THE COURT OF APPEAL

Birmingham J.
Edwards J.
McCarthy J.

222/14

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Darren Wynne

Appellant

JUDGMENT of the Court delivered on 30th day of January 2017 by

Mr. Justice Birmingham

1. On the 10th July, 2014, the appellant was convicted of murder by a unanimous jury after a trial which lasted 17 days. He now appeals against that conviction.

2. In order to appreciate the issues raised on the appeal, it is necessary to appreciate that Mr. Wynne had gone on trial along with two co-accused, Quentin Monaghan and James Seery. Prior to the commencement of the trial Mr. Wynne, Mr. Monaghan and Mr. Seery all offered to plead guilty to manslaughter, but the offers were rejected by the prosecution and the trial opened on the 18th June, 2014. On Wednesday the 2nd July, 2014, both Mr. Monaghan and Mr. Seery were re-arraigned and pleaded guilty to manslaughter, at which stage the pleas were accepted and sentence hearings in respect of both were held at a later stage.

3. By the stage in the trial when pleas of manslaughter by Mr. Monaghan and Mr. Seery were entered, the jury had heard memoranda of interviews conducted by gardaí with all three accused read. In a situation where Mr. Wynne was the sole remaining accused, counsel on his behalf sought the discharge of the jury. That application was rejected by the trial judge. The failure to discharge the jury provides the main, indeed the sole ground of appeal.

4. The background to the trial and now this appeal is to be found in events that occurred on the 6th April, 2013. On that day Jamie Lindsay was shot dead at Coneyboro, Athy, Co. Kildare. The case for the prosecution, as opened by counsel to the jury, was that on the day of the incident, which was a Saturday, the three accused met in a graveyard, St. Michael's, in Athy. Apart from the three accused, also present was a young woman from Limerick, Jodie Browne who was the girlfriend of Quentin Monaghan. At the graveyard Darren Wynne collected a firearm, this was the firearm that would be used in the fatal shooting. Having collected the firearm, the four drove by car to a remote wooded area where the firearm was test fired. It appears that this was done by Quentin Monaghan who discharged two rounds into a tree. Later they drove to Coneyboro Estate in Athy. On route a text message was sent from James Seery to Mr. Lindsay. Mr. Seery owed a small amount of money to Mr. Lindsay for cannabis and the impression given was that Mr. Seery was in a car in a laneway nearby with a view to discharging the debt owed. In the estate Mr. Wynne got out of the car, and according to the prosecution concealed himself until Mr. Lindsay arrived. Mr. Lindsay was shot by Mr. Wynne at very close range. Mr. Wynne got back into the car, which was owned and driven by Mr. Monaghan, which was then driven to the Monaghan home in Stradbally, where Mr. Wynne and Mr. Seery changed their clothes, they had brought a change with them and burned the clothes that they had been wearing.

5. As counsel made clear in his opening, the prosecution case Mr. Wynne was that he discharged the firearm at almost point blank range and that therefore the only inference that could be draw was that he had the requisite intent for murder. However, as counsel also made clear, the case against Quentin Monaghan and James Seery was a somewhat different one. The case against them was based on the prosecution contention that they had provided material assistance to Darren Wynne in carrying out the murder and that both were, in effect, being prosecuted as accessories to murder.

6. So far as the appellant Mr. Wynne is concerned, he provided a witness statement on the 7th April, 2013, then on the 12th April, 2013, he was arrested and detained at Naas garda station. During the course of his detention, he was interviewed on seven occasions. Over the course of these interviews his position evolved. In the course of the first interview he maintained his innocence and denied any involvement in the killing of Mr. Lindsay, saying that the victim was a friend of his. During the second interview the appellant gave an account of his movements on the day prior to the shooting. He said that he had rowed with the deceased, because he had declined to collect money for him. He also said that there had been a row during the week, because the deceased had accused him of stealing an ounce of "weed" from him. The appellant gave an account of his movements. He said that he had met Mr. Seery and had spent the day and evening at the home of Mr. Seery's sister and had left to go to the deceased so that Mr. Seery could pay off part of a drug debt. Mr. Wynne said the deceased had rowed with Mr. Seery because Mr. Seery had failed to pay the entirety of the money owed.

