THE COURT OF APPEAL

Record No: 237/2012

Ryan J.
Birmingham J.
Edwards J.

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Andrew Franey

Appellant

Judgment of the Court delivered on the 4th of February 2015 by Mr. Justice Edwards.

Introduction.

1. This is a case in which the appellant was convicted by a 10:2 majority verdict of a jury on the 28th of June 2012, following a six day trial in the Circuit Criminal Court, of the offence of assault causing serious harm, contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997. The injured party was Helena Power, a member of An Garda Siochána. The appellant had earlier pleaded guilty on arraignment to a further offence of assault causing harm, contrary to s.3 of the Non-Fatal Offences Against the Person Act 1997, committed on the same occasion as the s.4 offence of which he was convicted by the jury. The injured party in this instance was Thomas O'Halloran, who was also a member of An Garda Siochána.

2. Following his conviction, the appellant was sentenced, on the 29th of June 2012, to imprisonment for a term of ten years from that date, for the s.4 offence, with the final three years thereof conditionally suspended. He also received a further sentence of three years for the s.3 offence, and the sentencing judge directed that both sentences were to run concurrently.

3. The appellant appeals against his conviction in respect of the s.4 offence.

Grounds of Appeal Against Conviction

4. The appellant initially contended in his Notice of Appeal that his conviction was unsafe and unsatisfactory on six grounds numbered (i) to (vi), respectively. However, some of these overlapped and so in written submissions filed on behalf of the appellant the six grounds initially advanced were very properly distilled down to three substantive complaints, which were designated a. b. and c., respectively in the appellant's said submissions.

5. Then, at the commencement of the hearing before this Court, counsel for the appellant indicated that his client no longer wished to argue ground c., and that the appeal would be confined to the other two remaining grounds, i.e., those designated a. and b., respectively.

6. Grounds a. and b. are expressed in the following terms:

> a. It is submitted the learned trial judge erred in law in adjourning the trial after three Days of hearing for a period of two weeks in the absence of exceptional circumstances to justify a suspension of the trial.
>
> b. It is submitted that the learned trial judge erred in law in deliberately influencing and/or pressurising the jury into reaching its verdict.

Relevant background:

7. The case concerned an incident that occurred on the 31st October, 2008, at Bianconi Drive, Clonmel where a Halloween bonfire was being held. The jury heard evidence that a number of Gardaí were present at the bonfire. Andrew Franey, then aged 21 was observed in an intoxicated state with a bottle of whiskey. He went off, but his brother Jamie then aged 16 came on the scene. He was intoxicated to the extent that there was concern that he would fall into the bonfire. The Gardaí proceeded to arrest Jamie. What was described as "a shomozzle" then developed. During the course of it Andrew Franey came running and punched Garda Sergt. Thomas O'Halloran in the face with a closed fist. Garda Helena Power then sought to intervene in support of her colleague Sergt. O'Halloran and Andrew Franey turned on and towards Garda Power and kicked her directly into the face. He was subsequently charged with the s.3 and s.4 offences in respect of which he was before the Circuit Court.

8. There were two elements to the prosecution case. First, there was the account of eyewitnesses concerning what transpired at the bonfire. Secondly, the appellant was recorded as having made admissions while being taken from the garda van at Clonmel garda station. The admissions were in the nature of boasting of what he had done.

9. The appellant had sought without success to have the said admissions ruled inadmissible at a *voir dire* conducted by the trial judge on days 1, 2, and 3 of the trial. It is slightly surprising there was *voir dire* as the issue was not whether he was in lawful custody or anything like that, but whether the remarks alleged to have been made were in fact made. The admissions were ruled admissible and went before the jury.

10. Although the appellant did not give evidence on the *voir dire*, he subsequently gave evidence in his own defence on day 5 of the trial, and in his evidence before the jury contended that he had not in fact made the alleged admissions that were being attributed to him, and that they were fabricated.

11. However, another issue, potentially bearing on this, had arisen on the 8th of June, which was day 3 of the trial. It emerged on that date that a garda witness who was on the book of evidence, a Garda Foot, was not available. He was in the USA. The defence indicated that they wanted the witness. In that regard, counsel for the appellant told the trial judge that the defence regarded him as important because:

> One, he is a witness in relation to the opportunity to observe, and lighting and issues such as that at Bianconi Drive; and secondly, and perhaps more importantly, he is a witness in respect of what allegedly occurred when Mr Franey was removed from the garda van into the garda station in the yard.

