THE COURT OF APPEAL

Record No. 81/2017

Birmingham J.
Mahon J.
Hedigan J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

CHRISTOPHER RICE

APPELLANT

JUDGMENT of the Court delivered on the 5th day of March 2018 by Mr. Justice Mahon

1. The appellant has appealed against his convictions recorded at Clonmel Circuit Criminal Court on the 2nd March 2017 following a jury trial, on four counts. The appellant has also appealed sentences imposed in relation thereto on the 15th March 2017. The five counts, and the sentences imposed in respect of each are as follows:

- Count No. 1: Assault contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 (Twelve months imprisonment, concurrent to the sentence imposed on count 5).

- Count No. 2: An offence contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. (Twelve months imprisonment concurrent to the sentence imposed in relation to count 5).

- Count No. 3: Production of an article contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. (Taken into consideration).

- Count No. 4: Criminal Damage contrary to s. 2(1) of the Criminal Damage Act 1991. (Taken into consideration).

- Count No. 5: Aggravated burglary contrary to s. 13 of the Criminal Justice (Theft and Fraud Offences) Act 2001. (Five years imprisonment, sentence to date from the legal expiration of a sentence of six years imprisonment with the final two years suspended imposed in respect of Bill No. TYDP0025/2013 on the 7th May 2014. The final twelve months of the five year sentence was suspended on conditions.

2. At the time of the commission of these offences, the 5th April 2016, the appellant was on temporary release in relation to the previously imposed net four year prison sentence. It was on this basis that the learned sentencing judge directed that the five year sentence imposed in relation to count no. 5 (with the final twelve months suspended) be served consecutively to that previously imposed.

3. On the evening of the 4th April 2016 a number of young people, including the appellant, were drinking at The Mall in Cahir, County Tipperary. They proceeded to move from that location to the apartment of Shannon Power which was situate on a street off the main square in Cahir. In the apartment were the appellant, Shannon Power, Toni Wade, Chloe Ryan, Louise O'Donoghue and Brendan Maher. Also present, at least for a time, were Shannon Power's mother and Ms. O'Donoghue's brother. The group continued to drink in the apartment, and later a row broke out between Tony Wade and Louise O'Donoghue. Others in the group then became involved. The appellant intervened and struck Louise O'Donoghue who was then his girlfriend. He then brought Louise O'Donoghue into a bedroom where it is alleged that he further assaulted her. At some point the appellant left the apartment at the insistence of Ms. Power. He then re-entered the apartment by kicking in the door and as he did so he took a knife from his track suit pocket. This knife belonged to the apartment. The appellant waved the knife at Ms. Power and in doing so slightly cut the knuckle of one of her fingers. The gardaí were then telephoned. On their arrival they noted that the appellant was involved in a physical altercation with Ms. O'Donoghue. The appellant was arrested and brought to the garda station. He denied any wrongdoing, and in particular denied being put out of the apartment or unlawfully re-entering it. He denied assaulting Ms. O'Donoghue and Ms. Power or that he produced a knife at any stage in the course of the evening.

Conviction appeal

4. Twelve grounds of appeal were filed on behalf of the appellant. They are:-

(i) The learned trial judge erred in law and in fact that on the 22nd February 2017 when the first witness for the prosecution who had come to court voluntarily and stated "I do not propose to give evidence". The learned trial judge stated "You have made a statement. The penalties for perjury are severe". The learned trial stated he would remand the witness in custody unless she gave an undertaking to give evidence.

(ii) The learned trial judge erred in law and in fact that on the 22nd February 2017 when the second witness for the prosecution who had come to court by arrangement and stated "I am not prepared to give evidence and do I not have a right to retract my statement". The learned trial judge stated "You are liable to prosecution if you do not give truthful evidence."

(iii) The learned trial judge erred in law and in fact that on the 22nd February 2017 when the third witness for the prosecution who had come to court on a bench warrant and was remanded in custody for the trial, the learned trial judge stated "She is obliged to give the whole truth".

