



THE COURT OF APPEAL

**Birmingham J.
Sheehan J.
Mahon J.**

No. 45/11

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

JONATHAN FITZGERALD

APPELLANT

JUDGMENT of the Court delivered on the 25th day of July 2016 by Mr. Justice Birmingham

1. On the 7th February, 2011, following a lengthy trial the appellant was convicted of the offence of murder. A large number of grounds of appeal were formulated, but following a change in legal representation only one of the grounds as originally formulated which related to the admission of an out of court statement pursuant to the provisions of s. 16 of the Criminal Justice Act 2006, has been argued. In addition, and this has been the primary focus of attention on the appeal hearing, the appellant now seeks to argue a new ground relating to the failure of the trial judge to deliver an accomplice warning.

Background

2. By way of background it should be explained that the trial was concerned with events that occurred on the 18th December, 2006, at 567 O'Malley Park, Limerick. The prosecution case at trial was that in the early hours of the 18th December, 2006, shortly before 3.00 am, the late Noel Crawford was fatally wounded at his home at 567 O'Malley Park, Southill, Limerick.

Evidence at trial

3. Laura Kelly was a very significant prosecution witness at trial. It is the fact that the trial judge did not give an accomplice warning in respect of her evidence that has given rise to an application to argue an additional ground of appeal. She gave evidence by video link from a court in Britain during the course of the trial. She told the Court that she resided at 491 O'Malley Park, Limerick, and she explained that in the early hours of the 18th December, 2006, her nephew Raymond arrived at her home with two others, one of them the appellant, Jonathan Fitzgerald. She described how these three youths spent some time in her home and that at one stage a petrol bomb was produced, but later discarded. She also described how two of the youths, one of them Jonathan Fitzgerald, put on bullet proof vests and left her house with a shotgun. She subsequently heard the sound of gunshots and moments later the same two youths returned. According to her evidence, the appellant said "I got him, I got Paul Crawford".

4. She describes seeing Jonathan Fitzgerald washing himself in the sink, seeing a shotgun on the kitchen table and seeing Jonathan Fitzgerald put his clothes in a pile on the kitchen floor and dressing in other clothes that he had with him. She says that he burnt some of the clothes and also burned his trainers. Ms. Kelly also gave evidence of a telephone conversation that Jonathan Fitzgerald had with an unknown party that she was in a position to overhear. Her evidence was that she overheard Jonathan Fitzgerald saying that he was okay and that they had got Paul Crawford. She also gave evidence of rewinding CCTV footage and doing this at the behest of Michael O'Callaghan.

5. At approximately 4.00 am shots were fired into 491 O'Malley Park, gardaí came to the scene, but were not admitted by Ms. Kelly.

6. The three youths left her home shortly thereafter, apparently to go and spend the next few hours in the house next door, but then returned the following morning.

7. Ms. Kelly's admitted role in rewinding the CCTV tape, in refusing to admit gardaí to the house and misleading the gardaí by suggesting to them that Jonathan Fitzgerald came up to her house after her windows had been shot in, and so at a time subsequent to the murder, are all of significance in the context of the arguments in relation to an accomplice warning.

8. Jonathan Kiely, partner of Laura Kelly did not, when called to give evidence, offer testimony similar to that of Ms. Kelly as the prosecution would have hoped, but instead in direct evidence indicated that he could not recall or remember anything attributing his inability to recall to drug taking, claiming to have been "heavy on drugs, taking heroin, hash and tablets". Mr. Kiely's claim to have experienced a memory loss, precipitated an application under s. 16 of the Criminal Justice Act 2006, which was acceded to by the trial judge and his ruling in that regard is now an issue on this appeal.

9. There were a number of other elements to the prosecution case. There was, the evidence of a taxi driver, Thomas Maloney, the driver of a fourteen seater mini bus who gave evidence of receiving a call to make a pick up from Garryowen and picking up three young males wearing dark clothes, hoodies with the hoods up and bringing them to O'Malley Park, where he stopped at the rear of 491 O'Malley Park. Another element of the prosecution case related to interaction by gardaí with Mr. Fitzgerald at 491 O'Malley Park and then during the course of his subsequent detention following on an arrest. The trial judge upheld defence objection to the admissibility of certain remarks made by Mr. Fitzgerald to one member of An Garda Síochána, Garda Lynch, but allowed the jury hear evidence from another, Detective Sergeant Treacy. He described arriving at 491 O'Malley Park at around 7.56 am on the 18th December, 2006, when Jonathan Fitzgerald was present. Detective Sergeant Treacy gives evidence of taking a mobile phone from Jonathan Fitzgerald and records that Jonathan Fitzgerald was wearing a bullet proof vest. There was no issue at trial in relation to the arrest and detention of Mr. Fitzgerald. During the course of his detention Mr. Fitzgerald gave an account of his movements at relevant times and that account puts him at his mother's home at the critical time. He stated that he was in bed, there was a small child in the same bed, that he was "stoned out of his mind" having taken tablets and says this account will be supported by gardaí who called to his mother's home and found him there. A significant element of the prosecution case was to undermine or deconstruct the

