



THE COURT OF APPEAL

Record Number 89/2019

**Edwards J.
McGovern J.
Kennedy J.**

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

RICHARD DONNELLY

APPELLANT

JUDGMENT of the Court (*ex tempore*) delivered on 27th day of January 2020 by Ms. Justice Kennedy

1. This is an appeal against conviction and sentence. The appellant was found guilty of three counts of making a threat to kill or cause serious harm contrary to s.5 of the Non-Fatal Offences Against the Person Act, 1997. A sentence of two and a half years' imprisonment was imposed.

Background

2. By way of background, the appellant and the injured party, Mr Olusola, were both residents in the same sublet property. The Court heard that on the 20th October, 2017 the injured party was cleaning some dirt on the corridor outside the appellant's room when the appellant appeared and began to shout abusively at Mr Olusola using racially abusive language. Mr Olusola went upstairs to his room and he heard the appellant banging the wall aggressively and continuing to shout at him. The injured party left the house and did not return until the 24th October, 2017. Mr Olusola described how on the morning of the 24th October, the appellant again verbally abused him while holding a stick in his hand and he also told him that he was "well connected". Following this encounter, Mr Olusola went to Galway Garda Station to make a complaint. He returned to the house in order to use the Wi-Fi and remained in his car. He observed the appellant approach the car with a stick in his hand and the appellant shouted at him saying: -

"You're going to be dead. You're going to be dead. I'll make sure I kill you."

3. At this point, Mr Olusola returned to Galway Garda Station and made a formal complaint. The appellant was arrested on the 13th November, 2017 and pleaded not guilty to three counts of making a threat to kill or cause serious harm contrary to s. 5 of the 1997 Act and a count of criminal damage contrary to s.2 of the same Act. The two-day trial began in Galway Circuit Court on the 26th February, 2017. The trial judge directed an acquittal in respect to the count relating to criminal damage and the jury found the appellant guilty on the remaining three counts.

Grounds of appeal

4. The appellant puts forward two grounds of appeal relating to conviction: -
- (1) The trial judge to properly charge the jury in relation to *mens rea* and the issue of intention during the course of his charge and when requisitioned to do so by counsel for the accused; the trial judge did not properly direct the jury as to the necessary element of intent required for conviction under s.5 of the Non-Fatal Offences Against the Person Act, 1997.
 - (2) The trial judge failed to accede to a defence application to withdraw the case from the jury in accordance with the principles enunciated in *R v. Galbraith*.

Submissions

Ground 1

5. This ground is concerned with the issue of intention and how it was expressed in the judge's charge. The issue of intention was first aired in the appellant's application to withdraw counts from the indictment in which counsel for the appellant submitted that the *mens rea* of an offence contrary to s.5 of the 1997 Act focused not just on the defendant's state of mind but that this must also be assessed with reference to the other party believing that the threat would be carried out. In dismissing this argument, the trial judge held as follows: -

"So, I think that Mr Fahy is correct that whether he believes it or not is irrelevant insofar as the ingredients of the offence are concerned."

The trial judge went on to say: -

"Now, the way this offence is phrased in the statute, intention is something that is an essential ingredient, but it is an ingredient that has to be inferred from the evidence, because there is no other way."

6. The trial proceeded and following the judge's charge, counsel for the appellant, raised a requisition regarding the issue of intention as follows: -

"And the second issue judge was in relation to that, I think you may have dealt with it or just for the purpose of clarification please, the issue in relation to the *mens rea*. We touched upon it during the course of the *voir dire* earlier about the two aspects to the *mens rea* which would incorporate the - - in s.5, the intention and then that - - the requirement - - the belief that it be carried out beyond reasonable doubt as well".

The trial judge refused this requisition.

7. The appellant submits that although the trial judge referenced intention in his charge, he did not sufficiently elaborate on what constitutes intention in its legal definition. The appellant refers to *The People (DPP) v. Desmond* [2004] 3 IR 486 where the Court held that a jury must be given some definitional direction as to what constitutes intention.

