

THE HIGH COURT

2002 151 C.A.

BETWEEN

JACKIE DEVOY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANT

RECORD NO: 2002-15117P

Judgment of Finnegan P. delivered on the 1st day of December 2003.

The first matter mentioned in the title hereof is a Circuit Appeal and the second matter a plenary action both arising out of the same set of circumstances. The Plaintiff attended the Blue Banana Nightclub on Saturday evening – Sunday morning the 23rd and 24th November 1996. At approximately 12.30 a.m. on the 24th November 1996 pursuant to a warrant some 60 – 70 members of the Garda Síochána including approximately ten female Gardai entered the premises to effect a search. Inspector Michael Devine who was in charge of the operation caused music to be stopped and the lights to be switched on and over the public address system informed the patrons that it was proposed to search them in reliance of the warrant. Patrons were requested to line up men outside the men's toilet and ladies outside the ladies' toilet. Searches were carried out within the respective toilet areas. The Plaintiff in the Circuit Court action complained of the nature of the search her claim being grounded in assault, false imprisonment, negligence and breach of duty and breach of statutory duty and defamation. The Plaintiff failed in the Circuit Court and subsequent to the determination of the learned Circuit Court Judge the Plaintiff issued the plenary proceedings the relief sought being a declaration that the Misuse of Drugs Act 1977 as amended by the Misuse of Drugs Act 1984 section 13 is repugnant to the Constitution. It may be that the decision to institute these proceedings was prompted by circumstances which attended the hearing in the Circuit Court. The Plaintiff in those proceedings proceeded on the assumption that the search was carried out pursuant to the Misuse of Drugs Act 1977 section 23 as amended by the Misuse of Drugs Act 1984 section 12. The defence delivered did not disclose the true basis upon which the search was carried out namely the Misuse of Drugs Act 1977 section 26 as amended. An Affidavit of Discovery filed on behalf of the Defendant did not disclose the warrant or the information sworn in order to obtain the same and neither the warrant nor the information were available at the hearing. By agreement between the parties both matters were heard together.

The Circuit Appeal

The Plaintiff's account of what happened to her on this occasion is as follows. On the Saturday evening she had been in the Silver Granite Licensed Premises with her husband, her sister Christine McMahon and other members of her family. She had two pints to drink. She then went to the Blue Banana Nightclub with her family party and shortly after she arrived and before there was an opportunity to purchase a drink the music stopped and she saw Gardai in the premises. She heard the request for patrons to queue outside the toilets to be searched. Her Sister Christine McMahon was at that time in the ladies toilet and as Christine McMahon was pregnant the Plaintiff had a concern for her. She spoke to a Garda at the entrance to the nightclub and asked if it would be in order for her to go to her but that she did not wish to be "strip searched". The Garda told her that she would not be strip searched. She then went to the head of the queue outside the ladies' toilet and spoke through the door to her sister who confirmed to her that she was well. At that point a female Garda said to her "Were you strip searched"? And when she replied "No" she was told to enter the toilet. She was subjected to a search in the middle of the floor of the toilet by a female Garda in plain clothes. She had protested saying "I am not going to be strip searched". At that point the female Garda said to her colleague "Does she want to be locked up for the night". At this point she submitted to the search. The search was carried out by a uniformed female Garda. The Plaintiff was wearing a twin set and this was pulled up over her head. Her bra strap had broken during the evening and in consequence her breast was exposed and she was embarrassed. She was then ordered to pull up her skirt and the uniformed female Garda bent down and looked up her skirt. She asked the uniformed female Garda for her name and this was refused. She could not see the female Garda's identifying number as she was wearing a yellow high visibility jacket which covered the same. It has not been possible to identify either of the female Gardai mentioned in the Plaintiff's account.

The evidence as to the number of women in the toilet for the purposes of being searched at any one time varied one account being six or seven to the Plaintiff's twenty five. However on the balance of evidence I think it probable that between nine and twelve women were being searched at any one time.