12. The trial judge referred to the Book of Evidence and appeared to accept defence counsel's submission. After further deliberation counsel for the prosecution accepted that it was not acceptable that the witness was unavailable, and indicated regret that the defence had only been notified of the witness's unavailability on the previous evening. Moreover, he accepted that the trial judge had asked after the arraignment "are all the witnesses here?", and that he had received an affirmative answer from prosecuting counsel, which answer, although given in good faith, was in fact incorrect.

13. All of that having been acknowledged, counsel for the prosecution posed the question "does the trial fall and have to start again?", to which the trial judge immediately responded "The trial isn't going to fall", and suggested that the solution was an adjournment until the witness returned from the USA. It was subsequently established that the witness would be returning on the 16th of June, and so it was proposed to adjourn the trial until the 19th of June.

14. Counsel for the defence opposed any adjournment and requested that the jury be discharged, indicating that he was not comfortable that the jury would be sent away for a long period. Moreover, if the judge was not prepared to discharge the jury the defence would not be ready to resume the case until the 26th of June.

15. The trial judge ultimately ruled as follows:

> "[I]f there is to be a delay, I don't think that the issue of a delay of one week or two weeks really has any great bearing on it, because the prosecution are looking for a delay of one week, the defence are looking for a delay of an extra week because of the unavailability there, so I mean there can be no criticism of the -- of the delay being a two week delay because the second week's delay would be a defence delay rather than a prosecution delay, so you have to live with that. You're not available. I'm just thinking ahead, that if there were to be any other issues -- I'm inclined to adjourn the trial for two weeks, not to discharge the jury. If this were a difficult complex case with complex issues, I would say, "Yes, discharge the jury." But I think it is a fairly straightforward net point in this case. It's effectively down to whether or not the alleged confession was made, in essence. The rest is what took place up at the Green, and so on and so forth, there are differences in the -- in the evidence, of that there is no shadow of a doubt. But I don't think any of those differences are not something which cannot dealt with (a) by counsel in their speeches; and (b), by the judge's charge. And then the issue as to what took place down in the yard. And to a lesser extent, though no ruling has been made on that as to what took place by way of other statements in the station, and as I say, no ruling has been made on that. No, I think adjourn the matter until the 26th …"

16. The jury were then sent away until the 26th of June, when the trial resumed after a break of seventeen days. It then continued to a conclusion, the jury retiring late on the evening of the 28th of June, and returning with a 10:2 majority verdict of guilty after a total deliberation time of 3 hours and 30 minutes.

17. On day 5, the trial judge had addressed the jury in an attempt to provide them with an estimate as to how long the appellant's trial was going to continue. He said that the trial would not finish that day but he went on to say that "It will finish tomorrow, I promise you. There is no shadow of doubt about it that it is going to finish tomorrow." The Court then proceeded to ask the jury members if they had any availability problems and where they had any problems to write them down and give them to the Registrar. The jury foreman duly passed a note to the registrar summarizing the position, and the registrar in turn passed the note to the trial judge. The contents of the note were not made known to counsel at that point, and counsel only learned of what it contained on the day after the verdict.

18. The jury's note had stated:

> "MO'D not available from Friday. MW leaving the country on Sunday. Jury expressed flexibility for Thursday and/or Friday to starting early and finishing later. AO'D on holidays from 6th July. SW starting new job on Monday."

19. Having received the note, the trial judge addressed the jury stating:

> "That's very instructive, but I can assure you that if we are here until midnight tomorrow or 2 a.m. the day after, it is going to finish tomorrow. There is no shadow of doubt whatsoever about it. It will – I will not discommode anybody, you can rest assured of that. But thank you for that. Tomorrow is Thursday isn't it? It is yes. No, this is - this is going to finish. There is no shadow of doubt about it, it is going to finish."

