



THE COURT OF APPEAL

[2022] IECA 198

Court of Appeal Record No. [176/15]

**The President
McCarthy J
Ní Raifeartaigh J**

BETWEEN/

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

RESPONDENT

AND

LES PEACOCK

APPELLANT

JUDGMENT of the Court delivered on the 27th day of July 2022 by Mr Justice McCarthy

1. This is an appeal against conviction and sentence. On the 28th of January 2015, Leslie Peacock, the appellant herein, was convicted at Wexford Circuit Criminal Court on a single charge on Bill No: WXDP0005/2014 which was: -

Failure to ensure safety in the event of a fire contrary to Section 4, Section 5 and 18(2)(d), of the Fire Services Act of 1981, as amended by sections 25 and 29 of the Licensing of Indoor Events Act 2003.

2. The obligation the breach of which is alleged is that contained in section 18(2)(d) (as amended) and is as follows: -

“(2) It shall be the duty of every person having control over premises to which this section applies to—

...

(d) ensure as far as is reasonably practicable, the safety of persons on the premises in the event of an outbreak of fire whether such outbreak has occurred or not.”

3. This offence carries a maximum penalty of €130,000 or imprisonment for a term not exceeding two years or both. On the 10th of June 2015 the appellant was sentenced to pay a fine of €50,000.00 in monthly instalments of €1,000.00 per month over 50 months, commencing 3 months from the date of the sentence and 12 months' imprisonment in default should any payment or part thereof be missed. This judgment deals with conviction only.
4. On the 20th of January 2012 a fire broke out in Kennedy Plaza Apartments in North Quay, New Ross, Co. Wexford, a five-floor building of which Les Peacock was the sole owner. The premises consisted of twenty-four apartments spread over three floors. It was occupied by thirty-two residents at the time of the fire. One of the residents, Monica Stiahan, gave evidence *inter alia* to the effect that the appellant had let her apartment to her, a fact relevant to the issue of whether or not the appellant was the person in control of the premises, to which we will turn below.
5. The appellant was interviewed by the Gardaí and in interview he stated that all of the electrics were checked when he purchased the property in 2010 and a number of changes were made to the building at this time including his procurement of a new fire alarm system which was installed by Wesley Whelan Electrical. The fire alarm came from Horizon Safety Systems in Enniscorthy and this was confirmed at trial by a Mr Ken Healy, an engineer from the company, who further noted that this alarm was certified to standard as there were 135 checks before the alarm was "*signed off*" for use to ensure that it was compliant with the regulations.
6. It appears that a Mr Tomasz Gorski was employed (in strictness by the appellant's wife but under the appellant's undoubted control) for "general handyman type work" – he might properly be described as a caretaker - on the property as well as for other properties belonging to the appellant as acknowledged by the appellant. Mr Gorski did not give evidence at trial; he had however been the subject of a Garda investigation in the course of which he was interviewed by a Sgt Brophy; large parts of what he had said in his interview were elicited by both parties from the latter at trial. This was hearsay and inadmissible but this having occurred the jury could act on it, the fact that it was hearsay going to weight. In any event, Mr Gorski had told the Gardaí that he and the appellant were shown how to operate the fire alarm at the premises by an engineer from Horizon. Mr Gorski said that the fire alarm was silenced (that is, having sounded when it should not) roughly every weekend. The appellant also acknowledged that the alarm had been regularly triggered due to parties in apartments where it could be set off by, say, smoking which he said was dealt with once it was brought to his attention - those tenants were evicted. Monica Stiahan similarly said that the fire alarm would be triggered by the most minor of incidents such as the opening of her oven door.
7. In any event in the small hours on the morning of the day of the fire in question (c. 12.30am) a Mr Prezmyslaw Muzurek, a resident of the building, rang Mr Gorski, the appellant's caretaker, to tell him that the fire alarm had been going off for thirty minutes since around midnight. Mr Muzurek had to ring Mr Gorski as he worked in the building from

Mondays to Fridays between 8am to 5pm – outside these hours he was on call. Mr Muzurek was told that he was unable to attend to the fire alarm and Mr Gorski stated in his interview that he advised as follows: *“I told him to turn off switch and then open fire box. I tell him to look in box. He tell me apartment 7. I told him go there, check everything okay. He rang back five minutes. I tell him turn off. This not first time”*.

