THE COURT OF APPEAL

Record No. 219/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND–

F.E.

APPELLANT

JUDGMENT of the Court delivered on the 1st day of December 2017 by Mr. Justice Mahon

1. This is the appellant's appeal against his conviction on a number of counts following a jury trial at the Central Criminal Court on the 30th June 2016.

2. The appellant pleaded guilty to two counts, one of an attempt to cause serious harm contrary to common law and one of assault causing harm contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997. In relation to these he was sentenced on the 25th July 2016 to seven years and six months imprisonment and three years and six months imprisonment respectively.

3. In respect of the remaining counts the position is as follows:-

- Count No. 1: Assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997. The jury disagreed in relation to this count.

- Count No. 2: Rape contrary to s. 48 of the Offences Against The Person Act 1861 and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. The appellant was found guilty by unanimous verdict. He was sentenced to twelve years imprisonment with the final two years suspended on conditions.

- Count No. 3: Threat to cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to five years imprisonment.

- Count No. 4: Threat to kill contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to three years imprisonment.

- Count No. 5: Threat to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found not guilty by direction of the learned trial judge.

- Count No. 6: Threat to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The appellant was found guilty by unanimous verdict and was sentenced to five years imprisonment.

- Count No. 7: Threat to kill or cause serious harm contrary to s. 5 of the Non Fatal Offences Against The Person Act 1997. The jury disagreed in respect of this count.

4. The convictions appealed by the appellant relate to the rape, assault and threats to kill and injure his wife. A series of assaults and threats, including the rape in the marital home, culminated in an attack by the appellant on his wife and her mother during which both women were struck with a hammer and injured. The appellant pleaded guilty to the two offences relating to the hammer attacks on his wife and his mother-in-law.

5. The offences alleged against the appellant were said to have occurred between the 2nd May 2014 and the 7th August 2014, a period of just over four months. The offences in respect of which the appellant was found guilty by the jury occurred between the 25th May 2014 and the 9th June 2014, a period of under three weeks. The most serious of the offences, rape, was committed on the 25th May 2015 as was a threat to kill or cause serious harm. The remaining offences of threatening to kill or cause serious harm in respect of which the appellant was found guilty were committed on the 26th May 2014 and the 9th June 2014.

6. The appellant, an Egyptian national, and his wife, an Irish national, were married in 2005 and have one child, born in 2010.

Grounds of appeal

7. Eight separate grounds of appeal were initially filed on behalf of the appellant. These were essentially reduced to four in number at the commencement of the appeal hearing, and are as follows:-

(i) The learned trial judge erred in law in refusing to go beyond the usual generic warning issued to prospective jurors and in refusing to specifically address the potential for racial bias.

(ii) The learned trial judge erred in refusing an application by the defence to sever the Indictment which contained multiple unrelated counts in respect of offences which occurred on diverse dates between the 2nd May 2014 and the 7th August 2014.

(iii) (a) The learned trial judge erred in refusing an application by the defence to discharge the jury when matters of alleged misconduct by him during the trial were put to the accused during cross examination by the prosecution without leave of the Court and without notice to the defence, and in such a way as to prejudice the accused in front of the jury.

(b) The learned trial judge erred in law by erroneously interpreting s. 1(f) of the Criminal Justice (Evidence) Act 1924 in respect of an application by the defence to discharge the jury with regard to alleged misconduct of the accused during the trial process and whilst the accused was being cross examined.

(iv) The learned trial judge erred in refusing an application by the defence to have Garda Aoife Duggan added to the list of prosecution witnesses and therein rendered amenable to cross examination by the defence.

The warning to prospective jurors

8. A preliminary issue raised on behalf of the appellant prior to the commencement of the trial related to the appellant's concern that he would not receive a fair trial in circumstances where a jury would be empanelled in accordance with the provisions of the Juries Act 1976. On that basis the members of the jury would be Irish citizens drawn from the Register of Electors, and would most likely be entirely of the Christian faith. On the other hand, it was pointed out, the appellant was a foreign "dark skinned" Muslim from Egypt. This particular ground of appeal was, in reality, a challenge to the constitutionality of the Juries Act 1976. As such, at the commencement of this appeal, the Court was advised that the appellant did not intend to proceed with this particular ground of appeal before this Court. In so doing the appellant did not abandon his challenge in this respect but acknowledged that it was a matter which should be properly contested in separate proceedings.

