



THE COURT OF APPEAL

**Ryan P.
Birmingham J.
Edwards J.**

64/12

**The People at the Suit of the Director of Public Prosecutions
V
Michael Butler**

Appellant

Judgment of the Court delivered on the 20th day of January 2015, by Mr. Justice Birmingham

1. In this case the appellant, Mr. Michael Butler, appeals against his conviction following a three day trial at Cork Circuit Criminal Court on the 2nd March 2012, in respect of an offence contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997, and against the severity of the sentence of fifteen years imprisonment which was imposed on him.

2. Four grounds of appeal are advanced. These are

(i) That the verdict was against the weight of the evidence. However, in that regard it may be noted that there was no application for a direction following the conclusion of the prosecution case.

(ii) That the learned trial judge did not permit questions regarding the efficacy of DNA evidence.

(iii) That the learned trial judge did not consider submissions that were addressed to him in relation to the Criminal Law (Defence and the Dwelling) Act. However, in that regard it may be noted that the Criminal Law (Defence and the Dwelling) Act 2011, was passed on the 19th December, 2011 and was commenced on the 13th January, 2012, whereas the events that were in issue in the trial that resulted in Mr. Butler's conviction occurred on the 24th July, 2010.

(iv) The trial judge referred to the appellant as "your man" in the course of his charge to the jury and it is said that this is derogatory of the appellant and created a perception in the minds of the jury that the defence case lacked merit.

The Facts

3. At issue in the trial was a very serious and very violent incident that occurred at Roman Street, Cork during the early hours of the morning of the 25th July, 2010. In that regard the trial court heard from a taxi driver, Mr. Denis Daly, that he had picked up a fare and brought the lady in question, a Mrs. Conway, to No. 14 Roman Street, arriving there at about 3.10 am on the morning of the 25th July, 2010. A male came out with a television set from No. 14 Roman Street and was in the process of putting the television into the back seat of the taxi when Mr. Daly saw four or five people coming down Roman Street from the Eason Hill direction. They appeared to be armed and Mr. Daly could see a sword and brush handles.

4. The person with the sword swung out with it at the individual who was handling the TV set, he did so twice hitting the car in the process. The evidence was that the people who had come from the Eason Hill direction had hoodies up and there was reference in the evidence to a sword, a large knife, a bar and brush handle. Evidence was given by a Lisa Byrne, who lived at 28 Roman Street. After 3.00 am on the morning of Sunday the 25th July, 2010, she heard a commotion and the sound of screaming on the street. She saw a tall man hit a smaller man who went down on one knee and got up. The taller man then punched the smaller one again and the smaller one went down on the ground. This was on the footpath outside No. 35 Roman Street. At that point Lisa Byrne rang An Garda Síochána. She described that the taller individual had walked away, but then walked back and pulled the smaller person to a particular house. There the taller man put his hands against the wall as if to steady himself and stood on the head of the smaller individual. He stood on the smaller man two or three times. She refers to the tall person wearing a white hoodie as has having tight hair. She also referred to the presence of two women, an older woman and a blonde woman. After the standing on the head incident, she describes one of the females dragging the injured party to a pole and dropping him and that she could hear his head bounce off the ground. In the course of cross examination, evidence was adduced that women were screaming about an assault and people coming into the house to assault them. She had seen no weapons and had heard something along the lines of "come to my mam's house and attack her". It is noteworthy that Lisa Byrne was not challenged on her account of the incident.

5. The trial court also heard evidence from Anne Mooney of 26 Roman Street, where she resided with her son Stephen. Her evidence was that at around 3.00 am she looked out her window and saw a man waving a sword. She saw a taller man wearing a white jacket and the smaller man was waving a sword. The men started wrestling. The tall man put the other up against the wall of No. 35 and was hitting him, kicking him and eventually the small man fell over, but the tall man continued kicking. There was a woman and girl roaring and the small fellow was trying to get up, but the taller fellow was standing over him, hit him again and the smaller fellow went down again. The smaller man was then dragged down to a place between Nos. 34 and 35 and the taller man was kicking him in the ribs. Before the arrival of the gardaí the taller man decided to go back and this time he stamped on the face and head of the other man about three or four times. This witness thought that the smaller man would not survive the incident. She also saw a blonde woman complaining to gardaí about having been injured. Again, it is of note that Ms Anne Mooney was not challenged on her account of the incident.

6. Ms. Mooney's son Stephen also gave evidence. He had looked out of his mother's window when called by her and he said that basically he saw a small fellow on the ground and a tall fellow was kicking him and stamping him on the face and he would not stop. He kept doing it excessively and the fellow on the ground was not moving at all. The tall fellow kept on stamping on the head and kicking in the ribs. In the course of cross examination, evidence was adduced that the older woman who was at the scene was unhappy that when an ambulance arrived that it was for the small fellow on the ground and not for her girl and he accepted that this meant that this woman saw herself and her family as the victims. The witness commented that he did not feel that the stamping/kicking would have happened were it not for the role of the older woman in egging on the assailant. As in the case of his mother, Mr. Mooney was not challenged on his account.

