Judicial Communications Office

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COURT DELIVERS JUDGMENT IN APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal[1] today rejected an application for leave to appeal in respect of four convictions dating back to 1991 for making a property available for IRA meetings. It quashed, without objection, one conviction related to the kidnapping and interrogation of Sandy Lynch.

Background

Erin Corbett ("the applicant") pleaded guilty on 5 March 1991 to five offences of making property available to others knowing or suspecting that the property might or would be used in connection with terrorism. She was sentenced to five years' imprisonment suspended for five years. This was following a trial in relation to the events surrounding the kidnapping and interrogation of Alexander "Sandy" Lynch in January 1990 in which the applicant was one of 10 co-accused all of whom were convicted at trial for related offences. The applicant's involvement was in providing the first port of call on the evening where the interrogation of Sandy Lynch took place and from which house he was subsequently taken to the house at which he was found by the police following a tip-off that he was being held there against his will by members of the Provisional IRA. This activity by the applicant was comprised in one of the counts to which she pleaded guilty. The other four counts related to the provision of property for meetings of the IRA between 1989 and 1990.

In 2008, the convictions of the applicant's co-accused in the Sandy Lynch trial were quashed on the basis that relevant sensitive material was not disclosed at trial in relation to the possible involvement of state actors in the commission of the offences. The prosecution conceded that the applicant's conviction on count 9 was unsafe for the same reasons. The other four counts, however, pre-date count 9 and encompass the same type of activity, namely allowing property to be used for meetings of the IRA.

The applicant sought in her appeal to adduce fresh evidence in the form of two affidavits in which she explained that she had made her property available "through fear and misguided loyalty to my ex-husband" and that she had never been involved in paramilitary activity and did not support their illegal activities. The court cited from the police interviews which took place in 1990 in which she admitted that she knew the IRA was using her house and that she agreed. It commented:

> "Drawing all of the above together we identify some striking facts which emerged during this series of interviews. First, the applicant does not allege duress at any point. Second, the applicant does not identify the man who asked her for use of her property for the IRA. This is in keeping with an overall reticence on the applicant's part to divulge any information. In fact, as we have said it is only as the interviews progress that the applicant makes the admissions that then form the basis of the evidence against her. The third fact is that at no point either at the time or now does the

[1] The panel was Keegan LCJ, Treacy LJ and Sir Paul Maguire. Keegan LCJ delivered the judgment of the court.

applicant make any allegation of ill treatment by police during interview. This is the contextual setting in which we must assess the strength of the applicant's arguments."

The arguments

Two core points were raised by the applicant in support of her appeal:

- That all of the convictions are unsafe on the basis of the involvement of a state actor in the commission of the crimes who effectively entrapped the applicant.
- In the alternative that the applicant was deprived of the opportunity to make an application at trial for the exclusion of her confession and or an abuse of process application on the basis of the general circumstances surrounding these offences.

The prosecution, however, contended that the fundamental difference between the applicant's appeal and her co-accused was that in her interviews in 1990 she admitted allowing her property to be used well before the events of 5 January 1990 and there was no apparent connection to the kidnapping/murder of Joseph Fenton who was taken to the same address and then shot by the IRA as he was suspected of being an informer.

The court conducted an examination of sensitive material to decide if there was undisclosed material which was relevant to the four convictions which the prosecution maintained were valid. It was satisfied that there was no relevant sensitive information that would assist the defence or validate the applicant's case in relation to state involvement in relation to the four convictions at issue which were separate from the Lynch and Fenton cases. This outcome was communicated to the applicant's legal representatives to provide an opportunity to consider any implications and specifically whether or not evidence needed to be called from the applicant.

Counsel indicated that the applicant would not give evidence and that the appeal would proceed on legal submissions only. The argument was made that because count 9 was quashed and because the questioning of the applicant came about as a result of the evidence of Sandy Lynch that this infected the other counts and also led to a situation where the applicant did not have a fair trial in that she could not apply to exclude evidence or apply for an abuse of process at trial. In considering this refined appeal the court decided to admit the fresh evidence of the applicant in affidavit form to determine whether in the light of all available information this was a case of entrapment and/or whether abuse of process can be established. If either argument were made out it would have a bearing on the safety of the convictions.