9. In the course of his lengthy application to the learned trial judge in relation to what he believed were the deficiencies of the Juries Act 1976, counsel for the appellant indicated a fall back position in the event that the Court ruled against him in relation to that issue when he submitted that it was an appropriate case for the learned trial judge to suggest to the jury panel that any prospective juror who felt a bias against Muslims should seek their exclusion from the jury. Counsel for the appellant had a particular concern that an Irish person of the Christian faith might have a view that men of the Muslim faith treated women generally, and more particularly their wives, with less respect or at least differently than was the norm in Irish society. He relied inter alia on the decision of the Court of Criminal Appeal in *DPP v. Nicholas Tobin* [2001] 3 I.R. 469. In Tobin it was submitted that the trial court had erred in failing to discharge the jury when it was brought to the attention of the Court by the foreman of the jury that a juror had disclosed during the course of their deliberations that he had a prior experience of sexual abuse. *Tobin* was concerned with a number of counts of rape and indecent assault.

10. *Tobin* is easily distinguished from the present case. In that case a member of the jury disclosed that he had a prior experience of sexual abuse. The trial judge decided to take no further action, based on an assurance given by the foreman. The Court quashed the conviction on the basis that the trial judge had not sufficiently dealt with this specific issue which had arisen in the course of his charge to the jury.

11. Ms. Gearty, S.C., counsel for the prosecution, did not take issue with this suggestion and submitted that the application to invite prospective jurors *to examine their conscience and say, if I feel I cannot fairly try a Muslim, stand aside*, to be not unreasonable.

12. The learned trial judge however rejected the suggestion that she should give any additional warning or advice to the jury beyond that which was normally given. She said, inter alia:-

> *"Furthermore, in my opinion, any suggestion that a jury panel should be told by a Court that if they feel they are racially prejudiced is a suggestion which quite frankly to me is insulting to the panel and presumes prejudice on the part of members of the jury panel and I fundamentally disagree with that suggestion which was made both by the prosecution and by the defence. I do not accept that this is in any way appropriate. The panel should be given, in my opinion, the usual warnings and terms of section 15.3 in whatever manner the learned judge considers appropriate…. I do not see his religion as being in any way relevant and I certainly, as I stated, do not think it proper that the jury be asked if there is any issue of racial prejudice. As I stated, I can consider this to be insulting to any potential jurors and I refuse the application."*

13. She went on to state that the appropriate warning to be given to potential jurors was as follows:-

> *"That if a potential juror should feel that for any reason he or she cannot give the accused man a fair trial based on the evidence, that that should be communicated to the judge before taking the oath."*

14. In *DPP v. Haugh* [2000] 1 I.R. 184 at p. 193, O'Donovan J. stated in the course of his judgment:-

> *"However, from the point of view of safeguarding a fair trial for the accused, I think that the provisions of ss. 15(3) of the Act are most significant. In this regard, by virtue of the provisions of that subsection, the trial judge is required to warn jurors that they must not serve if they are ineligible, or disqualified and he must invite any of them who, inter alia , may have an interest or connection with the case, or the parties thereto, to communicate that fact to him (the judge), if he is selected on the ballot. Accordingly, the subsection has built into it a procedure whereby a potential juror is specifically advised of the circumstances under which he may not serve as a member of a jury in any criminal trial and is invited to disclose to the court any circumstance whatsoever which might raise a question mark against his or her impartiality. To that extent, therefore, an accused person is protected from a potentially prejudiced juror. Needless to remark, this assumes that all potential jurors are honest and forthcoming and that they respond appropriately, candidly and conscientiously to the trial judges warning and invitation."*

