



THE COURT OF APPEAL

Birmingham J.  
Edwards J.  
Hedigan J.

The People at the Suit of the Director of Public Prosecutions

177/16

Respondent

V

Brian McHugh

Appellant

JUDGMENT of the Court delivered on the 23rd day of March 2018 by

Mr. Justice Birmingham

1. On 9th June 2016, following a trial which had lasted six days, the appellant was convicted of the offence of robbery. Subsequently, he was sentenced to a term of four years imprisonment to date from the date of conviction. He has now appealed against his conviction.

2. The trial was primarily concerned with events that occurred on 13th January, 2014 at 326, Swords Road, Santry. There was also one count on the indictment relating to alleged threats to kill on 24th December, 2013 which resulted in a verdict of not guilty being returned by the jury. To put matters in context it should be explained that the alleged injured party was one Megan Lawlor. She gave evidence that she knew the accused as being an occasional boyfriend of one of her friends, Ms Robyn Skelly. Ms Lawlor gave evidence that she had a difficult relationship with Ms Skelly and fell out with her on occasions. She gave evidence of receiving a phone call on Christmas Eve, 2013 from the appellant stating that he wanted a laptop which was in her possession back and, according to her, going on to say that he was going to come up to her house and kill her stone dead and smash her house up. This was the subject of the first count of threatening to kill which resulted in an acquittal. Mr Lawlor's evidence was that she was in possession of the laptop because Ms Skelly, who was a drug addict, had stolen items belonging to her children previously and she had the laptop as a replacement for those items.

3. Her evidence in relation to 13th January, 2014 was that she was at home. She was in her bedroom and her two children were in bed in the next room. She said that she heard the front door getting kicked in. She heard somebody coming up the stairs and she locked her bedroom door. She heard the appellant saying "Megan, open the door" before he proceeded to kick her bedroom door in. He demanded the laptop. Ms Lawlor indicated to the appellant that Robyn Skelly had taken the laptop from her. The appellant did not believe her and Ms Lawlor rang the mother of Robyn Skelly who confirmed that the laptop had been taken by Robyn. According to Ms Lawlor, the appellant, Mr McHugh, grabbed her by the throat and was screaming at her, saying he "was going to batter her" if he did not get the laptop. He threw her onto the bed and was demanding information in relation to the laptop, saying that he was going to stand on her head if she did not tell him where it was. He then indicated that he was going to take a plasma television before ultimately taking the phone that she had in her hand. According to her, he threatened to stab her, to kick her head in, to kill her stone dead and to strangle her.

4. At one point during the incident he introduced a female to her who was present and asserted that this woman was being paid €2,000 to come up to kill her and another €1,000 in order to "slice her face". It appeared to Ms Lawlor that this woman did not know anything about this and that she was attempting to calm the situation. Ms Lawlor claimed that the appellant had a "blade" with him and he took it out of his pocket and put it right up to her cheek but the other female started screaming at him not to do it, saying that there were kids in the house. The appellant stated that he did not care if there were kids in the house but the female who was present convinced him not to cut Ms Lawlor. According to Ms Lawlor, when the appellant left he stated that if she rang the Gardaí, he was going to come back and petrol bomb her house.

5. The other female referred to in the course of this summary narrative is Annemarie Delahunty. Her role at trial is central to this present appeal. The main grounds of appeal that have been argued are that the judge erred in not insisting that Ms Delahunty be called as a witness by the prosecution or alternatively erred in declining to call Ms Delahunty himself as a witness. There is a further ground arising from the fact that the trial judge refused to allow the defence invoke s. 16 of the Criminal Justice Act 2006 and put in evidence the contents of a memorandum of interview conducted by the Gardaí with Ms Delahunty on the evening of 13th January, 2014. A further ground that has been argued is that the verdict was perverse. Essentially, what is in issue here is that the jury returned a guilty verdict on the robbery charge but a not guilty verdict on a charge of threat to kill arising out of the same incident.

6. The situation relating to Ms Delahunty was discussed at the very first page of the transcript. Prosecution counsel explained as follows:

"There was another lady arrested and questioned in relation to this matter, Ms Delahunty. She is not in the book of evidence, but I accept that she would be an essential witness from the perspective of the defence. She was never charged. She gives an account which, I suppose, is partially beneficial to the prosecution and partially beneficial to the defendant. The agreement that I had with Ms Frayne [counsel for the then accused] was that we would ask the court to call her as a witness so that both parties would be in a position to cross examine her if necessary. That's simply in circumstances where I don't know what she's going to say and I do have material from her memorandum of interview which I would wish to put to her, and obviously Ms Frayne would wish to elicit matters from her too. So subject to the Court, our proposal was that we'd ask the Court to exercise its discretion to do that."