8. The appellant further refers to *The People (DPP) v. McBride* [1996] 1 IR 312, where the Court found that the trial judge had misdirected the jury in relation to intention.
9. The appellant notes that the jury asked three questions during the deliberations which seemed to focus on the *actus reus* of the offences and this suggests that the jury had the impression that if they were satisfied that the threats were made, that in itself constituted an intention sufficient to convict the appellant.
10. The respondent submits that as a preliminary point, a requisition was never specifically raised by the appellant on the issue of intention in the judge's charge and therefore the appellant is not entitled to rely on this ground of appeal.
11. The respondent notes the appellant's reliance on *The People (DPP) v. Desmond* [2004] 3 IR 486 and submits that in that case, the Court had some criticisms of the charge but any shortcomings in the charge regarding intent were not such as to render the decision of the jury unsafe.
12. Further, the appellant's reliance on *The People (DPP) v. McBride* [1996] 1 IR 312 is unhelpful as in that case the fault arose due to a misstatement of law rather than a lack of definitional direction.
13. The respondent submits that the trial judge told the jury in clear and unambiguous terms that the prosecution and the burden of proof is beyond a reasonable doubt that the appellant made the threat and intended Mr Olusola to believe that it would be carried out, was to the effect that the jury were to: -

"Examine the circumstances in which each threat is alleged to have been made, what Mr Olusola did thereafter when you are considering whether the accused intended them to be believed".

It is respectfully submitted that this clearly demonstrates that the jury were directed that they could infer intention from the circumstances in which each threat was alleged to have been made.

14. As to the three questions asked by the jury, the respondent submits the submissions of the appellant are highly speculative in this regard and the jury simply focused on the key issue in the trial which was whether the words had been uttered at all.

Ground 2

15. This ground is concerned with the trial judge's failure to accede to the defence application to withdraw the case from the jury. The trial judge refused the application and stated *inter alia* as follows: -

"Now, inconsistencies as to dates and precise circumstances are exclusively jury matters, likewise the intent of the accused is a matter for the jury to assess on the evidence and in the circumstances that the evidence reveals."

16. The appellant submits that the jury could not properly convict on the evidence of the injured party and therefore the trial judge erred in failing to grant a direction. In support of this submission, the appellant notes that the trial judge gave a corroboration type warning indicating that the evidence may be unreliable.
17. The respondent says that, given that the defence application was predicated on the reliability and credibility of Mr Olusola, the dicta of the Court in *The People (DPP) v. M* [2015] IECA 65 must be borne in mind.
18. Clearly, it is submitted the trial judge was correct in finding that matters relating to the credibility and reliability of Mr Olusola were entirely for the jury to determine. The fact that the trial judge alerted the jury to the fact that there was no corroborating evidence is irrelevant to the issue of whether he was correct in refusing to withdraw the case.

Ground 1- Discussion

19. The respondent contends that the appellant is precluded from raising this ground pursuant to *The People (DPP) v. Cronin (No.2)* [2006] 4 IR 329 and contends in substance that the requisition raised by the appellant differs to the ground now being advanced. We do not agree with that contention and we will therefore address the issue raised.
20. The essence of the argument advanced before this Court was that the trial judge had failed to fully explain the concept of intention to the jury. In support of this argument, Mr Browne BL on behalf of the appellant, *inter alia*, contends that the questions raised by the jury at the conclusion of the judge's charge gave rise to the concern that they were in some way confused as regards the *mens rea* of the offences alleged.
21. The defence advanced by the appellant in the course of the trial was that of a denial of uttering the threats the subject matter of the charges. When charging the jury on the necessary proofs regarding the offences alleged, the trial judge firstly set out the relevant statutory provision, he then cited the particulars of the first offence alleged, then he then said as follows: -

