THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

207/15

The Director Of Public Prosecutions

RESPONDENT

V

Duku Popovici

APPELLANT

JUDGMENT of the Court delivered by on the 20th day of December 2016 by

Mr. Justice Sheehan

1. This is an appeal against conviction and sentence. The appellant was convicted by majority verdict on the sole count of aggravated burglary contrary to s. 13(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001, following a 3 day trial commencing on 15th April, 2015, before Clonmel Circuit Court. On 23rd July, 2015, he was sentenced to a term of 12 years imprisonment with the last two years thereof suspended for a period of five years.

2. This judgment is concerned solely with the appeal against conviction.

3. The facts of the offence may be summarised as follows.

4. On the 26th September, 2013, at approximately 4:40 a.m., during the hours of darkness, two men broke into the home of James and Sarah Quigley in a remote location at Tullohea, South Lodge, Carrick-on-Suir, County Tipperary.

5. The householders were alerted by a noise from the kitchen. Mrs. Quigley woke her husband up, and he proceeded into the kitchen area of the house. Mr. Quigley gave evidence that two men, subsequently identified as the appellant and another man who had both travelled overnight from Dublin by bus, were standing in the kitchen. Upon shouting at the men to establish the reason for their presence, Mr. Quigley's evidence was to the effect that one of the men, the appellant, who was armed with some sort of adjustable spanner, had said "get back or I'll stick this in you".

6. At this juncture, a scuffle started in the kitchen and moved outside the house. Mr. Quigley gave evidence that the other man had an iron bar in his hand at this point. Mr. Quigley said that he held the appellant to the ground and that as he did so, the second man kicked him in the stomach and hit him several times with the iron bar on the back and arms. Mr. Quigley was only wearing his boxer shorts at the time.

7. According to Mr. Quigley's evidence at trial, as the men had overpowered him, they had first attempted to regain entry to the house and only then did they attempt to run away, but both of them fell over an unfinished wall at the front of the house.

8. Mr. Quigley followed them and, following another scuffle, managed to drag one of the men, the appellant, back. Mr. Quigley states that upon putting to him words to the effect of "what brought you to my house", the appellant had answered "you shouldn't be here, you work all the time, you work nights." The appellant was detained by Mr. Quigley and his uncle, Mr. Brannigan, who had arrived with a shotgun and a dog, until gardaí arrived.

9. Garda Cuddy arrived on the scene at approximately 5:05 a.m. Mr. Popovici was cautioned and arrested at 5:12 a.m. The other man escaped but did not get too far as he fractured his leg. He managed to conceal himself. A thorough search of the area failed to locate him, but he was arrested later that evening.

10. It was established that a wrench and lock were found on an outside windowsill, and that a black rucksack containing a pair of gloves was found outside on the ground beside Mr. Popovici. The external conservatory/kitchen door was also damaged in that the brass handles were broken off, the lock had been interfered with, and the covers on the door as well as the panels around the door had also been taken off.

11. The garda investigation indicated that the appellant had travelled from Dublin to Clonmel by bus, that the bag that was with him was his, and that it only contained a pair of gloves. The appellant had also provided fingerprint and DNA samples while in custody. However, no forensic evidence linking the appellant to the inside of the house could be established.

12. At trial, the defence case was that Mr. Quigley had encountered the accused outside the house and that there had been a scuffle, but that the accused had had never been inside the house. Accordingly, the defence was run on the basis that all of the evidence in the case and the damage documented pertained to alleged events occurring outside of the house, which it was submitted was inconsistent with the prosecution case of aggravated burglary.

13. During the course of this appeal, counsel for the appellant indicated that the defence position seems to have been that if the accused was found not guilty of aggravated burglary, i.e. not to have been present within the building, a verdict of attempted burglary should have been left open to the jury.

The appeal against conviction

14. In respect of his conviction, the appellant has lodged three grounds of appeal, which are as follows:-

> (i) The learned trial judge erred in law in instructing the jury in his charge that it would be perverse not to convict the appellant of attempted burglary.
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> (ii) The learned trial judge erred in law in summarising the prosecution case twice in his charge to the jury.
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> (iii) The learned trial judge erred in law and in fact in failing to mention the absence of forensic evidence linking the appellant with the interior of the house.

15. As can be seen, the appellant's central submission is that the trial judge's charge was such as to deprive him of any prospect of a fair trial.