7. At one stage it was put to the appellant that Jenny Seery, sister of the accused James Seery had provided a statement to gardaí which alleged that the appellant had asked her to be his alibi witness. He was also asked whether he had been with Mr. Monaghan and about locating the firearm in the graveyard. At that point the appellant asked to see his solicitor and he was facilitated in that regard. After a consultation, he admitted that he had killed Mr. Lindsay, but contended that he was acting in self defence. He told gardaí that on the day of the shooting that Mr. Lindsay had threatened to burn his home down and to rape his grandmother or to have her raped and to have his entire family wiped out, while boasting that he had the resources and wherewithal to do this.

8. The appellant claimed that he had meant to scare the deceased, but that when he approached the deceased with the gun that Mr. Lindsay made a lunge at him and he then shot the other man. He alleged that the deceased had accused him of pocketing some

of the proceeds of drug sales in addition to taking some drugs and that as a direct result of this he "snapped".

9. Throughout the balance of interviews Mr. Wynne maintained that he had never intended to kill the deceased, rather he contended in later interviews that he had intended to fire a warning shot.

10. In relation to what he had to say about his co-accused, he acknowledged that he was in their company on the day of the shooting, that they had retrieved the firearm from the graveyard so that Mr. Monaghan could test fire it, as he was proposing to make a purchase. He accepted that he had mentioned knee capping the deceased, but claimed the intention was only to fire a warning shot.

11. In later interviews the appellant maintained that he snapped when threats were made against his grandmother and family members. In essence the contention advanced was that appellant was provoked into shooting the deceased. At trial it was not in dispute that the applicant had shot the deceased, but the issue was whether the prosecution could prove that he had the requisite mental element for murder when doing so and whether the prosecution could disprove the defence of provocation when raised. The defence emphasis was, it should be noted, on the provocation defence/partial defence.

12. So far as the position of the co-accused is concerned, it is of some note that they along with Ms. Browne handed themselves into gardaí together, some days after the fatal shooting. It appears that Mr. Monaghan and Ms. Browne had spent the intervening together and that Mr. Monaghan and Mr. Seery were in communication with each other. At the risk of over simplification the basic account of the incident that emerges from the several interviews conducted with Mr. Monaghan, is that the shooting was carried out and planned by the appellant, but that neither he or Mr. Seery were a party to it. The appellant "played them for fools, played a good game". This approach was broadly echoed by Mr. Seery.

13. In the course of the trial it would seem that there was some discussion and indeed disagreement between the parties about what procedures would be followed at trial. The prosecution preference was to call a certain number of witnesses and then to proceed to read into the evidence the memoranda of interviews conducted with each of the three accused. The defence preference was that the prosecution would call all their witnesses first before turning to the memoranda, but that suggestion did not find favour with the prosecution.

14. After the opening statement seventeen witnesses were called on the first day of trial. These witnesses were largely non controversial and their evidence at trial did not depart significantly from their witness statements. They were concerned with issues such as maps and photographs of the crime scene and locations visited by the accused men on the day, dealing with the last known movements of the deceased, the arrival of gardaí on the shooting scene, the removal of the body from the scene and its reception at Naas General Hospital.

15. On the second day of the trial, two witnesses were called by the prosecution. Garda Mairead Lacey in relation to the examination of a pink Samsung mobile phone found among the clothing of the deceased. Of interest were text messages between the appellant and the deceased, other text messages sent by the deceased to third parties and a text message sent to the deceased by James Seery.