8. Mr Muzurek said that he was told to get a screwdriver or pliers to open the alarm box; one normally uses a key for this purpose but none was available and it is proper to infer on the evidence that this had been so for some time as a makeshift solution had been adopted by Mr Gorski to gain access to the box; a hole had been drilled in it although the appellant denied knowledge of this. A second key was needed for initiating a reset within – this was essential if one wished to stop the alarm permanently. Mr Gorski stated he had given this to one of the residents; however, that resident had moved out a few weeks earlier. There was no evidence about the “first” key needed to gain access to the box. Mr Gorski further suggested in interview that the appellant knew about the difficulty, which he in turn denied. There was “usually” a set of spare keys in the box itself (for “resetting”), but these were not present. Mr Muzurek then stated that he was told by Mr Gorski to manually disconnect the alarm by removing the fuse and batteries and that he would reset the alarm the next day – this in the event was the only way of stopping the alarm. Mr Muzurek disconnected the battery. Mr Gorski was present in the building effecting repairs later that day when he realised that the apartment complex was on fire – he said: *“I think it was after 3 I went to Plaza. I was -- it was as I was at the fire alarm [when] (sic) somebody told me about the fire”*. Therefore, the fire alarm system was still disabled when the fire started. The fire was first noticed at approximately 4:20pm.
9. Garda Kevin Dooley and a Jean Fogarty were the first to arrive at the scene whereupon they noticed flames and thick smoke coming from the roof and top floor of the building. They further noted that the fire alarm was not ringing. Garda Dooley attempted to activate the alarm, but this failed. A Garda Gerry Heanue, gave evidence to the effect that the battery for the fire alarm box was not retrieved at the scene.

Grounds of Appeal

10. The appellant raised a number of grounds in their notice of appeal. However, at the oral hearing of the appeal they indicated that were now relying on only two of these grounds which are as follows: -
 - i. *The learned trial judge erred in law and/or in fact in failing to grant a direction on application by the Defence.*
 - ii. *The learned trial judge erred in law and/or in fact in permitting the Prosecution to amend the indictment following the close of the Prosecution case.*

We shall deal with each ground individually.

Ground 1 – “The learned trial judge erred in law and/or in fact in failing to grant a direction on application by the Defence.”

