



THE COURT OF APPEAL

Clarke C.J.
Edwards J.
Donnelly J

Record No: 104/2019

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
G. H.

APPELLANT

JUDGMENT of the Court (ex tempore) delivered on the 3rd day of December, 2019 by Mr. Justice Edwards

Introduction

1. This is an appeal by the appellant against his conviction by a jury on a single count of threatening to kill, contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997 at Cork Circuit Criminal Court on the 13th of May 2019.
2. He was subsequently sentenced to imprisonment for a period of five years to date from the 20/05/2019, with the final 18 months thereof suspended on conditions for a period of three years.
3. The evidence in the case is uncontroversial and is not in dispute, and the appeal involves a net point of law concerning whether the evidence, such as it was, had sufficient cogency and was of sufficient quality to allow the case to go to a jury. The appellant had unsuccessfully sought a direction relying on the second limb of the test in R v Galbraith. He contends in substance on this appeal that the trial judge was wrong to allow the matter to proceed to a jury.

The background facts

4. The complainant in this case is one Shane Hayes, a social worker who through the course of his work was involved with the appellant, his partner, and her children. As a result of this engagement, Care Applications were initiated in respect of the four children, the youngest of whom was the son of the appellant. The children came into care on the 11th of January, 2017.
5. The court heard evidence from the complainant to the effect that on the 27th of October, 2017, the Care Applications were listed for final orders, and concluded around 5.45 p.m. Upon making their exit following the proceedings, the complainant and a team-leader from the social work department, Mr Keith Duff, were confronted by the appellant and his partner. The complainant informed the court that the appellant acted in an aggressive manner, shouted abuse at the men, and threatened to kill the complainant in the following terms: *"I'm going to kill you. You're [fucking] dead. I'm going to kill you, I'm going to stab you. I'm going to find you and kill you"*. While saying these words, the appellant was moving in the direction of the complainant. The complainant feared some

form of physical altercation, taking some steps backwards, and Mr Duff stepped in between the two men, and words were exchanged between Mr Duff and the appellant for another ten to fifteen seconds before the situation was defused. The complainant later expressed some uncertainty as to whether he had in fact heard the words *"I'm going to stab you"*, a matter which will be elaborated on in more detail when we review the cross-examination of the complainant.

6. His companion Mr Duff recalled the words: *"I will cut you"*, *"I will see you"* being uttered by the appellant. He did not, however, say that these were the only words that were uttered. Mr Duff stated that he had asked the appellant to repeat himself, but that the appellant declined.
7. The appellant claimed to the gardaí that he had spoken angrily to the complainant but had not threatened him, and that Mr Duff had attempted to provoke him, but this was denied by Mr Duff under cross-examination.
8. The jury were shown CCTV footage of the incident, which contained no audio. The appellant's front was not visible to the camera. However, the footage appeared to show Mr Duff approaching the appellant, rather than the reverse. In the appellant's statement, he had stated that Mr Duff had said *"Hi"* to the appellant, and no mention was made of any screaming or shouting. Furthermore, in the complainant's statement to the gardaí, he states the appellant had said to him: *"You, you fucking cunt. I'm going to kill you. I'll see you around. I'm coming to kill you, you dirty fucker."*
9. The appellant was cross-examined by counsel for the defendant as to the inconsistencies between his account to the jury, his account to the gardai, and what Mr Duff had told the jury. A brief review of the highlights of that cross-examination will serve to illustrate the extent of the inconsistencies and how the complainant reacted when confronted with them:

Q. Okay. And the evidence you gave to the jury today about the words used, are you sure about those words?

A. Yes, Judge. Mr Hornibrook said, "I'll kill you. I'll fucking kill you, you're dead." Yes, Judge, I'm sure about those words.

Q. Okay. Now even there where you say you're sure of those words, in your evidence to the jury, you also said, "I'll stab you." He didn't say that, did he?

