



THE COURT OF APPEAL

Record No: 2020/84

**President
McCarthy J.
Donnelly J.**

BETWEEN/

**THE PEOPLE (AT THE SUIT OF THE
DIRECTOR OF PUBLIC PROSECUTIONS)**

RESPONDENT

- AND -

DEREK HEARNS

APPELLANT

JUDGMENT of the Court delivered on the 6th day of July, 2020 by Ms. Justice Donnelly

1. This appeal presents an unusual conundrum. The appellant was convicted by a jury at the Dublin Circuit Criminal Court on the 28th February, 2020 of three counts arising from a continuous incident that occurred at a given place and time concerning a certain person. The appellant was acquitted or had a *nolle prosequi* entered in respect of certain counts related to the same continuous incident and referring to the same person. For ease of understanding, this judgment will refer to the person against whom all counts were alleged to have been committed, as the victim.
2. The appellant was convicted of robbery, theft and an offence contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990 (hereinafter, "the 1990 Act") against the victim. The particulars of the s. 11 offence were that he "did, while committing an offence, to wit, false imprisonment, produce in a manner likely to unlawfully intimidate another person an article capable of inflicting serious injury, to wit, a knife." He was acquitted on three other counts and the jury disagreed on two other counts (on these, the DPP entered a *nolle prosequi*). Of importance to this appeal was that he was acquitted on a count of falsely imprisoning the victim during this continuous incident. It is the apparent inconsistency of the acquittal on the offence of false imprisonment with the conviction for the offence of the production of a knife while committing the offence of false imprisonment, that forms the basis of this appeal.
3. The appellant has not appealed the robbery (of cash) or the theft (of an iPhone) convictions. He was sentenced to three years imprisonment with one year suspended in respect of the robbery offence. Concurrent sentences of two years imprisonment with one year suspended in respect of the theft and the s. 11 offence. The trial judge specifically stated that he would not be prejudiced when sentencing on the s. 11 offence.

Issue on Appeal

4. The appellant's submission centres around what he submits is a perverse verdict. Pursuant to the indictment, at count 2, the appellant stood indicted that he "did, while

committing an offence, to wit false imprisonment, produce in a manner likely to unlawfully intimidate another person an article capable of inflicting serious injury, to wit, a knife." [Emphasis added]. Although we do not have sight of the issue paper, it appears from a comment made by the trial judge after the verdicts were delivered, that the issue paper reflected the wording of the indictment. The parties do not contest this position. Furthermore, the trial judge read to the jury from the counts on the issue paper and told them that they would receive the issue paper in writing. We are therefore satisfied to proceed on the basis that count 2, as worded above, was the count that was left to the jury.

5. The appellant submits that count 2 is manifestly inconsistent and perverse in conjunction with the jury returning a not-guilty verdict in respect of count 3, *i.e.* in respect of the offence of false imprisonment. The appellant submits that to have committed an offence of false imprisonment was a necessary ingredient of count 2. The appellant submits that these findings of the jury, namely, that the appellant is not guilty of false imprisonment but is guilty of producing a knife while committing an offence of false imprisonment, are perverse.
6. The appellant submits that while the appeal is one that is partially based on the proposition that the trial judge failed to properly direct the jury, the binary nature of counts 2 and 3 in and of themselves was not something that was alluded to in the course of the trial. On this basis, the appellant states that it is fundamentally unfair and contrary to the proper administration of justice to allow the conviction on count 2 to stand where it is manifestly unsafe given the appellant's acquittal of false imprisonment in count 3.
7. The respondent submits that there is no perversity in the verdicts. The trial judge had reminded the jury of their duty to consider each count separately. There were no requisitions by the appellant on the judge's charge. The jury were not confused as they asked no questions in relation to this count, but they did have questions on the other counts.
8. The respondent's main submission is that the knife was produced in the course of committing another offence, namely the offence of robbery. In those circumstances, and in accordance with the provisions of s. 11 and having regard to the judge's charge, he was correctly convicted. The respondent made the following submission:

"The Learned Trial Judge carefully outlined to the jury the legal concepts required by Count 2 namely Production of an Article capable of inflicting serious injury while committing an offence contrary to Section 11 of the Firearms and Offensive Weapons Act 1990 directing them that the charge required "*the production of an article in a manner likely to unlawfully to intimidate another person to wit a knife" while committing an offence.*" (Underlining added)

Finding that a jury verdict is perverse requires exceptional circumstances

9. The parties to this appeal are in agreement that a finding that the jury verdict was perverse requires exceptional circumstances and a strong basis for so holding. Both

parties refer to *The People (DPP) v. Nadwodny* [2015] IECA 307 and *The People (DPP) v. Tomkins* [2012] IECCA 82 to this effect. In *Tomkins*, MacMenamin J. stated that “*this court has repeatedly emphasised that it has no power to substitute its own subjective view of a case for that of the jury [...] A decision that a verdict was perverse is a very exceptional one*”. MacMenamin J. referred to *(The People) DPP v. Egan* [1990] I.L.R.M. 780 where the Supreme Court held that “[s]ave where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it.”

10. The appellant relies on *(The People) DPP v. Alchimionek* [2019] IECA 49 whereby the Court of Appeal overturned the rejection by the jury of a verdict of not guilty by reason of insanity. The Court of Appeal held that while the verdict of the jury has primacy, in certain rare situations, an appellate court would overturn such a verdict. In *Alchimionek*, the Court held that the jury’s verdict “*was not supported by any evidence in the case, was against all of the evidence in the case, and in those circumstances, has to be regarded as perverse.*” That case is not a perfect analogy with the present case as there was simply no evidence to support the verdict. In the present case, there was undoubtedly evidence upon which a jury could have found him guilty of the offence as charged in the indictment. The main issue is that the verdict of guilty in respect of this count, in so far as it incorporates the offence of false imprisonment, was inconsistent with the acquittal on the latter.

Inconsistent verdicts

11. The jurisprudence in this area would suggest a marked reluctance on the part of appellate courts to intervene in response to complaints of inconsistent verdicts. Walsh, *Criminal Procedure*, (2nd Ed., Round Hall, 2016) comments:

“It does not follow, however, that an apparently inconsistent verdict cannot stand. If the intention of the jury to convict is clear, the Court of Appeal may decide that no miscarriage of justice has occurred and decline to quash the conviction. On the other hand, if the verdict is such that no judgment can properly be entered, a retrial may be ordered.”

12. O’Malley, *Criminal Procedure* (1st Ed., Round Hall, 2009) having recited relevant US law, states: -

“Irish law, which follows English law in this respect, is somewhat more flexible in dealing with inconsistent verdicts, and it is guided by two fundamental principles. First, the onus of proving inconsistency rests squarely with the party challenging the verdict. Secondly, the test is one of substantive rather than formal inconsistency. It is not merely a question of asking if a conviction on one charge is formally incompatible with acquittal on another. Rather the question is whether a reasonable jury, applying their minds to the facts of the case, could properly have reached the decision which they did. It is only if this question must be answered in the negative that a conviction will be quashed for inconsistency. In *R. v McKechnie* [[1992] 94 Cr. App. R. 51], Auld J. said:

'Not every inconsistency between verdicts justifies interference by this Court. The principle well established in a number of cases is that where there is such an inconsistency the Court of Appeal will only intervene to quash a conviction where the appellant establishes that no reasonable jury could properly have reached the verdicts that they did.'

