



THE COURT OF APPEAL

Court of Appeal Record No. 21/2021

**President
McCarthy J
Kennedy J**

BETWEEN/

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

RESPONDENT

-AND-

JONATHAN O'SULLIVAN

APPELLANT

JUDGMENT of the Court delivered on the 15th day of July 2022 by Mr Justice McCarthy

1. This is an appeal against conviction. Jonathan O'Sullivan, the appellant herein, came before Cork Circuit Criminal Court on the 9th of December 2020 on one count of possession of a firearm contrary to section 27A(1) of the Firearms Act 1964 as substituted by section 59 of the Criminal Justice Act 2006 and as amended by section 38 of the Criminal Justice Act 2007 and of a second count of possession of ammunition (one round) contrary to the same provision. The offence occurred on the 23rd of March 2020 in Cork City and the weapon was a G9 automatic pistol. Sentence was passed on the 5th of February 2021, at which time he was sentenced to 10 years imprisonment, backdated to the 23rd of March 2020, when he went into custody.
2. On the day of the offence members of An Garda Síochána became aware of the fact that an Audi motor vehicle was parked in a cul-de-sac. The gardai visited the scene at or about 1.30am and on enquiry it was found that the registration number was false. The vehicle was locked. A total of five Garda witnesses gave evidence that they saw the weapon the

subject of the charge (which contained, on inspection, one round) through the window: it was lying in the front footwell on the driver's side. The appellant was found in the immediate vicinity and after a search (the lawfulness of which is not in dispute) he was found to be in possession of a key to the vehicle.

3. The key was used to open it. There was a can of petrol on the passenger seat. The firearm was rendered safe by a Garda Mills who was present when the vehicle was unlocked by his colleague Garda Shire and the door opened. He replaced the weapon where he had found it.
4. The appellant was arrested and interviewed. In the course of his detention he asserted that he had agreed to drive the vehicle to the place in question for the sum of €500. He said he did not know that the firearm was in the vehicle – he had not seen the firearm and did not know that it was there. Subsequently, he gave evidence to the same effect. Ultimately it was not contested but that the firearm had been in the vehicle but, merely, that he had not seen it – that it was not in his line of vision. In cross-examination he effectively agreed with prosecuting counsel that the Gardai must have been lying as to what they saw.
5. In cross-examination, it was put to the Gardaí who had said that they had so seen the firearm from the outside before the vehicle was unlocked, namely, Gardai Shire (who searched the appellant, found the key and called for the assistance of an armed support unit of whom Garda Mills was one), Fitzgerald (who engaged with the appellant at the scene and used a torch), Mills, McCabe and Kelleher, that they had not done so. Their evidence was tested by reference to lighting conditions and fields of vision. The absence of photographic evidence and the potential which might have existed for use by Gardaí of mobile phones in that context was raised. Each was adamant as to what he or she had seen. Photographs were taken the next day and showed that the firearm was in the position stated by the Gardaí, at that time, in any event.
6. Having regard to the starkness of the contest, understandably, the judge intervened during the cross-examination of the final Garda eyewitness, Garda Kelleher, to ascertain whether or not, in substance, the defence case was that the Gardaí had “planted” the firearm. This was an exchange with counsel only and did not involve any involvement with the witness. This in circumstances where it must have been obvious that five Gardaí in succession could not have been merely mistaken as to what they have had seen – undoubtedly it must have been that there was an insinuation that the item, though present in the car, could not have been seen by a driver but that the Gardaí were lying as to what they had seen or that it was positioned (in effect “planted”) by some one or more of the Gardaí (after the key had been recovered from the appellant) at some time, so that it was so visible from outside. Significantly, the intervention impugned occurred after the following exchange between the witness and defence counsel: -

“Q. *I have to suggest to you, in the same manner as I suggested to the other members of An Garda Síochána, that you simply did not see this item in the footwell when looked in on the night?*

A. *That's incorrect, Judge. I did, in fact, see a firearm clearly on the footwell of the car, the driver's seat of the car.*

Q. *And I think that all of the members of An Garda Síochána are effectively giving the same evidence on this issue but I am saying that you are incorrect?*

A. *That's because it, in fact, did happen and there was a firearm on the floor of the driver seat of the car, Judge.*

Q. *There's no doubt that there was a firearm in the vehicle but I have to suggest to you that it was not in the position that is described, namely, "In full view of people passing by"?*

A. *I can only give my evidence, Judge, and that's, in fact, where I got it."*

7. The impugned exchange immediately ensued and is as follows: -

"JUDGE: So, she planted it there, is it?

