THE COURT OF APPEAL

Ryan P.
Birmingham J.
Sheehan J.

CCAOT 0222/2011

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Richard Higgins

Applicant

Judgment of the Court delivered on the 31st day of July 2015, by Mr. Justice Sheehan

1. This is an appeal against conviction.

2. Following a twelve day jury trial in 2011, the appellant was convicted of murdering Sean Murphy at Lattin, Co. Tipperary, on the 17th January, 2010 and was sentenced to life imprisonment.

3. The appellant was also convicted by majority verdict on two counts of making threats to kill contrary to s.5 of the Non-Fatal Offences Against the Person Act 1997 and sentenced at a later date to two years imprisonment in respect of each of those counts to run concurrently with the life sentence.

4. The appellant challenges his conviction on the following grounds:-

> (i) The trial judge erred in law in admitting into evidence the incomplete audio recording of a conversation in the smoking area of Aherne's Bar, Lattin, Co. Tipperary.
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> (ii) The trial judge erred in law in permitting the prosecution, when examining their own witness Katie Quinn to question without proper basis her willingness to give evidence and/or the accuracy of her memory, to engage in a type of hybrid application which seemed to start as an application to have Katie Quinn declared hostile and ended up with her being required to refresh her memory overnight from her witness statement.
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> (iii) The trial judge erred in permitting Emma Butler to refresh her memory by referring to her witness statement following an application by the prosecution.
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> (iv) The trial judge erred in law in failing to accede to the defence application at the close of the prosecution case to direct the jury to acquit on counts 2, 3 and 4 on the indictment on the basis that the only evidence supporting those counts was that given by Paula Hassett which was materially inconsistent to the evidence given to the Court by the Gardaí who had a very different account of the events on the issues pertinent to the charges.
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> (v) The trial judge erred in law in failing to set out and explain to the jury with sufficient clarity and structure the defence of self-defence and/or to integrate that defence with the onus and standard of proof which rests at all times with the prosecution.
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> (vi) The trial judge erred during the course of his charge in unfairly challenging the defence's comment regarding the late addition of the five threats to kill contrary to s. 5 of the Non Fatal Offences against the Person Act 1997 to the indictment for murder just prior to the commencement of the trial.
>
> (vii) The accumulation of the matters set out in the grounds taken collectively operated to render the conduct of the trial unsatisfactory and the verdicts unsafe.

5. In order to consider these grounds of appeal it is necessary to set out the background to these offences.

Background

6. The appellant and the deceased were neighbours who lived in adjoining houses in a small housing estate in Lattin, Co. Tipperary. There had been a certain amount of friction between the appellant and his partner and the deceased and his partner which had been ongoing for some months. On the 17th January, 2010 the deceased man was in Tipperary Town having a drink in a public house. His partner, along with their small child, drove to Tipperary Town to collect the deceased man and bring him back to their home in Lattin at about 9.00 pm.

7. As the deceased man's partner was driving towards the entrance of the small housing estate where they lived, the appellant was standing at the door to Aherne's Pub which was adjacent to the estate. During the course of the afternoon, the appellant had been drinking in that public house and was heard to make various inculpatory remarks which were recorded on audiotape on the CCTV. This CCTV from that public house showed the car in which the deceased was being driven home by his partner arriving and turning into the estate. When this happened, the appellant immediately walked from his position outside the public house in the direction of the estate into which the car had driven. The appellant made threats to the deceased and then went to his own home where he got a knife. It appears that the deceased then armed himself with a plank of wood when the appellant had come out of his house with a knife. A physical altercation ensued whereupon the appellant swung with the knife once in the direction of the deceased and caused a fatal stab wound. There were three eyewitnesses: Paula Hassett (the partner of the deceased), Emma Butler (the partner of the appellant) and Katie Quinn, a neighbour in the said terrace.

Submissions in respect of the grounds of appeal

8. The appellant submits that the evidence of the three eyewitnesses was not presented impartially or fairly by the prosecution and, in relation to grounds 1, 2 and 3, that the manner in which the State presented its case was not balanced.

Ground 1 – Admission into evidence of the incomplete audio from Aherne's Tophouse Bar
9. As part of the investigation, the Gardaí recovered CCTV footage from Aherne's Bar where the appellant and others were having drinks in the course of the afternoon of the 17th January, 2010. The CCTV recovered by the gardaí revealed that the system had several cameras, one of which covered the smoking area and was fitted with audio recording equipment. The appellant was observed in this area with others at various times making hostile observations about the deceased and discussing the possibility that he might be physically injured by other people and stated:- "What would kill me is there's someone else going to give him a few slaps and I'm not gonna get any satisfaction out of that. I know for a fact he's a cowardly bastard. Now I'm no hard man. I can use myself, I'm no hard man."

