



THE COURT OF APPEAL

CRIMINAL

Record No: 202/20

**Edwards J.
McCarthy J.
Kennedy J.**

Between/

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

RESPONDENT

V

DANIEL KELLY

APPELLANT

JUDGMENT of the Court delivered on the 14th day of February, 2022 by Mr Justice Edwards.

Introduction

1. On the 5th of October 2020 the appellant was convicted by a jury at Limerick Circuit Criminal Court of five counts out of a six count indictment, being Counts No's 2, 3, 4, 5 & 6 respectively. The trial judge had earlier granted a direction in respect of Count No 1, being a count of endangerment, contrary to s.13 of the Non-Fatal Offences Against the Person Act, 1997 ("the Act of 1997).
2. Count No 2 was a count of damaging property contrary to s.2(1) of the Criminal Damage Act, 1991. Count No 3 was a further count of endangerment contrary to s.13 of the Act of 1997. Counts No's 4, 5 and 6 were each a count of dangerous driving contrary to s.53(1) of the Road Traffic Act 1961, as substituted by s.4 of the Road Traffic (No 2) Act 2011.
3. On the 9th of October 2020 the appellant was sentenced on Count No 3 to 2 years imprisonment to date from the 5th of October 2020, and further was disqualified from driving for 6 years from the date of sentencing. He was further sentenced to 6 months imprisonment on each of Counts No's 4, 5 & 6 to date from the 5th of October 2020, to run concurrently inter se and also concurrent to the sentence imposed in respect of Count No 3, and further was in each case disqualified from driving for a period of 6 months from the date of sentencing. The sentencing judge further directed that the details of the convictions and disqualifications in respect of Counts No's 3, 4, 5 and 6 respectively be

endorsed on the appellant's driving licence. Count No 2 was taken into consideration in the imposition of sentence on Count No 3.

4. The appellant now appeals against his said convictions. It is technically an appeal against all five convictions, but in reality the focus of the appeal has been upon the conviction recorded on Count No 3.

Background to the matter.

5. On the 8th August, 2016 Garda Marsh and Garda Melody were engaged in speed offence detection duty on the N21, having positioned themselves on the Ballybruge South Slip Road near Patrickswell, Co Limerick. The slip road in question provides the option for traffic travelling north along the N22 (the main Cork/Limerick road) to exit the N22 and transit west bound on to N21 in the direction of Adare. As one travels along the N21 from the Limerick direction towards Adare the road is initially a dual carriageway which then becomes a single carriageway just beyond where the Ballybruge South Slip Road merges with it. Just after 2.40pm, the two Gardaí concerned observed a small white van ("the van") travelling at an excessive speed along the N21 in the direction of Adare. It was in the outer lane of what was still the dual carriageway. The Gardaí activated the blue lights and sirens on their patrol car and pursued the van for about a mile and a half in the direction of Adare to the townland of Rineroe at which point the driver of the van brought his vehicle to a stop. The Garda car had pulled in behind the van at a distance of 3 to 5 metres behind it.
6. The van was identified as a white Vauxhall combi van bearing the registration number 04 D 74103. Garda Melody was in the process of exiting the Garda car when the driver of the van suddenly reversed the van and rammed it into the front of the Garda car. Garda Melody described the force involved as being extreme. However, only minor damage was caused to the Garda car. These events became the subject matter of Counts No's 1 and 2 on the indictment.
7. Continuing his testimony, Garda Marsh gave further evidence that he then pulled the Garda car to the right hand side of the road and drove up beside the van's driver's window. He gave evidence that he was able to look at the driver for 4 to 5 seconds and got a clear view of the driver who presented as a large man wearing a grey tee-shirt. This man was not known to either Garda Marsh or Garda Melody at that point. However, both asserted in their evidence that he was the accused before the court (i.e., the appellant before us), notwithstanding a defence contention that while the appellant had admittedly been a passenger in the van he was not in fact the driver. Garda Marsh gave evidence that the driver of the van then placed it in reverse and turned the vehicle. Having done so, he reversed the van in the direction of the Garda car again, and notwithstanding efforts on Garda Marsh's part to take avoiding action, the van struck the back corner of the Garda car on this occasion. According to Garda Marsh the force involved in this collision was greater than the first, and he experienced a sharp pain in his back. The van then drove off at speed.

