THE COURT OF APPEAL

Record Number: 01/2022

Kennedy J.
Ní Raifeartaigh J.
Burns J.

BETWEEN/

JOHN O'DONOGHUE

APPELLANT

- AND -

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of the Court delivered on the 16th day of February 2024 by Mrs. Justice Tara Burns.

1. This is an appeal against conviction. On 9 November 2021, the appellant was convicted by unanimous verdict of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997 and violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act, 1994. He was acquitted of a charge of production of an article capable of inflicting serious injury contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 and a charge of a threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997.

2. The appellant was sentenced to 10 years imprisonment in respect of causing serious harm and 8 years imprisonment in respect of violent disorder, both sentences to run concurrently.

Background

3. On 16 December 2017, Mr William O'Driscoll Senior, the injured party, was staying at Kealy's Yard, Bothar Buí, Rathkeale, County Limerick with 7 of his male relatives. They had travelled to the location from Newry the night before in anticipation of a party which was due to be held on the 17 December 2017, in celebration of the injured party's granddaughter's engagement.

4. The appellant, who lives in Rathkeale, is married to the injured party's niece. They had eloped thirty years previously. It was asserted by the appellant that this had caused a difficulty within his wife's family, to include the injured party, which the injured party accepted.

5. On the morning of the 16 December 2017, Mr O'Driscoll left the caravan he was staying in to go to the toilet. Not being able to find one in Kealy's Yard, he decided to go across the road to the house of another niece, Kathleen Keeley, who is a sister of the appellant's wife. While Mrs. Keeley and the injured party are not on speaking terms, it appears that her husband has a friendly relationship with the injured party. The injured party said in evidence that as he crossed the road, a car and a people carrier pulled up. The appellant, along with a number of other males, emerged from these cars. It was asserted that these men were armed with weapons including a machete, slash hook, handles of picks and hurleys.

6. The evidence of the injured party was that the appellant approached him stating "*I'm going to do you today, Willie O'Driscoll*". He said the appellant produced a machete and struck him a number of times on the head, hand and legs. While this attack took place, the other persons who had arrived at the scene with the appellant were alleged to be throwing missiles, to include rocks and stones, at the caravan in which the injured party's family members were staying and a vehicle in its vicinity, which prevented them from going to the injured party's assistance.

7. The appellant's case was that he did not assault the injured party but rather that he was set upon by him - that he had been delivering page boys suits to a neighbouring house for his son's wedding the following day when the victim emerged with a machete shouting that there would be no wedding and came at him with the machete causing an injury to his hand. It was alleged that a physical altercation ensued in the course of which the machete was dropped It was asserted on behalf of the appellant that the injured party's son was responsible for the injuries which were sustained by the injured party. These were caused when the victim's son missed the appellant with the machete he was swinging at him and connected with his father instead. Evidence from three civilian witnesses was called on behalf of the appellant in this regard. It was also asserted that the injured party's family members who were called to give evidence on behalf of the respondent were lying about the events of the day. Reliance was placed on the fact that despite claiming that they were under attack from the appellant's family with missiles being thrown at them, no damage was noted to have occurred to their vehicles, nor were any of the missiles which were alleged to have been thrown at them found in the vicinity of Kealy's yard. When the appellant was detained pursuant to s. 4 of the Criminal Justice Act 1984 for the purpose of investigation of the instant matter, the appellant made a complaint that the injured party assaulted him with a sharp object and was noted to have a bandage applied to his left hand.

Grounds of Appeal

8. By notice of appeal dated 31 December 2021, the appellant indicated his desire to appeal his conviction and set out his grounds of appeal as follows:-

