



THE COURT OF APPEAL

[74/16]

[75/16]

The President

Edwards J.

McCarthy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

JC

RESPONDENT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

MC

RESPONDENT

JUDGMENT of the Court delivered on the 17th day of January 2019 by Birmingham P.

1. This is a without prejudice appeal brought by the DPP following the acquittal, by direction of the trial Judge of both respondents who had faced charges of attempting to pervert the course of justice.

2. The background to the present proceedings is to be found in the fact that a murder occurred on 17th October 2017 in County Tipperary. Both respondents to the present appeal might be described as "persons of interest" in the context of the Garda investigation that followed. JC and MC were brothers and they, along with a third brother, James C, were all charged with attempting to pervert the course of justice. The witnesses in the Book of Evidence included MA, who had given a witness statement implicating the respondent, JC, with having asked her to lie about a significant matter, the effect of which was to give MC an alibi. MA was the partner of the respondent, JC, and the pair had been in a relationship with JC since 2010. She was the mother of his two children and was pregnant at the time of the trial.

3. KF was also included on the list of witnesses. She was in a long-term, 7-year relationship with the respondent, MC, and was the mother of his 7-month old son at the time of trial. She had provided a statement which the prosecution proposed to rely on against MC. In that statement, she said that she had picked up MC, along with another man, at a relevant roadside location at a particular time that was relevant and had been asked by MC not to refer to the fact of the pickup when speaking to the Gardai.

4. On Day Three of the trial, MA was called as a prosecution witness. At an early stage in the course of her evidence, she was asked whether her partner, JC, had said anything about the murder or the deceased man and she responded "no, not that I can remember anyway". When she answered other questions in a similar vein, the jury was asked to withdraw and Senior Counsel for the prosecution then indicated that he wished to make an application pursuant to s. 16 of the Criminal Justice Act 2006. The Court embarked on a consideration of the application and the stage was reached when Ms. A was about to be recalled to the witness box. At that stage, Senior Counsel for JC indicated that before the jury was recalled, that he had an objection to the evidence of Ms. A. It was contended that MA was not a compellable witness, given that she was the partner of the accused, the mother of his children and they had been together greater than three years. The Judge asked why this point had not been raised initially and counsel acknowledged that it was because he had "missed it". Counsel said that he was, though, objecting to her evidence and referred to s. 21 of the Criminal Evidence Act 1992. In the course of the debate that followed, Senior Counsel for MC indicated that he was taking a similar position. The Judge then ruled as follows:

"[i]f this application was not made in the context of a s. 16 application, the situation might perhaps be different: but in the circumstances, I am deeming the evidence of MA and KF inadmissible."

The consequence of that ruling was that two days later, on 25th February 2016, the Judge directed the jury to return verdicts of not guilty against JC and MC.

5. By notice dated 14th March 2016, the DPP indicated that she would be applying to the Court of Appeal seeking a number of reliefs, including orders determining that the Court of trial had erroneously excluded compelling evidence, orders quashing the acquittals and orders directing that the respondents be retried. In effect, the DPP instituted a with prejudice appeal. Said appeal was listed before this Court, but at that stage, it became evident that each of the witnesses whose evidence had been excluded had married their long-term partner, a situation which, it was accepted, meant that there could be no reality to ordering a retrial. There was also an issue about the extent to which the other evidence had actually been adduced at trial. In those circumstances the DPP indicated that she was happy that matters would proceed as a without prejudice appeal. This Court then, in accordance with the terms of the statute, assigned the solicitors and counsel who had been acting to argue in support of the acquittals.

6. The matter was brought back before the Circuit Court Judge who had presided over the trial. At that stage, counsel for the respondents indicated that they contemplated a situation where the Court of Appeal might ask a question about the rationale for the exclusion of the evidence. The Judge responded by saying:

"[t]he essential reason, then, and I am a little surprised to hear that it might not have been enunciated, the essential reason I acceded to the question was, I suppose, summed up in the phrase you used 'the changing landscape', the fact that non-marital relationships are recognised across such a broad sphere now in our law and in public life, and generally, that I felt that this was something which was, in effect, encompassed in the Criminal Evidence Act."

7. The issue of the position of the spouse of an accused as a prosecution witness is discussed in Heffernan & Ní Reafeartaigh on 'Evidence in Criminal Trials' at para. 495 and subsequent paragraphs. At paras. 497 and 498, the position under the 1992 Act may be summarised as follows.

"497. First, the spouse of an accused is a competent and compellable witness for the defence unless she is jointly charged in the proceedings. Second, if she is jointly charged, the spouse is treated as an accused person rather than a spouse for the purpose of giving evidence. Consequently, she is competent to testify for the defence or any other co-accused, but may not be compelled to testify on his or their behalf. Because a spouse who is jointly charged is herself a co-accused, she is never competent to testify for the prosecution. Third, assuming that she is not jointly charged in the proceedings, the spouse of an accused is competent to testify for the prosecution or any co-accused. Thus, the prosecution may call the spouse and present her evidence provided she is willing to testify. The spouse is not a compellable witness for the prosecution or any co-accused as a general rule. Controversially, however, the Act makes provision for the limited compellability of the spouse in relation to violent offences against the spouse herself and either violent or sexual offences against a child within the family or any person under 18 years of age.

