EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 50468/16
Robert MILLS
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 10 October 2017 as a Committee composed of:

Nona Tsotsoria, *President,*
Síofra O'Leary,
Lətif Hüseynov, *judges,*
and Anne-Marie Dougin, *Acting Deputy Section Registrar,*

Having regard to the above application lodged on 18 August 2016,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Robert Mills, is an Irish national, who was born in 1990 and lives in Dublin. He was represented before the Court by D'Arcy Horan & Co., a firm of solicitors in Dublin.

The circumstances of the case

2. The facts of the case, as submitted by the applicant and as established by the domestic courts, may be summarised as follows.

3. In 2013 the applicant was arrested following a drugs test purchase exercise conducted in the Drimnagh area of Dublin to identify individuals engaged in the sale and supply of illicit drugs. This was part of a broader operation against drugs known as Operation Trident, launched in November 2012 under the authority of the national police commander. The exercise in question began on 28 March 2013 and involved two members of the National Drug Unit working undercover, with a third member of the Unit observing the operation from an unmarked police car. The undercover

officers made a random approach to two males on the street and asked if there was "any weed around?". One of the males replied that he could make a telephone call on their behalf and asked what exactly the officers were looking for. Officer R specified that he wished to purchase a 25-euro sachet of cannabis. The call was made out of the earshot of the police officers, and some minutes later a car arrived in which the applicant was a passenger. He beckoned to Officer R to approach the car and sold him the requested quantity of cannabis. At the officer's request, the applicant gave him a mobile phone number for future contact. The car then drove off, followed by the third member of the Unit, who passed on to local police a description of the applicant, the car and the route it was taking. A local police officer joined the route and was able identify the applicant. At the subsequent trial, this officer stated that he had had many previous dealings with the applicant, and that the latter had been convicted in 2009 for possession of cannabis.

4. The following day, 29 March 2013, Officer R contacted the applicant via the number he had been given and asked him to sell another sachet of cannabis. They agreed to meet at the same place, and the applicant arrived soon afterwards and sold the drug to Officer R. He advised him to purchase a larger quantity the next time. The third and final purchase occurred on 2 April 2013, following the same pattern as before and involving 50 euros' worth of the drug.

5. On 5 June 2013 the police came to the applicant's house with a search warrant. He was arrested there and brought to a police station where he was detained and questioned for several hours before being released.

6. The applicant was subsequently charged with six counts under the Misuse of Drugs Act 1977. His jury trial opened in the Circuit Court on 13 November 2014. His counsel applied to have the police evidence excluded on the ground that the applicant had been entrapped by the undercover officers. Legal argument on this issue was heard over two days in the absence of the jury (*voir dire*).

7. The police witnesses were subject to examination and cross-examination. The first to testify was the officer in charge of the operation, Detective Sergeant R. He informed the court about Operation Trident. He indicated that he had given the police officers involved a briefing at the commencement of the operation in November 2012, including an explanation of the legal parameters of the exercise. In particular, it had been made clear to them that they were not permitted to act as *agents provocateurs*, or to entice any person to commit an offence. Rather, they were permitted to initiate the commission of an offence. The officers were not to engage any person in an activity that they would not otherwise have been engaged in. Asked to explain the legal basis and authority for such an exercise, he acknowledged that there was no official protocol or written procedure in place at that time, adding that a code of

practice had been introduced subsequently. He reiterated that the wider operation had been authorised at the highest level of the police. He further explained that all of the officers involved had received specific training in the conduct of such operations, including on the issue of entrapment. They had been required to pass a test in order to be assigned to such duties. Along with the daily briefings and de-briefings, through which he supervised the operation, this ensured that it was conducted in an acceptable way. The operation had involved three purchases, which was a way of verifying that the person concerned engaged in drug dealing on more than a once-off basis.

8. The two undercover officers were also questioned in detail about the way in which the exercise had been carried out and supervised. Three more police officers were also heard as witnesses. The applicant's counsel then argued, relying on relevant Convention case-law, that it would be contrary to the applicant's right to a fair trial if the evidence gathered by the test purchase operation were to be admitted. He submitted, in particular, that there were no adequate safeguards in place to ensure that the police did not cross the line from legitimate undercover work to inciting the commission of crimes. He also criticised the random nature of the exercise – there had been no basis for police to suspect the applicant of engaging in the sale of illegal drugs and it was only by chance that they encountered him and initiated the illegal transactions. This should properly be regarded as a case of entrapment, he submitted.

