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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **13/03/2024**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT LAGANSIDE COURTHOUSE

THE KING

v

SEAN FARRELL
and
GERARD MAGUIRE

RULING NO.1: POTENTIAL CHALLENGE TO THE ADMISSIBILITY OF EVIDENCE GIVEN BY MEMBERS OF AN GARDA SIOCHANA

Mr McCollum KC with Mr McNeill BL (instructed by the PPS) for the Crown
Mr Larkin KC with Mr O'Keefe KC (instructed by Phoenix Law, Solicitors) for the Defendant Farrell
Mr Ivers KC with Mr McIlroy (instructed by Brentnall Law, Solicitors) for the Defendant Maguire

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ROONEY J

Background

[1] This trial commenced on 28 February 2024. On 4 March 2024, members of An Garda Siochana ("AGS") were called to give evidence by the prosecution and were cross-examined by defence counsel.

[2] The members of the AGS were as follows: Garda Shane Lavelle; Garda John Prunty; Garda Matthew Murphy; Detective Garda Stephen McGonigle and Detective Inspector Patrick O'Donnell

[3] The evidence of Garda John Prunty and Garda Matthew Murphy referred to information provided to them from Garda Shane Lavelle (Communications Room at Letterkenny Garda Station) in relation to two vehicles, namely a black Volkswagen Passat, registration number 07-D-7897 and a silver Toyota Corolla, registration

number 06-WW-1870. Garda Lavelle informed Garda Prunty and Garda Murphy that these vehicles were connected with an incident on the outskirts of Derry where an explosive device was placed beneath an off-duty police officer's private motor car.

[4] The evidence of Garda Prunty and Garda Murphy was that they observed the Volkswagen Passat (07-D-7897) in Killygordon and thereafter followed this vehicle as it drove at excessive speed in the direction of Ballybofey. The vehicle eventually came to a stop. Garda Murphy told the occupants of the VW Passat, which included the defendants, that he was an armed Garda and that they were stopped under the provisions of section 30 of the Offences against the State Act. The occupants of the VW Passat and the vehicle itself were searched pursuant to the same statutory provision, namely section 30 of the Offences against the State Act.

[5] Detective Garda Stephen McGonigle arrived at the scene with Detective Garda Kilcoyne at 04:07am. Both Gardai were briefed by Garda Murphy that the Volkswagen Passat and the occupants had been stopped under section 30 of the Offences against the State Act and that the occupants had refused to give details of their identities. Detective Garda McGonigle stated that the three occupants of the Volkswagen Passat were arrested under section 30 of the Offences against the State Act 1939 as amended.

[6] The evidence of detective Garda Stephen McGonigle included a search of the route taken by the Volkswagen Passat which resulted in the recovery of gloves that were placed in six envelopes, labelled in a nylon bag, sealed with a cable tie and handed over to D/Garda O'Connell at Letterkenny Garda Station.

[7] D/Inspector Patrick O'Donnell arrived at the scene and took charge of the investigation. In his evidence, he stated that on walking back along the road towards Killygordon, he located a number of gloves. D/Inspector O'Donnell informed the Chief Superintendent that clothing seized from each defendant had been delivered to the forensic science laboratory in Dublin, for examination in relation to DNA and explosive traces. In addition, he informed the Superintendent that three pairs of gloves found on the roadside near Killygordon had also been forwarded to the forensic science laboratory for examination in relation to DNA and explosive traces. D/Inspector O'Donnell also gave evidence that on 24 June 2015, at 4:20pm, he became aware of a grey Toyota Corolla, registration number 06-WW-1870 which was parked in Lifford. This vehicle was seized as evidence under section 7 of the Criminal Justice Act 2006.

[8] The above summary of the evidence of the members of the AGS is not intended to be comprehensive. The significance of the said summary is that, after the witnesses had given their evidence, Mr McCollum KC on behalf of the prosecution, made a submission to the court in relation to two issues.

[9] The first issue raised relates to an anticipated challenge by the defence as to the legality and admissibility of the evidence of the AGS witnesses. Mr McCollum submits that, if the intention of the defendants is to challenge the admissibility of the An Garda Siochana (AGS) witnesses, then there is a duty on the defence at this stage to provide the prosecution with notice of (a) the evidence which the defence seeks to challenge as inadmissible, and (b)the grounds on which a challenge is to be made.

[10] Specifically, Mr McCollum submits that, based on the questioning of the Gardai witnesses by defence counsel, the prosecution surmises that the main, or at least some of the grounds for challenge, relate to the legality or the propriety of the stop, search and seizure of the respective vehicles and the search and arrest of the defendants. Mr McCollum KC strenuously argues that to properly address these matters, it is imperative that the prosecution is given advance notice of the challenges to the evidence and, in particular, the legal basis and grounds of any purported challenges to the admissibility of the said evidence.

