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McCarthy J.
Barron J.
Barr J.

(100-102/84)

COURT OF CRIMINAL APPEAL

DIRECTOR OF PUBLIC PROSECUTIONS

v.

MARTIN FERRIS, JOHN P. CRAWLEY AND MICHAEL BROWN

JUDGMENT delivered the 15th December 1986

On the 29th September 1984 units of the Naval Service intercepted a motor vessel, the Marita Ann, in the waters off the Great Skellig, called on the vessel by megaphone to halt and fired tracer rounds; the vessel was stopped and boarded by a party, including Garda Inspector Ryan and Detective Garda McGillicuddy who were on board L/E Emer; the Marita Ann was escorted to Haulbowline in Cork Harbour. At the time it was stopped, there was on board the Marita Ann a large quantity of firearms, ammunition and explosives. The three applicants and two other men were all on board the Marita Ann at the time she was stopped and taken under escort to Haulbowline. All of those on board were charged before the Special Criminal Court with offences under the Explosive Substances Act, 1883 and the Firearms Act, 1925 as amended by

the Firearms Acts 1964-1971 and the Criminal Law (Jurisdiction) Act, 1976. All the accused were found guilty of

(a) possession of explosive substances contrary to s. 4 of the Act of 1883

(b) possession of firearms and ammunition with intent to enable other persons to endanger life

(c) possession of an F.N. rifle and an M 1 carbine and ammunition therefor with intent to endanger life.

They were acquitted of a charge of possession with intent to endanger life of the entire quantity of firearms and ammunition, the distinction being that the two weapons specified had been prepared for use and had clips of ammunition nearby.

Each of the accused was, at the trial, represented by Senior and Junior Counsel and, having been refused leave to appeal by the Special Criminal Court, served notice of application to this Court for such leave and, in support of such application filed elaborate grounds of appeal, numbering 47 in the case of Martin Ferris, 47 in the case of John P. Crawley and 17 in the case of Michael Brown.

At the commencement of the hearing, in the case of Martin Ferris, it was stated that the grounds relied upon were numbers 4 to 14,

dealing with the admiralty charts, and 27 to 29, dealing with the search of the vessel and the arrest of the applicant. It later transpired that this applicant wished to rely also upon grounds 1, 15-19 and 30-33.

Counsel for Michael Brown confined his argument to grounds 4 and 5, the admissibility of the charts, and 15, which rested upon an observation made by the President of the Special Criminal Court at the commencement of the trial. Counsel for John P. Crawley confined himself to grounds 37 and 38, which rested upon the same argument as ground 15 of Michael Brown. On the second day of the hearing Counsel for Michael Brown and John P. Crawley stated that they were expressly instructed to adopt all the arguments advanced on behalf of all of the applicants; the Court invited Counsel for the Director of Public Prosecutions to deal with all of these argued grounds of appeal, save 1, but his arguments did not evoke a response on behalf of any of the applicants. The task of this Court has not been helped by this method of presentation of these applications; the task is, however, untrammelled by any consideration of merit. The guilt of each of the applicants is clear beyond question; the issue is whether or not there were technical defects in the proof of that guilt.

The Court is satisfied that there were not and the applications for leave to appeal will be dismissed. It is necessary, however, to deal with each of the matters advanced in argument, in so far as the Court can appreciate the nature of the argument. Since each of the applicants, through his Counsel, adopted the arguments of his fellows, it is unnecessary to distinguish between any of the applicants in respect of any of these arguments which, themselves, being entirely of a legal and technical nature are the responsibility of those presenting the arguments.

1. That the Certificate of the Director of Public Prosecutions required by s. 7(1) of the Explosive Substances Act, 1883 had not been furnished to the Special Criminal Court.