9. The trial judge refused to exclude the evidence. Her reasoning appears as follows in the transcript of the trial:

> "... I determine that the [police] provided an unexceptional opportunity for the accused to commit the crime and on that basis the evidence is admissible and, furthermore, confined themselves to investigating the criminal activity in an essentially passive manner and the Court is satisfied that on that basis the evidence is admissible and it is not in breach furthermore of the European Convention on Human Rights. While there was no written protocol, there were safeguards. It was carried out under the supervision of Detective Sergeant [R] who gave details, briefings and de-briefings which were supported by the evidence of [the other police officers]..."

10. As a result of this ruling, the applicant changed his plea to guilty in relation to two of the counts. On 20 February 2015 he was sentenced to two years' imprisonment on each count, suspended for two years.

11. The applicant brought an appeal against his conviction, arguing *inter alia* that the admission of the evidence had been contrary to Article 6 of the Convention. The Court of Appeal dismissed the appeal on 21 December 2015.

12. In its reasoning, the Court of Appeal made extensive reference to relevant Convention case-law. It noted the observation of this Court that Ireland was the only country in a comparative survey covering twenty-two Contracting Parties to the Convention that lacked a formal legislative or

regulatory basis for the use of undercover police (case of *Veselov and Others v. Russia*, nos. 23200/10 and 2 others, § 51, 2 October 2012). It also referred to the judicial power under the common law to stay a prosecution for abuse of process of the court (as laid down, in particular, in the House of Lords decision *R. v. Looseley* [2001] 1 WLR 2060). It then stated:

> "63. It is a common theme of the decisions in the European Court of Human Rights that operations which involve the initiation by police of activity which culminate in prosecutions, should be the subject of formal authorisation and supervision...
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> 64. Certain crimes, such as, for example, selling drugs or weapons, do not, as a general rule, produce immediate victims who might be expected to seek [police] assistance or otherwise prompt an investigation and prosecution. Yet the commission of such crimes are enormously damaging to the fabric and well-being of society, and, especially in the case of drugs, often severely damaging the lives of many young people. There is therefore a clear public interest that such criminality be amenable to effective professional police work, and in that respect undercover operations of the type evident in this case are both necessary and effective. What is wrong with providing a person with the opportunity to commit a crime which he is in the practice of committing anyway? The key is to ensure that such operations are appropriately authorised, controlled and supervised and that undercover operatives do not themselves precipitate criminal conduct that would not otherwise occur.
>
> 65. In Ireland, the existence of a formal system for the authorisation and supervision of this type of undercover operation does not appear to exist. Such operations appear to be undertaken with a degree of informality which might reasonably be described as unsatisfactory. That is not to say however that such undercover operations are inappropriate, or that they are not undertaken in a manner which would, in general terms, satisfy the principles enunciated in the various European and other decisions, and more particularly in a manner which contravenes the relevant provisions of the European Convention on Human Rights or Article 38 of the Constitution. However it would be preferable if in this jurisdiction the authorisation and performance of such undercover operations were approached with a greater degree of formality and record keeping than currently appears to be the case, and that a Code of Practice be established, possibly based on the U.K.'s Code of Practice, (in this case Det. Sgt. R stated that there was no Code of Practice in relation to undercover [police] operations for test purchasing illegal drugs, but that [the police] operated under a "protocol... in Ireland and the U.K.", and that the particular operation had been sanctioned at "Commissioner level"). It is also desirable that the details of such operations be recorded in a dedicated manner. Dedicated recording of such information would undoubtedly assist a court when called upon to make a determination as to the lawfulness of prosecutions or the admissibility of evidence arising from such undercover operations."

13. It continued:

> "66. The evidence in the case under appeal established the following:-
>
> (i) the undercover operation was sanctioned at "Commissioner level".
>
> (ii) the undercover [police] who participated in the purchase of illicit drugs from the appellant were adequately trained and advised as to their conduct and the need to avoid entrapment or enticement to commit crime.

(iii) the purpose of the undercover [police] operation was clear; namely the investigation of drug dealing and the identification of individuals selling drugs within a specific area.

(iv) the sixteen year old individual initially approached by the undercover [police] and who then apparently made contact with the appellant was not himself the subject of a prosecution.

