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COURT OF CRIMINAL APPEAL

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

ROBERT JOSEPH CAMPBELL AND MICHAEL JAMES RYAN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

MICHAEL ANTHONY McKEE, ANTHONY SLOAN, PAUL PATRICK MAGEE AND ANGELO FUSCO

JUDGMENT delivered the 7th day of February, 1983 by Finlay C.J.

Each of the applicants has applied to this Court for leave to appeal from his convictions on a number of counts by the Special Criminal Court. The first and second named applicants were convicted by the Court on the 23rd December, 1981, on a number of counts arising out of certain incidents alleged to have taken place in a prison at Crumlin Road, Belfast, Northern Ireland and outside the prison on the 10th June, 1981. The third, fourth, fifth and sixth-named applicants were also convicted by the Court on the 25th February, 1982 on counts arising out of those incidents.

Before hearing submissions in respect of these applications, the Court indicated that it proposed to reserve its judgment in respect of the applications of the first and second-named applicants until after the

conclusion of submissions in respect of the applications of the third, fourth, fifth and sixth-named applicants. At the conclusion of the submissions on behalf of the third, fourth, fifth and sixth-named applicants, the Court announced that it would deliver its judgment in respect of all the applications at a later date.

The counts with which each of the applicants was charged in the indictments related to the escape of a number of persons, some of them armed, from the prison at Crumlin Road on the 10th June, 1981, and an exchange of gun-fire with members of the Royal Ulster Constabulary which took place outside the prison immediately after the escape.

Each of the applicants was arrested by the Gardai at various places in the State between the 22nd September, 1981, and the 18th January, 1982 and detained in custody in purported exercise of the powers conferred by s. 30 of the Offences Against the State Act, 1939. The first-named applicant was charged before the Special Criminal Court on the 23rd September, 1981, with having escaped from lawful custody in Northern Ireland on the 10th June, 1981, contrary to section 3 of the Criminal Law (Jurisdiction) Act, 1976 (hereinafter referred to as "the Act"). Five further charges were preferred against him on the 30th November, 1981 of attempted murder, shooting with intent to prevent lawful apprehension,

production and use of fire-arms in the course of an escape and possession of fire-arms with intent to endanger life all contrary to s. 2 of the Act of 1976. The second-named applicant was charged before that Court on the 10th October, 1981 and 30th November, 1981 with similar offences. The third-named applicant was charged on the 7th January, 1982 before that Court with similar offences with the exception of attempted murder; and similar charges, again with the exception of attempted murder, were preferred against the fourth, fifth and sixth-named applicants before that Court on the 7th January, 1982, the 4th January, 1982, the 20th January, 198 the 9th December, 1981 and 13th January, 1982 respectively.

None of the offences with which the applicants were charged was a scheduled offence within the meaning of the Offences Against the State Act, 1939. The appropriate certificates under s. 47 (2) of that Act giving the Special Criminal Court jurisdiction to try the charges were issued by the respondent or, in one case, a professional officer of his department to whom he had delegated his functions in the case of the first-named applicant on the 23rd September, 1981 and the 28th October, 1982, in the case of the second-named applicant on the 10th and 28th October, 1981, in the case of the third-named applicant on the 6th January, 1982, in the case of the fourth-named applicant on the 4th January, 1982, in the case of

the fifth-named applicant on the 19th January, 1982 and in the case of the sixth-named applicant on the 3rd December, 1981 and 6th January, 1982.

As each of the charges was in respect of offences alleged to have been committed under the Act of 1976, it is necessary to refer to the provisions of that Act.

Section 2 (1) of the Act provides that:-

"Where a person does in Northern Ireland an act that if done in the State, would constitute an offence specified in the Schedule, he shall be guilty of an offence and he shall be liable on conviction on indictment to the penalty to which he would have been liable if he had done the act in the State".

The offences set out in the schedule to the Act include the following under the heading "fire-arms":-

"10. Any offence under section 15 of the Firearms Act, 1925 (possessing fire-arm or ammunition with intent to endanger life or cause serious injury to property).

11. Any offence under the following provisions of the Firearms Act, 1964

(a) Section 26 (possession of fire-arm while taking vehicle without authority);

(b) Section 27 (use of fire-arms to resist arrest or aid escape);

(c) Section 27 A (possession of fire-arm or ammunition in suspicious circumstances);

(d) Section 27 B (carrying fire-arm with criminal intent)."

Section 3 (1) (a) of the Act provides that:-

"A person who, in Northern Ireland, is charged with or convicted of:-

(i) An offence under the law of Northern Ireland consisting of acts (whether done in the State or in Northern Ireland) that also constitutes an offence specified in the schedule or an offence under section 2, or

(ii) An offence under the law of Northern Ireland corresponding to this section,

and who escapes from any lawful custody in which he is held in Northern Ireland shall be guilty of an offence".

Section 14 (1) of the Act provides that:-

"Subject to the provisions of this section, a person charged with an offence under section 2 or 3 may opt to go in custody to Northern Ireland for trial there instead of being tried in the State for the said offence and the person shall be informed of his rights under

this section -

(a) by the District Court, on his first appearance before that Court in connection with the charge, and

(b) by the Court by which he is to be tried for the offence, before entry of his plea on arraignment."

Section 20 (2) of the Act provides that where a person is charged with an offence under s. 2 or s. 3, no further proceedings in the matter except such remand or remands in custody or on bail as the court may think necessary shall be taken except by or with the consent of the Attorney General. The Attorney General gave his consent to further proceedings being taken against the first and second-named applicants on the 16th November, 1981, and against the third, fourth, fifth and sixth-named applicants on the 18th January, 1982.

