THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 109

Record No. 194/2016 & 175/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

MICHAEL LYNCH

APPELLANT/RESPONDENT

- AND–

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/APPELLANT

JUDGMENT OF THE COURT DELIVERED ON THE 30TH DAY OF MARCH 2017 BY MR. JUSTICE MAHON

1. The appellant was convicted by jury at Cork Circuit Criminal Court on the 1st June 2016 of one count of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997. He was also acquitted of making a threat to kill contrary to s. 5 of the same Act. The appellant has appealed against his conviction, and the Director seeks a review of the sentence of two years and six months imprisonment pursuant to s. 2 of the Criminal Justice Act 1993 on the basis that the said sentence was unduly lenient.

2. The appellant was sentenced on the 7th June 2016 to imprisonment for a period of two years and six months.

3. On the 21st July 2015 while the appellant was living with the complainant, Ms. Tara Byrd, at 184 Old Youghal Road in Cork, he poured boiling water, to which he had first added sugar, from a kettle onto her left leg, causing her severe injury. At the time the complainant was four and a half months pregnant. She suffered third degree burns to her leg and spent approximately ten days in hospital and underwent skin graft surgery. She has been left with severe scarring of her left leg. Immediately following the incident the complainant told a number of people that she had spilled the boiling water over herself as she was making coffee. The persons she told included Ms. Natasha Morey who came to her apartment soon after the incident, members of the ambulance crew who took her to hospital, and medical staff at Mercy Hospital in Cork. Approximately four days after the incident, the complainant told her father that the appellant had been responsible for the incident, whereupon the gardaí were contacted.

4. The gardaí requested statements from three individuals, Natasha Morey, Betty O'Driscoll and Martin Morey, but all declined to make statements. When interviewed by the gardaí, the appellant stated that the complainant had herself spilt the boiling water whilst making coffee.

The conviction appeal

5. The appellant's grounds of appeal are as follows:-

(i) The learned trial judge erred in admitting evidence which was more prejudicial than probative.

(ii) The learned trial judge erred in admitting evidence which while not probative was not relevant and would likely cause the jury to engage in speculation despite the absence of probative evidence.

(iii) The learned trial judge erred in admitting the evidence of Garda Paula Sidley with regard to persons who had been asked by her to provide statements and who had not provided statements.

(iv) The learned trial judge erred in admitting the evidence of Garda Sidley with regards to person who had been asked by her to provide statements and who had not provided statements; namely, Betty O'Driscoll, Martin Morey and Natasha Morey in circumstances where the jury was likely to ask a question whether another person, namely the appellant's nephew, Kenneth Lynch, was asked to make a statement and the jury was likely to engage in speculation on this issue despite the absence of probative evidence.

(v) The learned trial judge erred in failing to maintain in his charge of fair balance in presenting the cases for the prosecution and the appellant to the jury.

(vi) The learned trial judge failed to sum up the defence.

(vii) The learned trial judge erred in commenting in his charge on matters of medical evidence which had been read into the record and selective quoting and emphasising matters relied on by the prosecution and failing to refer to matters relied on by the appellant when the medical evidence was not available for the jury to read.

(viii) The learned trial judge erred in commenting in his charge on selective portions of the evidence concerning times given in the medical evidence having said he would not comment on the evidence and doing so in a manner which would convey to the jury a suggestion that the prosecution was more in accord with the evidence or that they ought to favour the prosecution's case.

(ix) The learned trial judge erred in commenting to the jury that it was wrong to convict an innocent person but equally wrong to acquit a guilty person and thereby tending to suggest that a form of balance was involved and that the standard of proof was other than or lower than proof beyond a reasonable doubt.

6. Grounds (i) to (iv) relate to evidence given by Garda Sidley. Grounds (v) to (viii) concern the learned trial judge's summary of the defence case to the jury. Ground (ix) is concerned with the learned trial judge's reference in his charge to the jury to the standard of proof.

