THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

181/11

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Ciaran Waldron

Appellant

Judgment of the Court (ex tempore) delivered on the 19th day of October, 2015 by

Mr. Justice Birmingham

1. On the 23rd June, 2010, the appellant was convicted by a unanimous jury in the Circuit Court in Letterkenny of an offence of threatening to kill contrary to s. 5 of the Non Fatal Offence Against the Person Act 1997. On conviction he was then fined a sum of €1,000. A review of that sentence on grounds of undue leniency has been sought by the DPP. However, this judgment at this stage, deals only with the conviction aspect.

2. The trial had its origin in an incident that occurred on the 7th August, 2006, at Ludden, Buncrana. Arising from the alleged incident the appellant faced trial on a number of charges including the charge of threatening to kill and a charge of reckless endangerment. The allegation there being that he drove a motor vehicle at a vehicle in which two people Christina O'Kane and Anthony McColgan were seated.

3. The particulars of offence provided in the case of the threatening to kill count, were that he on the 7th August, 2006, at Ludden, Buncrana without lawful excuse threatened to kill Anthony McColgan, intending Anthony McColgan to believe that the threat would be carried out.

4. The grounds of appeal related to a contention that the jury ought to have been discharged or ought to have received specific directions having been exposed to prejudicial matters. There are also a number of criticisms of the judge's charge and of how he dealt with requisitions and with the question posed by the jury.

5. To offer come context for the arguments that have been advanced, it is necessary to explain that Christina O'Kane was the estranged wife of the appellant Mr. Waldron and was at the time of the events with which the trial was concerned, in a form of relationship with Anthony McColgan, the phrase "form of relationship" is used because she balked at the term "relationship" when that word was put to her in the course of her evidence.

6. The ground of appeal relating to the discharge of the jury or the requirement for a specific direction arises from an exchange that occurred when Ms. O'Kane was being examined by prosecution counsel.

7. As appears from the transcript what occurred was this.

> Prosecution counsel said "Okay"
>
> Q. And Anthony said what?
>
> A. And I said that's Ciaran lock your door quick, because I am very afraid of Ciaran. I have been in a very abusive marriage to him since I was 20.
>
> PC: Well if you could just …
>
> Judge I am sorry I . . .
>
> DC: Really Judge . . .

8. An application was then made to the judge in the absence of the jury. The judge it must be pointed out had not actually heard the remark originally. There was some question about the witness sitting too close to the microphone and this causing problems. But when the issue was raised with him, the judge dealt with in these terms. Addressing defence counsel he said:-

> "You've made your point and it is perfectly valid and I will outline to the jury that that is what it is so."

9. He then proceeded to address the witness in giving certain advices and directions to her.

10. The remark in issue which should not have been made was volunteered by the witness, not led by the prosecution. Its impact, if any, must be very limited. The backdrop to the trial as was clear to all concerned was one of long running marital disharmony and an acrimonious breakup. That one party in what was now a very acrimonious split up indeed should categorise the relationship as abusive was hardly surprising. It has been stated repeatedly that the discharge of a jury will be exceptional and should be viewed very much

as a last resort.

11. In this case the judge was acting well within his discretion in deciding not to discharge the jury. It is true that he did not subsequently say anything explicit about the remarks that had been made despite having given an indication that he would. However, he was not asked to do so by the legal team that represented Mr. Waldron at trial. It may be the situation that all concerned felt that this was a case of least said soonest mended.

12. The point is made that in a situation where an indication had been given by the judge and everybody operated on the basis that that indication would be delivered on when the charge did not deal with the issue that this created a dilemma for defence counsel, because to raise the point at that stage would simply have the effect of focusing attention on the issue anew.

13. The court has considered that point, but remains of the view that the introduction of this material is not such that it brings into question the correctness of the verdict or the safeness of the trial.

14. Central to the arguments that have been advanced in relation to the charge, to the requisition and the response to the jury question is that the judge may have mislead the jury by inviting them to consider whether Mr. Waldron intended to carry out the threat as distinct from whether he wanted Mr. McColgan to believe in the threat.

15. The language of s. 5 of the Non Fatal Offences Against the Person Act, is very clear, as indeed was reflected in the language of the count on the indictment and the issue paper that subsequently went to the jury, which specifically referred to a threat made to Anthony McColgan with the intention that Anthony McColgan would believe that the threat would be carried out.

