THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Appeal No.: 34/14

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

Trevor Gleeson

Appellant

Judgment of the Court delivered by Mr. Justice Mahon on 14th day of November 2016

1. This is an appeal against conviction by a jury at Naas Circuit Criminal Court on 12th December 2012 following a six day trial. The appellant was found guilty of five counts of simple possession of certain drugs contrary to s. 3 of the Misuse of Drugs Act 1977, as amended. These counts related, separately, to Benzylpiperazine (Count 2), possession (Count 4), Diamorphine (Count 6), Cannabis (Count 7) and Cannabis (Count 8). These convictions were by way of a majority verdict of the jury. The jury disagreed in relation to four counts of possession contrary to s. 15 of the Misuse of Drugs Act 1977, as amended.

2. On 23rd July 2013 a second trial of the appellant took place in relation to the four s. 15 counts in respect of which there was a disagreement in the first trial. In the course of this second trial, the prosecution disclosed to the defence the existence of CCTV footage, at the end of the second day of the trial, showing the appellant being approached by two men whom he claimed were intimidating him at a supermarket premises on 29th March 2010. Because of the late disclosure of the CCTV footage, the learned trial judge discharged the jury.

3. A full account of the confrontation between the two men and the appellant and his young son was given by the appellant to the gardaí in a statement dated 20th April 2010. The visual content of the CCTV footage is consistent with part of that statement.

4. On 31st January 2013 the appellant was sentenced, (in relation to the convictions in the first trial), to a term of imprisonment of eighteen months. The entire term was suspended for a period of three years.

Background facts
5. The appellant was a prison officer at the Midlands Prison. On 22nd December 2009 he was observed parking his car in the Lourdesville area of Kildare town. Robert Dillon, who is a convicted criminal, was seen getting into the appellant's vehicle whereupon the car was driven a short distance when Mr. Dillon then left the car. The observing gardaí then followed and stopped the appellant. Before stopping the vehicle, the gardaí witnessed a plastic bag being thrown from the car. That plastic bag was retrieved and found to have contained Diamorphine and cannabis with a total street value of approximately €6,000.

6. The appellant was duly arrested, detained, questioned and charged with the various counts. From the outset, the appellant maintained that he had been threatened and intimidated by known criminals both inside and outside the Midlands Prison, his place of work, for the purposes of bringing illicit drugs into the prison for use by prisoners. He maintained that it was his intention at all times to dump the drugs rather than bring them into the prison. The issue as to whether the appellant was acting under duress was central to the trial.

The appellant's grounds of appeal
7. The appellant's written grounds of appeal are:-

> (i) The learned trial judge erred in law in instructing the jury as to how they deliberate in respect of the defence of duress.
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> (ii) The verdict of the jury in convicting the accused of counts 2, 4, 6 and 8 (the s. 3 offences) was perverse in all the circumstances and against the evidence, and in contravention of the charge of the learned trial judge.
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> (iii) The investigation of the offences by the prosecuting gardaí was flawed, unsatisfactory and improper as to the complaint of duress as alleged by the appellant upon his arrest.
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> (iv) The gardaí suppressed or withheld evidence in the first trial (which they had in their possession) which was detrimental to the defence of the appellant.
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> (v) The conviction in respect of the drug Benzylpiperazine count is in error as it is an offence unknown to law.

The duress issue
8. It is submitted on behalf of the appellant that the learned trial judge erred in law in respect of the standard against which the accused's actions were to be judged. It is maintained by the appellant that the learned trial judge erred in charging the jury that the test to be applied in relation to the appellant's claim that he had acted under duress was an objective test rather than a subjective test.

9. It is contended on behalf of the appellant that the learned trial judge should have adopted an approach in accordance with the decision in *DPP v. Dickey* (Unreported, Court of Criminal Appeal, 7th March 2003), and invited the jury to consider the reactions of the accused taking into account his particular circumstances. It is contended that the jury should have been expressly directed not to consider what they would have done in the circumstances that confronted the appellant at the relevant time, but what the appellant, with all his characteristics did, and ask themselves whether the appellant's power of resistance was overborne by the alleged threats.