> *"The learned trial Judge failed to discharge the jury upon an application made to so discharge the jury by Counsel on behalf of the Applicant in circumstances where without prior notice and in circumstances where the issue of failure to properly make disclosure the prosecution sought to lead in direct evidence entries in a notebook made by Garda Joe Collins.*
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> *The learned trial Judge failed to vindicate his constitutional right of the Applicant to a fair trial in circumstances where notwithstanding the fact that Counsel on behalf of the Applicant has specifically drawn the Courts attention to the failure of the prosecution to discharge its obligation to disclose and having indicated that if it remained a difficulty the Court could discharge the jury, failed to discharge the jury in circumstances where the prosecution lead direct evidence from a notebook entry from Garda Joe Collins which had not been referenced previously and failed to discharge the jury when requested to so do.*
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> *The learned trial Judge in failing or refusing to discharge the jury on foot of an application made by Counsel failed to give any or any adequate reasons or reasoned basis for failing to do so discharge.*
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> *The learned trial Judge failed or refused to provide adequate reason to basis for failing to discharge the jury notwithstanding the fact that Counsel after the Court had ruled requested the Court to so do or further clarify the basis for same.*
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> *The learned trial Judge failed and refused when requisitioned by Counsel at the conclusion of its charge to revisit the issue of the general principles applicable to all criminal trials.*
>
> *The verdicts of the jury in convicting on count 1 and acquitting on count 3 and 4 and convicting count 5 were inconsistent with the prosecution case where the prosecution evidence is offered.*
>
> *The unanimous verdict of the jury convicting in relation to count 1, acquitting in relation to count 3, and count 4, and convicting in relation to count 5 were inconsistent with verdict of guilty recorded as against the Applicant on Counts 1 and 5.*
>
> *Such further and other grounds as may be advanced prior to the hearing of the within appeal by the Applicant."*

By notice of motion dated 6 November 2023, the appellant sought leave to add two further grounds of appeal, namely:-

> *"The learned trial Judge erred in refusing an application by and on behalf of the Appellant herein upon the closing the prosecution and defence cases in furtherance of the jurisprudence emanating from DPP v. POC to withdraw the matter from the jury because of a failure by and on behalf of the prosecuting authorities to seek out and preserve CCTV in the context of the charges made against the Defendant pertaining to an incident of assault and/or violent disorder occurring on the 16th December 2017.*
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> *Further, that the learned trial Judge erred as a matter of law and fact in failing or refusing to grant the application to withdraw the trial from the jury upon said application being made by Counsel by and on behalf of the Appellant herein on the following grounds."*

This motion was listed before the Court on the same day as the appeal hearing.

Disclosure of Garda Notebooks

9. On 21 October 2021, before the trial commenced, the appellant's solicitor sent a disclosure request to the respondent seeking copies of any documents recording registration numbers of vehicles present at the locus of the incident. The defence specifically referred to the statement of Garda Joe Collins who was listed in the book of evidence and who had attended at the scene. The prosecution replied to the disclosure request stating that no such notebook entries existed. The appellant had a particular interest in whether such information existed in light of the line of defence being pursued to the effect that the O'Driscolls were lying about what they said occurred on the day which assertion was supported by the apparent lack of damage to their vehicles.

10. On 3 November 2021, Garda Collins was called to give evidence after lunch. Some of the O'Driscoll family had already given evidence in the course of which it had been put to them in cross examination that the evidence did not support missiles having been thrown at them in Kealy's yard. The O'Driscolls maintained their position that they were subjected to missiles being thrown at them and stated that significant damage had been caused to their car, which they referenced in the photographs which were in evidence. During Garda Collins's evidence in chief, the State Solicitor slid a document across the table towards the appellant's solicitor which Counsel for the appellant happened to notice. This document consisted of Garda Collins's notebook entries which recorded damage to the bonnet and front grille of a particular vehicle and noted blood to the front of the caravan. In the course of Garda Collins's evidence in chief, counsel for the respondent proceeded to ask Garda Collins questions in relation to his notebook entries. She also asked him:-

"Q. Can I just ask you to hold up the book of photographs and just point out… And regarding that vehicle, can you – where did you see damage and can you see it in the photo?

A. I noticed – I just wrote that there was damage to the bonnet and front grille. I think you can see in the front of the bonnet just over the Toyota symbol there seems to be a dint."

11. Formal disclosure had not occurred in relation to this notebook entry, nor had a notice of additional evidence been served in relation to this evidence led by the respondent.

12. Counsel for the appellant interrupted the direct examination of Garda Collins in light of what occurred and made an application for the jury to be discharged which application was refused by the trial judge who ruled:-

> *"The garda photographer indicated that he had taken 21 photographs and these were on a disc. And in the cross-examination of this witness, I recall that Mr Bowman made reference to I think photograph 11, which obviously isn't in the booklet, as the booklet only has five photographs. The garda notebook entries were requested, and the notebook in respect to Garda Collins was not revealed. The notebook entry has been disclosed when it was received. In the notebook there is an entry on page 3, which says: "Vehicles in compound", and it mentions: "SV12XVL, Silver Toyota Avensis, damage to bonnet and front grille". Other witnesses have said that there has been damage to the van and this car. In the last witness's testimony, these photographs - and I am afraid photograph No. 2 in particular - were blown up. It is difficult in looking at photograph 2 to see whether there is any damage. The disclosure of this notebook and in particular page 3 and the reference to "damage to the bonnet and front grille" is late. During the morning, three notices of additional evidence have been handed to me by the Registrar, which evidence hasn't been called yet, and it's often a feature of criminal cases that additional evidence is served during the trial. The issue as to whether or not there was damage to the Avensis or to the van has been live during the trial. I refuse to discharge the jury."*

13. After a short break, Counsel for the appellant asked the trial judge to revisit his decision or to provide expanded reasons for his decision, which the trial judge declined to do.