A. Judge, at the time when I gave that statement to the gardaí, I couldn't say with absolute certainty that he said he'd stab me, but I believed I had heard it, so it's difficult for me to say with absolute certainty today that he said the words "I will stab you." So, I believe with far greater confidence that I can say he said the words, "I'll kill you, I'll fucking kill you." As I've outlined. I've less confidence with the "I'll stab you" comment. I'm pretty sure I've heard it and that's my belief, but I

can't say with as much confidence as I've outlined with the "I'll kill you" statements.

Q. Mr Hayes, if you'll excuse me, this is extraordinary. You've giving evidence on oath to a jury --

A. Yes.

Q. -- alleging that Mr Hornibrook threatened to kill you, and the words obviously used are very important. In your evidence in chief you said he said, "I'm going to stab you." And now, if I understand you rightly, you're resiling from that saying, you don't have confidence in your own evidence that you gave 10 minutes ago.

A. Judge, I'm saying with that particular comment around the "I'll stab you", I believe I heard it, but I can't say with as much confidence, like I have done with the other comments around, "I'll kill you."

Q. Can I put it to you that you didn't put that caveat on it at all, when you were giving your evidence in chief in your reply to Mr O'Sullivan. You didn't say, he said, "I'm going to kill you. You're fucking dead." Then "he may have said", "I've some belief that he said 'I'm going to stab you' but I couldn't have confidence in that." You didn't say that at all, did you?

A. I accept that, Judge. I'm certainly trying to be as honest as I can be.

Q. But do you see the point?

A. I do, Judge.

Q. Your evidence about the words you say Mr Hornibrook used is crucial. Do you understand that?

A. I do indeed, Judge.

Q. Because the crime consists not of an assault, or of possession of anything, or of an action; it's an unusual crime that consists of words, a threat to kill, okay. Do you understand that?

A. I do, Judge.

Q. So, the words used, are very important. And if the jury are to be satisfied beyond a reasonable doubt that Mr Hornibrook threatened to kill you, intending you to believe it, the words he actually used are very important. I'm just trying to get to the point of, can the jury have confidence in the evidence you're giving about the words used, or do you have confusion about what was actually said?

A. No, Judge, I don't believe there's any confusion here. I believe I've answered the question as best I possibly can. I can say with absolute confidence that Mr

Hornibrook said on several occasions to me, over the period of a minute or so that he would kill me, and I believed that at the time. Leaving then with regard to the "stab you" comment, I can't stand over that as confidently as I can do with the other words used."

10. Counsel continued to press the complainant in cross-examination, leading to the following further exchanges:

Q. It doesn't. You see the point I'm getting to is, I'm trying to find out for the jury, whether you have an actual recollection of what was said, or are you just sure in your head that Mr Hornibrook threatened to kill you, and anytime you're asked about it, you're happy to make up a new set of words about what was actually said?

A. No, Judge. I was satisfied on the day of giving this statement to the gardai that the words recorded here were certainly said on that day. The incident happened for, I suppose, 30 seconds plus, so there would have been additional words said inclusive of "You're dead" amongst "you fucking cunt. I'll kill you, I'll see you around." So, I suppose what I'm saying, Judge, is not everything that was said by Mr Hornibrook is recorded here within the statement.

Q. So, there were other things said by Mr Hornibrook on the night -- sorry on the day, that you didn't tell the guards about?

A. That's correct, Judge.

Q. Okay. And why didn't you tell the guards about what he said to you?

A. Judge, because I was trying to give a very simple and concrete, accurate outline of exactly what was said. I didn't record everything that was said word for word throughout the course of the 30 seconds plus that it would have taken to say those words, Judge, because I couldn't say with absolute certainty what was said, in addition to these, but it was that it was all in the same context, it was all in the same line of, "You're dead. I'm going to kill you." I was under no illusions whatsoever the message that was being delivered to me at that time."

11. Counsel for the appellant sought a direction on the basis that the prosecution evidence contained what he characterised as "hopeless inconsistencies" rendering it so infirm that no jury, properly charged, could convict upon it. The trial judge refused to grant the direction to acquit sought by counsel for the appellant and allowed the matter to proceed to the jury. Ultimately, the jury convicted the appellant of the charge.