7. Evidence was also heard from a Peter Power of 22 Roman Street, who looked out of his window at 3.06 am and he saw multiple people present. Six or seven people were running down the street at intervals and he saw an older lady fall outside his window. The

people on the street were waving things, he thought he saw people holding some sort of a stick and what in one case looked like a piece of metal. After a break he looked out again and he saw two men, one of whom appeared to be held back and was kicking out, but he could not see more of this. The person being held back was wearing white. Evidence was also heard from a Richard Noonan, a taxi driver who was in the vicinity. He refers to having seen a woman with bleached blonde hair and of slim build swaying from side to side with a Samurai sword. He also saw an altercation in the distance, in cross examination he indicated that he thought that he had seen two men running towards the Cathedral, with what looked like weapons in their hands. He also referred to seeing two individuals in the distance, both wearing bright tops and that at one stage he thought he saw a flash and that could have been a weapon, but they were too far away for him to see.

8. The prosecution also called Garda Johnny Quinlan who told the jury how he had gone to No. 14 Roman Street at around 1.10 am, which of course was approximately two hours before the significant incident that gave rise to the charges, and there he met Michael John Butler who appeared intoxicated. He noted that the windows and the front door of the house were broken and that Mr. Butler said that this was done by "knackers". Mr. Butler was not very forthcoming. Garda Quinlan was back in the area at around 3.15am and on this occasion he saw Mr. Butler shouting out at the injured party as ambulance personnel were proceeding to put the injured party into an ambulance. He recorded Mr. Butler as saying "I did it, I stamped on his head" and as having then acted out a stamping motion.

9. Another garda, Garda Walsh, who was on the scene described witnessing an awful lot of bleeding from the head of the injured party and how the injured party appeared unconscious, but was convulsing and referred to fluids coming out of the victim's head. Of some significance is that Garda Walsh located a cylindrical object in the pocket of Mr. Barry, the injured party, which turned out to be the part of the sword hilt. Garda Michelle Quinn gave evidence in relation to interviews conducted with Mr. Butler later that morning commencing at 9.47 am. Mr. Butler admitted hitting a man who had attacked him, hitting him on the ground a few times to protect himself and kicking a man on the ground into the face, once or twice. Then, Detective Sergeant Vincent O'Sullivan gave evidence in relation to the fact that Mr. Butler was arrested on the 5th April, 2011 and questioned while detained. On this occasion he again admitted assaulting Mr. Barry and kicking him in the face, but stated that he was defending himself and his mother and his girlfriend.

10. Medical evidence also formed part of the prosecution case. By agreement a report from Dr. Stephen Cusack, a Consultant in emergency medicine at Cork University Hospital, was read which referred to the fact that Mr. Barry had been admitted to the hospital on the night of the incident and was found to have sustained a wound over the right eye, facial bruising and a severe wound to the left ear. A CT brain scan recorded a subdural haematoma, inter cerebral contusions and cerebral swelling. He remained as an in patient at Cork University Hospital until he was discharged on the 10th September, 2010. He referred to the fact that Mr. Barry's injuries were life threatening and that he was left with some permanent disability. A report of Dr. Aine Carroll of the National Rehabilitation Hospital in Dun Laoghaire was also read to the court by agreement. Mr. Barry had been under her care from the 15th September, 2010, until the 29th September 2010. In summary, her report referred to the fact that Mr. Barry had suffered from a traumatic brain injury, resulting in a left sided subdural haematoma, frontal contusions and secondary cognitive impairment. He experienced post traumatic amnesia for a period of five weeks which indicated a severe traumatic brain injury.

11. By any standards, these were very severe injuries and indeed, really the full impact of the injuries only became apparent at the sentence hearing.

12. This was a case where the defence went into evidence and evidence was given by Pamela Flynn, a girlfriend of Mr. Butler. She referred to the fact that she had been hit on the head with a bar and that the appellant's mother was pushed to the ground. She referred to the fact that there were five or six people with blacked out faces and that the people who were attacking them had Samurai swords and other types of weapons. She referred to the appellant's mother being pushed to the ground by a small man. The appellant's mother also gave evidence and referred to the fact that as she was being assisted by her son with the television, four tall men started attacking them. She said that it was vicious attack and that she was in fear. She refers to a small man running in from the right and pushing her and that she fell to the ground. She refers to him taking something from his pocket and hitting the appellant with it. She also referred to the fact that there was a scuffle on the ground and that the small man then got up and ran off down the road and that the appellant ran after him and that they both fell.

13. From the summary of the evidence, it will be clear that the issue at trial and the focus of defence attention was the question of self defence. The argument was made and indeed is made that the appellant was not the aggressor, that he was attacked by a number of masked men who were carrying dangerous weapons including swords and that in his presence both his mother and girlfriend were attacked and injured. The defence case is that he was personally attacked by the injured party Mr. Barry, who was in possession of a sword.

