THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 38

Record No. 2021/1087/JR

BETWEEN

ADNAN AFZAL

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Nolan delivered the 7th of February, 2024

Introduction

1. This is an application by way of judicial review brought by the applicant who is charged with three alleged offences of money laundering contrary to s. 7(1)(a)(ii) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. The applicant alleges that he has been seriously prejudiced in his defence by reason of the failure of An Garda Síochána to retrieve for inspection the Internet Protocol addresses ("the IP addresses") relating to email accounts which in turn related to money transfers in and out of three bank accounts which were held in his name.

2. The applicant alleges that the prosecution through An Garda Síochána failed to seek out, retrieve and inspect the relevant IP addresses which therefore gives rise to a real risk that the applicant will not receive a fair trial.

Factual background

3. In or around October 2017 Dublin Zoo started construction work on what is described as a *"Discovery and Learning Centre"* at Dublin Zoo. The building contractors for that work were T. Connelly & Sons Limited, Athlone Road, Roscommon. The financial arrangements included the payment of the intermittent payments by Electronic Fund Transfer ("EFT") during construction, from Dublin Zoo to T. Connelly & Sons Limited's bank account held at the Ulster Bank in Roscommon. The email address for that company was tconnellyandsons.ie.

4. On the 13th of November 2017 the Accounts Department at Dublin Zoo received an email from a similar address but different address, amanda@tconnellyandsons.com. As the applicant has stated in his Statement of Grounds, the change from .ie to .com was not noticed by the Dublin Zoo Accounts Department and they naturally assumed that it came from T. Connelly & Sons Limited. The purpose of the email however was to divert funds away from the bank account of the builders to third party accounts. In total, between the 17th of November 2017 and the 12th of December 2017, a sum of €511,369.14 was stolen. Thereafter, funds were transferred from one account to other accounts, creating what the applicant describes as a *"complex web of financial transactions"*. This involved a considerable number of individuals.

5. Acting promptly, the Garda National Economic Crime Bureau ("GNECB") obtained court orders from various financial institutions which ultimately led to a bank account in the name of the applicant's wife and co-accused Ms. Agate Jansone trading as MJ Traders.

Thereafter it would seem that funds were transferred into another account, which was a joint account held in the name of the applicant and his wife with AIB and thereafter, the monies were transferred to the applicant's AIB account trading as AA Fruits and Vegetables. From that account the monies were transferred into a Bank of Ireland account held in the name of the applicant and his wife.

6. Thereafter, a search warrant was obtained and the applicant's house at 2 Wellington Street, Clonmel, County Tipperary was searched on the 28th of February 2018.

7. A number of mobile phones and three Bank of Ireland debit cards (one in the name of the applicant's wife and the other two in the name of the applicant), receipts and a laptop were seized during the search.

8. On the 28th of February 2018 the applicant was interviewed by the Gardaí and at all times maintained his innocence and denied any involvement in the offences he was accused of committing.

9. Nearly two years later on the 24th of January 2020, he was charged with three charges set out in Charge Sheet 21141886, 21141894, and 21141901. These offences related to the transfer of €20,000, €6,200 and €25,000 credited to the AIB account no. 4359029 in the name of AA Fruits and Vegetables.

10. It should be noted that the entire sum of €511,369.14 had initially found its way into the bank account of the applicant's wife and co-accused Ms. Jansone trading as MJ Traders.

11. During his interview the applicant admitted setting up a bank account at AIB, to be used for business in the name of AA Fruits and Vegetables, for the purpose of importing goods from Pakistan. However, he maintained that the account was never used as he had no funds to commence trading. The monies that found their way into AA Fruit and Vegetables' account, were then transferred on to the Bank of Ireland account held in the name of the applicant and thereafter were transferred on to third parties.

The Chronology of the Prosecution

12. This case must be seen in context of the case brought by the applicant's wife and co-accused. Both were represented by the same firm of solicitors.

13. On the 19th of May 2020, the book of evidence was served on the applicant. The matter appeared in the Clonmel Circuit Court on the 3rd of November 2020 and a trial date was fixed for the 2nd of November 2021.

14. In the meantime, the applicant's co-accused brought a judicial review commencing on the 17th of December 2020 which was granted on the 1st of March 2021. At no stage was any complaint made in relation to the issue of disclosure in this case.

15. The trial date was adjourned on the basis of the judicial review proceedings brought by the co-accused.

16. Thereafter the applicant brought his own judicial review, one year after that of his wife, on the 20th of December 2021. At the second trial date, which was fixed for the 8th of February 2022, the matter was put back because of both judicial reviews.