account given by Mr. Fitzgerald and that was done by calling garda witnesses who went to Mr. Fitzgerald's mother's home at the relevant time, but were emphatic that Mr. Fitzgerald was not among those present in the house at the time of their visit.

10. An important prosecution witness was Nicola Hartigan, a friend of the appellant and of his family. She told the Court that members of the family and subsequently the appellant, made her aware that Jennifer, a sister of Jonathan Fitzgerald had been abducted on the same day as the murder of Noel Crawford at his home and that Paul Crawford, brother of Noel Crawford, was believed to have been responsible for the kidnapping. She stated that on the 18th December, Jonathan Fitzgerald said to her that his sister Jennifer had been kidnapped and had nearly been shot, adding "they didn't get her, but we got them". She said that Jonathan Fitzgerald mentioned the name of Paul Crawford in connection with the kidnapping.

11. A further concern of the prosecution was to put before the jury evidence of contact between various phones linked to prosecution witnesses and phones that were linked to the appellant and his mother. Four telephone numbers were in issue, these being 085-1272818, which was linked to Jonathan Fitzgerald, 085-1044540 which was connected to Nicola Hartigan, 085-7728387 which was connected to Mary Maloney, mother of the accused and 661414141 which was connected to Set Price Taxi's, the company for which taxi driver Thomas Maloney worked.

Section 16 of the Criminal Justice Act 2006

12. In support of this ground of appeal, counsel for the appellant stresses that this is a most extraordinary piece of legislation, which sees an out of court statement as opposed to sworn evidence from the witness box being put before the jury. He says that a court should be very slow to allow this to happen and that particularly this is so in this case given that the section is being invoked in a situation where the witness had given a number of accounts, some exculpatory of the accused others inculpatory.

13. The appellant is critical of the approach taken to the issue by the trial judge, and says that he exceeded his remit in engaging in fact finding, in particular in indicating that he accepted the evidence of Laura Kelly when considering the issue of the reliability of the statement sought to be admitted. Counsel says that the evidence of Ms. Kelly was in dispute and that being so the judge was not entitled to make findings of fact, findings of fact being exclusively for the jury. A further point made by the appellant focuses on the contention that Ms. Kelly was an accomplice and said he says that account was not taken of that fact. To that extent, the s. 16 ground of appeal overlaps with the proposed new ground in relation to the absence of an accomplice warning.

14. The prosecution says that the question of whether to permit the out of court statement to be adduced pursuant to s. 16 was one that was approached with particular care by the judge and that the procedure that he followed was that which was mandated by the statute.

15. Mr. Kiely was called to give evidence on day 6 of the trial. When brought to the 18th December, 2006 and asked whether he could remember where he was on that night he responded that "that's nearly four years ago now, like. That's a long time ago" and that he could not really remember. Asked whether he could tell counsel anything at all about the 18th December, 2006, he responded "not really", adding that he "was heavy on drugs, taking all kinds of drugs". He said that he could kind of recall the 18th December, 2006 as being the night Noel Crawford was shot, but that he could not place himself anywhere on the night. Asked how drugs could affect what he could remember, he said that he was on drugs prescribed by doctors for those coming off drugs. The prescribed drugs resulted in memory loss. This response precipitated two applications from the prosecution, one to treat Mr. Kiely as a hostile witness and the other to have admitted in evidence a prior video recorded interview. There followed a lengthy *voir dire*.

16. The judge ruled on the issue on day 10. He reviewed the evidence, referring to the fact that at one stage when asked did he remember Christmas 2006, Mr. Kiely responded that he could barely remember the Christmas just past, this despite the fact that he had earlier said that he did not have any memory problems since giving up drugs, which he had done eighteen months prior to trial. The judge referred to the fact that in the course of the *voir dire*, that he had the benefit of observing the video recorded interviews to which he had paid great attention and that he had not detected any sign of Mr. Kiely being anything other than fully alert, and in full control of his faculties. The judge went on to hold that he was satisfied beyond all reasonable doubt that Jonathan Kiely was not a forgetful witness, but rather that the witness was refusing to give evidence of facts within his knowledge and that he was hostile to the prosecution for some reason best known to himself and that accordingly the trial judge was permitting the State to treat the witness as hostile.

