THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 108

Record No.: 37/2014

Mahon J.
Edwards J.
Hedigan J.

Between/

The Director of Public Prosecutions

Respondent

- and–

Zachary Coughlan Ryan

Appellant

JUDGMENT of the Court delivered on the 30th day of March 2017 by Mr. Justice Mahon

1. The appellant has appealed his conviction at Limerick Circuit Criminal Court on 24th October, 2013 on two counts, namely:

(1) Count 1; False imprisonment contrary to s. 15 of the Non-Fatal Offences against the Person Act, 1997, and

(2) Count 2; False imprisonment contrary to s. 15 of the Non-Fatal Offences against the Person Act, 1997

The conviction followed a 14 day trial and a unanimous jury verdict.

2. The appellant was sentenced on 28th January, 2014 to concurrent sentences of eight years and three months. The sentences were directed to be served consecutively to a two year prison sentence imposed in Castlebar Circuit Court on 21st January, 2014.

3. In summary, the background facts are as follows; overnight on the 19th/20th August, 2012 two men, Stephen Cusack and Niall Reddan, were falsely imprisoned at an address in Castletroy, County Limerick by three men including the appellant. The hands of both men were tied with cable ties and they were gagged. They were then taken to a derelict house near Ballyclough in County Limerick where Mr. Redmond was released. Mr. Cusack was then taken to a field at Donoughmore, County Limerick from where he made good his escape.

4. The prosecution case was that it was intended to hold Mr. Cusack for ransom in order to facilitate a robbery of a post office in which Mr. Cusack's mother was employed.

5. The prosecution case relied on recognition evidence by Mr. Cusack at an identification parade at Henry Street Garda Station on 29th August, 2012 based on his view of the appellant on the evening of the offence.

6. The appellant's grounds of appeal, including the third ground which he belatedly sought leave of the Court to add, are as follows:

(i) The learned trial judge erred in law in failing to discharge the jury when requested by the defence following the evidence, before the jury, of a prosecution witness that the appellant had been in prison previously and to the effect that the appellant had previous convictions.

(ii) The learned trial judge erred in law and in fact in failing to sufficiently contextualise the warning pursuant to *AG v. Casey (No. 2)* [1963] I.R. 33 in respect of identification evidence upon which the prosecution relied wholly or substantially.

(iii) The appeal against conviction should be allowed as the verdict remains unsatisfactory as the evidence indicates a significant reasonable risk that the prosecution witness, Stephen Cusack, was informed in advance of the identification parade or after the parade in advance of the trial, that the appellant would be participating or had been a participant in the parade which renders the evidence at trial valueless in the context of a prosecution which is reliant wholly or substantially on the correctness of the identification evidence.

7. No issue was taken by the respondent on the application to add the ground of appeal, and the appeal proceeded on that basis.

8. Oral submissions were heard in respect of the first ground only, and this judgment relates only to that ground.

9. In the course of examining a witness, Ms. Troy, on the twelfth day of the trial prosecuting counsel asked her:-

"And can you remember any particular night upon which that happened?", to which she responded, *"I don't. He was over and back as I told you when he got out…"*

10. In the course of her evidence Ms. Tara Troy confirmed that she knew the appellant, and pointed him out in court. She was then asked:

"Q. … and do you remember when you first came across Zachary Coughlan?

A. I do.

Q. When was that?

A. Whenever he got out of jail the last time."

11. Prior to this point in the trial, the jury was unaware that the appellant had any previous record or had been imprisoned. In fact, the appellant had been in prison on more than one occasion. Following upon this evidence being given to the jury, counsel for the appellant applied to the learned trial judge to discharge the jury. He refused that application, stating,

> *"There is an application now to discharge the jury on the basis that the … last civilian witness, Ms. Troy, said that she first got to know the accused the last time he came out of prison. Well this was evidence given by Ms. Troy who is a witness for the prosecution. She was on the book of evidence, but was not going to be called for the prosecution, but was called at the instigation of the defence. That is the first point. Secondly, this matter was said by Ms. Troy, not as – it was an answer which was not invited by the prosecution. It was an answer that came from her at no invitation of the prosecution. And accordingly I will not discharge the jury. I will tell the jury of course that it is irrelevant. And that it is a matter that they should not take into account and I expect that they will not take it into account, just as much a judge who knows about these matters does not take it into account either."*

12. The learned trial judge added,

> *"I want to keep the jury".*

13. The basis for the application to discharge the jury was that their minds had been tainted by Ms. Troy's revelation of the fact that the appellant had previously been in prison on more than one occasion, and that such evidence was seriously prejudicial to him and rendered a fair trial impossible.

14. The application to discharge the jury was again made on behalf of the appellant at the close of the prosecution case. Again, it was refused by the learned trial judge.

