



## THE COURT OF APPEAL

[272/16]

Birmingham P.  
Edwards J.  
Hedigan J.

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**SEAN DAVY**

**APPELLANT**

**JUDGMENT of the Court delivered on the 31st day of July 2018 by Birmingham P.**

1. On 4th August 2016, the appellant was convicted of the murder, on 12th February 2014 in Edenderry, of Thomas (Toddy) Dooley. He has now appealed against conviction. Essentially, one issue is raised on this appeal which is that Mr. Sean Davy should have had a trial separate to that of his co-accused, James Davy and Matthew Cummins.
2. The trial, which opened on 11th July 2016, was presided over by Heneghan J. However, the main debate on the issue of whether separate trials should be ordered took place at an earlier stage, 20th June 2016, before McCarthy J. It is his decision to refuse to order separate trials that is at the heart of the present appeal, though the issue was returned to on occasions during the course of the trial proper.
3. By way of background, it should be explained that the prosecution case was that on 11th February 2014, Mr. James Davy came from Celbridge to Edenderry. On the afternoon and evening in question, he was drinking in a public house called Mangans. He went to this public house with his cousin, Sean Davy, the appellant, and others. The prosecution case was that James Davy had a wooden baseball bat in his possession in the public house, and also, at a party he attended later in the evening. Ms. April Murray, a witness at trial, was in the public house during the time and, at some stage that day, a decision was taken that they would go to the home of Ms. Murray at 178, The Sycamores, Edenderry. Matthew Cummins joined the party; he had not been in the public house earlier. All three accused were said to have consumed alcohol and a white powder referred to throughout the trial as cocaine or methadone (a head shop stimulant).
4. The three co-accused were engaged in acts of criminal damage at the house of Ms. Murray. As a result, they were asked to leave and there was evidence at trial that indicated that they left the party at approximately 5.00am. The prosecution case is that the three accused then went to home of Thomas (Toddy) Dooley, and there, murdered him. The late Mr. Dooley was subsequently found on Sunday 16th February 2014, slumped in the armchair of his living room with severe head injuries. The pathologist recorded ten blows to his body; numerous injuries to his back and torso and burn marks where an attempt had been made to set him on fire. The evidence at trial included CCTV footage showing the three accused leaving the party in The Sycamores and heading in the direction of St. Senan's Court where Thomas Dooley lived. There was also later CCTV footage showing the three men disposing of articles at a recycling plant. A baseball bat and various other items were recovered from the recycling bin.
5. At the application for separate trials before McCarthy J., the lead role was taken by junior counsel for Matthew Cummins. In seeking separate trials, he referred to memoranda of interview of his co-accused, James Davy and Sean Davy. Mr. Brendan Grehan Senior Counsel, then acting for Sean Davy, and Ms. Siobhán Ní Chúlacháin followed on. Mr. Grehan said that he was making a similar application to that made on behalf of Matthew Cummins, on behalf of Sean Davy, but in reverse circumstances, where Matthew Cummins, in effect, blames his client for using the baseball bat at the scene and suggests that he was somebody himself who was trying to stop the use the baseball bat. Likewise, the co-accused, James Davy ascribes to Sean Davy the role as the central beater with the baseball bat. Mr. Davy's admitted being there and being part of the scene; he accepted that he hit the deceased once when the bat placed in his hand by James Davy, who had been doing the hitting, and his client's account also has Matthew Cummins using the bat and also kicking the deceased. Counsel said that, in circumstances where his two co-accused are effectively trying to put all the blame onto his shoulders, the role that his client described in his memos would be lost on the jury and that he would, therefore, be at a risk of being unfairly convicted.
6. In response, counsel for the prosecution said that if ever there was a case that came before the Court as one of joint enterprise, this was that case. He said that there was a whole body of evidence in the case, involving sightings of the three accused together before they went to the late Mr. Dooley's house, and sightings of them afterwards as well as CCTV evidence, the integrity of which would be destroyed if the Court was to order separate trials. In ruling on the matter, the judge said that he was satisfied that this was a classic case in which there should be a joint trial. He did not see it as a borderline case or anything like that, but as a textbook case of its kind. The judge commented that he was not having regard to practical factors, a reference to the convenience of joint trials, but that he was having regard to the substantive issue of justice in the case. The judge felt it was inconceivable that a modern jury, properly charged, could not understand the distinction between the three accused. A jury would be told, of course, that they were dealing with three separate trials.
7. While the substantial discussion in relation to separate trials took place before McCarthy J, the issue was adverted to on Day 1 and again on Day 7. On Day 1, the issue was raised by Senior Counsel for Matthew Cummins, and essentially, she raised two issues. She expressed a concern that there was a possibility that lawyers for James Davy would attempt to introduce evidence of her client's previous convictions and also that there might be evidence of a text message sent by a witness in the case, an ex-girlfriend of James Davy, which made allegations against the deceased. This led to an intervention from Senior Counsel on behalf of Sean Davy who said that if the Court was disposed to sever solely on the basis of the text message that it would follow that his case should be tried with

