An Chúirt Uachtarach

The Supreme Court

Clarke CJ
MacMenamin J
Charleton J
O'Malley J
Baker J

Supreme Court appeal number: S:AP:IE:2020:000047, 000073, 000075, 000079, 000080
[2020] IESC 000
Court of Appeal record number 2019/219
[2019] IECA 53
Special Criminal Court bill number: SCDP 8/ 2015

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

Seán Hannaway, Edward O'Brien, David Nooney, Kevin Hannaway and Eva Shannon
Accused persons/Appellants

Judgment of Mr Justice Peter Charleton delivered on Tuesday 4 May 2021

1. In the context of the analysis of O'Malley J, with which this judgment concurs, what is considered here are issues of legal context and the statutory interpretation of the Criminal Justice (Surveillance) Act 2009. That is legislation whereby police, officials of the Revenue Commissioners, Defence Forces and Garda Ombudsman Commission representatives may covertly enter and conceal devices in locations where reasonable grounds suggest that bugging may help to prevent crime or whereby evidence for the pursuit of serious crime may be gleaned for use in prosecutions. Telephone usage analysis, what mobile phone called what phone for what duration, bounced off what mast location, and was used by whom, sometimes demonstrating a credible pattern consistent with the narrative of an offence, has been a feature of some serious criminal trials. Bugging evidence had been a stranger to Irish courts over many decades but, in many other jurisdictions, such as the United States of America, had been widely used by way of wiretap and covert surveillance. Accused persons' statements against interest, admissions or plans for a crime, being admissible in exception to the rule against hearsay.

Background

2. The accused, save for the first and last named, were convicted of membership of an unlawful organisation, the self-styled Irish Republican Army, and the first and last named with assisting that unlawful organisation. That conviction was returned on 29 June 2018, after a 50-day trial before the Special Criminal Court. The date of the offences was 8 August 2015. That date was among the dates when the unlawful organisation carried out an enquiry into internal issues. The proceeding was recorded by a device planted by gardaí in a home in Castleknock, Dublin. Since the enquiry was lengthy, the recording was edited down so that only relevant highlights were put before the court of trial with a view to offering evidence that what was involved was an event promoted as part of the activities of the unlawful organisation and that the accused persons were members of it or were assisting it.

Legislation

3. The 2009 Act has been much amended but any later changes were effected mainly to include the Garda Ombudsman Commission, enabling their officers to engage in surveillance subject to the same safeguards as the Garda Síochána, the Revenue Commissioners and the Defence Forces; see the Garda Síochána (Amendment) Act 2015. Section 3 provides that members of those organisations "shall carry out surveillance only in accordance with a valid authorisation or an approval" as granted under sections 7 or 8. Surveillance is, according to s 1, "monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications" and includes also "monitoring or making a recording of places or things". This latter definition widens the scope of what is authorised beyond simply listening or watching. Thus, this is not simply watching the comings and goings at a building or through a gateway, against which there is no legal prohibition, and is statutorily required to be conducted "by or with the assistance of surveillance devices". Such a device is not a camera used in a public place or closed-circuit television and nor is it apparatus designed to enhance "visual acuity or night vision", provided that this is not also used to "make a recording of any person who, or any place or thing that, is being monitored or observed". The definition thus fits closely with the common perception of a bugging device, one enabling hearing or vision from a distance and inside an otherwise occluded and out of sound range place. Night or vision enhancement can be used without legal interference in public places. Usually, the purpose of such a surveillance is to detect crime or keep the authorities a step or two ahead of criminal plans. Ordinarily, for practical evidence purposes, those devices must be able to make a recording. Similarly, a tracking device may be fitted, for instance to a car, under s 8 to "monitor the movements of people, vehicles or things" and here what may be envisaged is that either notes be kept but more likely a computerised record. In the view of O'Malley J, s 9 explicitly deals with the product of surveillance through the defining word "document" including a recording. This approach is correct as s 10 then expressly states the applicability of that section to documents, necessarily including those referred to in s 9. As O'Malley J analyses the obligations on the Minister, there is nothing in the facts of this case which has any bearing on this trial.