16. The second witness called on that day was Jodie Browne. She, it should be explained had been arrested in relation to the offence, detained and interviewed during the course of detention, but was never charged with any offence. Insofar as she was present for the shooting, she was in the company of the three accused prior to the incident and was with them for a period afterwards, she was potentially a very significant witness indeed. However, the submission on behalf of the appellant asserts that Ms. Browne's evidence in many respects was vague and her memory of events which led to the commission of the shooting was "nebulous".

17. Certainly, it is the case that counsel on behalf of all three accused made significant headway in cross examination of Ms Browne. But of significance in the context of the present appeal is that counsel on behalf of Mr. Seery and Mr. Monaghan met with pretty much total agreement for all propositions put by them during cross examination.

18. When Ms. Browne concluded her evidence, Detective Sergeant PJ O'Brien was called with a view to commencing the reading into the record of the memoranda of interviews with the three accused. However after he dealt with some formal matters, such as the times which interviews with the appellant were conducted and the like, his evidence was interrupted and the actual reading of the memoranda was left over until the following day. The next morning, the 25th June, 2014, it emerged that Dr. Michael Curtis, the State Pathologist, would only be available that day to give evidence, so he was called first. His evidence was brief and largely uncontroversial. Detective Sergeant O'Brien then returned to the witness box and began reading through the memos of the interviews with the appellant. That exercise took the rest of the that day and the entirety of the 26th June, 2014, day 4 of the trial continuing into the early part of the 27th June, 2014, day 5, after which there was a fairly brief cross examination by senior counsel on behalf of the appellant. Detective Sergeant O'Brien was followed by very evidence from Garda Bambrick in relation to the taking of the witness statement and then immediately after the lunch break. Detective Sergeant John Faherty was called, who dealt with the arrest and detention of Quentin Monaghan on the 12th April, 2013 and the fact that he was interviewed on nine occasions while detained. The then began the task of reading from the memos, which was still underway, when the court broke for the weekend.

19. The trial resumed on the 30th June (day 6 of the trial) with the witness reading from the memo taken of interview No. 5. When Detective Sergeant Faherty concluded his direct examination he was cross examined by junior counsel for Mr. Monaghan. At the heart of the defence case on this appeal is a contention that prior to the conclusion of the reading of the memos, that agreement was reached between the prosecution lawyers and lawyers for Mr. Monaghan that the case against Mr. Monaghan would not proceed to jury deliberation but would be disposed of by way of a plea of guilty to manslaughter.

20. Detective Garda Darragh Diffley was the next witness. He dealt with the arrest on the 12th April, 2013, of James Seery, his subsequent detention at Newbridge garda station and the fact that nine interviews, all electronically recorded were conducted with him during the course of detention. He had just finished dealing with the memorandum of interview No. 1 at 4.00 pm when the court rose. At that stage senior counsel for the prosecution indicated that the jury would not be required in court the following day as there was a legal matter that required consideration in their absence.

21. When the court sat on day 7, the 1st July, 2014, to take up the *voir dire*, senior counsel for Quentin Monaghan told the trial judge that there had been a development in that an offer previously made of a plea of guilty to manslaughter had been reconsidered by the Director and was now acceptable. However, counsel explained that his client could not be re-arraigned until the jury returned the following morning. Senior counsel for Mr. Seery then invited the jury to embark on the *voir dire*. She explained that she was seeking to have significant portions of interview 7 declared inadmissible. By way of offering the court an overview, she explained that in interview 1 and 2 there were significant untruths, but that towards the end of interview 6 and the beginning of interview 7, there

were significant admissions with her client accepting that he was aware the word "knee capping" had been used, but that her client's intention was and what he had anticipated would happen was that Mr. Lindsay would be frightened and no more than that.

22. Counsel explained that her team had offered manslaughter, but that was unacceptable to the prosecution. She made clear that if she succeeded in excluding interview No. 7 that would not be the end of the process, because very significantly there would remain the admissions to manslaughter. The *voir dire* then proceeded over the rest of the day.

