



THE COURT OF APPEAL

**The President
Birmingham J.
Sheehan J.**

131/13

The People at the Suit of the Director of Public Prosecutions

and

Andrew Heaphy

Appellant

Judgment of the Court delivered on the 16th day of March 2015, by

Mr. Justice Sheehan

1. This is an appeal against conviction.
2. On the 9th of May, 2013, following a three day trial at Clonmel Circuit Court the appellant Andrew Heaphy was convicted of assault causing harm to Fran O'Dwyer on the 17th October, 2011, contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997, by a majority verdict. He was sentenced to two years imprisonment directed to be consecutive to a four year sentence for arson which was also imposed on the 16th May, 2013.
3. The appellant appeals against his conviction on two grounds which he sets out as follows:
 1. The learned trial judge erred in law carrying out a cross examination of each of the accused and Gary Heaphy in particular.
 2. The learned trial judge erred in law in making reference to the fact that perhaps the victim's jacket was the reason why the victim had not sustained any apparent injuries to his body in the alleged assault.

In order to consider these grounds of appeal it is necessary to set out the background to the offence.

Background

4. The injured party Fran O'Dwyer had been out socialising on Sunday night, the 16th October, 2011, in Cashel. He was 36 years of age at the time and on his way home he decided to call into his mother who was unwell. As he was approaching his mother's home, he saw three people kicking a car and he shouted at them to stop and said he was going to call the gardaí. He continued walking and as he did so he got hit from behind. He was surrounded by three people one punched him on the back of the head and another in the face. He tried to defend himself and managed to pull the hood off one of his assailants. He kept getting punched and fell to the ground breaking his ankle as he did so. When he was on the ground he was kicked and punched and he was kicked in the head.
5. An independent witness Sarah Lane, who herself was on her way home by taxi saw the appellant and a cousin of his, Gary Heaphy punching and hitting Fran O'Dwyer who had his hands to his face trying to protect himself and trying to push them away. The taxi driver beeped her horn to frighten them hoping that this would stop the row but this did not work. Having gone past the scene of the attack the taxi continued a short distance and then did a u-turn and returned to the scene where Sarah Lane got out and observed the appellant and Gary Heaphy repeatedly kicking the injured party on the ground. This witness also observed the third defendant, a young woman kicking the injured party in the head. Sarah Lane remonstrated with the woman, whom she knew, and the two other assailants then departed from the scene with the young woman.
6. Sarah Lane brought the injured party to the police station. She said he was fairly shook up, had blood all over his face and could barely walk. The appellant was arrested some days later and interviewed by the gardaí. Initially he denied having had anything to do with the incident and suggested at first that his mother would be able to witness to the effect that he was at home all day. He resiled from this position and went on to say that he saw the injured party kicking a car, that he remonstrated with him and that as a result of this the injured party swung at him and hit him a number of times. He told the gardaí in the course of being interviewed that he had hit the injured party in the face two or three times. He said that the injured party had then fallen to the ground, but following this got up and went off in a taxi. He denied kicking the injured party and said he did not see anyone else kick him and further stated that he was acting in self defence.
7. The appellant gave evidence at his trial in the course of which he alleged that the injured party following a verbal exchange had attacked his cousin Gary Heaphy, that he went to break up the row and the injured party started swinging at him when he did so. He said that he then swung at the injured party but did not really hit him. He said that they, meaning himself and his co-accused, tried to get away, but the injured party kept coming after them. He denied kicking the injured party. Garda Curran gave evidence of the injured party's arrival at Cashel garda station and said that Fran O'Dwyer had a lot blood around his face and head and that he complained of a pain in his right ankle. He telephoned an ambulance to bring Fran O'Dwyer to the hospital.
8. The medical evidence in the case was read to the jury. This comprised a report by Dr. Cyrus Mobed a Consultant in Emergency Medicine, who based his report on hospital notes and stated that Fran O'Dwyer had attended at the hospital on the 16th October, 2011, at 23.00 hours. He said that on examination of Fran O'Dwyer's head and face he had bruising on the left cheekbone. He said that his ankle had swelling and tenderness with decreased range of movements. He said that Fran O'Dwyer had no apparent injuries

his neck, back, abdomen, chest and upper limbs. He had no neurovascular deficit. He said that X-rays of his right ankle revealed fractures, that he was given pain relief, a back slab was applied to his right ankle and he was referred to the fracture clinic at Waterford Regional Hospital for further management of his injuries.