The Power to Search

The Plaintiff's Civil Bill pleads that the Gardai were exercising their powers under the Misuse of Drugs Acts. In a reply to Particulars this was amplified in the following terms:-

"The power to stop and search pursuant to section 23 of the Misuse of Drugs Act 1977 (as amended) must only be exercised by a member of the Garda Síochána who with reasonable cause expects that a person is in possession of a controlled drug in contravention of the Act. In this particular case there was no reasonable cause. In addition the search was carried out in a public place. Further particulars of the breach of regulations contained in paragraph 5(d)(e) will be furnished on receipt of discovery and/or interrogatories".

Discovery was obtained and the Affidavit of Discovery contains no mention of the warrant or the information on foot of which it was obtained. The warrant was in fact obtained in reliance on section 26 of the Misuse of Drugs Acts and this was first drawn to the attention of the Plaintiff's legal advisors during the course of the Circuit Court hearing although neither the warrant nor information were there produced. The defence delivered does not expressly refer to the said section 26. On the evidence I am satisfied that the search was indeed carried out in reliance on a warrant issued pursuant to the provisions of section 26 of the Misuse of Drugs Acts.

The Misuse of Drugs Act 1977 section 26 provides as follows:-

26(1) If a Justice of the District Court or a Peace Commissioner is satisfied by information on oath of a member of the Garda Síochána that there is reasonable ground for suspecting that –

(a) a person is in possession in contravention of this Act on any premises of a controlled drug, a forged prescription or a duly issued prescription which has been wrongfully altered and that such drug or prescription is on a particular premises, or

(b) a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under this Act, or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the State, an offence against a provision of a corresponding law within the meaning of section 20 of this Act and in force in that place, is in the possession of a person on any premises.

such Justice or Commissioner may issue a search warrant mentioned in subsection (2) of this section.

(2) A search warrant issued under this section shall be expressed and operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána as may be necessary, at any time or times within one month of the date of issue of the warrant, to enter if need be by force the premises named in the warrant, to search the premises and any persons found therein, to examine any substance or article found therein, to inspect any book, record or other document found therein and, if there is reasonable ground for suspecting that an offence is being or has been committed under this Act in relation to a substance or article found on the premises or that a document so found is a document mentioned in subsection (1)(b) of this section or is a record or other document which the member has cause to believe to be a document which may be required as evidence in proceedings for an offence under this Act, to seize and detain the substance, article or document, as the case may be.

The Misuse of Drugs Act 1984 section 13 provides as follows:

13. Section 26 of the Principal Act is hereby amended by –

(a) the insertion of “or other land” after “premises” in paragraph (a);

(b) the insertion of the following paragraph after paragraph (a):

“(aa) opium poppy, a plant of the genus *Cannabis* or a plant of the genus *Erythroxylon* is being cultivated contrary to section 17 of this Act on or in any premises or other land, or”;

(c) the substitution of the following subsections for subsection (2):

(2) A search warrant issued under this section shall be expressed and operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána and such other persons as may be necessary, at any time or times within one month of the date of issue of the warrant, to enter (if need be by force) the premises or other land named in the warrant, to search such premises or other land and any persons found therein, to examine any substance, article or other thing found thereon or therein, to inspect any book, record or other document found thereon and, if there is reasonable ground for suspecting that an offence is being or has been committed under this Act in relation to a substance, article or other thing found on such premises or other land or that a document so found is a document mentioned in subsection (1) (b) of this section or is a record or other document which the member has reasonable cause to believe to be a document which may be required as evidence in proceedings for an offence under this Act, to seize and detain the substance, article, document or other thing, as the case may be.

(3) Where any premises or other land is entered pursuant to a warrant issued under this section, the member of the Garda Síochána named in the warrant may do either or both of the following:

(a) arrest without warrant any person or persons found on such premises or other land for the purpose of searching him or them,

(b) so arrest any such person or persons and keep him or them, as may be appropriate, under arrest until such time as such of the powers of search or examination as he wishes to exercise pursuant to the warrant have been exercised by him.

(4) In this section –

‘land’ includes any structure on land;

‘Structure’ means building, structure or any other thing constructed, erected, placed or made on, in or under any land.”,

and the said paragraph (a), as so amended, is set out in the Table to this section.