15. Juries have, time and time again, shown themselves well capable of acting responsibly and discharging their duty to determine an accused be guilty or not guilty in accordance with evidence presented in the course of the trial. Irish juries are regularly called upon to consider the guilt or innocence of persons charged with rape and various types of sexual offences including, on occasion, where the accused is a foreign national or a member of a non-Christian religion. To assume, or indeed to have any significant concern, that racial or religious prejudice was a significant feature in Irish society to the point that the probability of a fair trial could or should be called into question is, in the Court's view, without foundation. It is quite likely, as the learned trial judge observed in this case, that any special or unusual warning or advice to a jury panel to consider excluding themselves from service on a jury because of possible prejudice against Muslims or foreigners would simply be considered insulting and be entirely counter productive. It would also needlessly draw attention to such cultural differences, if any, as exist or are generally perceived to exist with respect to the gender dynamics, between men and women in certain foreign countries, and also with respect to the followers of non-Christian faiths when compared to Irish society.

16. The Court is satisfied the jury in this case were adequately and sufficiently warned and advised in relation to their suitability to

serve on the jury. Indeed, the fact that the jury disagreed in relation to two specific counts is strongly suggestive of the fact that the jury took their duty to fairly try the appellant seriously and were not prejudiced or biased against him because of his religion, colour or nationality.

Application to sever the Indictment

17. Section 6(3) of the Criminal Justice (Administration) Act 1924 provides:-

> "6.(3) Where, before a trial, or at any stage of a trial, the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment."

18. The appellant sought to sever the Indictment by separating the offences of threatening to kill (being counts 4, 5, 6 and 7) from the offence of assault causing harm (being count 1), the offence of rape (being count 2) and the offence of threatening to kill (being count 3). In particular, it was submitted that the inclusion of counts 4, 5, 6 and 7 would render it more likely, in the minds of the jury, that the appellant had committed the more serious offence of rape. It was submitted that the focus of the jury's deliberation should be on the *primary* offence of rape and that the inclusion of the other counts simply served to prejudice or embarrass the appellant in the minds of the jury. It was submitted that the threats to kill were not referable to the offence of rape and that they should therefore be considered as stand alone offences. It was submitted on behalf of the appellant that the jury, in dealing with all the counts taken together, would be exposed to a constant repetition of the appellant's bad behaviour in relation to his wife.

19. The learned trial judge rejected the application. She stated:-

> *"I'm satisfied that the evidence shows an ongoing relationship between the accused man and the complainant and that makes the evidence relevant to the counts on the indictment and it is relevant and necessary for the jury that the matters be tried together. In considering whether an accused person would be in any way prejudiced, that is a specific accused, in having to defend a multiplicity of allegations, I do not think and am not satisfied that this is one of those types of cases. The prosecution contend that the alleged conduct of the accused is relevant both before and after the alleged event, i.e. the allegation of rape. And that furthermore, it is significant that in interview the accused man, when interviewed regarding the allegation of serious assault, also made reference to the alleged threats alleged to have occurred prior to the attempted section 4 allegation. The prosecution contend that this demonstrates a course of conduct which should be considered by the jury; otherwise, in the absence of such, the jury would not have the complete picture.*
>
> *I do not accept that the timeframe as set out in the indictment as regards the alleged allegations under section 5 is excessive. The prosecution's argument that the evidence may disclose that this was a course of cumulative conduct, I accept that particular argument. I do not accept that the matter is unduly complex. I'm perfectly satisfied that the jury properly charged and to consider each of the counts separately would be more than capable to deal with matters. I don't see that there is any basis for severing the indictment and I refuse the application."*

20. In the course of her ruling, the learned trial judge referred to *Ludlow v. The Metropolitan Police Commissioners* [1971] AC29. In that case, Lord Pearson said:

> *"…It is important to notice that there has to be a series of offences of a similar character. For this purpose, there has to be some nexus between the offences…nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series. The nexus requisite to establish a series of offences of..a similar character..may be satisfied by the cross admissibility of evidence."*