The first and second-named applicants were arraigned on the 10th December, 1981 before the Special Criminal Court. The third, fourth fifth and sixth-named applicants were arraigned before the Special Criminal Court (differently constituted) on the 16th February 1982. The transcripts disclose that, in the case of each applicant, he was informed by the President of the Court of his rights under section 14(1) and in each case did not opt to go in custody to Northern Ireland for

trial there instead of being tried in this jurisdiction. Each of the applicants pleaded not guilty to each of the counts in the indictment.

The first and second-named applicants were found guilty of the counts in the indictment charging them with escape from lawful custody, shooting with intent to prevent lawful apprehension, production and use of fire-arms in the course of an escape and possession of fire-arms with intent to endanger life. They were found not guilty of the charge of attempted murder. The third, fourth, fifth and sixth-named applicants were convicted of the counts in the indictment charging them with escape from lawful custody, shooting with intent to prevent lawful apprehension, production and use of fire-arms in the course of an escape and possession of fire-arms with intent to endanger life.

Each of the applicants was separately represented at the two trials before the Special Criminal Court and was separately represented on the hearing of the applications by this Court. Separate notices of application for leave to appeal were served in respect of each applicant; but in a number of respects the grounds of appeal were the same in all cases. It is accordingly proposed in this judgment to consider collectively such of the grounds of appeal as are identical in the case of all the applicants.

Production and use of fire-arms "within the prison"

It was submitted on behalf of all the applicants other than the first-named applicant that there was either no evidence, or no sufficient evidence, to justify the findings by the Courts of Trial that the applicants produced or used fire-arms

> "within the prison at Crumlin Road, Belfast .... in the course of (their) escape from the custody of John Semple the person in charge of the said Prison."

A number of prison officers gave evidence at the two trials as to the sequence of events inside the prison on the afternoon of June 10th, 1981. In addition, evidence was given by members of the R.U.C. who exchanged shots with some of those who were escaping in the public road outside the prison. It was clearly open to the Court of Trial in each instance to reach the following conclusions of fact derived from the evidence. (For convenience, the applicants are referred to by their surnames in this part of the judgment).

At about 3 p.m. on that afternoon, a number of persons who were then in custody in the prison, including Campbell, Ryan and Magee, were escorted to the visiting area of the prison for the purpose of receiving professional visits in the interview rooms there provided from their

solicitors. While they were in the visiting area, Magee produced a small hand gun, which appeared to one of the officers to be an automatic weapon, and said to the officer: "that's as far as you're going, stay where you f..... well are". Campbell also produced a small hand gun at this stage, which seemed to one of the officers to be a .22 automatic and to another to be a Walther. Magee and Campbell then ordered or pushed some of the officers into what was called a "holding-room" where they were locked with the solicitors who had come to interview the prisoners.

Magee then released Sloan, Fusco and McKee from another holding-room. Campbell, Ryan and two other prisoners then went into an office where two of the prison officers were attending to various duties. Campbell held the gun which he had produced to the head of one of the prison officers and told him he was taking him as a hostage. He then pulled the slide of the gun back so that it would be in the firing position. Campbell then proceeded to pull this officer across the room. When the officer sought to resist by hitting him with his baton, he was felled to the ground with a blow struck from behind. A number of people then kicked him while he was on the ground, two of them being identified as Ryan and Campbell. Sloan and McKee then came into the room, pulled one of the officers away from the telephone where he was endeavouring to call for assistance and put

him into the holding-room.

During the course of these events, a number of the prisoners, including Ryan and Fusco, removed various items of the officers equipment such as tunics, batons and caps and donned or carried them. The party then made its way across a courtyard to an area known as the "air-lock" which separated the inner and outer gates of the prison. It was led by Sloan who was dressed in civilian clothes. At the outer gate of the air-lock, he produced what appeared to the officer on duty to be a copper disc of a type normally required to be produced by solicitors when making professional visits to the prison. The officer, recognised him as a prisoner and refused to open the gates. At that stage, however, he felt somebody putting what seemed to him to be a gun to his back. He turned around and saw that it was Ryan, who said something like: "don't make a noise". Magee at this stage entered an office off the air-lock area and smashed the windows of the door in. Campbell then followed him into the office, produced what appeared to be a fire-arm and told the officer in the office, who was about to activate the alarm, that "if he touched the alarm, he was dead." Fusco was also seen at this stage by one of the officers, breaking the glass in the office door with a baton he was carrying. One of the officers in this area produced his baton and

managed to strike three of the escaping prisoners. He was then told by Magee, whom he described as carrying a Walther pistol, to get back or "he would blow my head off". All the prisoners then made their way out through the outer gate of the air-lock on to Crumlin Road, followed by one of the officers. The group of escaping prisoners crossed the road and entered a car park on the opposite side; and, as he was getting over the wall of the car park, Campbell turned around and started to fire at the pursuing prison officer.

Within a matter of seconds, a police car containing three members of the R.U.C. which happened to be in the vicinity arrived at the scene, whereupon shots were discharged at its occupants from the direction of the car park by two persons, one of whom was dressed in a prison officer's uniform. The persons who fired the shots were identified by the R.U.C. members as Ryan and McKee.

None of the applicants gave any evidence in relation to any of these matters.

It was submitted in support of this ground that the evidence could not have satisfied the court of trial beyond reasonable doubt that the guns produced by certain of the applicants within the prison were "fire-arms" within the meaning of the relevant statutes as distinct from toy or

imitation weapons. The Court is satisfied that, having regard to the descriptions of the weapons given by the various prison officers, the manner in which they were used by the applicants concerned and the language used by the applicants towards the officers, there was ample evidence which justified the Court of Trial in each instance in reaching a conclusion beyond reasonable doubt that the weapons used were in fact fire-arms and not toy or imitation weapons.

