THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

221/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Niall Fitzpatrick

Appellant

Judgment of the Court delivered on the 31st day of July 2015 by Mr. Justice Birmingham

1. On the 31st October, 2014, the appellant was convicted in Cork Circuit Court of offences involving possession of a firearm, unlawful possession of ammunition and attempted aggravated burglary. Subsequently he was sentenced to a term of fourteen years imprisonment.

2. The prosecution allegation at trial was that the appellant attempted to enter a building at Glanmire, Co. Cork at a time when he was in possession of a pump action shotgun. The essential case made by it was that members of the Regional Support Unit who were present at the house which was expected to be the subject of the burglary recognised the appellant with a shotgun in his hand. The prosecution case then was that the appellant succeeded in making an escape from the crime scene but was later arrested at his home.

3. The applicant served an alibi notice and this defence was pursued at trial. No less than sixteen grounds of appeal have been formulated. Grounds 2 and 3 are advanced in these terms:-

> "(i) That the trial judge erred in failing to discharge the jury on the application of the defence in circumstances where a member of the jury panel sought to be excused from the jury on the grounds that the jury were deliberating prior to the conclusion of the case and that jury members were acting in contravention of the judge's directions.
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> (ii) The learned trial judge erred in failing to address the issue of the juror wishing to be excused, with that juror directly in open court and allowing the matter to be resolved through the court registrar in the jury room, thereby prejudicing the position of the applicant as to require the discharge of the jury.

4. The issue which gives rise to these grounds of appeal first surfaced in a somewhat oblique way on day fifteen, when, after the jury had been in and out of court a number of times to facilitate legal argument, the judge addressed the parties as follows:-

> "Judge: Now, Mr. Nix (defence counsel) Mr. Creed (prosecution counsel) the jury has been going in and out somewhat rapidly over the last while and it gave rise to some speculation as to what was going on, so that was just basically it, so we are now in a position to proceed.
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> Mr. Nix: Very good my Lord, thank you my Lord."

5. When the court sat the next day, the following exchange took place between the trial judge and the defence counsel:-

> "Mr. Nix: Morning my Lord.
>
> Judge: Morning, yes.
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> Mr. Nix: My Lord, yesterday Ms. McCarthy (junior counsel for the defence) informs me that when the guard who is in charge of the jury came out, she said to your registrar, her best hearing of it was – that a member of the jury wanted to be discharged. I feel obliged to mention it to your Lordship.
>
> Judge: Yes.
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> Mr. Nix: Is that in fact the case my Lord, I know it is not for the defence to engage in debate with the Bench, but if that is the case, my Lord, I think the defence should be informed of it.
>
> Judge: That which?
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> Mr. Nix: If that is the case, I think the defence should be informed about it.
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> Mr. Creed: I know nothing of this my Lord.
>
> Judge: Yes.
>
> Mr. Creed: I know nothing of what happened or ---
>
> Judge: The situation is as you say, that there was an indication from a member of the jury that matters were being

discussed and that Mr. --- the particular juror said that matters should be held in abeyance until all the evidence was in, as I had directed. And it was communicated to that person that that is the way it should proceed and had not been told that, that person was reassured and remained – indicated that he was no longer of the view that he should be discharged.

Mr. Nix: Very good my lord.

Judge: That was the basis of it.

Mr. Nix: Thank you my Lord.

Judge: It was just in between when they were going in and out at that point.

Mr. Nix: I appreciate that."

6. There matters rested at that stage. The issue was returned to once more on the following day after the prosecution evidence had concluded. On that occasion Mr. Nix commented:-

> "Yes, my Lord, yesterday I should have mentioned this to your Lordship. I was thinking about this last evening, my Lord, and I should have mentioned to your Lordship this morning, but I am afraid with all the toing and froing about Mrs. Fleming [a reference to an unconnected issue about the role of a forensic scientist when giving evidence] it went out of my head. Yesterday, a juror said that – wished to be excused and that as I understand it what was brought to your Lordship's attention was at least some members of the jury were discussing the matter, which this juror felt, was inappropriate in the circumstances. And on that basis wished to withdraw, and with discussion was taking place in breach of your Lordship's direction to them. Now I am making this point because in the event it might go someplace else. But it does strike me, my Lord, that if the jury have not – have ignored your caution on that point or your stricture on that point, they may have ignored it on others. And in those circumstances, a breach of your Lordship's stricture having been brought to your attention, I feel the jury should be discharged, even at this stage. That's my point my Lord."