21. Lord Pearson also stated:-

> *"[T]he manifest intention of the Act is that charges which either are founded on the same facts or relate to a series of offences of the same or of similar character properly can and normally should be joined in one indictment. And a joint trial of the charges will normally follow although a judge has a discretionary power to direct separate trials…The judge has no duty to direct separate trials.. unless in his opinion there is some special feature of the case which would make a joint trial of the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice."*

22. In order to establish the extent of the nexus between the various counts before the jury it is necessary to examine them individually and in some detail. Count 2 is the rape offence committed on the 25th May 2014. It occurred in the family home and was accompanied by a threat to kill the complainant (being Count 3). The background to the rape and the threat was the appellant's concern that the complainant intended to separate from him, and subsequent to the rape, her pretended agreement to stay together in an effort to calm the appellant and protect herself from him. Prior to the rape there was evidence of a row in the course of which the appellant grabbed the complainant, pushed her against a door and head butted her causing her nose to bleed. This incident occurred three weeks prior to the rape, on the 2nd May 2014, and was the subject of Count 1. While the issue of their separation was not specifically referred to in the course of this incident it is relevant to note that the complainant had told the appellant a few weeks earlier of her intention to separate.

23. Count 4 relates to an incident which occurred on the 26th May 2014, the day following the rape and threat to kill. By then the appellant had obtained a barring order from the District Court and had moved, with her young son, into her parent's home. The complainant said in evidence that the appellant had said to her over the telephone that *"I am never going to leave you with A, you are dead, O"*. The complainant's threat to separate from the appellant, or more accurately their separation at this point in time was clearly inextricably linked to the appellant's threat to kill his wife on this occasion.

24. Count no. 5 concerned another threat to kill the appellant made in the course of a telephone conversation. That count was the subject of a direction to the jury to make a finding of not guilty. The incident which was the subject matter of Count 5 was alleged to have occurred on the 8th June 2015. On the following day, the 9th June 2015, the incident which is the subject matter of Count no. 6 occurred. The background to this was a telephone call from the appellant to the complainant in which he specifically referred to her having attended earlier in the Family Court. The complainant was approached by the appellant outside Dunnes Stores and he said to her *"I know everywhere you have been today, I know everything you have done"*, *"the next time I come you won't see me coming"* and he threatened her that the next time he would have a hammer.

25. Count 7 related to an incident which occurred on the 1st August 2014 at Dawson Street following an agreed meeting between both parties. On this occasion the appellant threatened the complainant in the following terms *"You are to drop all this barring order stuff because I am going to do you serious damage"*. Again, as with the previous incidents the background and precipitating factor was the breakdown in the marital relationship, their proposed or actual separation and the fact that the appellant had obtained a barring order arising therefrom.

26. This brief recounting of the details relating to the incidents which formed the basis of the seven counts, and which is based on the summary of the evidence given to the jury by the learned trial judge in the course of her charge, (and which was commented on by counsel for the appellant as having been done *fairly*), serves clearly to emphasise the strong nexus as between the various counts. The incidents, the subject matter of the various counts, were very clearly closely related and formed a series of closely linked transactions in which the appellant perpetrated and threatened violence against the complainant within a number of weeks and in circumstances where the precipitating factor for the appellant was the proposed and/or actual decision by the complainant to separate and leave the family home with her young son, and to seek the Courts' assistance in that process.

27. In *DPP v. McNeill* [2011] 2 I.R. the issue for consideration by the Supreme Court was the decision by the trial judge to allow evidence before the jury of prior sexual impropriety between the accused person and the complainant. While the circumstances of that case are clearly distinguishable from the instant case the legal principles to be applied to both are broadly similar. In the course of her judgment, Denham J. (as she then was) said (at para 50):-