In essence it is argued that by failing to appreciate the inherently subjective and theoretical nature of the defence, the learned trial judge erred in her direction to the jury.

10. For the respondent, it is contended that the appellant's interpretation and understanding of the decision in *Dickey* is wrong. It is contended by the respondent that it is incorrect to suggest that the judgment in *Dickey* represents a change or shift in Irish law on duress towards a purely subjective test.

11. The learned trial judge charged the jury on the duress issue as follows:-

> *"You should apply your own experience and knowledge of the ways of life and perhaps ask yourself the question as to what you would have done in the circumstances in which the accused found himself. This is what is described as an objective test, in that it does not depend on what the particular accused regarded as appropriate in the circumstances, which would be described as a subjective test. It is an objective test, decided by reference to objective criteria and not to the accused subjective perceptions, because it is proper that in any rational system of law should take into account the standards of honest and reasonable persons. Particularly, when somebody seeks an exemption in relation to conduct that is otherwise criminal. It is fair and logical that the appropriateness and proportionality of the response to a threat are tested by reference to objectively reasonable standards as they are, for example, in the general area of the law for the use of force. This question must be answered in the way because everybody has to be judged by the same standards. The reactions of the reasonable person may or may not be the same as the reactions of any particular accused. You are here to represent society and community as a whole, and you set the standards of what is reasonable. In judging what a reasonable person would do you are not expected to imagine a saint or a particularly weak or a particularly touch or hard individual, and therefore you should adopt the posture of a reasonable person, being a sober person of reasonable firmness of the accused age and gender. Pose the question: what in your judgement, as judges of fact, would such a person have done in the circumstances? Would he have felt compelled to act in the manner in which he did?"*

12. Following the charge to the jury, counsel for the appellant made a requisition in relation to that part of the learned trial judge's charge relating to the issue of duress and how the jury should approach that issue in the case.

13. The learned trial judge ruled in relation to the requisition thus:-

> *"But, I am satisfied, as I say, having considered all the authorities, and indeed Ms. Coonan in her book seems to accept that there is no clear cut guidance in relation to this from the Court of Criminal Appeal, but from my interpretation of the authorities, it is on that basis that I have given my charge, and I don't propose to recharge in relation to that. Now, in relation to the immediacy of the threats, I just wonder having given the jury quite a lot to digest in relation to that, is it nit-picking in relation to something that .. I have told them that any threats that Mr. Gleeson received afterwards and what I was referring to was the note, threats of that nature, could not be perceived to be an immediate threat in terms of how they to view duress. And I think you would accept that does apply."*

14. The learned trial judge however did re-address the jury in the following terms:-

> *".. You may recall in dealing with the issue of duress we looked at the immediacy of the threat, and Mr. Colgan has asked me to point out to you, and I have agreed to do that, because I think it is appropriate in this case, that in relation to the immediacy of the threat, we know in this case that Mr. Gleeson has indicated that he was under duress to go and to collect these drugs, and that it has been his intention obviously to dump them. That is what his evidence is. It is a matter whether you accept that nor not. But that the threat clearly would only have been carried out at a later stage, in other word, that the immediate threat, in other words the threat to his family's life etc., or threat to his own life was not going to be carried out .. need not necessarily have been carried out in advance of the incident. It as the threat hanging over him that could, in fact, be carried out a few days later, when he had to face these people, whether that was with the drugs or without. You know he indicated, his indication was that the drugs were going to be dumped. But at some stage he was going to have to face these individuals. Mr. Colgan has asked me to point out to you that, you know, the threat did not have to be carried out there and then on the spot. In other words there did not have to be somebody standing there with a gun to get Mr. Gleeson to do this. The threat to life, whether his own or his family etc., could have been carried out in the days after the incident took place. So, I hope that assists you in some way."*