Counsel went on to explain that the lady in question had been present the previous day when the trial was first listed but had not proceeded in a situation where the complainant was not present. It was understood that Ms Delahunty had returned home to Limerick on the previous day. Counsel for the prosecution commented:

"I agree with Ms Frayne that this would be an essential witness from the perspective of the defence and that it wouldn't

be a fair trial to proceed without her.”

Counsel explained that if a warrant was issued he believed it would be possible to secure the attendance of the witness in question but he made clear that if the trial proceeded, and he was anxious that it should because the injured party was in a stressed state and had come to court with a child who required minding, that if in fact the attendance of Ms Delahunty could not be secured before the trial ended he anticipated that there would be an application for a discharge of the jury and if that happened he would not be in a position to resist.

7. Following the incident, Mr McHugh left the premises as did the woman who had entered the bedroom. Contact was very quickly made with An Garda Síochána and members of the Gardaí made their way to the scene almost immediately. They obtained a description of the vehicle in which Mr McHugh had left and that vehicle was stopped a short time later. There were three occupants, it was driven by Ms Delahunty, Mr McHugh was the front seat passenger and Ms Robyn Scully was a rear seat passenger. Ms Scully produced a phone from her handbag as the one that had been taken away from the bedroom of Ms Lawlor. Mr McHugh was arrested and brought to Coolock Garda Station. Ms Delahunty was also arrested and brought to Swords Garda Station, where she was interviewed. A memorandum was taken of that interview in the ordinary way. It is not a lengthy one and it merits quotation in full:

Q. What is your full name?

A. Annmarie Delahunty.

Q. What is your date of birth?

A. The seventh of the eight, '87.

Q. Do you understand why you have been arrested?

A. Yea.

Q. We are investigating a burglary that occurred at 326 Swords road, Santry, at 8pm today, 13/1/2014, when a male and female entered the house and took a mobile phone. Do you understand that?

A. Ya. It wasn't taken. It was given.

Q. What is your version of events?

A. Pulled up to Megan's house. Brian went in there about two minutes. I hear screaming, so I went in. I went upstairs. The lights were off upstairs. I thought it was flats. The two of them were screaming. They were in the bedroom. Brian was saying he wanted his laptop back and she was say Robyn has it. They were roaring and shouting. Brian rang Robyn's mam. Off the girl's phone. She said 'you can take the phone until I get the laptop back'. That was it, I walked down the stairs and there was two people downstairs. I was just telling him to come on, she gave you the phone until get the laptop back. The poor girl will tell you yourself. I just wanted to leave. She was in hysterics and the kids had woken up. I just wanted to leave.

Q. Where did you go when you left the house?

A. I was driving, took a left and drove to Ballymun. Brian was on the phone to Robyn. She got dropped off by a taxi and we picked her up and drove to Brian's home. I was dropping them off. I was going to my own friends.

Q. How do you know Brian McHugh?

A. I was going out with him for a while.

Q. When?

A. 2011, for a year. I meet him in Dublin.

Q. Where were you living when you were going out with him?

A. Baldoyle.

Q. Why did you meet up today with him?

A. Just for a chat to see how he's getting on.

Q. What time did you meet?

A. It must have been 6.30, 7 o'clock.

Q. Where did you go?

A. Over to McDonald's behind the Topaz, behind the Ballymun Road.

Q. Did you come up to Dublin to meet Brian?

A. No. I have court in the morning for my son.

Q. What made you decide to go to Megan.

A. He was talking about it. This argument between Robyn and Megan and just asked me to drop him down before I left.

Q. When you got to the house did you know what was going to happen?

A. No. I thought she was going to give the laptop and clothes.

Q. Was there a plan to break into the house?

A. No, Jesus Christ.

Q. Did you see Brian go to front door?

A. Yes. I reversed the car into the garden. I saw him knock on the door. I played on my phone for about five minutes. I heard screaming and I walked in.

Q. Was the door open or closed?

A. Open.

Q. Where did you go?

A. I walked upstairs. There was no lights on downstairs.

Q. Did anyone invite you into the house?

A. No.

Q. Why did you go in so?

A. I heard them arguing. She was getting upset and saying things about Brian's girlfriend. I was just telling Brian to go because the kids had woken up and Brian was onto Robyn's mother using Megan's phone.

Q. What was Brian saying?

A. That he wanted the laptop because Robyn didn't have it.

Q. What tone of voice was he using?

A. He was roaring.

Q. Were you afraid?

A. I was a bit afraid. The kids were in the house and Brian has a bad temper but he wouldn't have hurt her.

Q. Did you see Brian with any weapons?

A. No.

Q. There is an allegation that Brian had a blade and held it to her face?

A. No. He held his fist to her face and I got in between them, she said 'Take the phone, take the telly and go.'

Q. So Megan thought she was going to get hurt if he was doing that?

A. I told her that he wouldn't do anything to her and that's when we left.

Q. It's alleged that Brian said to Megan a girl from Limerick was paid €2,000 to come to strike her in the face? What do you say to that?

