



THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

Record No.: 273/15

Between/

The Director of Public Prosecutions

Respondent

- and -

Gerard Brown

Appellant

Judgment of the Court delivered on the 21st day of December 2016 by Mr. Justice Mahon

1. This is an appeal by the appellant against his conviction on one count of assault causing harm contrary to s. 3 of the Non Fatal Offences against the Person Act 1997 at Portlaoise Circuit Criminal Court on 6th November 2015 following a three day trial. The appellant was sentenced to three years imprisonment consecutive to the lawful termination of a sentence then being served by him.

2. The victim of the assault was one Stephen Cooper. Mr. Cooper and the appellant were both prisoners in the Midlands Prison on 20th May 2014. Mr. Cooper was previously a member of An Garda Síochána, but was serving a sentence for offences contrary to s. 15 of the Misuse of Drugs Act 1977 (as amended), fraud and perverting the course of justice. As a former member of An Garda Síochána, Mr. Cooper was afforded special protection within the prison. On 20th May 2015, as Mr. Cooper was being escorted to the prison gym, he was assaulted by the appellant when forcefully struck on the head two or three times with a mug concealed inside a sock. Mr. Cooper suffered a serious head injury requiring a number of stitches. The incident was captured on CCTV and was witnessed by a prison officer.

3. The appellant admitted that he attacked Mr. Cooper in the manner described. He claimed however that Mr. Cooper had consented to being assaulted, having requested the appellant to attack him for the purposes of facilitating or orchestrating Mr. Cooper's early release from prison on the basis that the prison authorities would consider that his safety inside the prison was at serious risk. The appellant maintained that Mr. Cooper instructed him not to "hold back" and to "just make sure there is blood" in order to make the attack look convincing and genuine. He alleged that Mr. Cooper agreed in return, to provide him with certain documentation and information, as well as €1,000 in cash.

4. For his part, Mr. Cooper gave evidence at the appellant's trial that he had not consented to being assaulted in the manner described, or at all. He insisted that he had no agreement with the appellant, as claimed by him.

Appeal grounds

5. The following grounds of appeal are promoted on behalf of the appellant:-

(i) The learned trial judge erred and misdirected the jury in law with regard to the interpretation of s. 2 and s. 3 of the Non Fatal Offences against the Persons Act 1997, in particular, the learned trial judge erred in distinguishing "assault" for the purpose of a s. 3 offence from "assault" as defined by s. 2 of the Non Fatal Offences against the Persons Act 1997;

(ii) the learned trial judge erred and misdirected the jury in law by interpreting s. 3 of the Non Fatal Offences against the Persons Act 1997 - so as to remove the concept of consent therefrom, and in so doing, the learned trial judge conducted the trial of the accused other than in due course of law in breach of Art. 38.1 of Bunreacht na hÉireann and in breach of obligations under Art. 6 of the European Convention on Human Rights;

(iii) the learned trial judge erred in law in holding that an agreement or consent to the physical application of force, was vitiated or removed as an element of the offence to be established by the prosecution, for reasons that it was contrary to public policy, for a dishonest purpose, tainted by unlawfulness and incapable of enforcement, whilst expressly acknowledging its applicability or the existence of the defence in other circumstances;

(iv) The learned trial judge erred in law in refusing an application on behalf of the appellant for an accomplice warning to be given to the jury.

Non Fatal Offences against the Persons Act 1997

6. The relevant provisions of the Non Fatal Offences against the Persons Act 1997 are:-

2(1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly:-

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.

(2) In subsection (1)(a), "force" includes:-

(a) application of heat, light, electric current, noise or any other form of energy, and

(b) application of matter in solid liquid or gaseous form.

(3) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 6 months or to both.

3(1) A person who assaults another causing him or her harm shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable:-

(a) on summary conviction, to imprisonment, for a term not exceeding 12 months or to a fine not exceeding £1,500 or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or to both.

4(1) A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both.

22(1) The provisions of this Act have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.

(2) Notwithstanding subsection (1) any defence available under the common law in respect of the use of force within the meaning of section 18 or 19, or an act immediately preparatory to the use of force, for the purposes mentioned in section 18 (1) or 19(1) is hereby abolished.

