THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Mahon J.

Appeal No. 230/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Bernard Daly

Appellant

Judgment of the Court delivered on the 10th day of November 2015 by

Mr. Justice Birmingham

1. As referred to in the course of a ruling of this Court on the 7th October, 2015, Mr Daly was, on the 30th July, 2015, following a lengthy trial, convicted in the Dublin Circuit Court of offences of furnishing incorrect information contrary to s. 1078(2)(a) of the Taxes Consolidation Act 1997, of an offence of conspiracy to commit an offence contrary to s. 243(1) of the Companies Act 1990 and of the offence of conspiracy to defraud.

2. On the 18th September, 2015, the applicant applied for bail pending the hearing of his appeal. The original application for bail was grounded on a very lengthy and comprehensive affidavit sworn by Mr. Daly's solicitor, amounting to some 98 paragraphs. On the 7th October, 2015, this Court refused bail pending appeal, but the Court indicated that it was prepared to facilitate an early hearing, and indeed the hearing of the appeal of Mr. Daly and of the co-appellant, Mr. O'Mahoney, is listed for hearing on the 11th day of January, 2016. In refusing the bail application on the 7th October, 2015, the Court observed that of the seven grounds that had been relied on, the one that came closest to meeting the *Corbally* test (*DPP v. Corbally* [2001] 1 I.R. 180) and the only one that in truth was likely to ever come close was the point argued in relation to the accomplice warning. It was stated for that reason when the transcript became available that the option of a renewed application for bail on the accomplice warning point was not excluded.

3. The transcript has now become available and Mr. Daly has renewed his application for bail. So far as the accomplice warning point is concerned, it is necessary to bear in mind that the real issue at the trial of Mr. Daly was whether the prosecution was in a position to prove that Mr. Daly knew that the list that he handed over to the Revenue authorities was incomplete. Evidence in that regard came from Mr. Brian Gillespie, a compliance officer with the Bank. In the course of his evidence on days thirteen and fourteen of the trial, Mr. Gillespie described having a brief conversation with Mr. Daly in a doorway during the course of which the applicant is alleged to have asked Mr. Gillespie if he would delete an account from the list in preparation for Revenue if requested to do so by a named person in a position of authority and to that inquiry Mr. Gillespie responded "No".

4. The defence say that Mr. Gillespie was an absolutely critical witness and indeed say that he provided the only evidence to suggest that Mr. Daly was a party to the conspiracy. The prosecution are firm in rejecting the suggestion that Mr. Gillepsie's evidence was the only evidence, but there can be no doubt that Mr. Gillespie was a very significant witness indeed. The defence say that Mr. Gillespie'e evidence requires an accomplice warning.

5. On behalf of the applicant, Mr. Daly, it is said that an accomplice warning was required in circumstances where Mr. Gillespie had acknowledged during cross examination that he played a leading role in interacting with Revenue in relation to an earlier audit in the late 1990s. In cross examination it was suggested to him that he had obstructed and misled the Revenue in relation to an early 2003 court ordered audit. In the course of that cross examination he accepted that the terms of the court order required the account that was central to the prosecution to be returned, the account of John Peter O'Toole, but that it was not on the list as submitted, though it was furnished at a later stage. He told the jury that he had instructed a colleague to remove the account from the list as originally submitted. It was suggested to him in cross examination that in acting as he did, that he had in fact committed the same offence, concerning the same bank account, as the one for which Mr. Daly had been put on trial. He rejected that suggestion.

6. A further issue is raised in relation to events that occurred on the 12th November, 2003. On that day there was a meeting between senior bank staff and Revenue officials. During the meeting, which began at 10.00 am, the Revenue officials outlined their intentions for the audit including the plan to examine all non resident accounts with a balance over €100,000. At one stage the meeting was suspended and the Revenue personnel were brought on a walk through tour of the deposit taking desks at the bank. A Revenue memorandum in relation to the events of the day suggested that everyone who had been at the meeting, other than Mr. Gillespie, went on the walking tour. After the walk through, the meeting resumed at 11.30 am. The significance of this is that the bank's email records show that the personal assistant to the person in authority sent an email that morning to the co-accused, Tiarnan O'Mahoney, passing on the bank account numbers of John Peter O'Toole. This email was timed at 11.33 am.

