



THE COURT OF APPEAL

UNAPPROVED

NO REDACTION NEEDED

[77/20]

Neutral Citation: [2021] IECA 200

The President

McCarthy J

Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JOSEPH BEHAN

APPELLANT

**JUDGMENT of the Court delivered (electronically) on the 16th day of July 2021 by
Birmingham P.**

1. The appellant has appealed against his conviction on 28th February 2020 in the Dublin Circuit Criminal Court following a trial for offences involving reckless discharge of a firearm, possession of a firearm with intent to commit an indictable offence, robbery, possession of ammunition with intent to commit an indictable offence and assault causing serious harm. On 2nd April 2020, the appellant was sentenced to a term of 15 years imprisonment in respect of the offence of assault causing serious harm and lesser concurrent sentences were imposed in respect of the other offences.

Background

2. The background to the trial is to be found in events that occurred in or around midnight on New Year's Eve, going into New Year's Day 2019, at Mizzoni's Pizzeria located at Edenmore Shopping Centre on Dublin's north side. At the time of the incident, the staff in the pizzeria were toasting the New Year with champagne. At approximately 12.20am, a man whose face was covered arrived on a bicycle outside the takeaway. The man produced a gun and entered the premises. He threw a white plastic bag over the counter and demanded money. A staff member who had been standing behind the counter, Mr. Ionut Datcu, responded by throwing a champagne bottle and also a bottle of sauce at the intruder. The intruder began to retreat, and as he did so, turned and fired a number of shots into the takeaway. The intruder then got back on the bicycle and fled the scene.

3. Two members of staff were hit, Mr. Datcu, and another staff member who had been standing in the kitchen area, Mr. Vasile Bitica. Other members of staff called Gardaí and the ambulance service. Remarkably, one of the ambulance team that responded, Mr. Clinton Jacobs, was an advanced paramedic who had served with the US Army and had a particular expertise and experience in treating gunshot wounds. Of the two staff members, Mr. Jacobs assessed that Mr. Datcu was the more seriously injured. He noted that Mr. Datcu had a "through and through" bullet wound to the chest and was at serious risk of death if there was not an immediate intervention. Mr. Datcu was placed on an IV drip and injected in an effort to stop the bleeding before being taken to the nearby Beaumont Hospital where he was operated on immediately. He eventually made a full recovery.

4. Gardaí who arrived at the scene quickly gained access to the security room at Edenmore Shopping Centre where they viewed CCTV which had footage of the arrival and departure of the intruder from the pizzeria. One CCTV camera covered the front of 48 Edenmore Park, a domestic dwelling about 200 metres from the shopping centre. This was

the home of the appellant and also of his brother, Anthony Behan. Mr. Anthony Behan stood trial alongside his brother, charged with an offence under s. 7 of the Criminal Law Act 1997 for impeding the prosecution of the appellant by hiding the bicycle used in the attempted robbery. He has appealed against both conviction and sentence. While, at one stage, it was envisaged that the appeals of both brothers might be dealt with together, Mr. Anthony Behan sought to adjourn his appeal and the Court acceded to that request. The CCTV footage showed that shortly after midnight, a person had left the house at 48 Edenmore Park and had walked around the corner. A person then returned to the house from that direction on a bicycle and re-entered the dwelling. Shortly after, a person emerged and cycled a bicycle towards Edenmore Shopping Centre and was shown on CCTV entering Mizzoni's Pizzeria.

5. After the attempted robbery, during the course of which shots had been discharged, the intruder was shown cycling back to 48 Edenmore Park and entering that dwelling. A little later, a person emerged and cycled the bicycle away. At trial, the prosecution case was that this person was Mr. Anthony Behan disposing of the bicycle. The bicycle, which had been taken from a neighbour's garden that night, was later recovered in a nearby park.

