

IRELAND / JUDGMENT

D.P.P. -v- Michael Breen [2008] IECCA 136 (16 December 2008)

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[2009] 2 IR 262,

[2008] IECCA 136 [New search] [Help] Judgment Title: D. P. P. -v- Michael Breen Neutral
Citation:

[2008] IECCA 136 Court of Criminal Appeal Record Number : 263/07 Date of Delivery: 16
December 2008 Court: Court of Criminal Appeal Composition of Court: Fennelly J., Budd
J., Hanna J. Judgment by: Fennelly J. Status of Judgment: Approved Judgments by Result
Fennelly J. Allow Appeal and Quash Conviction Outcome: Allow Appeal and Quash
Conviction Court of Criminal Appeal Fennelly J. Budd J. Hanna J. 263/07 People at the suit
of the Director of Public Prosecutions V Michael Breen Judgment of the Court of Criminal
Appeal delivered the 16th day of December 2008 by Mr Justice Fennelly 1. The applicant,
Michael Breen, was convicted 15th October 2007 in the Dublin Circuit Criminal Court after
a four-day trial before Judge McCartan and a jury of on a single count of possession of a
firearm in such circumstances as to give rise to a reasonable inference that he had the gun
in his possession or under his control for an unlawful purpose contrary to section 27A of
the Firearms Act, 1964, as inserted by section 8 of the Criminal Law Jurisdiction Act, 1976
and as amended by section 14 of the Criminal Justice Act, 1984 as further amended by
section 15 of the Offences against the State (Amendment) Act, 1998. 2. He was sentenced
on 22nd November 2007 to seven years imprisonment. He now applies for leave to appeal
against that conviction and sentence. He has advanced four distinct grounds of appeal
relating to the admission of an allegedly incriminating statement, to references during
trial to his failure to comment when questioned, to the sufficiency of the learned judge's
charge and to the sufficiency of the evidence relating to the nature of the alleged firearm.
The facts 3. The factual background can be summarised as follows. 4. The entire incident
related to an apparent attempt to break in to a dwellinghouse at 61 Knocklyon Road,
Templeogue. 5. On 15th March 2006 at about 4.20 pm the Garda Síochána, on the basis of

confidential information, mounted a surveillance operation on a silver Volkswagen Bora motor car at Bawnogue Shopping Centre in Clondalkin. This involved Gardaí from the Special Detective Unit and from the Garda National Bureau of Criminal Investigation, a number of whom were armed. The Volkswagen car was owned and driven by the applicant. It was driven from Clondalkin village to Knocklyon Road and parking on Lansdowne Park, Templeogue. The applicant was accompanied by two passengers, namely William Nicholson and Christopher Kearns. The three occupants got out of the car. The applicant and William Nicholson were dressed in dark clothing with dark hats. Christopher Kearns took a black holdall from the back of the car from which he removed a high visibility fluorescent jacket and which he then put on. 6. The three men walked from Lansdowne Park towards Knocklyon Road. As they reached the Knocklyon Road junction, the applicant and William Nicholson turned left and walked down that road towards Firhouse Road. Christopher Kearns separated from the other two men and walked across the Knocklyon Road and through a pedestrian entrance into Coolamber Court. Very shortly afterwards Christopher Kearns was observed walking back out onto the Knocklyon Road from Coolamber Court, he was now wearing a motorcycle helmet and he was carrying a small box and what looked like a notepad. The holdall was slung over his shoulder and he also walked down Knocklyon Road. He appeared to be dressed like a motorcycle courier. 7. The applicant and William Nicholson crossed Knocklyon Road; Christopher Kearns walked down Knocklyon Road some distance behind them. Christopher Kearns stopped outside no. 61 Knocklyon Road. He looked at the notebook as if he were a courier checking an address. He called to the applicant and William Nicholson who had walked past no. 61 and now turned and walked back towards him. Christopher Kearns handed the holdall bag to William Nicholson and all three men entered the driveway of no. 61. 8. William Nicholson and Christopher Kearns walked towards the door at the right side of the house. The applicant crossed the lawn and approached the front window of the house. At approximately 4.55pm the Gardaí converged on no. 61 Knocklyon Road. One member was armed with an Uzi submachine gun. They caused a loud noise or bang as a distraction device. The applicant ran across the front lawn of the house where he was stopped. The Gardaí called upon him to lie down and he did so. The Gardaí overcame and detained the applicant as well as William Nicholson and Christopher Kearns. Their purpose was to secure the area for the safety of the Gardaí, the individuals themselves and the public. However, they did not effect arrests until after the occurrence of the events next described which are central to the first ground of appeal. 9. The applicant was handcuffed and placed lying face down on the ground. He was in that position when Detective Garda John Keane of the Emergency Response Unit arrived on the scene with a colleague. The three men were already lying on the ground handcuffed. Detective Garda Keane was instructed to search the applicant. Detective Garda Keane also explained that firearms had been “mentioned in the brief” and that “the first thing you do ...is immediately search him, to make sure that not only your colleagues are safe, but that you are safe, the public is safe.” He cautioned the applicant. He found on his person a pair of gloves and a black woollen balaclava stuffed into the

