THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

19/2014

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Andrew Gibney

Appellant

JUDGMENT of the Court delivered on the 1st day of November 2016 by

Mr. Justice Sheehan

Introduction
1. On the 28th January, 2014, following a ten day trial the appellant was convicted by a 10 – 2 majority of murdering Gerard Burnett on the 21st August, 2012 at Castlecurragh Vale, Mulhuddart, Co. Dublin. He was sentenced to life imprisonment.

2. The appellant appeals his conviction on a number of grounds which have been classified under seven headings in the written submissions filed on his behalf. These are:-

1. Mr. Lee Dalton's statement should not have been admitted under s. 16 of the Criminal Justice Act 2016, because:

(a) the statement was inherently unreliable due to the pressure to which Mr. Dalton had been subjected by gardaí as a suspect/accomplice and his drunkenness at the time of the relevant events;

(b) the process of noting interviews leading to the statement was proven to be unreliable and there was no explanation for the failure to video record the statement.

2. The procedure permitted by the learned trial judge in deciding whether to admit the said statement under s. 16 was unfair and justice was not seen to be done since a crucial garda witness was permitted to view certain video recordings prior to be cross examined.

3. The prosecution unfairly commented to the jury that Mr. Dalton was not cross examined by the defence and the learned trial judge refused to direct the jury on that matter as to the law regarding how the s. 16 statement should be considered as to reliability, accuracy and credibility and the said comment by the prosecution in particular where the prosecution was relying on a literal interpretation of the remarks attributed to the appellant.

4. The learned trial judge misdirected the jury in failing to permit manslaughter to be considered as a verdict depending on the jury's consideration of the appellant's *mens rea* and role in the group or joint enterprise and in refusing to give certain directions in that regard.

5. The learned trial judge misdirected the jury in respect of reasonable doubt to the effect that such a doubt should be sufficient to be decisive in an important life choice, as opposed to be sufficient to cause hesitation.

6. The learned trial judge refused to direct the jury as to the character of the appellant to the effect that character evidence could be taken into account in assessing the credibility of the confession and the question of whether the appellant was guilty of murder.

7. The learned trial judge refused to direct the jury as to hearsay/opinion evidence given by a senior garda which was relevant to the possibility that the two youths who remained behind to attack the deceased inflicted the fatal damage at that time.

Background
3. The appellant was one of a number of youths who had been drinking together in a house before they went to the home of the deceased man armed with knives. The deceased was dragged from his home, beaten and stabbed to death. He received 30 stab wounds, six of which were described as being serious and the cause of death. The remaining wounds were described as shallow. There was evidence to suggest that two youths remained behind attacking the deceased after the others had run away.

4. Ms. Denise Farrell, partner of the deceased man gave evidence to the effect that a group of men knocked on their front door late at night. Ms. Farrell stated she heard someone saying "are you Gerard Burnett". The deceased man replied "yeah, why?" to which one member of the group replied "Ger Burnett you're fucking dead". Ms. Farrell further stated that one of the men in the group ran towards the door with something sharp in his hand, at which point she made her escape with their young child.

5. A significant part of the prosecution case was an uncontested admission by the appellant that he had been involved in the attack

on the deceased. The appellant went to Finglas garda station with his father and stated: "I was involved in the incident, the chap is dead now and I need to give him peace".

6. He was subsequently cautioned and told the gardaí that he had a knife and stabbed the deceased three times in the side. He said he was very drunk at the time and after he had stabbed the deceased man, he ran back to his own house where he washed the knife that he had used. In the course of the interview he was asked:-

> Q. When did you decide to do this Andrew?
>
> A. The stabbing?
>
> Q. Yes.
>
> A. What time was that at?
>
> Q. Between 11.30 and midnight.
>
> A. About half an hour before.

7. Further evidence of a statement made by a Mr. Lee Dalton was adduced pursuant to s. 16 of the Criminal Justice Act 2006. Mr. Dalton gave evidence contrary to his witness statement stating that he was very drunk on the night in question and could not remember anything after his first drink. He said the gardaí had forced and manipulated him into giving evidence and he sought to retract his signed witness statement which contained a statutory declaration. The statement which was admitted contained the following passage:-

> "Talk came up about Ger Burnett selling drink after hours, the lads were talking about going out to get drink off Ger Burnett. I was in the kitchen at this stage when Andrew Gibney took a knife out of the drawer. This knife had a silver blade with a silver handle. It had a thick blade from what I could remember. That's when they said they were going down to Ger Burnett for drink and Andrew said 'if he got smart he would fucking kill him'. He passed the knife to Glen Keogh and Glen Keogh passed it back to him. Andrew was waving the knife in front of him and that's when I put my hand on the handle of the knife and told him to put it down. They were in a group saying 'Ger Burnett was a prick and a wanker' and that they would kill him."