The Court of Criminal Appeal in this jurisdiction has adopted a similar approach, as reflected in *People (DPP) v Maughan* [[1995] 1 I.R. 304] and *People (DPP) v Sweeney* [[2007] IECCA 44]. Inconsistency was found in *Maughan* where the jury, despite clear instructions from the trial judge, returned guilty verdicts on counts of aggravated burglary, false imprisonment and handling stolen goods in circumstances where the third count was an alternative to the first and second (reflecting the well-established principle that one cannot be a thief and a receiver of the same property arising from the same criminal episode). Quashing all three convictions, the Court of Criminal Appeal was not satisfied that a reasonable jury, applying its mind to the evidence, would have returned a guilty verdict on all three counts. The application of the same test led to a different outcome in *Sweeney* where the applicants had been tried on counts of violent disorder and criminal damage. The jury acquitted on the violent disorder charges but convicted on the criminal damage charges. The Court of Criminal Appeal distinguished *Maughan* on the basis that, in the instant case, the violent disorder and criminal damage counts were not intended as alternatives. The different ingredients of these offences might have justified the jury in reaching the decision which it did. The court stressed that, to succeed, the applicant had to show that the verdicts were 'necessarily inconsistent' and that that if there was a possibility of consistency, 'even if it is an unlikely view of the evidence on which the verdict can be justified', the court should accept the verdict. More recently, the English courts have phrased the test as one of 'logical inconsistency', though that scarcely differs in any material way from the current Irish test. The English Court of Appeal has been willing in an exceptional case to quash a verdict where, despite the absence of a clear logical inconsistency, the overall facts or circumstances rendered it unsafe. Problems relating to inconsistent verdicts usually arise on appeal. However, as noted earlier, when a jury returns a verdict with an obvious internal inconsistency, the trial judge is entitled, if not obliged, to ask them to reconsider it. Finally, it is worth pointing out that when drawing upon appellate case law from other jurisdictions in relation to this and, indeed, other aspects of criminal procedure, it is always important to consider the test which the appeal court in question must apply when deciding if an appeal should be allowed. Outcomes might well differ depending on whether the court is confined to deciding if a verdict is unsafe as opposed, for example, to whether there had been a material or procedural irregularity in the conduct of the trial."

13. In our view, that rather lengthy passage substantially reflects the law. We say substantially because the reference to "reasonable jury" must be read in the context of the phrase used when making a direction application, namely "a reasonable jury properly charged". For reasons which we shall illustrate, the question of whether the jury were properly charged is at issue in this case.

14. Counsel for the appellant submits however, that the present case meets the threshold of amounting to an exceptional circumstance. Not only does the appellant submit that the verdict was perverse, but that the verdicts delivered in respect of count 3 and count 2 were mutually exclusive as a matter of law and fact. In making this submission, the appellant does not seek that this Court engages in an assessment of the jury's weighing up of the evidence that the appellant claims is particularly tenuous, but rather, the Court should engage in an analysis of the indictment itself. From analysing the indictment, the appellant submitted that it requires the Court to find that one verdict cannot be sustained without the same verdict on the other count because one is a subset of the other.

The indictment

15. The appellant makes submissions in relation to the indictment itself and how it may have misled the jury into delivering an allegedly perverse verdict. The appellant submitted that had the counts been listed in a different sequence on the indictment, then it would have become obvious to the jury that in acquitting the appellant of false imprisonment, they could not then go on to convict him of producing a knife while committing the offence of false imprisonment.
16. The appellant submitted that there is a duty on the prosecutor who framed the indictment to ensure the trial judge made the jury aware that while the counts are in a sense separate, the jury convicting on count 2 must have already been satisfied beyond reasonable doubt that the appellant had committed the offence of false imprisonment set out in count 3. The appellant relied on UK authorities in support of this submission (See: *R. v. McGranaghan* [1995] 1 Cr App R 559; *R v. Downey* [1995] Cr App R 547; *R v. Barnes* [1995] 2 Cr App R 491 and *R v. Brown* [1997] Crim LR 502; *R v. W* [1998] 2 Cr App R 289).
17. The respondent placed emphasis on the wording of s.11 of the 1990 Act, stating that while the jury acquitted the appellant of the charge of false imprisonment, the jury's subsequent finding of guilty in respect of count 2 was correct. The respondent submitted that s.11 of the 1990 Act states:-