28(1) The following common law offences are hereby abolished:-

(a) assault and battery,

(b) assault occasioning actual bodily harm,

(c) kidnapping, and

(d) false imprisonment.

7. The Act of 1997 does not define 'assault'; other than what is provided in s. 2 of the Act.

Submissions made to the Trial Judge

8. At the conclusion of the evidence, including the evidence of the appellant himself, and immediately prior to the jury being charged, submissions were made on behalf of the appellant and the respondent in relation to two issues. The first related to the interpretation of ss. 2 and 3 of the Act of 1997, and whether or not lack of consent is a necessary proof for an offence charged under s. 3 of the Act. The second concerned the necessity or otherwise for an accomplice warning.

9. In relation to ss. 2 and 3 of the 1997 Act, it was argued on behalf of the appellant that the issue of consent was an essential ingredient to the offences of assault, be they s. 2 or s. 3 assaults. It was contended that ss. 2 and 3 must be read as one, insofar as s. 2 purports to define the ingredients of assault and that, in effect, the provisions set out in s. 2 are carried over into s. 3. Section 2(1) provides that a person shall be guilty of an offence of assault "...who, without lawful excuse, intentionally or recklessly...applies force to or causes an impact on the body of another...without the consent of the other". It was contended that s. 3 of the Act creates the offence of assault "causing harm" where such an assault is committed (as provided for in s. 2(1)) without the consent of the other person. It was submitted that the jury ought to have been charged on the issue of consent and, more particularly, they should have been directed to consider whether or not, on the evidence heard by them, Mr. Cooper had consented to being assaulted by the appellant, and that if they were satisfied that he had so consented they should acquit.

10. A counter argument was made on behalf of the respondent. It was to the effect that the provisions of s. 2 did not carry over to s. 3, and that the offences created by both sections were completely separate and unconnected. Particularly the respondent argued that an absence of consent is not an ingredient of a s. 3 offence.

11. In his submissions to the learned trial judge, Mr. Fennelly BL, on behalf of the respondent, submitted as follows:-

"...what I am simply saying is that the Court, unless there are exceptional circumstances to it, and in my respectful submission there are none in the present case, consent can't be a defence to an assault occasioning actual bodily harm or in the case of our Statute, the offence of assault causing harm. And it does not require, for the purposes of clarity, it does not require that what we would consider serious bodily harm or grievously body harm under the old regime, be achieved. Once there is harm within the old definition...that is the threshold."

The learned trial judge's ruling

12. The learned trial judge ruled as follows:-

"Sections 2 and 3 are standalone offences in the Non Fatal Offences against the Person Act Statute. If it was intended

that the definition of assault in s. 2 was to be carried over to s. 3, than the Statute would have clearly provided for this. Section 2 defines for the first time in a Statute the offence of assault simpliciter. It does nothing else. If the Statute was intended to define assault in all its forms then this would have been covered in the interpretation section of the Statute. It doesn't do this. I am satisfied that the term "assault" as used in s. 3 derives from the definition which is enjoyed in law at the time that the Non Fatal against the Person Act was enacted."

13. Later in his ruling, the learned trial judge stated:-

"...According to the accused the purpose of the assault was to assist Mr. Cooper in getting a transfer out of Portlaoise Prison. I am satisfied that in the circumstances of the present case Mr. Cooper on grounds of public policy could not have consented to the imposition of an injury on him by the accused, which resulted in Mr. Cooper having to get twelve stitches to the head ... I am further satisfied that on the grounds of public policy that the courts could not permit the defence of consent to apply in this case as to do so would be to enforce the purported agreement between the accused and Stephen Cooper. This agreement in my view is illegal and could not be enforced on grounds of public policy as it endeavours to use force as a means to force the prison authorities to transfer Mr. Cooper from the Portlaoise prison. To allow enforcement or recognition of such an agreement would be to undermine the proper governance of the prison and would therefore be contrary to public policy and not in the public interest."