Garda Sidley's evidence
7. In the course of her evidence to the jury, Garda Sidley was questioned by prosecution counsel as to persons from whom she had sought statements, but who had declined to make statements. The following exchange occurred as between prosecution counsel and Garda Sidley:-

> *"Q. Ok, then I think on the 31st July 2015, you invited Betty O'Driscoll to make a statement and she declined to do so, is that correct?*
>
> *A. That's correct.*
>
> *Q. Ok, and then I think on the 19th August 2015, you invited Marty Morey to make a statement and I think he also declined to make a statement, isn't that correct?*
>
> *A. That's correct.*
>
> *Q. And I think on the 21st August 2015, you invited Natasha Morey to make a statement and she declined to do so, isn't that correct?*
>
> *A. That's correct."*

8. In the course of a *voir dire* following upon Garda Sidley's evidence, prosecution counsel maintained that the questions asked, and the information provided by Garda Sidley, were appropriate and admissable in order to establish that a proper investigation had been carried out by the gardaí. In response to the contention on behalf of the appellant that the evidence had not been probative, prosecution counsel commented *"…It's not hugely probative, but neither do I see how it is prejudicial at all."* He contended that Garda Sidley's evidence merely confirmed that the three individuals had not made statements.

9. Defence counsel addressed the learned trial judge as follows:-

> *"… It's not terribly controversial, but at the same time if it is probative at all even the slightest midge of prejudice, I don't want this to be used to allow the jury to speculate that there were reasons why, whoever these persons are, didn't give statements, no reason is given by any of these people for not giving a statement as far as I can see, I have just looked at it again this minute. I am concerned that it might create an impression, without at the same time producing anything probative or of value, because there is no issue as to the activities of the Siochana in his case. I haven't made an issue of any aspect of the 's treatment of the case from start to finish from detention to arrest, or anything like that. So, I don't see what's probative, I am concerned that an impression might be formed by the jury if they are casting a vote and speculating. I don't want to feed into speculations."*

10. Defence counsel also advised the learned trial judge that he was particularly concerned about this evidence because at an earlier trial, in which the jury disagreed, the jury had asked if a particular individual had given a statement in circumstances where he had not done so, and had been told by the trial judge that they should simply consider evidence actually heard by them in the course of the trial. He was concerned that the evidence was not relevant and that its introduction would only act to prompt the jury to speculate as to why these named individuals had not made statements, and more particularly that they might assume that these individuals had been intimidated into refusing to make statements.

11. The learned trial judge ruled as follows:-

> *"On the other hand, if the evidence was not led, it may lead to an apprehension that there was some element of failure to follow through by the investigating gardaí. It is contextual, having regard therefore to the matters raised as to whether it would give rise to some element of prejudice, and clearly the court must be far more focussed on that rather than anything else. I am not of the view that it would be in the circumstances, and am going to allow it to be led."*

12. It is submitted on behalf of the respondent that there are many reasons why a person might decline to make a statement, including a dislike of the gardaí or because they were related to the accused person (as indeed they were in the instant case), or simply a desire not to get involved.

13. In the court's view the learned trial judge correctly deemed the evidence admissible. It was merely a statement of factual information in circumstances where its absence may well have itself prompted the very speculation of which concern was expressed on behalf of the appellant. It was not evidence of a prejudicial nature and, indeed, no compelling reason is given for it having been so. This ground of appeal is therefore dismissed.

The charge to the jury in relation to the defence case
14. It is contended on behalf of the appellant that the learned trial judge erred in his failure to maintain, in his charge to the jury, a fair balance in presenting the cases for the prosecution and the appellant. No requisition was made in relation to this issue. In particular, attention is drawn to the fact that the learned trial judge summarised the evidence given by the complainant over three pages of transcript, whereas he summarised the appellant's position in less than one page of transcript. A closer examination of the transcript suggests however that the learned trial judge's summary of the prosecution evidence was less than twice that of the defence case, in terms of length. It is relevant to note in this respect that there were two witnesses for the prosecution, and none on behalf of the appellant. There were also details of a medical report from Dr. Chris Luke read to the jury. More specifically, it is contended on behalf of the appellant that the defence case was not adequately or properly put to the jury in the course of the charge. Arguably, summarising the prosecution case was necessarily a lengthier process than was summarising the defence case.