17. The judge then turned to the provisions of s. 16 of the Criminal Justice Act 2006. He addressed the various matters prescribed by s. 16 and concluded that the witness was in reality by his assertions of failure to recall the events of 18th December, 2006, refusing to give evidence. He was satisfied, having viewed the video recordings, the statement had in fact been made, and that oral evidence of the contents of the statement would be admissible. The judge then turned to the question of voluntariness and reliability. He indicated that he was satisfied that the accounts given were coherent and lucid. The judge observed that the witness had been cooperative throughout the interviews, was more than well able to stand up for himself insofar as he was seen to be argumentative at times, was someone who had access to legal advice and also had a visit from his father prior to making the statement. The judge indicated that he was satisfied that no threats or inducements were made and also satisfied that there was no suggestiveness on the part of the interviewing officers in the manner in which questions were asked, the witness was simply asked to give an account. In these circumstances, the judge indicated that he was satisfied that the statement was voluntarily made. In relation to reliability, the judge indicated that he was having regard to the other evidence in the case, the evidence given by Ms. Kelly and the evidence given by the taxi driver. He indicated that there was consistency of accounts as between the version given by Ms. Kelly and the version given by Mr. Kiely in relation to a gun being in the kitchen, in relation to the preparation of a petrol bomb, in relation to the burning of clothes, in relation to Mr. Kiely having received a phone call from his sister, in relation to Ms. Kelly having been told not to open the door to the Garda Síochána. He indicated he was satisfied that there was reliability to be found from the video from the CCTV camera. The judge was also satisfied in relation to evidence that was available to him about threats made on the morning, which he saw as providing an explanation as to why a true account might not have been given in the first instance to An Garda Síochána. In the circumstances he was satisfied that there was sufficient other evidence in support of the reliability of the statement sought to be admitted to justify its admission in evidence. The judge indicated that while the statement was not on oath or affirmation, nor was there a statutory declaration that he had regard to what had been said by Mr. Kiely in the course of his interview when asked why he had not told the truth previously and responded by saying the three days in garda custody was preferable to the remainder of his days in the grave. The judge said that in all the circumstances, he was satisfied that the requirements of the section were met in the present case.

18. The judge required the prosecution to adduce evidence of the other inconsistent accounts given by Mr. Kiely, indicating that fairness required this and that this ought not to be left to the defence to adduce.

19. In the Court's view, the question of whether to permit the introduction of the video recorded interview pursuant to s. 16 was approached with considerable care by the trial judge. He was clearly very conscious of all the statutory requirements which had to be

met if the interview was to be admitted and addressed these in turn. Overall it is clear that the conclusion reached by the judge was one that was open to him. In particular his treatment of the reliability issue was unimpeachable and accordingly this ground of appeal fails.

Failure to Give an Accomplice Warning

20. Turning then to the proposed new ground, the failure to give an accomplice warning, it is appropriate to consider how this issue surfaced at trial. There was no debate or discussion on this issue between judge and counsel before speeches and charge. The trial judge started his charge late in the afternoon of day 18 and having dealt with a number of general legal principles deferred the balance of his charge to the following day. At that stage, senior counsel for the prosecution raised a number of legal issues, including how the s. 16 statement would be treated and whether there was a need for a Lucas warning arising from an apparent lie told by the accused while in garda custody about having been at home at the relevant time. Counsel then turned her attention to the issue of an accomplice warning which gave rise to the following exchange between counsel and the trial judge.

Counsel: On the other matter just and perhaps its out of an excess of caution, whether or not, and perhaps my friends would consider this overnight, whether there is a need for an accomplice warning, given the fact that on their own evidence and given the earlier statements of Laura Kelly and Jonathan Kiely, they might have been accessories after the fact and that might bring into view the accomplice warning, but -----

Judge: Well I had intended dealing with the accomplice aspect of matters when I came to the evidence.

Counsel: Yes, I appreciate I am probably premature in most ----

Judge: And certainly of Jonathan Kiely, insofar as he was arrested on suspicion of possession of that particular firearm or the firearm that is -----

Counsel: May it please the court, I apologise, I am jumping the gun.