23. When the court sat the following day, the 2nd July, 2014, (day 8) the trial judge delivered his ruling acceding to the defence application to exclude the challenged material. Defence counsel indicated that she understood that in those circumstances that the Director had a particular view and that she would require five minutes with her solicitor before adding that she was in a position to be arraigned.

24. After a very short adjournment, prosecution counsel indicated that what should happen was that both Mr. Monaghan and Mr. Seery be re-arraigned, but that he understood that counsel for Mr. Wynne had an application for a discharge of the jury.

25. Counsel for Mr. Wynne indicated that he was taken a little bit by surprise as he had only heard at 2.00 pm that if the challenged memorandum was excluded that the "plea would then be acceptable of manslaughter to Mr. Seery", that he was expecting to have some time while other interviews were dealt with and he wished to defer his application for a discharge until the following day. Mr. Monaghan and Mr. Seery were then re-arraigned and as anticipated entered pleas that were acceptable to the prosecution. At that stage a note was passed to the trial judge from the jury foreman, which the judge handed to counsel.

26. From the exchange that followed between judge and counsel, it is evident that the note asked could jurors discuss the evidence prior to their deliberations. The judge indicated to counsel that he did not think they should do that and that it would be inappropriate for them to be discussing the evidence until they heard everything. There was no dissent from that view and when the jury returned to court, the judge directed them accordingly. In truth there would be nothing objectionable by jurors discussing the evidence among themselves as the case proceeded. While we are never privy to what goes on in a jury room, the likelihood must that a juror who believes that he/she has identified something significant in the testimony of a particular witness will draw the attention of colleagues to that fact.

27. The appellant is concerned about the timing of the note from the jury. It was submitted by counsel for Mr. Wynne that it was evident that the jury had already discussed the evidence. His interpretation of the note is not easy to understand. If they had in fact been discussing the evidence it is hard to see why they would be asking for guidance from the judge as to whether it was a proper thing for them to do. The approach of the judge might be thought of as something of a counsel of perfection. In truth there would be nothing objectionable about jurors discussing the evidence among themselves.

28. On the following day, the 3rd July, 2014, (day 9) counsel for Mr. Wynne moved his application for the discharge of the jury. The arguments advanced are essentially those put forward in the course of this appeal. It is because of the emphasis placed by counsel for Mr. Wynne at trial and again on appeal on the sequence of events that occurred during the trial that sequence has been set out in considerable detail in the course of this judgment. Counsel submitted that the interviews that were conducted with his client meant that Mr. Wynne clearly raised the issue of provocation.

29. In the course of his submissions, he asserted that while Mr. Monaghan's memoranda were being read, that counsel for the prosecution came to counsel for Mr. Monaghan and said to him "we will now accept the plea to manslaughter". Counsel asked rhetorically "why do we have suddenly, when these memorandums of interview of Quentin Monaghan are read in, that Mr. Monaghan then gets the offer of the plea to manslaughter which he offered a good time previously that was not acceptable?"

30. It is to be noted that at trial and on appeal that the appellant's legal advisers seem to have been operating on the basis that it was the prosecution which took the initiative and offered an acceptance of a plea if one was entered. On appeal the issue is put at the level of prosecution misconduct, the suggestion being that the prosecution embarked on a joint murder trial for the purpose of having the Monaghan and Seery memoranda read to the jury and that pleas were accepted once the memos of Mr. Monaghan were actually read to the jury.

31. There are a number of difficulties with that theory. There was first of all a very specific, though restrained statement by counsel for the prosecution that the notes were not read out in the knowledge that a plea was going to be accepted or sought. Secondly, it is the case that when the reading of the Monaghan memoranda was completed, the detective Garda who read them was cross examined by junior counsel for Mr. Monaghan with a view to highlighting matters favourable to Mr. Monaghan. Really, it seems almost inconceivable that counsel would engage in such a charade, if by that stage agreement had been reach that the matter would not be proceeding to trial, but was to be disposed of by way of a plea to manslaughter.