9. Part of the defence case was that the medical evidence was inconsistent with the evidence of the injured party and the evidence of Sarah Lane in the sense, that if the attack had occurred in the manner they described then one would expect to find evidence of more extensive injuries to the body of the injured party.

10. In the course of the trial, the three defendants gave a broadly similar account of events on the night of the attack.

First ground of appeal

11. While the learned trial judge did not ask the appellant any questions following his evidence, at the conclusion of Gary Heaphy's evidence and at the conclusion of the evidence of the third accused Siobhan Murphy the trial judge engaged in further examination of both witnesses. The cross examination of Gary Heaphy begins at line 12 on p. 85 of the transcript and concludes at line 13 on p. 86 and is as follows:

Judge: Any matters arising?

Ms. O'Dwyer: I have nothing more for Mr. Heaphy. I have nothing more that's Mr. Heaphy's . . .

Q. Judge

Judge: Yes Mr. Heaphy as you and your two cousins came along the green you were on foot path and Mr. O'Dwyer was on the other, is that right.

A. Yes, across the road, yes.

Judge: And you met him the middle of the road, is that right?

A. Well he came over to the kerb to us, kind of yes.

Judge Sorry he came to your kerb?

A. He came over to us like and we walked over a bit from the kerb, yes.

Judge: You walked over?

A. A bit from the kerb, yes.

Judge: But within the footpath?

A. Within the footpath, yes.

Judge: Your cousin said this happened in the middle of the road?

A. It was it went on for a good few minutes, like all different spots.

Judge: No I am talking about the first thing that happened once you met each other.

A. The first thing happened he came over to us.

Judge: That was on your footpath?

A. Yes he came over to us like.

Judge: And before the first blow was struck, were there any words apart from what was shouted.

A. No.

Judge: There was no argument.

A. It was just what I shouted over to the car like, he said, "who the fuck do you think you are"? I said I know who I am like, so that was it.

Judge: He said what?

A. I said I know who I am and he struck then.

Judge: So there was no argument before the first blow was struck?

A. No.

Judge: Did you report the criminal damage or possible criminal damage to this car to the gardaí.

A. No I didn't, no.

Judge: I see, any questions arising out of that?

12. At the conclusion of Siobhan Murphy's evidence, the judge asked the following questions:

Judge: Ms. Murphy you were asked by the gardaí when you came back up from the old road, what was happening and you

said, he, meaning Mr. O'Dwyer, had Gary grabbed as if he was going to grab him in a headlock, so he wasn't in a headlock at that stage, is that right?

A. No, but he had him grabbed as if he was going to grab him in a headlock.

Judge: I'm sorry?

A. He had him grabbed as if he was going to grab him in a head lock.

Judge: As if he was going to grab, so how had he him grabbed?

A. But that's the way he had him grabbed, he was going to put his hand around his throat and that's when I said to Andrew help him and that's when I went back up the road.

Judge: He was going to put his hand around his throat?

A. He did, that's when I said to Andrew help him and that is when I went back up the road.

Judge: I don't follow do you say he had him in a headlock?

A. He grabbed Gary, caught him in a headlock.

Judge: Yes.

A. That's what I seen that's . . .

Judge: Well why did you say to the guards, he had Gary grabbed as if he was going to grab him in a headlock?

A. Yes it's a headlock.

Judge: And you asked Andrew then to help Gary, is that right?

A. Yes.

Judge: And did he?

A. I don't know, I just said it to him and that's when I went back up the old road again.

Judge You asked Andrew to help Gary and when you left before you could see what happened?

A. Yes.

13. The appellant submits that these questions by the learned trial judge effectively amount to a further cross examination of the two witnesses and ought not to be categorised as questions asked for the purpose of clarification. The appellant further submits that by highlighting inconsistencies between the appellant's evidence and that of his co-accused Gary Heaphy an inference might have been drawn by the jury that the learned trial judge had formed an adverse opinion on the credibility of the appellant. The respondent contends that the learned trial judge remained impartial throughout the trial and that his interventions were precisely for clarifying answers or clearing up ambiguities.

