THE COURT OF APPEAL

APPROVED

Court of Appeal Record No. 2021/35
Neutral Citation Number [2022] IECA 334

Birmingham P

McCarthy J

Kennedy J

IN THE MATTER OF

SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

BETWEEN/

DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

-AND-

MICHAEL MCDERMOTT

RESPONDENT

JUDGMENT of Mr Justice McCarthy delivered on the 5th day of April 2022

1. This is a consultative case stated by His Honour Judge Nolan, pursuant to section 16 of the Courts of Justice Act 1947. In particular, he has sought from this Court the determination of certain questions of law pertaining to the Criminal Justice Acts of 1994 and 2006. Certain objections have been taken to the entertainment of the case by this Court, on procedural grounds, on grounds of supposed delay in advancing it and to the effect that the questions of law raised by him are now moot. I do not think that any of those

procedural objections are well-founded and will address them in due course turning thereafter to the substantive aspects.

2. On the 29th of January 2016 officers of An Garda Síochána, led by Sergeant Hugh McEnerney, pursuant to warrant issued under the Misuse of Drugs Acts 1977-1984, searched the respondent's home at 41 The Elms, Newbridge, County Kildare. During the course of the search cash in the amount of €11,505 was found together with a number of other items including a "*tick list*" of monies owed for drug transactions and a white powder which subsequently transpired on analysis by the Forensic Science Laboratory to be Benzocaine which is a mixing agent used when preparing large quantities of cocaine for resale. It appears that the respondent was regarded by the Gardaí as a key figure in the supply of cannabis and cocaine in the south inner city. When shown the items seized he said that the Benzocaine was a supplement which he took whilst training in a gym and he claimed ownership of the cash asserting that he had it as a result of buying and selling cars. The cash was seized in the course of the search pursuant to section 7 of the Criminal Justice Act 2006 and placed by Sergeant McEnerney in a safe kept by a Superintendent at Pearse Street Garda Station.

3. Sergeant McEnerney conducted investigations subsequently and ascertained from the Revenue Commissioners that the respondent had not been in paid employment since 2007 and from the Department of Social Protection that the respondent had not claimed Social Welfare benefits since April 2014, although his partner received €540 per month Child Benefit. He further ascertained that the respondent was the owner of a property in County Kildare, which he had purchased in 2012, having previously purchased a property in County Carlow which it was conceived may have been sold in 2016. The respondent had informed Sergeant McEnerney, in the course of the search, that he rented his home and paid the rent in cash. He was also the owner of a motorcar valued at €25,000. He had

numerous previous convictions and association with persons with convictions, including convictions under the Misuse of Drugs Acts, and extending, in one case, to false imprisonment and in another to unauthorised possession of ammunition and firearms. It appears clear, accordingly, to put the matter no further, on that uncontested evidence, that there was a rational basis upon which a judge could conclude that the sum in question was the proceeds of crime.

4. Of course, at common law a garda is entitled to seize items of evidential value in the course of a lawful search, but in any event by statute, as here, and in particular pursuant to section 7 of the Criminal Justice Act 2006, he was entitled to do so. Insofar as it is material that section is as follows: -

> "*7.— (1) Where a member of the Garda Síochána who is in—*
>
> *…*
>
> *(b) [a] […place] under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited or permitted to be,*
>
> *finds or comes into possession of anything, and he or she has reasonable grounds for believing that it is evidence of, or relating to, the commission of an arrestable offence, he or she may seize and retain the thing for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act 1897 shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.*"

The relevant provision of the Police Property Act 1897 is as follows (insofar as relevant): -

"*1(1) Where any property has come into the possession of the police in connection with any criminal charge or under section 66 of the Metropolitan Police Act, 1839, s. 48 of the Act of the session and third years of her present Majesty, Chapter 94 (Local) for regulating the police in the City of London, section 103 of the Larceny Act, 1861 or section 34 of the Pawnbroker's Act, 1872, a court of summary jurisdiction may, on application, either by an officer of police or by a claimant of the property make an order for the delivery of the property to the person appearing to the Magistrate or Court to be the owner thereof, or if the owner cannot be ascertained, make such order with respect to the property as the Magistrate or Court may seem fit.*"

5. It will be seen accordingly that the 1897 Act affords jurisdiction to the District Court (as it now is) to make orders disposing of property which comes into the possession of An Garda Síochána.