14. The learned trial judge went on to state that when charging the jury he intended to advise them that there was no need to consider the issue of consent, because, on grounds of public policy, a person cannot agree to the infliction of bodily harm on themselves unless there is a legitimate purpose for such to be done. He addressed the jury in the following terms:-

"In that respect, the accused has proffered the defence that he applied this force and caused the injury to Mr. Cooper in pursuance of an agreement he had entered into with Mr. Cooper, under which Mr. Cooper was to give him some confidential information that he had when he was a garda, together with a sum of €1,000. ... But the law is that infliction of force causing injury or harm is not a lawful defence and accordingly my direction to you is that you do not need to concern yourselves with the issue of consent in this trial. Mr. Cooper could not consent to the infliction of the type of injury he sustained. Our law states that, for public policy reasons, you cannot consent to yourself being injured in that fashion. And, for that reason, you are not to concern yourselves with the issue of consent. Consent is not a lawful defence to the charge of assault. And in this case, there is a double reason for that because, even if you accept Mr. Brown's evidence, the assault was perpetrated in pursuance of an agreement, which was to ensure that Mr. Cooper would be moved from Portlaoise Prison, and that type of an agreement in my view, is an unlawful agreement for public policy reasons because it involves the use of violence for the purpose of arranging the transfer of a prisoner, and that is an attack on the governance of the prison and the maintenance of peace in the prison, and as such any agreement that purports to involve the use of violence in that manner is unlawful and could not be enforceable for public policy reasons. So what you need to be satisfied beyond all reasonable doubt is that there was an application of force and that there was no lawful excuse for the application of that force, and that it caused harm. If you are satisfied on all of those issues, beyond all reasonable doubt, then you are entitled to convict ..."

The appellant's submissions

15. It was argued on behalf of the appellant that the learned trial judge erred in his decision not to allow the defence of consent to go to the jury.

16. The appellant maintained that the criteria for the commission of a s. 3 assault is the same criteria as applies to a s. 2 assault. In terms of gravity, a s.2 assault is less serious than a s.3 assault. It followed therefore that the requirement that there be an absence of consent on the part of a victim to being subjected to force or impact was necessary for the commission of the offence of a s. 3 assault, as it is stipulated to be for a s. 2 assault, notwithstanding the fact that the reference to consent only appears in s. 2.

The respondent's submissions

17. The respondent maintains that ss. 2 and 3 each define discreet offences, and that the criteria identified in the legislation as constituting the former offence does not apply to the latter offence.

18. The respondent's position is perhaps best explained in para 2.09 of her submissions, wherein it is stated as follows:-

"It is accordingly submitted that the learned trial judge did not err in construing sections 2 and 3 of the 1997 Act as creating two discreet and separate offences and that such construction correctly positions "consent" solely within the confines of a s. 2 assault. Insofar as consent is concerned therefore, the law permits a person to consent to the direct / indirect application of force etc. upon himself / herself (or the causing of an apprehension of such contact / force) but no more than that. The law specifically does not permit a person to consent to the infliction upon himself / herself of "harm to body or mind..(including) pain and unconsciousness."

Discussion and conclusion

19. The first matter for decision is the extent to which the provisions of ss. 2 and 3 of the Non Fatal Offences against the Person Act 1997 represent the creation of two discreet and separate offences, so that nothing stated in s. 2 applies in respect of s. 3, and vice versa. A s. 3 assault is clearly a more serious assault than is a s. 2 assault, with the former attracting a prison sentence of up to five years convicted on an indictment. Section 4 of the Act concerns an even more serious assault.

20. Section 2(1) provides that *A person shall be guilty of the offence of assault who, without lawful excuse, intentionally or recklessly... applies force.. or causes an impact on the body of another, or causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact, **without the consent of the other*** [emphasis added].

21. Section 3 on the other hand simply provides that *A person who assaults another causing him or her harm shall be guilty of an offence*. It does not go on to expressly incorporate or repeat the detailed explanatory provisions of s. 2, and, more importantly, it does not expressly state that the commission of the offence involves a lack of consent on the part of the victim.

22. Section 22 of the Act of 1997 must also be considered. The explanatory memorandum accompanying the Non Fatal Offences against the Person Bill 1997 expressed the view that s. 22 ensures the continuance of *"the common law rules under which bodily harm caused with consent in the course of sports, dangerous exhibitions or medical treatments will apply to exempt the actor from criminal liability"*. This section already contemplates the continuance of the old common law rule that consent cannot be a defence to

the infliction of serious harm save in very particular circumstances.