S. 7(1) applies where a person is charged before a Justice; these applicants were charged before the Special Criminal Court. In fact, Counsel for the Director expressly conveyed to the Court the consent of the Director to the charge under the Explosive Substances Act being disposed of in the Special Criminal Court (Book I p. 26). The powers of the Attorney General for Ireland were conferred upon the Attorney General of Saorstat Eireann by s.6 of the Ministers and Secretaries Act, 1924, and thence on the

Attorney General established by the Constitution all of whose functions capable of being performed in relation to criminal matters are, pursuant to s. 3 of the Prosecution of Offences Act, 1974, to be performed by the Director of Public Prosecutions. S. 4(3) of the 1974 Act provides that the fact that the function of a law officer has been performed by him ... may be established, without further proof, in any proceedings by a statement of that fact made ... orally to the Court concerned by a person appearing on behalf of or prosecuting in the name of the law officer. The requirement of s. 7(1) of the 1883 Act, by definition, cannot apply to a prosecution before the Special Criminal Court, where, as in the instant case, those charged were brought before the Special Criminal Court in the first instance. It is only the Attorney General and the Director of Public Prosecutions who can bring proceedings in the Special Criminal Court; the weakness of this ground of appeal is all too apparent. When the argument was advanced at the trial, Counsel for John P. Crawley referred to R. v. Bates[1]. It was a

[1](1911) 1 K.B. 964; 6 Cr. App. R. 153

case where the accused, prosecuted by the King in the first instance, was brought before a Justice; it has nothing to do with this case.

2. The admissibility of the admiralty charts.

The offences were charged to have been committed "off the Great Skellig Rock, within the State". Evidence was, accordingly, led to establish that this particular area, where the vessel was stopped and the applicants arrested, is within the territorial seas being part of the national territory as defined by Art. 2 of the Constitution. The territorial seas of the State, for the purposes of the Maritime Jurisdiction Act, 1959, are that portion of the sea which lies between the baseline and the outer limit of the territorial seas (ss. 2,3 and 4); the outer limit is a line every point of which is at a distance of 3 nautical miles from the nearest point of the baseline. A nautical mile means the length of one minute of an arc of a meridian of longitude. Accordingly, it was necessary to prove that the area around the Great Skellig Rock is within the outer limit. S. 13 provides:-

"The Government may by order prescribe the

charts which may be used for the purpose of establishing low-water mark, or the existence and position of any low-tide elevation, or any other matter in reference to the internal waters, the territorial seas, the exclusive fishery limits or a fishery conservation area, and any chart purporting to be a copy of a chart of a kind or description so prescribed shall, unless the contrary is proved, be received in evidence as being a prescribed chart without further proof."

By Statutory Instrument No. 174 of 1959 - Maritime Jurisdiction Act, 1959 (Charts) Order 1959:-

"The Government, in exercise of the power conferred on them by s. 13 of the Maritime Jurisdiction Act, 1959 (No. 22 of 1959), hereby order as follows:-

...(2) Charts published at the Admiralty, London, shall be charts for the purposes of section 13 of the Maritime Jurisdiction Act, 1959."

In the course of trial extensive evidence was given by naval personnel as to the use of charts for the purpose of plotting a "fix" on the position of the Marita Ann at relevant times so as to establish that she was within the outer limit. The most important of these charts, that used on L.E. Emer and produced in Court

bore upon it the words "published at Taunton". Taunton was identified in evidence as being in Somerset in England. The applicants submitted that the charts "published at the Admiralty, London" specified in the statutory instrument could not and did not include the chart in question which expressed itself to be "published at Taunton". It was submitted, as a foundation for this argument, that the Act of 1959 should be the subject of the strict construction appropriate to penal statutes. The Act of 1959 made provision in respect of the territorial seas and the exclusive fishery limits of the State but did also prescribe for jurisdiction and procedure in respect of the infliction of penalties; whilst s. 13 is not limited to use in the prosecution of offences, it can, as in this case, be used for that purpose and ss. 9, 10 and 11 are clearly penal in application; the Court is satisfied, accordingly, that s. 13 should be strictly construed. The rule of strict construction arises if and when there is a doubt or ambiguity as to the meaning of the provision being construed; for example, if there is an interpretation open which would avoid the imposition of penalty, then that is the interpretation that should be applied. The first test is to look at the provision in its ordinary natural

meaning. If examination reveals a doubt, then that doubt must be resolved in favour of a person accused. Essentially, the issue raised in the instant case is whether or not the chart (exhibit 9) is a chart within the terms of the statutory instrument; it is not a question of whether or not the statutory instrument is within the terms of the section. Accordingly, the rule of strict construction of penal statutes has no application to this ground of appeal. The power given to the Government under s. 13 is to prescribe charts which may be used for particular purposes, which the Goevernment has done by prescribing "charts published at the Admiralty, London" and the issue is whether or not the particular chart purported to be a copy of a chart of a kind or description so prescribed. Whilst the particular chart produced contains the legend "published at Taunton" the evidence clearly establish through Mr. Mount that it was a chart emanating from the Admiralty, London. The word "published" in its ordinary meaning means made publicly or generally available and in a specialised meaning, to issue or cause to be issued for sale to the public (Oxford English Dictionary). In context, however, it means no more than issued with the authority of the Admiralty, London. It would be nonsense to suggest that if the