17. On the 9th of May 2023 the co-accused withdrew her proceedings and an issue of costs was raised. That matter was ultimately dealt with by my colleague Ms. Justice O'Regan on the 6th of December 2023, where the court made no order as to costs.

18. The reason why this chronology is of importance is because it relates to the submissions made by the respondent that there has been very significant delay.

The Submissions of the Applicant

19. The kernel of the applicant's case is that the IP addresses were not sought out, retrieved, inspected and maintained by An Garda Síochána. The IP address is used to establish the physical location from which emails are sent from. If the applicant had access to the IP addresses, then the applicant and indeed the prosecution would know from where

the emails were sent. This would give rise to a potential electronic trail which may show where the electronic funds came from that went into the applicant's bank account and would establish a physical location which would, in the view of the applicant, exonerate him.

20. To that end, the applicant's solicitors employed Messrs. Keith Boher, Consultants who prepared a report on the 6th of April 2021. Mr. Ross Donnelly of that company prepared a witness statement. In it he stated that the external IP addresses are a unique identifier on the internet and are assigned by the internet service provider to each connection. This gives rise to the potential of a forensic fingerprint. Without this information it is the case of the applicant that crucial material has been lost which could exonerate him. The IP records would establish the physical location or address of the fraudulent emails and would establish the physical locations from where the EFT originated from.

21. Because the IP records are not available the applicant no longer has the ability to advance a point which would be material to his defence and has lost an obviously useful and important line of defence.

22. In this case it would seem that An Garda Síochána never sought the IP records.

23. It is clear that transfers were made from the MJ Traders account to the account of the accused and his wife together with seven other accounts.

24. The reason why the IP addresses are of importance is because of Section 11 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. Mr. Patrick McCarthy SC, representing the applicant, makes the point that the applicant simply cannot prepare a defence. He does not have the information. The IP addresses are normally kept by the bank for a period but since they are not available to him now, he cannot advance any argument. It was a fundamental failure on the part of An Garda Síochána not to gather the evidence. If the evidence had been gathered, it could have been tested. In those circumstances, there is a real risk of an unfair trial.

25. He believes there is no point in leaving it to the trial judge. The accused is entitled to prepare his defence in advance of the trial. It is a basic duty. Given the technical nature of the case, the fact that the accused does not know what happened, this could be interpreted by a jury that he had control of the bank accounts.

26. He believes that the failure to have the IP addresses goes to the weight of the evidence. An Garda Síochána had an obligation to get the evidence, which they negligently failed to do. They cannot be negligent on one hand and righteous on the other.

The Submissions of the Respondent

27. Mr. McGuinn SC, for the respondent, invites the court to consider three issues. Firstly, the exceptional jurisdiction of the court in Section 11 type cases, secondly to engage with the facts, and thirdly the role of the trial judge in these matters.

28. In relation to the first of these, namely the exceptional jurisdiction, he believes there is a fundamental misunderstanding in relation to Section 11. So long as the accused can put forward an explanation as to how the money came into his account, then the onus of proof shifts to the prosecution. Thereafter, he has referred me to a number of cases, which I will set out below, in relation to the jurisdiction to prevent the trial proceeding.

29. In relation to the facts, he disputes the suggestion that the IP address is a digital fingerprint. Unlike a fingerprint, it does not identify who was using the computer. Further, the use of technology in the form of VPNs, which is a virtual private network which encrypts one's internet traffic and protects one's online identity, can disguise the true address. In fact, the IP address often can tell one very little information. He argues that the failure to have an IP address could indeed assist the defence. It can only assist the prosecution if the accused is right beside the device being used. Therefore, the failure to not have an IP address is in no way fatal to the defence of the accused.

30. He argues that the fact that there is no IP address means that the defence now has a new line of defence to raise at the trial. The jury will have to consider this argument that somebody else may have taken control of his account. But he points out that the flow of money into the applicant's account is highly questionable.

31. There is ample evidence connecting the applicant and his wife to the accounts to which the monies were laundered. During this period of detention, he accepted he operated a number of bank accounts, one of which was an AIB current account in Clonmel, although he could not remember the account number. He claimed he only used this account for gambling and that he knew nothing about the significant deposits which had been made, suggesting that maybe someone else was using his accounts.