4. There is nothing to stop anyone photographing or viewing anyone in a public place and the general law is not altered by the 2009 Act which, at s 14(2) makes it clear, should this be doubted, that the legislation does not prejudice "the admissibility of information

or material obtained otherwise than as a result of surveillance" and at s 2(2) that nothing "in this Act shall render unlawful any activity that would otherwise be lawful." Where surveillance is authorised, that is evidence that a court must admit, s 14(1) providing: "Evidence obtained as a result of surveillance … may be admitted in evidence in criminal proceedings." Of course, there is nothing to stop an official with a wonderful memory reciting what she or he has heard over the device to a court, but that would lead to potential doubts as to accuracy. Notes could be taken and consulted, as in the ordinary way contemporaneously and later consulted for the refreshing of memory, but that is not the point. Clearly, the usefulness in a practical sense is to have a recording of what occurred in audio or visual format. Hence, s 1 and the Act generally defines a document as including "written or printed material in any form" but also includes "any recording, including any data or information stored, maintained or preserved electronically". It may be said that such is the purpose of the legislation: that officers be enabled to covertly enter, covertly plant a device, covertly observe, covertly record and then later covertly remove bugging devices. Aside from gathering intelligence for ongoing operations against subversion or organised crime, in the absence of recording and use such would be a pointless operation. What the legislation by necessary implication authorises is that such recordings be used.

5. These activities of entry and the planting of devices requires an authorisation, and this is granted by a judge under s 5, or by a superior officer in the case of emergencies and for a short time under s 7. Tracking devices require the permission of a superior officer under s 8. The Minister for Justice and Equality may promulgate subsidiary legislation for a lesser period of time for tracking than the four months in the section. All orders and documentation supporting authorisations are to be kept for court and monitoring, including by a designated High Court judge under s 12, and for review in the event of a complaint by a person who holds the belief that they are under surveillance. As might be expected, a surveillance authorisation under s 5 is based on extensive proofs, including those expected of belief, which cannot be unreasonably held, as to the necessity to prevent or detect serious crime through this method; generally see *Braney v Ireland* [2021] IESC 7 [20–25]. What may be involved is entry into a dwelling, otherwise constitutionally protected under Article 40.5, or into a business premises or the drilling into walls from an adjacent hereditament or some tampering with furnishing or items about to be delivered to effect a plant. Ordinarily, this is trespass but not a crime. A judge may put conditions on the authorisation under s 5 as may a superior officer who gives an emergency 72-hour approval.

Construction

6. While criminal trials may involve the presentation by the defence of ingenious arguments as to how the definition of offences are to be constructed in order to avoid liability or whereby special permissions for the gathering of evidence are to be construed so as to render what is proposed to be presented potentially inadmissible, two basic rules should guard against ostensibly alluring routes into statutory interpretations that are strained and which offend ordinary sense. Standing as sentinels, warning against entry into a state or place of detachment from reality, of law world, are, firstly, the requirement to not drive by, or take a quick look at, a provision, thereby detaching it from it's particular statutory context, but, secondly, also to consider what the legislative and historical context of the provision may be. Statutory context and legislative and historical background are essential illuminations that may help illustrate the purpose and construction of a provision. Anything may be misconstrued and the backdrop to

legislation and how provisions interact with each other inform meaning and also point up the intended parliamentary reality into what otherwise may become the unanchored musings of a law world speculation. As Lord Blackburn said in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743:

> But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.

7. Bennion on Statutory Interpretation (5th edn 2011) codifies this as "the commonsense construction rule" at section 197 of his work thus:

> It is a rule of law … that when considering , in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment.