It was further submitted, in support of this ground, that, in the case of Sloan, Fusco and McKee, there was no evidence of their having at any stage produced fire-arms within the prison.

The Court of Trial in each case came to the conclusion that the escape was the result of a concerted plan to which each of the applicants was a party; and that it was part of the plan that weapons introduced into the prison should be used to coerce prison officers to permit the escape and to prevent the apprehension of the applicants when they had left the prison. The Court is satisfied that there was ample evidence which justified the Court of Trial in each case in arriving at this conclusion. The Court of Trial in each case having thus found, on evidence which fully justified the finding that the production and use of the guns was part of a common design was entitled, in the view of the Court,

to convict each of the applicants in respect of these counts, whether or not they were shown to have actually produced or used the guns. Even if the Court of Trial had come to the conclusion in the case of any of the applicants, taking the view of the evidence most favourable to him, that he had merely joined in the escape without having been involved in the advance planning, the evidence would still, in the view of the Court, have justified his conviction. From the moment each of the applicants proceeded to assist in the execution of the pre-arranged plan, he also became criminally responsible for the production and use of the weapons which were an essential feature of that plan.

The Court rejects the submissions advanced in support of this ground which therefore fails.

SHOOTING WITH INTENT TO RESIST ARREST

It was submitted that, in the case of the first, second and sixth-named applicants, the evidence of identification given at the trials was not such as could have satisfied the Court of Trial beyond reasonable doubt that the applicants had in fact used fire-arms outside the prison with intent to resist arrest. It was further submitted, on behalf of the remaining applicants, that there was no evidence in their case of their having actually used fire-arms outside the prison.

In the case of the first, second and sixth named applicants, the Court of Trial in each case expressly referred to the necessity to exercise caution in respect of such evidence in accordance with the principle laid down by the Supreme Court in The People (Attorney General) -v- Casey (No. 2)((1963) I.R. 33). The Court is satisfied that, in each case, the Court of Trial was fully entitled, while bearing in mind the necessity of caution in such cases, to act upon the evidence of identification in convicting the applicants concerned.

The Court is further satisfied that, the Court of Trial having come to the conclusion in each case that certain of the applicants, being persons concerned in the escape, had shot at one of the pursuing officers and at one of the R.U.C. officers with the intention of resisting arrest, was further entitled to conclude that these shots were also fired as part of the common design already referred to of effecting an escape from the prison. It follows that, in the case of all of the applicants who are shown to have assisted in the execution of that common design, the Court was entitled to convict each of the applicants in respect of the count of shooting with intent to prevent lawful apprehension.

The Court rejects the submissions advanced in support of this ground which therefore fails.

The lawfulness of the applicants' custody in Northern Ireland.

It was submitted on behalf of each of the applicants that the respondent had failed to establish that the applicants had been in lawful custody at the time of their escape from Crumlin Road Prison and that the Court of Trial in each case had erred in holding that he had done so.

On each trial the prosecution accepted that it was required to prove the lawfulness of the custody of each of the accused on the occasion on which each escaped from prison. It sought to do so in the following way. In each case there was produced an authenticated copy of the Magistrate's Court Order Book containing the order of the Magistrate (or assistant Magistrate) returning the accused for trial to the Belfast Crown Court. To prove the orders in each case the prosecution relied on the provisions of s. 7 of the Law of Evidence Amendment Act, 1851 and submitted that the authenticated copy of the order signed by the person who made it was sufficient evidence by virtue of the 1851 Act of the making of the order. The prosecution then produced the Warrants of Committal in each case and proved them by the oral evidence of the official who signed the warrant.

In each trial evidence was given by Mr. William McCollum Q.C. a member of the Bar of Northern Ireland of 26 years' standing. In respect of each of the accused, he expressed the opinion that the orders and

warrants were valid orders and warrants under the laws of Northern Ireland and that under those laws such warrants justified the detention in Crumlin Road Prison of each of the accused on the day of his escape. In each trial his opinion was challenged by counsel for each of the accused and it was suggested to him that it was wrong for a number of different reasons. He did not accept any of the matters put to him and maintained his evidence that each accused was, according to the law of Northern Ireland, in lawful custody at the time of his escape. The Court of Trial of each of the accused held (a) that it should decide the lawfulness of the custody of each of the accused according to the law of Northern Ireland, (b) that the law of Northern Ireland was a question of fact to be ascertained by the evidence of an expert witness and (c) that Mr. McCollum was an expert witness whose opinion on the law the court should accept. As no evidence to contradict the opinion of Mr. McCollum was given in either trial, the court on each trial concluded that the prosecution had established beyond a reasonable doubt that each of the accused was in lawful custody at the time of his escape.

This Court considers that the Courts of Trial in all these cases correctly approached the question of the lawfulness of the accused's custody at the time of his escape. It was not for the Courts of Trial,

just as it is not now for this court, to ascertain for itself what the law in Northern Ireland is relating to the custody of prisoners who have been returned for trial and who are in custody pending their trial, or to consider for itself the legal effect of warrants issued for the custody of such prisoners. These are matters which must be proved by an expert on the law of Northern Ireland. In each trial the court accepted that Mr. McCollum was an expert witness and that the law of Northern Ireland was as stated by him. In the opinion of this court, the Courts of Trial were fully entitled to reach this conclusion and no satisfactory arguments have been advanced to this court as to why Mr. McCollum should not have been accepted as an expert witness.

