THE COURT OF APPEAL

Birmingham J.
Edwards J.
Hedigan J.

No. 156/16

The People at the Suit of the Director of Public Prosecutions

Respondent

And

Irmantas Paulauskas

Appellant

JUDGMENT of the Court (ex tempore) delivered on the 2nd day of November 2017 by

Mr. Justice Birmingham

1. On 11th May, 2016, at Galway Circuit Court, the appellant was convicted by a jury on two counts, one of robbery and one of possession of an imitation firearm. On 12th May, 2016, he was sentenced to 14 years imprisonment in respect of the robbery offence and to a concurrent sentence of five years imprisonment, the statutory presumptive minimum, in respect of the firearms matter. So far as the conviction aspect is concerned, essentially two grounds of appeal were identified in the notice of appeal and in the written submissions, these being that:

1. The verdict of the jury was perverse and contrary to the evidence; and,

2. The judge erred in law in refusing the request of counsel to particularise the *Casey* warning.

The appellant says that force is given to his arguments by reason of the fact that the jury spent only 32 minutes deliberating having heard evidence over six days.

2. The first ground of appeal that the verdict of the jury was perverse has not been argued today, and very wisely so. It is the case that there was no application for a direction nor could there realistically ever have been and it was clearly a case that was properly one to be considered by a jury.

3. This Court will now turn to the second ground in relation to the *Casey* warning. The background to the trial and conviction is to be found in events that occurred on Wednesday, 11th February, 2015. At approximately 10:42 a.m., four males dressed in dark clothing, wearing gloves and with their faces partially covered entered Hartmanns Jewellers situated at William Street in Galway city centre. Approximately 90 seconds later the same four men, having held up the staff at gunpoint, left the premises with two bags containing diamond rings and Rolex watches with a retail value of approximately €1.139 m. There was CCTV footage at trial from Hartmanns jeweller shop and also from the William Street, Shop Street and Abbeygate Street area of Galway. Gardaí were alerted to the fact that a robbery was under way and responded to the call at 10:48 a.m. Shortly thereafter, two suspects were arrested at Middle Street, Galway, which is not far from Hartmanns jewellers. One of those was the appellant. The other was found to be in possession of a pistol, as it happens, an imitation pistol with a silencer attached. Two other suspects were arrested a little later at Fairgreen Road as they waited for the departure of a bus from Galway to Dublin. That was at 11:30 a.m. A follow up search in the Fairgreen Road area saw the stolen jewellery which was contained in two rucksacks recovered. Everything was recovered with the exception of one ring and as it happened a member of the public later contacted Galway Garda Station and handed over the remaining diamond ring which she had found on Dock Road, Galway.

4. The prosecution case was that, fortuitously, there were a number of Gardaí in Galway city centre that day and they were in the general Shop Street area. Two of those were Detective Sergeant John McElroy and Detective Garda Gerry Carroll. They were alerted to the fact that a robbery had taken place and responded. At Abbeygate Street, they saw a male moving quickly with a phone to his ear and it turned out that this individual was a civilian who was in contact with Gardaí and was reporting to them what was going on in real time. That was Mr. Christopher O'Brien who later appeared as a prosecution witness. The detectives spoke to him and then they proceeded down Middle Street in pursuit. Two people were apprehended and restrained and were then arrested. This was after a struggle. One of those detained was the appellant, Irmantas Paulauskas. The other was a man by the name of Saulius Ripecka who subsequently pleaded guilty to offences in relation to the incident as did the other individuals detained at the bus stop. It is the case that a number of individuals, responsible citizens, witnessed the robbery or its aftermath, saw a number of men walking in single file from the robbery scene and decided to follow those people.