(v) The inquiry made by the undercover [police] to the sixteen year old (and his companion) was a general inquiry as to the availability of "weed". The words used by [Officer R] were "any weed around". Equally, words uttered by him in the first confrontation with the appellant, namely "a 25g of weed", were in response to the appellant asking "what are you looking for?"

(vi) the appellant was provided with no more than an unexceptional opportunity to commit a crime, an opportunity which he freely took advantage of in circumstances and where it appears that he would have behaved in the same way if the same opportunity had been offered by anyone else.

(vii) the appellant was not incited, instigated, persuaded, pressured or wheedled into committing a crime.

...

68. Notwithstanding the criticism of the absence of, at least, an identifiable Code of Practice regulating the authorisation and conduct of the undercover test purchasing of drugs and/or other illicit substances or material, for the reasons referred to above, the court is satisfied that in the particular circumstances of this case there was no infringement of Article 6 of the European Convention on Human Rights ..., and that the learned trial judge was correct in her decision to admit the evidence of the undercover [police]. The appeal is therefore dismissed."

14. The applicant sought leave to appeal to the Supreme Court. In a determination dated 3 June 2016, the Supreme Court refused the application. It stated:

"34. It must be noted that the phrase from *Ramanauskas*, in relation to police officers confining themselves to investigating criminal activity "*in an essentially passive manner*", is part of a sentence in which the contrast drawn is with behaviour which "*exert[s] such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed*". In *Bannikova v. Russia*, App. No. 18757/06, 4th November, 2010, the phrase was used in contrast with, in particular, "*any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms*." As noted in paragraph 20 above, the Court of Appeal found that on the evidence the applicant had not been "*incited, instigated, persuaded, pressured or wheedled*" into committing a crime.

35. This Court does not, therefore, consider it to be arguable that the Court of Appeal applied an incorrect test, by reference to the ECHR authorities, to the behaviour of the [police] in this case.

36. No evidential foundation appears to have been laid, and no argument put forward, as to how this applicant's rights could be said to have been violated by the absence of a written code of practice or protocol. No dispute of fact, or interpretation

of the facts, arose in the course of the *voir dire* which could have been resolved by reference to such a code or protocol. No link has been demonstrated or postulated between the lack of a formal system of authorisation and record-keeping and the actions of the applicant on the occasions in question."

COMPLAINT

15. The applicant complained under Article 6 of the Convention that his conviction was based on evidence obtained by police entrapment.

THE LAW

16. The applicant complained that the refusal of the domestic courts to exclude the evidence against him arising out of the test purchase exercise meant that he did not receive a fair trial.

Article 6 of the Convention, in so far as relevant, reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

17. The Court has developed an extensive body of case-law on the issue of entrapment, beginning with the case of *Teixeira de Castro v. Portugal*, 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, and including in particular the Grand Chamber judgment in *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008. In the case of *Bannikova v. Russia*, no. 18757/06, 4 November 2010, the Court set out an analytical approach to the issue, comprising a substantive test and a procedural test (see §§ 37-65). In a more recent case the Court included a detailed overview of the relevant principles and indicated the methodology for their application (see *Matanović v. Croatia*, no. 2742/12, §§ 121-135, 4 April 2017). The matter is thus the subject of well-established Convention case-law.

18. The preliminary consideration in the Court's assessment of the complaint relates to the existence of an arguable complaint that the applicant was subjected to incitement by the State authorities (*Matanović*, cited above, § 131). This being so in the present case, the Court will examine the complaint under the tests developed in its case-law.

1. Substantive test of incitement

19. The Court has formulated the substantive test as follows (*Matanović*, cited above, citations omitted):

"123. When examining the applicant's arguable plea of entrapment, the Court will attempt, as a first step, to establish on the basis of the available material whether the offence would have been committed without the authorities' intervention, that is to

say whether the investigation was "essentially passive". In deciding whether the investigation was "essentially passive" the Court will examine the reasons underlying the covert operation, in particular, whether there were objective suspicions that the applicant had been involved in criminal activity or had been predisposed to commit a criminal offence and the conduct of the authorities carrying it out, specifically whether the authorities exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.

124. In this connection the Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. It has considered judicial supervision as the most appropriate means in cases involving covert operations. Moreover, the execution of the simulated purchases performed by an undercover officer or informant must be particularly well justified, be subject to a stringent authorisation procedure, and be documented in a way that allows a subsequent independent scrutiny of the actors' conduct. Indeed, a lack of procedural safeguards in the ordering of an undercover operation generates a risk of arbitrariness and police entrapment."

