THE COURT OF APPEAL

Record Number: 60/20
Neutral Citation Number: [2021] IECA 126

Birmingham P.
McCarthy J.
Kennedy J.

UNAPPROVED

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

ANTHONY MCNAMARA

APPELLANT

JUDGMENT of the Court delivered on the 27th day of April 2021 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. The appellant was convicted of three counts, namely violent disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994, production of an article capable of inflicting serious injury contrary to section 11 of the Firearms and Offensive Weapons Act 1990 and criminal damage contrary to section 2 of the Criminal Damage Act 1991.

Background

2. The convictions relate to events occurring on the night of 9th October 2018 when a gang of 15-20 men attacked the home of Tanya Whelan, John Boswell and their two children. As part of the attack objects were thrown and significant damage was done to the home of

Tanya Whelan and John Boswell and the car parked outside. Several of the attackers were armed with implements and of some importance, one of the attackers was armed with a machete. It was the prosecution case that this was the appellant.

3. The trial of the appellant and a co-accused commenced on the 14th November 2019. Tanya Whelan and Mr Boswell had been served as prosecution witnesses in the book of evidence but ultimately the prosecution proceeded with a sole witness: Bridget Whelan, who was present in the house during the attack. In essence the respondent's case rested with the recognition evidence of Bridget Whelan and on a machete recovered from the appellant's home.

Grounds of appeal

4. The appellant puts forward the following three grounds of appeal:-

(1) *"* The learned trial judge erred in law and fact by refusing an application made by Counsel during the course of the trial to discharge the jury on the basis that hearsay evidence of identification had been introduced by the prosecution witness Ms. Bridget Whelan. The introduction of this evidence in a case that was solely one on identification resulted in an unfair trial and rendered the conviction of the Appellant unsafe. No direction to the jury could remedy the introduction of this evidence into the case;

(2) The learned trial judge erred by refusing defence counsel's application to discharge the jury where prejudicial evidence was introduced on multiple occasions by the witnesses for the prosecution. The prejudice created rendered the trial unfair and the conviction of the accused unsafe

(3) In all the circumstances the learned trial judge should have discharged the jury and the failure/refusal to do so resulted in an unfair trial."

5. The grounds of appeal are interlinked and may be summarised as a contention that the trial judge erred in refusing to discharge the jury despite several applications made by counsel for the appellant. All of these applications arose from evidence given by the witness Bridget Whelan during the course of her cross-examination. This appeal concerns four of those applications.

The first application for discharge

6. This application arose when the witness was being cross-examined as to when she first heard the smashing of glass. When giving answers the witness referred to discovering that another house had been smashed to the ground. This was not part of the prosecution case but was contained in the book of evidence. The precise words used by the witness were:-

> " …That would have been the Murphy's house getting smashed to the ground that I heard."
>
> "…I found out afterwards that the Murphy's house was after getting smashed to the ground."

7. The trial judge refused the application in the following terms:-

> "The first thing I would say is that the matter did arise in the course of cross examination and there was reference to this issue on the book of evidence, albeit the prosecution had not intended to call it. In the Court's view, the credibility or otherwise of whether the witness could have heard what she says she now heard in relation to the Murphy's house is a matter upon which she can be cross examined I think at present, and as matters stand any issue of prejudice can be dealt with by way of an appropriate warning to the jury. But in view of the fact that the defence were on notice of this other incident, not just by reference to disclosure but by reference to a statement in the book of evidence, I think the appropriate way with which it can be dealt with is by way of a warning to the jury and indeed the defence are entitled to cross examine the

witness further in relation to the credibility of what she said, that she believed it was the Murphy's house that was getting smashed and that's what she heard. So, I am refusing the application for a direction."

8. The appellant submits that the reference to smashed windows at another location was inadmissible as it referred to an incident that had been removed from the indictment. The appellant argues that he could not have been on notice that the line of questioning explored would lead to the introduction of this evidence. The appellant further argues that the contention that he caused criminal damage at another address is akin to the prejudicial evidence that occurred in *The People (DPP) v. Coughlan Ryan* [2017] IECA 108 where the Court overturned a conviction on the basis of prejudicial evidence relating to the accused's criminal past.