A. Bullshit – what, over a laptop?

Q. Did you know he had a blade?

A. No. I didn't know he had a blade, I wouldn't have gone over to the house if I had known that.

Q. So it's also alleged that he had a blade to Megan's face?

A. No. When I walked in she was sitting on the bed and Brian was standing to the left of the bed and was going to take the telly, she was just crying and asked me to help her. I said 'just give him the laptop.' I said 'Just go,' to Brian, 'You have the phone.' We left and there was a male and female downstairs when we were leaving.

Q. You mention that you had to stand in between them. When was this?

A. Just before we left.

Q. Why did you feel you had to stand in between them?

A. Just in case something did happen. Had a conversation about the burglary, an understanding of the incident and what happened.

Q. What happened next with the phone? After you left.

A. Brian put it into his pocket and we picked up Robyn and I was driving but somehow Robyn ended up with the phone. Whether she asked for it or not I am not sure.

8. By way of an aside, it should be observed that Ms Lawlor's account of events was noticeably favourable to Ms Delahunty. In the course of her evidence she commented that he [Mr McHugh] was after telling her that a girl was after being paid €2,000 to kill her stone dead and another €1,000 to get a knife and slice her face but she then added "but the girl didn't – to be honest I don't think she knew what she was walking herself into." She quotes the other female who was present as screaming "No Brian, don't do it. There's kids in the house." At another stage she said that "the girl like, kind of convinced him not to do it." She was asked a question which was prefaced, "So Mr McHugh was saying this lady was here to participate in this?" at which stage the witness interjected, "Yes, but I don't think she had a clue what she was walking herself into [...]. She didn't have a notion of what was going on." Counsel for the prosecution then asked, "She in fact was trying to prevent Mr McHugh? Ok?" to which the witness responded, "Yes, I believe if she wasn't there he would have striped my face."

9. It is clear that the defence was very reluctant to call Ms Delahunty as a witness and so be placed in a position where she could not be cross examined by them, hence their wish that she be called by the prosecution.

10. In the course of written and oral submissions the appellant has argued that there was an obligation on the prosecution to call Ms Delahunty. Reliance is placed in particular on the case of *DPP v. Lacey* [2005] 2 IR 241. In the Court's view the *Lacey* case is of very limited relevance. What was in issue there was a decision by the prosecution not to call a witness who was listed on the book of evidence. Here, the prosecution had never proposed calling Ms Delahunty as a prosecution witness. The prosecution say that they do not accept that the account that was given by her was a full and truthful one. They point to the fact that the memorandum of interview was taken at a time when Ms Delahunty was a suspect, was detained and was being questioned under caution. The prosecution say that in those circumstances there can be no question of them being compelled to call a witness in whom they place no confidence. The Court is quite satisfied that the prosecution was fully entitled to decide not to call Ms Delahunty as a prosecution witness and indeed it is unthinkable that they should be compelled to call a witness in the position of Ms Delahunty.

11. The defence backup position on this is that the judge should have called the witness. The occasions on which a witness will be called by the trial judge are likely to be quite rare. The occasions on which an appellate court would overrule a decision of a trial judge not to call a witness are likely to be rare indeed.

12. However, the striking feature of the present case is that the prosecution and the defence had agreed that the witness should be called by the judge. The Court would think that counsel would normally think long and hard before agreeing to a course of action which binds the actions of the trial judge. In that regard it should be noted that prosecution counsel when introducing the topic commented:

**"So, subject to the Court,** our proposal was that we'd ask the Court to exercise its discretion to do that [call the witness]." [Emphasis added].

When responsible counsel on either side had agreed to a course of action in relation to a witness that the prosecution stated on a number of occasions was an essential witness from the defence perspective, we feel that the trial judge should be slow to overturn that common position. If the judge feels after full and careful consideration that an agreement entered into is not an appropriate one, then he will of course decline to follow it but in that situation it would be appropriate to provide a clear and reasoned explanation for declining to accept the agreement entered into. An explanation for the judge's reservations about the proposal may enable counsel on one side or the other to come up with an alternative proposal to take account of the concerns, or it may be that an alternative agreed approach could be adopted. The judge dealt with this aspect rather tersely, ruling as follows:

"I don't see the interests of justice being served by the Court directing her to be called as a witness, and it is a matter for the defence if they wish to rely on the testimony of Ms Delahunty to call her as a witness for the defence."