In relation to the issue of the warrant I have had the evidence of Detective Sergeant Corrigan. He had attended at the premises on three occasions – on the weekend preceding the raid, on the night preceding the raid and on the night of the raid. On each occasion he attended with a female colleague. While there he identified a number of areas where controlled drugs were being sold. On each occasion there were some 300 patrons on the premises mostly aged between 19 and 25 years but with some older patrons. A lot of the young persons on the premises were intoxicated although there was no alcohol on the tables. There was a lot of water on the tables. Tap water was being sold across the bar. The water in the w.c. had been turned off. On the second occasion upon which he had attended at the premises a marked patrol car approached and the doorman raised his hand and pressed a bell which he, Detective Sergeant Corrigan believed to be a warning to those inside the premises. He identified the areas within the premises where drugs were being sold. The situation which existed within the premises on these three occasions suggests that controlled drugs were

not just being sold on the premises but were being used on the premises by a significant proportion of the patrons. I am satisfied that the circumstances described by Detective Sergeant Corrigan are sufficient to satisfy the requirement of reasonable grounds for suspicion in the terms required by the Misuse of Drugs Act 1974 section 26. I am further satisfied on the evidence of Sergeant Walsh who swore the information that he did so on the 23rd November 1996 and that the warrant was issued on that date.

The Nature of the Search Carried Out

I have outlined the nature of the search which the Plaintiff in her account says was carried out on her. Christine McMahon the Plaintiff's sister gave evidence as to the nature of the search carried out on her. She was wearing a long black skirt with a loose top over it. Her arms were taken out of the sleeves of her top and it was pulled up around her neck. The female Garda carrying out the search felt around her chest and upper body area with her hands outside her underwear. She then pulled up her skirt and pulled down her boxer shorts and looked into them.

Sarah Devoy a sister in law to the Plaintiff gave evidence as to the nature of the search carried out on her. She said her top had been pulled up and her slacks had been pulled down a little and she was felt around the waist. She overheard the remark in relation to the Plaintiff as to whether she wanted to spend the night in a cell and she also heard the Plaintiff ask the female Garda searching her for her name. She saw the Plaintiff's breast exposed.

Finally the Plaintiff called as a witness Elizabeth Casey who was on the premises on the night in question and was subjected to a search. She is a mature lady and was present with her son who was then some 29 years of age. She was not with the Plaintiff's party. She was searched. Her top was pulled up but as I understood her evidence not so far as to expose her breast area. The female Garda then patted her around the back and also around the waistband. I did not understand her to have been embarrassed by the nature of the search carried out on her.

For the Defendants I had evidence from some thirteen Gardai who were involved in the search and on this aspect of the evidence most importantly from female members of the Gardai – Sergeant Maura O'Sullivan, Garda Audrey Dormer, Garda Sheridan, Garda Patricia Byrne, Garda Mary Keown, Garda Patricia Maher. Their evidence was uniform as to the nature of the search carried out. The search was a body search and not a strip search. At the briefing prior to the warrant being executed it was made clear to the Gardai involved in the operation that the search to be carried out was a body search and what that involves is well understood by Gardai as a result of their training. The person being searched was requested to pull out their upper garment if the same was tucked into a waistband and they were then asked to pull out the bottom of their bra so that anything concealed therein would fall to the floor. The Garda would then run her hands around the back of the bra outside the outer clothing to feel for anything concealed. The waistband of trousers or skirts would then be pulled out to allow anything concealed therein to fall to the floor and if necessary a request would be made to open the waistband to achieve this. It would not be appropriate or usual to carry out a search in the manner described by the Plaintiff and so far as each of these witnesses were concerned no such search was carried out. None of the witnesses recalled the Plaintiff. None of the witnesses saw anyone's breast area being exposed.

