



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Edwards J.**

**271/12**

**The People at the Suit of the Director of Public Prosecutions  
V  
Ruth Barry**

**Appellant**

**Judgment of the Court delivered on the 16th day of February 2015, by Mr. Justice Birmingham**

1. On the 15th June, 2012, after a seven day trial, the appellant Ms. Ruth Barry was convicted of an offence involving a s. 4 assault on one Jennifer Bray (the allegation is of cutting the face with a knife), assault causing harm on Neil Callanan, robbery of a mobile phone and cash from Jennifer Bray and producing a knife. The events in question all occurred during the early hours of the morning on the 25th June, 2010, on O'Connell Street, Dublin. It is also the case that she pleaded guilty to a s. 3 assault on Jennifer Bray on the same occasion and to a s. 3 assault on one Sarah Furlong.

2. There are two grounds of appeal and these relate to (i) a ruling of the trial judge, that the case could proceed in the absence of a witness, Jacob Gajda and (ii) that as a result of that witness's absence and the further fact that the trial judge acceded to an application on behalf of the appellant's co-accused, Jonathan O'Brien, for a direction on the count of production of a knife, that the trial was rendered unfair and unsatisfactory such that the trial judge ought to have acceded to an application made at that stage for a separate trial.

3. The link between these two grounds is that the statement of evidence of Mr. Gajda which had been provided, was to the effect that the co-accused, Jonathan O'Brien produced an object from the back of his waist, walked about with it before placing it in a hiding place from where it was retrieved according to other witnesses and then disposed of it in a street drain where a knife was found. The argument made is that the absence of Jacob Gajda meant that the jury had an incomplete picture, namely that the co-accused only handled a blade after the slashing of the face of Jennifer Bray, whereas the book of evidence had contained some information that was to the contrary effect.

4. By way of background to this issue it should be explained that a witness order had been served on Mr. Gajda when the case had been listed on a previous occasion, but he had refused to attend. When the trial was listed in June, he had refused point blank to come to court. When this difficulty emerged, counsel on behalf of the appellant indicated a willingness to have Mr. Gajda's witness statement read to the court, but this suggestion was not acceptable to the co-accused, and this did not happen. In the course of his oral arguments to this court, counsel has indicated that on reflection, this was a concession that he should not have made as it involved denying himself the opportunity to have Mr. Gajda go beyond the terms of his witness statement and furnish additional evidence of assistance to the defence of the appellant.

5. To put these arguments in context, it should be explained, as already indicated, that the trial involved an incident that occurred on the 25th June, 2010, in O'Connell Street, Dublin. On that occasion, Ms. Jennifer Bray had been out socialising with a work colleague of hers Neil Callanan. Having had a few drinks, they went into a McDonalds restaurant in O'Connell Street to purchase food. They had met with Ms. Sarah Furlong who is a cousin of the main injured party Jennifer Bray. They queued for their food, this was in the early hours of the morning at about 3.00 or 4.00 am and there was an element of pushing and shoving in the queue. The appellant Ruth Barry was also in the McDonalds queue and an argument developed involving Ruth Barry and Jennifer Bray. Ms. Barry, who said she was pregnant, accused Ms. Bray of having hit her in the stomach. Ms. Barry was in the company of Jonathan O'Brien, the co-accused, who was wearing a red top. Ms. Bray, Ms. Furlong and Mr. Callanan left the restaurant and went out on to the pavement and tried to hail a taxi. They were followed out shortly afterwards by Ruth Barry and Jonathan O'Brien. When Ms. Bray was at the door of the taxi that had stopped for the group, Ruth Barry proceeded to assault Jennifer Bray, punching her and head-butting Ms. Barry's cousin, Sarah Furlong.

6. The prosecution case was that Mr. Callanan tried to break up the incident, but that he was assaulted by both Mr. O'Brien and indeed that he was bitten by Ms. Barry. At a time when Ms. Barry was standing in front of Ms. Bray, Ms. Bray felt something cold on her face and heard a click and then slumped to the ground. It was later ascertained that her face had been slashed. Ms. Furlong too sustained certain cutting type injuries which, as we will see, is of significance in the context of the issue that has arisen. The robbery charge related to the fact that as Ms. Bray lay slumped on the ground, Ruth Barry was seen to go through her belongings and then when Ms. Barry was arrested shortly afterwards, she was in possession of Ms. Bray's phone. The gardaí when they became aware of the incident checked the nearby gutter and there found what was described as a Stanley type retractable blade.