15. As correctly observed by Counsel for the appellant in the course of his requisition following the learned trial judge's charge to the jury, that charge, insofar as it related to duress was on the basis that the test to be applied in determining whether there was duress is an objective test and not a subjective test. Specifically, the learned trial judge told the jury that:-

> *"It is an objective test, decided by reference to objective criteria and not to the accused's subjective prespections.."*

16. She referred to:

> *"The standards of honest and reasonable persons"*

and

> *"…tested by reference to objectively reasonable standards as they are, for example, in the general area of the law for the use of force. This question must be answered in the way because everybody has to be judged by the same standards.*

and

> *"The reactions of the reasonable person may or may not be the same as the reaction of any particular accused."*

17. If the test was that duress was required to be considered by the jury on a subjective basis, or a primarily *subjective* basis it would have been necessary for the learned trial judge to not only specifically and unequivocally invite the jury to apply such a test, it would also have been necessary to specifically refer to the fact in that context that the appellant was a prison officer, and that he worked in an environment which required him to interact on a daily basis with convicted criminals. Indeed it was suggested by Mr. Hanahoe responding to Mr. Colgan's requisition to the effect that the jury should be re-addressed by the learned trial judge and informed that a subjective test was appropriate, that such might be disadvantageous to the appellant. Mr. Hanahoe stated:-

> *"If the jury was to adopt a subjective test the court might consider that it would have to inform the jury that what we are dealing with here is a prison officer who has ordinary congress or interaction with the people from whom the threats are meant to be emanating. He is used to dealing with criminals … so in fact what the subjective present in this case would, I say, point to the accused, Mr. Gleeson, having a far stronger ability to withstand threats than the ordinary man on the Clapham omnibus."*

18. The law on duress has, for over seventy years, been governed by the decision in *The People (A.G.) v. Whelan* [1934] I.R. 518. In the course of his judgment in that case, Murnaghan J. stated:-

> *"Threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal."*

19. This often quoted passage confirms and explains the defence of duress. It does not, however, assist in identifying, precisely, the criteria on which duress is to be assessed or confirmed in sufficient measure to result in a decision to exclude a finding of criminal responsibility for an act which, in the absence of duress, was criminal, and constituted the commission of a criminal offence. In *DPP v. MacEoin* [1978] I.R. 27 the facts were that the appellant was convicted by a jury of murder. At the trial, the appellant admitted that he struck the deceased with a hammer. Both men had met while serving prison sentences some years earlier. Subsequently they moved into a flat together. On the date of the killing, the deceased has consumed a very large quantity of alcohol. A row started, the deceased hit the appellant on the head with the hammer, it fell to the floor, both of them struggled for it, the appellant got the hammer, the deceased started to punch him whereupon the appellant claimed that he lost control of himself and hit the deceased on the head with the hammer and continued to hit him a number of times after he had fallen to the floor. The appellant claimed that he had been provoked into attacking the deceased. The issue addressed by the learned trial judge in his charge to the jury related to provocation and whether it had to be such that it made the accused unable to form an intention to cause serious bodily harm. This aspect of the charge was found to have been flawed, and the appeal was allowed on that basis.

20. In the course of delivering the judgment of the court, Kenny J. stated the following:-

> *"This would be sufficient to dispose of this appeal, but on the retrial, the question will arise as to whether the provocation must be acts or words which would cause a reasonable man to be provoked so that he temporarily loses control of himself and which actually cause the accused to cease to be master of himself (the objective test) or whether it is sufficient for him to raise a case that he was provoked by what was done or said whether it was such as would provoke a reasonable man or not (the subjective test)."*

21. Later in the judgment, Kenny J. stated:-

> *"The objective test is profoundly illogical: we assume that the reasonable man whom it propounds as the criterion is not the accused. If he were, the question would not be whether the reasonable man would be provoked but whether the accused was provoked. But what are the characteristics of this reasonable man? Is he to be endowed with the knowledge and temperament of the accused? Words which would have no effect on the abstract reasonable man may be profoundly provocative to one having knowledge of what people say about him. … These are difficulties which those who support the objective test have never attempted to answer."*