Submissions of the Parties

14. Counsel for the appellant submitted that he had been irredeemably prejudiced in the defence which he had mounted, in that a focused enquiry was made on behalf of the appellant in relation to this particular aspect of the case. In light of the response received, the appellant

ran his case on the basis that there was no objective evidence supporting the O'Driscolls' proposition that they had been subjected to a barrage of missiles and that damage had been done to their vehicle. Counsel stated that had disclosure of Garda Collins's notebook entries been made, this line of defence would not have been pursued.

15. Counsel for the respondent accepted that what had occurred in relation to Garda Collins's notebook and evidence was not ideal but argued that his evidence added nothing further to what already was in the case as it was in issue that damage was caused to the O'Driscolls' vehicle, and there was objective evidence of a small amount of damage to this particular car having regard to the photographs adduced in evidence. It was further argued that this issue was peripheral and not of central importance to the assault on the injured party.

Discussion and Determination

16. The manner in which Garda Collins's notebook entry was disclosed was completely inappropriate. A specific enquiry had been made on behalf of the appellant in relation to whether this guard had made a notebook entry in relation to the vehicles at the scene, the answer to which was that such a notebook entry did not exist. How this answer came to pass is unknown but what is known is that Garda Collins produced his notebook entry to the State Solicitor before he entered the witness box as a copy of that notebook entry was passed across the bench in the course of his evidence. Garda Collins should not have entered the witness box without time being sought from the trial judge to properly disclose the notebook entry. Of greater concern, however, is that without any notice of additional evidence being served, counsel for the respondent proceeded to lead evidence from Garda Collins regarding his notebook entry and what damage he saw to the vehicle at the scene. This was a wholly inappropriate manner to call evidence from a prosecution witness. The significance of the evidence was not lost on counsel for the respondent who responded to the application to discharge the jury by stating: "*The defence have been pointing out, as they are entitled to, that … in their view there was not damage. And now we have a witness who can point out evidence of damage*." The proper and appropriate manner for counsel for the respondent to have called this evidence, on becoming aware of the notebook entry, was to have Garda Collins provide an additional statement and to have this served as additional evidence.

17. While this Court is unimpressed with how this evidence was handled, the question arises as to the effect of these failures on the fairness of the trial.

18. The Court accepts that the issue of whether the O'Driscolls were lying about their claim to have been subject to a barrage of missiles in Kealy's yard was of importance. The defence case was that the injured party had attacked the appellant assisted by his son, and that the O'Driscolls were lying about what they said occurred. Raising a doubt about their veracity in relation to the missile attack was an important avenue for the appellant to pursue from the

perspective not only of their credibility, but also the family's asserted positioning within Kealy's yard.

19. As a preliminary, it is necessary to state that instructions given by a client are extremely important. It is the basis upon which counsel act and ground the manner in which a trial is conducted. Care must be taken both with respect to the taking of instructions and ensuring that one acts on instructions. Clearly in the instant case, the appellant had instructed his counsel that he had been attacked by the O'Driscolls and that the O'Driscolls were not subject to a barrage of missiles in the yard. Instructions should not be manufactured around what the evidence establishes. Accordingly, in general, the respondent bears no responsibility if evidence emerges in a case which is contrary to what the clear instructions from an accused are.

20. The question of whether damage had been sustained to the O'Driscoll's vehicle was at issue in the trial and a photograph before the jury revealed very minor damage to the front bonnet and grille pan. Garda Collins's evidence did not add anything further to this photograph in terms of the damage noticeable on the vehicle. Accordingly, while the manner in which this evidence was handled by the respondent left a lot to be desired, the failure to disclose the notebook and the calling of the evidence of Garda Collins at issue did not add significantly to the evidence already before the jury.

21. Accordingly, we are not persuaded that the trial judge erred in failing to discharge the jury, or that an unfairness arose which rendered the conviction unsafe in relation to this issue.

