were supposed gaps in the officer's knowledge the accused's personal circumstances and that he claimed privilege for the sources of his information (whereby the basis of the belief was not given in evidence) the court was not entitled to accept it or rely upon it and we cannot see why this should be so. Needless to say it was only one part of the evidence considered by the court in reaching its verdict.

14. Insofar as it was contended on behalf of the appellant that the court was wrong in law and fact in its conclusion that he failed to answer material questions pursuant to the 1998 Act with particular reference to questions about the van or the gloves, we cannot see how the questions on those topics could be anything other than material and indeed highly so. This was a conclusion on the evidence which the trial court was undoubtedly entitled to reach. The trial court also addressed the issue of whether or not what one might describe as the literal articulation of an answer or the affording of an excuse or explanation for a refusal to answer, meant that there was no failure or refusal. It is plain that the court looked to the substance and that as it did it made no error of law. With respect to the first and second interviews the court conducted an analysis of what was said in the context of the remaining evidence in the case and reached a conclusion as to the credibility of what was said by the accused which we cannot see raises any issue of law and which, as a conclusion of fact, was amply justified by the evidence.

15. It has also been submitted that the court fell into an error of fact or law (and we cannot see here, either, how any question of law could arise) in its conclusion of fact that the accused was in possession of the explosives: there was ample evidence upon which this conclusion could be reached with particular reference to the fact that the bags of fertilizer were in the plain sight of the accused in a van which he had driven from Cork to Monaghan and scientific evidence connected him with a precisely similar substance as that contained in the bag, *via* the gloves. We think that the abandonment of any charge of possession of explosive substances by the Director could have no relevance one way or the other to this finding: the evidence in a given case may well disclose a number of offences but an accused person might be prosecuted for some only of those thus disclosed. Whether or not a person is charged with all or some only of the offences disclosed is a matter for the Director of Public Prosecutions. We therefore dismiss this appeal.