6. On the 14th of July 2016 Sergeant McEnerney seized or caused to be seized the cash then kept in the Superintendent's safe at Pearse Street pursuant to the provisions of section 38 of the Criminal Justice Act 1994. The result of the analysis of the white substance seized in the course of the search was that it was not a controlled drug and a prosecution accordingly was not pursued against the respondent. The cash had been retained as potential real evidence in any prosecution, as the Gardaí were obliged to do. Section 38 of the 1994 Act as amended by section 20 of the Proceeds of Crime (Amendment) Act 2005, insofar as it is material, is as follows: -

"*(1A) A member of the Garda Síochána or an officer of the Revenue Commissioners may seize and in accordance with this section detain any cash*

(including cash found during a search under subsection 1) (the latter is not relevant here) *if* –

(a) its amount is not less than the prescribed sum [the sum here is not less than such sum], and

(b) he or she has reasonable grounds for suspecting that it directly or indirectly represents the proceeds of crime or is intended by any person for use in any criminal conduct."

7. It is not contended that the officer in question did not have reasonable grounds for suspecting that the sum in question represented the proceeds of crime. When seizure occurs the sum in question may not be detained for more than 48 hours except by order of the District Court. Such an order, or subsequent orders, permitting continued retention of the funds were made here. The sum was ultimately lodged to a bank account, where it remains. A motion was issued in the Circuit Court seeking an order pursuant to section 39 of the 1994 Act to forfeit the cash in question. That section is not relevant in the present context.

8. An issue was raised about the delay in making the application in the Circuit Court, but that point was effectively abandoned. The real procedural objection is that the Circuit Court judge had actually decided the substantive issue so that he could not seek the opinion of this Court. It was and is so submitted that this is clear from the 1947 Act: -

"*16.—A Circuit Judge may, if an application in that behalf is made by any party to any matter (other than a re-hearing, under section 196 of the Income Tax Act, 1918, of any such appeal as is referred to in the said section) pending before him, refer, on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the*

determination of the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of such case stated."

9. Three issues were raised by way of objection to the substantive application itself; it was submitted that there was no lawful basis for what was characterised as a second seizure of the funds (that is to say, the seizure under the 1994 Act made from the Superintendent's safe on the 14th of July 2016), that the Dublin Circuit Court did not have jurisdiction on the premise that the only lawful seizure which could be in issue was that effected during the search itself, and that, in any event, the effect of section 7(1) of the 1994 Act was to exclude any process for dealing with the sum other than pursuant to the Police Property Act 1897.

10. At the request of the applicants, the judge adjourned pronouncement of his judgment; the implication of that request was that it was for the purpose of affording the applicant an opportunity to give consideration to an application to him to state a case under the 1947 Act. The respondent objected to this course on the basis that the judge had reached a conclusion. It is however expressly stated in the case itself by His Honour Judge Nolan that "*the matter is still **pending** before me and I have adjourned pronouncement of my judgment pending the determination of the case stated*" [my emphasis]. I think the exchange should be set out in full in the light of the procedural issue, as follows: -

"*JUDGE: And it seems to me that the proper procedure envisaged by section 7, the power that was used to seize the cash was disposal by a hearing I presume in the District Court as set out in this Police Property application. Further, it seems to me that obviously the State's case in relation to the seizure of the cash pursuant to section 38 was from the safe in Pearse Street. The custodian of the safe, and the owner of the safe, and the owner of the money at the time was the man who had*

charged: the superintendent. And I don't think it's a great point by Mr Kelly, that he had to be named as a respondent; it's a subsidiary point. I3ut, I think I will decline to make an order pursuant as asked by the State.

MS O'NEILL: Yes, Judge, I wonder if the Court would reserve making the final order and put it back for mention early in January, there's very serious ramifications in relation to this, and I just wish to get instructions as to whether the Court might be asked to state a case –

JUDGE: I would –

MS O'NEILL: -- and that's the circumstance.

JUDGE: I will, yes.

MR KELLY: Judge, I don't know if there's any –

JUDGE: Well, there is a power to state a case from this Court.

MR KELLY: There is, Judge, but my understanding is that, that's only a consultative case, and I don't think that it's one -- I don't think there is a –

JUDGE: Well, if it is a consultative case –

MR KELLY: May it please the Court."