9. The appellant submits that no directions could have cured the prejudice arising as this was a case where the appellant's conviction was based primarily on the identification evidence of the witness.

10. In response, Mr Rahn BL on behalf of the Director submits that the impugned reference was not referable to the appellant and therefore did not cause him prejudice. Moreover, it is said that the appellant was on notice of this evidence with which the appellant takes issue.

Discussion

11. It is undoubtedly so that inadmissible evidence may arise in trials and the prejudicial impact of that evidence will fall to be determined on the circumstances of any given case. It appears that this material was contained in another witness statement which was served as part of the book of evidence and therefore the appellant was on notice of the evidence. We accept the submission on the part of the respondent that the evidence given by the witness was not referable to the appellant and so did not in any event give rise to prejudice.

The second and fourth applications to discharge the jury

12. It is important to examine the evidence which gave rise to these applications to discharge the jury. Mr Spencer BL for the appellant drew our attention on appeal to aspects of the direct testimony given by Ms. Whelan in contending that this evidence gave rise to the necessity to cross-examine her as he did, in turn giving rise to responses which resulted in the second and fourth application to discharge the jury. We will address those two applications together.

13. Mr Spencer refers this Court to the following extracts from the direct testimony:-

"A. Tanya just went for the baby, things started coming through the window.

Q. And just --?

A. I didn't know I was hit, she didn't know she was hit, the blood started going over the baby, our most thing was just concentrating on the baby and the kids, and then before I knew it, there was guards and paramedics everywhere, that's all I knew.

JUDGE: Guards and blue lights, is that what you said?

WITNESS: Paramedic.

JUDGE: Paramedics?

WITNESS: Yes.

MR RAHN: Paramedics, guards and paramedics everywhere?

A. Yes.

Q. And I think you're just -- I'm just going to sort of try and break that down again if I can, I think you told us that things started coming through the window if that's --?

A. Yes, there was a --

Q. Can you just tell us about that and again there's a booklet, there's photographs in front of you, you might have a look through those and tell us if any of those

photographs assist in explaining to the jury what you recall?

JUDGE: Take your time, Ms Whelan, just look through them.

WITNESS: Planks of wood, and red bricks.

JUDGE: See do any of the photos assist you.

WITNESS: Just the likes of them stakes, planks of wood and bricks.

MR RAHN: Okay. If you look at photograph -- the photographs should be numbered, is there a number on the bottom, did somebody put a number on them, perhaps not, but --?

A. That one.

Q. -- six photographs in -- that photograph, I'll ask you to have a look at that, does that assist you?

A. Yes, that one, the likes of them.

JUDGE: Okay, that's --

MR RAHN: So that's what you're -- they're referring to photograph No. 7?

JUDGE: No. 7.

MR RAHN: -- the photograph before that, the photograph before that?

A. Yes, the one that's outside now, I don't know.

Q. Take your time?

JUDGE: I think you were describing, you say what came through the window, and you were referring to photo seven and you were asked to --?

A. The one that's of the couch.

Q. Yes?

A. And that's where my sister's baby was lying.

Q. Okay, this is photograph -- it's photograph No. 6 as I have numbered it, that photograph of the couch, there appears to be something lying on the couch?

A. Yes.

Q. What's that?

A. It's what came through the window.

Q. That's what came through the window?

A. That's what came through the window.

JUDGE: You're referring to the plank of wood; is that right?

WITNESS: Yes.

JUDGE: Okay.

MR RAHN: And you were telling us that there was a baby, that there was a child?

A. Yes.

Q. Where was the child?

A. My sister's baby was lying on the couch."

14. Counsel drew the trial judge's attention to this evidence and argued that it was highly prejudicial. On appeal it is said that the nature of the direct testimony gave rise to the necessity to cross-examine the witness on the issue as it was relevant to the issue of the witness's ability to identify the appellant. It is difficult for this Court to see the nexus between the responses in direct testimony and the cross examination. We proceed now to assess the basis of each application.

The second application to discharge the jury

15. This application arose specifically from the following exchange in cross-examination:-

"Q. How long did that incident last?