7. In his closing speech to the jury, Mr. Guerin S.C., counsel for the applicant, suggested that as Mr. Gillespie was not a participant on the walk through tour that he was the person who had alerted the person in authority to what was being proposed by the Revenue, thus precipitating the 11.33 am email.

8. Before the trial judge commenced his charge to the jury, the various parties were given an opportunity to raise matters of concern with him. Counsel for the applicant did so in these terms:-

> "I say that a similar warning should be given in respect of the evidence of Mr. Gillespie [accomplice warning, a similar request having been made by counsel for Mr. O'Mahoney]."

Counsel continued:-

> "In respect of Mr. Gillespie, on the basis that if the prosecution case is that the email that was sent at 11.32 am on the morning of the 12th November, was sent in response to information that came out of the meeting that morning, on the

evidence, Mr. Gillespie was the only person who had been at that meeting who was not on the walk through visit and therefore that puts him in the picture in terms of participating in the actual conspiracy itself. And he is also someone who on the evidence in my respectful submission, even if he wasn't an accomplice in the actual offence would still require a warning on grounds of credibility generally because there is evidence that he mislead the Revenue Commissioners in 1999 and in 2002.

There is evidence by his own admission that he interfered with the list that was furnished to the Revenue Commissioners earlier in 2003 and that he did so knowingly. And that he did so I suppose, on the evidence as part of the larger conspiracy that the prosecution refer to and that all of these matters gave him an interest in shifting the focus of the investigation in the first place and shifting the focus of blame at this stage to others, in particular Mr. Daly. . . ."

9. Counsel for the applicant now places considerable emphasis on the prosecution response to the submission that there should be an accomplice warning. That response was in the following terms:-

"In terms of the accomplice warning, again I have no difficulty with that, provided that the jury in order to place any reliance on that warning, they first have to come to the conclusion or think that it may be a reasonable possibility that any of the named individuals were in fact accomplices. And certainly, the prosecution contention is that none of those three, Mr. Shaw, Mr. McGill and Mr. Gillespie, that none of those three were accomplices. And indeed their evidence would suggest that all three of them were reluctant in their cooperation with these accused. Mr. Gillespie being fairly resolute in maintaining that the John Peter O'Toole account should go to Revenue on the High Court order and that the only reason that he did not include it in the list was on the express instructions of Mr. O'Mahoney and nevertheless, he insisted that the account was disclosed later in November, by reason of that he was then left off the task team.

In my submission, that scenario and objective facts of that suggest that Mr. Gillespie, far from being an accomplice was in fact hindering the conspiracy. . . . [s]o in my submission, the objective evidence shows that none of those three individuals were accomplices. But clearly, that is a matter of fact for the jury to assess and should they have a reasonable doubt that they may be accomplices then I have no difficulty with the accomplice warning been given."

10. The trial judge then indicated that, in a situation where there was agreement, he proposed to give the warnings sought. Counsel for the applicant intervened once more to submit that, in the case of Mr. Gillespie, even if the jury came to the view that he was not an accomplice, they should still be warned about his evidence because of his having lied to the Revenue in 2002 and having participated in the misleading of the Revenue in 1999, and because of his evidence of having interfered with the list, even if he was acting on instructions, so that even if he was not an accomplice in law, there should still be a warning. The trial judge responded:-

"The question of the credibility and weight to be attached to Mr. Gillespie's evidence is a matter for the jury, for their assessment and I propose to deal with it on the basis of an accomplice warning, if they are so minded, it is a matter for them after that."