[11] On behalf of the defendants, Mr Larkin KC submits that the admissibility of all evidence derived from unconstitutional or unlawful action by members of An Garda Siochana is open to challenge on the basis of that unconstitutionality or illegality. In respect of the evidence already given by the members of An Garda Siochana, Mr Larkin KC states that no objection is made at the stage as to the admissibility of the evidence. However, a candid assertion is made by Mr Larkin KC, that the evidence already given and also evidence yet to be received, is likely to form the basis of a submission that there has been unconstitutional or unlawful behaviour by Gardai.

[12] In essence, Mr Larkin's submission is that once the relevant evidence has been given, the PPS and the court can expect to receive legal arguments in relation to the admissibility of the evidence. Specifically, Mr Larkin in his skeleton argument, states that the court will receive submissions on the decision of the Irish Supreme Court in *People (DPP) v JC* [2017] IR 417. It is submitted that this decision confirms that the onus is on the prosecution to establish the admissibility of all evidence and specifically, where objection is made regarding the admissibility of evidence, the onus is on the prosecution to establish the evidence was not gathered in circumstances of unconstitutionality or, if it was so gathered, that it should nonetheless be admitted (see [2017] IR 417 at 769).

[13] The second issue raised by Mr McCollum KC relates to the role of the court, presumably in a voir dire, in its attempt to interpret and adjudicate upon law from another jurisdiction and, in particular, whether the powers exercised under the relevant legal provisions in a foreign jurisdiction were lawful or unlawful.

[14] Mr McCollum drew the court's attention to section 114(2) of the Judicature Act (NI) 1978, which provides as follows:

"*Other law in Northern Ireland courts*

114.-(1) For the purposes of proceedings before any, court in Northern Ireland whether sitting with or without a jury, any question as to the effect of evidence given with respect to the law of any country or territory outside Northern Ireland shall be a matter to be determined by the judge of the court.

(2) Without prejudice to any other statutory provision or to any rule of law or practice, in proceedings before a court in Northern Ireland judicial notice may be taken of the law of England and Wales or of the law of the Republic of Ireland.

(3) In proceedings before a court in Northern Ireland a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside Northern Ireland, irrespective of whether he has acted, or is entitled to act, as a legal practitioner in that country or territory.

(4) Where any question as to the law of any country or territory outside Northern Ireland with respect to any matter has been determined (whether before or after the commencement of this section) in any such proceedings as are mentioned in subsection (6), then in any subsequent proceedings before a court in Northern Ireland not otherwise empowered to take judicial notice of that determination-

(a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country or territory with respect to that matter; and

(b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country or territory with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved,

but this paragraph shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings.

(5) Except with the leave of the court, a party to any proceedings shall not be permitted to adduce any such finding or decision by virtue of subsection (4) unless, before the hearing at which he seeks to adduce it, written notice that he intends to do so has been served on each of the other parties to the proceedings or on his solicitor.

(6) The proceedings referred to in subsection (4) are the following, whether civil or criminal, namely-

(a) proceedings at first instance in any of the following courts, namely the High Court or Crown Court, or the High Court or the Crown Court in England and Wales;

(b) appeals arising out of any such proceedings as are mentioned in paragraph (a);

(c) proceedings before the Judicial Committee of the Privy Council on appeal (whether to Her Majesty in Council or to the Judicial Committee as such) from any decision of any court outside the United Kingdom.

(7) For the purpose of this section a finding or decision on any such question as is mentioned in subsection (4) shall be taken to be reported or recorded in citable form if, but only if, it is reported or recorded in writing in a report, transcript or other document which, if that question had been a question as to law of Northern Ireland, could be cited as an authority in legal proceedings in Northern Ireland."

[15] Mr McCollum refers the court specifically to section 114(2) of the 1978 Act and emphasises that it is a matter of discretion for a Northern Ireland court to take "judicial notice" of the law of the Republic of Ireland. Mr McCollum submits that judicial notice can be taken in relation to matters of general knowledge or custom, matters of common sense and ordinary experience. Generally speaking, the doctrine of judicial notice allows a court to treat a fact as established, notwithstanding that no evidence has been adduced to establish it. It is submitted that the rationale for the

doctrine of judicial notice is that a fact is sufficiently notorious or of such common knowledge that it requires no proof. Accordingly, the judge, without recourse to any extraneous sources of information may take judicial notice of the fact and treat it as established, notwithstanding that it has not been established by evidence.