The position might well have been different had the defence been in a position to adduce expert evidence to establish that the opinion of Mr. McCollum was wrong. In this connection it is to be noted that at the first trial no evidence was adduced by the defence and no application to adjourn the hearing to obtain such evidence was made. At the second trial, counsel for the accused had available in Court to them (as the transcript of the trial discloses and as this Court has been informed) a lawyer from Northern Ireland, but he was not called as a witness for the defence to rebut Mr McCollum's conclusions.

In the course of their submissions to this Court, Counsel for the applicant advanced a number of arguments to support the contention (a) that the warrants under which each of the accused was held in Crumlin Road Prison were invalid and (b) that in any event the warrants were spent when each of the accused was arraigned before the Crown Court in Belfast so that they were no longer in custody under them. The Court does not propose to examine these submissions in any detail because it believes that they are fundamentally flawed. All the points raised in this Court were put to Mr McCollum who, as has already been pointed out, maintained that the warrants were perfectly valid, that each of the accused was in custody under them when the escape took place and that none of the warrants was spent. Once the Court of trial has accepted this witness as an expert witness and that the law of Northern Ireland and the effect of th warrants was as stated by him, it is not for this Court to go behind that evidence and to construe the warrant or the laws relating to it or the accused's custody. Essentially these are matters of fact for the Court of Trial in each case, and in each case the Court of Trial has found certain facts on evidence on which it was entitled to act. This court is therefore satisfied that there are no grounds for the submission that the Courts of Trial were wrong in holding that the custody of the accused

was lawful according to the law of Northern Ireland.

The conclusion of the Courts of Trial as to the lawfulness of the custody of each of the accused is challenged on another ground. It is urged that the prosecution failed to establish by proper proof the orders made by the magistrates in each case as it had incorrectly relied on s. 7 of the Evidence Act, 1851 to prove them. The prosecution, it was said, should have established by evidence that the magistrate (or assistant magistrate) who authenticated the copy documents was a "judge" and that in the absence of such proof the authenticated copy was worthless.

This submission, in the opinion of this Court is based on a misinterpretation of section 7. This section provides inter alia, that, where a judge of a court which has no seal authenticates a document pursuant to its provisions by means of his signature, he is required to attach to his signature a statement in writing that the court of which he is judge has no seal. This was done in each case in the present proceedings. Each document put in evidence was signed and following the signature the document bore the words:

> "Signed pursuant to section 7 of the Evidence Act, 1851 by me a Resident Magistrate of the Petty Sessions Court for the City of Belfast and I hereby state that the said Petty Sessions Court of which I am a judge has no seal".

Section 7 of the Act of 1851 goes on to provide that the authenticated

copy shall

> "be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal where the seal is necessary or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement".

It is clear from this section that the prosecution need not prove the "judicial character" of the person who signed and authenticated each of the documents adduced in evidence and that it was not necessary to prove that the magistrate (or the assistant magistrate) was a judge. In the opinion of this Court, these authenticated documents were properly received in and acted upon by the courts of trial.

In addition to urging that the custody of the applicant was unlawful under the law of Northern Ireland, it was suggested that the Courts of Trial should have considered, and that this Court should now consider, the accused's custody in the light of standards which according to the law of this jurisdiction should be applied in criminal proceedings. It was claimed that, if such standards were applied, the Court would decide that the accused's custody was illegal.

In support of this proposition reference was made to a passage in the judgment of the Supreme Court in In the Matter of The Criminal Law (Jurisdiction) Bill, 1975 ((1977) I.R. 129). The Court in that case

considered arguments against the constitutionality of the Bill urged by counsel assigned by the court to oppose it. One of these centered on the provisions of s. 11 by virtue of which letters of request could be sent by a court in this jurisdiction to the Lord Chief Justice of Northern Ireland for the purpose of obtaining the evidence of a witness in Northern Ireland, for a trial in this jurisdiction. In the course of his judgment the Chief Justice (at pp 157/158) observed that the presumption based on the Constitution that all proceedings, procedures, discretions and adjudications would be carried out in accordance with the principles of constitutional justice did not apply to procedures taking place outside the State by persons who have no obligation to uphold the Constitution; but he added that the admissibility of any statement taken in pursuance of the letters of request remained completely within the jurisdiction of our courts.

It is clear that neither this passage nor any other part of the judgment of the Supreme Court is an authority for the argument which is now urged on this Court. The Chief Justice was dealing with the powers of the Courts during a trial in this jurisdiction in relation to the evidence of a witness whose testimony had been taken in Northern Ireland. The point now raised is an entirely different one; namely whether in

adjudicating on the lawfulness of an act in Northern Ireland (i.e., in this case, the lawfulness of the accused's custody) the Courts here can decide that the act is unlawful if it does not accord with our laws (constitutional or otherwise). As to the rights which Irish citizens are granted by the Constitution, the judgment of the Supreme Court makes it clear that the right to obtain "constitutional justice" from tribunals (judicial and non-judicial) is a right which does not extend to tribunals established outside the jurisdiction of the state. The lawfulness of the custody in Northern Ireland of an Irish citizen cannot therefore be impugned by reference to a non-existent right. The conclusions of the Supreme Court with regard to the right to constitutional justice apply with equal force to any of the other unspecified personal rights which an accused person may enjoy by virtue of Article 40 (3) of the Constitution in relation to criminal proceedings in this State. As to rights conferred by statute, it is obvious that the laws of Northern Ireland in relation to the trial of offences are different to the laws of this State. It would lead to a result manifestly contrary to the intentions of the Oireachtas if the Courts here were required to find that a person who escaped from a custody which under the law of Northern Ireland was perfectly legal had committed no offence under the 1976 Act because the

custody in question failed to comply with the statutory laws of this State. As to rights granted by the common law, again the Court is of the opinion that the 1976 Act does not require the courts to determine the lawfulness of the custody in Northern Ireland of an accused person by reference to common law principles which operate in this jurisdiction.