22. It is of course the case that *MacEoin* was concerned with the defence of provocation, not duress. While both are, of course, different, they have some similar characteristics, in that both are concerned with criminal behaviour prompted by third party pressure. Their difference was explained in *Criminal Law* (Charlton, McDermott and Bolger), in the following terms:-

> *"An extension of that reasoning can be argued as applying to duress. The difference between the two defences is, however, that provocation as a defence is a concession to human frailty; where a person acts in the throes of passion to the extent that he is no longer master of his actions. To limit the defence to provocation or provocation to circumstances where a hypothetical, ordinary or reasonable man would act as the accused did is often to exclude the defence from those who may deserve its protection. Duress on the other hand involves a rational choice between two evils."*

23. The defence of duress was an issue in the case of *DPP v. Dickey* [2003] WJSC/CCA at 3266. In that case the Court of Criminal Appeal considered the learned trial judge's charge to the jury and criticised it because it failed to outline the evidence of how the appellant was put under stress and allowed the appeal on that basis. The Court of Criminal Appeal did not criticise the following extract from the learned trial judge's charge in that case:-

> *"When you are considering this you have to consider it from the powers that you perceive the accused to have; it is not what you do in the situation but what you perceive the accused's powers were, and take into account the particular circumstances and human frailties of the accused specifically..".*.

24. Undoubtedly this short quotation is a reference to a *subjective* test, rather than an *objective* test.

25. In the Australian case of *Lawrence* [1980] 32 ALR72, Moffat P. stated:-

> *"The questions posed are not simply whether the defence of duress is subjective or objective. On any view the defence involved both elements. It would be available only if the mind of the accused is in fact (subjectively) overborne, but that there are some objective developments before the defence is available, is clear."*

26. In the view of this court, the appropriate test to determine whether the duress complained of is sufficient to acquit an individual of a criminal act attributed to him is neither entirely *subjective* or entirely *objective*. It has to include an element of both, as it needs to take into account the particular circumstances of the person seeking to invoke the defence. For example, a wealthy person capable of moving himself and his family out of the jurisdiction to avoid threats made against him and his family should not be entitled to benefit from the defence of duress in the same way as somebody without the means to escape. Some people will be, because of their individual or personal circumstances, more vulnerable to duress, than will others. It is reasonable therefore that a jury should consider allegations of duress in the context of the individual and personal circumstances of the accused person.

27. Accordingly, it was appropriate for the learned trial judge to incorporate into her charge to the jury a requirement that the jury would consider the defence of duress on the basis of what the appellant, as a prison officer working in a prison inhabited by dangerous criminals ought to have reacted to the threats made against him in those particular circumstances. Her failure to do so

constitutes an error of principle. It may well be the case that the appellant, as suggested by Mr. Hanahoe to the learned trial judge, as a prison officer, used to dealing with criminals on a daily basis, ought to have been better able than most to have withstood such threats. Equally, it is arguable that a prison officer, because of his work, might feel particularly vulnerable to such threats. It is, however, a matter for the jury to consider which is the case in the circumstances as presented to it.

The CCTV issue

28. On the morning of the hearing of the appeal the appellant filed a Notice of Motion with a grounding affidavit (sworn by the appellant's solicitor, Mr. Boyce). The Notice of Motion sought leave to introduce fresh evidence which had not been presented to the jury in the course of the trial. This additional evidence included the following:-

> (i) The transcript of a subsequent trial of the outstanding counts on the same Bill (KE67/2010) which began on 23rd July 2013. (All relevant excerpts are already contained in the applicant's submissions).
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> (ii) CCTV footage (2 cameras) retained by An Garda Síochána of a incident at Eurospar on 29th March 2010 disclosed and played during the course of the second trial. This footage is in the possession of An Garda Síochána.
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> (iii) The statement of the appellant made to An Garda Síochána regarding the above incident made on 20th April 2010.