(iv) The learned trial judge erred in law and in fact that on the 22nd February 2017 when dealing with each of the first three witnesses stated it was "remarkable" all three sought to retract statements.

(v) The learned trial judge erred in law and in fact in his dealing with the statement of the first witness for the prosecution who stated in cross examination "I am only giving evidence because I will be remanded".

(vi) The learned trial judge erred in law and in fact in acceding to an application by the prosecution to allow evidence of Garda Fitzgerald to be put to the jury about the claim by Garda Fitzgerald that she had searched a number of parties present at the scene of the crime. Such application having been made after both the prosecution and the defence had closed their cases.

(vii) Despite the defence stating that the evidence was not rebuttal evidence in response to the sole witness for the defence who was also one of the victims, the learned trial judge stated that he wished to have all evidence put before the jury, and the court acceded to the prosecution request.

(viii) The learned trial judge erred in law and in fact in his charge to the jury in that he did state that the jury must consider the problems to society of a guilty person going free, while the trial judge did say this was balanced by the presumption of innocence, the fact that the learned trial judge's order of the rights gave undue weight to the finding of guilty.

(ix) The learned trial judge erred in law and in fact in his summing up to the jury about the issue of witnesses being instructed to give evidence, as his charge to the jury reinforced the reluctance of the three civilian witnesses to give evidence, said reluctance being misconstrued.

(x) The learned trial judge erred in law and in fact in his charge to the jury that forensics had not established one way or another, but blood or fingerprints would not have established anything (sic).

(xi) The learned trial judge erred in law and in fact in his dealing with the issue of recklessness in answering the prosecution's issue as raised in requisitions. The defence request that in dealing with recklessness it is submitted by the defence the jury could be misdirected, as there was no evidence of self defence or accident.

(xii) The learned trial judge erred in law and in fact in stating to the jury that there was no issue of self defence and later in requisition stating that they may consider self defence.

5. At the opening of the appeal before this court, Mr. Leahy BL on behalf of the appellant advised the court that he wished to *"narrow the points of appeal"*. He advised the court that the *"main point"* of his appeal was that relating to the late addition of evidence following the close of both cases for the prosecution and the defence, namely grounds (vi) and (vii) above. He advised the court that in relation to the other grounds of appeal, he would simply rely on the written submissions filed on behalf of the appellant. He also advised the court, lest it be otherwise construed, that there was no suggestion being made on behalf of the appellant that the learned trial judge was in any way biased in the manner in which he conducted the trial.

The warnings given to certain witnesses

6. In relation to the contention that the learned trial judge erred in the manner in which he warned a number of civilian prosecution witnesses as to their obligation to give evidence to the trial, any such warnings given were stated in the absence of the jury. The learned trial judge addressed the various witnesses in relation to the requirement that they give evidence to the trial against the background where three witnesses had not turned up on a previous occasion and warrants had been issued for them, whereupon they gave undertakings to be in attendance, and in circumstances where two of the civilian witnesses failed to attend for the adjourned trial on the 21st February 2017. Another civilian witness, Ms. Power, indicated to the gardaí on the 21st February 2017 that she would not be present in court on the 22nd February 2017. When warned by the court she gave an undertaking to attend court which she did. Similar undertakings were given by Tony Wade and Chloe Ryan.

7. Appropriately, none of the witnesses were told that they were required to give evidence in strict conformity with what was stated in their statements. They duly took oaths to tell the truth, the whole truth and nothing but the truth. They were the subject of robust cross examination conducted by Mr. Leahy on behalf of the appellant.

8. The court is satisfied that the various witnesses were dealt with appropriately by the learned trial judge, and in a manner which enabled them to satisfy their civic and legal obligation to give evidence in the course of a criminal trial. The manner in which the issue was dealt with by the learned trial judge did not create any unfairness for the appellant.