32. He did accept, however, that he had recently opened a new account with PTSD because the AIB accounts had been closed by the bank, and his wife had recently obtained a new phone in her name for him to use. When specifically asked about the account 43593029 in the name of his business, he asserted that this was being used by a friend called Ali, who also lived in Clonmel. He said that Ali wanted to use it to run a business, details of which he was unaware.

33. It is the prosecution's case that the activity on the accounts, especially the manner in which the funds were immediately transferred between accounts upon receipt from the zoo and the fact that the monetary value of these deposits was wholly inconsistent with the remainder of the account activity, would strongly suggest that the person or persons controlling them were aware of the illicit nature of the transfers.

34. The evidence would suggest a connection between usage of the accounts at the time and the two accused. The identity documents of the applicant and his wife were used to open at least two of the three accounts and the regular unremarkable usage of the accounts in the

months before November 2017 evidence that the two accused were responsible for the accounts.

35. There is a strong case to be made that the two accused were acting in consort in trying to hide the funds and thus were jointly indicted for money laundering offences representing the totality of the €511,369.14 transferred. Accounts owned by and connected to the applicant have been the direct recipients of stolen funds which were redirected from Dublin Zoo and no reasonable explanation has been provided by the applicant to explain how he had no awareness of the transactions relating to the stolen funds in his accounts.

36. It is the case of the respondent that at a minimum the applicant allowed his bank accounts to be used for money laundering purposes and then allowed his online passwords and codes be used to transfer his funds to other bank accounts.

37. The final issue relates to the role of the trial judge. Mr. McGuinn says that this is a classic example of the type of matter which the trial judge should be allowed to give an appropriate direction to the jury. Indeed, the written submissions make multiple references to the role of the trial judge in these matters.

38. Further he argues there has been very significant delay which must be seen in the context to the proceedings brought by the applicant's wife.

Section 11 of the Criminal Justice (Money Laundering and Terrorist Financing) Act of 2010

39. Under the heading of "*Presumptions and other matters*", Section 11 (2) of the 2010 Act says as follows: -

> *"(2) In proceedings for an offence under section 7, 8 or 9, where an accused has engaged, or attempted to engage, in specified conduct (defined in s. 11 (1)) in relation*

to property that is the proceeds of criminal conduct, in circumstances in which it is reasonable to conclude that the accused—

(a) knew or believed the property was the proceeds of criminal conduct, or

(b) was reckless as to whether or not the property was the proceeds of criminal conduct,

the accused is presumed to have so known or believed, or been so reckless, unless the court or jury, as the case may be, is satisfied, having regard to the whole of the evidence, that there is a reasonable doubt that the accused so knew or believed or was so reckless".

40. The key issue in this case is the effect of the reversal of burden of proof.

41. It seems to me that the issue of the reversal of the burden of proof is not new in Irish criminal law. Indeed, in the case of the *DPP v Forsey* [2016] IECA 233, Ryan P. said that the question of the reverse burden of proof had been the subject of a great deal of discussion in judicial and academic circles in recent years and was the principal issue in that appeal. The question in that case is whether Section 4 of the Prevention of Corruption Act 1906 as amended imposed a legal or an evidential burden of proof on the accused. The court concluded that it imposed a legal burden on the accused in a case of corruption where the necessary statutory elements had been proved beyond reasonable doubt. The provision was held not to be unconstitutional.

42. In this case, Mr. McGinn has stated that if the applicant gives an explanation, as to how the money came to be in his accounts then in those circumstances the onus on proof shifts back to the prosecution.

The Duty to Seek and Preserve Evidence.

43. Having heard the submissions of both parties it seems to me that there is little between them in relation to the law. In *Braddish v The DPP* [2002] ILRM 151 the Supreme Court held that it was a well-established principle that evidence relevant to the guilt or innocence of an accused must, as far as is necessary and practicable, be kept until the trial concluded. In that case there was a dispute as to whether still photographs taken from a video which had been lost, could be introduced into evidence. Judge Haugh (as he then was) excluded the stills on the basis that it would be unfair to produce them when the video from which they had been taken was not available to the defence. That was the issue which came before the Supreme Court. The court found that it was the duty of the gardaí to seek out and preserve, so far as is fair and reasonable, all evidence relating to the guilt or innocence of the accused, regardless of whether the gardaí would seek to rely on that evidence during the trial and regardless of its usefulness to the prosecution or the accused's case.