MS LANKFORD: That's it, Judge.

JUDGE: She planted it? Somebody planted it?

MS LANKFORD: No, I'm saying that the gun was in the car but that it was not in that position, that it was not in full view.

JUDGE: The clear inference from your cross-examination is that somebody of the guards planted the gun in this position?

MS LANKFORD: That the gun was moved or that the gun -- yes, Judge.

JUDGE: They planted the evidence, yes?

MS LANKFORD: Yes, Judge. Thank you.

WITNESS: Thanks."

It will be seen that counsel agreed with the judge that the inference from her cross-examination that the Gardaí "planted" the evidence.

8. Subsequently, the judge returned to the topic during cross-examination of the appellant and the relevant exchange is as follows: -

"Q. Mr O'Sullivan, if I could refer you to photograph No. 4 there with the gun in the footwell. If I understand your evidence, you're acknowledging that if the gun had been in that position when you drove up to Ardcullen, you couldn't have missed it, you would have seen it?

A. *That's correct.*

Q. Okay. So, when you say you accept the gun was in the car, do you accept it was on the floor of the driver's seat all the time or are you saying the guards planted it from somewhere else in the car?

A. Like, I'm not really saying the guards planted a gun in any car, like, it's just, like, there was no gun visible to me, like, when I approached this car.

Q. So, you're not alleging that the guards, for example, took it out of the glove compartment or the boot or anything like that? It was either out in the middle of the driver's footwell or it was under the seat; is that what you're saying?

A. Well, I -- I'm not accusing the guards of anything, like.

Q. You're not accusing the guards?

JUDGE: Ms Lankford, in fairness to this witness, I did put it to you earlier on this morning --

MS LANKFORD: Yes, Judge."

9. After the prosecutor's closing, in the jury's absence the judge canvassed this issue again with counsel. We think it necessary, similarly, to set out that exchange, as follows: -

"JUDGE: You see, I was actually trying to see what is the best way -- when I put it to you this morning about the evidence being planted, I mean, there is kind of -- no matter what way I get around it, there's no way -- I don't see any way around that except to say, which is even worse: "He says it was probably planted but he doesn't want to say that."

MS LANKFORD: You see, Judge, the difficulty with this is there is an acceptance that the gun was in the car. What this man is saying is that it wasn't out there in plain view. The guards are saying it was in plain view. They don't have any way of showing us what that means on the night. They are going from recollection and saying: "That's what it looked like the following day and that's where it was."

JUDGE: Ms Lankford, I'm sorry, you want me to discount the evidence of three or four guards because they say they went up -- "I was standing over the car, I saw it."

MS LANKFORD: It's a matter for the jury, I suppose, ultimately, Judge.

JUDGE: No, no, no, but I was trying, as it were, to find some way of putting the defence to the jury in as best a light as I can. That's why I put it to you early on, are you saying the gun was planted? You kind of resided from that but, you see, that actually makes it worse. "I believe it was planted but I don't want to say it." Think about that.

MS LANKFORD: I know that, Judge, but there's a difference between planted in the car and repositioned, if you like. Do you know what I mean? I mean "planted" is a

very loaded word. There is nobody suggesting that these guards came up and put a gun, that this man -- that knew nothing, that was never in the car. Nobody is suggesting that a gun was taken from Gardaí storerooms and put into this car.

JUDGE: Right."

10. No doubt in the light of that defence counsel did not put the "defence case" to the jury on the basis that the gun was "planted" (in the footwell and capable of being seen from the outside or that the Gardaí were lying) but made clear, and rightly, that credibility was in issue. It was explicitly acknowledged by the appellant in evidence that the Gardaí must be lying as to where it had been supposedly seen; the defence contention was effectively that whilst the firearm was in the vehicle, it was repositioned at some point. It was an all but inevitable inference that the Gardaí were lying as to what was seen from the outside of the vehicle and, further, this meant that the firearm was "planted" or "repositioned" by a Garda at some point. As appears from the latter exchange, counsel agreed that "...there is no getting away from that".

