



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 124

[2012/17]

**The President
Birmingham J.
Edwards J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

KEVIN COUGHLAN

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered by the President on 18th June 2015

1. The Court is first of all grateful to Counsel for their assistance in the submissions that they made on the original hearing of the appeal and on their further submissions now. The Court notes that the Director's submissions were terse, but her position is perfectly articulated, as we understand, by Mr. McCarthy, and it is quite understandable that he should take the position that he does.
2. The Court has a number of issues to address. The primary question is the appeal by Mr. Coughlan against his conviction for murder. That happened on 22nd December 2011 after a trial lasting 13 days in the Central Criminal Court. He was sentenced to life imprisonment on his conviction of murder and that happened on 22nd December 2011.
3. What is the appeal about? The appeal arises out of the evidence of the Pathologist. The Pathologist's evidence was very important in the case, indeed was crucial in the case. The fundamental point made by the defence in the various grounds of appeal, all of which relate to the Pathologist's evidence, is that the defence were presented with conclusions and analyses that had not been notified to them in advance. In fairness to the prosecution, and there was no suggestion of any improper conduct on the part of the prosecution, it came as news to the prosecution, as much as to anybody else, as to some of the evidence that was given by the Pathologist. The Court does not wish to express any criticisms, other than is strictly necessary for the purpose of this ex tempore judgment. But it is clear that everybody in the Central Criminal Court recognised that serious complications were presented by the evidence given by the Pathologist for the prosecution. The only disagreement arose as to the mode of dealing with those complications. Among the difficulties was the basis of the doctor's conclusions; material that he referred to that was not included in his report. He felt, in respect of some of the material, namely, the injuries to the deceased's tongue, that because he had supplied the photographs that went with his report, it was sufficient to do that. Maybe in some circumstances it would be, but the Court is not satisfied that it was in this case. I should not pick out the photographs in relation to the tongue in isolation because the Court is satisfied overall, that by reason of the unsatisfactory mode of presentation of the pathological evidence, the trial was unsatisfactory to that extent.
4. This was a case where the accused was charged with murder. The case against him was that he had forced his victim, for alleged wrongs as perceived by the accused, into the river where the unfortunate man met his death by drowning. That was the case that was made. However, the Pathologist also produced an opinion that the man had been strangled before he got into the river. He had referred to asphyxiation in his report, but he had also referred to the cause of death to be ascertained at some future time. But it is not satisfactory that that should have been ascertained or given for the first time in the witness box when the Pathologist was giving evidence in the course of an important murder trial.
5. The Court is entirely satisfied that the prosecution dealt with this as best they could and the learned trial judge made heroic efforts to try to ensure that fairness would ensue and that everybody would be accommodated as far as possible. But the Court is left with a view that this was ultimately an unsalvageable dilemma; a situation that in respect of the evidence of pathology could not be rescued. The Court finds that the trial, in respect of the pathology evidence overall, despite the heroic efforts of the trial judge and the best efforts of the prosecution, that the net result was unsatisfactory.
6. The Court is also satisfied that the appellant could have been found guilty of manslaughter and that the jury must have been satisfied of facts which prove him guilty of such a crime. That is the essence of the requirement under s. 3(1)(d) of the Criminal Procedure Act 1993. In this respect, there is no dispute as to the fact that the jury could have and would have had to convict of that because Mr. Sammon, Counsel for the appellant, concedes that this is a case of manslaughter. That is one option available to the Court. The other option would be to set aside the conviction and direct a retrial. Another option would be to apply what used to be called the *proviso*, to say that notwithstanding what had taken place, that, nevertheless, no miscarriage of justice had actually occurred. Just to deal with that latter one. The Court is not satisfied to say that no miscarriage of justice could have applied so as to leave the conviction of murder, notwithstanding its views on the pathology evidence. That part of the evidence was just too important in this particular trial. The Court is not making any general ruling in this respect. It is confined to the facts of this particular case. In these circumstances, the Court is not satisfied that the *proviso* would be appropriate. In respect of a retrial, the Court is also satisfied that that is not an appropriate remedy because some, at least, of the same issues would be bound to arise, even if one were to ignore all questions of availability of evidence or of witnesses.
7. In the circumstances, the Court is satisfied, under s. 3(1)(d), to quash the conviction and to find the accused guilty of the offence of manslaughter. This section provides that the Court can (ii) substitute the verdict, which the Court does, and then it provides "(ii) impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence i.e. for manslaughter, not being a sentence of greater severity". That is what the provision says. Does that mean that the Court must do that? The disadvantage is that, firstly, there has been no hearing as to the appropriate sentence in the Central Criminal Court because the sentence for murder is mandatory. Secondly, the difficulty is that the accused would not, in these circumstances, have

a right of appeal. Again, the Court does not want to establish any binding precedent in this respect because it may happen in some other case that that is an appropriate step to take. If this were the Court of Criminal Appeal, which was a Court that was entirely dependent for its jurisdiction on statutory power, the Court might well be limited to that remedy. This Court, however, is a constitutional Court and so it has inherent jurisdiction to take such measures as it deems appropriate in order to do justice.

8. There is a section which can be invoked in any event, irrespective of inherent jurisdiction, and that is s. 3(iii)(e) which empowers the Court on the hearing of an appeal that it may "generally make such order as may be necessary for the purpose of doing justice in the case before the Court". The Court invokes that power as well as its inherent jurisdiction to decide that fairness and justice require, in this case, that the sentence be imposed by the Central Criminal Court so as to afford Mr. Coughlan, if he chooses to do so, a right of appeal to this Court in respect of the sentence imposed, even though that is not expressly stated in s. 3(d)(ii) of the 1993 Act. The Court notes, in this respect, that Mr. Sammon has acknowledged that that is the correct step and there could be no legitimate objection to that, provided there is power to do so, and the Court is satisfied that it has the power to do so. It is clearly in Mr. Coughlan's interest that the matter should be dealt with in that fashion so as to preserve his entitlement to appeal. The Director would also be entitled, in appropriate circumstances, to seek a review of such sentence in the event that the Director was of the view that the sentence was unduly lenient. Everybody's position is preserved by the order thus made which we invoke, the section giving general power and the Court's inherent jurisdiction.

9. Accordingly, the Court sets aside the conviction of murder, replaces it with the conviction of manslaughter, in accordance with s. 3, and remits the matter to the Central Criminal Court for sentence on manslaughter. Mr. Coughlan will be remanded in custody for the purpose of sentence on conviction of manslaughter. He is now a convicted person, convicted of manslaughter, and he is sent to the Central Criminal Court for sentence with a right of appeal on either side. I do not want to make Mr. Coughlan's custody conditional upon his turning up in the Central Criminal Court; he is convicted of manslaughter and he is remanded in custody for the purpose of sentence.