inside pocket of his jacket, a set of Volkswagen keys and a mobile phone. (The applicant at his trial denied that he had any balaclava and claimed that the Gardaí had planted it on him.) 10. He asked him a number of questions. The questions and the applicant's answers were as follows:- He asked him his name and he replied "Michael Breen" "What are you doing here?" and he replied "I am only the driver, I am only the driver" "How many of you are there?" he replied "three" "Have you any weapons on you?" he replied "No". "Where is the firearm?" he replied "in the bag". "Is this your balaclava?" he replied "yes". "Are these your black woollen gloves?" he replied "yes". In relation to the Volkswagen key found in Michael Breen's jeans pocket, "is it yours?" He replied "yeah". In relation to the car, "where is it?" he replied "across the road". "Is there anything in it?" he replied "it's full of stuff out of the house". "Is everything there yours?" he replied "yeah". "Do you have a phone?" he replied "yeah it's in my pocket". 11. Detective Garda Keane did not have his notebook with him, but made a note of these questions and answers on an A4 half sheet as soon as he returned to the office. (The applicant at trial denied that he gave any of these answers.) 12. At 17.05hrs Detective Garda Carney arrested the applicant under the provisions of Section 30 of the Offences against the State Act, 1939, on suspicion of having committed a scheduled offence under part V of the Act, namely the unlawful possession of firearms at Knocklyon Road on the 15th March 2006. He also cautioned the applicant. He then conveyed him in the rear of a patrol car to Rathfarnham Garda Station. 13. Whilst en route to the Garda Station, according to Detective Garda Carney's evidence, the applicant said "I wish I had been shot in that garden, I am sick of it" and "I did not have a gun, did someone have a gun?" Detective Garda Carney noted these comments upon his arrival at Rathfarnham Garda Station. 14. The firearm found in the holdall bag was subsequently examined by Detective Garda Jarlath Lennon of the Garda Síochána Ballistics section, who identified it in evidence as a G10 black repeater air pistol .177 calibre which was incapable of discharging pellets or darts as it was designed to do. He said that it fell within the description in Section 4(1) (f) of the Firearms and Offensive Weapons Act, 1990. 15. The applicant, while detained pursuant to section 30 of the Act of 1939, was questioned extensively but exercised his right to remain silent. He said either "no comment" or did not answer. The voir dire 16. Counsel for the applicant objected to the admissibility of the verbal statements alleged to have been made to Detective Garda Keane on the ground that, as counsel expressed it, there was an issue in relation to the applicant's "status when he made the first verbal." It was also alleged that that there had been breaches of the Judges' Rules, and general unfairness and oppression. It was not submitted that the statement was not voluntary. The trial judge initially ruled the statement made to Detective Carney in the car inadmissible as being of no probative value, but it was admitted later at the request of the defence. 17. During the voir dire, Detective Garda Keane gave the evidence mentioned above concerning the circumstances of his searching, cautioning and questioning of the applicant. He accepted that the applicant was lying face down and handcuffed, but denied that there was an Uzi submachine gun pointing at him, though there were firearms drawn by members until the area was secured. The applicant was "very calm." The questions were short, the answers were short and the applicant was

happy to talk. 18. He said that he spoke to the applicant, while he was being interviewed, at Rathfarnham Garda Station the next day. He put to him the questions he had asked at the scene the previous day based on his notes of what had been said both by himself and in reply by the applicant and the applicant replied “no comment” to all questions. 19. The learned judge ruled on the admissibility of the verbal answers allegedly given by the applicant to Detective Garda Keane. He held that there had been no non-compliance with the Judges’ Rules, as the questions and answers had been put to the applicant within a reasonable time and he had been given an opportunity to say that they were wrong. He held that there had been no illegal detention and that what had occurred had taken place in a “continuum” with the initial Garda operation where the primary concern was safety of all concerned including the public. Grounds of appeal 20. Counsel for the applicant, Ms Aileen Donnelly, Senior Counsel, advanced four succinct grounds of appeal. They are:

1. That the verbal answers allegedly given by the applicant to Detective Garda Keane at the crime scene while he was lying on the ground should not have been admitted in evidence;
2. That, in a number of ways, the jury were made aware that the applicant, in the course of questioning in Garda custody, had exercised his right to silence by answering “no comment” or the like to questions put to him; that this constituted a breach of the applicant’s constitutional right to silence as recognised by the judgment of the Supreme Court in *Director of Public Prosecution v Finnerty*

[1999] 4 I. R. 364; that the learned trial judge should have discharged the jury as requested by counsel for the applicant when this had occurred;