"So, the prosecution must prove beyond a reasonable doubt that the accused first of all threatened to kill or cause serious harm to Mr Olusola on each occasion as alleged, and that he intended Mr Olusola to believe that he would carry out the threats. Now you have to consider each charge separately, effectively three separate trials. Each charge separately, apply the same care when you are considering each. Now, if you've a doubt as to whether the alleged threats were made by the accused at all, well then you have to acquit, not guilty, full stop. Even if you decide that he did make the threats, but you have a doubt as to whether he intended that he would be believed, then you must acquit. It's only if you're satisfied beyond a reasonable doubt that he made the alleged threats and that he intended that Mr Olusola would believe that he intended to carry them out that he be convicted. That's the law. Examine the circumstances in which each threat is

alleged to have been made, what Mr Olusola did thereafter when you're considering whether the accused intended them to be believed."

22. The trial judge then instructed the jury that there was no evidence capable of corroborating the injured party's testimony and he ultimately advised the jury to look to all the evidence and to use their common sense.
23. It is contended on the part of the appellant that the jury may have been confused regarding the *mens rea* and may have considered that they also had to look to the injured party's state of mind in assessing whether the offences were made out. In this regard he relies on the following sentence by the trial judge: -

"Nonetheless, if you believe the evidence of Mr Olusola you're entitled to approach the guilt or innocence of the accused accordingly."

It must be pointed out that immediately following this sentence, the trial judge advised the jury to look through all the evidence and to apply their common sense, their knowledge and experience of life, in assessing the evidence.

24. It is contended on behalf of the appellant that following the trial judge's charge certain questions, three in all were asked by the jury and in particular, reliance is placed on the first two of those questions. The first concerned the words uttered by the appellant and the second concerned the statements made by the injured party to the Gardaí. These questions, it is argued, indicated that the jury were confused regarding the issue of intent.

Conclusion

25. This was a short trial where the jury were considering three counts contrary to s. 5 of the 1997 Act. The trial judge in this case took scrupulous care to set out the nature of the offence alleged, he then proceeded to identify the ingredients of the offences alleged, the necessary proofs, and he did so with admirable clarity. The requirement for clarity on the part of a trial judge in the charge to the jury is essential and a trial judge's objective in charging a jury should be to ensure accuracy in all aspects of the charge, appropriate to the case in question. It is not necessary for a trial judge to be overly verbose but it is necessary to fully explain the legal principles in clear terms which can be readily understood by all parties.
26. On examination of the transcripts in this instance, we are wholly satisfied that the trial judge addressed the issue of intention in very clear terms and we do not accept that the questions raised by the jury gave rise to a concern as to the absence of an understanding on their part regarding the issue of intent. The questions raised by the jury concerned the terms of the utterances on the part of the appellant and the statement of the accused to the Gardaí. Neither could be said to go to the issue of intent, nor could it be said that the third question which concerned the difference between the two offences alleged on 24th October, 2017 could give rise to a concern regarding the issue of intent.

27. The judge made it quite clear on whom the burden of proof lay and the required standard of proof. Moreover, he clearly pointed out to the jury that they were entitled to examine the circumstances of the alleged offences when considering the issue of intent.
28. Accordingly, we can find no error in the judge's charge and we reject this ground of appeal.

Ground 2 Discussion

29. This ground concerns the trial judge's refusal to direct verdicts of not guilty on the basis of inconsistencies in the course of the injured party's testimony. He has accepted on the part of the respondent that there were inconsistencies in the injured party's testimony, but that such inconsistencies were insufficient to require the trial judge to direct verdicts of not guilty. In the now well-known case of *The People (DPP) v. M* [2015] IECA 65, Edwards J. emphasised that the withdrawal of a case from a jury should only be as an exceptional measure. He also emphasised that *R v. Galbraith* is concerned with the question of fairness. Edwards J. stated: -

"At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition."