Lest there be any misunderstanding occasioned by the views which have just been expressed, the Court should make it clear that the only irregularity which Mr McCollum accepted had occurred was that in the printed form of the warrant used in each case a reference was made to Rules of Court which had been amended and were no longer in force. Whilst it is not necessary for this Court to express any concluded view on the point, it should be pointed out that no authority was cited to show that if the lawfulness of a custody was being challenged in this jurisdiction such an irregularity would render an otherwise lawful custody illegal.

In the second trial, it was submitted that the prosecution had failed to establish that the accused's custody was lawful because (a) the consent of the Director of Public Prosecutions of Northern Ireland was required before the accused were charged with the offences with which they were on trial in Northern Ireland and (b) no evidence that this consent had been sought and obtained was given to the Court of Trial when the

prosecution's case had concluded. During the second trial, Mr McCollum was questioned on this point and expressed the opinion, on which the Court of Trial was free to act in the absence of contrary evidence, that the law of Northern Ireland did not require the consent of the Director of Public Prosecutions to the charges preferred against the accused. This point therefore fails. In addition, it should be said that once the prosecution had established that the accused were in custody under a valid warrant it was not required in addition to adduce evidence relating to the consent of the Director of Public Prosecutions.

The Court is of the opinion therefore that the courts of trial correctly concluded that each of the accused was in lawful custody at the time of his escape.

The Court rejects the submissions advanced in support of this ground which therefore fails.

The adequacy of the Indictment

Ground 4 of the Notice of Appeal of Michael Ryan claimed that in relation to Count No. 7 on the indictment (the count relating to escape from lawful custody) the Special Criminal Court had misdirected itself in convicting the applicant; Ground 5 claimed that counts 9, 10, 11 and

12 (all firearm offences) did not disclose any offence; and Ground 6 claimed that these Counts (as well as Count 7) were defective as being contrary to the provisions of s.4 of the Criminal Justice Act, 1924 and because they failed to comply with the Indictment Rules scheduled to the Act. None of the other notices of appeal specifically challenged the convictions on the ground of a defect in the indictments but the Court will proceed on the assumption that all the applicants rely on the grounds raised on behalf of Michael Ryan and wish to adopt the arguments urged in support of them.

A specific point arising in relation to Count 7 concerns the application of Michael Ryan only and will be dealt with later in this Judgment. With regard to the claim that the counts in the indictment relating to the firearm offences disclose no offence, and that they are defective, it will assist in understanding the argument, and the Court's conclusions on it, if reference is made to a specific count. Count 9 of the Indictment preferred against Michael Ryan was in the following form

"Statement of Offence

Shooting with intent to prevent lawful apprehension (being an offence specified in the Schedule to the Criminal Law Jurisdiction Act 1976), Contrary to Section 2 (1) of the said Act.

Particulars of Offence

Michael James Ryan on the 10th day of June 1982 at

Crumlin Road, Belfast Northern Ireland shot at one Detective Constable Logan with intent to prevent his lawful apprehension".

Each of the other firearm counts against this applicant were in a similar form, and each of the counts in the indictments against the other applicants were similarly drafted, that is to say, with a statement that the accused was charged with an offence contrary to section 2 (1) of the Act.

It was submitted that this Count did not disclose the commission of any offence because section 2 (1) of the 1976 Act did not create any offence; it merely conferred jurisdiction in respect of the offences specified in the Schedule. The Count, it was said, should have charged the accused with an offence in the Schedule and referred to the relevant statute which created it.

The Court cannot agree. Section 2 (1) of the Act reads as follows:

"Where a person does in Northern Ireland an act that, if done in the State, would constitute an offence specified in the Schedule, he shall be guilty of an offence and he shall be liable on conviction on indictment to the penalty to which he would have been liable if he had done the act in the State."

Quite clearly the section created a new offence, namely, the doing of an act in Northern Ireland that if done in the State would constitute an offence specified in the Schedule and the indictment complied with Rule 4 of the Indictment Rules by stating that the offence with which the

accused was charged was contrary to section 2 (1) of the 1976 Act.

It was also submitted that this Count (and others similarly drafted) was defective in that it failed to state the particular section of the Firearms Act which it was alleged the accused had infringed and it was urged that this should have been done, followed by a reference to section 2 of the 1976 Act.

The Court considers that this submission is also based on a misreading of the section. Section 4 of the 1924 Act requires that a statement of the specific offence with which the accused was charged should be contained in the indictment. This was done and Rule 4 (3) was complied with. The count also contained reasonable information as to the nature of the charge which the section also required, and the applicants in these cases were correctly charged and given all the information that was necessary to inform them of the case they had to meet.

As has been pointed out earlier in this judgment, there was evidence on which the Courts of Trial could have concluded that each of the accused was involved in a concerted action which involved the use of firearms to escape from lawful custody. It follows therefore that each, whether he actually had the firearm in his physical possession or not, could be charged as a principal in respect of the firearm offences contained in

the indictment. In such circumstances it was not necessary (as was submitted on behalf of one of the accused before this Court) to charge an accused who had not physical possession of a weapon as an aider and abettor; in the light of the evidence adduced at the trial each applicant was correctly indicted.