20. Later on day 5, again addressed the jury with the purpose of sending them home until the following day. He indicated to them that they were to come back to resume the trial at 10.30 in the morning and his target was to finish the trial the following day. He added:

> "So, we may have a late sitting tomorrow evening, so, if you can clear the decks, just in case, thank you. If anybody has any difficulty tell me about it first thing in the morning and we will sort it out but again this – I want this case to finish."

21. On the following day, following closing speeches and the judge's charge, the jury retired at 16:52. The timeline in respect of their deliberations was as follows:

> 16:52 Jury retires
>
> 18:19 Jury returns to court and is sent on a break and given refreshments
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> 18:38 Jury resumes its deliberations
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> 19:34 Jury returns to court and are directed that they could bring in a majority verdict
>
> 19:36 Jury resumes its deliberations
>
> 20:22 Jury returns to court and are on the point of being sent home for the night when, upon being asked by the trial judge if they would benefit from a small amount of time that evening, they answered in the affirmative.
>
> 20:32 Jury resumes its deliberations
>
> 20:48 Jury returns with a verdict.

22. At 22.20 the trial judge had returned to court and indicated to counsel that he proposed bringing back the jury and asking them was there any prospect of them reaching a majority verdict and would they benefit from more time. Counsel for the defence indicated discomfort with such a course of action and applied to have deliberations ended for the night, relying on People (Director of Public Prosecutions) v Kelly [2006] 4 I.R. 273. The trial judge's response to this was:

> "Oh, I have no difficulty putting it off until tomorrow. You don't have to rely on any decision, so you don't. It's called dinner time, so it is. ... man has to be fed. Okay, bring them out so please, Sergeant. 20.22 for the record."

23. After the jury were brought back at 20:22, the following exchanges took place:

> JUDGE: Madam Foreman, if you were given more time, would there be any prospect of a majority verdict being reached?
>
> FOREMAN: I would think so, yes.
>
> JUDGE: All right. Well, I'm not going to give you any more time this evening, because I don't think it would be fair. I'm it's you've been deliberating now for three hours and six minutes or there or thereabouts and it's now 20 past 8 and I think
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> MR WHELAN: I'm just wondering, Judge, if the jury had a view as to whether, if they had the benefit of a small amount of time this evening, it would make any difference.
>
> JUDGE: What short additional time now be of benefit, do you think?
>
> FOREMAN: Yes.

24. At this point, counsel for the defence applied (in the absence of the jury) to have the jury discharged. He submitted:

> "Judge, this is exactly the situation that I am concerned about, where what I fear, Judge, is that very simply there's three people who are undecided and there are nine contemplating conviction and you have the situation where it's 20 past 8, it's late in the day and one of those three people decides oh, okay, fine. I'll go with you nine majority people. That's why I don't want deliberation of this hour of the night, because I think it's too late for a jury to be deliberating and the idea of well a little bit more time and we'll just lean on it may well be in my favour, I'm never optimistic about these things, but I don't like the idea of the jury deliberating at 25 past 8 this the evening, having been sitting here since 10.30 and it's a particularly difficult day for them when they're not listening to evidence and I think that's of some relevance. It's a day where they're listening to the same they only have three voices to listen to and it's too late for them to be deliberating in my submission and I'm uncomfortable with it going on at this stage."

25. The trial judge refused to discharge the jury.

26. On the following day, once counsel for the defence had learned the contents of the note that had been passed to the trial judge on day 5, he interpreted it as indicating that one of the jury was unavailable on the Friday, and he expressed concern that the trial judge, knowing that to be the position, had pressurised the jury into bringing in a verdict on the previous evening. The trial judge rejected any such suggestion stating:

> "JUDGE: Can I have those notes back, since they're becoming an issue. You see, Mr Doyle, I think you're being very unfair to me. And I'll tell you the context in which I think you're being unfair to me. "MO'D not available from Friday. MW leaving the country on Sunday. Jury expressed flexibility for Thursday and/or Friday to starting early and finishing later. AO'D on holidays from 6th July. SW starting new job on Monday." The clear import when you read the whole of the note is that MO'D was available on Friday but was not available thereafter. Hence, the third paragraph in the note, "Jury expressed flexibility for Thursday and/or Friday."
>
> MR DOYLE: Well, if that's the Court's reading of the note, so be it. It's not what I read from it --
>
> JUDGE: Yes, well that's my reading. I'm quite happy that there is no -- the jury had expressed flexibility -- the jury expressed flexibility for Thursday and/or Friday to starting early and finishing later."

