

THE HIGH COURT

[2019 No. 109 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

JOSH TURNER

ACCUSED

JUDGMENT of Mr. Justice Meenan delivered on the 30th day of August, 2019

Background

1. This is a consultative case stated by District Judge Grainne Malone at the request of the accused.
2. The accused was charged with an offence contrary to s. 36 of the Prisons Act, 2007 (the Act of 2007). It is alleged that he was found in his cell in possession of a mobile phone.
3. At the trial evidence was given by an officer of the prison that a mobile phone was found in the accused's cell. No submissions were made that the accused was not in possession of the mobile phone and the District Judge found as a fact that the accused was in possession of the phone. Evidence was given as to the seizure of the mobile phone. No issue was taken in respect of its seizure, retention or chain of custody.
4. Governor O'Sullivan gave evidence that he was the governor on duty on the day in question, 28 April 2018. He gave evidence that he has twelve years' experience in this role, that he was one of three governors on duty at the time in question and that he was the senior governor on duty at the time. He said he had not given the accused permission to have a mobile phone. He also said in evidence that no other governor would have given permission as it is the policy of the prison not to give such permission. He said that inmates are made aware of this upon their committal to the prison and there are signs in the prison saying that no mobile phones are permitted. Governor O'Sullivan said it would have been exceptional if permission had been given and that he would have been told had this been done. Under cross-examination by counsel for the accused the governor accepted that each governor has the power to give such permission and that they may do so, but that in his twelve years as a governor this had never happened. He also accepted that there is an overall governor of the prison, that person being Governor Mullins. He gave evidence that there are four governors in total. If Governor Mullins is not on duty, the next governor in seniority is in charge of the prison. There are normally three governors on duty at any one time. On 28 April 2018 Governor O'Sullivan was the senior governor on duty. Governor Mullins was not called to give evidence nor were the other governors.
5. At the close of the prosecution's case counsel for the accused made an application for a direction on two related grounds as follows: -

- (a) First, the offence is possession of a mobile phone without permission of the governor. As no evidence was heard from Governor Mullins the accused was entitled to an acquittal on this basis; and
 - (b) Secondly, it was submitted that as evidence was not heard from the other governors, the accused was entitled to an acquittal as the prosecution had failed to prove that the accused possessed the phone without permission
- 6. Counsel for the accused relied upon a decision of the Special Criminal Court in *Director of Public Prosecutions v. Rattigan* (Bill No. SSC005/2011). It was submitted that this case established that in order to prove the offence the prosecution was obliged to call evidence from each governor to state that they had not given permission. In particular, reliance was placed on the court's observation that the Act of 2007 does not contain an evidential presumption that no such permission was granted.
- 7. In response, the solicitor for the prosecutor submitted that there was no requirement on the prosecution to call every governor given the nature of summary proceedings and that the decision of the Special Criminal Court in *Rattigan* was decided on, and confined to, its own facts.
- 8. Having considered the evidence and the submissions of the parties the District Court Judge had regard to the definition of "governor" in the Act of 2007, the fact Governor O'Sullivan was the senior governor on duty at the time and that he had not given permission to the accused to possess a mobile phone. The District Judge also considered it to be relevant that each person is told upon their arrival to the prison that they may not possess a mobile phone and that there are signs to that effect around the prison. The District Judge disagreed with the decision in *Rattigan* insofar as it held that each governor was required to give evidence and that that decision was confined to its own facts. The District Judge indicated that if the accused wished to make the case that permission had been granted by a particular governor it was open to him to go into evidence himself or to issue a witness summons to the appropriate governor.
- 9. Having delivered the decision an application was made on behalf of the accused to seek the opinion of the High Court by way of a consultative case stated. Consequently, the opinion of this Court was sought on the following three questions: -
 - A. In a prosecution for an offence contrary to s.36 of the Prisons Act, 2007, must the prosecution prove that the governor of the prison did not give permission for the accused to possess a mobile phone?;
 - B. In a prosecution for an offence contrary to s.36 of the Prisons Act, 2007, must the prosecution negate the possibility that each governor of the prison gave an accused permission to possess a mobile phone?; and
 - C. In circumstances where the prosecution did not adduce evidence from each and every governor of the prison that the accused had no permission to possess a

mobile phone in the prison, is it nevertheless open to me to convict for the offence in s.36 of the Prisons Act, 2007?