5. The prosecution case in particular turned on eyewitness evidence from Christopher O'Brien and Ken Jackson. In essence, it was the prosecution case that the appellant and a co-accused were caught in the act, or if not actually caught in the act, all but caught in the act. The defence, on the other hand, emphasised the absence of any DNA or other forensic evidence, the absence of any admissions and made the point that the case was essentially one of visual identification, with all the frailties that would entail. The prosecution case was that the civilian witnesses had been in active pursuit and were observing the individuals throughout. In cross examination, it was put to Mr. O'Brien that he was not correct when he said that he was close behind those that he was following at all times and he accepted that there was a few brief seconds when those that he was pursuing had turned a corner and were out of sight. Mr. Jackson was also cross examined. He was asked:

"Q. Now, there is a period of time when you were out of sight of these people, all four of them, isn't that right?

A. Yes

Q. So you don't know what could have happened in that period of time, isn't that right?

A. Hypothetically, but unless they swapped their clothes with somebody else, they're the four people that I saw.

Q. Mr. Jackson, you either saw or you didn't see, and I'm putting it to you that there's a period of time in which you had not sight of these gentlemen and you couldn't possibly have known what happened in that period of time. Do you agree?

A. My answer to you, sir, is that I am certain that the four people I identified to the Gardaí are the four people I saw come out of Hartmann's jewellers.

Q. That isn't the question I asked you. Now, would you please answer the question?

A. Certainly.

Q. Do you agree that there's a period of time in which these four individuals are not in your sight?

A. I agree with that sir."

6. The judge dealt with the question of identification in these terms:-

> "The accused is linked with this robbery by the evidence of two civilian witnesses who followed four men from Hartmann's that morning. Now, history shows, ladies and gentlemen, that plenty of cases of mistaken identity by persons who had adequate opportunity to observe people have resulted in people being convicted, convicted by honest and diligent juries like yourselves, only for the truth to emerge later that these people weren't the people in fact and that the people who were convicted were innocent; that's a fact. So be careful, ladies and gentlemen, when you're deliberating on this aspect of the case. Consider the opportunity that both civilian witnesses had to observe the people. Ask yourself is there a reasonable chance that both of them were wrong when they said that the two men who were tackled to the ground in Middle Street were two of the men that they had followed from Hartmann's. If you're satisfied that the accused was one of the four in Hartmann's and they were followed as far as Middle Street, then you're fully at liberty to act on it. You have the CCTV evidence of what happened that morning and what is, in effect, real time coverage of the scene; the street outside, movements of people on the street before, during and after the robbery. You've the evidence of two brave, some might describe them as foolhardy, civilian witnesses who, when they saw what was happening in Hartmann's, did what they could to help the Gardaí to apprehend the people who they saw leaving the jewellery shop and who they followed down Shop Street, turning left into Abbeygate Street, and then turning right into Middle Street."

7. When the judge concluded his charge, counsel for the defence, by way of requisition, commented that the judge had given what might be described as a *Casey* warning in general terms but that he thought that a specific *Casey* warning with particular reference to the facts of the particular case would be preferable to contextualise the warning. In response, the judge reviewed what he had said where he pointed out that he had already indicated to the jury that there was a gap and that he had emphasised to the jury what counsel had said. It is indeed the case that when reviewing the evidence, the judge had referred to the fact that Mr. O'Brien had accepted in cross examination that there was maybe four seconds when those he was following were out of sight. The judge also reviewed the evidence of Mr. Jackson, the other key civilian witness, a former soldier and naval cadet. The jury were reminded that, in cross examination, he too had accepted that there was a moment when those he was following were out of sight. Having heard from counsel, the judge indicated that he was satisfied that he had dealt with the *Casey* warning in a non-stereotypical fashion and that there was no need to recharge the jury.

8. In the view of the Court, what was said by the judge in relation to identification was, in all the circumstances of this case, adequate. This was not a classic identification case. The facts are as far removed from the facts of *Casey* as it is possible to imagine. This was in truth a "caught-in-the-act" or "hot pursuit" case.

