THE COURT OF APPEAL

[27/19]

The President
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JOSEPH O'CONNOR

APPELLANT

JUDGMENT of the Court delivered on the 28th day of January 2020 by Birmingham P.

1. On 7th November 2018, following a trial, the appellant was convicted on four counts of knowingly having in his possession child pornography. Subsequently, on 15th February 2019, he was sentenced to a term of two years' imprisonment. The trial had commenced on 23rd October 2018, and ended in a conviction on 7th November 2018. It is worth noting that the said trial was a retrial, a jury having been discharged on a previous occasion.

Background

2. By way of background, it should be explained that the appellant, Mr. Joseph O'Connor, is a retired member of An Garda Síochána who served in the force for many years. In August 2011, an individual, Mr. Patrick Farrell, now deceased, came forward making allegations of sexual abuse, false imprisonment, and rape against Mr. O'Connor. These offences were alleged to have occurred on 28th and 29th July 2011 at the home of Mr. O'Connor. The complaint was by phone to then Detective Inspector Colm Fox, also now deceased and who had been promoted to the rank of Detective Superintendent prior to his death. The response of Mr. O'Connor to learning of the complaint was to go to a Garda station to provide a statement. He explained that he had consensual sex with Patrick Farrell, and that thereafter, Mr. Farrell stole his Garda ID card, handcuffs and a sum of money. The statements that Mr. Farrell provided to Gardaí contained a reference to the presence of child pornography on the computer of Mr. O'Connor. A search warrant was applied for and obtained by Detective Sergeant (now Detective Inspector) Anne Ellis. The application for the warrant came after discussions with her Supervisor, the late Detective Superintendent Colm Fox. In the course of a search of Mr. O'Connor's dwelling, a mobile phone and laptop were seized. Child pornography was discovered on the laptop.

3. The appellant was interviewed on 21st June 2012. He denied downloading or viewing child pornography. He said that hundreds of men had visited his home and that any of them could have used the laptop which was on the table. He added that Mr. Farrell had made up allegations against him and that he had, in fact, corrupted the computer in question on 30th July 2011.

4. By way of offering greater detail of the counts on the indictment, it should be noted that:

> Count 1 alleged the knowing possession of two images, one image of child-explicit sex and one image of child sexual exposure on a date unknown between 30th July 2011 and 2nd August 2011.
>
> Count 2 alleged the knowing possession of 56 duplicate images of the two images referred to in Count 1 on a date unknown between 30th July 2011 and 2nd August 2011.
>
> Count 3 alleged the knowing possession of 14 videos of child sex and one video of child exposure on a date unknown between 30th July 2011 and 2nd August 2011 (this referred to material found in the Recycle Bin of the laptop.
>
> Counts 4 and 5 allege the knowing possession of video images on a date unknown between 1st January 2010 and 2nd August 2011, these video images had been found in the 'Unallocated Files' on the laptop. These could only be accessed by using special forensic programmes.

The appellant was convicted by unanimous verdict of the jury in respect of four counts and he was acquitted in respect of Count 2.

5. The appellant raises four issues in his Notice of Appeal:

(i) That the judge erred in her rulings relating to an unavailable witness.

(ii) That the judge erred in relation to the search conducted by Gardaí.

(iii) That the judge erred in refusing an application for a direction which was made at the close of the prosecution case.

(iv) That the judge's charge to the jury contained errors."

Grounds 1 and 2: The Unavailability of Detective Superintendent Fox and the Validity of the Search

6. Grounds (i) and (ii) relating to the unavailable witness and the validity of the search are closely linked in that they both rely in part on the tragic death of Detective Superintendent Fox prior to the retrial in November 2018. As the parties dealt with these issues collectively in their respective submissions, we will follow suit in doing so. In essence both issues deal with the appropriateness and fairness of proceeding in the absence of Detective Superintendent Fox who had given evidence in the first trial and was unavailable at the second trial due to his untimely passing. Indeed, an application to the

effect that it would be unfair to proceed in Detective Superintendent Fox's absent was made at the start of the second trial.