"Where a person, while committing or appearing to be about to commit an offence, or in the course of a dispute or fight, produces in a manner likely unlawfully to intimidate another person any article capable of inflicting serious injury, he shall be guilty of an offence".
18. The respondent submitted that the evidence disclosed in the transcript of the victim depicts a narrative of a dispute and unlawful offending on the part of the appellant which resulted in the jury recording convictions of robbery and theft. The respondent states that it was during the course of this offending that the knife, the subject matter of count 2 was produced. The victim gave evidence that he believed he would be killed and was terrified. The respondent submitted that the wording in s. 11, namely "while committing or appearing to be about to commit" is commensurate with the victim's disclosed state of mind at the time of offending.

The Judge's Charge

19. Counsel for the respondent refers to the trial judge's charge of the evidence to support the contention that the conviction under count 2 was safe. The respondent submitted that the trial judge carefully directed the jury to consider each count separately as if each were separate trials. On this basis, the respondent argues that the jury was left in no doubt that the same standard of analysis and scrutiny of the evidence applied to each count along with the application of the legal principles set out in her charge which applied to each count. Therefore, the respondent argues, the jury was aware that each count had to be examined and determined on its own merits before a verdict could be recorded in respect of each count.
20. The respondent submitted that as part of the summary of the evidence, the trial judge stated in her charge to the jury that the victim had given evidence that during the encounter with the appellant in the victim's home, the appellant used a large kitchen knife in his hand which came from the victim's kitchen. She stated to the jury that the victim felt threatened and intimidated as a result. Secondly, the trial judge referred to the forensic evidence introduced by the prosecution who stated that a major DNA profile belonged to the appellant. Thirdly, she stated in her charge that the victim told the jury that he had been unlawfully intimidated by the use of the knife and production thereof. On this basis, the appellant submits that the jury were left in no doubt therefore, of either the legal or evidential parameters within which to conduct their deliberations in respect of count 2.
21. Having carefully perused the transcript, we are satisfied that the judge told the jury as follows: "First of all, there's eight counts. Consider each count separately as if you were considering eight separate trials." The trial judge then proceeded to read out each of the counts on the indictment/issue paper. The trial judge then told the jury she was going to tell them briefly the ingredients in law of the offences. She did so by referring to the legal ingredients of the offence followed by a reference to the evidence which related to that offence. In general, that is an informative and helpful approach to giving the jury instructions. It will focus the jury on the legal requirements of the offence and the evidence upon which the prosecution seek to assert that the offence has been proved.
22. It is appropriate to begin by way of example with the trial judge's charge in respect of count 1, the offence of assault causing harm (on which the jury disagreed). The trial judge gave a lengthy explanation of the legal ingredients and also of the evidence in respect of assault. The trial judge then went on to discuss count 2. She incorrectly stated that count 2 was the charge of false imprisonment. She then gave a quite lengthy explanation of the legal ingredients and stated that "false imprisonment occurs where an accused intentionally or recklessly unlawfully imposes for any time a total restraint on the personal liberty of another." She referred in detail to the evidence of the victim in the case. The trial judge referred to the circumstances of the appellant coming in, looking for hot tea, punching the victim and "there was knives being shown and he was being taunted to react to him and he didn't - he wanted to keep the situation low key because he was afraid because his partner...and her son...was upstairs and her son has a particular

medical condition and he was afraid that if he reacted and his partner or her son came down it would turn into a completely different scenario. He said that he was absolutely terrified but he wanted to keep the matter calm. That's the allegation of false imprisonment. He said that he wasn't free to move ..."

23. The trial judge then went on to deal with the s. 11 count *i.e.* production of the knife and corrected herself by referring to this as "the second allegation." The following is the totality of what she said:

"The second allegation is -- sorry, the second allegation is production of an article in a manner likely to unlawfully to intimidate another person, to wit a knife and [the victim's] evidence that a knife was used and that the large kitchen knife was in Mr Hearn's hand. And the forensic evidence say that the major profile on that knife was Mr Hearn's. He was cross examined about it, whether there could be cross transfer of DNA from somebody shaking hands or using a mug on to that knife but the major profile on that knife, it remains from the forensic scientist was from Mr Hearn. It's [the victim's] evidence that he was unlawfully intimidated by the use of that knife and that knife was so produced."