6. Gardaí put the house where the activity had taken place under surveillance. The appellant left the house on two occasions and had interaction with Gardaí on the street. In particular, the appellant was stopped on the street just before 3.00am by members of the Emergency Response Unit, at which point he was arrested by a local Garda, Garda Fay.

7. Prior to the arrest of the appellant, Gardaí searched 48 Edenmore Park on foot of an arrest warrant which had been issued pursuant to s. 29 of the Offences Against the State Act 1939 (as amended). In the course of the search, a glove was found on the upstairs landing in the dwelling. That glove was later examined and it was found to have firearms residue on it and was also found to have a major DNA profile, which, on analysis, matched the DNA of the appellant. The lawfulness of the search was an issue both at trial and on this appeal. The

warrant had been issued in circumstances of urgency by Detective Superintendent Paul Scott. That circumstances of urgency had prevailed was not the subject of controversy, but what was in issue was whether a warrant could be validly issued by Detective Superintendent Paul Scott in circumstances where he was serving as a Detective Superintendent attached to the Northern Division of the Dublin Metropolitan region. The location of the offence and the search in Edenmore formed part of the Coolock District, one of four districts within the Northern Region of the Dublin Metropolitan region.

8. After the pizzeria incident, contact was made with Superintendent Donnelly, the District Officer, based at Coolock Garda Station. As District Officer, Superintendent Donnelly would be in charge of the investigation. He considered the question of searching 48 Edenmore Park, but as the District Officer in charge of the investigation, he was not in a position to issue a warrant.

9. The statutory constraint on Superintendent Donnelly issuing a warrant is provided for in s. 29 of the Offences Against the State Act 1939, as amended by the Criminal Justice (Search Warrants) Act 2012. The section, so far as material, provides as follows:

“(2) If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.

(3) Subject to subsections (4) and (5), if a member of the Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member

of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.

(4) A member of the Garda Síochána not below the rank of superintendant [*sic*] shall not issue a search warrant under this section unless he or she is satisfied—

(a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and

(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.

(5) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under this section only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought.”

10. Superintendent Donnelly rang Detective Superintendent Paul Scott, the divisional Detective Superintendent based at Ballymun Garda station

The warrant

11. In effect, the issue at trial and now on this appeal is whether Detective Superintendent Scott was independent of the investigation. Having regard to the terms of the statute, only if he was independent of the investigation could he validly issue a warrant. When challenged on this issue in the course of the trial, Superintendent Donnelly responded as follows:

“A. My concern at the time, Judge, was the sheer urgency of this. I contacted Detective Superintendent Scott because he was available to me insofar as I had his number to hand. At that time, too, he was not involved in the investigation. He had no prior knowledge of it I was the first person to phone him and appraise him of the situation and request him to attend with a view to securing the evidence.

Q. Yes?

A. I accept the point that counsel is making, that there are a number of other superintendents in the Dublin region, but Detective Superintendent Scott at this time had no involvement in the investigation. It was urgent; I was concerned; there were firearms used in the incident; there was a lot of movement in the vicinity of the house that the suspects returned to and I was extremely concerned, and that was my concern.

Q. So, you knew that Detective Superintendent Scott would be available to you because that was his job, to be available to you; isn't that right?

A. I -- a situation could have arisen where I phoned Detective Superintendent Scott and I got no answer from his phone, and at that stage, I would have moved onto another superintendent, perhaps Superintendent O'Connor [then District Officer for Raheny] or perhaps Superintendent Twomey [District Officer for Balbriggan].

Q. Well -- or Daly [District Officer for Ballymun]?”

12. The case on behalf of the appellant is that Detective Superintendent Scott was not the appropriate person to be contacted. It is pointed out that there are 29 district superintendents in the Dublin region and there are also a significant number of other superintendents attached to specialist units who are based in the Dublin region. The case is made that Detective

Superintendent Scott had a managerial or supervisory role in relation to serious criminal investigations across the division. In effect, the case was made that Detective Superintendent Scott was part of the chain of command (our phrase).

