

THE HIGH COURT

[2019 No. 80 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY
JURISDICTION ACT, 1857, AS EXTENDED BY SECTION 51
OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF SERGEANT GRACE O'CONNELL)

PROSECUTOR

AND

PHILIP O'BRIEN

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 6th day of February, 2020

Introduction

1. This is a case stated by a judge of the District Court, pursuant to s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961, on the application in writing of the defendant, for the opinion of the High Court.
2. The defendant appeared before the District Court for summary trial to answer two complaints, the subject matter of summonses: -
 - (i) The first summons alleged an offence of resisting and obstructing a peace officer, contrary to s. 19 of the Criminal Justice (Public Order) Act, 1994 (*"the obstruction charge"*); and
 - (ii) The second summons alleged an offence of simple assault contrary to s. 2 of the Non-Fatal Offences Against The Person Act, 1997 (*"the assault charge"*).
3. In summary, the facts as proved or admitted, and as found by the District Judge, were as follows: -
 - (a) On 26 May 2017, gardaí received a call to a disturbance at the defendant's home, located at 35 Marino Apartments, Tralee, Co. Kerry. On arrival at the apartment, gardaí observed that the living room window had been broken. A block of knives lay on the ground outside the window;
 - (b) Garda John Coffey gave evidence that he, along with his three colleagues, could see through the broken window into the defendant's apartment. The defendant was not wearing a shirt and appeared to be in an agitated state. Garda Coffey gave evidence that it appeared that the apartment had been damaged and that several items were scattered around the room. Garda Coffey said that he tried to speak with the defendant through the window. He said that he and the other gardai then approached the front door of the defendant's apartment. Garda Coffey stated that the defendant continued to be agitated. Whilst Garda Coffey tried to speak with the defendant at the doorway, the defendant spat in his face; and
 - (c) Garda Coffey stated that following the spitting incident, he entered the apartment with his three colleagues. In evidence he stated that his entry was to effect the

arrest of the defendant for the offence of breach of the peace, contrary to common law. Garda Coffey stated that upon entering the apartment, it seemed that the defendant had retreated into the kitchen, where the gardaí could see a knife on the floor. Garda Coffey gave evidence that the defendant violently resisted the attempts of the gardaí to arrest him. The defendant was restrained in the kitchen by the gardaí and Garda Coffey stated that he arrested the defendant for the offence of breach of the peace. The arrest was effected in the kitchen.

4. At the close of the prosecution case the Solicitor for the defendant, Mr. Brendan Ahern of Brendan Ahern and Co. Solicitors, moved an application that the defendant had no case to answer in respect of both charges. In relation to the obstruction charge, Mr. Ahern submitted that the gardaí had no right under common law to enter the defendant's apartment home to effect an arrest for breach of the peace. He submitted that the entry onto and arrest within the defendant's private dwelling place was both unlawful and in breach of the defendant's constitutional right to the inviolability of his dwelling.
5. The District Judge held that An Garda Síochána had a common law power to enter the defendant's apartment to effect an arrest for the offence of breach of the peace contrary to common law. The Court considered the judgment of the High Court in *Director of Public Prosecutions v. Delaney* [1996] I.R. 556 where Morris J. noted, obiter, that it was doubtful that An Garda Síochána had a power to enter a private dwelling to effect an arrest for breach of the peace. In the view of the District Judge, this decision was not binding and held that other authorities indicated that the common law power of arrest for breach of the peace extends to a power of entry to effect such an arrest.
6. The District Judge convicted the defendant on the obstruction charge. The defendant now appeals, by way of case stated, in respect of the conviction for the obstruction charge. The opinion of the High Court is sought on the following questions: -
 - (i) In light of the evidence heard before the District Court, did the gardaí enjoy a common law power to enter the dwelling of the defendant to effect an arrest for the offence of breach of the peace, contrary to common law?
 - (ii) If the answer to question (i) is no, was the District Judge correct in holding that the defendant had a case to answer in relation to the obstruction charge?

Submissions of the Prosecutor

7. In the course of his judgment in *Thorpe v. Director of Public Prosecutions* [2006] IEHC 319, Murphy J. conducted a detailed analysis of the power to arrest for breach of the peace. However, in this judgment the questions which were posed, also by way of a case stated, were: -
 - (i) Is the offence of the breach of the peace contrary to common law known to law?and

- (ii) If the answer to the first question is yes, may the offence be prosecuted in the District Court and, if so, what is the available penalty?
8. Murphy J. answered “yes” to both questions and stated that the penalty resultant on conviction was a matter of the District Court acting within the sentencing limits of the District Court. However, this decision did not consider what is in issue before me, namely, do the gardaí enjoy a common law power to enter the dwelling of a defendant to effect an arrest for breach of the peace.
9. The prosecutor relied upon a number of English authorities. In *Robson v. Hallett* [1967] 3 WLR 28, Lord Parker C.J. stated: -
- “It seems to me quite impossible in those circumstances to say that they were not acting in the execution of their duty in coming to the assistance of Sergeant McCaffrey, and also avoiding any further breach of the peace. It is really unnecessary to go further, but even if they had been outside the gate, it seems to me that they would have abundant right to come onto private property in those circumstances ...”
10. In *Rice v. Connolly* [1966] 2 QB 414, Lord Parker C.J. said in his judgment, at p. 419: -
- “It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.”
11. This passage was cited by Blayney J. in *Director of Public Prosecutions (Stratford) v. Fagan* [1994] 3 I.R. 265.