15. The issue was addressed by the learned trial judge in his charge to the jury, thus:-

> *"Now, the last think I want to mention as regards the .. before I go into .. give you a resume of the case is the fact that Ms. Tara Troy in the course of her evidence referred to the fact that the accused had previously been in prison. She should not have said that, and the reason she should not have said that is that such matters are not put before a jury - a jury does not hear such matters for a very good reason. A jury is asked to consider the evidence as it is and not to consider - to take into account previous matters adverse to the accused because you are to consider the evidence against him in this particular case and not be influenced because if you were influenced by any previous record of the accused that would be wrong. So you have to put that out of your mind. Now this is important. That is not to feature at all in your considerations and if anybody brings it up in the jury room the other jurors should say no, this is - we are to take this case and run it on the basis that this man is a man of good character. This came out by Ms. Troy. She shouldn't have said it, and because she shouldn't have said it you are to ignore it and not put any reliance on it. And, members of the jury, I am sure you will do that. And I am sure you will understand the reason for this. I mean some people do say, well all of this should be made known to the jury, but the law is that it shouldn't, and there is a very good reason for it, and it's a commonsensical reason as well, and I know you will observe this and not take it into account."*

16. The trial judge was requisitioned on behalf of the appellant in the following terms:

> *"Now with regards to Tara Troy your Lordship said it shouldn't have been said. Ooh, tut tut tut, this is America, strike it from your mind, strike it from the record, as if that makes things better as if that makes things better. Your Lordship gave it the rub a dirty rag in an attempt to clean it up by the suggestion that he might have been in jail before has nothing to do with this. And yet your Lordship must have a pain in his jaw from telling people and the people of Limerick generally that people who commit previous offences are more likely to have committed this one than another and that's your Lordship in handing down sentences on pleas. So I don't understand what your Lordship is at with regard to this. I suggested to you at the time that this was completely beyond remedy. It clearly is so now. The very least your Lordship could have done: and I am not your Lordship and I am not marking your Lordship's card - people in this jurisdiction has gone to jail for stealing a loaf of bread. People in this jurisdiction, women have been taken from their children for not paying their t.v. licence. My client might have seen the inside of a prison for driving without insurance, which would give him a perfect reason for not driving: not been seen to be driving. But that might be fair to him, so it is a matter entirely for yourself what to do. It is not good enough to give it a light rub of the rag to suggest that I make comment on the absence of CCTV. This is the Braddish point I said to you."*

17. The learned trial judge agreed to re-address the jury on the evidence from Ms. Troy. He stated:-

> *"…when I mentioned the fact that one witness had said - alluded to the fact that the accused had been in prison and I said to you in the strongest terms possible that that is not to be taken into account, it is of course possible that he was in custody for relatively minor matters. I mean, people do go to prison for relatively minor matters and that's quite possible. But in any event, as I say, you are not to take that into account. .."*

18. Inadmissible evidence finds its way into many trials, usually accidently and inadvertently. When it does, its prejudicial effect will vary from case to case, obviously very much depending on what has been stated to the jury or how it might be interpreted by the jury. It is well established and long accepted that a jury should only be discharged where the prejudicial effect is significant and it is not possible to counter that prejudicial effect by suitably warning or directing the jury. Juries have proven themselves time and time again to be willing and capable of heeding judicial warnings and instruction and of acting appropriately in response thereto.

19. In *Dawson and Or v. Irish Brokers Association* (6th October, 1998,The Supreme Court) O'Flaherty J. stated:-

> *"Even if inadmissible evidence gets in, the jury should be taken as likely to abind by the trial judge's ruling in all matters of all and by their oath to do essential justice between the parties… Oh, once again, it is necessary to reiterate as this court is doing with increasing frequency that the question of having a jury discharged because something is said in opening a case or some inadmissible evidence gets in should be a remedy of the last resort and only to be accomplished in the most extreme circumstances. Juries are much more robust and conscientious than is often thought. They are quite capable of accepting a trial judge's ruling that something is irrelevant or should not have been given before them as well as in the face of adverse publicity."*

20. In *D v. DPP* [1994] 2 I.R. 465, Finlay C.J. said:-

> *"I am satisfied that there is much strength in the argument submitted on behalf of the DPP in the hearing of this appeal that this court should not disregard both the capacity of a trial judge strongly and effectively to charge a jury in a manner which would indicate beyond question their obligation to try the issues before them only on the evidence adduced, and the robust common sense of juries who might well ignore dramatic or sensational newspaper articles."*

21. In *King v. A.G.* [1981] IR 233, McWilliam J. stated:-

> *"One of the concepts of justice which the Courts have always accepted is that evidence of previous convictions shall not be given at a criminal trial except at the instigation of the accused, as that could prejudice the fair trial of the issue of the guilt or innocence of the accused."*

22. In *DPP v. Keogh* [1998] 4 I.R. 416, Kelly J. (as he then was) referred with approval to the views expressed by McWilliam J. in *King.* He said:-

