



THE COURT OF APPEAL

Record No. 218/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

SEAN CARRAHER

APPELLANT

JUDGMENT of the Court delivered on the 10th day of May 2018 by Mr. Justice Mahon

1. The appellant was convicted in the Circuit Criminal Court on the 14th June 2016 following a six day trial on one count of harassing Sergeant Conor Gilmartin contrary to s. 10 of the Non Fatal Offences Against The Person Act 1997. On the 27th July 2016 the appellant was sentenced to five years imprisonment. He has appealed against both conviction and sentence, and this judgment relates to the conviction appeal.
2. The appellant was alleged to have harassed the complainant between March 2009 and May 2011 with internet postings and telephone calls. At the time, the appellant was being investigated for offences under the Domestic Violence Act 1996 in relation to his former wife. In the course of these investigations the appellant alleged child abuse against his estranged wife. He was successfully prosecuted in the District Court, and on appeal to the Circuit Court, in relation to the offence of harassing his former wife on the 1st February 2011, and received a six month suspended sentence. The appellant became dissatisfied with the manner of the investigation of allegations made in the course of that prosecution conducted for the most part by Sergeant Gilmartin.
3. It is alleged that the appellant made between ten and twelve telephone calls of an abusive nature to the complainant, mainly in March 2009. He also instigated fifty eight internet postings to three websites, namely "Victims of the legal profession", "Word press" and "Rate your solicitor". These postings made various allegations about the complainant including that he was a corrupt member of An Garda Síochána and included references to his family life and an allegation of infidelity on the complainant's part.
4. The appellant was arrested in 2011. He admitted making the internet postings but claimed they were done in the exercise of his right to freedom of expression. He denied making the phone calls complained of. He complied at that time with a request to desist from this activity and was not again the subject of garda attention between then and 2016 when he was taken into custody in relation to the case now under appeal.
5. While two grounds of appeal were promoted on behalf of the appellant since the commencement of this appeal, the court was informed at the outset of the oral hearing of the appeal that only one ground, the second ground, was being proceeded with. That is that:-

"The learned trial judge erred in law and in fact in allowing the prosecution put evidence of the appellant's wife's mobile phone records before the jury, while the prosecution failed or refused to provide the jury with the appellant's own mobile phone records which, in the circumstances, was prejudicial to the appellant's defence in circumstances where the appellant had, in person, given evidence to the jury."
6. In written submissions filed on behalf of the appellant, an explanation of the ground of appeal was provided as follows:-

"A significant issue over the course of the trial was the appellant's contention that his phone records would contradict, in terms of length of call, the phone records provided by his ex-wife. A number of the posts, the subject matter of the Circuit Court proceedings, related to that very issue. Over the course of the trial the appellant's ex-wife's phone records were put before the jury, despite defence's objections as a prosecution exhibit. The appellant claimed he never received his own phone records, a point not disputed by the prosecution and these records were never referred to or put before the jury."
7. However, in the course of the oral appeal hearing, the court was advised by Mr. Colgan S.C., on behalf of the appellant, that the criticism in relation to the failure on the part of the prosecution to provide the appellant's telephone records was on the basis that it prevented him establishing that the telephone calls which the complainant said he received from the appellant's telephone were never in fact made from his phone. The issue, it was contended, was the credibility of the complainant. It was argued on behalf of the appellant that the prosecution had failed in its obligation to procure and disclose the said telephone records to the appellant in advance of, or at the trial. There had also been an issue, arising from the prosecution of the appellant in relation to harassing his former wife, as to the number of telephone calls made by him to her.
8. In the course of his evidence the complainant stated that he had not sought the appellant's telephone records. However, in evidence given by Garda Clancy the trial court was advised that the appellant's records had indeed been provided to An Garda Síochána following an application made for them. It was his understanding that these records had been disclosed to the appellant. The appellant was adamant that he had never received them. Equally, it has to be stated, the appellant did not himself seek his own telephone records.
9. Subsequently, on the 14th November 2017, and on the day this appeal was first listed before this court, the appellant's solicitor received a letter from the respondent to the effect that the only telephone records ever obtained by An Garda Síochána relating to the appellant were those concerned with incoming calls to his telephone number. Such records were of no use in the appellant's quest to establish that he had never telephoned the complainant as alleged. Furthermore by then the records of outgoing calls was

no longer available.