Conclusion

30. While in the instant case there were some inconsistencies on the part of the injured party in his testimony, these were issues directly within the province of the jury or, as has been previously stated by the courts, quintessentially matters for a jury. In those circumstances, we are entirely satisfied that the trial judge did not err in refusing to direct the jury to return verdicts of not guilty and we reject this ground of appeal.

Decision

31. Accordingly, the appeal against conviction is dismissed.

The Sentence Appeal

32. The trial judge was concerned with sentencing the appellant in respect of three counts contrary to s.5 of the 1997 Act, a count of criminal damage contrary to s.2(1) of the Criminal Damage Act, 1991, and one count of assault contrary to s.2 of the 1997 Act.
33. In this regard the trial judge nominated a headline figure of three years' imprisonment in respect of the counts contrary to s.5 of the 1997 Act and he then proceeded to discount that sentence by six months in light of the mitigation present, giving a sentence of two and a half years' imprisonment. Counts 5 and 6 on the indictment; being those of assault contrary to s.2 and criminal damage were taken into consideration.
34. The appellant contends that the headline sentence was set at an excessive level and moreover that the sentencing judge erred in failing to have sufficient regard to the

mitigation which consisted of the appellant's mental health difficulties. In this regard certain reports were relied upon, including a probation report on behalf of the appellant and a report of consultant psychiatrist, Dr. Hallahan.

35. In the first instance, in his sentencing remarks, the sentencing judge acknowledged that the appellant has significant mental health problems. He then went on to consider the nature of the offences for which the appellant had been convicted and he said as follows:

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"From the evidence of – a trial and the report of his engagement with the Probation and Welfare Services, his conduct was, in his perception, racially motivated. He has shown no remorse, he doesn't accept the verdict of the jury and denies involvement in these offences. While the threats were taken seriously by the victim at least to the extent that he was quick to alert the Gardaí, he has declined to make a victim impact statement."

36. In the sentencing judge's view, the threats to kill were significant offences and he placed the gravity of the offences as "higher than low to medium on the scale of gravity". He then went on to nominate the headline sentence in respect of each of the counts contrary to s.5 of the 1997 Act, as being that of three years' imprisonment. In this regard, it is clear that the appellant's mental health difficulties were very much to the forefront of the judge's mind. He was entitled to take into consideration the appellant's difficulties as a mitigating or extenuating factor in the assessment of the appellant's moral culpability. This Court is of the opinion in light of the racially motivated comments on the part of the appellant, that absent the appellant's mental health difficulties, each count contrary to s.5 of the 1997 Act would have warranted a headline sentence of at least five years' imprisonment. However, taking into consideration the appellant's mental health difficulties, we are satisfied that the sentencing judge did not err in nominating a headline sentence of three years' imprisonment.
37. The sentencing judge then went on to consider the mitigation present being the appellant's mental health difficulties. In this regard, we observe that any reduction in sentence by virtue of this factor were relevant in considering whether such difficulties would make a sentence of imprisonment more onerous for him to bear than for somebody without such difficulties.
38. We note that the appellant was not considered suitable for community service, and nor was he considered suitable for probation intervention. It appears that he is not always compliant with his medication. The judge concluded that he had little scope other than to impose an immediate custodial sanction and in this respect he reduced the headline sentence on each of the offences from one of three years to one of two and a half years' imprisonment, which sentences were imposed on a concurrent basis.
39. It is clear that the sentencing judge carefully considered the evidence, the reports submitted on behalf of the appellant and the submissions made. He properly identified the aggravating factor as being that of the racially motivated comments. Moreover, he

then carefully considered the mitigating factor present and reduced the sentence accordingly.

40. We are satisfied that an appropriate reduction was applied by the sentencing judge by virtue of the mitigation present and certainly the sentence of two and a half years' imprisonment was one well within the margin of appreciation afforded to a sentencing judge.
41. We are not therefore persuaded that there was any error of principle and we dismiss the appeal against sentence.