16. In this regard, counsel for the appellant first submits that a trial judge should not tell a jury that it would be perverse for them to acquit an accused and that because of this the judge's charge was a clear contravention of the constitutional right of the appellant to trial by jury.

17. Secondly, it is submitted that the repetition of the prosecution case when dealing with a defence point, namely the reliability of eyewitness evidence in circumstances of high stress at night, contravenes the principle of fairness and balance. Counsel submits that the trial judge's contextualisation turned into a second summary of the prosecution case, and that it is highly likely that this repetition of the prosecution case in the judge's charge reinforced it in the minds of the jury to the detriment of points relied upon by the defence.

18. Thirdly, counsel for the appellant submits that the absence of forensic evidence linking the appellant to the interior of the premises was central to the defence to the charge of aggravated burglary in this case as, in conjunction with other evidence, it undermined the prosecution case to the effect that there was a violent encounter involving three men in a room in the house. Particularly, counsel submits that this was an issue of importance for the jury in their deliberations, as evidenced by their subsequent questions pertaining to the state of the kitchen. Accordingly, it is submitted that in conjunction with the direction that it would be perverse to acquit, the trial judge's failure to refer to a main plank of the defence deprived the appellant of a fair trial.

19. By way of response, counsel for the Director submits that the first ground of appeal is moot as the appellant has been convicted of aggravated burglary, not attempted burglary and that the trial judge was referring to attempted burglary when he stated that it would be perverse to acquit. Further, it is submitted that a trial judge is entitled to express his opinion provided that he does not direct that a particular verdict is required by the evidence. Accordingly, it is submitted that the trial judge did not overstep the line in opining to the jury that a not guilty verdict would be perverse in the circumstances.

20. In addition, counsel submits that there is no rule of law which requires that the summary in a trial judge's charge be in a particular order; rather, what is required is that it contains the essential elements. Thus, it is submitted that the trial judge's charge was fair in that it set out the defence case, the prosecution case and then the central issue of the defence case, namely that the accused did not enter the house, before revisiting both the prosecution case and the defence case again.

21. Finally, counsel submits that it is not essential that the trial judge should make every defence point in his charge. Accordingly, it is submitted that although not referring to the absence of DNA evidence in the house, the trial judge had made clear to the jury that no physical evidence had been found inside the house, and had also emphasised to the jury the criminal standard of proof, i.e. that the benefit of the doubt must go to the accused, in relation to the questions they had subsequently raised regarding the state of the kitchen when gardaí arrived and whether or not it had been cleaned.

22. In the first instance it is necessary to contextualise the trial judge's impugned remarks. While it is true that counsel for the appellant at trial had sought to have a verdict of not guilty left open as a possible jury verdict, the principal focus of the defence had been to suggest that the appellant had not entered the house and that a more appropriate verdict for the jury to bring in was one of attempted burglary.

23. The trial judge opened his charge to the jury with the following remarks:-

> "Ladies and gentlemen, I think it's important at the outset to tell you about verdicts here because it contextualises everything else I'm going to say to you and it's important that you have this at the beginning. The verdict which the State urges here is a verdict of guilty of aggravated burglary. The case made for the defence, and I'll be going into that in greater detail shortly, amounts to a situation where there was an attempted burglary, and it will be open to you, if you're not satisfied of the guilt of Mr Popovici beyond reasonable doubt of the offence of aggravated burglary, to bring in a verdict of not guilty but guilty of attempted burglary. And of course, there is the verdict which Mr Sheahan has mentioned, the verdict of not guilty. And the higher courts have said that I cannot tell you that you cannot return a verdict of not guilty in this case. But this is an unusual case and you've heard what the prosecution case is and what the defence case is and the defence do not deny that Mr Popovici was one of two men who were at the - on the premises of Mr Quigley and his wife on the early morning in question and that there was an attempted break in there. So that it seems to me that to bring in a verdict of not guilty would be perverse in all the circumstances but I stress that the verdict is very much a matter for you and the facts on which any such verdict would be based are also a matter for you and the facts on which any such verdict would be based are also a matter for you."

24. While counsel criticises the trial judge's use of the word "perverse" it is noteworthy that the trial judge immediately qualifies what he has said by telling the jury:-

> "I stress that the verdict is very much a matter for you and the facts on which any such verdict would be based are also a matter for you."