7. It was submitted that the unfairness emerged not simply because of the unavailability of a significant witness, but that particular prejudice arose in circumstances where the witness had been cross-examined during the voir dire in the first trial and the jury were then discharged before documentation which had been disclosed after that initial cross-examination could be put to him. This disclosure came in the form of a report authored by Detective Superintendent Fox and dated 3rd August 2011 wherein he concluded that "there [was] no evidence of sexual assault, rape or false imprisonment" which was of some significance to the defence's case. It should also be noted that the decision to discharge the jury came from the trial judge herself on the basis that the jury had been absent for quite some time and that the case was not ready to proceed. No application was brought by the defence seeking to have the jury discharged on that or any other basis.

8. The additional issue which flowed from the unavailability of Detective Superintendent Fox was that in the course of the first trial, the appellant had sought to challenge the validity of the search warrant. It was contended that Detective Sergeant Ellis had no interest in investigating the allegations of rape, sexual assault and false imprisonment, and that the reference to these items was a "colourable device" designed to gain access to appellant's dwelling to investigate the allegations of child pornography. The late Detective Superintendent Fox had been the supervisor of Detective Sergeant Ellis and the warrant had been sought following discussions between the two. Indeed, it was in this context that that the voir dire of Detective Superintendent Fox had occurred.

9. The point raised about the unavailability of Detective Superintendent Fox arises in circumstances where the defence were anxious to run a line of argument suggesting that the Gardaí had no interest in investigating the alleged rape, false imprisonment, and sexual assault and that the warrant was obtained on a false basis. The defence sought to argue that the alleged rape, false imprisonment, and assault provided cover for the true intention of investigating the alleged possession of child pornography. The judge ruled on this aspect of the case in the following terms:

> "I fully accept that the issues which the defence raises now regarding the role of Detective Inspector Fox and their concern or suspicion that the warrant was obtained through unlawful means, is not something which they argue now that Detective Inspector Fox has tragically passed away. On reviewing the transcript of the trial in January 2018, it is clear that there was a full cross-examination by Mr. Carroll [Senior Counsel for the defence] of Detective Inspector Fox on the issues raised before this Court now, save of course, for the report which was disclosed after his cross-examination. The defence argue that the disclosure of this report strengthens their case, in particular, due to the sentence contained therein: '[t]here is no evidence of sexual abuse, rape or false imprisonment'. The defence have placed great weight upon the absence of Detective Inspector Fox as a witness and

the importance of his role, and in particular, the contents of the report disclosed, which they did not have the opportunity to previously put in cross-examination to him. While I appreciate their concerns in this regard, having had the opportunity to consider the entirety of report, I am completely satisfied that it was Detective Inspector Fox's critique or view of the evidence, as he understood it at that time, which post-dated the warrant and the search. He sets out in detail the reasons why he has come to the view '[t]here is no evidence of sexual abuse, rape or false imprisonment'. If this were to be taken in isolation, that might well be so, but when one reviews the contents of the totality of that report, it concludes that 'the main issue here would appear to be the alleged physical injuries caused during the consensual sex act and each other's claim of theft. It appears the physical injuries are a consequence of the sex acts. If this is accepted, I will endeavour to focus on and resolve the theft issues'. It is my view, having considered the report, that it does not advance the defendant's arguments relating to the warrant or the search or, more importantly, the motivation behind same.

The other matter that has to be considered is the role played by Detective Inspector Fox in the swearing [of] the information, the obtaining of the warrant and the role he played in supervising same. I am satisfied on the evidence received by Sergeant Ellis, an experienced and specialist member of the Child Protection and Assault Unit, that she was the appropriate party to swear the information and obtain the warrant. It is clear to me that having received the statement of complaint and the version of events offered by the defendant, that she had independently formed the view that the next step in the investigation process, that was both justified on the material received and appropriate in the foregoing circumstances, was to procure a warrant to search the defendant's home, where it was alleged the offences had occurred. I accept her evidence that the search warrant was obtained on foot of her sworn information to advance the investigation. I found her evidence to be credible and forthright.

The specific suggestion that the Gardaí sought to obtain a warrant to investigate child pornography images via a warrant purporting to investigate the primary allegations already cited, I do not find persuasive for the following reasons:

(i) There was a serious allegation made against a serving member of An Garda Síochána of sexual abuse, false imprisonment and rape.

(ii) Statements were taken from both parties which required further investigation, in particular, because the accused was a serving member of An Garda Síochána.

(iii) Information sworn contained a list of items all directly relevant to the statement of complaint of the alleged injured party, Mr. Farrell.