23. If a s. 3 assault is an offence in respect of which consent is irrelevant and therefore doesn't require to be established, are there circumstances where consent nevertheless provides a defence? The answer to this question is: yes. In particular circumstances the infliction of physical harm may be permissible.

24. In *R v. Donovan* [1934] 2K.B.498, the Court of Criminal Appeal included the following passage in its judgment:-

"If an act is unlawful in the sense of it being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrongdoer. There are, however, many acts in themselves harmless and lawful which become unlawful only if done without the consent of the person affected. What is in one case an innocent act of familiarity or affection, may, in another be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

25. It is of course the case, and it occurs frequently in everyday life, that many types of medical treatment, and in particular invasive surgery invariably requires the use of force and involves the infliction of bodily harm. As such, it is permissible that persons who subject themselves to such force lawfully consent to same. Another example of activity where consent to the infliction of physical harm arises is in the sporting sphere. Issues may however arise in relation to certain so called sporting activity and unregulated sporting activity where consent becomes an irrelevant factor. It can be seen therefore that consensual violence is therefore permissible in certain limited circumstances.

26. In *R v. Nazif* [1987] 1 NZLR 122, the New Zealand Court of Appeal noted that while consent is a defence to assault there are exceptions, both statutory and otherwise, where the public interest is involved.

27. In *R. v. Wilson* [1997] QB 47, the accused branded his initials on his wife's buttocks with a heated knife with her consent and active encouragement, supposedly as an act of love. In that case the Court of Appeal overturned a conviction for assault occasioning actual bodily harm on the basis that the conduct was lawful and was not dangerous.

28. In *Attorney General's Reference (No. 6 of 1980)* [1981] Q.B. 715 at 719, the Court stated:-

"Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases."

29. In *R v. Jones* [1986] 83 Cr.App.R. 375, the activities of rough and undisciplined horseplay were added to this list of exceptions.

30. The issue of the relationship between ss. 2 and 3 of the Act of 1997 was considered by Peart J. in *The Minister for Justice, Equality and Law Reform v. Damien Dolny* [2008] IEHC 326, and by Denham J. (as she then was) in an appeal of that case to the Supreme Court: [2009] IESC 48. The case concerned an application for the surrender of Mr. Dolny to Poland for the purposes of serving a prison sentence imposed on him there in December 2004 following his conviction for an offence of assault. Amongst a number of issues raised on Mr Dolny's behalf was a suggestion that the offence for which Mr. Dolny was convicted in 2004 did not correspond to any offence under Irish law. The basis for this submission was that the facts as recited in the warrant did not go so far as to explicitly state that the offence was committed without the consent of the victim.

31. Submissions made on behalf of Mr. Dolny were to the effect that the provisions of s. 2 of the Act of 1997, (*that a person shall be guilty of the offence of assault who without lawful excuse intentionally or recklessly ... applies force to or causes an impact on the body of another, or causes another to believe ... that he or she is likely .. to be subjected to any such force or impact ... without the consent of the other*), constitutes a definition of assault carried over to s.3, although nothing is specifically stated to that effect. In his judgment, Peart J. stated:-

"In my view, this submission is wrong. The offences created respectively by s. 2 and s. 3 of the 1997 Act, are distinct and different offences. An assault under s. 2 requires for its commission that the person assaulted did not consent to being assaulted, as well as that the assault be inflicted without lawful excuse and intentionally or recklessly. The section is clear in that regard. But the separate and distinct offence of 'assault causing harm' in s. 3, contains no such requirements. It is a separate offence, and it is not the case that s. 2 is intended to define the concept of "assault" for all purposes of the Act. There is no definition of assault contained in s. 1 of the 1997 Act, or elsewhere therein.