> *"In considering whether background evidence may be admitted, relevant consideration may include:-*
>
> > *(i) Consideration of whether the background evidence is relevant to the offence charged.*
> >
> > *(ii) Consideration of whether background evidence is necessary to make the evidence before the jury complete, comprehensible, or coherent. Whether without such background evidence the evidence may be incomplete, incomprehensible or incoherent.*
> >
> > *(iii) Consideration of evidence of the commission of an offence with which the accused is not charged, but that is not of itself ground for excluding the evidence.*
> >
> > *(iv) Consideration of whether the background evidence may be necessary to show the real relationship between relevant persons.*
>
> *The test to be applied by the court is whether the background evidence is relevant and necessary. The test is not that it would merely be helpful to the prosecution to admit the evidence."*

28. The learned trial judge was particularly careful in the course of her charge to the jury to emphasise the fact that each of the counts were to be considered separately in the course of their deliberations. She said:-

> *"Now, you know there are a number of different charges on the indictment and each offence gets a separate trial. So each count must be given separate consideration by you. The various counts or charges on the indictment are there for the sake of administrative convenience and that means for the sake of administrative convenience and where it is fair, the law permits a number of charges to go before the same jury based on the evidence in a single trial. So, there is no question therefore as you can see that if your decision goes in favour of the prosecution on one count, that this should influence your decision in relation to the other counts. Equally, if your decision goes in favour of the accused in relation to one count, this does not mean that an effect of falling dominos should bring the other counts with that verdict."*

29. In the instant case, given the obvious and close connection between the incidents relevant to the different counts it would have been almost impossible, from a practical perspective, to expect that evidence, and in particular the evidence of the complainant relating to, for example, the rape count would exclude any reference to the other violent incidents which are the subject of other counts. It would have been extremely difficult for the complainant to tell her story without referring to and disclosing the series of events which occurred either individually or in their totality. Furthermore the background to the rape incident, if recounted by the complainant without reference to the other incidents which are the subject of those counts sought to be severed would serve only to provide the jury with a false and truncated version of the *whole truth*. To have proceeded on the basis that the counts, or some of them, ought to be severed on the Indictment would almost certainly have been a recipe for disaster.

30. The Court is therefore satisfied that the learned trial judge was correct in her refusal to accede to the application to sever the Indictment. This ground of appeal is therefore dismissed.

The bad character evidence

31. On Day 7 of the trial counsel for the prosecution questioned the appellant in the following terms:-

> • *Q. Now, did you say anything to them as they came up to give their evidence?*
>
> • *A. When?*
>
> • *Q. During this trial?*
>
> • *A. No.*
>
> • *Q. I'm just wondering if you said to either or both of those guards, "You fucker" as they walked behind you, did you say that?*
>
> • *A. Absolutely not."*

32. The background to this questioning of the appellant was the belief on the part of counsel for the prosecution that the appellant had muttered the words *"you fucker"* when in close proximity to garda witnesses within the court room. While it was acknowledged by Mr. Munro S.C., (counsel for the appellant), that ordinarily vulgar abuse on its own is not normally evidence of misconduct, he suggested that the position was different in the particular context in which it had been imputed to the appellant on this occasion, and that the effect of the question was to cause maximum prejudice to the appellant.

33. The application made to the learned trial judge to discharge the jury on the basis of the question asked of the garda witness was rejected. In the course of her ruling, the learned trial judge stated:-

> *"I am satisfied that the question which was asked does not in fact show or tend to demonstrate that the accused man is a person of bad character. The position is that the matter must be considered with proportionality. I must of course ensure that the accused man received a fair trial. But in my view, the question asked did not give rise to a suggestion of intimidation on the part of the accused man or anything even approaching that. And one must apply one's common sense in a consideration of the question which was asked. It is also the position that the speedy intervention by counsel for the defence and prosecution counsel proceeded to move on. The accused's man denied any such conduct or saying any such remarks and it is and I am satisfied that it is simply then the position that the question asked amounts to a suggestion by counsel which is not evidence in the case. And the words, in my view, certainly do not amount to anything approaching a threat. And, or simply, and can be considered to be such as a situation which comes about and arises from time to time in the tense circumstances of a criminal trial. And it is the position, and I repeat the accused man rejected any suggestion that he said any such thing".*