(iv) The belated inclusion of the terms 'mobile phone' and 'computer' do not support the view, in my opinion, that child porn images on the computer were to the fore of Sergeant Ellis's mind at that time, clearly, because she was adding them in while she was in Court before the information sworn. As well as the fact that both can be assessed to be factually relevant to the primary allegation made, rather, the linking of both the phone and the computer can be seen to be related to the means of communication used by the parties, O'Connor and Farrell, prior to meeting up, as well as Mr. O'Connor's acceptance that he took photos of Mr. Farrell on his phone on the night in question and these might need to be downloaded at a later stage. Sergeant Ellis said that at the time of the swearing of the information, her focus was to obtain the best evidence, as at that time, she did not believe that the two parties were consenting adults, and she had a duty to investigate the allegations made.

(v) The search log documented that the items sought were obtained and seized.

(vi) The whole thrust of the warrant specifically related to very specific allegations made by Mr. Farrell against Mr. O'Connor.

I am satisfied beyond reasonable doubt that the prosecution had a very specific allegation of sexual abuse, rape and false imprisonment made to them, for which they sought a warrant. This coincided with less specific allegations of child or teen images and sexual acts on the defendant's computer. Sergeant Ellis gave evidence that she was not persuaded by the allegations, having probed the matter during the statements being taken. She gave evidence that she had decided there were grounds for such a warrant. She was experienced in the field of child pornography and would have had the competency or the know-how to go about obtaining such a warrant. Whatever the reasons why a search warrant wasn't specifically sought at that time to include the investigation of child pornography, I am satisfied that the warrant sought was in pursuit of an allegation made and being investigated [regarding] Mr. Farrell and I do not accept that the report of 1st and 3rd August 2011 of Detective Inspector Fox is suggestive of any new issue which would cast doubt on his previous evidence and that of Sergeant Ellis. For what it is worth, I am satisfied that Sergeant Ellis made representations to Detective Fox regarding the warrant, which he agreed with, and she proceeded to carry out. The warrant sought is directly related to the allegations made by Mr. Farrell and is persuasive. To me, Sergeant Ellis's role regarding the warrant makes sense, as she has been involved in taking the statements, observing the demeanour of the witnesses, and her evidence was that she was of the view that she had enough to seek a warrant to investigate the primary, in time, allegations against Mr. O'Connor.

I am satisfied that the role played by the late Colm Fox was in truth and in fact no more than a supervisory role, but while it was entirely appropriate that Sergeant Ellis would discuss her view with him on the matter and take into account his views,

it is clear to me that she acted entirely appropriately in coming to the conclusion that a warrant was necessary, and in furtherance of same, she swore an information, as a result of which a warrant was granted and a lawful search took place.

For the reasons outlined, I am satisfied that the prosecution case, which I have referred to in terms of the evidence of Sergeant Ellis, and the other documents that have been handed into me and that I have referred to, has proven its case on this issue regarding the lawfulness and validity of the warrant and subsequent search. I am also satisfied that the District judge was satisfied upon the information that was sworn on oath before her by a member of An Garda Síochána, which was appropriate, and that there were reasonable grounds for suspecting what was alleged before her on the information on oath, and that a valid warrant was issued and a lawful search took place."

10. The prosecution has categorised the attempt to stop the trial because of the non-availability of Detective Superintendent Fox as opportunistic. In a situation where Detective Superintendent Fox had been a witness at the first trial and had been questioned by the defence in support of the argument that they were advancing, the reference to "opportunistic" may be somewhat harsh. We are, however, entirely satisfied that the judge was correct in reaching the view that there was no need to stop the trial. The "colourable device" argument was never a strong one and that the judge had little difficulty in rejecting it was entirely to be expected.

11. The late Detective Superintendent Fox was very much in the background of this investigation. He was not involved in the taking of any statement nor did he swear the information. He did not apply for the search warrant and he was not involved in the search. In essence, the defence contend that because Detective Superintendent Fox was unavailable, that they were inhibited in advancing the argument that they wished to advance. The fact is that the argument was all but unstatable, particularly where the witness in question would not seem to have had admissible evidence to offer in any event.