A. Honestly, I wouldn't be able to put my hand on the Bible and tell you.

Q. Can you give us an approximate roundabout period of time?

A. In my mind I think it went on for about 10 minutes and then when John said to us get into the house, we went into the house. They tried to kick the door in. Me and

my sister went straight for the baby because there was planks and bricks and whatever coming through the window. My sister was screaming "My baby, my baby" and she was getting screamed back at "I'll kill you and your F ing baby." So, my first instincts was my niece and nephew and then when you have got an eight-year-old screaming because there's so much blood coming out of you…" (Our emphasis)

16. In refusing the application the trial judge concluded as follows:-

"Objection is taken to this answer under cross-examination on the basis that it was not in the statement in the book of evidence. However, the book of evidence does refer to threats being made. At page 20 of the book of evidence there is referral to the planks being thrown in and of threats being made to "burn me out" and "shooting me." She also indicated earlier in the statement, "Before all of us went back into the house Anto started making threats towards us saying he was going to burn us out of it and shoot us."

In the Court's view, the answer given is not wholly inconsistent with that statement, even though it is more specific, but counsel for the defence have referred to the statement made by Ms Murphy where specific references were made to threats to the baby. In the Court's view, this goes to the credit of the witness and can be dealt with by way of charge to the jury. And I am refusing the application for a discharge of the jury."

17. The appellant submits that the effect of the gratuitous introduction of prejudicial hearsay material not contained in the statements of the witness was not properly appreciated by the trial judge

18. The appellant argues that it should not have been open to the witness to include in her evidence matters that were only addressed by other witnesses in the book of evidence but which did not form part of the prosecution's case at trial.

19. The respondent submits that the words spoken by the witness do not identify the appellant as the man who said, " I'll kill you and your f-ing baby." As such, it was not prejudicial to him, particularly in circumstances where the evidence was of a large group of men attacking the house.

Discussion

20. It is undoubtedly so that inadmissible evidence may be given in the course of a trial, and the key question is whether the impugned evidence is of such a prejudicial nature that the jury must be discharged. It is well established that a discharge of a jury is a last resort and only where the situation cannot be addressed by the trial judge.

21. In the present case it is said by the appellant that the words spoken amounted to inadmissible hearsay. We are told that Tanya Whelan, to whom the words are attributed, was unavailable to give evidence. The words spoken were said during the incident in question when, on the evidence, planks and bricks were coming through the window of the house. In those circumstances, the words spoken, although hearsay, formed part of the criminal offence for which the appellant was on trial. The words were not simply closely associated with the offence or spoken some minutes after the incident but were entirely part and parcel of the offence itself and so clearly formed part of the *res gestate* and an exception to the rule against hearsay. This argument was not advanced at trial, but nonetheless is the correct position in law. Apart from the fact that the evidence was admissible, the words did not identify the appellant as the person who uttered the words. We are satisfied that the judge did not err in refusing to discharge the jury.

The fourth application for discharge

22. During the course of cross-examination counsel for the defence questioned the witness concerning her previous assertion that there had been threats to kill her sister's baby. Like

the second application for discharge, the appellant was concerned with the introduction of hearsay identification evidence.

"Q. And you claim that Mr McNamara was making threats to kill a baby, is that right, or you claim that --

A. Well, I won't lie on that one. There's -- when my sister was screaming "There's a baby, my baby, my baby" there was screams coming through the window "I'll kill you and your baby." I don't know if it was Anthony. I don't know if it was I don't know who it was.

Q. Well, you said you won't lie on that one, by implication you have lied on the others?

A. I said I won't lie. I am not here to tell any lies. I could easily turn around and say no, yes it was Anthony or yes it was Ian. It definitely was --

Q. Why didn't you put that in the statement?

A. I don't know which one of them screamed that.

Q. Why didn't you

A. But I do know that that's what was screamed, "I'll kill you and your baby."

Q. But you never put that in your statement?

A. I don't know why I didn't put it in my statement.

Q. It's not there?

A. Well, I don't know. I am saying it now.

Q. Yes, but the point is that you have every opportunity made available to you to give a full and complete account of what occurred, okay?

A. Yes.

Q. And now we hear for the first time that there are all these other allegations that are being made against Mr McNamara, allegations that if you remember them as factual and as truth, you would have told the jury the first time you got up there

A. Sorry…" (Our emphasis)

At a later stage the following arose:-

"Q. And you don't know who threw the pole?