printing of such charts and their initial production were to be changed from one venue within the United Kingdom to another or, indeed, to a venue outside the United Kingdom, that this would require consequent fresh statutory instruments to be made. The Court is quite satisfied that the chart relied upon came within the kind or description prescribed in the statutory instrument.

3. Admiralty Charts - second ground

Council directive 80/181/EEC made on the 20th December 1979 made provision for the approximation of the laws of the Member States relating to units of measurement. It required that Member States should adopt and publish before the 1st July 1981 the laws regulations and administrative provisions necessary to comply with the directive. The directive prescribed legal units of measurement under three separate chapter headings and included in Chapter III legal units of measurements referred to in Art. 1(c) which permitted the continued use of the Chapter III units in certain Member States until a date not later than the 31st December 1989. Art. 2 provided that the obligations under Art. 1 "relate to measuring instruments used, measurements made and indications of quantity expressed in units of measurements, for economic, public health, public safety

or administrative purposes." This provision is echoed in Statutory Instrument No. 235 of 1983 which, clearly, was made in compliance with the EEC directive and prescribed the metrical equivalent of a wide variety of measurement, including "nautical mile (U.K.)" at 1,853 meters. The nautical mile as defined in the Act of 1959 means "the length of one minute of an arc of a meridian of longitude". It was, apparently seriously, contended that because of the EEC directive the term "nautical mile" could not legally be used and, it followed, that the prescription of the outer limit of the territorial seas in s. 3 of the 1959 Act was invalid with the consequence that the territorial seas of this State are either undefined or are without limit.

It is clear beyond peradventure that the purpose of the directive was to achieve what is called the approximation or harmonization of the laws of the Member States relating to units of measurement; in no sense does this make illegal the use of any form or expression of measurement but, as an examination of the directive reveals, demands that along with the older form of measurement, in the instances prescribed by Art. 2(a) the units of

measurement set out in the directive must be used. In the view of the Court the prescribing of the outer limit of the territorial seas of the State does not fall within "economic, public health, public safety or administrative purposes"; the prescription or delineation of the outer limit of territorial seas is a political act which may have consequences in a variety of ways. This ground of appeal is rejected.

4. Application for reference.

In the course of argument, Mr. Gray, on behalf of Martin Ferris, applied to the Court, as had been done on behalf of one of the other accused, not an applicant to this Court, in the Special Criminal Court, to refer to the Court of Justice of the European Economic Community the question as to whether the term "nautical mile" contained in the 1959 Act is compatible with EEC directive No. 80/181 of 20th December 1979.

Art. 177 of the Treaty of Rome provides:-

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutues so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

Assuming, without deciding that this Court is a court against whose decisions there is no judicial remedy under national law within the meaning of the last paragraph of Art. 177; that, although this Court or the Attorney General may certify an appeal to the Supreme Court in a matter that has been decided by this Court, the ordinary reading of the paragraph indicates a judicial remedy that does not require special leave, the Court is satisfied that the question posed is not a question within sub-paragraphs (a), (b) or (c) of Art. 177.

5. Search and arrest

Inspector Ryan of the Garda Siochana on stopping the Marita Ann

was one of the first boarding party of four persons who went by rubber dinghy to the Marita Ann and boarded it. He went to the after deck, was in full uniform, and informed the five men, later to be identified as all of the persons accused in the Special Criminal Court and including the three present applicants, who he was and that he was arresting them under s. 30 of the Offences Against the State Act, 1939 because "I suspected they were engaged in the commission of a scheduled offence under that Act, namely, possession of firearms." He told them to turn around and to face down on the deck which they did; Inspector Ryan requested the naval personnel to secure the prisoners and accompanied by Det. Garda Michael McGillicuddy and two naval officers searched the Marita Ann.