Duty to Seek Out CCTV & the PO'C Application

22. The issue of whether CCTV was sought in the aftermath of the incident was explored with Detective Garda Joseph O'Sullivan by counsel for the appellant. The following exchange took place:-

> *"Q. I think CCTV was canvassed within the town itself, there'd be quite a lot of CCTV on the main street; is that correct?*
> *A. From my understanding there was CCTV canvassed.*
> *Q. Yes?*
> *A. I was informed that there was nothing of evidential value progressed on it."*

23. Evidence was called on behalf of the appellant from Kathleen Keeley who was the victim's niece and the appellant's sister-in-law. Her house was directly across the road from where the incident took place. She indicated that CCTV cameras on her house were operational at the time of the incident. She also stated that members of An Garda Síochána had called to her house on the day of the incident enquiring about CCTV footage. She stated that she informed them that she had CCTV cameras and that she gave them permission to access the footage. They said they would come back but she heard nothing further from them. It

was put to Mrs. Keeley that the reason the guards did not come back was because of what she had told them but what this was, was not put to the witness nor established in evidence. This perhaps is not a surprise in light of a reply from the State Solicitor to the appellant's solicitor to the effect:-

> *"I am instructed to inform you that house to house enquiries did take place by Gardai Denis McCarthy and Enda Moroney. Neither of these Gardai made any notes in respect of this part of the investigation and do not have in their possession any details of the people spoken to."*

24. Expert evidence was also called on behalf of the appellant. Martin Foy, a forensic engineer who had conducted an examination of the area of the incident in the course of the trial, confirmed that the line of sight from one of the CCTV cameras on Mrs. Keeley's house captured the area where the appellant had indicated the incident had occurred. Mrs. Keeley had indicated in her evidence that the camera's positioning had not been moved since the time of the incident. Mr. Foy gave evidence that the cameras were fixed position cameras. He also confirmed that he inspected Main Street, for the presence of cameras and noted that on the north side of Main Street there were 22 external mounted cameras on the northern side of the Street and 8 mounted cameras on the southern side.

25. At the conclusion of the evidence called on behalf of the respondent and the appellant, a *PO'C* application was made on behalf of the appellant relying on the principles set out in *The People (Director of Public Prosecutions) v. CC* [2019] IESC 94. The basis of the application was that An Garda Síochána had failed to gather relevant CCTV evidence relating to the incident arising from which the appellant had been deprived of a realistic ground of defence. Counsel for the respondent countered this application on the basis that the evidence established that there were cars and people lining the streets and that accordingly, even had the CCTV cameras been recording, which was not definitively established, the incident itself may not have been viewable. The truthfulness of Mrs. Keeley's evidence was also called into question.

26. The trial judge ruled:-

> *"Well, the application concerns whether the defendant has been deprived of a reasonable and realistic ground of defence, and there is no CCTV available from the report of Mr Foy. Yesterday there was a CCTV assisting in operation which is 4.89 metres above the ground. He cannot say whether it was operational or recording at the date of the incident on the 16th of December 2017. Now, the test to be applied with regard to this application is that separate determination is to be made, conscientiously, and the test is to whether the fairness and justness of the process is safe. Now, with regard to the totality of the evidence which has been adduced in this case and that evidence shows, first of all, that even on the defendant's admission*

in interview that he was present at the scene. Secondly, the defendant's own witnesses, Mr Daly and Mr Hogan specifically, said that there were people and cars on both sides of the road. Mrs Keeley did not invite the gardaí upstairs, where the recording can only be viewed, according to Mr Foy, in the upstairs bedroom from the recording to the TV. This is a case where both Mr O'Driscoll and Mr O'Donoghue are each claiming that the other assaulted them. With regard to the CCTV, we don't know was it working on the day in question, we don't know was it recording. With a crowd of cars and people and even having regard to the red car there in photograph 6 on the left, it is quite possible that the camera would not have captured the incident, if there was footage available. Obviously it's desirable that the gardaí would have had such footage that's not available. In the circumstances and in the totality of the evidence, I do not think that the defendant has been deprived of a reasonable and realistic ground of defence. Accordingly, I refuse the application."

Discussion and Determination

27. The appellant argued that in accordance with the line of authority developed since *The People (Director of Public Prosecutions) v. Braddish* [2001] 3 IR 127, there was an obligation on the investigating guards to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence of the appellant as far as was necessary and practicable. On the basis of the uncontradicted evidence before the trial judge, highly relevant CCTV evidence was available from Mrs. Keeley's house which the investigating guards were aware of, yet had not harvested. In light of the nature of the defence case and the conflict between the allegations of the respective parties, which the investigating guards were also aware of since the initial stages of the investigation, there was an onus on them to acquire the CCTV evidence from Mrs. Keeley's house. The absence of this material from the trial deprived the appellant of a realistic ground of defence, as a result of which the trial judge should have withdrawn the case from the jury.