14. In support of his submissions in relation to the learned trial judge's interventions, the appellant relies inter alia on the judgment of the Court of Criminal Appeal in the *People (At the Suit of the Director of Public Prosecutions) v. Phelim McGuinness* [1978] I.R. at 189. In that particular case the accused was on trial in respect of a charge of rape and during the course of the trial, the trial judge interrupted the cross examination of the complainant on numerous occasions to make inquiries and remarks. The interventions were not confined to seeking clarifications of answers given by witnesses or to resolve ambiguities. The accused was convicted and sentenced. On appeal to the Court of Criminal Appeal it was held in granting the application and allowing the appeal that the interventions of the trial judge had caused the trial to be unsatisfactory and that there should be a retrial. In the course of its judgment delivered by Kenny J. the Court of Criminal Appeal referred to a judgment of the English Court of Criminal Appeal in *R. v. Clewer* [1953] 37 Cr.App.R. 37 in the course of which Lord Goddard stated:

"No doubt it is sometimes difficult, when the defence is one that appears to the presiding judge to be fantastic or devoid of merit, to treat it with the same consideration as he would pay to a defence not marked by those characteristics. At the same time, the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury. If counsel is constantly interrupted both in cross examination and examination in chief, and, more especially, as in this case, during his speech to the jury, his task becomes almost impossible."

15. In the course of its concluding remark in the *People v. McGuinness*, the Court of Criminal Appeal stated:

"We consider also that an active participation by a judge in the examination in chief of witnesses is undesirable. It may give the impression to the accused or to the jury of a lack of impartiality on his part."

16. The interventions in the present case are nowhere near as serious as those referred to in the *McGuinness* or *Clewer* cases. They occurred at the conclusion of two separate cross examinations and did not interrupt the trial.

17. While the questions did not help the appellant's case, particularly the last question to Gary Heaphy as to whether or not he had reported a possible malicious damage offence to the gardaí (a question that he had already answered when put to him by prosecution counsel in cross examination) it is relevant that he made no complaint at the time. It also appears to this Court that in light of the effective cross examination by prosecution counsel the trial judge's continued cross examination of the witnesses added little to the trial.

18. While this Court accepts that as a general rule it is undesirable for a trial judge to intervene in the examination of witnesses in the

manner done in this case the interventions were nevertheless not such that they interfered with the appellant's defence or with his right to a fair trial. Accordingly, this ground of appeal is dismissed.

Second ground of appeal

19. The second ground of appeal arises in circumstances where the appellant had challenged the injured party's account of the attack on him by suggesting that it was not supported by the medical evidence. In the course of his charge to the jury, the learned trial judge remarked that the injured party may not have sustained further injuries because of the jacket that he was wearing. Given that Sarah Lane had stated that when she got out of the taxi the injured party was not wearing a jacket the appellant contended that this remark undermined his defence. The learned trial judge was duly requisitioned and re-addressed the jury in the following terms:-

"Judge: One matter that I had intended to say to you ladies and gentlemen, I had thought that when addressing you earlier in relation to the question of the jacket that I said to you that the evidence, the only evidence which was from Ms. Lane, was that Mr. O'Dwyer was not wearing a jacket when she got out of the taxi. He was wearing a dark top, he was not wearing a jacket and indeed his jacket was found elsewhere subsequently. So the evidence is in relation to that, that whatever might have been the situation earlier at the time that she got out of the taxi, Mr. O'Dwyer was there on the ground, as she and Mr. O'Dwyer would say, that he was not wearing a jacket at that stage, thank you ladies and gentlemen."

20. The second ground of appeal must fail. The learned trial judge was entitled to make the remark he did. The appellant in the course of being interviewed by the gardaí said that the injured party was wearing a jacket and the injured party himself when cross examined about the apparent lack of injuries to his body suggested that his jacket had protected him. Any possible unfairness was remedied by the manner in which the learned trial judge re charged the jury regarding that part of Sarah Lane's evidence, where she had stated that when she got out of the taxi the injured party was on the ground and not wearing a jacket.

21. Accordingly, the appeal against conviction is dismissed.