8. Garda Marsh then turned the Garda car and began a pursuit of the van. It was pursued through several townlands, and in the course of the pursuit the Garda car had to briefly stop as Garda Marsh could not continue driving due to the pain in his back. Garda Melody took over driving and resumed the pursuit. As they proceeded after the van, a radio call was made for assistance.
9. The jury heard that Garda Martin Tierney who was also in the area and driving a marked Traffic Corps vehicle heard the radio call for assistance. He proceeded to the Old Patrickswell Road and parked his vehicle at a staggered junction with the R526 at Cloughkeating, Patrickswell. As he was sitting in his vehicle a White Vauxhall Combi van, Reg no 04D74103 approached the junction on his right hand side. As the van drove up to the junction it slowed to a stop. Garda Tierney was able to look directly in through the windscreen of the van. The van sat there for approximately 15 seconds during which time Garda Tierney stared at the driver of the van, who in turn stared back at him. Garda Tierney described the driver as having tight black hair and as wearing a grey tee-Shirt. At this point Garda Tierney activated the blue lights on his vehicle and gestured to the van driver that he should pull over to the side of the road. However, the van then took off with a wheel spinning and headed in the direction of Limerick.
10. At this point Garda Tierney did a U-Turn in his vehicle and drove after the van. He had just begun to catch up with the van when it suddenly slammed on its brakes. The reverse lights of the van came on, and the van began to reverse towards Garda Tierney's vehicle at speed. Being aware of what had reportedly happened to the other Garda car, and anticipating a possible ramming, Garda Tierney also put his patrol car into reverse and avoided a collision by reversing away from the approaching van. The van then came to a stop and took off again at speed in the direction of Limerick. This incident was the subject matter of Count No 3.
11. Garda Tierney then pursued the speeding van which turned on to a narrow country road in the direction of Crecora. There was a further attempt at reverse ramming Garda Tierney's vehicle on this road, but once again Garda Tierney was able to take avoiding action. This was the subject of Count No 4.
12. There was further pursuit through the townland of Ballyclough at high speed. When turning left at a junction the driver of the van almost lost control, with the van skidding into the junction and on to its incorrect side of the road before control was regained. It then scraped past an oncoming tractor and trailer almost forcing it off the road. The van then approached a T-junction. The driver of the van applied his brakes but was unable to turn at the junction due to his speed and so skidded across the junction, colliding with a gate opposite. He then reversed, turned left and continued. The road had an 80kph speed limit but the van was driven at up 130kph, and at times on its incorrect side of the road. The manner in which the van was driven through the Ballyclough area was the subject matter of Count No 5.
13. The van eventually reached another T-Junction with the Limerick/Fedamore road, or R511. It turned right using the incorrect side of the road, and in doing so almost collided