The recall of Garda Fitzgerald

9. Garda Canty was the last witness called on behalf of the prosecution. The defence called just one witness, namely Ms. O'Donoghue. In the course of being cross examined, Ms. O'Donoghue referred to one of those present in the apartment having a scissors. There had been no evidence about a scissors although the gardaí maintained that they had gathered all of the evidence at the location. At the conclusion of Ms. O'Donoghue's evidence, Mr. O'Shea BL (on behalf of the prosecution) applied to the learned trial judge relief to call rebuttal evidence from Garda Sarah Jane Fitzgerald. Mr. O'Shea said:-

> *"The last witness that was called who was for the defence was Louise O'Donoghue. And during the course of her testimony, she was being asked about the scissors that she alleged that Toni Wade was playing with earlier. And had produced on a separate occasion. And she raised the question herself in answer to one of my questions as to whether the gardaí had searched Ms Wade or not at the scene, and appeared to be inviting the jury to infer from the fact that she may not have been searched, that she may in fact have had a weapon on her, that is to say a scissors, but that it simply wasn't located. It has been brought to my attention by Garda Sarah Jane Fitzgerald, through the State solicitor, that at the scene, there were searches conducted of persons for the safety of the gardaí and for the safety of themselves and others present, and one of those persons was Toni Wade. And that arising from that search there was nothing found in the line of a weapon or a scissors. And I say that I'm entitled to call that as rebuttal evidence arising directly from the testimony given by the defence witness."*

10. Mr. Leahy opposed the application.

11. The learned trial judge ruled as follows:-

> *"My approach to this as to so many matters is that the jury may have - may be wondering about the situation with regard to the scissors and in particular in view of the fact that Miss O'Donoghue herself raised the issue of searches at the scene. Of course, I say this, that my general approach to such matters is that the jury should be in a position to*

reach a decision based on the greatest information possible, some of which may be irrelevant, rather than too little. It is proper that this be canvassed and canvassed further and that of course will include the entitlement of Mr Leahy to cross examine vigorously and indeed to put the allegation that he has raised in his argument to Garda Fitzgerald in cross examination."

12. Garda Fitzgerald then gave evidence.

13. The court is satisfied that the learned trial judge properly exercised his discretion to permit rebuttal evidence to be called in the circumstances. He did so in the interests of ensuring that the jury had a full picture of what had occurred on the evening in question. Arguably, such evidence as was given by Garda Fitzgerald was more in support of the defence than against it. In reality, however, the evidence was neutral and is unlikely to have swayed the jury one more or the other. In those circumstances it did not render the trial unfair.

The summing up
14. The appellant contends that the summing up by the learned trial judge was unbalanced.

15. On the contrary, the learned trial judge's charge to the jury was well balanced and well constructed. It included more than one reference to the presumption of innocence and the onus of proving guilt resting entirely with the prosecution. Some extracts from the charge are useful to repeat, such as:-

"The next safeguard, ladies and gentlemen, is the most important and fundamental of all. It is and it's been referred to by prosecution and defence counsel, it is the presumption of innocence. As he faces you here today, here in this court, Mr Rice is an innocent man. He remains an innocent man unless and until you the jury find him guilty…

A person enjoys the presumption of innocence right throughout the trial and right until such time as a jury might bring in a contrary verdict against him..

That standard is proof beyond reasonable doubt, an expression that no doubt is familiar to you because it has found its way into everyday speech, but it derives from the criminal law.."

16. The learned trial judge also told the jury:-

"The defence case is that Christopher Rice was there as an invited guest in the apartment. He was never put out even though a fight did emerge. He never unlawfully went back in. He did not assault Louise O'Donoghue; he did not assault Shannon Power, and he did not produce a knife at any stage or use a knife at any stage. And that is essentially the defence case."

The issue of recklessness
17. The learned trial judge also referred to inconsistencies in the prosecution evidence. He also dealt comprehensively with the issue of recklessness. It is difficult to identify how much clearer the learned trial judge might have been in this respect.

18. Requisitions were raised at the conclusion of the learned trial judge's charge by Mr. Leahy. One of these concerned what was described by Mr. Leahy as the inadequacy of the learned trial judge's charge in relation to the issue of recklessness. The learned trial judge then readdressed the jury on this particular issue. There was no requisition made on behalf of the appellant to the effect that the overall charge lacked balance.