15. In the course of his charge, the learned trial judge stated the following:-

> *"It was put to her directly that she spilt the water on herself and she denied this. She did agree that Michael and Tasha went to the pharmacist but that was the next day she said. She agreed that he put her in the cold shower and put cold water on the area. She denied that it was an accident. She agreed with Mr. Fleming that when she spoke to Tasha on the Wednesday she said that she had split water on it and she wanted Tasha to believe it. She said something similar to*

the ambulance people, the same thing, and again she wanted them to believe it. At the Mercy Hospital she agreed that she said more or less the same thing. So on the two days when she was at the Mercy Hospital on the 22nd and 23rd, she said the same. It was an accident."

16. In a nutshell, the foregoing clearly refers to the defence case, namely, that the boiling water had been accidently spilt by the complainant herself, without any involvement on the appellant's part, and that this was the version of events told and re-told to others by the complainant over a considerable time period thereafter.

17. The issue as to whether the complainant had lied in blaming the appellant for the boiling water being poured over her was a live issue throughout the entire trial, and this was made abundantly clear by the learned trial judge in the course of his charge to the jury. Additionally, considerable emphasis was placed by defence counsel in his address to the jury at the end of the trial of the fact that the complainant had claimed to a number of people over a relatively prolonged period of time that the she was the author of her own misfortune, and that the incident had not involved the appellant in any way.

18. Furthermore, the jury had very recently (in the context of the trial being a very short one) heard the complainant being challenged in respect of these matters, and even more recently, had been reminded of the appellant's account of the incident (in effect, his claim that the complainant was responsible for the boiling water spillage), in the closing speeches of both counsel.

19. The focus of the appellant's criticism on this issue is his contention that the learned trial judge unfairly charged the jury in a manner which favoured the suggestion that the complainant's first attendance in hospital was on the day following the incident, rather than on the day itself, (the latter being more supportive of the appellant's claim that the incident was the result of an accident). Furthermore, the appellant is critical of the learned trial judge's failure to tell the jury that the medical record/report was based on information provided by the complainant, and to this extent was not independently provided information.

20. The disclosure of the content of the medical report was by consent. The jury was told by the learned trial judge that the report *"has been prepared from clinical records pertaining to the above named patient who attended at the Mercy University Hospital on the 22nd July 2015"*. He then went on to refer to the content of the report, including the reference to the medical notes stating that the incident had occurred "yesterday".

21. It would have been reasonably obvious to the jury that references in the hospital's records to the incident having occurred on the previous day to the hospital visit was based on information provided by the complainant to hospital staff. The learned trial judge clearly referred to the report as having been prepared "from clinical records pertaining to the … patient".

22. It is also noteworthy that this short trial was concerned with one simple issue, namely, did the complainant accidently spill boiling water over herself as contended by the appellant and, indeed, as told by her to a number of other people, or, was the boiling water deliberately thrown on the complainant by the appellant. In this sense, and to this extent, it was a very straight forward and uncomplicated trial.

23. The court is satisfied that there was no unfairness in the manner in which the learned trial judge addressed the jury in relation to the prosecution evidence and the extent to which that was challenged by the defence. It is difficult to imagine what more might have been said to the jury while at the same time avoiding a tedious and unnecessarily repetitive account of every piece of evidence, and each and every challenge to that evidence. This ground of appeal is therefore dismissed.

Standard of proof

24. The final ground of appeal concerns the following comment by the learned trial judge in the concluding part of his charge.

"On the other hand, if you don't have a doubt, equally speak up and express your views in that regard. To convict an innocent man would be very wrong. But it would be equally wrong to acquit a person who is, on the evidence, if you so decide on the evidence, is guilty."

25. It is contended on behalf of the appellant that these words undermined or cast into doubt the requisite standard of proof, and which had been very comprehensively addressed by both counsel in their closing speeches to the jury, and also in the learned trial judge's charge.

26. The learned trial judge told the jury:-

"…The prosecution must prove the accused is guilty of the charge preferred - charges in this case, beyond reasonable doubt. It is for them to prove according to that standard. If you decide that the prosecution have proved their case beyond reasonable doubt, then you must convict the accused and return a verdict of guilty on the charge preferred against him. That is your sworn duty, and remember that you must consider each charge separately. If you have a reasonable doubt as to whether the prosecution have proved the guilt of the accused on the charges preferred, then clearly you must acquit and find him not guilty, that's also your sworn duty."