28. The respondent argued that the trial judge had a wide discretion in the matter and had not erred in failing to direct the jury to return an acquittal in the matter as it had not been established whether the CCTV would have been of any assistance to the appellant. It had not even been established whether the CCTV was operational on the day and the presence of people and cars, as referred to by the appellant's witnesses, meant that a view of the assault, may not have been visible even if the incident had occurred in the sightline of the camera.

29. The seminal case of *DPP v. PO'C* [2006] 3 IR 238, establishes that a trial judge has an inherent power to withdraw a case from a jury if an unfairness or lack of due process arises in the trial procedure. Denham C.J. stated at paragraph 21 of her judgment:-

"[The] trial court retains at all times its inherent and constitutional duty to ensure that there is due process and a fair trial. Thus, in the course of the trial matters

may arise, evidence may be given, which renders a trial unfair, or the process unfair. In these circumstances the trial judge retains the jurisdiction of preventing the trial from proceeding."

30. The jurisdiction referred to in *DPP v. PO'C* [2006] 3 IR 238 was considered by the Supreme Court in *DPP v. CC* [2019] IESC 94. O'Donnell J. (as he then was) stated at paragraphs 14 - 19 of his judgment:-

> *"14. …[T]rial judges must exercise [the P'OC] jurisdiction fully and conscientiously, and be prepared to withdraw cases based on their own consideration of the impact of a lapse of time on the case. It should be emphasised, moreover, that the test is not whether a trial judge would himself or herself consider that a guilty verdict was or could be appropriate (that is, that as a matter of fact the defendant was or might be guilty of the offence), but rather the distinct question of whether any question of guilt, if arrived at, could be considered to have been achieved by a process which would be considered just. The trial judge is not asked to second-guess or anticipate the decision of the jury, but rather whether the process meets the standard required to permit a jury to deliver its verdict.*
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> *15. Not only is this a distinct function of the judge, it is one to which a judge is particularly suited. It might be thought that most questions of the extent and significance of the evidence can safely be left to a jury, who must be satisfied beyond any reasonable doubt before they can convict an accused. Generally speaking, deficiencies in the evidence – lapses, inconsistencies, gaps, and absences – will tend to make it more difficult to reach that standard. Furthermore, a jury in delay or in lapse of time cases will be given a detailed warning about the impact of delay upon their adjudications…*
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> *16. These are, themselves, substantial guarantees of the fairness of the process. Nevertheless, a trial judge has critical information and experience in this regard that a jury lacks. The assessment of the impact of lapse of time and the unavailability of evidence necessarily involves an assessment not just of the evidence actually adduced, which the jury can be expected to appreciate and assess, but rather a consideration of the absence of evidence. A jury has no comparator against which to gauge the trial which they are hearing. A trial judge, by contrast, will normally have heard many cases and may have participated in such trials as a practising lawyer, and therefore may be expected to have the capacity to attempt to assess the impact on the trial in reality of what is now unavailable. A trial judge may be expected to understand that in a trial in which all available evidence is adduced and tested, there may be a number of side-issues which may be explored with greater or lesser effect, which may give rise to unexpected twists and turns,*

and which may be of benefit to the accused, if not in providing evidence that is positively exculpatory, at least raising doubts about the case. This investigation is part of the trial process.

17. Even, therefore, if the core components of a case remain – the complainant's allegation and the defendant's denial, whether contained in evidence, a statement made, or simply by maintaining that the case has not been established – a trial which is limited to such matters may be rendered unjust because it has been shorn of all the surrounding detail which might be expected in a trial held soon after the event, the investigation and testing of which is a normal part of the fair trial process.

18. Few trials, however, are perfect reproductions of all the evidence that could possibly exist. The absence of a witness or a piece of evidence does not render such trials unfair. A trial judge has therefore a vantage point which allows him or her to consider whether what has occurred crosses the line between a just and an unjust process. In shorthand terms, this involves considering whether the evidence which is no longer available is "no more than a missed opportunity", as the trial judge and the Court of Appeal considered, or by contrast whether the applicant has "lost the real possibility of an obviously useful line of defence", as considered by the majority in this court, adopting in this regard the language of Hardiman J. in S.B. v. Director of Public Prosecutions [2006] IESC 67, (Unreported, Supreme Court, 21 December 2006) (" S.B."), at para. 56. These judicially adopted phrases seek to identify either side of the dividing line: it is inevitable that many cases will proceed to trial without all the evidence that was potentially available at the time of the alleged offence, but that in itself does not prevent a trial occurring. There is a point, however, at which the deficiencies are of such significance and reality in the context of the particular case that it can be said that it is no longer just to proceed.