25. It is therefore clear from the transcript that the learned trial judge did not direct the jury to bring in a particular verdict. Rather he expressed the view that if the jury were not satisfied to convict the appellant of aggravated burglary then it would be perverse not to convict of attempted burglary. Such a verdict being what the defence was calling for in the absence of an outright acquittal. Indeed on any reading of the transcript it is difficult to see how the appellant could have realistically expected a verdict of not guilty. While counsel for the appellant seeks to rely on the *Director of Public Prosecutions v. Davis* [1993] 2 I.R. 1, it is relevant to note that in the course of his judgment in that case Finlay C.J. stated:-

> "It is open to a judge in an appropriate case to express an opinion that a particular verdict of guilty is the only one which would be reasonable or proper on the evidence, but that must of necessity fall short of the right to direct a verdict of guilty."

26. It cannot be said that the learned trial judge undermined the power of the jury to return a verdict in conflict with the opinion he expressed. While it is generally preferable that a trial judge express no opinion as to the verdict, we are satisfied that in this particular case he was entitled to express his opinion in the manner that he did. Especially when he immediately qualified it by saying:-

> "But I stress that the verdict is very much a matter for you and the facts on which any such verdict would be based are also a matter for you."

27. Accordingly, we dismiss this ground of appeal.

28. The remaining grounds of appeal relate to the judge's charge. Essentially the appellant contends that the charge was weighed in favour of the prosecution case and was unfair in that it did not refer the jury to a particular aspect in support of the defence case, namely the absence of DNA evidence to link the appellant to the conservatory.

29. First of all this was a short trial. The jury retiring to consider their verdict at 3.29 p.m. on the second day.

30. While a greater part of the judge's charge was undoubtedly taken with the prosecution case, this was at least in part, because the only evidence in the case was that called by the prosecution. Even so the trial judge referred to the defence case on more than one occasion. About two thirds of the way into his charge he repeated the defence case saying:-

> "Now, the big dispute in this case is the first of those matters, whether or not Mr. Popovici entered the dwelling house of Mr. and Mrs. Quigley."

31. Later on in the judgment referring to the struggle between Mr. Quigley and the appellant, the trial judge says:-

> "The defence case is that it was outside the house only, and there was a considerable degree of agitation undoubtedly on everybody's part. This is not an everyday event by any means. It must be, inevitably, very stressful. And the defence put considerable emphasis on that. There is the fact that - first of all, that Mrs. Quigley heard her husband shout, 'You tried to break in' and then say to her after that her when he arrived back with Mr. Popovici, 'They tried to break in'. All of these matters must be considered."

32. During the course of his charge to the jury the learned trial judge made it clear that no physical evidence had been found in the house. He stated:-

> "But bear in mind, ladies and gentlemen, that the spanner which was found was found on the outside ledge of the - beside the patio door on the window ledge to the right of that door as described by Garda Cuddy. Bear in mind too, and bear in mind too that there were gloves found inside the bag not being worn by anybody. Bear in mind that there's no evidence of any damage having been caused inside in the kitchen/conservatory, even though Mr. Quigley says a fight took place there. So you must look at all of those circumstances and see where they lead you to, ladies and gentlemen."

33. This was not a complicated case. The issues for the jury to consider were clear. The jury returned after 45 minutes and asked three questions. They wanted to know if the conservatory had been cleaned after the incident, clarity as to where the scuffle had taken place and what state the conservatory was in when the gardaí arrived. This is evidence, if such is required, that the jury was alive to the defence case and did not require to be informed about the absence of DNA evidence. In considering these final two grounds of appeal we note what Coonan and Foley say on the standards expected in summing up at para. 2-15 on p. 21 of The Judge's Charge:-

> "It is unreasonable to expect perfection in the summing up. As was said by the Ontario Court of Appeal in *R. v. Baltavich*:-
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> > 'Much has been said in recent years about the complexity of jury charges and the need to simplify them. Trial judges face a difficult task in this regard, especially when it comes to explaining complicated issues of law. In *R. v. Jacquard*, Chief Justice Lamer observed that while 'accused individuals are entitled to properly instructed juries', there is 'no requirement for perfectly instructed juries'. Those words are as true today as they were then. No one expects perfection in a jury charge. Mistakes are bound to occur.'"

34. The charge in this case was admirably succinct. We see no unfairness in the charge and insofar as it relates to the prosecution and defence cases and in our view there was no onus whatsoever on the trial judge to tell the jury that there was no DNA evidence to place the appellant in the conservatory.

35. The appellant was entitled to a properly instructed jury and that was what he received. These two final grounds of appeal also fail and accordingly the appeal against conviction is dismissed.