10. The letter from the Director of Public Prosecutions dated 14th November 2017 and addressed to the appellant's solicitor stated:-

"In the two page letter dated 21st September 2017 received in this office on 10th October 2017 you seek a copy of the phone records referred to in Garda Clancy's letter of the 9th October 2009 addressed to her sergeant in charge in Shankill garda station, that were delivered to your client's solicitor at the time, Ms. Sandra McAleer. You also refer to the fact that your client "has sought pre trial disclosure of certain telephone records (specifically his own mobile telephone records) relating to calls supposedly made by him on the 16th and 17th March 2009 from his mobile telephone number 08791554461, which records he believed to have been obtained by gardaí.

With regard to your request for garda PULSE records you have already made a request under s. 4 of the Data Protection Act 1988 and 2003 and been furnished with such information as An Garda Síochána as prepared to furnish in that regard....

In relation to the garda letter sent to Ms. McAleer I understand that you have sought a copy of that letter directly from Ms. McAleer and await a response from her.

I am informed that Garda Clancy was the garda member in charge in relation to the prosecution against your client for breaches of the Domestic Violence Act 1996 involving Ms. Martha Gimena. As part of that investigation, Garda Clancy sought relevant mobile telephone records of calls made to her mobile telephone. She received this information from Ms. Gimena's mobile telephone service provider and this was disclosed to Mr. Carraher's solicitor in relation to those proceedings. Garda Clancy also sought relevant mobile phone records of calls made from your client's mobile telephone. However, the mobile telephone service provider did not supply that information, but instead provided mobile phone records of calls received by your client's mobile telephone. I understand that this material was furnished to Mr. Carraher's solicitors in relation to those proceedings. It is also my understanding that when this error came to light in the proceedings involving Ms. Gimena that the records of outgoing calls made from his mobile phone were sought. However, as two years had passed the mobile telephone provider provided could not provide those records....

I am also to inform you that Garda Murphy was the garda member in charge in relation to the prosecution against your client for harassment involving Garda Gilmartin. As that investigation related to harassment using the internet Garda Murphy only sought relevant mobile telephone records of calls made to Garda Gilmartin's mobile phone. I understand that this material was furnished to your firm as you acted for him in relation to the case involving Garda Gilmartin.

I am informed that issues of disclosure were fully litigated before the commencement of this trial."

11. Of the telephone calls made by the appellant to Sergeant Gilmartin most were from the appellant's mobile phone but some were from an unknown number. All were abusive and on each occasion Sergeant Gilmartin recognised the appellant's voice.

12. For example, a telephone call received by Sergeant Gilmartin on the 18th March 2009 was recorded as stating:-

"Are you listening, Conor, are you listening? Well, do you know on the 23rd of April the judge is allowing the legal recordings and I've got loads of them and guess who's in them, you. So have fun on the 23rd. Make sure you turn up because I'm going to fucking expose you and the rest of your lying bastards in that fucking station. Goodbye."

13. Sergeant Gilmartin recognised the appellant's voice.

14. The many internet postings were highly critical and defamatory of Sergeant Gilmartin. By way of example, one such post stated:-

"Question to all the gardaí in Shankill and Dun Laoghaire. Is there anyone of you prepared to tell the truth about your corrupt colleagues? They are dragging down the good name of the gardaí. I'm not asking you to say anything on this site, but asking you to tell those in charge and make a difference. Can anyone of you restore my faith in the gardaí? I felt I met some genuine good gardaí but if you don't speak up it means, I was wrong about you also. I don't want to name you because you were nice to me. You were the exception. If asked later in private, I will praise you. It's the likes of Sergeant Conor Gilmartin that gives you all a bad name."

15. Another internet post on the 22nd August 2010 quoted the appellant as stating:-

"...She (a reference to the appellant's wife) is being helped by a lying, corrupt Garda Sergeant Conor Gilmartin based at Shankill Garda Station, South County Dublin."

