THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Appeal No.: 235/2012

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Elvis Aliphon

Appellant

Judgment *(ex tempore)* of the Court delivered on the 5th day of February 2016 by Mr. Justice Mahon

1. The appellant was tried before a jury and convicted at the Central Criminal Court in April 2011 of four offences, namely:-

- Count No. 1: Harassment contrary to s. 10 of the Non Fatal Offences Against The Person Act 1997;
- Count No. 2: Assault contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997;
- Count No. 3: Theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2011; and,
- Count No. 5: Assault contrary to s. 3 of the Non Fatal Offences Against The Person Act 1997.

2. The appellant was sentenced on 19th June 2012. In relation to counts numbered 2, 3, and 5 the appellant was sentenced, respectively, to four years, one year, and three years imprisonment, said sentences to run concurrently, and to date from 1st March 2010. In respect of count number 1, the appellant was sentenced to two years in imprisonment, such sentence to date from the legal expiry of the sentences imposed in respect of counts 2, 3 and 5. The said sentence of two years was suspended on the appellant entering into a bond in the sum of €10. The effective overall sentence was therefore one of four years imprisonment.

3. The appellant was given bail by the Court of Criminal Appeal on 16th July 2012, and just four months approximately of his sentences remain outstanding.

4. The appellant has appealed his conviction in respect of the harassment offence. (in respect of which the appellant received a two year suspended sentence).

The background facts
5. The victim in respect of all offences is a Mauritian national, Ms. Meenakshi Bhoyrub (the complainant). The complainant came to Ireland in late 2008. She met the appellant, also a Mauritian national, shortly after her arrival in Ireland having moved into a house where he was also residing. Shortly afterwards, the couple commenced a relationship. The complainant ended that relationship in April 2008 on learning that the appellant's wife was soon to arrive in Ireland. In September 2009 the complainant commenced a relationship with another man.

6. The appellant, on learning of the complainant's new relationship, turned up at her college and her place of work, in Dublin, and on two occasions followed her on a bus journey. She made a complaint to An Garda Siochana in October 2009. The defence of harassment relates to the period between 1st September 2009 and the end of November 2009. The appellant assaulted the complainant at an address in Dublin on 18th December 2009, and again, some hours later, on the 19th December 2009. The appellant also stole the complainant's mobile phone on that occasion.

7. On 1st April 2012 the appellant was convicted of the four offences, namely the offences of harassment, the two assault offences and one offence relating to the theft of the mobile phone. He had also been tried by a jury in respect of other offences, but there was a disagreement in relation thereto. He was subsequently re-tried in respect of those other offences, and that trial concluded on 19th June 2012 (again with a disagreement in relation to a verdict).

The conviction appeal
8. The appellant's written submissions identify six grounds of appeal in relation to the harassment conviction. They are:-

> (1) That the trial judge erred in law in refusing to accede to the application of the defence at the close of the prosecution case, to withdraw the case from the jury.
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> (2) That the trial judge erred in law in allowing the allegation of harassment to go to the jury in circumstances where the only evidence placed before the jury that was capable of amounting to harassment related to just two occasions.
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> (3) That the court erred in law and in fact in allowing the allegation of harassment to go to the jury in circumstances where evidence of telephone calls and texts from the appellant to the alleged injured party did not specify the time frame within which these communications were received.
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> (4) That the learned trial judge erred in law and in principle and in fact in failing to properly distinguish between an interference with a person's privacy and a "serious interference" with their privacy, which is required for the allegation of harassment to be proved.
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> (5) That the learned trial judge erred in law and in principle and in fact in allowing the allegation of harassment to go to the jury in circumstances where the court accepted, or appeared to accept, that each incident relied upon by the prosecution as amounting to harassment might not, on their own, amount to behaviour that was a serious interference with the privacy of a person but that a sequence of these events could commutatively amount to harassment.

(6) That the learned trial judge erred in law and in fact in not giving the jury appropriate or sufficient direction as to whether the mens rea required to convict of harassment was a subjective test, an objective test, or a mixed objective and subjective test.