The arguments before this court

27. Although he was not prepared to abandon his ground a., counsel for the appellant all but conceded that it would be difficult for him to sustain it on a stand alone basis. He stressed to the court that the real importance in so far as he was concerned of the break in the trial was that it provided important contextualisation for the trial judge's concern to see the trial brought to an early conclusion once it had resumed on the 26th of June.

28. In support of ground a. the Court was referred to the judgment of O'Dalaigh C.J. in *The People (Attorney General) -v- McGlynn* [1957] I.R.232 where he remarked:

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury."

29. In relation to ground b., i.e. the contention that the learned trial judge exerted undue pressure on the jury to return a verdict, the Court was referred to the statement of the law in relation to how a jury should conduct its deliberations by Cassels J. in *R. v McKenna* [1960] QBD 411 at page 419:

> "It is a cardinal principal of our criminal law that in considering their verdicts, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject and they are still one of the main defences of personal liberty".

30. In the *McKenna* case, the jury having deliberated for about two hours, they were called back before the Court where the trial Judge said to them: "In ten minutes I shall leave this building and, if by that time, you have not arrived at a conclusion in this case

you will be kept all night and we will resume this matter at quarter to twelve tomorrow." The English Court of Criminal Appeal quashed the conviction even though it was satisfied that the evidence would have entitled the jury to reach a guilty verdict.

31. The Court was also referred to *People (Director of Public Prosecutions) v Kelly* [2006] 4 I.R. 273; to *People (Director of Public Prosecutions) v Gavin* [2000] 4 I.R. 557 and to *Director of Public Prosecution v Finnamore*, (Court of Criminal Appeal, ex tempore, 21st November, 2005). In the latter case, McCracken J, giving judgment for the court, held that a trial judge was wrong in leaving it up to a jury as to how long into the evening they would deliberate for. He held that it was a matter for the trial judge because the judge in his experience is the person who would be aware of the dangers of a jury sitting for too long and reaching a decision when they were overtired or perhaps influenced by pressure of time.

32. It was submitted that the trial Judge erred in law by (i) pressurising the jury into reaching a verdict through the making of various comments as to when the trial was going to finish, (ii) knowing that one juror had difficulty on Friday the 29th June, 2012 and not informing the parties of this fact, (iii) keeping the jury in continued deliberations late into the evening on Thursday, 28th June, 2012 and (iv) refusing to discharge the jury or order that they cease their deliberations until the following morning.

The Court's Decision

33. The Court considers that the learned trial judge's decision to break the trial was a matter properly within his discretion, and there was nothing unsafe about it in the circumstances of the case. It happens not infrequently that juries are sent away during a *voir dire* for lengthy periods. This was not a complex case and the prejudice, if any, was capable of being addressed by a somewhat more detailed review of the pre-break evidence than might otherwise have been the case. The trial judge in fact reviewed the pre-break evidence in great detail.

34. The Court is equally satisfied that no pressure was in fact exerted on the jury. That it was manifestly not the trial judge's intention to place them under pressure is evident from the exchange at 20.22 on day 6 when, just before the jury were brought back, he said expressly "Oh, I have no difficulty putting the case off to tomorrow", and referred to man having to be fed. Moreover he told the jury "I'm not going to give you any more time this evening, because I don't think it would be fair" (the Court's emphasis).

35. It seems to the Court that the appellant's entire argument is premised on the possibility that one of the jurors had indicated that he or she would be unavailable on the Friday, and that the judge knew that and piled pressure on the jury in those circumstances to return with a verdict on the Thursday evening. This premise is based on counsel for the appellant's interpretation of the jury foreman's note. The Court considers the premise to be entirely flawed, and counsel's interpretation of the note to be untenable. On no reasonable construction of the jury foreman's note could the judge have believed that there would be a problem on Friday. On the contrary, the note indicated a willingness on the part of the jury to be flexible in terms of starting early or finishing later on the Thursday and Friday.

36. The Court is satisfied to dismiss the appeal on both grounds in the circumstances.