498. The special rules contained in Part IV apply only to the 'spouse' of an accused and although the term is not expressly defined, its use in conjunction with other language indicates a legislative intent to limit the terms of the Act to relationships based on marriage. The effect of this limitation is to exclude from the scope of the Act persons in relationships other than those based on marriage, such as persons in a common law marriage, persons in a civil partnership or cohabitants. Thus, a partner in a relationship of this kind is treated as an ordinary witness and may be called to testify by any party to the proceedings. The exclusion of relationships based outside the institution of marriage is difficult to defend in contemporary society and arguably inconsistent with the protection afforded to the de facto family under the European Convention on Human Rights. Whereas consideration of judicial certainty and judicial economy might justify confining the statute to formal relationships, the exclusion of legally recognised relationships, such as civil partnerships, is controversial given that the public policy objectives of protecting spouses and preserving family integrity resonate forcefully in these contexts."

8. The use of the term 'spouse' in conjunction with other language is footnoted as follows:

"165 Such as the terms 'marriage', 'judicial separation' and divorce a mensa et thoro in section 20, the terms 'husband' and 'wife' in the Criminal Evidence Act 1992, section 25, and the term 'marital privacy' in section 26."

The position of the spouse of an accused in criminal proceedings is also the subject of discussion in McGrath on 'Evidence' at paras. 314 and subsequent paragraphs. There, the Criminal Evidence Act 1992 was put in the context of the decision of the Court of Criminal Appeal in DPP v. JT [1988] 3 Frewen 141. In the course of the discussion that follows, there is reference to the decision of the European Court of Human Rights in *Van Der Keijden v. The Netherlands* [2012] ECHR 588. At para. 324, the following comment appears:

"Compliance with Article 8 may require an extension of the provisions of section 21, not just to civil partners of an accused, but to equivalent, informal but long-standing relationships."

9. Notwithstanding that comment, it is, nonetheless, the situation that the Grand Chamber by a majority found that there had been no violation of Article 8 of the Convention. This was a situation where the applicant was the unmarried life partner of a man accused of shooting and killing a person in a café and was believed to have been with him at the time of the shooting. The relevant provision in the Netherlands provided for testimonial privilege for "spouses" and for "registered partners", but not for those in a de facto relationship. The majority, while accepting that compelling the applicant to give evidence in criminal proceedings against her partner interfered with the applicant's right to respect for family life, such interference was found to be "necessary" under Article 8(2) in circumstances where there had been a failure to have the partnership registered.

10. At para. 69, the Court commented as follows:

"[t]he Court does not accept the applicant's suggestion that her relationship with Mr. A, being in societal terms, equal to a marriage or a registered partnership, should attract the same legal consequences as such formalised unions. States are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage or registered partnerships. The legislature is entitled to confer a special status on marriage or registration and not to confer it on other *de facto* types of cohabitation. Marriage confers a special status on those who enter into it: the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see *Mutatis Mutandis Burden v. The United Kingdom* and *Serife Yigit v. Turkey*). Likewise, the legal consequences of a registered partnership set it apart from other forms of cohabitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. The absence of such a legally binding agreement between the applicant and Mr. A, renders their relationship, however defined, fundamentally different from that of a married couple or a couple in a registered partnership (see *Burden* cited above). The Court would add that, were it to hold otherwise, it would create a need either to assess the nature of

unregistered, non-marital relationships in a multitude of individual cases or to define the conditions for assimilating to a formalised union, a relationship characterised precisely by the absence of formality.”

11. The issue has been before the Courts of England and Wales in *Parce* [2002] 1 Crim App R 39, where it was argued that the failure to provide the same protection from testimony afforded to cohabitants and long-term partners as those possessed by wives and husbands amounted to a violation of Article 8 of the European Convention on Human Rights. The Court of Appeal held that Article 8(1) did not require that a cohabitee should not be compelled to give evidence. It is to be noted that the basic statute in England, s. 80 of the Police and Criminal Evidence Act 1984, has been amended on a number of occasions and draws a distinction between spouses and civil partners on one side of the line, and those who are not spouses or civil partners on the other side.

12. The Court regards it as significant that the Oireachtas, in the context of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, did not amend the Criminal Evidence Act 1992. The 2010 Act is an extremely detailed one. The list of Acts that it amends runs to almost three pages. Amongst the Acts referred to are the Criminal Assets Bureau Act 1996, the Criminal Damage Act 1991, the Criminal Justice Act 1999, the Domestic Violence Act 1996 and 2002 and the Non-Fatal Offences against the Person Act 1997. So comprehensive is the 2010 Act that it seems to us inherently improbable that the 1992 Criminal Evidence Act was inadvertently overlooked.

13. It seems to the Court that there can be absolutely no doubt that the reference to a “spouse” in the Criminal Evidence Act 1992 means only a married spouse. At this remove, there may be an argument for extending the privilege to those in informal, long-term relationships. However, there may equally be an argument for drawing a distinction between relationships based on marriage and all other relationships and perhaps arguments for drawing a distinction between marriage and civil partnerships, on the one hand, and other relationships. However, these arguments are for the legislature. It is not for this Court, under the guise of interpreting the Criminal Evidence Act 1992, to set about amending it.

14. In those circumstances, the Court must answer the question posed, which was whether there are any other relationships, apart from a spousal relationship established by marriage, amenable to the non-compellability provisions of the Criminal Evidence Act 1992, in the negative.