11. In any event the case was stated by the Circuit Court judge on the 3rd of July 2020. The facts as found by the judge are as follows: -

a) on the 29th of January 2016, the family home of the respondent at 41 The Elms, Newbridge, County Kildare was searched on foot of a search warrant issued pursuant to section 26 of the Misuse of Drugs Acts, 1977-1984;

b) during that search, a number of items (including cash) were found and seized as evidence in a criminal investigation pursuant to section 7 of the Criminal Justice Act, 2006 ("the 2006 Act");

c) the applicant directed no prosecution;

d) on the 14th July 2016 Detective Sergeant Hugh McEnerney formed the belief that the cash represented directly or indirectly the proceeds of drug trafficking and he seized the cash from the Superintendent from Pearse Street Garda Station pursuant to section 38 of the 1984 Act.

The case further states that: -

"*6. The applicant argued that it was open to her to seek the forfeiture of the cash pursuant to s. 39 of the 1994 Act. The respondent argued that once the cash had been seized pursuant to s. 7 of the 2006 Act, that cash could only be dealt with by way of an application under the Police Property Act, 1897 as amended.*

7. The matter is still ***pending*** *before me and I have adjourned pronouncement of my judgment pending the determination of this case stated*." [my emphasis]

A number of questions of law were asked by the Circuit Court judge accordingly and these are as follows: -

"*7. 1. If cash had been seized pursuant to s. 7 of the Criminal Justice Act, 2006 can it only (sic) be dealt with pursuant to the Police Property Act, 1896 (sic)?*

If the answer to number 1 is no –

2. Is it open to Gardaí to seize it subsequently pursuant to s. 38 of the Criminal Justice Act, 1994?"

A further paragraph appears in what was characterised as the draft (*sic*) case prepared by the applicant in the following terms: -

"*Was I correct in my* ***finding*** *that the word '****shall****' in s. 7 of the Criminal Justice Act, 2006 is mandatory, and that cash seized pursuant to that statutory provision must, where no criminal prosecution arises, be dealt with in accordance with the Police Property Act, 1897.*" [my emphasis]

12. It is not in debate but that section 16 of the 1947 Act contemplates a determination of a question of law by the Court of Appeal before judgment is given by the Circuit Court judge – a determination should or will be relied upon by the judge to assist him in reaching a decision; the respondent argues that contrary to what the judge says the proceedings were concluded by judgment and are accordingly not pending before him and, if he is correct, then there was no jurisdiction to state a case. This is also the "*mootness*" point but that amounts to the same thing. The matter was adjourned to the 20th of January 2020 and on at least one further occasion to the 27th of February 2020. The objection to stating the case, this Court was informed, was repeated on the 20th of January, the 27th of February or both.

13. The judge was expressly asked to refrain from making final orders; this was obviously to enable the Director to obtain instructions as to whether she would apply to him to state a case. In those circumstances it must follow that in truth he had not ultimately reached a decision, whatever views he may have expressed in the course of the hearing on the 18th of December 2019; this is to say nothing as to the terms of the case – we do not doubt accuracy of what Judge Nolan has expressly said. In any event in the course of an exchange lasting no more than minutes a judge is entitled, certainly when the hearing is a continuum, as it was here, before he even left the bench, to substitute one view for another, which, in fact, we do not think was truly the case; there is no reality in the proposition that he finally decided the matter or was in any sense bound by his brief remarks. I am accordingly of the view that the Circuit Court judge was properly entitled to state this case under the 1947 Act so that in due course he has the benefit of this Court's view of the law when deciding it in substance.

14. Did the seizure within the meaning of section 38 occur when Sergeant McEnerney caused the money to be taken from the Superintendent's safe at Pearse Street on the 14th of July 2016 or was it the seizure which occurred in the course of, or in the immediate aftermath of, the search? The latter is the respondent's contention. The money was retained, obviously, as something of evidential value in the event that a prosecution was initiated. Mr Kelly says that when the decision was made not to prosecute the money ought to have been returned to his client because it could not then be seized under the 1994 Act. No one questions the fact that the Gardaí had a duty to return the money to the respondent after a decision was made not to prosecute him subject to any other power which might have permitted them to seize or retain it. Sergeant McEnerney acted under the power conferred by section 38 of the 1994 Act.