8. Hence, such context as may illumine what the legislators were about and how a provision was to benefit criminal investigations and to protect the rights of those investigated, intruding so far as was necessary, are imperatives towards a realistic, and necessarily close, assessment of any involved argument that may upset a manifest statutory intention; see section 193 of Bennion. A classic example of this is *Chandler v DPP* [1964] AC 763 where Lord Reid at 791 refused to import into the Official Secrets Act 1911 a defence of subjective good faith enabling the invasion of military facilities in aid of nuclear disarmament where the protestors felt this to be of benefit to the general polity, or indeed world peace. Context is both internal and external. Words are construed in reference to their accompanying relevant provisions, as in the maxim *noscitur a sociis*, and to those the necessary backdrop is the purpose for which the provision was passed as seen within the then existing scheme of relevant legislative and common law rules, which may include judicial decisions. No court should be "oblivious … of the history of law and legislation." This does not involve a consideration of motives, which is an inappropriately subjective exercise and also of little usefulness for the analysis of any collective political will expressed in statutory form, but of examining what the legislature had in mind, such instruments speaking in effect for themselves, and an examination of whether the "terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending to something that was not intended." See Jessell MR in Holme v Guy (1877) 5 Ch D 901, 905.

9. Whereas there was no existing law in 2009 against which this new introduction of surveillance with a view to presenting evidence in court is to be construed, there is very definitely an existing context as to how Garda investigations are conducted. Here, the rule against radical amendments is helpful. As Dodd puts the rule, in *Dodd on Statutory Interpretation in Ireland* (Dublin, 2008) at 4.110:

> It is presumed that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. Where provisions give rise to plausible alternative constructions, one of which is a narrow interpretation and one of which is a wider interpretation that radically changes the law, the narrow interpretation may be preferred. It is

> considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment. The more radical the change, the more weight may be assigned to the presumption.

10. See *Doyle v Hearne* [1987] IR 601 and see the summary of the applicable rules in *JC Savage Supermarket Ltd. v An Bord Pleanála* [2011] IEHC 488 and Dodd's explanation of the informed interpretation rule at 8.04 and *Eastern Health Board v Fitness to Practice Committee* [1998] 3 IR 399; *State (Ennis) v Farrell* [1966] IR 107. In *Minister for Industry and Commerce v Hales*, McLoughlin J applied the presumption against radical amendments when rejecting an interpretation of s. 3(3) of the Holidays (Employees) Act 1961 which appeared to grant the Minister the power to radically redefine the scope of the Act to alter the law of contract. Henchy J in *Minister for Industry and Commerce v Hales* [1967] IR 50, 76, quoted *Maxwell on Interpretation of Statutes* (11th ed., Sweet & Maxwell, 1962), p 78 as to the following statement of the presumption:

> One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

The relevant context

11. Here is the relevant context. To get information, members of the gardaí may have statutory powers to stop and search, as in s 23 – 26 of the Misuse of Drugs Act 1977, or agricultural officers may have legislation enabling them to enter farms and to test animals for such dangerous dosing as growth hormones or clenbuterol, as in s 11 of the Animal Remedies Act 1993, or to get a search warrant allowing a home to be searched for drugs, as in s 26 of the 1977 Act as amended, or clenbuterol or growth hormones, as in s 12 of the 1993 Act. That requires, typically, information on oath giving grounds for suspicion reasonably held by the person swearing whereby a judge of the District Court may judicially arrive at the decision that there are indeed grounds to reasonably suspect the presence of relevant evidence, the usual formula used in statutes, in the home in question. The officers then enter and search. No doubt they will see much else beside syringes, or counterfeit notes if searching under the Criminal Justice (Theft and Fraud Offences) Act 2001, but a necessary infringement of privacy is what is implied by a search warrant and judicial scrutiny is part of what enables a reasonable standard to be set before entry can be effected. Since the tendency in modern statutes is to leave nothing to implication, and very little to delegated legislation, effectively but wrongly putting legislation on the same basis as revenue statutes, where there is no equity, the

2001 Act is a good example. There, s 48 authorises the issue of a warrant in searching for any evidence of a serious offence, including robbery or forgery. It may be noted that the section goes further than even the 1977 Misuse of Drugs act, including in s 48(3) a power to enter, using force if necessary, to search (including people) to "examine seize and retain" items reasonably believed to be evidence. Since much modern forms of theft has tended more towards actions through tricking people out of their property by computers or phone calls, the powers scope wider and s 48(4) includes copying records, seizing and retaining a computer, and then in the next subsection using a seized computer and demanding a password. Generally, the power is as in s 48(6) which is to "seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued."