[16] Mr McCollum argues that the doctrine of judicial notice, which invokes the discretion of the court, should not be utilised when a Northern Ireland court is required to adjudicate on the interpretation of a foreign statute and whether, as in this case, the police officers in the Republic of Ireland, in the exercise of their statutory powers, acted unlawfully or unconstitutionally.

[17] In essence, the submission advanced by Mr McCollum is that whilst a Northern Ireland court can take judicial notice of the law of the Republic of Ireland, in the exercise of its discretion, in the circumstances of this trial it should decline to take judicial notice but rather call for the evidence of an appropriately qualified expert. In support of this submission, Mr McCollum refers the court to the decision in *Deighan v Sunday Newspapers* [1987] NI 15 108, where the judge declined to take judicial notice under section 114 of the 1978 Act and called for expert evidence on a complex point of Irish law.

[18] Mr Larkin KC, on behalf of Sean Farrell, refers also to section 114(2) of the 1978 Act and makes the observation that the law of the Republic of Ireland and the law of England and Wales are placed on the same footing. Therefore, a Northern Ireland court should have no more hesitation about evaluating submissions based on decisions of the Irish superior courts than it would have in evaluating submissions based on, for example, the Criminal Appeal Reports in England.

[19] The defence submit that the content of the law of the Republic of Ireland, including the extent of rights under the Irish Constitution is a matter on which, with the assistance of the legal representatives, the court can take judicial notice pursuant to section 114(2) of the Judicature (Northern Ireland) Act 1978.

Decision

[20] Having carefully considered the written and oral submissions of counsel, in respect of the issues raised above, I make the following rulings.

[21] Firstly, I accept the arguments advanced by the defence that it is not required at this stage to provide the prosecution with advance notice of (a) the evidence which the defence may seek to challenge as inadmissible and (b) the particular grounds, legal or otherwise, on which any challenges are to be made.

[22] The court notes that during cross-examination of the Gardai, it was not specifically put to any witness that he acted unlawfully or unconstitutionally in the exercise of his powers. Mr Larkin and Mr Ivers, on behalf of the defendants, submit

that whether the officers acted illegally or unconstitutionally is a matter for legal argument and submissions. This tactical decision is a matter for defence counsel.

[23] Counsel for the defendants submit, and I agree, that it is only after the evidence has been given by the witnesses, will the defendants be in a position to make submissions on admissibility. Until such evidence is received, the defence is not required to give advance notice to the prosecution and witnesses for the prosecution of the ways in which the admissibility of the prosecution evidence may be attacked.

[24] Accordingly, it is my decision that the evidence of the prosecution witnesses should continue until the stage is reached for the defence to challenge the admissibility of the evidence. However, I will emphasise that, once the evidence has been given, the defence must provide the prosecution with immediate notice as to (a) the evidence of the witnesses to be challenged and (b) the legal grounds forming the basis of the admissibility challenge.

[25] I will give further rulings in respect of the necessary requirements at a later stage.

[26] In relation to the second issue, in the event that the defendants challenge the admissibility of the evidence of members of An Garda Siochana on the basis that they acted unlawfully or unconstitutionally, I will decline to take judicial notice of the law of the Republic of Ireland pursuant to section 114(2) of the Judicature (Northern Ireland) Act 1978. In my view, the law of the Republic of Ireland is a question of fact which calls for the evidence of an appropriately qualified expert and cannot simply be the subject of judicial notice. Section 114(3) of the 1978 Act makes specific reference to a suitably qualified expert, and I will require the guidance from such an expert.

[27] Counsel for the prosecution referred me to the decision of Mr Justice Binchy in *Minister for Justice and Equality v Maguire and Farrell* [2019] IEHC 805. In each case, the Minister sought orders for the surrender of the defendants to Northern Ireland pursuant to European Arrest Warrants ("EAWs") issued by the District Judge sitting in Laganside Court, Belfast. At para [24], the learned judge stated as follows:

> "There are two striking features to these applications. The first is that no allegation of any kind had been made that the evidence gathered by the Gardai from the respondents was gathered in violation of their constitutional rights…..It is not unrealistic to expect that if such instructions disclosed any violation of their constitutional rights, such violation would have been relied upon by one or both of the respondents in support of one, or both of these applications."

[28] The failure of the defendants to challenge before Mr Justice Binchy the evidence of the Gardai on the basis that it violated their constitutional rights has deprived this court of the benefit of the learned judge's analysis and interpretation of the relevant legal principles regarding the circumstances of this case. It is also likely, if the submission of Mr Larkin KC is correct, that such an analysis would have involved a consideration of the decision of the Irish Supreme Court in *People (DPP) v JC* [2017] IR 417 (see para 12 above). I am therefore fortified in my decision that the evidence of an appropriately qualified expert will be required.