Judicial Communications Office

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COURT DISMISSES APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal by Fionnghuale Mary Theresa Dympha Perry against her conviction for a single count of collecting or making a record of information likely to be useful to a terrorist.

[The quotations below are from McCloskey LJ, delivering the unanimous judgment of the Court of Appeal]

1. On 15 March 2023 Nuala Perry, ("*the Appellant*"), following a non-jury trial, was convicted of a single count of collecting or making a record of information likely to be useful to a terrorist(per the indictment) -

> "*… on a date unknown between 16 September 2015 and 21 February 2018, collected or made a record [*namely, certain notes*] of information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely a security debrief regarding the police recovery of firearms, ammunition and explosives.*"

… contrary to section 58(1)(a) of the Terrorism Act 2000. On 17 May 2023 she was punished by a sentence of four years imprisonment.

2. The search of the Defendant's home and discovery of the offending notes occurred on 20 February 2018. In summary, the prosecution case was that the notes constituted a debriefing by dissident Republicans of certain persons who were arrested and interviewed by the police following a significant arms discovery in the Ballymurphy area of Belfast. A police search of a house in Ballymurphy, West Belfast on 17 September 2015 detected semtex explosives, two improvised detonators, a revolver and silencer, a semi-automatic pistol and a substantial quantity of ammunition. The householder was arrested, prosecuted and convicted.

First Ground of Appeal Against Conviction

3. The Appellant contended that the search of her home was unlawful, on two counts. The first count is dismissed in these terms:

"[39] We consider that, fundamentally, Article 17(6)(a)(i) of PACE 1989 is designed to ensure a procedurally proper search warrant process which is invested with the degree of formality and solemnity appropriate to the subject matter, the judicial nature of the procedure

[1] The panel was McCloskey LJ, Colton J and Fowler J. McCloskey LJ delivered the judgment of the court.

and the rights of occupiers of premises. It also caters for the possibility that some imposter or miscreant might present a search warrant application to a Lay Magistrate, which is not an entirely fanciful one (and is expressly recognised in the published materials of the English College of Policing). It operates as a safeguard for the occupier of premises. We pose the question of whether any of these purposes is frustrated by specifying in the search warrant application the service number, and not the name, of the police constable concerned. We consider that this question invites a negative answer. The name of the applying police officer is but one means of identifying them in furtherance of the overarching aims of procedural propriety and formality and affording the occupier of premises adequate safeguards. The police officer's service number, an identifying mechanism which can be readily verified by the Lay Magistrate or District Judge concerned, together with the officer's warrant card, is equally capable of furthering these purposes. They are not diminished or compromised in any discernible way by the use of this mechanism. The absence of any statutory requirement that the applying officer possess any particular expertise or qualifications or elevated rank is another material factor.

[40] Our conclusion is that in devising Art 17(6)(a)(i) of PACE 1989 the legislature did not intend to visit a search of premises with the draconian condemnation of illegality on account of the police officer concerned having applied to the judicial officer for a search warrant utilising their service number rather than their name. This construction provides an adequate safeguard for the occupier of premises, gives rise to no discernible incongruity (much less an absurdity), is compatible with good sense and pragmatism, respects the values of formality and solemnity identified above, does not compromise any discernible safeguard for the occupier of premises and results in no impermissible imbalance in the triangulation of interests in play. It follows that we reject the first limb of the unlawful search ground of appeal."

4. The second challenge to the lawfulness of the search of her home is dismissed in these terms:

"[50] … We consider it material that there is no statutory requirement that the authorised search officer be of a rank above that of constable or possess any special qualification or experience. Nor does the statutory scheme require that they be members of any particular unit or based at any particular station. We further consider that the legislature must have had in contemplation some of the practical realities of policing. These would include police officers' work shifts, sickness absence, unexpected changes of circumstances, fluctuating corporate plans and priorities and the resulting difficulties in making unerring operational predictions and forecasts. Some of these prosaic realities featured in the evidence adduced at the Appellant's trial. Of course, Parliament legislates in what is frequently called "the real world".

[51] … We must also take into account the absence of any evidential foundation for any suggestion that if the letter of this discrete statutory requirement had been fully observed the relevant part of the form would have been completed in any different way. In other words, the composition of the search team would presumptively have been the same. We further take into account that there was no outright failure to observe the statutory requirement. In substance, the officers concerned were in fact authorised, albeit by Detective Constable Lynch. Properly analysed, therefore, the failing related to who provided the requisite authorisation.

Finally, this is the sole irregularity in the entirety of the search process and operation of which the Appellant complains.