19. It follows that there is a particular and distinct onus upon trial judges to address this issue separately and conscientiously. This jurisdiction, which is in addition to the power of the jury to consider the impact of lapse of time, is an important protection for fair trial rights in circumstances which can be challenging. The exercise of that jurisdiction can, and must, be reviewed on appeal. That is a further important aspect of maintaining a fair trial. However, it is in the nature of such a determination, which is to some extent dependent upon an appreciation of the manner in which the case has progressed, the demeanour of witnesses and parties, and the manner and cogency with which evidence is given, that a significant margin of appreciation must necessarily be afforded to the decision of the judge presiding at the trial. For this reason, it is important that trial judges should set out the relevant factors involved, their assessment of them, and the reasons for arriving at their conclusion, in order to permit an assessment of the matter on appeal."

31. Clarke C.J., delivering a dissenting judgment, but agreeing with respect to the principles applicable in a *PO'C* application stated at paragraph 9.2 of his judgment:-

> *"9.2 In that regard, the trial judge must (a) first consider the prosecution case as it has actually developed at the trial. Thereafter, the trial judge must (b) consider whatever evidence is available as to the testimony which might or could have been given but which is said to be no longer available. That exercise will generally involve two principal considerations. First, the court must (c) consider the available evidence about what might have been said by the missing witness or what might have been contained in missing physical evidence, such as documents or objects. The trial judge will be required to have regard to the degree of confidence with which it can be predicted that the particular evidence would have been available, while recognising that the very fact that the evidence is not available means that that exercise must necessarily be speculative at least to some extent.*
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> *9.3 If the trial judge is satisfied that it has been established that there was a real prospect that the evidence concerned could have been tendered, next, he or she will be required to (d) assess the materiality of any such evidence. The materiality of that evidence will need to be considered in the light of the prosecution case as it evolved at the trial.*
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> *9.4 In the light of all of those factors, the court must finally (e) reach an assessment as to whether the trial is fair. The assessment of whether the trial is fair involves a conscientious determination by the trial judge whether, on the basis of all of the materials before the court, it can be said that the test identified by Hardiman J. in S.B. has been met, being that the absence of the missing evidence has deprived the accused of a realistic opportunity of an obviously useful line of defence.*
>
> *9.5 Although not relevant on the facts of this case, it should also be noted that culpable prosecutorial failure or wrongdoing can be taken into account in assessing the degree of prejudice which renders a trial unfair. As noted earlier, no trial is perfect. However, the degree of departure from a theoretically perfect trial which will render the proceedings unfair can be less where it can be said that culpable action on the part of investigating or prosecuting authorities have contributed to the prejudice. A lesser departure from what might be considered to be a theoretically perfect trial will render the proceedings unfair if that departure is caused or significantly contributed to by culpable action on the part of investigating or prosecuting authorities. A greater degree of departure from the theoretically perfect trial will need to be demonstrated in cases where there is no such culpable activity."*

32. While recognising that the trial judge is entitled to a significant margin of appreciation in a decision of this nature as he is best placed to evaluate the evidence before the jury, the

Court has a concern about the absence of CCTV footage having regard to the evidence adduced.

33. It is axiomatic that CCTV footage of the incident, if it existed, would have been vitally important in light of the completely opposed positions adopted by the parties in relation to what occurred on the morning in question. The investigating guards were on notice that a dispute existed between the parties as to what had occurred arising from the allegation of assault which the appellant made against the injured party when detained pursuant to s. 4 of the Criminal Justice Act 1984 on the day of the incident. Accordingly, securing CCTV footage of the incident should have been a priority for the investigating guards.

34. In those circumstances, the question arises as to whether the investigating guards took sufficient steps to secure any CCTV footage which might have been in existence. The evidence called on behalf of the respondent was from Detective Garda O'Sullivan who indicated that he was informed that nothing of probative value arose from CCTV enquiries conducted. No evidence was adduced on behalf of the respondent with respect to the actual enquiries which took place. The reply by the respondent to the CCTV disclosure request revealed that the respondent was not in a position so to do as no notes were kept of any investigation steps in this regard, to include not even keeping a basic record of the persons who were spoken to regarding CCTV.