Inspector Ryan did not have a warrant; if he had, s. 29 of the 1939 Act, as inserted by s. 2 of the Criminal Justice Act, 1976 would have been ample authority for the officers of the naval service acting on their own. The search and arrest are challenged on the grounds that the wording used by Inspector Ryan was not a compliance with the standard requirement of a valid arrest in that there is no such offence as possession of firearms,

simpliciter. There are a variety of offences that can arise from the possession of firearms, ranging from mere possession without a firearms certificate to ... possession with intent to endanger life; there is an incidental power (under s. 21 of the Firearms Act, 1925) for any member of the Garda Siochana at all reasonable times to enter upon and to have free access to the interior of any ship or other vessel used for the conveyance of goods. Where a vessel is being used for the importation of a large variety of arms and ammunition, any time is a reasonable time for access by the Garda Siochana. As to the information regarding the offence upon which the arrest was being made, it is apt to quote a passage from the judgment of Walsh J. in The People (at the Suit of the Director of Public Prosecutions) v. Quilligan and O'Reilly.[2]

> "When a person is arrested under s. 30 as in any other arrest he must be informed of which of the many possible offences he is suspected unless he already has that

[2] Supreme Court, unreported, 25th July 1986

information, see The People v. Walsh[3].

It is important to emphasise that the authority to arrest under s. 30 springs from a suspicion held by a member of the Garda Siochana that an individual has committed or is about to commit or is or has been concerned in the commission of an offence under any section or sub-section of the 1939 Act or an offence which is for the time being a scheduled offence or otherwise as provided in subsection 1. There may well be circumstances in which the arresting Garda may not have sufficient information at the time of arrest to specify in detail which of several possible scheduled offences the person arrested is suspected of having committed. This is particularly

[3](1980) I.R. 284

[4]Frewen Vol. 2, p. 211

[5](1980) I.R. 294

[6](1982) I.R. 1

so in respect of offences under the Firearms Act; essentially, it is the unlawful nature of the possession that is the gravamen of the offence. Where the crew of a vessel at sea have in their possession the large stock of arms, ammunition and explosives as found in the Marita Ann and are told by an Inspector of the Gardai that they are being arrested for possession of firearms, it can scarcely be intelligently argued that they have not the information as to the offence or offences of which they are suspected when, as here, Inspector Ryan spoke of possession of firearms. In any event, even assuming the arrest was unlawful and, consequently, a breach of the constitutional rights of the applicants, it is nothing to the point. They did not make inculpatory statements and it does not bear upon the search. The search was authorised by s. 30 of the Offences Against the State Act, 1939, apart from s. 21 of the Firearms Act, 1925. The complai in respect of the search is that it was not carried out by the Gardai only but also by members of the Naval Service. This is so. It is not to the point. As was held in the Special Criminal Court,

the Gardai are entitled to call upon the assistance of the Defence Forces in support of the civil power; it would be ludicrous if it were otherwise.

5. Notices of further evidence.

An argument was advanced on the contention that the trial had been unfair in that there was what was called a stream of notices of further evidence; this is just not so. Four notices of further evidence were furnished, some well in advance of the date of trial which itself lasted four days. On being questioned in the course of argument, Mr. Gray agreed that there was no basis on which it could be said that the service of these notices prejudiced the conduct of the defence. The Court refrains from further comment on this ground.

6. The preliminary observation of the President of the Court

Mr. Justice McMahon at the very beginning of the trial referred to the public knowledge that a vessel loaded with arms and ammunition had been found and it was said that the persons charged were those on it. The complaint is made that this was in contravention of what are said to be the principles in The State (Healy) v. O'Donoghue[7], in that the particular applicant would feel that he was

[7] 1982 I.R. 335

not getting a fair trial. The Court considers this ~~an instance of~~ ~~undesirable~~ ~~[illegible]~~ and a quite unsustainable ground of appeal. It is fortified in this belief by the very fact that no objection was taken at the trial on behalf of any of the accused until the very end of the trial when the matter was first mentioned on behalf of the accused John P. Crawley, this despite the fact that each of the five accused was represented by Senior and Junior Counsel. Being a member of the Judiciary does not preclude the reading of newspapers, listening to the radio or watching television. The observation of the President of the Court was made in the context of a totally unsustainable objection to the form of the indictment in respect of the particulars; it is being taken out of context and used or sought to be used in a manner which the Court considers quite improper and unwarranted.

As already stated, these applications for leave to appeal are dismissed.

Affirmed as amended.

29.1.87