[52] When pressed by the court to articulate what, on the Appellant's case, is the purpose underlying the statutory requirement under scrutiny, Mr Hutton KC submitted that it was designed to import control and regulation. We are disposed to accept this. The evidence establishes, however, that the elements of regulation and control characterised this search process and operation from beginning to end. This is evident from the relevant documentary records and the sworn police testimony. At its zenith, the Appellant's case is that one of the multiple elements of control and regulation was provided by a police officer with a rank below that of inspector. The functions of the inspector had been discharged in all respects bar one. Furthermore, the Appellant is unable to point to any concrete consequence adverse to her, any deprivation of rights or any tangible prejudice resulting from this irregularity.

[53] Giving effect to the analysis and reasoning in the preceding paragraphs, we are unable to identify any discernible reason for imputing to the legislature an unexpressed intention that a failure to strictly observe the authorisation provisions of paragraphs 1 and 2 of Schedule 3 to the 2007 Act should have the extreme consequence of condemning the ensuing search as unlawful and/or rendering its fruits inadmissible in evidence in any ensuing criminal trial. Thus the second limb of the first ground of appeal fails."

Second Ground of Appeal

5. The Appellant contended that the trial judge erred in rejecting the Appellant's application for a direction of no case to answer. The first element of the application made to the judge, focusing on the statutory requirement of "*likely to be useful* [etc]", was that the notes in question did not have the requisite quality of utility within the terms of the statutory stipulation. In summary the argument was: there was no evidence (at the mid-stage of the trial) of when the Appellant had made the notes (which conduct was agreed); there was no evidence to "*counter the suggestion*" that this occurred some-time after 2015; the court should consider the relevant date to be the date of the search, in February 2018; there was no evidence that on that date the notes had the requisite quality of utility in the statutory terms; and any previous utility had been extinguished by the passage of time.

6. This argument is rejected:

"[60] It is trite that the material passages in the judgment must be considered as a whole. This ground of appeal does not entail any developed challenge to or critique of the several elements of the judge's reasoning. Evaluative judgement based on the evidence adduced is the hallmark of these passages. In our view each of the expressed matters of evaluative judgement fell comfortably within the judge's margin of appreciation in the context of the evidence, documentary and oral, adduced by the mid-stage of the trial, together with the agreed facts. If and insofar as there are elements of inference and/or judicial notice in these paragraphs no error is ascertainable. Furthermore, no specific aberration has been formulated on behalf of the Appellant. It is appropriate to add that the elapse of time point, which featured prominently in the submission made, was at its height purely speculative, devoid of any supporting evidence.

[61] It follows that the first limb of the application for a direction of no case to answer was correctly refused, with the result that the first limb of this ground of appeal has no traction."

7. The second element of the application to the trial judge (and of this ground of appeal) was that there was sufficient evidence of the defence of reasonable excuse and a corresponding lack of evidence from or on behalf of the prosecution countering this to the requisite standard of proof. The essential components of this defence were the Appellant's asserted journalistic activities, her political views, the nature of other materials recovered from her laptop, her previous connection with Saoradh, a newspaper article dated 15 March 2018 and, finally, the layout of her room and the positioning of the offending materials. The trial judge did not address this limb of the direction application. This failure is not dispositive of this ground, which this court must proceed to evaluate in full.

8. This discrete ground is dismissed:

"[69] The resolution of this discrete ground of appeal turns firstly on the trial judge's assessment of the content and nature of the offending notes. We have examined this above and found it to be unimpeachable. We further consider that on a purely objective assessment: none of the materials on which the Appellant relied/relies sounded on or addressed in any way the offending materials; they did not shed any benign or innocent light on the latter; the other materials were of an indisputably different kind in content, recording and presentation; the nexus between the Appellant and the offending materials was incontestable; the offending materials were concealed; the room layout was at best a neutral factor; and the Appellant's silence during her police interviews undermined, rather than promoted, her "reasonable excuse" defence.

[70] From all of the foregoing it follows that the trial judge's failure to engage with, and determine, the second element of the Appellant's application for a direction does not avail her at this remove as this could not realistically have succeeded. The second limb of this ground of appeal fails accordingly, as does the ground itself in consequence."

Third and Fourth Grounds of Appeal

9. These interrelated grounds were based firstly on the trial judge's interpretation of part of the Appellant's Defence Statement ("DS"), which claimed:

> "[72] … *These original notes were forwarded to the defendant some considerable time after the events giving rise to Kevin Nolan's conviction and were forwarded after Kevin Nolan was sentenced. Any currency in the information contained in the notes was considered by the defendant to have long since dissipated. The defendant did not think that the information in the notes, at the time at which she received them, would be of any future use to any one in any sinister way. Any usefulness or utility that the information might once have had (which utility is not accepted) had been spent. She believes that this was partly why the notes were considered suitable for sending to her at that time."*

10. The trial judge held that the Appellant's account in her sworn testimony was manifestly untruthful, being contradicted both by various elements of the evidence before the court and her DS (above).