12. We are also of the view that the appellant's reliance on DPP v. JC [2017] 1 IR 417 is misplaced insofar as it requires an assessment of the conduct of senior officials. Such an assessment can only be embarked upon where the initial threshold of unlawfulness has been made out and the appellant has failed to do so. Again, we emphasise that this was not a case where this arose.

13. Accordingly, we are quite satisfied that the judge was correct to proceed with the trial and was fully justified in coming to the view that the application for the warrant was a valid one and that the search carried out on foot of it was lawful.

Grounds 3 and 4

The Direction Application

14. The direction application related to Counts 4 and 5, the material in the unallocated files section of the laptop, which it was accepted could only be accessed using special forensic programmes. It is of note that in contrast to the other counts on the indictment, the timeframe here was much wider, the counts laid possession as having been between 1st January 2010 and 2nd August 2011. The start date of January 2010 was set by reference to the appellant's contention that he had bought the computer, new, in January 2010. The issue was again brought into focus by a question posed by the Foreman of the jury as the judge finished her charge. The Foreman interjected "from my point of view, I'm just wondering if possessing an image and then deleting it and not knowing that you had it, is that still a criminal offence in your understanding of the law?". The evidence in relation to the unallocated clusters was that when material is deleted from a computer, while it is deleted on the register of the hard drive, it, nonetheless, remains present on the hard drive, albeit in the unallocated clusters section and remains there unless and until it is overwritten by other data. In this case, it had not been overwritten. The prosecution case was that that the appellant had possessed this material at some period between the dates referred to the charges and had, thereafter, deleted it. The question, therefore, for the jury was whether at some point within the timespan of the indictment the appellant had knowingly possessed the material in question.

15. Having heard oral argument on the issue, and in a situation where the Court was of the view that the point about Counts 4 and 5 on the indictment was the only point of any substance in the appeal, we indicated at the conclusion of the oral hearing that we would not commence work on preparation of a judgment for a period of two weeks, which was designed to allow both sides an opportunity to provide additional submissions specifically addressed to this issue. Both sides have taken advantage of this and the Court would express its appreciation of their efforts in that regard.

16. Insofar as the defence suggest that the material in question came from a browser and was then deleted automatically, it must be said that there is no evidence to support this. There was no evidence at trial as to where the material had come from, whether it was the result of Internet browsing, or had emanated from another device. In that connection, it is not without relevance that the pornographic movies found in the Recycle Bin would appear to have originated on another device and had not come from a browser. It is certainly true that at least at the level of theoretical possibility, the material relevant to Counts 4 and 5 could have been obtained without the user's knowledge and deleted without the user's knowledge. However, whether that was a reasonable possibility was properly a matter for the jury. If the matter was properly left for the consideration of the jury, it was open to them to attach significance to the fact that the evidence established that the appellant had accessed child pornographic material and had engaged in deletion activities.

17. It seems to the members of this Court that in those circumstances, the trial judge was correct in leaving matters to the consideration of the jury. It was for the jury to consider

whether there was a real possibility that the material had been on the appellant's computer without his knowledge and had been deleted to the unallocated clusters area without the knowledge of the appellant. It was for the jury to decide whether they had any reasonable doubt about that, or whether it was the case that insofar as it was suggested that there was a doubt, that any such doubt was fanciful. In fact, the outcome of this case showed the care with which the jury approached consideration of this. The fact that the jury acquitted on Count 2, presumably on the basis of a doubt as to whether the appellant would have been aware of the existence of duplicated images, is strongly suggestive of the fact that the jury was acutely conscious that the appellant had to have known that he was in possession of such material. Further evidence that the jury were focused on the question of knowledge is to be found in the intervention by the Jury Foreman as the trial judge finished her charge. Overall, it seems to us that in a situation where other pornography was found on the accessible area of the appellant's computer, and which had been deleted at a time when it seems only the appellant was using the computer, provided a rational basis for concluding that the material in the unallocated clusters had been present on the computer at a time when the computer was under the control of the appellant. In these circumstances, we have not been persuaded to uphold this ground of appeal.