44. That decision was reiterated in the case of *Dunne v The DPP* [2002] 2 ILRM and more recently in the case of *The People (at the Suit of the Director of Public Prosecutions) v S.Q.* [2003] IESC 8, which highlighted the duty on the prosecution to seek out and preserve evidence. In that case Baker J. said:

> *"22. The duty to investigate crime has at its corelative the duty to seek out and preserve evidence, and to disclose it to a defendant. Thus, the duty of the prosecution authorities, in practice one that rests on the gardaí, to seek out and disclose evidence is central to, and supports, fair trial rights and goes some way to redressing the imbalance between prosecution and defence in the light of the powers of the gardaí to investigate and collect evidence."*

However, that duty must be seen in the light of the Supreme Court decision of *Savage v DPP* [2009] 1 IR 185, where Denham J. (as she then was) set out the relevant principles.

45. I do not intend to set them out but suffice to say that top of the list is that each case should be determined on its own particular circumstances. Further, the court has a duty to protect due process. The duty to preserve and disclose cannot be precisely defined as it is dependent upon all the circumstances of each individual case. The duty should be interpreted in a practical manner on the facts of the case.

46. Dealing with the issue of missing evidence there are a number of leading decisions as to how the court should assess the effect of missing evidence. They are quoted at length in the submissions of the respondent. One of these principles is that the applicant must show by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. The essential question is whether there is a real risk of an unfair trial (see *Dunne v Director of Public Prosecutions* [2002] 2 IR 305, *Bowes v Director of Public Prosecutions* [2003] 2 1 IR 25, *McFarlane v Director of Public Prosecutions* [2006] IESC 11 and *Byrne v Director of Public Prosecutions* [2011] 1 IR 346.)

47. In *Byrne* O'Donnell J. (as he then was) says as follows: -

> "*In my view, having considered the decided cases, the position has now been reached where it can be said that, other than perhaps the very straightforward type of case as in Branddish v DPP, it would now require something exceptional to persuade a court to prohibit a trial."*

Warming to his theme he said as follows: -

> *"The constitutional right, the infringement of which is alleged to ground an applicant's entitlement to prohibit a trial, is the right to fair trial on a criminal charge guaranteed by Articles 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the courts established under the*

Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced (in the case of video stills) or is not available (in the case of CCTV evidence itself)."

Delay

48. The respondent makes a case in relation to delay in circumstances where there was no disclosure complaint made to the trial court on the 28th of May 2020 Indeed, the request for disclosure only came on the 2nd of October 2020. The application for judicial review was made on the 15th of December 2021. The issue of delay is clearly relevant, particularly in circumstances where the applicant's wife brought her application for judicial review one year before that of her husband.

Decision

49. While the use of computers in day-to-day life is ubiquitous, what happens behind the screens is often seen as a great mystery. I have little doubt that ten years ago, or even less, the concept of an IP address would be unknown to the vast majority of the general public. However precisely how important it is in the context of this case seems to me to be overstated.

50. As the respondent has set out the use of a VPN or other devices to hide the IP address is commonplace. Anybody who is in the company of teenage children will be no doubt be aware of their proclivity to use VPN's and other devices to hide the IP address in order to stream online video material, which is not readily available in this jurisdiction.

51. Given that the applicant himself has described the fraud in this case as a *"complex web of financial transactions"* it is highly unlikely that the thieves would leave their calling card in the form of an easily identifiable IP address.

52. While I readily accept the duty placed upon An Garda Síochána is to seek and preserve all evidence, particularly in circumstances where there is a shifting of the burden of proof, pursuant to Section 11, it does not seem to me that the missing evidence is so significant so as to give rise to a risk that the applicant will not receive a fair trial. I do not believe that the unavailability of the IP address will deprive the applicant of the ability to advance a full defence. Indeed, the very fact that the IP address is not available, seems to me to potentially give the applicant a further line of defence.

53. The number of account transfers in and out of accounts held in the name of the applicant or jointly with his wife give rise to suspicions. They certainly colour the factual matrix in this case. However, that is a matter for the trial. With the appropriate warning to the jury from the trial judge any potential risk of injustice should be dealt with.

54. If I were not satisfied in regard to the issue above, it seems to me that the delay in this case is fatal. The applicant and his legal team were clearly aware of the importance which they placed on the missing IP addresses, since it was the basis of the application which was made by the applicant's wife, over a year before this application was brought. It seems to me that there is an onus upon the applicant to act swiftly. That did not occur and on that ground alone I would have dismissed this application. However, taking both matters into

consideration I have no doubt as to the correct approach. In the circumstances, I dismiss the application.

55. I will hear submissions in relation to costs.