24. It is immediately apparent from the above that the legal ingredients of the offence of production of an article under s. 11 of the 1990 Act, as set out above, were not fully explained to the jury. Contrary to the respondent's written submissions above, there was no reference by the trial judge to the requirement that for the offence to be committed the person must produce the prohibited article "while committing or appearing to be about to commit an offence". Nor did she refer to the alternative manner in which it may be committed, *i.e.* in the course of a dispute or fight.
25. Instead, the trial judge gave to the jury the information that the offence could be committed where a person produced an article in a manner likely to unlawfully intimidate another. There was no reference in her direction to the requirement that the article be capable of inflicting serious injury but if that was the only issue there could of course be no substantive complaint. A knife would clearly fit that description and it was not an issue in the case. The other omissions are, we believe, issues of substance.
26. It is a matter of significance that the trial judge never told the jury that the article had to be produced while committing or appearing to be about to commit an offence. In particular, nowhere in her charge did she relate this offence to the requirement that they must consider it in the context of whether he had committed an offence of false imprisonment or "appearing to be about to commit an offence" of false imprisonment. Unfortunately, this jury were simply never given the legal requirements of the charge. The judge did not receive any assistance on this by way of requisition. Her mistake (and indeed the failure to requisition) may be understandable because the real focus of the trial was on the substantive offences of assault, robbery and false imprisonment. Indeed, this case could be said to reflect the dangers of overloading an indictment with offences that as a matter of fact (if not law) are incorporated in the substantive offences. When a

prosecutor does include these counts, the prosecutor must be assiduous in ensuring that the distinguishing features of each count are given full consideration in the trial.

The issues under appeal were not the subject of a requisition at the trial

27. The respondent submitted that because the matter under appeal was not the subject of a requisition in the Circuit Court, it cannot therefore become the subject matter of an appeal. Secondly, the respondent argues there was no indication at any stage during the jury deliberations of any confusion on the part of the jury nor indication that they required assistance in respect of either of these counts. The respondent's submissions on the failure to requisition appear to be grounded upon the contention that there was no problem with the instruction itself.
28. In response to the fact that the appellant did not make any requisition in respect of the matter under appeal, the appellant makes three submissions. First, that the outcome was not easily foreseen by the appellant; second, that the order in which the charges are listed on the indictment is a matter for the prosecution and third, the inconsistency in the fact finding of the jury in respect of count 2 and 3 was not one that manifested itself until after the verdicts were returned. The appellant submits that on this basis, the respondent cannot seek to rely on *DPP v. Cronin (No. 2)* [2006] 4 I.R. 329. Moreover, the appellant argues that the appellant is permitted to argue a point not raised before the court of trial where it is in the interests of justice to do so. The appellant relies on *The People (DPP) v. Shazhad Hussain* [2014] IECCA 26 to this effect.
29. In the view of the Court, the decision in *Cronin* must be viewed in light of the necessity to consider what is the requirement of the essential interest of justice. This was given effect by the Court of Criminal Appeal in *Hussain* when it stated as follows: -

"In all the circumstances of this case, the Court remains concerned that there is a real risk of injustice and that the essential justice of the case does require the Court to pay significant regard to its concern that the jury may have remained under a significant misapprehension as to the proper legal basis on which they were to consider the key point in the defence case being provocation."