9. The appellant attaches significance to the fact that the jury returned their verdict after a very short period of deliberation but it must be said that the case was a particularly strong case. The robbers had been followed by responsible and concerned citizens from the scene of the robbery. There were other factors that added weight to the prosecution case. The appellant, when arrested, was wearing glasses, black gloves and a black hat, and was in possession of silver handcuffs. He engaged in a struggle and that was a matter of significance. Subsequently, Mr. Paulauskas gave the explanation that he thought that he was being kidnapped. It seems likely the jury would not have been impressed with that suggestion. Again, during the course of his detention various items of his own clothing that he had been wearing were put to him and in response to each item he responded, "Not mine, nothing to do with me." Again, it would be very understandable if the jury was unimpressed by this approach.

10. The Court is satisfied that the conviction in the circumstances of this case was safe and proper and the Court dismisses the appeal against conviction.

Sentence Appeal

11. The Court turns then to the question of sentence. So far as the question of sentence is concerned, the judge dealt with the appellant and his three accomplices who had entered guilty pleas in a single sentencing hearing. In the course of that hearing, the trial judge identified 15 years imprisonment as the starting point, having regard to the gravity of the offence. In respect of all four, he then discounted one year to take account of the hardship that they, as foreign nationals, would experience serving a lengthy prison sentence. In the case of those who had entered pleas, he further discounted the sentences and imposed sentences of eight years. This reflected the admissions, the pleas and indications of steps that were under way towards rehabilitation in terms of time being put to productive use while in custody. In the case of the appellant, the judge imposed the 14 year sentence which is now the subject of the appeal. In doing so, the judge referred to the appellant's significant prior criminal record including, most notably, a sentence of eight years imprisonment in respect of the offence of causing grievous bodily harm, and said that the extent of the record meant that a higher starting point might be considered in his case than for the co-accused although he did not in fact go further down that road.

12. In the view of the Court, this was a very serious offence. It was obviously planned. It was premeditated. For the members of staff who were held up, it must have been a terrifying experience. The rewards that would have been achieved if this robbery had been successful were very considerable indeed, €1.139 m being the value of the items stolen. In those circumstances, it was a case that had to be met with a very significant sentence indeed. In the case of the appellant, there was no plea of guilty, no expression of remorse, even at the time of the sentence hearing there was no willingness to belatedly accept the validity of the jury verdict and in those circumstances there was really nothing before the court by way of mitigation. In those circumstances it was inevitable that Mr. Paulauskas would receive a sentence towards the top end of the available spectrum.

13. The sentence imposed of 14 years was obviously a substantial and severe sentence. The Court does pay some attention to the fact that this was a case that involved imitation firearms rather than actual loaded firearms. Now, let it be said clearly and without equivocation that the use of imitation firearms, and in this instance they were realistic imitations, is a very serious matter. By

definition, those to whom the firearms are produced do not know whether what is being pointed at them are real or otherwise so the production of an imitation firearm in support of a robbery is a very grave matter indeed. On the other hand, it must be said that if what was produced was an actual loaded firearm, that would add an additional dimension of gravity and it seems to the Court that robbery offences involving actual loaded firearms are in a more grave category still than what the Court was dealing with here. It seems to the Court that it is proper to draw some distinction between imitation and actual loaded, lest the view be taken that one might as well bring an actual loaded firearm on the robbery. For that reason, the Court feels that some limited modification of the sentence imposed in the Circuit Court is appropriate. It does, however, remain the case that the offence was a very serious one committed by someone with effectively no mitigation available to him and committed by somebody with a very significant record.

14. In the circumstances the Court will identify as the starting point a sentence of 13 years imprisonment rather than the starting point of 15 years identified by the trial judge. The Court will then, as the Circuit Court did, discount from that identified starting point leaving in the case of Mr. Paulauskas a net sentence of 12 years imprisonment in respect of the robbery count and the Court will leave unaltered the concurrent sentence in respect of the imitation firearm of five years.