32. The assertion that there was prosecution misconduct, or an ambush laid, remains that – an assertion, but one that is unsupported by any evidence and such evidence that there is goes the other way.

33. It is noteworthy that there was no application for separate trials in this case. The case started with the expectation that the jury would hear three sets of memoranda, that they would be directed by the judge that the memoranda from each accused was evidence only against the individual person interviewed, and did not form any part of the case against the co-accused. In fact as it turned out that is precisely what happened. Indeed as counsel for the prosecution pointed out at trial, the fact that the jury did not have to adjudicated in relation to Mr. Monaghan and Mr. Seery meant that they were not given copies of these memos as would otherwise have happened.

34. This was a case where is appears that all three accused appreciated that a full acquittal was probably unobtainable. In those circumstances, each was willing and indeed it would seem anxious to plead guilty to manslaughter. However the situation of the three accused was not identical. The prosecution case against Mr. Wynne, the shooter, was always stronger and more straightforward than the case against the co-accused. In a situation where there were pleas offered, it is understandable that the situation would be kept under review by all sides.

35. It is noteworthy that counsel for Mr. Seery when opening her case on the *voir dire* on day 7, commented that her client's offer of a plea to manslaughter had been rejected "so far". Again, the fact that the prosecution was not prepared to accept a plea from Mr. Seery, while it was still seeking to have the contents of interview No 7, admitted into evidence would suggest that the prosecution was not prepared to accept a plea unless and until the evidential scales were tipped in that direction. The controversial material from interview 7, involved the interviewee saying that he believed that Mr. Wynne was going to knee cap Mr. Lindsay. That was potentially a difficulty for Mr. Seery because of cases such as *DPP v. Martin Kelly,* a decision of the Special Criminal Court of the 1st December,

2011.

36. Mr. Wynne would no doubt argue that while the exclusion of an interview with Mr. Seery might possibly be seen as a development of some significance, there was no comparable development in the case of Mr. Monaghan. However, that is to fail to give due significance of the evidence of Ms. Browne. Her testimony certainly did not help the prosecution case. As counsel for Mr. Wynne put it when moving the application for a discharge "she nearly agreed with everything in cross examination in from all three accused". Certainly, the prosecution can hardly have felt that their case was stronger after the evidence of Ms. Browne than it was before the trial opened. In these circumstances the willingness to revisit the rejected offer is understandable.

37. The trial judge when considering the application to discharge the jury was doing so in a situation where there had been no request for separate trials, and indeed there was a specific statement by counsel for Mr. Wynne, that an application for separate trials would have been unsuccessful. It was the case that the trial started with an expectation that the judge would be called on to warn the jury to have regard to the contents of interviews only in relation to the individual interviewee and that the interviews were not relevant in the cases of the other co-accused. The expectation at that stage was that the jury would be capable of following the directions given by the judge and would in fact do so.

38. What transpired was that the jury was directed in clear terms, not to have regard to what was said out of court by Mr. Monaghan or Mr. Seery and there is no criticism made of the terms of that direction. Is there any reason for concern that the jury was unable to follow the judge's clear direction or declined to do so? In the court's view there is nothing to suggest that either happened here. There may be, as indeed is acknowledged in the prosecution submissions, cases where the run of the trial or the nature of the evidence or inconsistent verdicts give rise to a fear that the jury failed to obey the judge's direction, but this is just no such a case.

39. This was a case where the appellant equipped himself with a sawn off shotgun and cartridges. On his own account he intended to either scare his victim by shooting beside him or knee capping him. On his account, the deceased ran at him and he raised the gun and fired, shooting his victim through the right eye. The prosecution case against Mr. Wynne was a strong one, indeed it might be said a very strong one indeed and the jury verdict therefore was not at all surprising. The court is not persuaded that the trial was unfair or that the verdict was unsafe. In the circumstances, the court will dismiss the appeal.