11. Counsel for the appellant made an application for an acquittal by direction on the position that there was no case to answer on a number of grounds. The main ground, emphasised in the trial court, was that there was insufficient evidence on which a jury could properly conclude that the appellant was the person “*having control*” of the premises being, obviously, an essential element in the offence. To a more limited extent the contention was, in effect, canvassed that there was insufficient evidence to prove that there was a failure to ensure such safety so far as “*reasonably practicable*”; the latter was also explored here.
12. We turn first to the contention that the evidence did not establish that the appellant was a person “*having control*” of the premises. We are in agreement that the concept of “*control*” is not defined in the relevant section 18(2)d of the Fire Services Act 1981 (as amended). Thus, the question of who is or is not the person “*having control*” must be decided by applying the common law definition of that concept to the evidence.
13. The prosecution opened (and indeed closed) the case to the jury by referring to the fact that the appellant was the owner of the apartment buildings and, by implication at least, that he was in control for the purposes of the Act by virtue of that fact. The appellant argues that there was a positive obligation on the prosecution to show, beyond a reasonable doubt, that the appellant was more than a mere owner and that in the situation which presented itself on the afternoon of the 19th of January 2012 that he was not a person “*having control*” over the premises at that time. Of course, as a matter of legal principle one might own a premises – it is not in dispute here that the appellant was such owner – but that does not mean one is necessarily the person in control.
14. Counsel for the appellant asserted the proposition that the appellant had lost control over the premises when the fire alarm was disabled by Mr Muzerek, at the behest of his caretaker Mr Gorski – an act they contend was that of a third party that was so unilateral and extreme that Mr Peacock cannot be held to account for it. Furthermore, they consider the phone call advising improper instructions by Mr Gorski to Mr Muzerek were such to as to constitute “*a frolic of his own*” and beyond the knowledge of the appellant.
15. We reject these arguments. While there is a distinction between ownership and control there was here sufficient evidence of control. The fact that the appellant was the owner, although not decisive, was considerable evidential value; he was in receipt of rent, he ,in practice, retained the caretaker who was responsible *inter alia* for the alarm (having at least some training in its operation, having been in possession of a key or keys, having adapted it to permit access without keys and who was on call to deal with such emergency as arose – the fact that the alarm went off). He was also of course responsible for the installation of the alarm itself which, by definition, imports of control or is at least evidence relevant to prove it.
16. I will return later to the issue of whether there was sufficient evidence to go the jury having regard to the issue of whether the appellant had taken reasonably practicable steps to

ensure safety, an issue which is separate and distinct from the question of control and may indeed have been somehow conflated by the parties in the case.

Ground 2 – “The learned trial judge erred in law and/or in fact in permitting the Prosecution to amend the indictment following the close of the Prosecution case.”

17. The appellant contends that the trial judge erred in permitting an amendment to the particulars of offence in the indictment by the insertion of a reference to “owner”. It is said this fundamentally changed the case being made to the (illegitimate) prejudice of the appellant.

18. The particulars, prior to amendment, read as follows: -

*“Leslie Peacock, did on the 20th January 2012, at or near your premises at Kennedy Plaza Apartments, North Quay, New Ross in the County of Wexford, being a premises within the meaning of Section 18(1) of the Fire Services Act 1981 and **being a person in control** within the meaning of the Fire Services Act 1981 (as amended) did fail to ensure as far as is reasonably practicable the safety of persons on said premises in the event of an outbreak of fire whether such outbreak occurred or not.”*
(emphasis added)

The indictment following it read as follows: -

*“Leslie Peacock, did on the 20th January 2012, at or near your premises at Kennedy Plaza Apartments, North Quay, New Ross in the County of Wexford, being a premises within the meaning of Section 18(1) of the Fire Services Act 1981 and **being the owner and having control** within the meaning of the Fire Services Act 1981 (as amended) did fail to ensure as far as is reasonably practicable the safety of persons on said premises in the event of an outbreak of fire whether such outbreak occurred or not.”* (emphasis added)

19. Whilst the appellant accepts that pursuant to section 6(1) of the Criminal Justice (Administration) Act 1924, the trial court has a broad power to amend an indictment in order to cure a defect in it, he submits this was not an appropriate case in which to do so and that the amendment coloured the minds of the jury. In particular it is said that the jury could or would have been misled into thinking that proof of ownership was enough to make out the offence.

20. Counsel for the respondent in response argues that the amendment in the instant case did not cause the offence to be fundamentally changed and the appellant has not pointed to any specific prejudice arising out of the amendment. He said in this connection is that the particulars in an indictment are merely that; reasonable details or information about the offence and one certainly need not, in such particulars, plead facts. This is the position in strictness. At its height, accordingly, it can be said that the amended particulars here merely afforded further information as to the circumstances in which the offence occurred and the amendment was unnecessary. The reference cannot on its face be regarded as harmful.