7. The case was opened to the jury by prosecution counsel on the basis that the prosecution case was that Ms. Barry slashed the face of Jennifer Bray. This gave rise to a request for the discharge of the jury by counsel for Ms. Barry who contended that nowhere in the book of evidence had it been alleged specially that Ruth Barry slashed the face of Jennifer Bray and nowhere was it specifically alleged that Ruth Barry had the knife that was used to disfigure Ms. Bray, but that application for a discharge was resisted by the prosecution who pointed out that while Ms. Bray did not say in terms that she saw Ms. Barry taking out a blade and holding the blade to her face and slashing her, it was absolutely clear that that was the real import of her evidence and that that was the only inference that could be drawn from the available evidence.

8. On day five of the trial when the prosecution was about to close its case, counsel for Ms. Barry indicated that there was an outstanding witness that the appellant wanted produced. This gave rise to the issue being canvassed in the absence of the jury. At that stage, the trial judge heard from Det. Gda. Daniel Charles who explained that along with a colleague, Det. Gda. Emma Ryan, he had gone to a supermarket on the Ennis Road in Limerick on the previous afternoon where Mr. Gajda was due to collect a social welfare payment. They asked him to attend court and he refused. They offered him a lift from Limerick, to take care of his expenses and to give him a lift back to Limerick, but he persisted in his refusal. The gardaí were in possession of a witness order requiring him to attend court and they attempted to hand this to him, but he refused to take it from them, instead putting his hands behind his back and walking away and apologising saying that he did not want anything to do with the gardaí. The court also heard about difficulties experienced when the trial was originally listed for the 20th March, 2012. There had been a number of attempts to serve a witness order, and Mr. Gajda had been asked to meet with gardaí at Mayorstone garda station but refused to do so. There were numerous

attempts to contact him by phone and text. A witness order was eventually served and Mr. Gajda finally responded by text. The "gist" of that text was that he did not want to attend court, that he did not want to travel to Dublin and that that was his final decision. Det. Gda. Sheelagh Sheehan explained that at 4.00 pm on the 12th June, she had received a text in the following terms:

"Hi, Jacob here, spoke to a detective. My decision is final. I do not want to come to court. I do not remember faces. I do not remember anything about that day. Sorry, Jacob."

9. As has already been indicated, counsel for Ms. Bray indicated that he was prepared to have the statement of Jacob Gajda read to the court, but counsel for Mr. O'Brien stated that he could not possibly allow that. During the debate in the absence of the jury, the relevant extracts from the statement of Mr. Gajda were read to the trial judge. These were as follows:

"I see this guy in the red jumper take something from behind his back. I don't know what, but he put this thing on the window and before he did this he was walking around with this thing. He put it down on the window and he kept walking around. Something else happened in the corner but it was too dark to see. There were two guys and an angry girl and one guy with two girls."

A further extract as follows was read:

"I didn't see any knife or blade but I saw this guy in the red jumper take something from behind his back, back of his waist, later put it on the window."

10. It has to be said at the outset that the situation in relation to Jacob Gajda was not handled at all well by the prosecution. When the case failed to get on in March and was relisted for June 2012, the prosecution should have taken the necessary steps to ensure the attendance of Mr. Gajda. However, it would seem that it was only on the afternoon of the 12th June, 2012, which was day four of the trial, that gardaí met with Mr. Gajda with a view to securing his attendance at trial. Following on from which Mr. Gajda sent the text message indicating that his decision was final and that he did not want to come to court, adding that he did not remember faces and he did not remember anything about that day. There is a further area in which the procedure followed by the prosecution is quite unsatisfactory. It does not appear that the defence were informed that there were difficulties or might be difficulties in relation to the attendance of Mr. Gajda until the prosecution was about to close its case. Senior counsel for the defence indicated that it was in the afternoon of Monday 11th June, 2012, that he became aware of any difficulty. This is particularly unsatisfactory in circumstances where the prosecution must have been fully aware from the opening moments of the trial how the defence was approaching the case, because of the application to discharge the jury when it was suggested that counsel for the prosecution had overstated the position in relation to the intention of the prosecution to prove that it was Ms. Barry who had slashed the face of the unfortunate Ms. Bray.