> *"This statement is so well known that it hardly requires elaboration. It is a principle which is to be found not alone by reference to the constitutional concept of justice which imports fairness and fair procedures, but also by reference to the common law*

23. In *R v. Hope and Another* [1976] 2WCA Crim, Milmo J., referring to the seriousness of the disclosure of a previous conviction to a jury, stated:-

> *"It is well settled that in the event of a prisoner's previous conviction being improper or accidently revealed in the course of a trial, the judge has a discretion whether or not to discharge the jury.."*

24. It is necessary therefore to consider the exercise of the discretion not to discharge the jury taken by the learned trial judge in the instant case in the particular circumstances that arose. Those circumstances can be usefully summarised as follows:-

> (i) The trial was a lengthy trial. The relevant evidence was given by Ms. Troy on the twelfth day of the trial, the second last day of evidence in the trial.
>
> (ii) The relevant evidence was given by Ms. Troy in response to questions put to her by prosecution counsel. There is however no criticism of prosecution counsel for the questions asked and he could not have been aware in advance of the responses provided by Ms. Troy.
>
> (iii) Ms. Troy's response *"whenever he got out of jail the last time"* suggested that the appellant had spent time in prison on more than one occasion.
>
> (iv) The subsequent use of the phrase by Ms. Troy "when he got out" was, in the context in which it was stated, a reference to the appellant having been in prison.
>
> (v) In his charge to the jury the learned trial judge emphasised that these remarks of Ms. Troy should be ignored by them, that they were to consider their verdict on the basis that the appellant was a person of good character, and that time spent in prison may have related to minor offending.

25. The process of exercising the discretion whether or not to discharge a jury is one which ought to be carried out by a trial judge on the basis of a full analysis of the relevant facts and a decision made based on the extent of any likely prejudice to the accused, and whether any such prejudice can be sufficiently countered in the charge to the jury at the end of the trial. On occasions, it will be appropriate for a judge not to refer at all in his charge to the inadmissible evidence in question to avoid reminding the jury of it, or emphasising the inadmissible evidence or comment which may have, in the intervening period, been forgotten.

26. The exercise of discretion by the trial judge whether or not to discharge a jury has to be undertaken in the light of the particular facts of each case, but always subject to the primary consideration as to the extent of the prejudicial effect of the inadmissible evidence on the jury and any likely consequential undermining of the accused's right to a fair trial.

27. In the course of his ruling refusing the application to discharge the jury because of Ms. Troy's remarks, the learned trial judge essentially provided two reasons for his decision. They were:-

> *"• Well…, this was evidence given by Ms. Troy who was a witness for the prosecution. She was on the book of evidence, but was not going to be called by the prosecution, but was called at the instigation of the defence. That's the first point.."*
>
> *"• Secondly, this matter was said by Ms. Troy, not a - it was an answer which was not invited by the prosecution. It was an answer that came from her at no invitation of the prosecution."*

28. The learned trial judge does not appear to have analysed the prejudicial effect of the evidence in question. His *first point* was that Ms. Troy was called as a witness by the prosecution *at the instigation of the defence*. However, in the court's view that is not particularly relevant. The fact is that Ms. Troy was called as a witness and as such her evidence was heard by the jury. The situation would not necessarily have been different if she had been called as a witness for the defence, absent any suggestion of orchestration in the giving of such evidence.

29. The second reason given by the learned trial judge for his decision not to discharge the jury was that the evidence given by Ms. Troy was a response *not invited by the prosecution*. She gave her answer *at no invitation of the prosecution*. However, in the particular circumstances of this case, the fact that the inadmissible evidence was not invited by the prosecution is irrelevant. The fact is that the inadmissible evidence was given and was heard by the jury.

Conclusion

30. The court is satisfied that the prejudicial effect of the words spoken by Ms. Troy was significant. In particular, the fact that Ms. Troy's remarks were, in effect, a reference to the appellant having been in prison more than once is of considerable concern. It created a real risk that the jury would, notwithstanding the strength of any judicial instruction to the contrary, approach its

consideration of a verdict on the basis either that the appellant was not a person of previous good character or had been to prison on more than one occasion for serious offences. There is the added factor that Ms. Troy's inadmissible evidence came at a very late stage in a very lengthy trial and shortly before the jury retired to consider its verdict, so that the matter may still have been fresh in their minds. There was insufficient time for a *fade factor* to set in and thereby come to the trial's rescue Indeed the nature of the offences which were the subject of the trial were such as might reasonably suggest to the average lay person that the appellant's previous prison sentences were unlikely to have been for minor offences.

31. In the circumstances the court has concluded that the jury ought to have been discharged in the wake of Ms. Troy's inadmissible evidence. It will therefore allow the appeal on ground one and quash the appellant's conviction. In these circumstances the court does not consider it necessary to proceed to deal with the second and third grounds of appeal.

32. The court will proceed to hear submissions as to whether or not a retrial is to be ordered.