Section 3 provides for a freestanding offence of 'assault causing harm', as opposed to a simple assault. In order to be guilty of this offence, a person must have carried out an assault and must have caused 'harm' as defined in section 1 of the 1997 Act. In such an offence, it is not part of the offence that it occurs without the consent of the victim. That is clear from the plain meaning of the words used in the section. In section 3, the word 'assault' is not used as a term of art by reference to the provisions of s. 2, or by reference to any statutory definition of that word. The Concise Oxford Dictionary definition of 'assault' is a "violent physical or verbal attack". That is the meaning to be given to the word 'assault' for the purpose of the section 3 offence."

32. In the Supreme Court appeal from the decision of Peart J., Denham J. affirmed the approach taken by Peart J.:-

33. The judgment of Lord Jauncey in *R v. Brown* [1993] EWCA Crim J0311-1 is interesting, although it is important to be aware when reading it that both sections 20 and 47 of the Offences Against the Person Act 1861 were expressly repealed by the Act of 1997. Lord Jauncey stated:-

"...In my view the line properly falls to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by section 47 of the Offences Against the Person Act 1861, with the result that consent of the victim is no answer to anyone charged with the latter offence or with a contravention of section 20 unless the circumstances fall within one of the well known exceptions such as organised sporting contests and games, parental

chastisement or reasonable surgery. There is nothing in sections 20 and 47 of the Act of 1861 to suggest that consent is either an essential ingredient of the offences or a defence thereto. If consent is to be an answer to a charge under section 47 but not to one under section 20, considerable practical problems would arise. It was held in Reg. v. Savage [1992] 1 AC 699 that a verdict of guilty of assault occasioning actual bodily harm is a permissible alternative verdict on a count alleging unlawful wounding contrary to section 20 (Lord Ackner at p. 740D). A judge charging a jury in a section 20 case would therefore not only have to direct them as to the alternative verdict available under section 47, but also as to the consequences of consent in relation to that alternative only. Such direction would be more complex if consent was an answer to wounding under section 20, but not to the infliction of grievous bodily harm under the same section. These problems would not arise if consent is an answer only to common assault. I would therefore dispose of these appeals on the basis that the infliction of actual or more serious bodily harm is an unlawful activity to which consent is no answer."

34. Section 22 of the Act of 1997, as already noted, provides a defence to any offence created under the act where there exists "lawful authority justification or excuse". Section 23 provides for consent by a minor over sixteen years of age to surgical, medical and dental treatment, and s. 24 removes the previous immunity enjoyed by teachers in respect of *physical chastisement of pupils*.

35. It is not contended or suggested that the statutory provisions relating to a s. 2 offence should be also applicable to a s. 4 offence. Section 4 provides:-

"4(1) A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both.

While s. 4 does not use the term 'assault', it clearly creates an offence which might be described as an assault type offence, albeit of a more serious nature than ss. 2 and 3 assaults. Indeed an s. 4 offence is often referred to as an assault causing serious harm.

36. Section 2 of the act of 1997 specifically creates an offence of assault occurring *without the consent of the other*. Section 3 contains no such provision. The drafting of these related sections, (to the extent that they both refer to assault), creates confusion as is evident from this and other cases and might have been the subject of more careful drafting. It is nevertheless appropriate that the offences described in ss. 2 and 3, respectively, should be treated as separate and distinct offences, as indeed should the offence described in s. 4.

37. In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 Blaney J. stated:-

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense."

And

"...The meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find that natural meaning of the words used in the context in which they occur, the context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

38. Proof of an absence of consent is therefore not a necessary ingredient in a s. 3 assault. Consent may however provide a defence to a s. 3 assault charge in limited circumstances such as, for example, legitimate sporting activity and necessary and appropriate medical treatment.

39. An assault causing harm committed in circumstances where the purpose and / or intention of the assault is itself unlawful and / or contrary to public policy can never be rendered lawful on the basis that the victim invited the assault or consented to being assaulted. Consent in those circumstances would not serve to undermine the criminalisation of such conduct under s. 3 of the Act of 1997. In this Court's view, the ruling of the learned trial judge in this case was correct, as was his charge to the jury to the effect that the very serious attack on Mr. Cooper by the appellant was not excusable on the basis that it had been consented to, if indeed there was any such consent.

40. It is therefore unnecessary for the Court to consider the ground of appeal concerning the decision of the learned trial judge not to give an accomplice warning to the jury.

41. The appeal against conviction is dismissed.