21. The question however is whether or not it could have given rise to the prejudice identified, namely, the creation in the minds of the jury of an erroneous understanding of the offence. We do not think that there was any risk that this occurred. In the first instance, the indictment referred to "control" both before and after the amendment. Secondly, ownership is relevant to control and the inclusion of the reference to the fact that the appellant was the owner merely highlighted that, without substituting it for the word "control". Thirdly, the trial judge in plain terms explained the nature of the offence in the charge and made it clear that the key issue was control. The relevant portion is as follows: -

"Now, ladies and gentlemen, the charge in this case is, in count No. 1, statement of offence: 'Failure to ensure safety in the event of a fire, contrary to section 4, section 5, 18(2)(d) of the Fire Services Act 1981, as amended by sections 25 and 29 of the Licensing of Indoor Events Act 2003. The particulars of the offence, that Leslie Peacock did, on the 20th day of January 2012, at or near his premises at Kennedy Plaza Apartments, North Quay, New Ross, in the county of Wexford, being a premises within the meaning of section 18(1) of the Fire Services Act 1981 and being the owner and person having control within the meaning of the Fire Services Act 1981, as amended, did fail to ensure, as far as is reasonable practicable, the safety of persons on the said premises in the event of an outbreak of fire, whether such outbreak occurred or not.'

Section 18(1); this section applies to premises, or any part thereof, put to any of the following uses, and there are a number of uses, but there's only one that applies to this case, and that's 18(1)(a): 'Use as, or for the purpose involving the provision of sleeping accommodation.' So therefore 18(1) applies to the apartment block. (2): 'It shall be the duty of every person having control over the premises to which this section applies to ensure, as far as is reasonably practicable, the safety of persons on the premises in the event of an outbreak of fire, whether such outbreak has occurred or not.'

Ladies and gentlemen, this is a trial of strict liability so there is the duty of every person having control over the premises to ensure, as far as reasonably practicable, the safety of the persons on the premises in the event of an outbreak of fire, whether such outbreak of fire took place or not."

We therefore reject this ground of appeal also.

Strict liability, negligence and knowledge.

22. Unusually, however, although the Court rejects the two grounds of appeal relied upon by the appellant's counsel at the hearing of the appeal, the Court proposes nonetheless to quash the conviction and order a re-trial. This is because of the Court's concerns about how ingredients of the offence other than "control" were dealt with in the trial judge's charge, and in particular her direction to the jury that knowledge on the part of the appellant was entirely irrelevant.

23. In the course of the trial, there were numerous references during legal argument to concepts such as "strict liability", *mens rea*, knowledge, and the issue of "reasonable practicability". There was in our view considerable confusion on all sides about these matters. This culminated in the trial judge charging the jury that the offence was one of strict liability and that the issue of "knowledge" was irrelevant. This was in a context where a live factual issue in the trial was whether or not the appellant knew that the alarm had been disabled the night before the outbreak of the fire. The only direct evidence to this effect was the hearsay evidence of Mr Gorski, relayed to the trial court by a Garda who had interviewed him. Mr Gorski did not himself give evidence at the trial and was not available for cross-examination, in circumstances where the appellant's position was that he did *not* know the alarm had been disabled.
24. It is necessary to recall the wording of the legislative provisions creating the offence (set out earlier). The duty placed on the person in control is to "ensure *as far as is reasonably practicable, the safety of persons on the premises in the event of an outbreak of fire whether such outbreak has occurred or not.*" The words "as far as is reasonably practicable" are key. They indicate that the duty is not strict or absolute and that there are circumstances where the person may be absolved of liability even though there has *in fact* been a failure to ensure safety. The person must also have failed in his or her duty to take "reasonably practicable" steps to ensure safety. In our view, what is required is that the prosecution must show that (a) that the accused was a person in control; (b) that there in fact a failure to ensure safety; *and* (c) that the accused failed to take reasonably practicable steps to ensure fire safety. Therefore, because of (c), the offence is, in effect, a negligence-based offence. The onus is on the prosecution to prove *inter alia* that the person failed to meet an objective standard of taking all "reasonably practicable steps". This is different from strict liability insofar as the latter would simply render a person guilty of the offence if there was in fact a failure of safety without incorporating the words "reasonably practicable" at all (or, in other words, if it merely required the prosecution to show (a) and (b) but not (c)).
25. Where does knowledge fit into this? It is true that it is not necessary to show that the person *knew* that the situation was unsafe. It is correct to say that *mens rea* in this sense is not required to be proven. However, it does not follow that the person's knowledge is entirely irrelevant (as the trial judge told the jury). Even where an objective standard ("reasonably practicable steps") applies, the person's knowledge (or lack of knowledge) of certain facts on the ground *may* be relevant. Some examples may assist.
26. Imagine an apartment owner who has gone to considerable expense to have a top-of-the-range alarm system installed by a reputable company on a particular date, and that he ensures that the caretaker and himself receive appropriate and detailed training on the system on that date. Suppose further that a fire breaks out that very evening and that it transpires that there was some technical fault which the owner could not possibly have known about. No one would suggest that he would be guilty of failing to take "reasonably practicable" steps or that he should be convicted. On the contrary, he had taken all