8. While counsel for the appellant proceeded with all grounds of appeal, his principal focus was on ground 4.

9. Mr. O'Lidheadha S.C. contended on behalf of the appellant that the trial judge had failed to direct the jury on the partial defence to murder which he had advanced on behalf of his client. He maintained that this defence was open on the facts of the case and would have allowed the jury to bring in a verdict of manslaughter. Put another way counsel contended that the jury should have been asked to consider two different joint enterprise possibilities namely:

> (i) In the first instance the jury should have been asked to consider whether or not as the defence had contended, the appellant had engaged in a unlawful and dangerous act with intent to cause harm falling short of an intent to kill or cause serious harm, that he caused harm and then withdrew, the fatal stab wounds being inflicted by one or both of the assailants who remained at the scene attacking the deceased.
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> (ii) The second scenario was whether or not the appellant had participated in a joint enterprise to kill or cause serious injury to the deceased having that intent at the time.

10. The prosecution had always maintained that this was a joint enterprise case. In the course of written submissions, counsel for the respondent submitted that there was no basis to argue that the appellant did not intend to cause anything less than serious harm. Counsel pointed out that the appellant went with a gang of others armed with a knife; what might be done to the deceased was discussed prior to departure from the house where the youths had been. The evidence was that at least two and possibly three knives were used in the attack. There were 30 stab wounds inflicted and the appellant admitted to causing three of those stab wounds. He was a principal offender in the attack. Given that the appellant admitted to being a principal coupled with the nature of the injuries (there being a total of 30 stab wounds) there was no reasonable basis for a manslaughter charge and the trial judge was correct in declining to give one.

11. These submissions however, must be seen in light of the fact that the prosecution stated they could not say who had inflicted the fatal stab wounds nor could they say that the only inference to be drawn from the appellant's admissions was one indicating at least an intent to cause serious harm. Counsel for the appellant had also pointed out that the jury had been warned to take special care when considering what weight if any, was to be attached to the s. 16 statement of Lee Dalton. If the jury chose to attach no weight to this statement or to reject it, then the only direct evidence about a prior discussion and the fact that the appellant had the requisite intent for murder was no longer in the case. In those circumstances a manslaughter verdict was very much a possibility. In submitting that the trial judge was correct in refusing to allow this defence to go the jury, counsel for the respondent had relied on the s. 16 statement of Lee Dalton.

12. Counsel for the appellant relied on the evidence of the State Pathologist who had described 24 wounds as being shallow and apparently at one stage as not being serious. It was also argued that the word "kill" could have been used in a colloquial sense meaning "to beat up". It was also submitted that there was no evidence that the appellant had heard the words "you're dead Burnett" being used by someone in the group when he arrived at the deceased's house.

13. In the course of his submissions counsel relied on the judgment in *R. v. Jogee* [2016] UKSC 8. Both parties agreed that this case provided a helpful overview of the law on joint enterprise.

14. Counsel for the appellant relied inter alia on para. 96 of that judgment:-

> "If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v. Church* [1965] 1 QB 59, approved in *Director of Public Prosecutions v. Newbury* [1977] AC 500 and very recently re-affirmed in *R v. F (J)* &

> *E (N)* [2015] EWCA Crim 351; [2015] 2 Cr.App. R 5. The test is objective. As the Court of Appeal held in Reid, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a *fortiori*, but manslaughter is not limited to these."

15. Counsel for the appellant pointed out that a prosecution witness had stated that there was a gap of up to ten seconds between those who fled the scene first and the last two attackers. Counsel for the appellant had maintained that it was open to the jury to hold that in this period of time the violence had escalated resulting in the fatal stab wounds then being inflicted when the appellant was not present.

16. The question that we have to decide is was the defence advanced on behalf of the appellant open on the evidence. In this regard paras. 93 and 94 of the *Jogee* judgment have some relevance:-

> "93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.
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> 94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances."

17. While we fully appreciate how unattractive this defence may have seemed to the trial judge, it seems to us that it is one which was stateable and a matter for the jury to decide. The trial judge was in error in refusing to put this defence, which counsel for the appellant had raised not only by way of requisition, but had also raised when invited by the trial judge to make suggestions to him as to what he might deal with in his charge to the jury. Accordingly we allow the appeal on this ground and it is therefore unnecessary to consider the remaining grounds of appeal.

18. We direct a re-trial.