Consideration of issues

12. In considering the issues that arise in answering the questions posed by the District Judge, a starting point has to be the provisions of Article 40.5 of the Constitution, which provides: -
- “The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”
13. The guarantee enshrined in Article 40.5 has been considered on a number of occasions. In particular, I refer to the following passage of Hogan J. in the High Court in *Omar v. Governor of Cloverhill Prison* [2013] 4 I.R. 186. In this case a deportation order was made in respect of the applicant and his family, requiring them to leave the State. The applicant and his family had remained in the State beyond the date specified in the order. Late one night, four members of An Garda Síochána called to the applicant’s dwelling. The gardaí did not have a search warrant permitting them to enter the dwelling but were invited to enter by the applicant and his wife. Having informed the applicant and his wife

that they were to be deported, the gardaí escorted the family to Dublin Airport. At no stage did the gardaí explain to the family that they were not legally obliged to accompany them. Hogan J. held that the permission to enter the dwelling house had been exceeded and further, at p. 191: -

"12. At common law members of An Garda Síochána could enter a dwelling without a warrant for the purposes of effecting an arrest where they had a reasonable suspicion that the arrested person had committed a felony: see *The People (Attorney General) v. Michael Hogan* (1972) 1 Frewen 360. The distinction between felonies and misdemeanours was, however, abolished by s. 3 of the Criminal Law Act 1997 ("the Act of 1997"). This common law power of arrest was then replaced by a statutory power of arrest contained in s. 6 of the Act of 1997. Section 6(2) empowers a garda, subject to certain conditions, to enter a dwelling without a warrant for the purpose of effecting an arrest in respect of an arrestable offence (which itself is defined by s. 2 of the Act of 1997 as embracing any offence carrying a punishment of imprisonment of at least five years or more) and to search the premises."

and

"32. ... Absent a search warrant or express statutory authority or an acute emergency which immediately threatened life and limb (such as was at issue in *Director of Public Prosecutions v. Michael Delaney* [1997] 3 I.R. 453), such conduct entirely compromised the substance of the Article 40.5 guarantee in respect of the inviolability of the dwelling. The object of this provision was summarised thus by Hardiman J. in *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68 ... at p. 7: -

'This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2°), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee.'

14. In *Omar v. Governor of Cloverhill Prison*, Hogan J. referred to the provisions of the Criminal Law Act, 1997. Section 6(2) provides: -

"(2) For the purpose of arresting a person without a warrant for an arrestable offence a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of an

occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless —

- (a) he or she or another such member has observed the person within or entering the dwelling, or
 - (b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or
 - (c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or
 - (d) the person ordinarily resides at that dwelling.”
15. In this prosecution, s. 6 was not relied upon and therefore does not apply. No attempt was made to retrospectively validate the entry on the basis that the gardaí could have lawfully entered the defendant’s dwelling under s. 6. Were there to have been such an attempt, it would have been impermissible in the light of decision in *People (Director of Public Prosecutions) v. Laide* [2005] 1 I.R. 209. In giving the decision of Court of Criminal Appeal McCracken J. stated at p. 230: -

“Entry was gained to the house on that morning on foot of the search warrant. No other basis of entry was proffered to the parents on arrival. The finding that the warrant was bad has therefore removed the very foundation on which the entry was made, and in the absence of the gardaí informing the occupiers of the house that they had another purpose apart from searching, namely the arresting of the second accused, it is the view of this court that the power provided by s.6(2) of the Act of 1997 cannot be relied upon, since it was never invoked by the gardaí at the time. The fact that the power of entry exists does not mean, in the view of this court, that the purpose of entry, namely the arrest of somebody who resides in the house, does not have to be explained before entry is enforced on foot of the power. The inviolability of a citizen’s dwelling is an important constitutional right, and it cannot be trespassed upon without explanation in clear and unambiguous terms. It has been recognised that where the restriction of a constitutional right is permitted by law, it must be restricted to the least extent necessary for the achievement of the desired objective.”

Decision

16. Having considered the submissions made and the authorities relied upon, I conclude the following: -
- (i) The English authorities on the issue before the Court are of limited assistance, given the provisions of Article 40.5 of the Constitution;
 - (ii) As what is under consideration is the restriction of a constitutional right/guarantee, any restriction that may be permitted by law must be minimal; and

(iii) Save where life is in imminent danger, in which case other constitutional rights are engaged, the restrictions on the rights/guarantees enshrined in Article 40.5 are those set out in statute. In this case the relevant statutory provision is s. 6 of the Criminal Law Act, 1997.

17. As, as has been stated, the gardaí did not rely on the provisions of s. 6(2), it follows that the gardaí did not enjoy a common law power to enter the dwelling of the defendant to effect an arrest for the offence of breach of the peace. Therefore, the answer to the questions posed by the District Judge are: -

(i) In light of the evidence heard before the District Court, did the gardaí enjoy a common law power to enter the dwelling of the defendant to effect an arrest for the offence of breach of the peace, contrary to common law? – answer – no.

(ii) If the answer to question (i) is no, was the District Judge correct in holding that the defendant had a case to answer in relation to the obstruction charge? – answer – no.