20. The Court will first consider the question of procedural safeguards, the importance of which has been strongly and repeatedly emphasised in previous cases. As noted by the domestic courts in the present case, at the material time in Ireland there was no formal system for authorising and supervising such operation. In the course of his evidence to the Circuit Court, the police officer in charge of the operation conceded that there was no official protocol or written procedure in place at the time in question. This confirms, as far as Ireland is concerned, the information included in Court's comparative survey in the *Veselov* case (cited above, at § 63). In that judgment, the Court stated:

"105. The Court observes that similar investigative activities are subject to strict regulations in other Member States. The majority of justice systems require authorisation of test purchases and similar covert operations by a judge or a public prosecutor. In the few countries where there is no involvement of a court or a prosecutor in the authorisation procedure the decision-making bodies are still separate from the services which carry out the operation. The police are generally required to justify the need for such a measure before the decision-making body (...).

106. It follows that the Russian system, where test purchases and operative experiments fall entirely within the competence of the operational-search bodies, is out of line with the practice adopted by most Member States. The Court considers that this shortcoming reveals a structural failure to provide for safeguards against police provocation."

21. As recorded above, the Court of Appeal criticised the lack of a formal procedure in domestic law governing the authorisation and conduct of undercover operations and urged a greater degree of formality and record keeping in this regard, notably so as to assist the courts when called upon to rule on the admissibility of evidence obtained by such means. The Court marks its agreement with this criticism. As it has previously observed, the line between legitimate infiltration by an undercover agent and instigation

of a crime is more likely to be crossed if no clear and foreseeable procedure is set up by the domestic law for authorising undercover operations (*Veselov*, cited above, § 93).

22. Having made that general remark, the Court notes from the evidence heard during the *voir dire*, and accepted by the domestic courts, that the test purchase exercise in the present case was arranged in accordance with the standards established in police practice. This involved the specific training, undertaken at an earlier date, of the officers participating in the exercise, including instruction on the issue of entrapment. The exercise took place within the framework of a broader operation authorized at the highest level of the police, and the initial briefing given to the officers involved included the question of entrapment. The undercover officers remained under the close supervision of a more senior officer, with briefings and de-briefings taking place each day. All of the persons involved in the exercise gave evidence in court and were cross-examined in detail by the applicant's counsel on the conduct of the test purchases (see further paragraphs 7 and 8 above).

23. The focus of the substantive test for entrapment, as developed in the relevant case-law, is on the reasons for carrying out the undercover operation and conduct of the police. In the majority of entrapment cases considered by the Court, the applicants were the intended, specific targets of the authorities and the Court sought to ascertain whether there were valid grounds for suspecting their involvement in criminal behaviour, or their predisposition to commit such offences. The operation in the present case was somewhat different. It concerned a particular area rather than any particular person; the applicant's identity was not known to the protagonists until after the first transaction, when it became clear he had had previous dealings with the police and a prior conviction for possession of cannabis (see paragraph 3 above). The question whether there were pre-existing suspicions in relation to the applicant therefore lacks relevance. The Court will concentrate instead on the conduct of the police, to determine whether they exerted such an influence on the applicant as to incite the commission of an offence that would otherwise not have been committed.

24. In contrast to some previous cases in which the facts were not fully elucidated (see for example the three situations in *Veselov*, cited above, §§ 98-128, and the four situations examined in *Lagutin and Others v. Russia*, nos. 6228/09 and 4 others, §§ 103-111, 24 April 2014), the facts of the present case were established in detail by the domestic courts. In his submission to this Court, the applicant did not take issue with any fact found by the trial judge and relied on by the Court of Appeal. Instead, he argued that the facts signified that he had been entrapped into selling illegal drugs by the actions of the police.

25. The Court has regard to the following facts of the case. The initial approach to the applicant was an indirect one. The undercover officers'

interest in purchasing a small amount of drugs was relayed to the applicant by a third party approached at random. That this person could contact the applicant immediately is suggestive of knowledge in that locality about the applicant's involvement in drug dealing. The applicant's behaviour from the first contact with the undercover officers is not consistent with any form of influence or pressure exerted on him by the police. On the first day he arrived on the scene within minutes, ready to make a small sale to a person who was completely unknown to him. It does not appear that much was needed to persuade the applicant to enter into the two subsequent transactions. He provided a contact phone number upon the simple request of Officer R and advised the purchase of larger quantities. The other two sales were made with the same speed and ease as the first one. The Court sees no factors that have led it in other cases to suspect or conclude that the person was entrapped – renewing an offer to purchase drugs despite initial refusal, insistent prompting, raising the price beyond average or appealing to compassion by mentioning withdrawal symptoms (factors recalled in *Scholer v. Germany*, no. 14212/10, § 82, 18 December 2014).