All the applicants with the exception of Michael Ryan were charged with escaping from lawful custody contrary to section 3 (1)(a) of the Criminal Law (Jurisdiction) Act, 1976. It is quite clear that that sub-paragraph of sub-section (1) of section 3 of the Act created an offence and that the accused were correctly charged under it. A different situation arose, however, in the case of Michael Ryan. He was charged with "Escape from lawful custody contrary to Section 3 (1)(b) of the Criminal Law (Jurisdiction) Act, 1976". At the end of the prosecution's case, Counsel for the accused specifically asked whether or not it was proposed to amend the indictment. Counsel for the prosecution stated that no such application was being made, but the next day sought leave to amend, relying on section 6 of the 1924 Act. He pointed out that a misprint had occurred in the indictment and, as the offence was created by section 3 (1)(a) of the Act, the accused should have been charged under subparagraph (a) and not under subparagraph (b). Counsel for the

accused objected and the court refused the application to amend. It nonetheless convicted the accused of the offence charged under this Count (Count 7).

The submission made to this Court in relation to this part of the case was first that the offence with which the accused was charged was under subsection (1)(b), which did not create an offence; and second that if it did create an offence (of aiding and abetting an escape from lawful custody) the indictment was defective in that inadequate particulars of this offence were given.

It is clear that the offence of escaping from lawful custody in Northern Ireland is created by sub-paragraph (a) of the subsection and that sub-paragraph (b) created no offence. It provides; inter alia, that a person in lawful custody in Northern Ireland charged with an offence under the law of Northern Ireland which consists of acts which if done in the State would constitute the aiding and abetting of one of the offences specified in the Schedule and who escapes is guilty of an offence under sub-paragraph (a).

The Rules in respect of indictments contained in the First Schedule to the Criminal Justice (Administration) Act, 1924, provide that when the offence charged is one created by statute the indictment should contain a

reference to the section of the statute creating the offence. It is clear, accordingly, that it was not necessary in drafting the indictment in the present case to have specified in the indictment either of the sub-paragraphs of section 3 (1) of the Act; but in all these six cases the draughtsman nonetheless decided to refer to a specific sub-paragraph. In five of them, he correctly referred to sub-paragraph (a) of Section 3 (1); but in the case of Michael Ryan a typographical error occurred and as a result the indictment contained a reference to sub-paragraph 3 (1)(b). However, the accused was not in any way misled by this error. He was well aware that he was charged with the offence of escaping from lawful custody in Northern Ireland (both the certificate of the Respondent under section 47 (2) of the 1939 Act and that of the Attorney General under Section 20 of the 1976 Act made this clear and in fact made no reference to either of the sub-paragraphs of the subsection). It was indeed expressly admitted on his behalf at the trial that he had escaped from custody in Northern Ireland. His defence was that the prosecution had not established that the custody was lawful, a defence that was not in any way prejudiced by the error in the indictment. On the evidence before it the Court of Trial was entitled to hold (as it in fact held) that the prosecution had established the lawfulness of the custody in Northern

Ireland and to have convicted the accused of an offence under the section.

The Court of Trial would have been within its rights to have amended the error in the indictment but in fact, as has already been pointed out, it did not do so. Nonetheless it convicted the accused. The transcript makes it clear that the submission made on the accused's behalf at this trial was not that the indictment as unamended referred to a sub-paragraph of the section which did not create an offence, but that it was defective in not containing adequate particulars of the offence. The court apparently, acted on this interpretation of the sub-paragraph but did not accept the submission that inadequate particulars of the offence had been given.

This Court is satisfied that, bearing in mind that on the evidence before it the Court of Trial was fully entitled to convict the accused of an offence under the section, that the typographical error in the indictment did not in any way prejudice the accused, and that the misunderstanding of the section was contributed to by the submissions made on his behalf, this is a proper case to exercise its powers under section 5 of the Courts of Justice Act, 1928. This section provides that this Court may, notwithstanding that they are of opinion that a point raised in an appeal might be decided in favour of an appellant, dismiss the appeal if

they consider that no miscarriage of justice has actually occurred. This is a power to be exercised only in exceptional circumstances, but it is clear that in this case no miscarriage of justice has actually occurred and that exceptional circumstances exist which justify the court in dismissing this appeal in so far as it relates to the point now being considered.

The Court rejects the submissions advanced in support of this ground which therefore fails.

The jurisdiction of the Special Criminal Court to try the applicants.

Each of the applicants before this Court had been arrested under the provisions of s. 30 of the Offences Against the State Act, 1939 and was subsequently brought before the Special Criminal Court pursuant to subsection (4) and charged with the offences in respect of which indictments were subsequently preferred. It was urged on behalf of the applicant Robert Campbell that he was in unlawful custody at the time he was brought before the court and that as the jurisdiction of the Special Criminal Court under s. 43 (1) of the 1939 Act was to try, convict or acquit any person lawfully brought before it the court had no jurisdiction to try him because he was not lawfully brought before it. The unlawfulness of the applicant's custody arose, it was said, from the

circumstances in which he was arrested. A similar submission was made on behalf of the applicant Michael Ryan and submissions as to the illegality of his arrest were made in support of it. Counsel on behalf of the other four applicants stated that they wished to adopt these submissions but no separate submissions on the illegality of their arrests were made in their cases.

The circumstances of each arrest in the six applications were different and each must be separately considered. But before doing so it is important to bear in mind that what the court is now considering is (a) a statutory power given to a member of the Garda Siochana to arrest without warrant any person whom inter alia, he suspects of having committed an offence under any section of the Act or an offence which is a "scheduled offence" (as defined), and (b) a statutory power to detain in custody a person arrested under the section for up to forty-eight hours (subsection (3) of s. 30). The suspect in custody under subsection (3) may be charged before either the District Court or the Special Criminal Court.