11. This challenge is rejected on several legal grounds. In particular:

"[98] … To summarise, the DS has a series of unique characteristics and functions, all enshrined in statute. It is exclusively a creature of statute. Its compilation is a matter of statutory obligation. This is a solemn and formal exercise, carried out by the defendant's lawyers. It speaks for itself. It is not evidence of anything. It should not be treated as a defence exhibit. The DS is a species of criminal litigation pleading. It commits the Defendant to a concrete case, to be contrasted with any evidence bearing on the ingredients of such case …

[99] … The chief ingredients in the context in this instance are the following: the DS was an obligatory statutory requirement; it was compiled in the context of a prosecution for a serious criminal offence; its authors were experienced lawyers; it was prepared following committal for trial; it was not amended subsequently; it had the presumptive approval of the Appellant; and later subjection to close scrutiny by prosecuting lawyers and the trial judge would have been as a minimum readily foreseeable. Given these contextual factors the scope for latitude in construing this document is limited.

…

[101] The trial judge entertained no reservations about the meaning of para 4(n) of the DS. He considered it "*obvious*". This court is unable to identify any error of law in the construction espoused by the judge. Furthermore, having construed the DS in this way, the judge did not rest. Rather, he provided a reasoned analysis of why the Appellant's sworn evidence had entailed a "*new and different account*": see para [42](v). The extensive arguments on behalf of the Appellant do not engage with this passage in any meaningful way. This court considers the reasoning in this passage to be cogent. None of the aberrations identified in para [79] above is suggested and none is identifiable.

[102] Alternatively, applying the criterion enshrined in the Appellant's formulation of this ground and assuming the Appellant's argument to be correct viz the meaning of para 4(n) of the DS is purely a question of fact, we consider that the trial judge's assessment of the meaning of para 4(n) of the DS was not merely "justified": in our judgement, it was irresistible – in his terms, "obvious".

[103] This ground of appeal has certain additional elements. These are, in summary, that the trial judge's assessment that the Appellant's "story" was a fabrication and his determination of the adverse inference issue are unsustainable as both were contaminated by his erroneous construction of para 4(n) of the DS. We have rejected the cornerstone of this contention.

The court added:

"[106] The trial judge's assessment of the Appellant's account as untruthful was not confined to his construction of para 4(n) of the DS. Rather it had several other

ingredients. There is no sustainable challenge to any of these. The judge concluded that the Appellant's account was directly contradicted by all the evidence. He identified no evidence supporting it. These are powerful, uncompromising findings. They are plainly harmonious with the evidence adduced. They betray no error of law.

[107] Furthermore, it is to be noted that the judge's diagnosis of a *direct contradiction* of the Appellant's account by the evidence *included* what followed. The five particulars then formulated, therefore, were not designed to be exhaustive. It is clear to this court from its careful review of the transcribed evidence, particularly that of the Appellant, that the judge could have amplified his list. In particular, and inexhaustively, the judge could readily have added that the Appellant's claim that the notes allegedly received by her were never going to be of any journalistic value because of (a) their lack of intelligibility and (b) the anonymity factor was manifestly irreconcilable with her assertions that she nonetheless devoted a full week to the exercise of deciphering them and struggled to comprehend much of their meaning. The judge could also have made the same assessment of the Appellant's claim that she copied the content of the notes into her own handwriting for the purpose of protecting the source – an unidentified person - and, further, one whose lack of identity, on her case, rendered the content journalistically useless. The contradiction is unmistakeable. Equally striking is the Appellant's failure to adduce evidence of comparable writing conduct – which, on her case, was available. The judge could also have added that the Appellant's explanation of her failure to record the relevant information on her laptop (see para [72] above) was incongruous and, hence, unbelievable.

[108] For the reasons elaborated this court can identify no merit in this ground of appeal. The effect of this conclusion is that the freestanding section 58(3) (ie the 'reasonable excuse' defence) ground of appeal must also fail. So too the challenge to the trial judge's determination to make an inference adverse to the Appellant arising out of her effective silence during the police interviews. It is appropriate to add that this challenge had no merit in any event given the judge's unequivocal statement that it did not contribute to his guilty verdict."

12. In summary, this court entertains no reservations about the safety of the Appellant's conviction. None of the grounds of appeal has any merit. The appeal against conviction is dismissed for the reasons given. The court will consider the appeal against sentence separately.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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