10. The gardaí documented this conversation and included it in the Book of Evidence over two transcripts. On day five of the hearing, and for the first time, a further extract of a transcript of audio material from the smoking area of the public house where the appellant had been drinking was served on the defence.

11. Counsel for the appellant submitted that the trial judge should have exercised his discretion to exclude the recording on the basis that the transcript was unreliable and no more than pub talk. It was only part of a recording and therefore it was misleading because it did not include the whole of the conversation.

12. Counsel for the appellant submitted that a trial judge in this jurisdiction has discretion to exclude evidence which is otherwise relevant. Such an exclusion is often exercised if there is something wrong, albeit not unconstitutional, in the manner in which the evidence was obtained. Counsel for the appellant placed reliance upon *R v. Christie* [1914] AC 545; *R v. Sang* [1980] AC 402; *The People (Attorney General) v. O'Brien* [1965] IR 142; *The People (Director of Public Prosecutions) v. Meleady (No. 3)* [2001] 4 I.R. 16 and *The People (DPP) v. McNeill* [2011] IESC 12.

13. Counsel for the respondent submitted that it was established in interview, and accepted by the appellant, that he was discussing the deceased on the CCTV in Aherne's pub. The principal objection by counsel for the appellant at trial was confined to certain parts of the recording and that the prejudicial effect of the recording outweighed its probative value. Counsel for the respondent submitted that the recordings were properly admitted and amounted to real evidence. No issue was taken as to their authenticity and indeed the appellant had himself confirmed in interview that he could be heard speaking on the audio/CCTV.

Conclusion
14. This evidence was clearly relevant and of probative value in that it was a factor in establishing the hostility of the appellant to the deceased man on the day in question. The audio recording was real evidence and the trial judge properly exercised his discretion and correctly applied the balancing test before ruling that the evidence was admissible. There was no suggestion at any point that the authenticity of the recording was in issue. The context of that statement was a matter for the jury to determine and it was right that the evidence was placed before the jurors for their evaluation. This Court therefore holds that this ground of appeal must fail.

Ground 2 – Application to treat Katie Quinn as hostile
15. Katie Quinn was a friend of the appellant, and particularly the appellant's partner, and was in their home on the day the deceased was stabbed. She came out of the house and witnessed both the appellant and the deceased in the immediate aftermath of the stabbing. Her statement of proposed evidence went to certain relevant matters including the location of the fight, the appellant's state of knowledge after the stabbing, his demeanour and whether or not he was aware that the deceased had been stabbed. During the course of a garda interview, the appellant had stated that he had gone home and was not aware that he had stabbed or injured the deceased until the ambulance arrived. At the trial, however, Katie Quinn gave evidence which was inconsistent with her statement of evidence.

16. Counsel for the appellant submitted that the defence gave the courtesy to the prosecution to have Katie Quinn led in relation to a considerable part of her evidence and requested at a certain point that the leading of the witness cease and that the evidence be given in the normal way from that point on. Counsel for the appellant submitted that Katie Quinn gave her evidence in an honest and voluntary manner and in all material respects consistent with her statement and consistent with truthfulness and contended that the prosecution application to have her declared hostile was improper and that this amounted to a character assassination. Counsel for the appellant submitted that the trial judge's ruling to allow the witness the opportunity to refresh her memory from her statement resulted in an unwarranted interference in the flow of evidence by the prosecution. Furthermore, it was submitted that when Katie Quinn returned to give evidence the next day, counsel for the prosecution continued a line of questioning which was in effect, a cross-examination. It was the submission of counsel for the appellant that the honesty of the witness was called into question and this tainted her credibility before the jury. Counsel for the appellant submitted that there was not much significance between the account given in evidence and that set out in Katie Quinn's statements. Counsel relied upon the cases of *R v. Price* [1988] 86 Cr. App. R 111 and also referred this Court to para. 14.77 in O'Malley, *The Criminal Process* (Dublin, 2009).

17. Counsel for the respondent submitted that what was in Katie Quinn's statement of evidence was of great importance. Counsel contended that Katie Quinn was failing to give that crucial evidence at trial before the jury. Furthermore, counsel for the respondent submitted that hostility to the process is often apparent by observation at trial and thus counsel for the prosecution is entitled to make such an application based on their observance of the witness at trial.