19. The court is satisfied that the issue of recklessness was adequately addressed by the learned trial judge, and that in general terms the charge to the jury was proportionate, comprehensive and fair.

Conclusions
20. As none of the grounds of appeal in relation to conviction have been made out, the court will dismiss the appeal against conviction.

Sentence
21. The appellant relies on the following grounds of appeal in relation to his sentence:-

(i) It is respectfully submitted that the learned sentencing judge placed too great an emphasis on the attitude of the accused to the verdict of the jury.

(ii) It is respectfully submitted that the learned trial judge placed too great an emphasis on the previous convictions of the appellant which related to previous incidents none of which involved violence.

(iii) It is respectfully submitted that the appellant has been punished twice for the same offence, in that the sentence imposed by the court, was to be consecutive to a sentence the accused was currently serving for the reason that the offence and the within appeal was committed while the accused was on temporary release.

(iv) It is further submitted that the sentence of five years imposed on the appellant with one year suspended is too severe in all the circumstances and is in breach of recognised principles of rehabilitation encouragement to lead a better life and to refrain from re-offending.

(v) That the learned sentencing erred in principle in failing to have any or any adequate regard to the principle of totality.

(vi) The sentence imposed by the learned sentencing judge was arrived at as a consequence of an error in principle.

22. It is quite clear from the sentencing judgment that the learned sentencing judge was, when sentencing the appellant, conscious of the fact that the offence was committed while he was on temporary release from an earlier sentence. He considered this fact very much in the context of the appellant's previous fifty three convictions and which he noted were in many instances in respect of *"relatively serious offences"*. He also referred to the fact that the appellant had contested the charges against him, but in doing so, emphasised that he was entitled to do so, and that the fact that he did so was not an aggravating factor. He correctly observed that a mitigating factor arising from a plea of guilty was not present.

23. The learned sentencing judge is also criticised by the appellant for his assessment of the seriousness of the offence on the gravity scale. Mr. Leahy suggested that in terms of gravity, the offence ought to have been placed at the lower range, as it was not, as he described, a *normal* aggravated burglary. The learned sentencing judge in fact placed the offence, in terms of its gravity, *"in the middle range, perhaps towards the bottom of the middle range"*. There is in reality little difference between the *lower range* and *the bottom of the middle range* in this type of offence.

24. To suggest that the aggravated burglary was not normal, by which the court understands to be a contention that it was less serious than the more usual type of aggravated burglaries that come before the courts, is somewhat misconceived. This case involved the production of a knife and the infliction of a wound with that knife, albeit a minor one. The fact that the appellant took the knife from his pocket, wielded it in the fashion described in the evidence before the court, makes the case relatively serious, and places it in that frightening category of offending sometimes referred to as *"knife crime"*, and which is of particular concern to the general public in recent years.

25. It is also argued that the failure of the learned sentencing judge to backdate the sentence to the 5th April 2016, being the date of the commission of the offence and the date on which the appellant was returned to prison, and where he remained until the date of sentencing. However, such an argument is entirely without merit as the reason for the appellant's return to prison on the 5th April 2015 was because he had breached a central condition of his then temporary release, namely that he stay out of trouble. To suggest that the appellant should get credit in terms of time spent in custody in respect of a new offence because he was returned to prison to continue to serve what was then a live sentence is an unsustainable argument. To have done so, as submitted by Mr. Humphries BL (on behalf of the prosecution), would have the result that the appellant paid no penalty for breaching his temporary release condition. He was given temporary release on the basis of his good behaviour in prison up to that point in time and very much on the strict understanding that he would remain out of trouble while on temporary release. He undoubtedly was in breach of that condition.

26. The court cannot identify any error of principle on the part of the learned sentencing judge in the manner in which he structured the sentence imposed on the appellant, including his decision to direct that the sentence be served consecutively to one already imposed. He respected the principles of totality and proportionality in suspending the final twelve months of the five year sentence. In those circumstances the court must dismiss the appeal against sentence.