14. Turning, then to the grounds of appeal, it is undoubtedly the case that there was evidence from which a jury could have concluded and indeed very probably would have concluded that the appellant was not the initial aggressor.

15. However, there was also undoubtedly evidence from eye witnesses Lisa Byrne, Anne and Stephen Mooney and others and indeed from the admissions made at various stages by Mr. Butler, by reference to which the jury could return a guilty verdict. It is noteworthy that there was never an application to withdraw the case from the jury on the basis that there was no evidence on which a jury, properly charged, could convict. This was a case where there was evidence to be considered by the jury, it was a case that was properly left to the jury. Assessment of the evidence was a matter for them. The verdict arrived at by the jury was one that was entirely open to them.

Restriction in cross examination in relation to DNA

16. This issue arose when Dr. Diane Daly of the Forensic Science Laboratory was called to give evidence. The direct evidence was very brief and referred to the fact that a swab taken from blood staining outside No. 35 Roman Street matched the DNA profile of the injured party Mr. Billy Barry. The cross examination however, which was quite an extensive one, focused on a dagger found at a location known as Cathedral Walk and a sword to which there has already been reference. It was established that the sword and the cylindrical object found in the pocket of the injured party formed a physical fit. In addition it was established that a mini tape lift from the dagger recorded the presence of a mixed DNA profile indicating that DNA was present from more than one person. The major portion of the profile matched the DNA profile of Thomas McCarthy and a minor profile which was present at a trace level occurred commonly in the population as a whole. It was explained that the minor contribution was present at a trace level in Billy Barry, Michael John Butler and Joseph Butler. Pamela Flynn, Marie Butler and Myles McCarthy were excluded as the source. The cross examination confirmed, by reference to a report that had been prepared by the forensic scientist, that insufficient DNA was obtained from the handle of the sword in order to generate a DNA profile. At that stage junior counsel asked "Would you explain to the court what is the difference between a major and a minor profile"? At that stage the judge intervened to say that he did not think that was relevant and was not going to allow that question. Senior counsel for the defence then intervened to say that that was an issue that should be addressed in the absence of the jury, but the judge responded, "No let's continue".

17. The arguments for the appellant at this stage make the point that the purpose of the cross examination was to elicit evidence, supportive of the appellant, concerning possible DNA profiles generated from mini tapes taken from the handles of the dagger and the sword. This had the potential to support the view that Mr. Barry had handled one or other weapon. Obviously, the question of whether Mr. Barry handled either weapon was a perfectly legitimate subject of inquiry. However, when the trial judge intervened, which was well into the cross examination, it had been established that the minor profile on the dagger matched the profile of Mr. Billy Barry as well as that of a number of others. However, as far as the sword is concerned, insufficient DNA was obtained in order to generate a DNA profile. In those circumstances a debate about the distinction between major and minor DNA profiles did not have the potential to advance matters. The evidence of Anne Mooney along with the fact that the cylindrical top of the sword was found in the pocket of Mr. Barry meant the jury must have approached the case on the basis, rightly or wrongly, that Mr. Barry was linked to the sword.

18. It does not appear that the intervention of the trial judge impaired the defence in any material way. There was insufficient DNA material from the sword for a profile to be obtained. That situation was not going to be advanced in any way by a discussion about differences between major and minor profiles.

Criminal Law (Defence and the Dwelling) Act 2011.

19. This issue arose when counsel for the defence sought a ruling on the topic before beginning his address to the jury. There followed an exchange between counsel for the prosecution and counsel for the defence, which sought, without great success, to identify just what changes the 2011 Act had brought about and how relevant those changes were to the case at trial. There are two points that have to be made as regards this ground of appeal. First of all, as already referred to, the Act had not been passed when the incident, the subject of the trial, occurred on the 24th/ 25th July 2010. Moreover, and more fundamentally, the trial judge did not in fact prohibit defence counsel from referring to the Act. Quite the contrary in that the judge brought the debate that had taken place to an end by saying "I tell you what, I say you take it up with the jury and drive it".

20. In these circumstances, this point does not seem to be one of substance.

The reference to the appellant as "your man".

21. This point arises in the following circumstances. At one stage, in the course of his charge, the learned trial judge commented "did your man who says he was defending himself, and it is up to you to know whether he was or not, did he put his hands against the wall and stand on his head or stamp on his head"? It may be that this phrase "your man" is a colloquialism used by the trial judge because he used the same phrase when dealing with the taxi driver witness Mr. Denis Daly. But it is also the case that at other stages in the trial he referred to the appellant as Mr. Butler, Michael Butler, Michael John Butler and as the accused.

22. Reading the charges as a whole it does not appear that there was any attempt whatsoever to refer to the appellant in derogatory terms or in terms that would undermine his defence.

23. In these circumstances the court will refuse the appeal against conviction and will now turn to address the question of sentence.