27. This statement is a clear and unambiguous direction to the jury in relation to the standard of proof. The learned trial judge's later reference to it being *"…equally wrong to acquit a person who is on the evidence, if you so decide on the evidence, is guilty."* did not undermine the earlier instruction as to the standard of proof. Importantly, the latter comment emphasises a guilty verdict should only be the result of the decision by the jury *based on the evidence heard* in the course of the trial (emphasis added).

28. No requisition was made on behalf of the appellant in relation to this particular issue.

29. The court is satisfied therefore to dismiss this third ground of appeal.

30. All grounds of appeal have therefore been dismissed in relation to the conviction appeal.

The undue leniency application

31. As already indicated, the appellant was sentenced on the 7th June 2016 to a term of imprisonment of two years and six months. The Director seeks to have this sentence reviewed on the grounds that it is unduly lenient, pursuant to s. 2 of the Criminal Justice Act 1993.

32. Of the eight grounds of appeal originally submitted to the court (in relation to sentence), the Director seeks to rely on two, being as follows:-

(i) The learned sentencing judge erred in law and in fact in placing the severity of the assault at the mid to high range rather than at the high range of assaults, in that the assault was a pre meditated assault in a domestic context, was of unusual cruelty, and caused severe and permanent injury to the victim, Tara Byrd,

and

(ii) the learned sentencing judge erred in law and in fact in attaching undue weight to the mitigating factors in the case.

33. Section 2 of the Criminal Justice Act 1993 provides as follows:-

"(1) If it appears to the Director of Public Prosecutions that a sentence imposed by a court (in this Act referred to as the "sentencing court") on conviction of a person on indictment was unduly lenient, he may apply to the Court of (Appeal) to review the sentence.

(2) An application under this section shall be made, on notice given to the convicted person within 21 days from the day on which the sentence was imposed.

(3) On such an application, the Court may either:-

(b) quash the sentence and in place of it impose on the convicted person such sentence as it considers appropriate, being a sentence which could have been imposed on him by the sentencing court concerned, or

(c) refuse the application.

(4) …"

34. The court will not interfere with a sentence which is merely lenient; it will only do so where it is satisfied that the sentence is unduly lenient. Neither will it interfere simply because it, or its members individually, would have, if hearing the case at first instance, imposed a different sentence. In the often quoted judgment in *DPP v. McCormack* [2000] 4 I.R. 356, p. 359, Barron J. stated:-

"In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would save perhaps in exceptional circumstances, have been caused by an obvious error in principle.

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties will depend on these two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

35. The learned sentencing judge stated in the course of his sentencing judgment:-

"Therefore, on the scale of things and within the context of this being a serious offence, my view is that it resides between the mid to the higher end of the scale and before I take into account the personal and other circumstances of the offender, I am of the view that this matter would ordinarily attract a sentence of three and a half years imprisonment."

36. Earlier in his judgment, the learned sentencing judge referred to the victim impact statement. He said *"the pain truly must have been horrendous"*. He went on to refer to the cosmetic blemish left as a consequence of the injury and the fact that the complainant had to undergo skin grafting for three degree burns.

37. This offence was a particularly serious one. It was a pre-mediated, callous and merciless assault on an innocent woman in a domestic setting. The fact that sugar was added to the water before it was boiled places the gravity of the offence at the very highest level as, in the circumstances, and in reality, it amounted to torture. In the court's view, it warranted a headline sentence at the maximum (being five years), or certainly close to the maximum.

38. The mitigating factors taken into account by the learned sentencing judge include the respondent's difficult personal circumstances and his relatively young age of twenty four years. Although the transcript may not accurately replicate what the learned sentencing judge intended, it does appear that he treated as a mitigating factor the fact that this offence was not committed while on bail in relation to another s. 3 assault conviction, in October 2013. On the contrary, a previous conviction can never be a mitigating factor, whether or not committed while on bail, and will in many instances be an aggravating factor.

39. In the court's view, the sentence of two and a half years imprisonment for this very grave offence was unduly lenient, and it will therefore proceed to re-sentence Mr. Lynch as of this time.

40. The court is satisfied that the appropriate headline sentence is the maximum term of five years. It will, with some reluctance, and giving Mr. Lynch greater benefit for the mitigating factors than perhaps they properly deserve, suspend the final twelve months of that sentence on condition that a bond be entered in the sum of €100 to keep the peace and be of good behaviour for a period of twelve months post release.