The Judge's Charge

18. The criticism of the judge's charge is not so much to the charge itself as to how she responded to the intervention by the Jury Foreman. To put this in context, it is helpful to consider the background to the intervention. The judge completed her initial charge, at which point defence counsel indicated that he had just one requisition which he was making out of an abundance of caution. He said that in respect of Counts 4 and 5, the Court had fairly summarised what the issues were and what the evidence was and then quoted the Court as having said that what the jury had to be satisfied about beyond reasonable doubt in respect of Counts 4 and 5 is that from the date in January 2010, when the computer was purchased, to the date when it was seized, that during those dates, the information contained in the unallocated clusters was present on the computer at some stage. He said that that was undoubtedly part of what the jury had to be satisfied oF, but they also had to be satisfied that Mr. O'Connor knowingly possessed the material, causing the judge to interject to say "oh yes, of course". To that interjection, counsel said "so, I'm sure they probably would get that from the overall charge". The judge indicated that she had no problem saying that to the jury. She did so, and then asked the jury to retire, which triggered the intervention by the Jury Foreman. To that, the judge responded:

> "[w]hat I'll have to do at this stage is, I'll just have to repeat what it is, and then when I give you that law, it's a matter for you to apply to the facts, okay? So I propose to re-read to the jury what I said to them in relation to possession and knowledge of it. Okay, so I said 'what you have to decide is, on the evidence you have heard, are you satisfied that the accused, Mr. O'Connor, knowingly had possession of those images in the circumstances set out in each individual count? The term 'knowingly' in its ordinary meaning, means that the accused had

knowledge of or was aware of the fact that he possessed those images. And then, so you're given a timeframe in relation to each count, that is what you have to be concerned with. So, what is possession? This can be the actual physical possession of the images, in that he had control of or an ability to do with them as he wished. Possession means that he was in actual possession of the images or was exercising control over them and that he knew that the images were, consisted of child pornography material. There has to be a mental element in the possession, that is that he had control over them, he had knowledge of them'. And I said to you at the end 'the offence is one of knowingly having possession. The question for you is whether you accept that the accused knowingly had possession of the child pornography images'. And to come to that answer, you take all of the evidence you have been given and you assess it, you go through it, and you answer that question as you will, having considered the evidence, alright? Thanks, okay. So, I'll ask you to retire to your jury room now, thanks very much."

19. When the jury retired, counsel for the prosecution intervened to say that she was not sure what the Jury Foreman's questions related to, but it seemed that the position is that in respect of the unallocated material, the accused had possessed them at a point before they were deleted. The judge's response was to say that she thought she had dealt with that in detail.

20. On behalf of the appellant, it is said that this was a complex, and in some respects, novel case. The appellant has referred to the case of R. v. Leonard [2002] 2 All ER 936, which again was a case that concerned images that had been deleted from a computer and could not be retrieved by anyone who lacked the specialist computer skills or did not have specialist software. As the judge in that case came to the end of her charge, the jury passed her a question by way of a note. It requested "can you guide us as to the law regarding possession and retrievability? If the image is stored on a computer, but the user cannot actually retrieve it, could the image in law be said to be in a person's possession?" The Court of Appeal agreed with the defence counsel that the specific question asked should have been answered 'No' and that the judge's approach of recharging the jury in similar terms to what she had already said was not adequate.

21. It is said that the situation in R v. Leonard is closely analogous to what occurred here. The Director, for her part, draws attention to what the Court of Appeal in Leonard had to say at para. 25 where the Court commented:

> "[b]efore leaving the case, we shall underline that it seems to us that the indictment in cases of this kind. and we here make a general observation which may or may not apply to the specific facts of this case. In relation to the issues raised by the decision in R v. Porter, any problems can be resolved if the indictment addresses the deletion issue by alleging possession of the indecent image over a period covering either the date of the deletion (if it can be established), or between the dates when the defendant assumed control of the computer and the date when the images were found. If that were done, it would not be the end of the case as it

would be open to the defendant to advance any of the statutory defences provided."

22. Reading the judge's charge and recharge as a whole, as well as her response to the intervention, it seems to us that the matter was really put beyond doubt. The issue the jury had to consider was whether they could be satisfied beyond reasonable doubt that at a point between acquisition of the computer by the accused and the seizure of the computer in the course of the Garda search, that the accused had possession, knowingly, of the images. It must have been clear to all that this was the issue.

23. For the reasons we have discussed earlier, it was a matter for consideration by the jury and it was a matter on which the jury was ultimately satisfied.

24. Accordingly, we reject all grounds of appeal and affirm the conviction and dismiss the appeal.