3. That the alleged firearm of which the applicant was alleged to have had possession, was not a firearm as defined in the applicable legislation and that the learned trial judge should have withdrawn the case from the jury on the ground, when an application to that effect was made on behalf of the applicant;
4. That the learned trial judge was wrong in law in failing to direct the jury regarding the absence of any corroboration of the verbal statements attributed to the applicant by Detective Garda Keane, contrary to section 10 of the Criminal Procedure Act, 1993. The applicant went into evidence 21. Though it is not strictly relevant to the four distinct grounds of appeal, it should be noted that the applicant chose to give evidence in his own defence. He contested all incriminating aspects of the prosecution case. He said that he had no balaclava in his possession and that the Gardaí dropped it on his head. He denied that he made any verbal answers to Detective Garda Keane and said that these answers were made up by that officer. He said that he had said nothing to Detective Garda Carney in the car. He explained his presence at the scene by saying that William Nicholson had asked him for a lift to collect a motorbike and that he did not know the other man at all. Ground No 1: admissibility of verbal statements 22. I will refer to the contested evidence given by Detective Garda Keane regarding the replies made to him at the scene as the “verbal answers.” They were certainly given in highly unusual circumstances. There was quite a

large Garda operation. The Gardaí were in possession of some unspecified information about possession of a firearm by one of the group and several of them were armed. The three men appear to have been suspected of being about to organise a break-in to the house at no. 61 Knocklyon Road. The Gardaí used some sort of explosive device to create a distraction so as to be able physically to overcome the three men. They got the three men on the ground. The applicant was handcuffed and facing down. He had been searched after caution and no weapon was found on him. He was then asked a number of highly material questions, without his being arrested either for charge or for detention pursuant to any of the various statutory powers available to them. 23. In these circumstances, Ms Donnelly submitted that the status of the applicant was ambiguous or was “in issue.” He was in some sort of “detention limbo.” It was not submitted either in the court of trial or in this court that the applicant’s detention was unlawful. It was accepted that, in a situation of danger, the Gardaí are entitled to subdue people for the protection of the Gardaí themselves, the public and even the persons being detained. However, the Gardaí should not have questioned the applicant for the purposes of gathering evidence in the circumstances of this case. At that point, the applicant had been overcome. It had been established by the search that he had no weapon in his personal physical possession. The Gardaí should have arrested and detained him pursuant to their statutory powers before engaging in any questioning. 24. The only authority cited to the court was the decision of this court in *The People (DPP) v Kehoe*

[1986] I. L. R. M. 690, an appeal from the Special Criminal Court. The facts of that case were very different from this. A number of heavily armed men were apprehended in circumstances where they were carrying a range of firearms, including three submachine guns, all loaded and ready for use. Their purpose, as found by the court, was use in a shoot-out with the Gardaí. A question was raised that the physical restraint placed on the applicant by the Gardaí invalidated his subsequent arrest pursuant to section 30 of the Act of 1939. The court expressed no concluded view on the point, but the judgment delivered by McCarthy J contains the following: The court would wish.....to state that it shares the view of the Special Criminal Court that the restraint placed upon Nicholas Kehoe was part of the sequence of events at the scene, involving the exchange of a great number of shots the firing of which might be renewed at any moment and that it was only after things had returned to normal that a formal arrest was made.” 25. It is not possible to extract any principle from that decision for the purposes of the present case. There is no issue of the validity in this case of the arrest pursuant to section 30. The issue in this case is the admissibility of a statement made during the so-called “limbo” period, which is a quite different matter. There was no issue of admissibility of evidence in *Kehoe*. The applicant in the present case was under physical restraint justified on the Garda evidence by the need to protect the safety of the Gardaí themselves and the public. During that time and while so detained, the applicant was questioned after caution. The learned trial judge described these circumstances as amounting to “a continuum, a concept well established in law and referred to by the late Mr Justice McCarthy in the case of *Kehoe*...” 26. In this highly unusual situation, the Court has come to the conclusion that the verbal answers

should not have been admitted in evidence. The evidence of Detective Garda Keane was, it is true, that the applicant was very calm and happy to answer questions. The learned trial judge ruled the verbal answers admissible. Nonetheless, without ruling explicitly on the lawfulness of his detention, it can be said that the applicant was under physical restraint; he was lying face down and handcuffed; even if there was not an Uzi submachine gun pointing directly at him, the gardaí were armed with such a weapon and a number of Gardaí in the immediate vicinity were openly armed. He had not been arrested. Yet he was not free. The garda did not have his notebook with him. Obviously, the statement was not videorecorded, though this fact, taken on its own, would not render the evidence inadmissible. Detective Garda Keane had already searched the applicant and had found no weapon on him. It is not easy to see why, nonetheless, he asked him whether he had a weapon on him. This combination of circumstances leads the court to the conclusion that the evidence of the questioning of the applicant should not have been admitted. The gardaí could have arrested him as they did shortly after. 27. For these reasons, the court rules in favour of the applicant on his first ground of appeal. Thus, it is unnecessary to consider the other grounds. 28. The court will treat the application for leave to appeal as if it were an appeal against conviction. It will allow the appeal and will quash the conviction. It will not order a retrial. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IECCA/2008/C136.html>

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Prepared on 27 October 2026 · Esheria