In the case of the applicant, Robert Campbell, the arrest was made in Dundalk at 1.15 a.m. on the 22nd September, 1981 by Detective Garda O'Connor. Detective O'Connor was in an unmarked police car following

another car through the streets of Dundalk when it suddenly stopped and a passenger (who subsequently turned out to be Robert Campbell) jumped out of it and ran away. Detective O'Connor gave chase. He eventually caught up with the suspect and then arrested him, saying: "I am arresting you under section 30 of the Offences Against the State Act,". Campbell was brought to the Garda Station and was there questioned and his custody extended pursuant to the subsection for a period of forty eight hours. Detective O'Connor was asked during the course of his testimony in the Court of Trial why he had arrested Campbell and he informed the court that he suspected that he was a member of the I.R.A., a suspicion which under the section justified the arrest which he had made. He also gave evidence that after he had brought him to Dundalk Garda station he informed him that he believed that he was a member of the I.R.A.

Since the judgment of the Special Criminal Court delivered by Finlay, J., as he then was, on the 24th May, 1974 (see A.G. -v- McDermott and others, unreported) the courts have consistently held that a valid arrest is effected under the section if the arresting garda informs the suspect that he is being arrested under s. 30 of the Offences Against the State Act and that a failure to give any further information as to the grounds of the arrest does not invalidate it. This Court has been asked

to hold that McDermott's case was wrongly decided. But in the light of the evidence to which reference has just been made it is quite unnecessary to consider this point. Once the applicant had been informed by Detective O'Connor that he believed that he was a member of the I.R.A. the applicant must have known why he had been arrested. If there had been any invalidity attached to the arrest, it does not follow that the custody under subsection (3) of section 30 was an unlawful one. This is clear from the decision of the Supreme Court in D.P.P. -v- Raymond Walsh (1980 I.R. 294).

That was a case of a suspect arrested under a common law power of arrest in a public house in Dublin. At the time of the arrest he was not told of the reason for it. He was brought to a police station and was there informed of the reason. He was subsequently convicted of a serious crime and appealed directly to the Supreme Court, the essential issue in the appeal being the legality of the appellant's detention in the police station at the time his fingerprints (which were the only evidence connecting him with the crime with which he was convicted) were taken. The appeal was dismissed. Giving the judgment of the majority of the Court, the Chief Justice referred to a portion of the judgment of Maguire, C.J. in In re Loughlois (1960) I.R. 93 and added:

> "It seems to me that in this excerpt from the judgment in the O'Laighleis Case (certainly in the concluding portion thereof) the onus was placed on the person arrested to establish that he did not know why he was arrested, and that a clear line of distinction was drawn between the actual arrest and the ensuing imprisonment or detention. If such a line of distinction can be drawn where the arrest was made pursuant to warrant, as in the O'Laighleis Case, I can see no reason why it should not also be drawn where the arrest was made pursuant to the common-law. An arrest is the actual or notional seizure of a person for the purpose of imprisonment. In the case of a common law arrest, a suspicion of felony which is reasonably held is the authority which justifies the arrest and the ensuing imprisonment for the purpose I have already mentioned. In either case a fault in the arrest, on the reasoning in the Court's judgment in the O'Laighleis Case ought not to operate so as to render the subsequent imprisonment (if otherwise authorised) unlawful". (pp. 305/306).

Later in his judgment the Chief Justice pointed to the fact that the appellant had been informed of the reason for his arrest shortly after he had been brought to the Garda Station and concluded that this would have, in any event, made his custody in Garda Station a valid one (p. 308).

Applying this judgment to the facts of the present case it is clear (a) that the onus was on the accused to show that he did not know why he was arrested and he did not discharge that onus, and (b) Even if the arrest was invalid the subsequent detention was lawful when he was given information which made it clear to him why he had been arrested. There is therefore no substance in the argument that the applicant was in unlawful custody when

he was brought before the Special Criminal Court and there charged. Accordingly, there is no basis for the submission that the Special Criminal Court had no jurisdiction to try him.

The circumstances of the arrest of the applicant, Michael Ryan, were as follows. On the 10th October, 1981 Sergeant Boyle was executing, with other members of the Garda Siochana, a search warrant of a dwelling house owned by a man called McConnell. When carrying out the search of the house he saw the applicant coming from an upstairs bedroom. He recognised him and he asked his name and address. To this he made no reply. Sergeant Boyle then arrested him saying; "I am arresting you under Section 30 of the Offences Against the State Act, 1939 as I suspect that you have committed a scheduled offence under the Act". He was brought to Monaghan Garda Station where he was detained in custody and was subsequently brought before the Special Criminal Court and there charged. In the course of his cross-examination, Sergeant Boyle explained that the scheduled offence he suspected the Applicant had committed was that of membership of an illegal organisation, and he added that from previous experience and knowledge that he had of Michael Ryan he believed that he was a member of the Provisional I.R.A.