with another vehicle travelling from left to right. The driver of the other vehicle had to slam on his brakes to avoid a collision with the van. It then drove past a school, in an area where the speed limit was 50kph, at a speed at in excess of 100kph. After passing the school it braked hard and skidded with the driver again almost losing control. It then proceeded at very high speed in the Ballyneety direction, driving straight through a cross-roads with a major road without stopping or yielding. The van ultimately emerged on to the main Limerick to Ballyneety Road, the R512, at a staggered junction at Scart, Ballyneety. It turned right and then attempted to turn left but failed to complete the left turn. The van skidded as it attempted to make the left turn and collided with a wall. It then reversed back and took off yet again. After approximately 30 metres the van driver slammed on the brakes, the van's reverse lights came on and there was yet another attempt to reverse ram Garda Tierney's vehicle. There was no opportunity for Garda Tierney to take avoiding action on this occasion due to his proximity to the junction. However, as it reversed the van was seen to weave violently and the driver lost control during the reversing manoeuvre and collided with a ditch before reaching Garda Tierney's vehicle. The van then took off yet again, all the while pursued by Garda Tierney's vehicle, and proceeded through some further junctions without yielding or stopping. At a point just past Donaghmore Church on the main Limerick/Kilmallock Road, the R512, the van braked hard and pulled left into the church's overflow car park. It drove straight across the car park and rammed a gate leading into a field at the opposite side. It then drove into the field and across the field in a diagonal manner. At the bottom of the field it attempted to ram its way through a ditch but was unsuccessful in doing so and was brought to a halt, there being a concealed wall inside the ditch. The manner in which the van had been driven through the Ballyneety area became the subject matter of Count No 6.

14. As Garda Tierney approached in his vehicle from behind he saw two passengers exiting from the passenger side of the vehicle. They then sat down on the ground beside the vehicle. However, the driver exited on the driver's side and jumping the ditch ran into the next field. Garda Tierney was able to determine that it was the same person that he had seen driving the vehicle earlier at Cloughkeating, Patrickswell. The driver was pursued by Garda Tierney, who was joined in the pursuit by Gardaí Marsh and Melody and other gardaí from the regional support unit. During this stage of the pursuit the driver scaled a six foot high embankment leading into a further field. However, he was ultimately apprehended hiding in a ditch in that field.
15. Following his arrest by Garda Marsh on suspicion of dangerous driving, the appellant was taken to Roxboro Garda Station where he was detained for the proper investigation of the offence for which he had been arrested. He was interviewed while in detention but nothing of evidential value emerged.

Grounds of Appeal

16. Two grounds of appeal were pursued by the appellant before us.

17. The first was that the trial judge erred in law and in fact by conducting the trial in a rushed manner, particularly the appellant's application for a direction to acquit in respect of the second count of endangerment.
18. The second was that the trial Judge erred in law and in fact in failing, in his charge to the Jury, to make any proper reference to the issue raised by the defence to the effect that the small van had not been forensically examined by Gardaí.

The complaint that the trial was rushed

19. The trial commenced on Friday 2nd October 2020. On 2nd October evidence was given by Detective Garda Mark Walton, Garda John Marsh, Garda Pat Melody and Garda Martin Tierney. The trial was then adjourned to the following Monday 5th October 2020.
20. When the matter came back before the Court on 5th October 2020, the trial Judge, in the absence of the jury, raised the issue of whether the first count of endangerment (Count No. 1) should be allowed to go to the Jury. He went on to raise a similar query in respect of the second count of endangerment (Count No 3). This was before the close of the prosecution's case. However, all witnesses of potential relevance to Count's No's 1 and 3 had been heard and cross-examined, with the exception of a Mr James O'Brien, who was a retired PSV Inspector who had examined the patrol car that had been rammed in the incident at Rineroe, Adare. However, it had been accepted by the gardaí who had occupied that vehicle that the damage to it had been minor, and indeed photographs showing the extent of the damage had been produced and put to them, which they had accepted.
21. The trial judge's concern was that one ingredient of the charge of endangerment was the creation of a substantial risk of death or serious harm to another. He was concerned that in circumstances where it was accepted that only minor damage had actually been caused to the garda car that had been involved in the Rineroe incident, and only minor injury to Garda Marsh, that this ingredient had not been established. While the prosecution sought to argue the contrary on the basis that what was relevant was not the damage or injury actually caused, but the potential, which they characterised as being at the level of substantial risk, that death or injury might have ensued. The trial judge was not persuaded and proceeded to grant a direction on Count No 1 on the basis of insufficiency of evidence. In doing so, he observed:

"JUDGE: I -- funnily enough I think you would have been maybe on slightly stronger ground had there been no impact and there had been an avoidance. Like, in the second case."