Judge: No, no it is alright. That is the way I had intended approaching it.

Counsel: Thank you.

The Court then adjourned.

21. On the following morning, before the jury was brought down to court, there was a discussion between senior counsel for the prosecution and defence and the trial judge in relation to a factual issue, but there was no further mention of the issue of an accomplice warning before the judge resumed his charge. While reviewing the evidence of Jonathan Kiely and Laura Kelly, he concluded Laura Kelly's section by dealing with her cross examination, reminding the jury that during the course of that she was asked about an occasion when on the 1st February, 2008, she was stopped by gardaí while she was in possession of at least 184 Ecstasy tablets and other material in foil wrapping. He told the jury:-

"She was cross examined, ladies and gentlemen, in relation to the fact that she had been stopped, detained and it was suggested to her that what she was doing by giving this account to the Garda Síochána was delivering a self serving statement in either the hope or the expectation of lenient treatment from the Garda Síochána in relation to matters, insofar as they mightn't prosecute her or they might prosecute her to a lesser extent than one might normally expect.

And you heard, ladies and gentlemen, in relation to other encounters with the law or brushes with the law that Laura Kelly might have had."

He then concluded:

"It's a question of you, ladies and gentlemen, to assess the credibility of witnesses. You have had the opportunity of observing Ms. Kelly, you have heard her give her account and you have seen her give her account of matters and it is for you to decide whether she is a truthful or credible witness and whether she is giving a true account of the events that happened in the early morning of the 18th December, and you must be satisfied beyond reasonable doubt that that is the position. If you in any (way) feel that she might have been motivated out of self interest and that the statement may not be true, then as I say, its for your ladies and gentlemen to assess the witness, you are entitled to accept everything a witness says, you are entitled to reject everything a witness says, you are entitled to accept part of a what a witness says and reject other parts of what a witness says. But that is the evidence ladies and gentlemen that she has given."

22. When dealing with the evidence of Jonathan Kiely, having pointed out that this witness had been treated as hostile and that the evidence from him was admitted by way of a s. 16 statement, he told the jury:-

"He made that statement or he was interviewed and he made the observations or gave the answers, ladies and gentlemen, in circumstances where he had been arrested under s. 30 of the Offences Against the State Act, on suspicion of being in possession of the firearm that had killed Mr. Crawford. At the stage he was arrested he was a suspect in the eyes of the Garda Síochána. The Garda Síochána have advised you, ladies and gentlemen, that he may have been a suspect at that stage, but he is no longer a suspect and they consider that he did not have anything to do with the matter. But that is really a matter for you ladies and gentlemen. That was the circumstance in which he was arrested, and if he is an accomplice or if he was an accomplice and if you consider that he might have been an accomplice, you should be very wary of his evidence, not just from the point of view of the fact that he is an unreliable witness, having been treated as a hostile witness, but also because he might perhaps have been an accomplice, and you should look for corroboration of his testimony.

As you heard from Ms. Ní Rafartaigh, corroboration is independent testimony that tends to show that what is being said is correct. In that regard, ladies and gentlemen, it is for you to decide if there was any corroboration: you can perhaps look, ladies and gentlemen, to the account given by Laura Kelly, you can perhaps look to the evidence that was given by Mr. Maloney, the taxi driver, because you have the details, ladies and gentlemen of his having paid €7 to the taxi driver who had arrived up in a white mini bus that had delivered the three individuals to his back gate. You have the evidence from the taxi driver that it was €7 and you have the evidence from the witness Jonathan Kiely that's what he paid."

23. The observations made by the judge as to how the jury should deal with the evidence of Mr. Kiely followed through on what had

been indicated to counsel when the issue of a warning had been raised. His treatment of the issue might be described as a modified warning. It did not contain all the elements of the classic corroboration warning in that the jury was not told in terms that it would be dangerous to convict on his evidence if uncorroborated, but rather the jury was told that they should be very wary of his evidence and should look for corroboration of his testimony. While the warning is not a classic one, no issue has been raised in relation to it. Rather the focus of attention has been on the failure to deliver any form of accomplice warning in the case of Laura Kelly.