11. The trial judge did address the issue of accomplice evidence in the course of his charge. He did so in these terms:-

"A further detail of evidence peculiar in this case that you must have regard to is this, whether or not any of the witnesses you have heard can be considered as accomplices in the wrongdoing as alleged against the accused. This is a matter of fact for you to resolve. Potentially, you could see in the argument being made that Mr. Shaw and Mr. McGill, along with Ms. Maguire, set in place the deletion programmes required for them. They knew they were doing wrong because Mr. Gillespie was asked to go back and raised with Ms. Maguire the concerns about this. As banking personnel it was wrong to seek to delete records, but think went ahead nonetheless. Didn't ultimately employ a deletion programme, but diverted the information or documents off the main banking system into the archive. The defence say you could well consider them to be complicit in the wrongdoing. The prosecution say no. They raised concerns. They are employees and ultimately they did not do what was pressed upon them. They didn't delete. They archived. It's a matter of fact for you to resolve. Were they complicit? Mr. Gillespie was told, on his account of it, by Tiarnan O'Mahoney not to include the John Paul O'Toole accounts and he didn't until directed. So they didn't go into the early list. They did go in on November 30th or whatever, again I am hazy on dates as I speak to you.

The defence argue that you could consider Mr. Gillespie complicit in the wrongdoing as alleged as against Mr. Daly and Mr. O'Mahoney, the non inclusion of the John Paul O'Toole accounts in the list as returned. Mr. Gillespie says "No", he did everything possible to comply with the High Court order, he did everything possible to make the information available and ultimately did. So, it is a matter of fact for you to resolve having regard to the evidence and the arguments raised. Do you consider them complicit in any way? If you do then you must have regard, with caution, to their evidence for the obvious reasons. If you are also involved complicit in the wrongdoing there is a human tendency to try and push the blame elsewhere, to blame others and in this case to blame Mr. O'Mahoney, to blame Mr. Daly and blame those up the line who gave the directions whoever they were. So if you consider either Mr. Shaw, Mr. McGill or Mr. Gillespie in any way complicit in the wrongdoings alleged as accomplices, you must exercise caution when acting upon their testimony to the extent that they seek to put the blame on any or all of the accused."

12. Counsel for the applicant is extremely critical of the passage quoted. The issue was raised by him at the requisition stage. He did so in these terms:

"The second issue then deals with the accomplice issue. And the first thing I should say is that in my respectful submission the court did not actually give an accomplice warning. An accomplice warning – the court will find that this is dealt with at p. 649 of the book on the judge's charge in the criminal trial, ' an accomplice warning is a statement that it is, or at the very least, that it may be dangerous to convict in the absence of corroboration' and having elected to give a -well, the court is in fact bound to give an accomplice warning, that is the proper and only form of the warning and to say simply that the jury should proceed with caution is an inadequate direction to the jury. But I say is that in fact the court should have given a fall back warning. I know I raise this issue before the court's charge, but what in fact I say the court has done is that it has addressed the possibility that Mr. Gillespie may have been an accomplice but then given a warning that would apply in relation to any witness who may have reason to give or where there may be reason to doubt their credibility and the court has therefore mixed up the two things. So, the court should in my respectful submission have given a warning in respect of Mr. Gillespie that it may be dangerous to convict in the absence of corroboration of his evidence and the court will then obviously have to point to any evidence that is capable of corroborating his testimony and in my respectful submission there is none and I say the court, in default then, should have told the jury that even if they were not satisfied – even if the prosecution had not satisfied them beyond a reasonable doubt that he was not an

accomplice, that he was still someone who might have reason to lie, but more importantly he is someone who, on his own testimony, had a history of dishonesty and that therefore they should be cautious in accepting his evidence.

Also in relation to the question as to whether or not he was an accomplice, in my respectful submission the court dealt only in part with the evidential basis upon which the jury might conclude that he was an accomplice. And in particular in relation to what he had said he had done in relation to the list that was required to be returned under the High Court order. My case is that he in fact was an accomplice in the specific offence alleged in count No. 1 because the prosecution placed reliance on the email sent by Monica Carney to Tiarnan O'Mahoney on the 12th November, they say that related to the meeting that had taken place that morning and it is my case that the only person who could have provided information from that meeting to Mr. ---------- [name omitted] was Mr. Gillespie because he was the only person who wasn't on the walk through meeting. And these evidential matters should, in my respectful submission, have been dealt with because they give rise to the very real possibility that Mr. Gillespie was in fact an accomplice in the specific offence charged on count No. 1. What I would of course ask the jury also to deal with, Mr. Gillespie's history of dishonesty in his dealing with the Revenue Commissioners prior to 2003 and I respectfully say that the court did not do that."