Discussion

The court first considered the case law in relation to entrapment which states that a court has discretion to stay proceedings for abuse of process in any given case where it would be an affront to the public conscience to continue. This may arise in circumstances of entrapment by law officers or state actors in the Northern Ireland context in the commission of criminal offences. Whether the claim does result in the quashing of a conviction will depend on all the circumstances. In 2020, the Court of Appeal[2] concluded that "the failure to disclose the participation of informers in the commission of the crime did not deprive the appellant of any opportunity to stay the proceedings on the basis of entrapment."

[2] R v Hill [2020] NICA 30

The court said that in this case the sensitive material did not support the applicant's case as regards the four counts in question. It said her cases therefore represented "an unexceptional opportunity to commit the criminal offences which she admitted at interview."

The second wider argument based on abuse of process did not depend upon entrapment but was connected with the fairness of the proceedings as a result of which the applicant was convicted. Counsel for the applicant presented the following argument:

- Had the relevant disclosure been made by the prosecution, it would have enabled an application for a stay of proceedings as an abuse of process and/or an application to exclude evidence.
- That the ability to make such application would not have been confined to count 9.
- That it could not be said whether such application would or would not have been granted.

The court has power to stay proceedings where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case[3]. In that category of case the court is concerned to protect the integrity of the criminal justice system and a stay will be granted where the court concludes that in all the circumstances the trial will offend the court's sense of justice and propriety or will undermine public confidence in the criminal justice system and bring it into disrepute. Counsel for the applicant maintained that the applicant should not have been prosecuted for offences which came to light only by way of Sandy Lynch's evidence in respect of offences with substantial state involvement from which flowed the applicant's arrest and detention, and consequent admissions.

The court commented that this was not an argument that has arisen in any of the other case law provided to it, however, the answer to the question simply involved application of principle to the particular facts. The court made the following determination:

> "Firstly, it is quite clear from the interviews that we have examined that the applicant at that time through a series of interviews did not identify duress as an issue. She also quite clearly indicated that she knew that members of the Provisional IRA were using her property. So, duress is not an issue. The next question is whether this is truly an entrapment case. We have, as we have said, found that there was no state actor involvement in the original request to the applicant to provide her property one year before these events took place. It is therefore impossible to see how the applicant can claim entrapment by a state actor. There is simply no evidential basis to support that argument."

The remaining question for the court was whether or not there was merit in the more procedural point that the applicant was denied the opportunity to make a stay application to the trial judge on the basis of abuse of process. The court said it could see why this point was raised:

> "The applicant comes before this court saying that she was not a sympathist with the IRA and therefore wants to clear her name. However, at the time of these serious criminal offences it appears that she willingly gave up her property. This was well before the Sandy Lynch incident. Therefore, we do not consider that the applicant was

[3] *R v Maxwell* [2011] 1WLR 1837

> prejudiced by the lack of disclosure at trial of sensitive material relating to that incident. Equally, we do not accept the argument that there is a case of *de facto* duress as a result of the general conditions in Northern Ireland prevailing at the time. We cannot accept this argument as it overlooks the fact that notwithstanding the conditions prevailing at the time the general population in North Belfast and elsewhere in Northern Ireland did not allow their houses to be used by the IRA for terrorist purposes."

The court said that without any other evidential basis the convictions in relation to counts 10 to count 13 could not be said to be unsafe:

> "These are not convictions based on instigation or inducement by the police or state agents by way of manipulation of the applicant. We do not consider that the applicant's argument is sustainable that the criminal justice system would be compromised if such prosecutions were pursued. It is perhaps difficult for the applicant in circumstances where all of the co-accused in the other case relating to Lynch were acquitted. However, as we have said the bulk of her offences pre-date that circumstance quite substantially. On the basis of all of the material received and the submissions made we do not consider that the arguments made on the basis of entrapment and or abuse of process have been sustained."

Conclusion

The court concluded that the convictions on counts 10, 11, 12 and 13 are not unsafe and should stand. The conviction on count 9 will be quashed.

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://judiciaryni.uk).

ENDS

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