34. This Court finds itself in agreement with the views expressed by the learned trial judge. The crucial words in her ruling were *"proportionately"* and *"one's common sense.."*. The remark suggested as having being made by the appellant was no more than a derogatory reference to a garda witness. The jury would have appreciated the likelihood that a person accused of serious criminal offences, and who had been the subject of an extensive garda investigation might harbour less than friendly thoughts towards members of An Garda Síochána. It is unlikely that a jury would have ignored their common sense and considered an off the cuff swear word directed at a garda witness to be evidence of *misconduct* to the point where they would consider it supportive of the appellant's guilt in relation to the substantive charges facing him in the trial. To the extent that it suggested misconduct on the appellant's part it was relatively minor and trivial. It certainly was well short of, for example, evidence of a previous conviction or other grievous misbehaviour.

35. It is not uncommon that raised voices, outbursts and other expressions of anger or frustration on the part of accused persons are overheard by juries. Save in exceptional circumstances, such an event would not justify a jury being discharged. To have discharged the jury on this occasion would have been, in the Court's view, unnecessary and disproportionate.

36. This ground of appeal is therefore dismissed.

Garda Aoife Duggan

37. The final ground of appeal relates to Garda Aoife Duggan. Garda Duggan had not been named as a witness in the Book of Evidence. She had taken a written statement from the complainant on the 9th June 2014 in relation to the incident relevant to Count 6, in the context of her investigation of a possible breach of the barring order against the appellant. Garda Duggan made a statement in which she said she had asked the complainant if she wished to pursue a complaint against the appellant and that she had informed Garda Duggan that she did not wish to do so *at this time*. However, it was maintained that the complainant had indeed wished to pursue the complaint, contrary to what Garda Duggan had maintained. A complaint was subsequently made on behalf of the complainant to a garda superintendent in relation to Garda Duggan. Garda Duggan then became the subject of an internal disciplinary investigation within An Garda Síochána. These matters were all disclosed to the defence.

38. It was submitted on behalf of the appellant that the application made by counsel for the appellant to the effect that Garda Duggan should be called as a prosecution witness and thereby be amenable to cross examination ought to have been acceded to.

39. In the course of her ruling the learned trial judge said:-

> *"..the prosecution have very clearly indicated that it is not the intention of the prosecution to call these witnesses primarily because Garda Duggan and Garda Lawless are under investigation in relation to the manner of the investigating of these particular matters of the 9th June 2014. And Ms. Gearty has very clearly stated the Director's position, that the Director does not consider these gardai to be witnesses of truth and therefore there is no obligation whatsoever upon the State to call witnesses, who they do not believe be worthy of credit. There is the option of an application which can be made by the defence to seek witness orders to call certain witnesses and which would by necessity make them defence witnesses. I do not see in this particular instance that I should direct the prosecution to call any of the witnesses, either Garda Duggan, Garda O'Donovan or Garda Lawless as prosecution witnesses. I do not consider it is one of those category of cases where I should exercise any discretion to do so and I refuse the application."*

40. The decision of the learned trial judge to reject the application to call Garda Duggan was reasonable and correct. Garda Duggan could have been called as a witness by the defence and could have been questioned in relation to the subject matter of interest to them. Garda Duggan could simply have been asked to recount the details of her contact with the complainant on the date in question by reference to any note or memorandum prepared by her in relation thereto. That would have yielded evidence to the jury that it was her understanding that the complainant had declined the opportunity to pursue a complaint against the appellant at that time.

41. The mere fact that the opportunity to cross examine a witness would facilitate a more robust questioning of a witness that might reasonably be expected to emerge from an examination-in-chief, with the result that evidence from that witness could, speculatively, be supportive of the case for the defence cannot, of itself, be a reason for requiring the prosecution to call that witness simply for the purpose of making him or her available for cross examination.

42. This ground of appeal is therefore dismissed.

Conclusion

43. As none of the grounds of appeal argued on behalf of the appellant have succeeded the Court will therefore dismiss the appeal.