Grounds of Appeal

11. Counsel for the appellant decided to rely solely on the first ground of appeal which is as follows: -
 - (a) *The Trial Judge erred in law and in fact in so far as in the course of the Trial the Judge misrepresented and/or misinterpreted the Defence's case to the Jury.*
12. Counsel for the appellant contend that throughout the course of the evidence given in the trial that the judge misrepresented and/or misinterpreted the appellant's defence to the jury, in suggesting on various occasions during the trial that the appellant's defence was that the Gardaí had "planted" the firearm in the vehicle. Counsel emphasised this by special reference to the intervention set out above during the appellant's cross-examination by Mr Boland.
13. Counsel for the appellant contend that this intervention by the judge should not have taken place in the presence of the jury. They argue that judicial interventions should not be tilted one way or the other (it is said that they were here against the appellant – we think not) and coupled with the blunt use of the term "planted" was an inappropriate form of words from the judge that rendered the appellant's trial unfair.
14. The appellant relies on the decision of *DPP v DC* [2019] IECA 367 where Edwards J summarised the principles regarding judicial intervention inter alia as follows: -
 - "33. *First, the tribunal of fact in a criminal trial in the Crown Court is the jury and no one else.*
 34. *Secondly, ours is an adversarial system, not an inquisitorial one. The role of the judge is therefore to act as a neutral umpire, to ensure a fair trial between the prosecution and the defence. The judge should not enter the arena so as to appear to be taking sides. These are well established principles of our law. If authority is needed for them,*

it is to be found in the two decisions of this court which have been placed before us: Hamilton, an unreported judgment of 9 June 1969 and Gunning (1994) 98 Cr. App. R 303.

35. *Thirdly, there is nothing wrong in principle with a trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge. For example, this may be done to clarify a point that may arise on the face of a document or in an immediate response to an answer that has just been given by a witness. Otherwise, it may often be preferable for the judge to wait until the end of the evidence given by that witness, or at least the end of the evidence-in-chief. Often things that are not clear may become clearer once the evidence-in-chief has been completed.*
36. *Fourthly, since ours is an adversarial system it is for the prosecution to prove its case and it will have the opportunity to cross-examine the defendant if he or she chooses to give evidence. It will often be unnecessary for the judge to ask any questions during the defendant's evidence-in-chief because it should be for the prosecution to cross-examine the defendant. It is certainly not the role of the judge to cross-examine the defendant.*
37. *Fifthly, it is particularly important that the defendant should have the opportunity to give his or her account to the jury in the way that he or she would like that evidence to come out, elicited through questions from their own advocate. If there were constant interruptions of the evidence-in-chief there is a risk that a defendant will not be able to give his or her account fully and in the manner they would wish to put before the jury.*
38. *Sixthly, this is not affected by the fact that the defence account may appear to be implausible or even fanciful. If it is truly incredible, the prosecution can reasonably be expected to expose its deficiencies in cross-examination and the jury will see through it. If anything, unwarranted interventions by a judge may simply prove to be counterproductive.*

(Emphasis added by counsel for the appellant)

15. As pointed out by counsel for the respondent, no protest was made by the defence counsel at the time of the exchanges before the jury, no request was made to send the jury out so that impugned conduct of the judge could be addressed or rectified, no submission was made before the charge commenced to the effect that the judge should correct any erroneous impression which might have been created by his interventions and no requisition in that regard was made after the charge. Any criticism of the charge has been expressly withdrawn.

16. We think it is obvious from the interventions of the judge during the cross-examination and his subsequent discussion with counsel in the absence of the jury that he was desirous of establishing clearly what the defence was; in a case where the inferences were so unambiguous, he was entitled if not obliged to do so. The only question, accordingly, is whether the trial was rendered in some sense unsatisfactory because the judge was in error in making these enquiries in understandably blunt terms before the jury. This is not a case where the judge failed to act as a "*neutral umpire*" to ensure a fair trial between the prosecution and the defence. He did not enter the arena. His engagement, which was solely with counsel, could not be said to have undermined the conduct of cross-examination or prejudiced the defence. The judge, neither by the intervention during the cross-examination of Garda Kelleher by defence counsel nor that of the cross-examination of the appellant by prosecuting counsel, did not so impinge on the opportunity for either of those persons to give their accounts fully. The interventions were minimal. The judge did not transgress the boundaries elaborated in *D.C.*
17. We think that it is within the normal course of the ebb and flow of a trial for a judge in such an obvious case, in the context, and for legitimate reason, to engage as he did and when he did. He cannot be criticised by virtue of the fact that the interventions were in the course of the evidence of two witnesses. A judge will from time to time be confronted with a difficulty such as this; the evidence will lead in a given direction, but the defence may wish in some sense to "*stop short*" of making the case implicit on it. It is that with which the judge was confronted, and he dealt with it satisfactorily in the circumstances.
18. We therefore dismiss the appeal.