15. This issue has been dealt with by the High Court in *Kelly v Dunne and The Commissioner of an Garda Síochána* (unreported High Court 4th of March 2011) which was a decision of O'Keeffe J. There, cash was seized pursuant to section 9 of the Criminal Law Act 1976. That provision is in the same terms as the 2006 Act (so far as material here). This occurred on the 29th of May 1997; it seems proper to infer that a prosecution was contemplated but in any event the Director of Public Prosecutions made a decision not to prosecute. A seizure under section 38 then took place even though the cash was in garda custody. Since it imposes an obligation (in effect) to apply to the District Court for orders affording the Gardaí an entitlement to retain any property seized as the proceeds of crime within 48 hours, the issue of what was or was not a seizure for the purpose of the 1994 Act arose. It was there submitted that there was no power pursuant to section 38 of the 1994 Act enabling a member of An Garda Síochána to seize cash in the possession of another member originally taken earlier under another statute. It was held by O'Keeffe J that it was lawful for a member of the Gardaí, acting pursuant to the 1994 Act, to seize cash held by

another member seized originally under section 9 of the 1976 Act. O'Keeffe J adopted the reasoning of the High Court of England and Wales in *Chief Constable of Merseyside Police v Hickman and others* [2006] EWHC 451 where, on the basis of what he obviously took to be a similar provision to section 38 of the Irish act (section 294 of their Proceeds of Crime Act 2002) it was held that cash already seized could be subsequently seized (again) – the police were not restricted to the user of one statutory provision to the exclusion of any other.

16. In *Kelly*, O'Keeffe J was dealing with pertained to section 9 of the Criminal Law Act 1976 and not section 7 of the Criminal Justice Act 2006, so far as what I might call the original seizure was concerned. Of course, what makes it potentially relevant is the reasoning, and counsel for the respondent contends that the rationale underpinning the decision is flawed. He further contends that in truth *Merseyside* afforded no sound basis for interpreting our legislation because the statute under which the original seizure had taken place was different in terms from the Acts of 1976 and 2006, as indeed were the supposedly analogous provisions of the Proceeds of Crime Act 2002 – which differ in terms from the 1994 Act, as amended. Counsel also submits that other relevant English authorities were not opened to O'Keeffe J and, effectively, that if this had been done, he would not, for that reason alone, have been justified in relying on such to assist him in interpreting the Irish legislation. Furthermore, he says that *Kelly* was a judicial review of an order of the District Court. I am satisfied that the latter point is ill-founded since the judge was dealing with a net issue of law, as is the position here. I do not propose to enter into a discussion of whether or not the reasoning in *Merseyside* was correct, since there is no need to, and we are not bound by it – what I do say is that its ultimate conclusion is right.

17. To my mind the matter is entirely straightforward and should be decided on first principles; there is no reason in principle why, if property is in the hands of An Garda Síochána having been lawfully seized, say, in the course of a search (as here) some other statutory power cannot be relied upon thereafter by a member to seize the item. There is no restriction of such a kind in any statute.

18. The seizure in the Garda Station (and the fact that it was in a Garda Station and kept in safekeeping in a safe) does not affect the position one way or another. The relevant or operative seizure was that effected on the 14th of July 2014 within the meaning of the Act, thus grounding the procedures thereunder. There is no basis for saying that, in effect, if in the course of a search the Gardaí seize items in contemplation of potential proceedings and having evidential value an item is, so to speak, sanitised and rendered immune thereafter from the provisions of the 1994 Act.

19. That conclusion means that the Dublin Circuit Court and the District Court before it was engaged in the matter has or had jurisdiction.

20. In the event that the seizure of the 14th of July is the seizure within the meaning of the 1994 Act, section 7 is not relevant. In any event section 7 merely provides that the 1897 Act "***applies*** *in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act*" [my emphasis]. It merely deals with any adjudication on ownership or disposition of property which may be in dispute – that is what the 1897 Act is **for** and no more. If there was no such provision the 1897 Act could not be invoked for the purpose of deciding on ownership or disposition of property seized under the 2006 Act in the event of a dispute. The fact that items of property (including money) which might well be the proceeds of crime can be dealt with under the 1897 Act is neither here nor there when one is addressing the 1994 Act.

21. Heavy emphasis has been put on the meaning of the word "*shall*", it need not be said but that the provision in question must be given its ordinary and natural meaning and of course the word must be read in context; here it is sought to take it out of context and deal with it on a freestanding basis – even to the point of taking it out of the very sentence in which it appears; the provision pertains to the application of the 1897 Act; its effect is not to exclude jurisdiction under the 1994 Act but confer it on the District Court under the 1897 Act, should a dispute arise as to property in this context.