13. Mr. McGinn S.C., counsel for the prosecution, responded as follows:

"The accomplice issue in my submission was dealt with amply by the court and particularly in the context of this case indicating that if the jury came to the conclusion that any of the witnesses were accomplices they – the jury then would have to have concern or certainly pause about their evidence because of the tendency of accomplices to blame others to exonerate themselves. This is not in my submission a case about corroboration. There is certainly no statutory requirement for corroboration and in my submission going into the full accomplice warning which is designed for cases where the only evidence against an accused is from the mouth of an accomplice that certainly isn't the case. In this instance in my submission Mr. Gillespie has not been established to be an accomplice and in any event there is other evidence apart from that and to burden the jury with the legal requirements about corroboration in my submission is unnecessary and would simply confuse matters."

14. In reply, counsel for the applicant said:-

"Yes, well the most important matter to respond is what Mr. McGinn (prosecution counsel) said in relation to accomplice evidence. It is an incomprehensible submission that he has made. I can't understand how a responsible prosecutor could tell the court that this isn't a case about corroboration and therefore it can be ignored. The whole point is that there isn't any corroboration and that is therefore to be drawn to the attention of the jury and it has to be drawn to the attention of the jury in such a way as to make it clear that it is dangerous to convict on the evidence and the reason why its dangerous is because wrongful convictions occur where people act on the testimony of an accomplice whose evidence isn't corroborated. And I understand what he is saying to be to the effect that he isn't in fact able to identify any corroboration. He did say that the full accomplice warning is only designed for cases where the only evidence is from an accomplice. Again I don't believe that to be the law. There is a decision of the Court of Criminal Appeal in the case of *Ryan*, Mr. McGinn acted in the retrial in that case, he may or may not be familiar with the judgment of the court from the original trial but that was a case where there was other evidence but an accomplice warning was still required and that is a case in fact where there was evidence capable of amounting to corroboration."

15. The trial judge interjected:-

"If I understand Mr. McGinn's submissions correctly there are, if one likes, two warnings necessary or possible in the area of an accomplice. One is where it is the sole evidence and it is uncorroborated. There a jury must be told that it is dangerous to act or convict upon it."

Counsel for the applicant said "Yes", and the trial judge continued:-

"There is a separate warning where, again in the absence of corroboration, the accomplice is levelling, so to speak, or is giving evidence and the jury has to be told that it is unsafe to act upon that evidence having regard to the status of the witness as a potential accomplice and that there are two different warnings or two different aspects to the warning."

Counsel for the applicant replied:-

"Well, I don't think they are two different situations because in both of the scenarios the court has outlined there is no suggestion that there is corroboration. I mean what is the difference between these two scenarios? In one he is definitely an accomplice and another he may be an accomplice."

The trial judge intervened to say:-

"Judge: No, no in both he is an accomplice. In one it is the sole evidence, in the other its not.

Mr. Guerin: Well what other evidence is there against Mr. Daly other than that of Mr. Gillespie?

Judge: Well you've made that point, yes."

Mr. Guerin:- No. But there has been no answer to that point so. . .

Judge:- Well I don't agree with you but I will give you my answer shortly.

Mr. Guerin:- Yes. Well the law in my respectful submission is very clear. The court will find it in Mr. McGrath's book beginning at p. 199 that there are two elements to the warning. The first element is the prohibitive part which is to tell the jury about the danger and in fact on p. 200, at footnote 273, the court will find the reference to the various phrases such as 'very great care', 'particular care' and 'considerable care' which have been held not to be an adequate warning to the jury and the court didn't even go that far. The court simply told the jury to exercise caution. So the point of the first part of the warning is to tell them that it is dangerous to convict because wrongful convictions can occur and if there is other evidence that exists in the case, it is a necessary part of the corroboration warning to identify corroborating evidence or evidence that is capable of being corroborated, to explain to the jury the meaning of corroboration, that the

> evidence requires to point independently of Mr. Gillespie towards the guilt of the accused, and to direct the jury as to the necessity for them to make a determination as to whether or not the evidence is actually corroborated. And, if so then they can proceed to act on it. So, I mean if the court takes the view that there is other evidence the direction is still required as to whether that evidence is corroborating evidence and the court simply hasn't dealt with the question of corroboration at all.
>
> And another feature of the case of course is to draw to the jury's attention to the evidence that suggests that the witness is an accomplice and the court didn't do that in respect of the email of the 12th November and Mr. Gillespie's absence from the walk through meeting which of course suggests that not only was he involved in the earlier deletion June 2003, but that in fact he was an accomplice in the offence charged in count No. 1 on the indictment."