11. The trial judge was placed in the very unfortunate situation, a situation which, it must be stressed, he should never have been placed in. If there were to be further efforts to secure the attendance of Mr. Gajda, whether following the issue of a bench warrant or otherwise, the likelihood was that the case would have to have been adjourned until after the following Tuesday. The gardaí did not have an address for Mr. Gajda, and the only point of contact that they had for him was the supermarket where he collected his weekly social welfare payments. This would have been inconvenient all round, would have disrupted the continuity which is desirable in any criminal trial and was likely to give rise to juror difficulty because one juror had inquired about when the case would end and had received assurance that it would end before the Monday after this debate.

12. In these circumstances, the judge felt, and felt correctly in the view of the court, that he should conduct an assessment of the relevance of the witness who was making himself unavailable. The judge rose and read the statement of evidence, he said he did this a number of times. He did so in order to decide whether the defence would be prejudiced if Mr. Gajda did not give evidence and he concluded that that was clearly not the case.

13. This Court has undertaken the same exercise. The trial judge had the advantage, which this Court does not have, of having heard all of the prosecution evidence. However, this court has carefully considered the proposed statement of evidence of Mr. Gajda and has done so in the context of the evidence of Ms. Bray, Ms. Furlong, Mr. Callanan, but also the evidence of other witnesses, Mr. Dowman, Mr. O'Reilly and Mr. Hardy.

14. In assessing the significance of the situation that was allowed to develop, the court has also had regard to the fact that this was always a case which the prosecution was putting on the basis of joint enterprise.

15. So far as Jennifer Bray is concerned, her evidence was that Ms. Barry dragged her over to a group of men which included Mr. O'Brien. Ms. Barry is supposed to have said to him "this girl has just hit me in the stomach and I am pregnant, what should we do about it?" As Ms. Bray left McDonalds, Ms. Barry said, "there will be 30 people waiting outside for you". The evidence of Ms. Bray was that the appellant was central to this incident from its very inception. However, that said, contrary to what would seem to have been the expectation of prosecuting counsel when opening the case, the witness put "the man" (Mr. O'Brien) and "the woman" (Ms. Barry) in close proximity to her at the time that she sustained her serious injuries. Her evidence was also, that as she became aware of her surroundings having suffered the serious injuries that she did, that there was a woman (Ms. Barry) leaning over her, as she lay on the ground going through her pockets.

16. The evidence of Mr. Callanan strongly supports the view that it was Ms. Barry as distinct from Mr. O'Brien who slashed the face of Ms. Bray. The evidence does so in two ways. First of all it says that at the time when Mr. O'Brien was trying to take the witness's wallet and was demanding compensation that out of the corner of his eye, Mr. Callanan saw Jennifer Bray going to the ground, as he describes it "like a tree falling". It is clearly implicit in this that Mr. O'Brien was not in close proximity to Ms. Bray when she slumped to the ground as he was engaging with the witness. However, what was implicit was then made explicit, because later in the cross examination the witness said that there was only Ms. Barry around Ms. Bray as she fell to the ground.

17. So far as Sarah Furlong, the cousin of the injured party is concerned, her evidence puts both Ruth Barry and Jonathon O'Brien in proximity to Jennifer Bray when she slumped to the ground. Ms. Furlong's narrative describes that she was assaulted a number of times by Ms. Barry, but it does not suggest in any way that she was directly physically assaulted by anyone else. In her evidence, she clearly attributes the open stab wound that was inflicted on her arm to her physical contact with Ms. Barry. The witness was very specific that she had no physical dealings with Mr. O'Brien at all, commenting that so far as she was concerned, he did not "intervene at all".

18. It is true that in cross examination by counsel for the appellant, Ms. Furlong confirmed that she had not seen any weapon being used and that in her statement to the gardaí that she had said "I didn't see any weapons used. When the girl assaulted me, she used her fist and her head". However, in cross examination by counsel for the co-accused the witness confirmed that she had concluded

her narrative to the gardaí by saying "that the fellow in the red hoodie hadn't done anything to her". When asked to confirm that this was the situation, her response was to say "yes he didn't".

19. Counsel for the appellant has laid emphasis on the fact that he had received agreement from the witness that everything had happened quickly and at a time when she and her cousin were very shocked and in pain. However, Ms. Furlong was absolutely clear in her narrative that she was assaulted by Ms. Barry and only by Ms. Barry. The injuries that she sustained included a deep and open cut to the upper arm, which could not have resulted from a punch or from being head butted, but was inflicted by someone wielding a knife or blade.