16. The first blurring of the distinction between an intent to carry out the threat and an intent that the threat should be taken seriously and believed came in the closing speech on behalf of the defence. Counsel for the appellant commenting as follows:

> "Now there is two aspects to that. You can make a threat to someone "I'm going to kill you if do that again" to your child, "I'll kill you if you don't stop that" "if you go near that television again I am going to kill you". You say that that's a threat, but the law requires a bit more than that. The law requires an awful lot more than that. The law requires that Mr. McColgan and you saw him in the witness box. You can make your own judgment of him, of what kind of man he is, his demeanour. Mr. McColgan has to believe that Mr. Waldron, a District Court clerk is going to carry out the threat. He is going to go and get a gun and shoot him or he is going to get somebody to shoot him. He has to believe that."

17. Counsel for the prosecution was somewhat uncomfortable with the way this issue had been dealt with by his colleague and raised that with the court before the judge commenced his charge.

18. The judge dealt with it in these terms:

> "You all know about that, but you must look at Mr. Waldron. Did Mr. Waldron, whatever words he used, did he use words that he wanted Mr. McClogan believe that he meant it. Mr. McColgan on the other hand says and as Mr. Keane points out, he said the fact that Mr. McColgon was not particularly afraid of him, is not what you would be looking at. Well I am not saying that you shouldn't look at it, but its Mr. Waldron, it is the intent in Mr. Waldron's mind that you are looking at, not Mr. McColgan."

19. Having commenced their deliberations the jury then returned to the court with a question. On behalf of the jury, the foreman asked: "Yes your honour we want to clarify is it necessary for Mr. McColgon to believe that the threat would be carried out", to which the judge responded:

> "I thought I had explained that quite clearly. It is not Mr. McColgan's belief that you must look at. You must look at the threat and was it intended by the accused to carry it out."

20. Now pausing there for a moment that direction certainly taken in isolation was wrong. The exchange between the foreman and the judge continued with the foreman thanking the judge and the judge saying:-

> "Alright, I have already said that, you can look at all the other bits of evidence if you so wish and you can, you can assess them as you wish, but I repeat and I repeat again the intention to be examined is not that of Mr. McColgan, the intention to be examined is that of the accused Mr. Waldron. Was it his intention and if you look at the wording of the section you will see was it his intention. I will read it once again just to be sure.
>
> A person who, without lawful excuse, makes to another a threat, so a person that's … me heads gone . . . by any means intending the other to believe it will be carried out, to kill or cause serious harm to the other or a third person shall be guilty of an offence. So it is Mr. Waldron's intention that you look at. Did he intend Mr. McColgan to say that what he said he was going to do, he was going to carry out. Did he, Mr. Waldron, and you can, have to assess that on the basis of the evidence you have heard.
>
> Foreman; Thank you your Honour.

The jury then retired.

21. Prosecution counsel was not satisfied with the judge's formulation and sought clarification and redirection. To that request defence counsel, who it must be said was a particularly experienced one, responded by saying:

> "You said that at the very end judge when you went through the section. I am absolutely certain that that was what you said. I am very happy with it".
>
> Prosecution counsel said: "Yes judge."
>
> The judge then said: "I am happy with what I have done, I am happy with what I did before I did it, so I am not going to go back into it again".
>
> Defence counsel: "Very good".

Prosecution counsel: May it please the court."

22. While the sentence that I have quoted and highlighted was wrong, having regard to the clear wording of the section which was opened to the jury, the clear wording of the count on the indictment and what the judge said initially, the court and jury could have been in no doubt about the ingredients of the offence. Insofar as any equivocation entered into the equation, this arose from the defence tactic to focus on the improbability of Mr. Waldron, a person of previously good character ever carrying out such a threat or ever intending to carry out such a threat and thus raising a doubt as to whether such an improbable out of character threat could have been believed or taken seriously.

23. In a situation where the defence resisted a request for clarification and specifically stated that it was very happy with what had been said, this ground must fail.

24. The jurisdiction of this Court, sometimes referred to as the Cronin jurisprudence, indicates that when a point that has not been raised at trial is sought to be raised for the first time on appeal, that the defence may find themselves in difficulties in seeking to do that. This is a particularly clear cut case in that the defence expressed themselves as very happy with what had been said and specifically resisted a request by the prosecution for further clarification. Accordingly, the court has no hesitation in dismissing this ground of appeal also. Accordingly, the appeal against conviction is dismissed.