No evidence was given as to what was said to the applicant whilst he was in custody, and it was submitted on his behalf to this Court that the arrest was invalid because insufficient information was given to the applicant as to the reason for it. The Court cannot agree. The applicant was told of the statutory power which was being invoked to justify the arrest and was told the reason why Sergeant Boyle was invoking it. The situtation might be different (but the Court expressly refrains from stating any view on the point) had the applicant asked Sergeant Boyle what was the scheduled offence Sergeant Boyle suspected him of having committed and had Sergeant Boyle refused to tell him. But this is not what happened. Instead, according to Sergeant Boyle's evidence the applicant resisted arrest. Objection was taken to any further evidence being given on this aspect of the arrest and Sergeant Boyle was not cross-examined in relation to it. It is clear, therefore, that resistance to the arrest did not take place because of the inadequacy of the information the applicant was given for it at the time it was effected. So it seems to the Court that the statutory power of arrest given by section 30 (1) was validly exercised and it cannot be said that the detention in custody under section 30 (3) was at any time unlawful.

In addition, of course, the principles enunciated in the Raymond Walsh Case would apply to this case, and the onus was placed on Michael Ryan to show that he did not know why he was arrested and he did not discharge that onus.

A further point was taken in relation to the appeal of this applicant. As has been pointed out, Sergeant Boyle stated that he suspected the applicant of being a member of the Provisional I.R.A. It was submitted that the prosecution had failed to establish by proper evidence that this organisation was an illegal one and accordingly that it failed to show that the arrest was a valid one under the section.

No doubt on the trial of an accused person on a charge of membership of an illegal organisation in respect of which a supression order under s. 19 of the 1939 Act, has been made, the prosecution will prove the relevant statutory instrument in the ordinary way. But in the present case, there is no charge that the accused was a member of an illegal organisation. In so far as it is necessary in a case such as the present to establish the validity of an accused's arrest, this is properly done by evidence from the arresting Garda of the statutory power under which he effected the purported arrest (if it was not effected at common law) and the words used by him at the time of the

arrest. If the bona fides of the arresting Garda are put in issue by the defence, then the Court of Trial may have to consider whether it has been established beyond a reasonable doubt that the power of arrest was validly exercised - in the case of an s. 30 arrest, for example, whether the arresting Garda bona fide entertained the suspicion referred to in the section. In determining such an issue, what the Court is concerned with is the state of mind of the arresting Garda, not the facts on which that state of mind was formed. Once the prosecution has established that the suspicion referred to in the section was bona fide entertained by the arresting Garda, it does not in addition have to prove by evidence in cases such as the present, where the suspicion justifying the arrest was that the accused was a member of an illegal organisation, that the organisation was in fact illegal. Therefore in none of these cases was the prosecution required to prove the statutory instrument (S.I. No. 162 of 1939) which declared the I.R.A. to be an illegal organisation or that the Provisional I.R.A. was the organisation declared illegal by the statutory instrument.

In the remaining four cases, no arguments were adduced to support the view that the arrests under s. 30 (1) were invalid or the submission that the subsequent detention under s. 30 (3) was unlawful. The

circumstances of the arrests in these cases are as follows.

The applicant, Anthony McKee, was arrested in Dundalk on the 3rd December, 1981 by Sergeant Corrigan who at the time was in possession of a search warrant issued under the Firearms Acts, 1925 to 1971. In the course of a search of the house to which it related he met McKee. He arrested him. In doing so he said: "I am arresting you under section 30 of the Offences Against the State Act, on suspicion of being a member of the Provisional I.R.A.

The applicant, Paul Magee, was arrested on the 6th January, 1982, in Tralee by Detective Sergeant Callaghan. He was in possession of a search warrant under s. 29 of the Offences Against the State Act, 1939 , and he met the applicant in the house to which it related. He there arrested him. In doing so he said: "I am arresting you under section 30 of the Offences Against the State Act on suspicion of being a member of the I.R.A."

The applicant, Anthony Sloan, was arrested in Cork on the 3rd January, 1982, by Detective Inspector Thorne. Inspector Thorne was in possession of a search warrant and was searching the house to which it related when he met the applicant. He arrested him. He stated: "I am arresting you as I suspect you of being a member of an unlawful

organisation, the I.R.A. otherwise Oglaig na hEireann, otherwise the Irish Republican Army". In evidence he explained that he had received confidential information that the applicant was a member of the I.R.A. but that he did not at that time suspect that he was a person who had escaped from prison in Northern Ireland.

The applicant Angelo Fusco was also arrested by Sergeant Callaghan in Tralee. On the 18th January 1982 Sergeant Callaghan was in possession of a search warrant under section 29 of the Offences Against the State Act, 1939. He entered the premises to which it related and there met Fusco. He arrested him. When doing so, he said: "I am arresting you under s. 30 of the Offences Against the State Act, 1939 on suspicion that you are a member of an unlawful organisation, to wit the I.R.A." It was suggested to him in cross-examination that he was aware that the applicant was one of those who had escaped from Crumlin Road prison and that this was the reason for his arrest. Sergeant Callaghan maintained that this was not so and, that when arresting him, he was unaware that he was one of those who had escaped from the Crumlin Road prison.

The court is satisfied that in these four cases the bona fides of the suspicion entertained by the arresting Garda was a matter of fact to be determined by the Court of Trial and that the Court of Trial was entitled

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to hold that in each case the suspicion deposed to was bona fide held. The Court is also satisfied that in each case the words used by the arresting Garda when effecting the arrest were perfectly adequate.

The Court rejects the submissions advanced in support of this ground which therefore fails.

The Court being satisfied that all the accused were in lawful custody at the time they were charged in the Special Criminal Court, finds it unnecessary to determine whether persons not lawfully arrested but brought before the Special Criminal Court and charged are, or can be subsequently lawfully tried by that Court pursuant to s. 43(1) of the 1939 Act.

It follows that, each of the grounds having failed, the applications of each of the applicants for leave to appeal are treated as the appeals and are dismissed.

Cur Tel

7th February 1983