7. In a brief ruling the application for a discharge was refused. The judge commented as follows:

> "Judge: Yes. Well, the application has been made by Mr. Nix then at the close of the evidence that the jury should be discharged on the basis of his application what he has set out. And I am of the view that having regard to the warnings I have given, and having regard to what I am going to – how I am going to address them presently, that these matters can be kept within this trial and the jury will not be discharged."

8. The appellant says that it is unsatisfactory that it was only because a conversation was overheard or overheard in part by junior counsel for the defence that the issue in relation to the jury was brought to the attention of the prosecution or the defence. The resolution of the issue that then took place behind closed doors in the jury room, and not as a result of independent scrutiny by the trial judge in open court, was also not satisfactory.

9. The first point to be made is that the concerns that the juror was reported as having were not of the first order. It is true that, in the course of introductory remarks made by the trial judge to the jury before the case was opened, he told the members of the jury that they ought not to discuss the case among themselves and insofar as the juror was reported as indicating that the jury were discussing the case among themselves, that could be regarded as breaching the trial judge's directive providing a basis for the complaints by defence counsel that the jury was ignoring the judge's caution or the judge's stricture. However, the advice to the jury from the trial judge was slightly surprising and went beyond what was usual. Ordinarily a judge will instruct a jury that they should not discuss the case with anyone outside the jury and that they should not form any conclusions or reach any firm views until they had heard all the evidence and the closing speeches and the charge of the trial judge. A suggestion that jurors should not discuss the case among themselves during the course of a long trial might seem somewhat unrealistic and indeed might be seen as undesirable. Ultimately, the jury will be asked to return a collective decision. If any individual juror feels that a particular aspect of the evidence, or the manner in which an element of the evidence is being presented or is emerging, is of significance there may be something to be said for the juror mentioning this to his or her colleagues. Some or all of them may share the view that what has been identified as significant is in fact significant. Other jurors may take an entirely different approach. There may, certainly in some cases, be advantages in jurors first addressing the issue when it is fresh in everyone's mind. However, that does not alter the fact that in this case a juror seems to have felt that there was something inappropriate in the way in which fellow jurors were approaching the case, to the extent of wishing to be discharged, presumably because the juror did not wish to be associated with what was going on. That a juror would feel that is a matter of some significance. In the Court's view, when such a situation arises, the fact should be drawn to the attention of both sides and their views sought as to how to proceed. In this case the way the issue was approached meant that the parties were denied an opportunity to have any input. Neither is it satisfactory that the parties or more specifically the defence only became aware of the fact that there was an issue at all, because junior counsel for the defence happened to overhear a conversation.

10. A somewhat similar situation arose in the case of Joseph O'Reilly v. DPP [2015] IECA 111. In that case a copy of the book of evidence or perhaps a portion of the book of evidence was left in the jury room causing jurors to wonder if it had been left there for them. Now, it must be said, in fairness to the trial judge in the present case, that a book of evidence being located in a jury room was a much more unusual and indeed concerning situation than jurors discussing an ongoing case among themselves. Nonetheless, the manner in which the trial judge in the Joseph O'Reilly case responded to the issue is instructive. It is set out in considerable detail in the judgment of this Court on the application by the DPP to dismiss proceedings brought by Mr. O'Reilly's s. 2 Criminal Procedure Act 1993, as an abuse of process. In summary though, the trial judge first saw prosecution and defence counsel together in chambers and informed them of what had emerged. Having forewarned counsel, the trial judge then raised the issue with counsel on both sides in open court and reached agreement on how to proceed which involved addressing questions to the jury, through the jury foreman, in order to ascertain if any of them had read the document. Following a similar approach in the present case would have seen the trial judge inquiring of jurors whether, because of any discussions the jury might have had among themselves, or for any other reason, any of them felt that they had reached a point where they had formed a concluded a view on the issue of whether all were satisfied that as of that moment their minds remained open.

11. In the Court's view, the failure to follow such a procedure or something similar may leave the appellant with an understandable sense of grievance. The procedure that was adopted was not an appropriate one. In the Court's view, the appropriate way to deal with the situation that has emerged is to quash the conviction and order a re-trial. Given the view that the Court has reached, it is not necessary or indeed appropriate to comment on the other grounds of appeal. That is so in a situation where the Court is satisfied

that once the view is taken that the manner in which the concerns expressed by the juror were dealt with was unsatisfactory which means that the conviction ought not to stand, and where the Court is equally of the view that this is clearly a case where a re-trial is appropriate.