It is not possible to reconcile the account given by the Plaintiff, Christine McMahon and Sarah Devoy with that given by the Gardai. I must not accord any greater weight to evidence given by a member of the Garda Síochána than to that of any other individual. Rather I must look to any circumstance independent of the parties to support one or other account of what transpired during the search of the Plaintiff. I find this in the evidence of Elizabeth Casey. She is not related to the Plaintiff and has so far as I am aware no connection with the Garda Síochána. Her account of the nature of the search carried out on her and indeed the searches carried out in her vicinity was consistent with the evidence given by the Garda Síochána witnesses and tends to support their evidence as to the nature of the search in fact carried out. Taking the evidence of Elizabeth Casey into account I find myself in the position that I am unable to find as a matter of probability that the search as described by the Plaintiff in fact occurred and accordingly the Plaintiff has failed to satisfy me on the balance of probability that her account of the nature of the search carried out on her is correct. In so finding I do not find that the Plaintiff was in any way dishonest in her evidence but find that she has failed to discharge the evidential burden which rests upon her. To be searched at all must be distressing and in the particular circumstances of this case where a large number of persons were being searched even more so. The Plaintiff's distress must have been exacerbated by her awareness that her bra had become undone leading to a concern that when her upper garments were pulled out as described by the Garda witnesses her breast would be exposed. I should record that there is no suggestion that the Plaintiff was in possession of or had been using drugs. In consequence the Plaintiff's claim on each of the bases upon which it is pleaded must fail. In these circumstances I affirm the order of the learned Circuit Court Judge. With regard to the costs of this appeal I consider the failure of the Defendants to discover the information leading to the warrant and the warrant pursuant to which the search was affected as material and I will hear Counsel in relation to the costs of the appeal.

The Plenary Action

The relief claimed in the Plenary Summons is as follows:-

THE PLAINTIFF'S CLAIM is for

1. A Declaration that Section 26 of the Misuse of Drugs Act 1977 (as amended by Section 13 of the Misuse of Drugs Act 1984) is invalid having regard to the provisions of Article 40.1, Article 40.3.1, Article 40.3.2 and Article 40.4.1 of the Constitution of Ireland.
2. Such further or other Declaratory Order as this Honourable Court shall seem meet and just.
3. Damages
4. Costs.

The basis of the constitutional challenge is particularised in paragraph 8 of the Statement of Claim as follows:-

8. Section 26(2) of the Misuse of Drugs Act 1977 (as amended by Section 13 of the Misuse of Drugs Act 1984) is repugnant to Article 40 of the Constitution in that –
 - (a) Any person or persons found on the premises the subject of the search warrant may be searched. There is no requirement of reasonable suspicion that the person or persons found on the premises or lands be in possession of a controlled drug.
 - (b) A person or persons on the said premises may be arrested without warrant for the purpose of searching him or them. There is no requirement of reasonable suspicion that the person or persons arrested be in possession of a controlled drug.

- (c) The Section does not require the members of the Garda Síochána to have any suspicion at all prior to searching and arresting a person or persons on the premises the subject of the search warrant.
- (d) The Section gives the Garda Síochána a power of arbitrary arrest to carry out a search.
- (e) The Section enables the Garda Síochána to engage in conduct that violates a person's right to bodily integrity.
- (f) The Section fails to respect, or as far as practicable, to defend and vindicate the personal rights of the Plaintiff.
- (g) The Section allows an unjust attack on the personal rights of the Plaintiff in a situation where there is no suspicion or in the alternative no reasonable suspicion that she has committed or is about to commit an Offence under the Misuse of Drugs Acts.
- (h) The Section permits the arrest and search of a person or persons on premises merely by reason of the fact that they were on the premises the subject of a search warrant.

I am satisfied that the approach to be taken by the court in considering the powers conferred by the Misuse of Drugs Act 1977 section 26 as amended is that adopted by Morris J. in the High Court and approved of by the Supreme Court in *O'Callaghan v Ireland The Attorney General and the Director of Public Prosecutions* 1994 1 I.R. 555 in considering the power to search conferred upon the Gardai by section 23 of the 1977 Act. At p.562 Finlay C.J. said –

"Morris J. in rejecting the submissions made on behalf of the Plaintiff on the first point, concluded that the power to search on suspicion, based upon reasonable cause, could be construed as an extension of the ordinary power of arrest on suspicion of the commission of an offence and that the principle applicable to the constitutional validity of such an extension is that laid down by Kenny J. in Ryan v The Attorney General (1965) I.R. 294 where at p.312 he stated that

'The Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens, unless there is no reasonable proportion between the benefits which the legislation will confer on the citizen or a substantial body of them and the interference with the personal rights of the citizen'.

The court is satisfied that this is the correct test to apply and that it was correctly applied by the learned Judge. It confirms its conclusion that the potential damage to society from the use and distribution and therefore, from the possession of controlled drugs is so great and constitutes such a pernicious level that the legislature was clearly acting within a reasonable and proper discretion in making lawful such extension of the powers of arrest as might be found in the power to search contained in the section".