reasonably practicable steps and the failure of safety occurred by reason of something of which he had no knowledge whatsoever.

27. Another example might be the following. Suppose a perfectly good alarm system has been installed by an owner which generally operates in a perfectly satisfactory way, but that on a particular night, a burglar breaks in, disables the alarm, and discards a cigarette butt before leaving the premises, as a result of which a fire breaks out. Again, no one would suggest the owner had failed to take "reasonably practicable" steps or that he should be convicted.
28. Take a contrasting hypothetical example. Suppose an owner had been specifically told that his alarm system had been disabled by a tenant, and although weeks and months went by, he did nothing to rectify the situation, His knowledge combined with his failure to do anything in response would be highly relevant towards showing a failure to take "reasonably practicable" steps to ensure safety.
29. These examples show that knowledge or a lack of knowledge *may* be relevant to liability, even though the overall standard of liability is an objective one, namely failing to take "reasonably practicable" steps to ensure safety. This does not mean that knowledge is required as a matter of *mens rea*. Nor does it mean that knowledge is always required in order to show a failure to meet the objective standard. It all depends on the facts of the case. It means that, depending on the facts of an individual, the accused person's knowledge or not as to particular facts may be relevant in determining whether or not he failed to take reasonably practicable steps (itself an objective standard).
30. In the present case, the kinds of facts that were relevant to whether or not the owner had failed to take "reasonably practicable" steps to ensure safety would have included facts concerning: (a) the installation of the alarm system and who was trained on it; (b) whether it was regularly serviced; (c) the history of it being over-sensitive or easily triggered; (d) the fact that it was disabled by a tenant on the instructions of Mr Gorski the night before the fire; and (e) the appellant's knowledge of these matters. Did the appellant know about the alarm constantly going off? Did he do anything about it? Did he have it inspected, if so? Did he know about the discussion between Mr Gorski and the tenant? Did he know that it was still disabled at the time the fire broke out? His knowledge on all of these matters would have been relevant on the ultimate issue which was whether he had taken "reasonably practicable" steps. His knowledge, particularly regarding what had happened the night before, was relevant even though it was not the ultimate test of his liability. Thus, it was misleading for the jury to be told that the accused's knowledge was irrelevant, without any qualification and without linking of the issue of knowledge to the "reasonably practicable" issue. The jury may well have thought that it simply did not matter whether or not the appellant knew that the alarm had been disabled the night before, whereas we are of the view that this should have formed an important part of their deliberations. We should make clear that we are not saying that it was the sole issue to be considered, but it was one of the important ones to be considered before the jury could decide whether or not he take failed to take reasonably practicable steps

31. In the circumstances, we are concerned that the appellant may have been convicted in circumstances where the jury did not properly understand the ingredients of the offence, or how these might be proved by the prosecution.
32. We will therefore quash the conviction for that reason and remit the matter for a retrial.