29. The appellant also sought an order pursuant to Order 86(C), Rule 11 for the production of the said CCTV footage and the said statement.

30. In his affidavit, Mr. Boyce averred, at para. 4:-

> *"I say that at the subsequent trial (herein referred to as the second trial) of the outstanding counts, evidence that was not adduced at the first trial was disclosed to the defence for the first time during the course of that trial, specifically CCTV of an incident at Eurospar, Kildare town on 29th March 2010. The jury from the second trial were discharged on the grounds that the DPP failed to disclose this material to the defence at the first trial and up to, and including the second trial."*

and

> *"I say that on 20th April 2010, the appellant made a statement to An Garda Síochána relating to the said incident at Eurospar in which he claimed to have been intimidated by certain named individuals. This was disclosed at the second trial."*

31. The court duly permitted the introduction of the new evidence. It has viewed the short CCTV footage since the hearing of the appeal. That short CCTV footage shows a man and a child (apparently, the appellant and his young son) standing at, and then entering a lift (apparently, at the Eurospar premises in Kildare). It shows two men walking immediately behind the appellant and his young son (apparently, these two men are Messrs. Dillon and Moorhouse), and shows them walking away as a garda approaches. The court has also read the statement of the appellant made to An Garda Síochána dated 20th April 2010 and the transcripts of the second trial which commenced on 23rd April 2013. The relevant part of the statement is generally consistent with the events apparent from the CCTV footage. The appellant then (and at his trial) maintained that Messrs. Dillon and Moorhouse were convicted criminals and were involved in the intimidation relevant to his duress claim.

32. On the second day of the second trial the CCTV footage was made available to the defence for the first time. The CCTV was viewed by the defence, and an application was then made to discharge the jury in relation to this and other matters. The decision to discharge the jury was made by the learned trial judge only on the basis of the failure to provide the defence with the CCTV footage prior to the commencement of the trial. In her ruling, she stated:-

> *"However, the one matter that does concern me arises from the CCTV which we have seen this morning, and it concerns me because, not only was this not disclosed until this morning, although we became aware of it yesterday and thankfully the CCTV footage is still available so that we don't have to head down the road of missing evidence, but this clearly shows Robert Dillon, who features prominently in this case, in the CCTV footage in the presence of the accused, and the accused said he was being intimidated by him along with another person. It also discloses, and Mr. Gleeson's statement discloses, that he telephoned the gardaí and that they arrived, and as Dillon and Moorhouse saw the gardaí arriving they moved off. Now I did not enquire as to whether a statement had been taken from .. I should not have said ban gardaí .. from the gardaí that arrived and I was told no."*
>
> and
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> *.. but what is very clear from the CCTV and I have seen is that it coincides and corresponds with the complaint made, and it is not a situation where they are simply passing in the street. They was obviously some form of contact between them. .."*

33. Duress formed the thrust of the appellant's defence in both trials. In the first trial, the jury was addressed by counsel for the respondent, Mr. Hanahoe, very much on the basis that the evidence did not disclose the existence of duress, or at least duress of such an immediate nature as might, in effect, disprove the allegation that the appellant was guilty of the various charges, on the basis that such offences had been committed by him freely and in the absence of duress.