that of Matthew Cummins because he too was relying on the text message. The judge felt that the application was premature and that really what was happening was that counsel was flagging difficulties that might arise later in the trial. Accordingly, the trial proceeded.

8. The issue of separate trials was canvassed again on Day 7. There was an intervention by counsel for Sean Davy who expressed concern about the fact that he understood that counsel for Mr. Cummins was proposing to play part of the video recording of one of his interviews during the course of her cross-examination of the State Pathologist. In fact, counsel for Mr. Cummins did not pursue her request to be permitted to play the video and that issue, in effect evaporated.

9. In moving this appeal, counsel on behalf of the appellant acknowledges that the mere fact that one co-accused has implicated another and referred to the actions of another co-accused does not per se oblige a judge to order separate trials. However, he says that in the present case, what the co-accused had to say was so vivid that it overwhelmed the account given by Mr. Sean Davy, so that in effect, Mr. Davy's voice was not heard. In response, counsel for the Director repeats his assertion that this was classically a case for a joint trial. He points to the fact that Mr. Sean Davy, in the course of interviews, admitted to hitting the deceased with the baseball bat on the head on one occasion, and says that, as a consequence there has to be a real doubt as to whether, in fact, Mr. Davy suffered any prejudice as a result of what the co-accused had to say in their interviews.

10. The issue of joint trials is the subject of a helpful discussion in 'The Criminal Process' by Professor Thomas O'Malley at paras. 1498 to 14101. At 14100, he comments:

"[a] joint trial can doubtless prejudice an accused person's right to a fair trial, which means that applications for separate trials should always be treated seriously. Defenders of joint trials often rely on arguments of economy and convenience, matters that should, at best, be peripheral to decisions on severance. Fairness must always be the paramount consideration. The general preference for joint trials stems undoubtedly from the legitimate concern that when two or more persons are charged in connection with a single transaction, each of them, if tried separately, would attempt to cast the entire blame on one or more of the others. Therefore, joint trials are permissible even when a statement made by one accused incriminates another. The fact that such statements have been made does not in itself compel the trial judge to order joint trials. Nonetheless, before severance is refused, the judge should always be satisfied that the applicant runs no meaningful risk of getting an unfair trial."

11. It is noteworthy, in this case, that the judge dealing with the application for severance disavowed any intention to have regard to what he described as "practical matters", a reference to arguments relating to economy and convenience. He was, nonetheless, of the view that this was a classic case for a joint trial and that it was not a case that could be regarded as borderline.

12. The Court is in no doubt that McCarthy J. acted well within his discretion in refusing the applications for severance. Indeed, the Court goes further and would add that this was a case where the application for severance was properly refused. This was a case where the prosecution advanced its case fairly and squarely on the basis of joint enterprise and common design. It was their case that the three accused had been in each other's company prior to the crime; had gone together to the home of the deceased; had been present when Mr. Dooley was murdered and when there was an attempt to set fire to him; left the scene together and were then together at the recycling centre. In the Court's view, the case for a joint trial was compelling. The application for severance having been refused, both the prosecution, in the first instance, and then trial judge were careful to explain to the jury in very clear terms that each statement was evidence only in the case of the maker of the statement and was not evidence in the case of the co-accused. The confidence expressed by the judge ruling on the application in that regard was well-founded.

13. In all the circumstances, the Court is satisfied that the complaint about the failure to order separate trials has not been made out and the Court will dismiss the appeal.