35. However, Mrs. Keeley, on behalf of the appellant, stated that the functioning CCTV cameras which were established to be on her house at the time of the trial were also on her house at the time of the incident. Furthermore, she stated that the guards came to her house enquiring about CCTV. This evidence permits of the reasonable inference that cameras were visible on her house on the day the guards called. Had guards not called to her residence, one might have expected that the respondent would have called evidence from the investigating member to establish this fact. However, the response to the appellant's disclosure request to the effect that no notes were kept of door to door enquiries rendered this route of inquiry unavailable to the respondent.

36. In light of rebuttal evidence not being called on foot of Mrs. Keeley's evidence, the state of the evidence was to the effect that there were CCTV cameras on her house; that the guards called to her house enquiring about CCTV; that they were given permission to access the CCTV but they failed to access that CCTV whether by permission or compulsion. In light of the recognised duty on investigating authorities to seek out and secure all relevant evidence, to include CCTV evidence, as far as necessary and practicable, the failure to take steps in this regard was a significant omission in the investigation.

37. With respect to the ruling of the trial judge, he detracted from the possible significance of any such CCTV on the basis that the appellant accepted that he was present at the scene. That reasoning does not take account of the fact that while the appellant accepted he was

at the scene, he asserted a completely different set of circumstances occurred. Being present at the scene did not render the CCTV of any less value in light of the defence which was being run. In addition, the trial judge relied on the fact that it had not been established that the CCTV was in fact operational on the day. While that is the case, in light of the evidence, the question as to whether the CCTV was operational could have been determined had the guards followed up on their enquiries. Finally, the trial judge determined that it was unlikely that the CCTV would have shown the incident in light of the number of people and cars in the vicinity. The Court fails to see how the trial judge could come to that conclusion in light of where the appellant indicated the incident happened and where blood was noted to be present on the road; and the positioning of the cameras which were at a height under the eaves of the house. While CCTV at ground level may not have captured the assault, it is most likely that CCTV from a height would have captured the incident regardless of the cars and the people who were allegedly present, and in light of where the injured party asserted he had been assaulted.

38. Accordingly, the trial judge's reasoning for determining that the *PO'C* application should not be successful does not engage with the significance of the facts as established on the evidence.

39. The duty on An Garda Síochána to seek out and preserve CCTV footage is well established. In the instant case, no evidence was placed before the trial court to rebut what was stated by Mrs Keeley to the effect that she had operational CCTV in her house on the day in question; that the guards called to her house enquiring about it and that she gave them permission to access it. It transpires that the respondent was not in a position to do so because of the failure to keep a basic record of the CCTV investigations which took place. It seems to us that there were significant failings regarding the investigation into CCTV in this case and that a realistic prospect of a defence existed in relation to this missing CCTV.

40. Accordingly, we uphold the appellant's complaint regarding the failure of the trial judge to direct an acquittal on the basis of an unfairness arising in the process which deprived the appellant of a reasonable prospect of a defence.

41. In light of this determination we propose to deal with the remaining grounds raised in short order.

Inconsistent Verdicts

42. At trial the appellant was found guilty of assault causing serious harm, and not guilty of production of an article capable of inflicting serious injury. The trial had proceeded on the basis that the serious harm caused to the victim was caused by a machete which was supported by the medical evidence.

43. The appellant relied on *The People* (*Director of Public Prosecutions) v. Doddy* [2009] IECCA 59, a case in which the appellant had been convicted of the offence of assault causing serious harm but acquitted on a charge of producing a weapon in the course of a fight. The prosecution's case at trial had been that the appellant had inflicted the injury with a knife. The Court of Appeal held that as the assault was perpetrated with a knife, the appellant's acquittal on the charge of producing the knife was inconsistent with the guilty verdict of assault.

44. While it was established by the prosecution that the assault in this case was perpetrated by a machete type object, there are important differences between the facts of this case and *The People* (*Director of Public Prosecutions) v. Doddy* [2009] IECCA 59. In the instant case, the appellant's case was that it was the injured party who produced the machete into the melee rather than the appellant who had come armed with it. Also, after being charged by the trial judge, the jury returned with a very specific question in relation to the specific charge of production of an article, namely what was the legal meaning of "*produce*". The jury were re-charged by the trial judge in the following manner:-

> *"So, we've considered the question and first of all produce is not defined in the Firearms and Offences Weapons Act 1990. So, therefore it has its ordinary and natural meaning and that is produce would be to introduce or in plain English to show it and bring it out."*

45. The Court is of the view that in light of the very specific question which was raised by the jury and the direction which they received from the trial judge on foot of this, and having regard to the defence case raised during the trial, the reasonable possibility existed of the jury not being satisfied beyond reasonable doubt that the appellant had produced the machete, yet still being satisfied beyond reasonable doubt that he had assaulted the injured party with it.