9. Section 10 of the Non Fatal Offences Against The Person 1997 provides as follows:-

(1) Any person who without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him, or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where:-

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace or privacy or cause alarm, harm or distress to the other.

(3) Where a person is guilty of an offence under section (1) the court may, in addition to, or as an alternative to, any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(4) A person who fails to comply with the terms of an order under s. (3) shall be guilty of an offence.

(5) …

(6) A person guilty of an offence under this section shall be liable:-

(a) on summary conviction to a fine not exceeding IR£1,500 or to imprisonment for a term not exceeding 12 months, or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

A summary of the evidence relating to the offence of harassment heard by the jury

10. The relevant evidence can usefully be summarised as follows:-

(i) The complainant stated that after the appellant learned of her relationship with another man in September 2009, he threatened her.

(ii) On the 18th October 2009 the complainant attended at Terenure Garda Station with her employer's daughter to make a complaint in relation to the appellant. She complained to Gda. Andrew O'Neill that the appellant was threatening her. Subsequently, the appellant acknowledged to Gda. O'Neill that he had contacted the complainant at her house and at her college, and he agreed to stop doing so in the future.

(iii) The content of a letter dated 12th November 2009 written by the appellant to the complainant was read to the jury. In that letter, the appellant professed his love for the complainant and informed her that he intended to get a divorce from his wife.

(iv) In a further letter dated 26th November 2009, the appellant again expressed his love for the complainant. He said that he had never meant to cause her any harm.

(v) The complainant gave evidence of an incident which occurred on 16th November 2009 when the appellant followed her on a bus journey home. On that occasion she complained about him to the bus driver. She said that as she alighted from the bus, the appellant attempted to strike her.

(vi) The complainant gave evidence in relation to another occasion when the appellant had followed her onto a bus.

(vii) Gda. Maloney told the jury that he had witnessed the appellant sitting on a bus on one of the occasions when she had complained that the appellant was following her. He witnessed the appellant attempting to talk to her on that occasion, and he also witnessed the complainant leaving her seat and waiting at the top of the bus until the journey was completed.

(viii) Evidence was given to the jury by the complainant of the appellant ringing her at work, ringing her employer, ringing her employer's daughter, ringing her mother, ringing her sister and ringing her ex-husband, and of threatening her. The complainant maintained that the appellant was trying to tarnish her name.

(ix) There was evidence that the appellant acknowledged in interviews with the gardaí that he had been trying to contact and telephone the complainant, and that he had followed her.

11. Central to the appeal is that the incidents referred to by the complainant did not establish harassment within the meaning of s. 10 of the Non Fatal Offences Against The Person Act 1997, in that they could not be said to have "seriously" interfered with the complainant's peace and privacy, or were such as might be expected to cause her alarm, distress, or harm. The appellant's counsel suggested that the actions of the appellant in his attempts to contact her, and in actually contacting her within the period in question were, in reality, the actions of a jilted lover desperately seeking to re-kindle a romantic relationship, and that other than

describing such acts as being acts of stupidity they could not be said to be acts of a criminal nature, and therefore did not satisfy the definition of harassment in s. 10.

12. An application for a direction was made at the end of the prosecution case in relation to the harassment charge referring to what the appellant described as the *"paucity of evidence"* relating to the charge. Specifically, the fact that telephone and text records were not put to the complainant is criticised.

13. Ultimately, the learned trial judge ruled as follows:-

> *"..I think there is enough to go to the jury because I think whilst Mr. Dwyer is right when if one breaks down particular instances they might not be enough to fall into the category of objectively something which would seriously interfere with another's peace and privacy, or the accused acts in a way that a reasonable person would realise that they would seriously interfere with the others peace and privacy or cause alarm, distress to another, or that a reasonable person would not .. I think myself that if one looks at a sequence of events, one takes the .. all of the events which, even if one were to split them up individually might not be enough, than one, having regard to the totality during that perio, there is sufficient to go to the jury. I think one of the facts there is distress, and I think that seriously interferes with the others peace or causes alarm, distress or harm, or causes alarm, distress or harm, and I don't think that there is any doubt but that alarm was caused or certainly distressed, and I think they must be read disjunctively so I am satisfied there is enough to go to the jury."*

14. It is evident from the manner in which the learned sentencing judge ruled in this matter that he took the view that the various incidents referred to in the evidence, while not individually constituting harassment, were quite capable of commutatively doing so. The fact that they occurred over a relatively short period of time, and the nature of the contact and attempted contact, was also relevant.