16. Another internet posting on the 23rd May 2011 stated:-

"I want to get corrupt Garda Sergeant Conor Gilmartin to attempt to sue me for defamation of character, wishful thinking. I suggest to all. Do not be intimidated by these low life corrupt policemen called gardaí."

17. Another internet posting on the 25th May 2011 stated:-

"Police corruption in Ireland. For hire, one corrupt garda police sergeant Conor Gilmartin based at Shankill Garda Station, South County Dublin. If the deal is right he will lie for you, especially if you are a drug abuser or a child abuser..."

18. In the course of his evidence the appellant accepted that his former wife's telephone records which were available in the course of the trial and which were the subject of robust cross examination were accurate. No application was made on behalf of the appellant to the learned trial judge in respect of the absence of telephone records. No requisition was made on behalf of the appellant in the aftermath of the learned judge's charge to the jury.

19. In the course of the trial counsel for the appellant took issue with the admission into evidence of the appellant's former wife's telephone records. That issue was ruled upon by the learned trial judge in the following terms:-

"I don't see any difficulty. It is not because the foreman of the jury has asked to see them that Mr. Dwyer purports to adduce them as an exhibit; it is because they are an issue in the trial, reference has been made to them repeatedly by

Mr Carraher to ground the basis upon which he says there is discrepancy which, when one comes back to the postings on the internet, he relies upon to indicate that in his view, Sergeant Gilmartin is a corrupt, dishonest perjurer and somebody who is prepared to fabricate evidence, so that it would seem to me that they are very relevant and the prosecution ought to be entitled to rely upon them in their cross-questioning of Mr Carraher as to his credit. Mr Carraher has already indicated in his evidence that he is happy with the records. What he says is that they don't match up to the evidence given by Sergeant Gilmartin. So, in all of these circumstances, I believe the prosecution ought to be allowed adduce these records now as an exhibit and rely upon them in the further questioning of Mr Carraher."

20. Disclosure issues often arise in the course of a trial. While there is on the prosecution a general duty to disclose documentation / information which may assist the defence, that duty is not limitless. A failure to disclose relevant material will only result in a verdict being quashed where it renders the verdict unsafe or the trial unfair. The test for setting aside a conviction as a result of an alleged failure to make disclosure was the subject of a decision by the Court of Appeal in *DPP v. McCarthy* [2007] IECCA 64. That judgment stated:-

"The Court is of the view that a failure of disclosure must be shown to have been important, as distinct from technical or trivial, if a conviction is to be regarded as unsafe. To put it another way, this Court must engage with the facts of this case to see if the omission disadvantaged the defence in such a way as to render the trial unfair or the jury verdict unsafe in the particular circumstances of the individual case. There is a two part consideration; was there a failure in the first instance, and, secondly, if so, did it materially affect the outcome of the case in the particular circumstances?"

21. No issue was taken on behalf of the appellant in relation to the failure to disclose his own telephone records. In any event, it is clear that the gardaí had never been in possession of the appellant's telephone records, and that by the time their non-availability became an issue in the case it was no longer possible to obtain them. The appellant had never challenged his prosecution in relation to the disclosure issue.

22. The fundamental principle of disclosure was described by Keane C.J. in his judgment in *McKevitt v. DPP* (Supreme Court, Unreported, 18th March 2003) in the following terms:-

"(t)he prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution, and if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."

23. The court is satisfied that the prosecution was not in breach of its duty to disclose the telephone documentation to the appellant. Firstly, they did not have it. Secondly, it was documentation available to the appellant and within his procurement, and, thirdly, its availability is unlikely to have provided any useful additional information and, more particularly, information likely to be useful in the appellant's defence. The court is satisfied that the unavailability of the appellant's own telephone records was not prejudicial to him, nor did it harm his defence, nor did it render the trial unfair or the verdict unsafe. It is in any event noteworthy that the charges preferred against the appellant related to telephone calls and internet postings, and it is undoubtedly the case that the internet postings comprised by far the most serious allegations made against him. The telephone calls were either heard by Sergeant Gilmartin alone, or by some of his colleagues within his garda station, whereas, in contrast, on the other hand, the internet postings were disclosed to the public at large, and it is likely that they were read by large numbers of people.

24. The court is satisfied that the conviction of the appellant was fair and it will dismiss his appeal in relation thereto.