I should also record what Finlay J. said at p. 563 –

"The court has already laid down on more than one occasion, the principle that in testing the constitutional validity of any section the court must assume that persons given powers under and by virtue of it will exercise those powers in a constitutional manner. If any member of the Garda Síochána should in the purported exercise of the powers conferred on him by section 23 of the Act of 1977 expose any person to unnecessary harassment, distress or embarrassment, it would be an abuse of the powers and an unconstitutional violation of that person's rights for which that person would have the appropriate and correct remedies".

I do not see that Article 40.1 of the Constitution which requires all citizens to be held equal before the law has any relevance to the Plaintiff's claim. However Article 40.3.1 and 40.3.2 and Article 40.4.1 are relevant. Article 40.3.1 and 2 provide as follows –

(1) The State guarantees in its laws to respect and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen.

(2) The State shall in particular by its laws protect as best it may from unjust attack, and in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Article 40.4.1 provides as follows –

No citizen shall be deprived of his personal liberty save in accordance with law.

Insofar as it was argued on behalf of the Plaintiff that a power of arrest could only be exercised for the purpose of charging and bringing a person before the court this is clearly not the case. As a result of statutory intervention there are a number of Acts which confer an express power of arrest for the purposes of search. Indeed the Defendant has furnished instances of such a power arising under statutes other than that in issue here namely the Criminal Damage Act 1991 section 13, the Criminal Justice (Theft and Fraud Offences) Act 2001 section 48 and the Illegal Immigrants (Trafficking) Act 2000 section 7. I am satisfied that the Misuse of Drugs Act 1977 section 26 as amended by the Misuse of Drugs Act 1984 section 13 for the like reasons as held by the Supreme Court in *O'Callaghan v Ireland and Others* is constitutional. The interest of the common good in combating the availability of drugs justifies the creation of the power of arrest for the purposes of search created by section 26. The particular circumstances described in evidence by Detective Sergeant Corrigan and summarised above amply demonstrate a necessity for the powers to search premises and persons found therein where the necessary reasonable suspicion is established. The exercise of the powers in the present case clearly caused inconvenience to the patrons many of whom undoubtedly had not been in possession of a controlled drug. Their evening's entertainment was interrupted. They were exposed to the inconvenience of a search. However I am satisfied that the Oireachtas has maintained a reasonable proportionality between the evil which it seeks to prevent and the interference with the constitutional rights of the citizen.

Safeguard is provided for the citizen by the requirement that the warrant must be issued by a District Judge or a Peace Commissioner. Again in executing the warrant a member of the Garda Síochána must not expose any person to disproportionate unnecessary harassment, distress or embarrassment.

In the present case I am satisfied that the Garda Síochána exercised their powers in a constitutional manner. Women were searched in the manner in which I have found in the ladies' toilet. The searches themselves, on the evidence took perhaps two to three minutes. Because of the number of patrons on the premises the searches were conducted over a prolonged period perhaps 1½ hours.

This was inevitable having regard to the number of patrons on the premises and the number who could be accommodated in the women's toilet at any one time. Clearly greater privacy could have been afforded by taking one woman at a time into the women's toilet for searching but this would have extended the inconvenience to the patrons. In any event I am satisfied on the evidence that the opportunity of being searched within a cubicle within the toilet was available and offered and availed of on a number of occasions but that in general patrons were content to be searched in the main area of the women's toilet. I am satisfied that the manner in which the search was carried out did not impose unnecessary harassment, distress or embarrassment or indeed inconvenience. I am satisfied that the search exercise was a proportionate response to the position found in the premises by Detective Sergeant Corrigan on the three occasions on which he visited the premises and it was not suggested in the course of these proceedings that any other effective response which would lessen the distress, embarrassment or inconvenience was available to the Garda Sióchana. It was not suggested that the Garda Sióchana should stand idly by and allow the situation as described by Detective Sergeant Corrigan continue unhindered. I am satisfied that the Garda Sióchana exercised their statutory powers pursuant to the warrant in all the circumstances in a proportionate, reasonable, proper and constitutional manner.

I refuse the Plaintiff the declarations which she seeks.