A. And red bricks. No, I don't now who threw them, no.

Q. Yes. Because in your statement you tried to blame the pole—

A. I remember my sister was shouting "Anthony, my baby, my baby" so I still wouldn't be able to be 100% sure—

Q. Yes?

A. If it was Anthony or not because I didn't see. It would have been a bit—

Q. In your statement you tried to blame him?

A. It would have been a bit darker from where I was from the kitchen to the window.

Q. So, you are now saying you didn't see who threw the pole in. In your statement tried to blame Mr McNamara?

A. I said I was about 90% sure because my sister was screaming "Anto, my baby, my baby.

Q. You didn't say 90%?

A. Well, I don't know what way the guards wrote down the statement, but that's exactly what I said."

23. It is said that this reference to the witness' sister identifying the appellant was referred to by the witness several times. Counsel made an application to discharge the jury, arguing

that the witness repeatedly introduced the evidence without any direct question on that issue being put to her.

24. The trial judge ruled as follows:-

> "This is an application, a further application for a discharge of the jury in view of the evidence given by the witness, who is the complainant in this case, regarding the sequence in which the sequence of events following her retreat into the house and it arose in the context of her identification of the parties running towards Diane McNamara's house. I am satisfied that this classically arose in the context of cross examination because Mr Spencer had put to the witness regarding the incident of a pole coming through the window and what was happening at that time and it was in the context of that sequence. I am satisfied that the jury can be warned in that regard. In particular the defence were on notice of another statement from the complainant's sister who is not available to the Court, I accept that, that such conversation took place, that she had been shouting at Mr McNamara and had identified him as one of the persons involved in putting implements through the window. So, in those circumstances, I believe it did the evidence did emerge classically from cross examination in the context of a very vigorous cross examination of the witness. I am satisfied that a warning to the jury can suffice and I will give a very strong warning to the jury regarding identification, but I am not going to discharge the jury."

25. The appellant submits that in the context of the case and of Ms. Whelan's evidence as a whole this Court should take the view that these references to inadmissible hearsay were made knowingly, in spite of warnings given, and in order to influence the jury on the issue of identification, after her own identification had been challenged.

26. The appellant submits that the failure of the trial judge to discharge the jury upon each application by counsel culminated in the jury being exposed to prejudicial material which

resulted in an unfair trial and refers to *The People (DPP) v. Lynch* [2016] IECA 78 where the Court held that the evidence given by gardaí of their use of the PULSE system to search for the registration of the vehicle used during the offending which was registered to the accused was inadmissible hearsay in circumstances where evidence of the reliability of the PULSE system had not been given.

27. The respondent says that in all of the circumstances the high threshold to discharge a jury has not been reached in this case and refers to the dicta of Mahon J. in *The People (DPP) v. Coughlan Ryan* [2017] IECA 108 where he stated as follows:-

> "Inadmissible evidence finds its way into many trials, usually accidently and inadvertently. When it does, its prejudicial effect will vary from case to case, obviously very much depending on what has been stated to the jury or how it might be interpreted by the jury. It is well established and long accepted that a jury should only be discharged where the prejudicial effect is significant and it is not possible to counter that prejudicial effect by suitably warning or directing the jury. Juries have proven themselves time and time again to be willing and capable of heeding judicial warnings and instruction and of acting appropriately in response thereto."

28. Finally, the respondent argues that the trial judge correctly applied the principles set out in *Coughlan Ryan* and that any prejudicial effect was dissipated by the manner in which the trial judge dealt with it.

Discussion

29. Mr Spencer BL says he was not on notice of the threat to kill the baby, however, it appears from Tanya Whelan's statement in the book of evidence that she stated "…I seen Anthony McNamara outside the window put a post through the window which nearly killed me and my child. I said 'you nearly killed my baby' he said 'I will kill your baby' he was screaming that." It seems that Bridget Whelan had followed her sister into the house.