26. The trial judge considered that the police had given the applicant an "unexceptional opportunity" to commit a crime. The Court of Appeal agreed, adding that he had freely taken advantage of the opportunity, and that it appeared he would have behaved in the same way if the same opportunity had been offered by anyone else. This characterisation of the undercover operation closely resembles that which appears in the *Scholer* judgment, cited above, where the Court concluded (at § 90) that the police:

> "did not incite the applicant to commit drug offences he would not have committed had an "ordinary" customer approached him instead of the police. The undercover measure thus did not amount to police incitement, as defined in the Court's case-law under Article 6 § 1 of the Convention."

27. The Court thus considers that the role of the police in this case was "essentially passive". It finds that their conduct did not cross the line to become entrapment or incitement to commit an offence.

2. Procedural test of incitement

28. The Court's conclusion above would, in principle, be sufficient for it to hold that the subsequent use of the evidence so obtained in criminal proceedings against the applicant raised no issue under Article 6 § 1 of the Convention (*Scholer*, cited above, § 90; *Matanović*, cited above, § 133).

29. In the present case, however, given the absence in the domestic system of a formal protocol applying to undercover operations, the Court deems it appropriate to examine the procedure whereby the plea of incitement was determined, the role of the trial court being crucial in such circumstances (*Khudobin v. Russia*, no. 59696/00, § 135, ECHR 2006-XII (extracts); also *Bannikova*¸cited above, § 51).

30. The relevant case-law principles have been summarised as follows (*Matanović*, cited above, § 126):

> "As the starting point, the Court must be satisfied with the domestic courts' capacity to deal with such a complaint in a manner compatible with the right to a fair hearing. It should therefore verify whether an arguable complaint of incitement constitutes a substantive defence under domestic law, or gives grounds for the exclusion of evidence, or leads to similar consequences. Although the Court will generally leave it to the domestic authorities to decide what procedure must be followed by the judiciary when faced with a plea of incitement, it requires such a procedure to be adversarial, thorough, comprehensive and conclusive on the issue of entrapment."

31. It is clear from the course of the domestic proceedings that, had the applicant succeeded in demonstrating that he had been entrapped, then the evidence against him would have been ruled inadmissible in light of the constitutional right to a fair trial (Article 38 of the Constitution), as further reflected in Article 6 of the Convention. The Court of Appeal also referred to the power at common law to stay a prosecution for abuse of process of the court (see paragraph 12 above). The Court is therefore satisfied as to the capacity of the domestic courts to deal with a complaint of entrapment (see *Lagutin and Others*, cited above, § 117, with further references).

32. Furthermore, the procedure followed by the trial judge met the criteria deriving from the Court's case-law. It was adversarial, the applicant's counsel having the opportunity to cross-examine the police witnesses. It was thorough and comprehensive, in the sense that all material details about the test purchase operation were elucidated during the *voir dire*. In other words, the domestic courts were not in fact hampered in their examination of this matter by the lack of a formal protocol governing the test purchase exercise in this case. Lastly, the trial judge issued a reasoned conclusion on the objection, endorsed by the Court of Appeal, which provided more detailed reasons for rejecting the applicant's challenge to the evidence (see, respectively, paragraphs 9 and 12-13 above).

33. Finally, the Court is satisfied that the other requirements of Article 6 relevant to the issue – equality of arms, procedural guarantees related to the disclosure of evidence and the questioning of the undercover agents (see *Matanović*, cited above, § 129) – were complied with in the domestic proceedings.

34. Although the Court has found that the decision of the trial judge to admit the evidence resulting from the police undercover operation did not, in the circumstances of the instant case, give rise to unfairness contrary to Article 6 of the Convention, it reiterates the need signaled by its case-law and the Court of Appeal in the instant case for procedural safeguards and some sort of formal procedure in domestic law regulating undercover operations by the police (see paragraphs 19-21 above).

35. It follows that the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 2 November 2017.

Anne-Marie Dougin
Acting Deputy Registrar

Nona Tsotsoria
President