Conclusion

30. The question that must be answered in the present case is whether a reasonable jury properly charged, applying their minds to the facts of this case, could properly have reached the decision which they did? It is fair to comment that this jury understandably rendered a verdict of guilty based upon the charge they were given. They were told that the ingredients of the offence were the production of an article, to wit, a knife in a manner unlawfully to intimidate another. They were told that the victim's evidence was that he had been so unlawfully intimidated and the knife was so produced. The verdict of guilty was a logical verdict when viewed in that light.
31. On the other hand, a reasonable jury who were properly charged could not properly have reached a decision to convict him of an offence of producing a knife unlawfully to intimidate another in the course of committing an offence of false imprisonment when they in fact, by their verdict on another count acquitted him of that very offence. That is

certainly a *prima facie* inconsistency. It is one that does not readily in this case, lend itself to a resolution.

32. The respondent's submission that the jury verdict is consistent when viewed in light of the fact that the jury may have thought he was about to commit the offence of false imprisonment or indeed was committing it in the course of another offence or in the course of a dispute, might, in other circumstances, have some validity. Certainly, it may be something that could weigh heavily in a consideration of whether the Court should apply the proviso notwithstanding a technical inconsistency based solely upon the wording of the count i.e. by the specific reference to the offence of false imprisonment. In the present circumstances, we are satisfied that such a submission cannot be accepted.
33. In the present case, the jury were never charged in accordance with the requirements of the section. They were never given the option of considering whether to assess this in light of the fact that they may have considered he was about to commit the offence of false imprisonment or was in fact committing another offence or had produced it in the course of a dispute or fight. The option of considering whether it had been produced in the course of a dispute or fight was wording that was never left to the jury either in the issue paper or in the charge by the trial judge. It cannot therefore form the basis of an attempt to construe an otherwise inconsistency in the verdicts. Although the offence of false imprisonment was referred to in the issue paper, the option was never left to the jury to consider that he was about to commit that offence. Thus in trying to ascertain the reasonableness of the jury's collective mind, it is not open to this Court to impute a legal understanding of the charge when that instruction had not been given to them.
34. It is worth commenting at this stage that perhaps matters might not have reached the stage they did if the indictment had concentrated on the substantive charges, if a logical sequence had been followed in the charges or if other offences had been mentioned on the indictment. If the false imprisonment charge had been count 2, perhaps the jury's methodology might have assisted in reaching a logically consistent verdict. We cannot enter into the jury's mind nor trespass into their methodology. In any event, the jury reached a verdict on that count that was consistent with the judge's direction to them, but unfortunately was inconsistent with their verdict on count 3. The verdict was reached after a charge that was unfortunately incomplete on the ingredients of the offence.
35. We have considered the fact that there was no requisition. On occasions it may not be relevant for a judge to outline in detail each legal element of a charge or even to mention one at all. In some cases, that element may be so uncontested or so self-evident that it is entirely unnecessary to do so or, at the very least, no discernible prejudice or even effect of such an omission can be demonstrated. Here there is a discernible effect, the jury have returned a *prima facie* inconsistent verdict. There is marginal prejudice; while his sentence is unaffected, the appellant stands convicted of an offence which refers to him have committed the serious offence of false imprisonment: an offence of which in fact he has been acquitted.

36. In the context of this case, the failure to requisition cannot be the deciding factor. This is a logically inconsistent verdict which no reasonable jury, properly charged, could properly have reached. To paraphrase the words of the Court of Criminal Appeal in *Hussain*, the Court is required to pay significant regard to its concern that the jury may have remained under a significant misapprehension as to the proper legal basis on which they were to consider the offence of s. 11 with respect to the requirement that the appellant had to be shown that he was about to commit or was committing an offence. In those circumstances, there is a real risk of injustice that this appellant has been convicted of an offence on an improper legal basis. Although the explanation for the failure to requisition is simply that of omission in the circumstances to spot the significance, we are satisfied in this case that the real significance of the charge to the jury is now much more stark in light of the inconsistent verdicts. It is that *prima facie* inconsistency that is the driver of the decision to overturn this conviction and not simply the incomplete directions given to the jury on the essential legal ingredients of this offence.
37. For the reasons set out above, we allow the appeal against the conviction on count 2 of the indictment.