Consequently, Mr Rahn says that the appellant cross-examined with knowledge of the risks involved. Moreover, it is quite clear from the transcript that prior to this line of cross-examination, there was no evidence pointing to the appellant as the author of the impugned words. Mr Spencer argues that the evidence given by Bridget Whelan amounted to inadmissible hearsay, however, for the reasons we have set out when addressing the second application to discharge the jury, while the evidence is certainly reported speech, it was admissible as one of the exceptions to the rule against hearsay, as the words formed part of the *res gestae*.

30. Mr Spencer further argues that the introduction of this material rendered the trial unfair. When we examine the transcript, it is quite clear that Ms. Whelan was at pains to point out that she was unsure as to who spoke the impugned words. In fact she specifically said that she did not know which 'one of the lads said it'.

The third application for discharge

31. The witness was questioned in cross-examination regarding the duration of the incident when she referred to matters that occurred earlier in the day that had not been referred to in her statement to gardaí. The exchange went as follows:-

> "Q. Okay. And you say that it occurred about an hour after you arrived at your sister's house; is that correct?
>
> A. When I arrived at my sister's house, myself and Cathy walked into my sister's house into the kids. Joanne Cummins' boyfriend and a few fellas pulled up outside my sister's house. There was some kind of talk going on out there with them. It wouldn't be the first time Joanne Cummins sent people to my sister's house. And I was standing outside I walked out to see what was going on. I heard screaming and I ran around

the corner and towards Anne Murphy's house. I seen three girls running in that direction

JUDGE: Now, wait now." (our emphasis)

32. The trial judge refused the application as follows:-

"Clearly, and I just want to make it clear for the record, this answer did not arise from the question asked and there's no doubt about that. The issue is whether this answer at this point in the trial prejudices the fair trial of the accused. To be fair, the nexus between these people and the accused and the incident, if any nexus arises between this incident and the incident, the subject matter of these proceedings, arises, it's not clear at this point in relation to what Ms Whelan has just said and there's no obvious nexus. I am not satisfied that it would sufficiently presently the jury to warrant its discharge at this point. But I will at this stage warn the witness that she is not to refer to matters outside of the incidents that occurred in No. 13, the subject matter of these charges, and I will again advise her to listen to the question asked and answer that question and that she is not to divert into extraneous matters or it could have certain consequences."

33. The appellant submits that the witness continuously sought to introduce gratuitous evidence and this represents a clear risk that the witness had colluded with other witnesses to incorporate into her evidence matters that they had addressed in their statements.

34. The appellant argues that the judge's ruling on this issue forced the defence to address a number of issues that it was not intended to address in cross-examination.

35. The respondent submits that this evidence did not refer to or prejudice the appellant and there was no obvious nexus between this earlier interaction and the subsequent attack.

36. The respondent submits that the trial judge quite properly warned the witness in the absence of the jury to confine her answers to what was specifically asked. It would have

been improper for the prosecuting counsel to speak to the witness regarding her evidence once the cross-examination had commenced.

Discussion

37. The question arises as to whether the impugned evidence caused prejudice to the appellant of such a character that the judge ought to have discharged the jury. It is quite clear from the transcript that the words did not link the appellant or indeed any particular person to the events on the night in question or to any other event. We are entirely satisfied that the judge did not err in refusing the nuclear option of a jury discharge.

Conclusion

38. This is a case where the primary evidence was that of recognition evidence, where Ms. Whelan gave evidence that she saw the appellant with a machete in his hand. She said she recognised him and his co-accused. She had known the appellant for 10 years. It seems he lived across the road from her parents. The trial judge warned the jury in strong terms that the only evidence of identification was the evidence of Bridget Whelan and warned the jury in respect thereof.

39. A disagreement was recorded by the jury concerning the co-accused, and Mr Spencer makes the argument that the only distinguishing feature in respect of his client was the impugned evidence. However, that does not seem to us to be correct, in that a machete was recovered from the appellant's house, which of course is relevant, in that Ms. Whelan said the appellant had a machete in his hand. While Mr Spencer says the machete was different to the one described, this was entirely an issue for the jury's assessment.

40. We are not at all persuaded that there was any unfairness arising from the trial judge's refusal to discharge the jury on a consideration of each application separately or cumulatively. Appropriate directions were given by the trial judge in her charge regarding

the impugned evidence and there is no reason to believe that the jury disregarded the directions of the judge.

41. Accordingly, the appeal against conviction is dismissed.