34. In the course of her charge to the jury in the first trial, the learned sentencing judge stated:-

> *"Now, he reminds you that the accused raised the issue of duress from the very first moment that he was apprehended, and indeed he pointed to the area in the interview where, in fact, even on the way back to the garda station it would appear that the accused was indicating that he did these matters under duress. He also said that the explanations as to what Mr. Gleeson said in relation to his phone and the analysis, and all of that stacked up. And clearly it is not disputed in any way that the persons that Mr. Gleeson's referred to as intimidating, that clearly all of these people are very serious and dangerous criminals. I don't think anybody is disputing that. And as I say, you have all of their previous convictions. So in looking again, ladies and gentlemen, at what effectively is the defence in this case of duress, as I say, you must look to what the evidence in relation to the threats, whether or not they were immediate…"*

35. In her written submissions to this court, the respondent observed that no evidence was called to contradict the appellant's

suggestion that he had been threatened by third parties, and in particular, Mr. Dillon, or that he had made multiple complaints of such threats to the gardaí, or that the gardaí had not taken such threats seriously. She went on to state that while the failure to disclose the CCTV footage was *most unfortunate*, and that because of the implicit acceptance by the prosecution that the accused had indeed been threatened on at least one occasion following his arrest, the failure to disclose the CCTV did not have any material impact on the case. She placed reliance on the decision in *DPP v. McCarthy* [2008] 2 I.R. 2 where the following was stated:-

> *"The court is satisfied however that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure on the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question."*

36. That statement represents, in the court's view, the correct statement of the law on the effect of a failure to disclose relevant evidence. What is particularly relevant however is the *question of degree… having regard to the nature and importance of the material in question.*

37. The prosecution have, in general terms, a duty to make all relevant evidence available to the defence. It is the case that the gardaí have a specific duty to seek out and obtain relevant evidence and to preserve it for possible use at a trial. In *Braddish v. DPP* [2001] 3 I.R. 127, Hardiman J. stated:-

> *"It is the duty of the gardaí arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the guilt or innocence. This is so whether the prosecution propose to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not."*

38. The verdict of the jury in the first trial clearly suggests that the jury was not convinced that the appellant had been subjected to duress of either a sufficient nature or of such immediacy as excused the appellant's involvement in the criminal activity in question.

39. It is undoubtedly arguable that had the jury been provided with the opportunity to view the CCTV it might have averted any doubt they may have had that the appellant had been subjected to duress.

40. The effectiveness of CCTV footage in assisting a jury to decide the guilt or innocence of an accused person varies from case to case. It can however be, (and often is), very effective and persuasive if its visual impact is significant and the subject matter of the video coverage reasonably clear. In this case, the appellant maintained that his admitted involvement in the offences in question came about as a result of duress, and in particular a fear for his family if he did not cooperate with the demands of certain criminal elements. It was always possible that a jury would accept or reject such a defence. However, the benefit and evidential value of the jury seeing with their own eyes the scenario of the appellant and his son being approached by two criminals, and the fact that the two criminals moved away when a member of An Garda Síochána arrived on the scene is likely to have been of considerable impact had they viewed it. At a minimum, it is likely to have provided a significant degree of credibility to the case being made by the appellant that he was acting under duress from the individuals in question. It is a fact that the CCTV footage in question was in existence at the time of the first trial. Had it been available to the jury at the first trial it is probable that it would have been of considerable benefit to the appellant, and may have swayed the jury in a particular direction leading, ultimately, to his acquittal on all charges. Understandably, for this reason, the absence of the CCTV footage was of concern to the learned trial judge in the second trial. It may well have been the case that in similar circumstances, the learned trial judge in the first trial would have acted in a similar fashion.

Conclusion

41. The court will allow the appeal on the basis that:-

> (i) The charge to the jury by the learned trial judge wrongly emphasised the test relevant to the defence of duress as being solely and entirely objective, and
>
> (ii) the CCTV footage ought to have been made available to the defence in the course of this, the first trial of the appellant, as it was possible and indeed probable that a viewing of the CCTV footage by the jury might have confirmed (or confirmed to a greater degree) the fact that the appellant had acted under duress,

42. In the circumstances, it is unnecessary for the court to make any determination in relation to those grounds of appeal which maintain that the verdict of the jury in relation to counts 2, 4, 6 and 8 were perverse, or that the investigation of the offences by the gardaí was unsatisfactory and improper in relation to the complaint of duress or that the conviction in respect of the Benzylpiperazine count was in error because the offence was one unknown to law.