18. Counsel for the respondent referred the Court to s.3 of the Criminal Procedure Act 1865 and the procedure to be applied in making an application to treat a witness as hostile as set out in *The People (Attorney General) v. Taylor* [1974] IR 97. Counsel made the application however and the trial judge refused to grant the application. However, the trial judge held that the witness was entitled to refresh her memory by looking at her statement. Counsel for the respondent referred this Court to the decision in *The People (Director of Public Prosecutions) v. Clifford* [2002] 4 IR 398 in which Ó Caoimh J. held that a witness is entitled as a matter of law to refresh his or her memory.

Conclusion
19. It is this Court's view that the trial judge was correct in suggesting that Katie Quinn refresh her memory by reading through her statement. Defence counsel did not object to the witness being shown her statement and whilst disagreement arose between counsel at a later point as to whether Katie Quinn was simply reading her statement or refreshing her memory from it, the trial judge stated that he observed the witness to be merely checking the statement.

Ground 3 - Request by the prosecution to have Emma Butler refresh her memory
20. Counsel for the appellant submitted that the trial judge erred in permitting Emma Butler to refresh her memory by referring to her witness statement following an application by the prosecution. Emma Butler is the partner of the appellant. She had provided a long witness statement to the Gardaí which was read back to her on videotape following which she confirmed the statement was correct.

21. In a similar way to the unfolding of the issues pertaining to the witness testimony of Katie Quinn, it is submitted by counsel for the respondent that Emma Butler did not give testimony which was consistent with her previous statement of evidence in material respects. Counsel for the Director of Public Prosecutions made an application for the witness to be allowed to see her statement to refresh her memory. No objection was made by the defence and the trial judge granted that application.

22. Counsel for the respondent submitted that an objection cannot now be taken to this witness refreshing her memory on two grounds. The first is that the application was properly made and acceded to by the trial judge. The second reason is that no challenge was taken by counsel for the defence at the time. In written submissions to this Court, counsel for the respondent relied upon the following cases:- *Laupakngam v. R* [1966] Criminal Law Reports, *Supreme Court of Hong Kong; Attorney General's Reference No. 3* [1979] 69 Cr. App. R. 411; *DPP v. Clifford* and *R v. Tyagi* (The Times, 21st July 1986).

23. Counsel for the appellant submitted that in the course of the examination-in-chief by the prosecution, Emma Butler was providing answers consistent with her proposed statement of evidence in a complete and voluntary manner. It was submitted that the application for the witness to be allowed to see her statement to refresh her memory was made "out of the blue". Counsel for the appellant acknowledged that a witness, subject to the Court, has a right to see a contemporaneous statement to refresh his or her memory. A request to see a previous written statement is made in circumstances where the witness is trying to give some evidence that he or she has difficulty remembering. Counsel for the appellant submitted that this was not the situation which arose in relation to Emma Butler and counsel for the Director of Public Prosecutions made an application which was a curious hybrid of refreshing memory and an application to have a witness declared hostile.

24. Counsel for the appellant submitted that in a case such as this, the jury must carefully consider the credibility and demeanour of the three eyewitnesses. It was submitted that the prosecution called into question the reliability and credibility of two of the three eye witnesses by unwarranted and unconventional procedure before the jury and disturbed the fine balance in relation to the credibility issue. Counsel for the appellant stated that the manner in which the three witnesses were dealt with by the prosecution revealed a bias by the prosecution towards Paula Hassett.

Conclusion
25. The application to the trial judge that Ms. Butler be allowed to refresh her memory arose in circumstances where the witness was unable to remember relevant evidence concerning a discussion with the appellant at a critical point when he had returned from the pub. The Court is satisfied that the trial judge was correct in these circumstances to accede to the application made by counsel for the respondent to allow Emma Butler to refresh her memory by reviewing her statement of evidence. The Court, in rejecting this ground of appeal, also rejects the appellant's assertion that the manner in which the three eyewitnesses were dealt with by the prosecution revealed a bias by the prosecution towards Paula Hassett.

Ground 4 – the trial judge erred in law in failing to accede to the defence application for direction on counts 2, 3 and 4 on the indictment
26. Counsel for the respondent submitted that Paula Hassett gave a clear and coherent account of what had occurred which was supported by the evidence of two gardaí, however it was noted that there were inconsistencies relating to precise details of the accounts given. Counsel submitted that this was a matter which rested within the remit of the jury and thus the trial judge was correct. Counsel for the respondent relied upon the decisions in *R v. Barker* [1977] 65 Cr App. R. 287 and *R v. Galbraith* [1981] 2 All ER 1060 in this regard.