12. What is not there, but what is an inescapable backdrop, are those steps which by necessary implication and essential context are the very fabric of criminal investigations: taking items and comparing them, preparing items for court, having tests run on items or on data, during tests perhaps dismembering items or destroying them necessarily to obtain best results, sending items or data abroad for physical or data processing according to the most modern techniques; for example see the steps taken in DNA analysis that necessarily followed from a lawful search in *Nash v Director of Public Prosecutions* [2015] IESC 32. All of that is implied by any lawful seizure of items. Otherwise, taking anything from a search, from a computer to a bloodstained axe, is a futile excursion into the gathering and admiration of curios fit only for display in a police museum as opposed to the obvious and essential purpose of making connections between items, recordings or data and the commission of a crime, with a view to presentation in court as a potentially credible forensic pattern: this is the very essence of police investigations which is proposed to be rendered futile by the defence argument as to the 2009 Act.

13. To exemplify the context further, at the back of someone's home an entrance to an underground facility is detected and therein amphetamines are reasonably suspected of being illegally manufactured. Ordinarily a search warrant will specify, in accordance with legislation, not just a power to look and take notes or photograph, but to seize the entire equipment, which may later be forfeited under the 1977 Act, and the raw and finished materials. Taking back to a police facility or laboratory whatever, in other words, seems reasonably to be of potential relevance. This is brought to such relevant facility by the authorised officers, gardaí or customs, and is catalogued and then sent for testing. The Forensic Science Laboratory is an independent facility under the aegis of the Department of Justice and Equality. Testing is done by qualified scientists, not by law enforcement officers, and some samples may be kept, for instance DNA profiles in accordance with the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. All of this involves some people going to court, them and others going to search, others guarding the scene of a crime, others bagging evidence, others cataloguing it, others bringing it for initial and then scientific analysis and the keeping of whatever is relevant for potential prosecution. Some samples may be sent abroad to facilities which have more advanced testing and then returned with reports; see *Nash v Director of Public Prosecutions*. During trials mounds of drugs or huge currency printing machines are not produced, but photographs and samples or the result of tests and, where the accused make confession statements on video, these are edited for necessary context as opposed to juries having to hear hours of repetitive to and fro dialogue.

A radical change

14. What is proposed by the argument on behalf of the accused on this appeal is that a radical change be effected. This argument is against the constitutional order. Article 15.2 of the Constitution in declaring to the representatives of the people "the sole and exclusive power of making laws for the State" might readily be defeated by a departure from the ordinary cannons of legislative construction as to the enactments thereby promulgated. According to the will of the Oireachtas, a new form of evidence is to be introduced in Irish courts; that derived from surveillance. But, according to submissions on behalf of the accused persons, this is to be treated not only in a way which is completely beyond the ordinary course of any criminal investigation but also operates as an affront to common sense. Section 9 of the 2009 Act provides that documents upon which an authorisation is based must be retained for three years or "the day on which they are no longer required for any prosecution or appeal to which they are relevant, whichever is later." If the defence, which is their entitlement, wish to raise an issue as to legally obtaining evidence, those documents are relevant to the valid issue of authorisations and to the existence of relevant suspicions. It could, and indeed has, been argued that s 9 refers to documents but not to the product of surveillance, which is likely to be a recording stored on a computer device in audio or visual format. As a matter of construction, that approach is untenable. The information obtained by surveillance is confidential under s 13 but disclosure may be made to a person authorised by the Garda Commissioner, or similar head of Revenue etc, for the purposes of "the prevention, investigation or detection of crime" or for the "prosecution of offences" or in "the interests of the security of the State" or as other enactments require. Under s 62(1) of the Garda Síochána Act 2005, information come by in the course of police duties cannot be disclosed save as to a list of exceptions set out in s 62(4)(a), including various State bodies and "to a court". There is nothing anywhere stating that normal police and investigation work is to cease outside of such exceptions. No provision requires that testing, communication of information and analysis is to come to an end. That cannot be implied. Further s 13 of the 2009 Act contemplates that relevant people may commit an offence by disclosing information and these include civilians working in a police setting and anyone "engaged under a contract or other arrangement to work with or for the Garda Síochána". Of the latter, the most obvious is the Forensic Science Laboratory in the Phoenix Park and other agencies with whom there is an arrangement to test samples for possible use in trials as evidence. These would not be put under an obligation of confidentiality were they not ever able pursuant the ordinary interpretation of this legislation to get this material, as counsel on behalf of each accused contends.