The Grounds of Appeal

12. The appellant seeks appeal on the following grounds:

I. The trial judge erred in fact and law in failing to direct the jury to find the accused not guilty on the basis that the evidence of the two prosecution witnesses as to the

words allegedly spoken by the appellant, which were alleged to have constituted a threat to kill, were fundamentally different.

- II. The trial judge erred in fact and law in failing to direct the jury to find the accused not guilty on the basis that the evidence of one of the two prosecution witnesses as to the words allegedly spoken by the appellant, which were alleged to have constituted a threat to kill, did not in fact constitute a threat to kill, but rather a threat to assault the complainant causing him harm.
- III. The trial judge erred in in fact and law in agreeing with the prosecutor that in order to direct the jury to find the accused not guilty, the prosecution evidence had to be "utterly diabolical".

Discussion & Decision

13. As the parties have acknowledged in argument, this was a case that required the correct application of the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* (1981) 73 Cr App R 124; [1981] 1 W.L.R. 1039. This Court considered the *Galbraith* test in its judgment in *The People (Director of Public Prosecutions) v (J.R.) M.* [2015] IECA 65. In that case we sought to address a commonly held misapprehension that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. We emphasised that it is not authority for that proposition, and went on to say:

"On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.

Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction. This Court considers that the matter is well put in the following quotation from *Archbold, Criminal Pleading Evidence & Practice* 2014 at page 484, where the authors state:

'In making the judgment in line with the second limb of *Galbraith*, as to whether the state of the evidence called by the prosecution, taken as a whole, is so unsatisfactory, contradictory or so transparently unreliable, that no jury, properly directed, could convict, the judge must bear in mind the constitutional primacy of the jury and not usurp its function.'

Further, in *The People (Director of Public Prosecutions) v M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) Denham J, as she then was, provided the following exegesis, with which we fully concur, concerning how the *Galbraith* principles ought properly to be applied:

“If there is no evidence that an element of the crime alleged has been committed, the situation would be clear. The judge would have to stop the trial. However, that is not the case here. If a judge comes to the conclusion that the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict it is his duty to stop the trial. However, that is not the case here. Here there is lengthy evidence from the complainant in which there are some inconsistencies. These inconsistencies are matters which go to issues of reliability and credibility and thus, in the circumstances, are solely matters for the jury. The learned trial judge was therefore correct in letting the trial proceed. These are matters quintessentially for the jury to decide. However, if the inconsistencies were such as to render it unfair to proceed with the trial then the judge in the exercise of his or her discretion should stop the trial. However, that is not the situation here. On the facts and the law the learned trial judge did not err in refusing to withdraw the count in respect of the sexual assault from the jury at the conclusion of the prosecution case.”

14. In the present case there were undoubtedly inconsistencies in the evidence. The question we have had to ask ourselves is whether those inconsistencies rendered the evidence so infirm that no jury properly directed could rely upon it. We have concluded that they did not. There was evidence that a jury properly charged could rely upon, and upon which, taken at its high water mark, they could potentially be satisfied to the standard of beyond reasonable doubt in relation to the guilt of the accused. In our assessment the trial judge was right to allow the matter proceed to a jury. The conflicts and inconsistencies in the evidence were well within the capacity of the jury to resolve. They were, to quote Denham J, quintessentially matters for a jury.
15. It is suggested that the trial judge may have applied the wrong test in response to a submission by prosecuting counsel that the law requires that a case should not be withdrawn from the jury unless the evidence was “absolutely diabolical”. While the colourful phrase used by counsel is not one we would adopt, we do not believe that the trial judge was misled into applying the wrong test, or that he in fact applied the wrong test. He was correctly referred to the *Galbraith* and *M* cases, and it is clear from his remarks that he was fully au fait with them. Counsel for the prosecution had intended no more than to suggest that the bar for the granting of a direction is a high one, and that, per the *M* case, even if the prosecution’s evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. We are satisfied that the trial judge fully understood that, and that he did in fact apply the correct test.

16. We therefore find no errors of principle on the part of the trial judge, and are not disposed to uphold any of the appellant's ground of appeal. The appeal against conviction is dismissed in the circumstances.