22. The respondent relies on sections 5(1) and 23(1) of the Interpretation Act 2005 dealing with the basic principles of statutory interpretation; reference is also made in the argument to case law on the interpretation of statutes; however, in my view, there is no need for entry into debate based on the case law about the meaning of the word since the position is clear and unambiguous. One is not here seeking to put some form of gloss on the word or address the issue of whether or not, in the present case, the word "*shall*" might be equated, for example, with the word "*may*". Here, I rely on the ordinary and natural meaning of the words of which the provision is comprised – the basic rule relied upon by the respondent under the 2005 Act. Section 61 of the 1994 Act addresses the disposition under the 1897 Act of property the subject of unsuccessful applications for forfeiture; it is not relevant.

23. Turning then to what I might describe as the final point, namely, that the Court should not entertain this case stated for want of conformity with the Rules of the Circuit Court or this Court and the delay which occurred in forwarding the case stated.

24. Extensive reliance is placed by the respondent on a number of decisions pertaining to compliance with the provisions of the Summary Jurisdiction Act 1857, of a procedural type (including provisions as to time). I am not dealing here with a case stated under that Act or, indeed, any procedural issues (including issues as to time) which arise by virtue of

statute. The decisions are therefore of no relevance. There are no statutory procedural provisions in respect of cases stated under the 1947 Act.

25. Accordingly, I am addressing rules of court only. Non-compliance with the rules is not fatal to the jurisdiction of this Court and the rules are not of course an end in themselves. In the first instance the respondent refers to Order 62(5) of the Rules of the Circuit Court which is as follows: -

> "*As soon as the case stated shall have been signed it shall be lodged with the County Registrar for transmission to the Court of Appeal*."

26. There is no information as to whether or not the case was so lodged "*as soon as… [it was] … has been signed*" – assuming, (and this is by no means clear), that imposes any obligation as to time (it *was* lodged, obviously). I certainly am prepared to accept, in the absence of a dispute upon the point, what counsel for the Director says to the effect that it was so lodged promptly but that no doubt due to some oversight of the kind which occurs in the best run offices, it was overlooked for some months in the Circuit Court Office. This occurred, let it be noted, in the past year during the current public health emergency. In any event it was found after diligent search.

27. Reference is also made to Order 86B(1) & Order 86B(2) of the Rules of the Superior Courts which is in the following terms: -

> "*2. (1) In the case of a case stated… by a Circuit Court Judge, the County Registrar, as soon as the case stated has been signed and lodged with the County Registrar… shall indorse on the case stated:*
>
> *(i) the date of lodgement,*
>
> *(ii) the name of the party or parties who applied for the case to be stated,*
>
> *(iii) the name of the party who is to have carriage of the case stated,*

and

(iv) the names and addresses of the solicitors (if any) for the parties.

(2) The County Registrar …, within seven days of lodgement of the case stated, shall serve notice of the signing and lodgement of the case stated by registered post on every party who appeared on the hearing of the appeal or matter in respect of which the case is stated and shall transmit the original of the case stated to the Registrar (emphasis added by counsel for the respondent)."

28. The papers were not sent to this Court by the County Registrar within 7 days of its lodgement as required (by definition); nor was the date of receipt by her endorsed thereon. Furthermore, it was not, apparently, served on the respondent by the County Registrar; it is said it was not served at all and that the respondent first received notice from this Court on the 17th of February 2021 thereof.

29. There is no assertion that in any way the respondent was prejudiced by want of conformity with the rules or any delay which arose since the judge signed the case stated. This is obviously of the first importance when dealing with procedural matters. The respondent plainly knew of the fact of the case stated and its terms from 2020 and cannot have been surprised by the fact that it ultimately appeared in a list in this Court. It is not suggested that, at some point, if one could put it that way, the document in question and relevant supporting documents were not furnished to the respondent's solicitors nor is it suggested that due to any delay there was any difficulty about dealing with this matter. I accordingly think that want of compliance with the rules in this instance is of no consequence in substance and certainly should not inhibit this Court from providing the Circuit Court judge with the determination he seeks.

30. I would accordingly answer the questions in the following terms: -

(1) If cash has been seized pursuant to section 7 of the Criminal Justice Act, 2006 can it only *(sic)* be dealt with pursuant to the Police Property Act 1896 *(sic)*?

No.

(2) Is it open to Gardaí to seize it subsequently pursuant to section 38 of the Criminal Justice Act 1994?

Yes.

The following question, as appears from what I have said above, was also asked (it is unenumerated): -

Was I correct in my finding that the word "shall" in section 7 of the Criminal Justice Act 2006 is mandatory and that cash seized pursuant to that statutory provision, must, where no criminal prosecution arises, be dealt with in accordance with the Police Property Act 1897?

No.