13. Upon receiving the phone call at his home, Detective Superintendent Scott went to the crime scene where he met with Superintendent Donnelly who briefed him on what had happened. Detective Superintendent Scott viewed the CCTV footage on the shopping centre's security system and he then went to Coolock Garda station where he issued the warrant.

14. The appellant attaches considerable significance to the role played by Detective Superintendent Scott thereafter. Having signed the warrant, he did not depart the scene. Rather, he took a number of significant decisions – specifically, being of the view that best practice would require that an arrest should not be carried out by an armed member of An Garda Síochána. He identified Garda Fay as someone who might perform this role and asked if he would carry out the arrest. Garda Fay said that he would and Detective Superintendent Scott then instructed him on the wording that should be used during the course of the arrest. Following the arrest, when Mr. Joseph Behan was brought to Coolock Garda station, Detective Superintendent Scott nominated a member based in Raheny Garda station but who was present at the time, Sergeant Ray Byrne, to carry out firearms residue testing. During the course of cross-examination, Detective Superintendent Scott explained that as a Detective Superintendent for that division, that if there was a serious crime, he would certainly be notified about it. It did not mean he would attend the scene; it would depend on the circumstances of the individual case. There were a number of different possible roles. He could be investigating or he could have oversight of it, but it would generally be oversight. He explained that oversight meant that one would involve oneself in the overall management of the investigation to ensure sure that it was on track and that things that should be done are being done as well as possible.

15. In addressing the arguments that have been raised, this Court would make some preliminary observations of a general nature. The general expectation is that warrants would be sought from and issued by judges of the District Court. It is only in circumstances of urgency where it is not practical to apply to the District Court that the question of resorting to the alternative and seeking a warrant from a Garda officer arises. In this case, there is a broad acceptance, and properly so, in our view, of the fact that this was an occasion of urgency, and thus, it was a proper one in which to seek a warrant from a Garda officer. In our view, where such a situation arises, the officer to be approached should be one who would not be expected to have an involvement in the investigation at any stage. In saying that, we recognise that when it is necessary to make an application as a matter of urgency, that it may be that the full extent of the investigation that will follow will not be apparent, nor will it be clear what routes the investigation may take.

16. To take an unlikely example, one could imagine a situation where Gardaí required a warrant as a matter of urgency in order to avoid a situation where a consignment of drugs was moved or disposed of, and contact was made with a superintendent normally working in the area of cybercrime and who happened to live conveniently close by, but as it happened, well into the investigation – perhaps days or weeks or months later – it emerged unexpectedly that there was a cybercrime dimension. Such situations may arise and may not be capable of being avoided. However, we think that where an officer is somebody who is likely to become involved in the investigation at a later stage, that the Gardaí may be wiser to look elsewhere. Such a course of action will enhance confidence that a fresh mind has been brought to bear.

17. In the present case, it is the situation that Detective Superintendent Scott knew nothing of events at Edenmore Shopping Centre until he was contacted by phone by Superintendent Donnelly. We do not think that this contact is open to the interpretation that he was, in effect, inviting Detective Superintendent Scott to become involved in the

investigation. His reason for contacting Detective Superintendent Scott was that he needed a Superintendent who was independent of the investigation and he felt that, at that stage, Detective Superintendent Scott fell into that category. For our part, we are not overly influenced by the fact that at a point in time after he had issued the warrant, that Detective Superintendent Scott became actively involved in the investigation, in the sense of nominating the arresting member and the member to take forensic samples. It is quite likely that any investigator worth his salt, called from his bed in the early hours of New Year's Day, would, having decided to issue a warrant and with an initial role at an end, have decided to lend a hand.