16. The trial judge then ruled as follows:-

> "I am satisfied that I dealt with the issue of accomplice correctly and adequately and that I do not intend to or revisit this matter. Suffice to say this that in many of the submissions made by Mr. Guerin is premised by the fact that he, as he did in this address to the jury, say that the only evidence in the case linking his client to the charges was the testimony of Mr. Gillespie. That is a proposition I clearly don't accept. I resonated to the jury what I considered to be evidence adduced or relied upon by the prosecution, much of it in dispute it has to be said and much of it construed in his inimitable way by Mr. Guerin on behalf of Mr. Daly but nonetheless evidence that is there and for the jury to resolve. They are the judges of fact and it is for them to deal with the matter."

17. Counsel for the applicant is, as has already been stated, severely critical of the approach of the trial judge. He begins by saying that this is a case where the prosecution had agreed that an accomplice warning was appropriate. The prosecution says that that is to overstate matters and that they went no further than saying that they were not opposing the giving of a warning.

18. Counsel for the applicant submits that the trial judge stated that he would give an accomplice warning, but then failed to do so. He says that the judge never told the jury that it was dangerous to convict on the uncorroborated evidence of an accomplice, which he says is the absolute core element of the accomplice warning. Because the trial judge did not tell the jury that it was dangerous to convict in the absence of corroboration, he did not explain to the jury what was meant by corroboration, nor did he address the question of whether there was any evidence capable of amounting to corroboration and either tell the jury that there was in fact no corroboration, as counsel for the applicant contended to be the position, or if the judge was of the view that there was evidence capable of amounting to corroboration and to draw the jury's attention to that. He is also critical of the trial judge for not putting adequately before the jury the basis for the defence's contention that Mr. Gillespie was an accomplice, an actual participant in the crime.

19. The Court is not at this stage convinced that the complaint that the trial judge did not adequately put the defence case about Mr. Gillespie's status to the jury is a point of real substance. There was no evidential basis for the suggestion that Mr. Gillespie was the source of information for the person in authority or that it was information from him that precipitated the email of the 12th November. This was a defence theory. The Court does not believe that there was an obligation on the trial judge to repeat the defence's submissions, which were essentially an invitation to the jury to speculate.

20. The Court accepts that the issue raised about the need for an accomplice warning and the adequacy of what was actually said by the judge, by way of warning, is a significant one. There is no doubt that the warning delivered by the trial judge was certainly not a classic accomplice warning, and many of the features of the classic warning were absent, including the fact that the jury was not told that it was dangerous or may be dangerous to convict on the uncorroborated evidence of an accomplice. However, it remains for consideration whether a full blown warning is required where the suggestion that the witness was a participant in the crime is based on an assertion to that effect by the defence, rather than an acknowledgment of participation or other direct evidence.

21. There is disagreement between the prosecution and defence as to whether there was other evidence against Mr. Daly and as to whether there was any corroborative evidence. It is clear from the exchanges quoted above that the trial judge was of the view that there was other evidence. However, at this stage, and without an opportunity to study the full transcript in detail, the Court cannot resolve that dispute. The resolution of that issue may be significant on the hearing of the appeal.

22. The points made about the need for warning and the adequacy of the charge are certainly not ones that could be regarded as flimsy or inconsequential. They are points of some substance, but determining how much substance can really only be established in the context of an overview of the case. The Court has given careful consideration to the points raised which are not being dismissed, but has concluded that the *Corbally* threshold has not at this stage been crossed by the appellant. In a situation where an early appeal has been provided and where that appeal is now listed for hearing, the Court does not regard it as appropriate to admit the appellant, Mr. Daly, to bail at this stage.