



THE SUPREME COURT

Supreme Court Record No. 2021/106

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Woulfe J.

Between

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

-and-

JOSEPH BEHAN

Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 30th day of May, 2022

1. I have had the benefit of reading a draft of the judgment which O'Malley J. proposes to deliver for the majority herein, and I am happy to gratefully adopt the comprehensive account of the issue in the trial, the Court of Appeal judgment and the submissions in this appeal contained in her judgment.

2. O'Malley J. would be inclined to conclude that the Divisional Detective Superintendent who issued the search warrant was not "independent of the investigation of the offence" within the terms of s.29(5) of the Offences Against the State Act 1939, as amended. This conclusion is based on her finding that the Divisional Detective Superintendent must, inevitably, be considered to be "involved" in an investigation, on being notified that a serious incident has occurred and is being investigated, and she comes to that view on the basis of the evidence that it was Detective Superintendent's Scott's job to be involved, in order to take on an oversight function and to ensure that the investigation was carried out as effectively as possible.
3. I regret that I cannot agree as to this conclusion, and I prefer the alternative conclusion arrived at in the judgment of Charleton J., which I have also had the benefit of reading in draft form, for the reasons set out therein.
4. I might just add the following observation. It seems to me that the finding in the majority judgment that a Divisional Detective Superintendent must inevitably be considered to be involved in an investigation on being notified that a serious incident has occurred in his division and is being investigated, suggests that such a Divisional Detective Superintendent so notified could never come within the category of "a member of the Garda Siochana not below the rank of Superintendent" empowered to issue a search warrant under s.29 of the 1939 Act in respect of a matter inside his own division.
5. However, the wording of the legislation does not support any such inevitable outcome, in my opinion. The wording appears to me to suggest that any Divisional Detective Superintendent is empowered in principle to issue a search warrant under s. 29, and the legislation envisages that he or she may in principle not be involved in a particular investigation despite his or her general oversight function, which gives him or her the capacity or potential to be actually involved.

6. In my opinion the intention of the Oireachtas, as derived from the wording of the legislation, was that it is a question of fact in each case whether the local Divisional Detective Superintendent was actually involved in a particular investigation, at the time the warrant was issued, rather than a question which turns on his or her general oversight function.
7. I do, however, agree with the majority judgment of O'Malley J. as to the potential application of the proviso under s.3 of the Criminal Procedure Act 1993, on the basis that the Court can be satisfied that there has been no miscarriage of justice in this case. Hence, like Charleton J., this dissent is as to the issue discussed above, but not as to the result.