15. Generally, data which is kept in inert form, in other words is not being processed for the purpose of investigating crime or preventing serious offences, is kept apart from the context of police work. Section 98 of the Postal and Telecommunications Services Act 1983 made it an offence to intercept or reveal telecommunications data. Section 110(1)(b) of the 1983 Act, legislates that preservation is provided for by direction of the Minister and was accompanied by a requirement to strictly preserve the data. Data is rendered inert by storage. See now also Directive no 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and see also the Communications (Retention of Data) Act 2011. Here, there are strict prohibitions as to

disclosing data and as to how it is to be stored and here there are regulations as to access. What the defence point argued on this appeal is that there are no regulations made by the Minister under s 10 of the 2009 Act. This provides that the Minister, similar to those enactments, "shall ensure that information and documents to which this Act applies are stored securely and that only persons who he or she authorises for that purpose have access to them." This, however, has nothing to do with criminal prosecutions. It has to do with storage outside the context of investigative work by police. Section 10(2) enables the Minister to limit "the persons or categories of persons who are to have access" and to regulate procedures and numbers of copies. Use must be made only for legitimate purposes and the Minister may make subsidiary legislation as to the purposes for which access is granted, protecting privacy and avoiding any compromise to future investigations. This is about storage and research. It is not about criminal investigation or the preparation of evidence for court.

16. Because such regulations were not made, counsel on behalf of each accused posit the following scenario: that any police officer apart from those sitting in a nearby van to the surveilled location and listening, in this instance to an internal terrorist enquiry, can electronically record what they hear. They cannot, however, bring a USB containing the recording back to a Garda station, or even listen to it themselves later on. With every second that passes on a digital recording, information is stored. According to the defence, that cannot be played back. This, according to the argument put on appeal and to the Special Criminal Court, is accessing the information. The digital recording, it is contended, cannot be used by other personnel to collate information, the recording cannot be copied or processed to find and prepare relevant sections for presentation in court because, the defence contend, this is accessing. Thus, absent regulations, the defence argument goes, a police officer sitting in a nearby building can merely listen as the recording is made and then take the device on which it is stored and apply to the Minister for permission under the as yet to be promulgated secondary legislation. Of course, the defence argument concedes that the police officers in the van can take notes from which to later refresh their memory in court, in a detached appeal to a Georgian-era form of evidence presentation which reasonable people might be driven to reason the Oireachtas decided to move away from in favour of more certain methods of presentation of a case.

17. The scheme of the 2009 Act, however, like every other information gathering power as to crime prevention and detection, clearly enables all the relevant powers over seized items to also apply to seized data by way of surveillance. This information as to the trial or enquiry within the unlawful organisation was not unlawfully obtained. Any argued for distinction as to obtaining evidence and processing evidence is not evident on the authorities, which is not accepted in any event on the limited argument here preferred, and, furthermore, cannot have any connection with the case. The Special Criminal Court drew such a distinction but that was outlined in the context of a 50-day trial with multiple accused and in circumstances which impeded clarity of approach. The court of trial was correct, however, in the fundamental premise as to the validity of admitting the evidence. It may also be commented that it is not wrong for a court to require concision and to rule that the central issues of a case be focused on. Court resources may be properly marshalled in aid of trial efficiency. In her separate judgment, O'Malley J comments as to the possible implications of how such an analysis is to be approached. This is for another time. What is central to the decided cases cited in that there is a balance to be struck, should there be an illegality, and since crime has become more recently analysed as not

only being an affront to society but also a wrong against the victims of crime, further analysis may take that position of victims into account.

Result

18. In the result, the appeal should be dismissed and the order of conviction and sentence by the Special Criminal Court affirmed.