13. Ms Delahunty was called as a defence witness. Had she, when called as a witness, given evidence broadly along the lines of the memorandum of interview that was taken from her, that would probably have been the end of the controversy. However, that is not what happened. Defence counsel commenced her direct examination by asking: "First of all, can you recall the 13th of January 2013?" To which the response was, "Not really. No." In evidence in response to further questions, she repeated that she did not really remember, that she was not in a good place at the time and that she was in active addiction. She was handed a copy of the statement and asked if she could confirm whether it was correct or not. She said that she had gone through the statement "the other day" and it was correct. At that stage, counsel said, "Do you mind if I read that [the statement or memo] out to you?" Ms Delahunty said no. However, if Ms Delahunty did not object, prosecution counsel did. At that stage the jury was asked to withdraw. In the course of argument counsel observed that the witness may stand over the statement, at which point the judge interjected and said, "Well, how can she if she does not have a recollection?" The judge said that he would not permit counsel to read the statement to the witness. Counsel then indicated that she was seeking to have the statement made an exhibit and wanted to have both Gardaí involved in the taking of the memorandum called. In the course of further debate between the trial judge and counsel there was reference by counsel to s. 16 of the Criminal Justice Act 2006. The judge commented that at that point he had heard no application from counsel in respect of s. 16, so prompted, counsel then applied to have the statement admitted as an exhibit pursuant to the provisions of s. 16 of the Criminal Evidence Act. That application, too, was unsuccessful and the judge's ruling in that regard is the subject of a separate ground of appeal and indeed it was probably the issue that dominated the appeal hearing. In the Court's view the ruling by the judge that he would not act in accordance with the agreement reached between prosecution and defence in the events that subsequently transpired may have worked to create an unfairness. When counsel on both sides had reached an agreement, if the judge was not prepared to act in accordance with it, the Court feels he should have explained his position in some detail and given counsel on both sides and more particularly counsel for the defendant an opportunity to consider the situation that was developing. When that did not happen, one cannot say with confidence that the trial was fair.

14. It might be that had the judge explained his reasoning in greater detail, counsel might have explored the question of whether her difficulties would have been overcome by an application to treat the witness as hostile. In the course of the debate in relation to s. 16, the trial judge observed that he did not believe the statement by Ms Delahunty that she did not recall what had happened on the day of the alleged offence. This suggests that the judge would have been prepared to accede to an application to treat the witness as hostile. In those circumstances it is at least possible that a successful application to treat the witness as hostile might have resulted in counsel for the accused persuading the witness to re-embrace the contents of her memorandum of interview. We will never know at this stage. However the Court is concerned that what transpired may have created an unfairness and is minded to allow the appeal on this ground, quash the conviction and order a retrial.

15. As already referred to, not to permit reliance on s. 16 of the Criminal Justice Act 2006 is the subject of a further ground of appeal. However, having reached the conclusion that we have on the issue in relation to the calling of Ms Delahunty as a witness, we do not find it necessary to consider this ground.

16. There remains the point in relation to the conviction on the robbery count being perverse in a situation where it is said that the conviction on that count is inconsistent with the acquittal on the count involving a threat to kill. The Court feels it appropriate to comment on this ground, as success on this ground might have a relevance to the question of whether a retrial should be directed. Essentially, the case made is that the prosecution evidence on both counts was heavily dependant on the evidence of Ms Lawlor and her account links the robbery and the threats in the closest manner imaginable. It is well established that the task facing a party seeking to set aside a verdict on a particular count on the basis that it is inconsistent to the point of perverse with another count is a formidable one. In the Court's view there are a number of reasons why a jury could rationally have decided to reach different conclusions on different counts. So far as the robbery count is concerned, it is the case that a phone was removed from the bedroom and was recovered from the car in which the appellant was travelling. A jury might well have taken the view that this was of very considerable significance and that it offered objective evidence that the phone was taken. In a situation where there seems to have been no dispute that the door of the bedroom was kicked in and that the appellant was roaring and shouting any jury would probably have little difficulty in concluding that the injured party was put in fear, at the time when the phone was removed from the bedroom.

17. There is a further point. In the course of the interview that was conducted with Mr McHugh following his arrest and detention, the following exchange occurred and was laid before the jury:

Q. Did she give you the phone out of fear?

A. I was loud and you're right, she probably did. That makes sense, yea, she probably - yea, I reckon she gave it to me out of fear, I was thinking it like that. Why didn't she say that? She definitely did give it to me out of fear, that's sickening me now, yea?

18. This is tantamount to an admission to robbery and it could certainly be that it would offer the jury comfort if considering a guilty verdict on the robbery count. In the circumstances the Court has no doubt that the ground related to the perversity of verdicts must fail.

19. In summary, then, the Court has concluded that the fact that the defence was forced into a situation of calling a witness when it had an agreement to the contrary with the prosecution and when that witness then failed to give evidence in accordance with an earlier statement does render the trial unsatisfactory and accordingly the Court will quash the conviction. The Court is entirely satisfied that the ground in relation to inconsistency or perversity of verdicts does not succeed.

20. Accordingly, for the reasons stated, the Court will quash the conviction.