27. Counsel for the appellant submitted that the view that this was a matter of credibility and therefore a matter for the jury to determine was not well founded in all the circumstances. It had been admitted at various points throughout the trial in various applications that the purpose of adding these counts to the indictment was to render previous allegations of misconduct admissible and thereby avoid an admissibility argument in relation to previous misconduct. The evidence of the Gardaí did not support the claims made several months later in Paula Hassett's statement and it was submitted that those factors alone would be sufficient in the ordinary course for the DPP to decide against prosecuting. The appellant submitted that by putting these allegations before the Court on discrete counts it served to bolster Paula Hassett's testimony before the jury by a clear inference that the prosecuting authorities felt there was sufficient merit in these allegations to justify grounding a criminal charge on each. The trial judge erred in permitting these counts to go to the jury solely on Paula Hassett's evidence when such evidence conflicted with the independent reliable evidence of the gardaí. Counsel for the appellant relied upon the decision of *R v. Galbraith* [1981] 1 WLR 1039.

Conclusion
28. The test that a trial judge is obliged to apply in these circumstances is well established. Was there sufficient evidence in the case on foot of which a jury properly instructed could convict? The answer to this question is in the affirmative and accordingly the Court dismisses this ground of appeal.

Ground 5 - The Judge's charge in respect of self-defence
29. Counsel for the appellant submitted that the trial judge's charge in relation to self-defence was not sufficiently clear for a jury to fully comprehend the nature of the offence nor did the judge endeavour to apply the principles to the particular facts of this case. After requisitions in relation to the self-defence charge at the conclusion of the trial, the trial judge recharged the jury in relation to self-defence. It was the appellant's submission that this recharge rendered the situation wholly unsatisfactory and argued that it could amount to a misdirection to the jury on this matter. It was submitted that there ought to have been some attempt in the charge to marry the concept of self-defence to the particular facts of the case. Counsel relied upon the decisions in *The People (AG) v. Dwyer* [1972] I.R. 16, and *DPP v. Clarke* [1994] 3 I.R. 289.

30. Counsel for the respondent submitted that the trial judge's charge was correct. In their written submissions, the respondent notes that the trial judge had described the issue of self-defence as being the crux of the case and made it clear to the jury that in respect of the issue of intention they were required to put themselves in the shoes of the accused. The trial judge made it clear to the jury that they had to decide, in this particular case, whether or not a question of self-defence arose. The trial judge directed the jury that a person is entitled to use reasonable and proportionate force in order to defend himself. It was further submitted that the trial judge had correctly directed the jury that if the force used was reasonable they should acquit the accused. The jury was also directed that if objectively speaking the degree of force was not reasonable force but the subjective view of the accused was that the force was reasonable, the correct verdict was manslaughter. Counsel for the respondent noted that the trial judge correctly directed the jury that a margin of error must be afforded to a person in a self-defence situation. It was submitted that the trial judge gave a fair and full summary of the facts of this case to the jury.

31. In the course of his summing up to the jury on the question of self defence, the learned trial judge stated at day 11, p. 2, line 30-35:-

> "Now in relation to the present context I will come in a moment to the question of self defence, but as a general principle it is the case that it is lawful to use reasonable force to defend oneself. That is to say not every killing so to speak apart from the rather theoretical examples which I have given you is an unlawful killing and that is the crux of this case, but I will come to that in a moment."

32. The learned trial judge then went on to deal with the definition of murder, a rebuttable presumption that a person intends the natural and probable consequences of their actions and the duty of the prosecution to exclude any reasonable possibility that that presumption has been rebutted. The trial judge then went on to talk about the state of mind of a person and then, returning to the question of self defence, stated the following:-

> "You then have to decide in this particular case, whether or not a question of self defence arises. Now as I have said to you I am entitled to use reasonable and proportionate force in order to defend myself, so if I am being threatened with deadly force, I am entitled to respond with deadly force."

And at a later point:-

> "So you have to decide in this particular case having regard to the evidence whether or not objectively speaking the force used by the accused in this instance on the evidence was reasonable force. Now let us suppose you decided objectively speaking the force used was reasonable and proportionate. You would then be in a position where since I am allowed to use reasonable force proportionate to the threat in order to defend myself and if I do that, in those circumstances it is a lawful killing then you would acquit the accused. If however, objectively speaking the force was not reasonable force, but the subjective view of the accused was that the force was reasonable as sometimes and indeed as one of the law reports has said as a concession to human beings, the law says in that instance the person is guilty of manslaughter not a complete acquittal. So in the even that you take the view that objectively speaking the force used was reasonable, then the accused is entitled to an acquittal. If you take the view that the accused subjectively speaking notwithstanding the objective position thought it was reasonable then the accused is entitled to a reduction of the charge before you from murder down to manslaughter. It is as I say a concession to human beings."