24. The issue has been the subject of comprehensive written and oral submissions. The point is made that the giving of a warning is a rule of law and that there was ample evidence, which at the very least supported the proposition, that Ms. Kelly might be regarded as an accomplice after the fact which would have required a conditional warning couched in terms that if the jury took the view that Ms. Kelly was an accomplice, then in that situation they should bear in mind that it would be dangerous to convict on her uncorroborated evidence. Indeed, counsel says the position is if anything, more clear cut than that and that this is a case where the jury should have been told that the evidence established that Ms. Kelly was an accomplice and that accordingly the warning should have been unconditional. While the industry applied to expounding on the law as to who is or is not an accomplice is commendable, in the circumstances of this case it was unnecessary and in that sense misplaced. There can be no doubt that Ms. Kelly's role in refusing to admit the gardaí, in rewinding the CCTV footage and misinforming the gardaí that Jonathan Fitzgerald had first come to her house after the windows had been shot in meant that a warning was appropriate. Indeed, while it is unnecessary to express a concluded view on this, it very much appears that a warning if given, ought to have been in unconditional form.

25. The real issue in the case arises from the fact that the judge was not requested to give such a warning notwithstanding that the question of whether a warning would be appropriate was specifically raised by the prosecution and the defence were invited to consider their position. At the conclusion of this charge, the judge was requisitioned in respect of a considerable number of matters by the defence. A number of those requisitions related to how the evidence of Ms. Kelly had been dealt with. The trial judge agreed to recharge and he did so in relation to a number of the points raised in relation to Ms. Kelly's evidence, but none of the requisitions were directed to the issue of an accomplice warning.

26. The prosecution submit that the appellant should not be permitted to raise the issue of an accomplice warning as it had not been raised by the defence at any stage during the trial, relying in that regard on the case of *DPP v Cronin (No.2)* [2006] 4 I.R. 329. Now, it must be acknowledged that the factual background to *Cronin* was an unusual one. The case involved a fatal shooting in a disco. At trial there was one defence and one defence only which was that Mr. Cronin never had a gun and still less had he fired one in the disco. At no stage, whether by way of evidence by or on behalf of the appellant or by way of submission or by way of cross examination or in any other way was an alternative defence of accidental discharge of the gun raised. Following a change of the legal team, the appellant argued that the trial judge's charge was deficient in not addressing the issue of accident or mistake and so the possibility of a manslaughter verdict. The Supreme Court ruled that it was only in circumstances where an appellate court was of the view that due to some error or oversight of substance, a fundamental injustice had occurred, should the court allow a point not raised at trial be argued on appeal. In addition, an explanation must be furnished as to why it was not raised at trial.

27. In this case, there can be no question of the parties and in particular the defence having lost sight of the accomplice issue. The issue was raised by prosecution counsel with a request that the defence consider their position overnight. On the following morning, although there was a debate in the absence of the jury relating to aspects of the ballistics evidence, nothing whatever was said about the desirability of an accomplice warning. This was despite the fact that the judge's response to counsel the previous evening must have put everyone concerned on notice that the judge felt that there was a distinction to be drawn between the position of Mr. Kiely and Ms. Kelly.

28. Again, there can be no question of the issue being overlooked as the judge charged the jury. He did give a warning, albeit in modified form in the case of Mr. Kiely and did not do so in the case of Ms. Kelly. In that regard, he was following through on the indications that he had given when the issue was raised with him before the Court rose on day 18. The charge was the subject of detailed requisitions from the defence including a number of requisitions directed to the treatment of the evidence of Ms. Kelly. So, it is abundantly clear that all involved, including the defence, were aware of the fact that the judge had adopted a different approach to the evidence of Ms. Kelly than he did to the evidence of Mr. Kiely and no objection was raised.

29. In this case, the defence pursued a particular strategy in seeking to undermine the evidence of Ms. Kelly. They did so by suggesting she was currying favour and seeking advantage from the gardaí in respect of transgressions that she had been engaged in. The defence at trial did not by way of evidence, or submission, or cross examination raise the issue of whether she might be regarded as an accomplice. The judge in the course of his charge, while choosing not to address the issue of whether Ms. Kelly was an accomplice and what the significance of that would be, an issue in respect of which the defence had shown no interest whatever, was assiduous in putting before the jury the actual basis for the challenge to Ms. Kelly's evidence which had been advanced by the defence.

30. In the Court's view, the judge cannot be faulted for putting before the jury the actual case presented by the defence and not putting before the jury a case, which while one that was open on the papers, was one in which the defence had shown no interest whatever. It must be recognised that introducing warnings in relation to issues which had not featured at trial can serve to dilute the impact of what is said and to divert attention from the actual case being put forward.

31. The Court is satisfied that the judge's charge, together with his willingness to address issues raised by way of requisition, dealt comprehensively with the real issues in this case. That being so, the Court must dismiss the appeal.