46. Accordingly, the appellant is not successful on this ground of appeal.

Inadequate Judge's Charge

47. The appellant submits that the judge's charge to the jury was inadequate. While accepting that it did not lack the essential elements, it is submitted that it was overly brief when dealing with the core principles such as the presumption of innocence, burden of proof and reasonable doubt/benefit of doubt.

48. No error with respect to the content of the directions given by the trial judge to the jury in relation to the general principles which apply in a criminal trial is alleged by the appellant; rather the complaint is that the charge was overly brief. While the charge is brief, no error exists in relation to what the jury were informed of, nor was anything omitted which should of necessity have been brought to the jury's attention.

49. There is no merit in this ground of appeal advanced by the appellant.

Arrest of Verdict

50. The day after the return of the jury verdict, a member of the jury contacted Senior Counsel for the appellant by email dated 10 November 2021. The email indicated that the decision to convict the appellant of assault causing serious harm, had not been unanimous as had been directed by the trial Court and that she regretted not bringing this to the attention of the trial judge at the time. The email was brought to the attention of both the respondent and the trial judge and the matter was re-listed prior to the sentencing hearing.

51. Counsel for the appellant applied to the judge to arrest the verdict on the assault causing serious harm charge in circumstances where there was a query as to whether the verdict had been unanimous. Counsel for the respondent opposed the application on the grounds that the court did not have jurisdiction to arrest the verdict following the establishment of the Court of Appeal, and further that the verdict had clearly been delivered in accordance with law. Having considered submissions and authorities from both the respondent and the appellant, the trial judge ruled as follows:-

> *"And then the jury came out and the foreman was asked, "Have you reached a verdict on which you are all agreed on each of the counts?" Count 1 was for assault causing serious harm. And he said, "Yes." Count 2 was an alternative count, which is Count 3 of assault causing harm. Then on Counts 3, 4 and 5 he was asked the same question and gives a same answer. Counts 3 and 4 were verdicts of not guilty. And Count 5 was a verdict of guilty. All the jury were present in the courtroom while that was being read out, and she refers to at one stage in her note saying, "It's a small place where 12 people are having discussions." Well when she was in in the courtroom it's a very large courtroom and at that stage she had opportunity to express any misgivings or the fact that the verdict wasn't unanimous. But taken at its height, what she says is that there were 11 jurors in favour and she was against, and it's not clear as to whether that was initially or whether she went along with the vote in respect of Count 1.*
>
> *So, a normal procedure is that after a jury have indicated that they're not in agreement, they're given at least two hours and 10 minutes to try and reach a -- after two hours and 10 minutes, they're given the option of bringing in either a unanimous verdict or a majority verdict. It's a procedural matter but it's clear that there were 11 jurors in favour of the result. I'm satisfied that once the jury have left the jury box, I have no power to correct the verdict, and the verdicts of juries hold a place of sanctity in the Irish criminal system. So accordingly, I refuse the application to arrest the jury."*

Discussion and Determination

52. The sanctity of the jury verdict has long been recognised within our system. It was reaffirmed in the recent Court of Appeal decision in *The People (Director of Public Prosecutions) v. JN* [2022] IECA 188 which carefully considered the matter, including the exceptionality of the circumstances in which a jury verdict might be scrutinised.

53. The unanimous verdict was returned in this matter in open court in accordance with s. 25(2) of the Criminal Justice Act 1984. It was pronounced in the presence of the juror member who subsequently contacted the appellant's Senior Counsel. No issue was raised by that juror at that time. The verdict was correctly received and recorded and no issue arises with it. This Court has no basis to interfere with the verdict having regard to what has been set out by the appellant and the law as summarised in *JN*.

54. Accordingly, we do not uphold this ground of appeal.

Conclusions

55. In circumstances where we have upheld the proposed ground of appeal which the appellant sought to add to his grounds of complaint, the Court will permit the appellant to add that proposed ground to his original grounds and will grant the relief sought of quashing the convictions on Counts 1 and 5.

56. The Court will hear further from the parties with respect to the consequences of its order.