Conclusion
33. In light of the above extracts, this Court is satisfied that the learned trial judge's charge in relation to self defence was adequate and accordingly the Court dismisses this ground of appeal.

Ground 6 - the Trial Judges' charge in relation to criticism of the late addition of five threats to kill
34. The sixth ground of appeal put forward by the appellant was that the trial judge erred during the course of his charge in unfairly challenging the defence's comment regarding the late addition of the five s.5 Non Fatal Offences against the Person charges (threats to kill) to the indictment for murder just prior to the commencement of the trial.

35. Counsel for the appellant submitted that the accused was returned for trial on the sole count of murder. On the morning of the commencement of the trial, five additional charges were placed on the indictment, those being five threats to kill charges on various dates prior to the date of the events giving rise to the murder charge. The allegations of the five threats to kill were made by Paula Hassett in the course of her statement to the gardaí after the death of the deceased. None of these allegations were the subject of any material garda investigation. In the course of giving the closing address to the jury, the defence made reference to the fact that until the start of the case, the accused was never charged with making any threat to kill and it was commented that these charges were merely used to put before the jury allegations of previous bad behaviour and those allegations did not, in any event, stand up under scrutiny given the totality of the evidence and particularly the evidence of the gardaí.

36. In the course of the charge to the jury, the trial judge addressed the comments made by the defence and stated the following:-

> "Now the position is there has been some criticism of the fact that these additional charges have been laid against the accused in the same indictment that is before you. There is in legal terms no basis for such a criticism. The prosecution is entitled to put down or add any counts it wants at any time and it has been suggested that it was a device which would have allowed you to hear evidence which would blacken the character of the accused which might not otherwise be evidence which you would be entitled to hear. That is in fact not the position. The position is that of course in this case, you have evidence of the background and circumstances of this offence. You have the sequence of events in terms of the relationship between the parties and anything which occurred between them whether it was as it were, favourable to one side or the other or whether it casts the accused in a bad light or not. . . ."

37. It is the submission of the appellant that the trial judge's comments were unbalanced and together, either subliminally or otherwise, went to support the credibility of Paula Hassett in a case where credibility was a major factor.

38. Counsel for the respondent referred the Court to the Criminal Procedure Act 1967 as substituted by s.9 of the Criminal Justice Act 1999 and the judgments in *The People (DPP) v. Moylan* (Court of Criminal Appeal, May 19th, 1999) and *The People (DPP) v. Desmond* [2004] 3 I.R. 486. Counsel submitted that the DPP was entitled to add the amended counts. The trial judge's charge to the jury in clear terms outlined that it was their function to decide the case only on the evidence.

Conclusion
39. The Court notes that the additional counts that were added to the indictment in respect of allegations of threats to kill arose out of the statement of evidence of Paula Hassett which had been served on the defence prior to trial. To that extent there can be no surprise that these counts were added to the indictment. Counsel for the prosecution, being concerned that the evidence of Paula Hassett in respect of these threats, even though it went to motivation, would be excluded by the trial judge on the basis that he or she might rule it inadmissible, told this Court that she added the additional counts of threats to kill to the indictment to ensure that this would not happen. While the Court considers this approach somewhat unusual, it was a decision that the prosecutor was nevertheless entitled to take and accordingly the Court is satisfied that the counts were properly introduced into the case. Equally the Court is of the view that the trial judge was entitled to comment on the remarks made by defence counsel in respect of these additional counts in his closing speech and the Court is satisfied that no unfairness arises out of him so doing.

Ground 7 - Accumulation of all the grounds
40. Counsel for the appellant submitted that each individual ground advanced herein gives rise for concern and that the accumulation of all of the grounds in the one trial renders the verdict unsafe. Counsel for the prosecution opposed the submission that leave should be granted on any of the individual grounds or on the accumulation of grounds.

Conclusion
41. The Court has considered this final submission and in view of the rulings already made in respect of the other six grounds, does not consider the accumulation of grounds advanced in this appeal as being sufficient to render the verdict in this case either unsafe or unsatisfactory in any way.

42. Accordingly, the appeal against conviction is dismissed.