20. In terms of the other witnesses, Ross Downan gave evidence that with a passenger he was driving home from work along O'Connell Street when he became aware of the incident. He describes a girl on the ground and two people, one male, one female leaning over the person on the ground and "rooting through her handbag". He describes the two people as giving one or two punches to the girl lying on the ground. He commented that they kind of assaulted her a few times with various punches and kicks. So far as his evidence in relation to the knife is concerned, he refers to the male (Mr. O'Brien) going to a ledge at that bank, taking what appeared to be a blunt object that looked like a butterfly knife or Stanley knife and dropping it in a shore. In the context of the present controversy, his evidence serves to place Mr. O'Brien in control of the knife by taking it from a ledge and dropping it into a shore, at a time after Ms. Bray sustained her injuries. In cross examination it was put to him that he had not referred to the female playing a role in assaulting the person that was lying on the ground and it was also put to him that the reference to rooting through the bag may have been based in a misapprehension that the bag belonged to the injured party. It does seem to be the case that this would, in fact, have been a misapprehension.

21. The evidence of Jonathan O'Reilly, Mr. Downan's passenger, is largely to the same effect, though with the distinction that he describes "one of them" as going to the ledge. His evidence does not advance the prosecution case in terms of establishing direct contact by Ms. Barry with a knife or the knife. The court also heard from Mr. Patrick Hardy, a road sweeper who was present in O'Connell Street on the occasion of the incident, who describes seeing a male (Mr. O'Brien) and seeing a blade coming down his arm, which was then put in a gully.

22. In assessing the significance of the absent witness, and how the situation was handled, the court takes the following matters into account. It was the responsibility of the prosecution to secure the attendance of Mr. Gajda and take all reasonable steps in that regard. In the nature of things, precisely because Mr. Gajda absented himself, any consideration of how he would have contributed to the trial had he been present must inevitably involve an element of speculation. For this reason, it is certainly not necessary for the defence to establish that the missing witness would have advanced the defence case materially, it is sufficient to establish a reasonable possibility that this might have happened.

23. Even setting out to take a view of the unavailable evidence that is most favourable to the accused, it is inconceivable that the affect of the missing evidence would be to negate the evidence of Mr. Callanan and Ms. Furlong. The evidence of Mr. Gajda certainly had the capacity to advance the point in time at which Mr. O'Brien was connected with a knife, but it does not address the question of whether Ms. Barry ever had a knife or blade, whether the one in the possession of Mr. O'Brien at various stages or another.

24. Given what happened to Ms. Furlong, with or without the presence of Mr. Gajda, it is impossible to conclude that any doubt is raised as to whether Ms. Barry had an involvement with a knife or a blade.

25. There is a further aspect to this. The case was always presented as one of joint enterprise/joint design with both Ms. Barry and Mr. O'Brien each being responsible for the actions of the other. There is no doubt but that Ms. Barry was centrally involved in the incident from the very earliest stages. Her actions in robbing Ms. Bray as she lay slumped on the ground and then departing the scene in company with Mr. O'Brien, put beyond doubt that she never withdrew from the joint enterprise.

26. No evidence that Mr. Gajda might have to offer could raise any doubt about the fact that Ms. Barry was party, whether as the person wielding the knife at the relevant time, which seems highly likely, or by supporting and assisting the person wielding the knife, to the very serious assault on Ms. Bray which resulted in the injuries sustained.

27. The ground for the application for a separate trial after Mr. O'Brien obtained a direction on the count on the indictment in relation to the production of a knife does not take the matter any further. When two or more individuals stand trial together, it is not unusual that one may secure a direction on a particular count or indeed on all counts, but ordinarily this will not have implications for the way the trial proceeds against the remaining accused. In this case, the application for a separate trial would seem to have been designed to provide the trial judge with an opportunity to reconsider the rulings he had already made, and to invite him to do so. He declined to do so. At this stage this ground of appeal does not put the situation any further than has been considered in the context of ground 1.

28. The court has made clear its view that the situation that developed and the situation in which the trial judge was placed ought not to have been allowed happen. Nevertheless, when viewed in the context of the entire body of evidence, that there was at trial, it cannot be said to have rendered the verdict of the jury unsafe or unsatisfactory. Accordingly the court will dismiss the appeal.