



Cúirt Uachtarach na hÉireann  
Supreme Court of Ireland

**The People (at the suite of the Director of Public Prosecutions) v. Joseph Behan**

**On appeal from: [2021] IECA 200**

**Judgment delivered on 30<sup>th</sup> May 2022**

**[2022] IESC 23**

**Headline**

The Supreme Court today dismissed the appellant’s appeal against conviction for offences arising out of an attempted robbery. Although there had been a breach of the statutory requirements under s.29(5) of the Offences Against the State Act 1939, the Court, in applying the proviso under s.3 of the Criminal Procedure Act 1993 was satisfied that no miscarriage of justice had occurred.

**Composition of Court**

Dunne, Charleton, O’Malley, Baker, Woulfe JJ.

**Judgments**

O’Malley J. provided the majority judgment dismissing the appellant’s appeal against conviction with whom Dunne and Baker JJ concurred; Charleton and Woulfe JJ concurred as to the result of the appeal but dissented as to the interpretation of s.29 of the Offences Against the State Act 1939.

**Background to the Appeal**

The appellant was convicted of a number of offences arising out of the attempted robbery of a business premises. A firearm was discharged during this incident injuring two staff members, one seriously. A search warrant in respect of the appellant’s house was issued by a division detective superintendent on foot of which incriminating evidence was found.

The appellant disputed the lawfulness of this search and contended that the division detective superintendent was not “independent” of the investigation within the meaning of s.29(5) of the Offences Against the State Act 1939 (as amended) (“OASA 1939”). The trial judge held that the division detective superintendent was independent at the time the warrant was granted and his actions thereafter did not affect that decision. The Court of Appeal also dismissed this argument holding that the division detective superintendent had made an independent assessment of the case for the warrant, his subsequent involvement in the investigation did not alter this. In any event, if it had been an error to request this particular member of the gardaí to grant a warrant, it was not one that had any practical consequences.

**Reasons for the Judgment**

O’Malley J. concluded that the Division Detective Superintendent who had issued the warrant for his arrest could not be considered to have been “independent of the investigation of the offence” as required by s.29(5) of the OASA 1939. Due to the nature of the role of division detective superintendent, such a member must inevitably be considered to be “involved” within the meaning of s.29(12), on being notified that a serious incident has occurred and is being investigated. This

role necessarily requires such a member to be involved so as to take on an oversight function and to ensure that an investigation is carried out as effectively as possible. [62] Therefore, there had been a breach of the statutory requirement. [66]

O'Malley J. considered the applicable principles in applying the proviso under s.3 of the Criminal Procedure Act 1993, where a court may affirm a conviction notwithstanding that the appellant raises an argument that could be decided in their favour, if it is satisfied that there has been no miscarriage of justice. Here, it was incontrovertible that no rational person, whether a member of the gardaí or a judge, would have declined to issue a search warrant in the circumstances as they existed. [73] O'Malley J. therefore agreed with the view of the Court of Appeal that the error in this case was one that made no practical difference. Even on the assumption that a *J.C. (People (Director of Public Prosecutions) v. J.C.* [2017] 1 I.R. 417) enquiry could have led to the exclusion of the evidence, there could not have been much more than a remote possibility of an acquittal. The evidence against the appellant was more than sufficient for a conviction, even if the evidence gathered on foot of the warrant was excluded. [75]

Charleton J., dissenting on the issue of statutory interpretation, considered that it had not been demonstrated that when the officer reviewed the CCTV footage for the purpose of determining whether to grant a warrant, he was doing anything different to what a judge would do, noting also that the burden to show otherwise is on the appellant. [16] As a result, the division detective superintendent was not "involved" at the time he issued the warrant as he was not aware of the investigation when he was granting the warrant. [18]

Woulfe J., also dissenting on this issue, further observed that the finding of the majority judgment suggests that such a divisional detective superintendent so notified of such an incident could never be empowered to issue a search warrant in respect of a matter inside his own division. He considered that the legislation envisaged that any such officer is empowered in principle to issue a search warrant under s.29 OASA 1939, and it is a question of fact in each case whether he was actually involved in a particular investigation.

However, despite dissenting on the interpretation of s.29, both Charleton and Woulfe JJ agreed with the majority judgment as to the application of the s.3 proviso of the Criminal Procedure Act 1993 and therefore the decision to dismiss the appeal.

#### **Note**

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

#### **Case history**

1<sup>st</sup> March 2022

[\[2021\] IESCDT 127](#)

[\[2021\] IECA 200](#)

Oral submissions made before the Court

Supreme Court Determination granting leave

Judgment of the Court of Appeal