Relevant statutory provisions

10. Section 2 of the Act of 2007 defines "governor" as follows: -

That "governor" means the governor of a prison or an officer of the prison acting on his or her behalf;

Section 36(1) of the said Act provides: -

"(1) A prisoner who, without the permission of the governor of the prison, possesses or uses a mobile telecommunications device, or a person who supplies such a device to a prisoner without such permission, is guilty of an offence and liable –

..."

Consideration of issues

11. The definition of "governor" means the governor of a prison or an officer of the prison acting on his or her behalf. In this case, for the purposes of the Act of 2007, both Governor O'Sullivan and Governor Mullins were the "governor" of the prison.

12. Under s. 36(1) of the Act of 2007 in order to prove the offence the prosecutor must establish that the prisoner had possession of the mobile phone "without the permission of the governor of the prison". On the day in question, 28 April 2018, Governor O'Sullivan was "the governor" of the prison as he was acting on behalf of Governor Mullins.

13. Both the prosecutor and the accused accepted that the applicable standard of proof was "beyond reasonable doubt". It was further agreed that the Act of 2007 does not contain an evidential presumption that no such permission was granted. In para. 4 above I set out the evidence that was given by Governor O'Sullivan. This evidence was to the effect that he did not give permission, if permission had been given he would have been told, that it was the policy of the prison not to give such permission, that inmates are made aware of this policy on their committal and that there are signs in the prison to this effect. None of this evidence was challenged. Having heard this evidence, in my view, the District Judge was entitled to reach the conclusion that it had been proven beyond reasonable doubt that the mobile phone in the possession of the accused was without the permission of the governor of the prison.

14. Counsel for the accused relied upon the decision in *Director of Public Prosecutions v. Rattigan*. The relevant part of this decisions states: -

"3. Counts 4 and 5: the evidence that the court heard in respect of these matters from John Sugrue, Mr. Edward Whelan and Fergus Downey, all of whom said they were governors of the prison. The court also then heard from a number of senior prison officers, all of whom replied when asked by the prosecution that they did not give permission to the accused man to have a telephone in his cell on the date in question. Two persons who could give permission, who were Assistant Governors,

Martin O'Neill and Chris McCormack were not called. The legislation is drafted without any presumption that a person does not have the permission and, that being the case, the onus is on the prosecution to prove the matters. The prosecution submitted that the Act does not require evidence from various governors and others, that there is evidence from the governor and the governor is Mr. Whelan who gave evidence he didn't give permission.

The court is not satisfied beyond a reasonable doubt in respect of the evidence adduced in respect of these two matters."

15. In that case, the court was clearly not satisfied beyond a reasonable doubt in respect of the evidence adduced. It is not clear if the Special Criminal Court heard evidence of the type that was adduced in this case. Thus I believe the correct conclusion to be drawn from *Rattigan* is that it was decision based on its particular facts.

Conclusion

16. In light of the foregoing, I answer questions raised by the District Judge as follows: -
 - A. Yes: in a prosecution for an offence contrary to s. 36 the Act of 2007 the onus is on the prosecution to prove that the accused was in possession of a mobile without the permission of the governor of the prison. The governor is defined in s. 2 of the Act of 2007.
 - B. Yes: s. 36 of the Act of 2007 does require the prosecution to negate the possibility that each governor of the prison gave an accused permission to possess a mobile phone.
 - C. Yes: it is open for the District Judge to convict the accused for an offence under s. 36 of the Act of 2007 notwithstanding the fact the prosecution did not adduce evidence from each and every governor of the prison that the accused had not permission to possess a mobile phone in the prison. What is required under s. 36 is that the prosecution give evidence that the governor of the prison, as defined by s. 2, did not give permission to the accused to possess a mobile phone.