18. Insofar as Detective Superintendent Scott's subsequent role has any significance, what it does show is that he was close to the team of investigators, and the expectation that he was someone who was likely to become involved was one that was well-founded. However, that being said, there can be no doubt that when initially contacted by Superintendent Donnelly, that Detective Superintendent Scott knew nothing about the incident. Having been contacted, he did not depend on what others would tell him, but made his own way to the crime scene to independently view the CCTV footage. The case is to be contrasted with some others where the decision whether to issue a warrant would depend on an assessment of intelligence being communicated by others. Here, Detective Superintendent Scott, having been contacted, was in a position to make an assessment of the case for a warrant without reference to any other investigator. He was in a position to make a totally independent assessment of the case for the warrant based on the CCTV footage.

19. In the circumstances, we are not prepared to uphold this ground of appeal.

20. Had the trial judge been persuaded that Detective Superintendent Scott was not independent, he would still have had to consider whether the evidence should be excluded, or whether, in the circumstances, it should be admitted. It does not seem to us that it could be

said that the search of the home of Mr. Behan on foot of the s. 29 warrant involved a conscious and deliberate violation of his rights. Superintendent Donnelly was conscious of the fact that as District Officer in charge of the investigation, and by virtue of that position, , he could not consider the question of a warrant and he required that the question of issuing a warrant should be considered by an officer independent of the investigation. He believed that Detective Superintendent Scott fell into that category. Even if it was to be held that he was wrong in that regard, it was at most a mistake in the interpretation of the law. If it was a mistake, it was not a mistake that had any practical consequences. As the defence was at pains to point out at trial, there were any number of other superintendents who could have been called on to give consideration to the matter, including several within the division who presumably would have been readily accessible and in a position to come and view the footage *in situ* and make an independent assessment.

21. Unlike some other cases where an assessment is required of the intelligence available to the investigation team and a balancing of the rights of the State and the investigation against the rights of the individuals, here the decision to be made was a binary one. Whether the Superintendent called on to make a decision was from the same division or from the other side of the city, the CCTV footage to be viewed would remain the same. No injustice was done by reason of the fact that it was Detective Superintendent Scott who viewed the footage, rather than any other officer of An Garda Síochána.

CCTV footage

22. While the issue of the identity of the senior officer was the primary issue at trial and certainly on appeal, there was also an issue raised in relation to the admission into evidence of CCTV footage from Edenmore Shopping Centre. In that regard, the appellant submitted that the provenance of the relevant CCTV footage had not been proved, in that the person

who had granted physical access to Gardaí was not called as a witness. There was evidence that Gardaí had sought and obtained the permission of the owner of the shopping centre to access the footage, but it is said that there was also a need to call the person who was in direct control. This was very much a secondary point, as evidenced by the fact that counsel for the appellant was content to rest in respect of this aspect on his written submissions, and instead to focus his oral presentation on the point in relation to the identity of the Detective Superintendent who issued the warrant, a point referred to in the course of the appeal by way of shorthand as ‘the *Damache* point’.

23. It appears that the individual who provided access to the CCTV footage for Gardaí was a Mr. Nias, a tenant in the shopping centre, who was also a key-holder, available in the event that an emergency took place in the middle of the night.

24. The other evidence on the topic came from the owner and managing director of the shopping centre who gave evidence of giving permission to Gardaí to download the CCTV footage on the morning following the incident. The owner explained that the CCTV system was a brand new system that they had installed and was the latest technology.

25. In essence, what seems to have occurred is that Mr. Nias allowed Gardaí into the CCTV room in the early hours of the morning. A number of Gardaí viewed footage at that point but nothing was downloaded by them. However, there was evidence of what they observed and evidence that the same footage was downloaded the following day.

26. In the circumstances, this Court is of the view that there was no substantial basis available for a challenge to the admission of the CCTV footage and we are quite satisfied that the trial judge was correct to admit the footage. Accordingly, this ground of appeal is also dismissed.

Conclusion

27. In summary, we have not been persuaded to uphold any ground of appeal and we will dismiss the appeal against conviction.