15. In the course of his charge to the jury the learning sentencing judge stated the following:-

> *"So, maybe it is putting the cart before the horse. If you look first of all would a reasonable person realise that the acts in question would seriously interfere with the others peace and so forth .. would a reasonable person, constituting a reasonable person between the twelve of you, you then so on to ask yourself as to whether or not this man acted either intentionally or recklessly. He or she sorry whether or not this man by his or her actions intentionally or recklessly seriously interferes with the others peace or privacy or causes alarm, distress or harm to the other. So you see, you decide whether or not a reasonable person objectively speaking would in fact realise that the acts would seriously interfere etc. Then you ask yourself the position where this man is concerned, which might be different. And of course that is one of the tools you use anyway in order to decide the state of mind of a person.*

16. The learned sentencing judge also summarised fairly to the jury the evidence given in the course of the trial in relation to the harassment issue.

17. The court is satisfied that the jury was adequately charged in relation to the necessary ingredients for a s. 10 harassment offence, and that the evidence (which is summarised above) relating to the harassment allegation was properly left with the jury for their evaluation and verdict.

18. The evidence (as summarised above) is, when taken in its entirety, quite capable of meeting the threshold sufficient to constitute the offence of harassment, and more particularly, to satisfy the definition in s. 10(2)(a) and (b) of the Non Fatal Offences Against The Person Act 1997.

19. The conviction appeal is therefore dismissed.

The sentence appeal

20. The appellant pleaded not guilty to the offences in respect of which he now appeals the sentences imposed in respect thereof. Had he pleaded guilty at the outset, the outcome in terms of sentencing would likely have been very different.

21. The appellant maintains that he did not seriously contest the two assault charges in the course of the trial. This is itself contested by the respondent as being somewhat inaccurate, and we think rightly so. The appellant certainly maintained that the assaults were less serious than in fact they were, and this amounts to a degree of contest on his part as to the detail of those assaults.

22. The assaults were indeed serious. The first being more so than the second. The first assault involved beating and slapping the complainant on her head and face using a closed fist, a hair straightener and a lamp, resulting in significant superficial injuries. The second assault, some hours later, was, only marginally less serious. It also involved beating and slapping the complainant, biting her on her neck and chest and threatening her.

23. In all, these were quite vicious assaults on a defenceless woman and she is fortunate to have emerged with what might be described as relatively minor injuries. Undoubtedly, the experience must have been very terrifying and distressing for her.

24. In essence, the appellant maintains that the sentences imposed on him for the assault and phone theft offences, and which effectively equate to a four year prison term, were excessive, and that the learned trial judge erred in principle for the following reasons:-

> (1) The learned sentencing judge placed the offenses at too high a level on the scale of severity.
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> (2) Insufficient weight was afforded to the lack of previous convictions.
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> (3) Insufficient weight was afforded to the appellant's expression of remorse and
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> (4) Insufficient weight was afforded to the appellant's good conduct while detailed for a considerable period prior to sentencing, including his undertaken courses and achieving certificates while in prison, all suggesting positive steps towards rehabilitation

25. The sentences imposed were severe, and this was recognised by the respondent in her submissions to this Court. Having regard

to the fact that the court was sentencing a person without relevant previous convictions, the sentences, and in particular the four year sentence, appear to this Court to be somewhat out of line with sentences in similar cases, and to this very limited extent could be said to be an error of principle.

26. Accordingly, the Court proposes to deal with the matter by simply suspending as of today's date any unserved balance of the sentences already imposed, and which the Court believes to be in the region of four months.

27. The sentence appeal is therefore allowed on this basis.