22. It is clear that the trial judge's thinking in respect of the first endangerment count was that the first ramming incident had moved beyond the potential for death or serious harm, and had crystallised in terms of its consequences with only minor damage and injury actually resulting. As it is not an issue before us, we express no view on the correctness or otherwise of this ruling.

23. As regards the second endangerment count, i.e., Count No 3, the trial judge observed to prosecuting counsel that, "*I will take your point in relation to the second count on the basis that there was this event which a guard was able to avoid but had he not, it might – .*" Again, it is clear that the trial judge's thinking with respect to this count was that, unlike in the case of Count No 1, the potential for death or serious harm had not crystallised at low level consequences, and so a substantial risk of death or serious harm had existed and persisted during the attempted ramming.
24. Before ruling with respect to Count No 3, the trial judge addressed defence counsel leading to the following exchanges:

JUDGE: Have you anything to say about the second count of reckless endangerment?

MR McINERNEY [i.e., DEFENCE COUNSEL]: Well, I'll be saying, if -- you shouldn't let that go to the jury either but I might be a little bit premature in making that application.

JUDGE: Why? Oh, no, there's going to be that -- make it now because there's the more going out.

MR McINERNEY: No, but I -- well, can I tell you --

JUDGE: Unless there's more evidence on it.

MR McINERNEY: Unless there's more evidence on it but what my inclination was to make an application for a direction on Count 1 at the conclusion of the prosecution case for all the reasons you set out.

JUDGE: You'll get that on Count 1.

MR McINERNEY: My inclination was not to make it in relation to the second endangerment count at that point but to make the application at the conclusion of all the evidence when the higher standard of beyond a reasonable doubt would apply rather than prima facie --

JUDGE: No, but you may be going into evidence on that point.

MR McINERNEY: Oh, well, I'm not saying whether I am or I amn't at this juncture but what I'm saying is I would -- my inclination was to make the application for a direction at the conclusion of all the evidence to ask you to stop that count going to the jury. And of course at that stage you asked me --

JUDGE: And I -- I'm working on the basis that in relation to that count, I have all the evidence now. There is no other evidence.

MR O'SULLIVAN [i.e., PROSECUTING COUNSEL]: There's no other evidence.

JUDGE: Relevant to that point.

MR O'SULLIVAN: I can confirm that to you. There's -- insofar as the first three counts, if you like, the counts that are non-dangerous driving. All my evidence has been put before you on that apart from I'm going to have -- you -- this is one thing you must remember. Retired public service vehicle inspector, Garda Jim O'Brien, he will give evidence about the damage to the vehicles. So that might be the only thing --

JUDGE: On Count 1?

MR O'SULLIVAN: I beg your pardon?

JUDGE: And he's relevant ON Count 1?

MR O'SULLIVAN: He is relevant to Count 1 and --

JUDGE: Yes, yes, yes.

MR O'SULLIVAN: Yes. He's relevant to Count 1. And --

JUDGE: And he's going to do better than the photographs?

MR O'SULLIVAN: Well, I'm not saying -- I don't -- I mean, he's an expert --

JUDGE: Anyway, I -- as far as I'm concerned, Count 1 is a dead duck.

MR O'SULLIVAN: Very good. Well, I -- but I might be allowed nonetheless to call the evidence anyway?

JUDGE: Oh, call all the -- call anything you like.

MR O'SULLIVAN: It won't be -- it won't be a length in it unduly.

JUDGE: Mr O'Sullivan, I'm not here to inhibit your progress.

25. The trial judge accordingly indicated that he intended allowing the second count of endangerment to go to the jury. While further evidence was heard, none of it pertained to the events at Cloughkeating, Patrickswell which were the subject matter of Count No 3.
26. The case was made before us that defence counsel was inhibited from making submissions that he had wished to make by the trial judge's haste in considering a direction application in respect of Count No 3 at the point at which he insisted upon doing so. However, precisely what those submissions might have been have not been specified. The defence counsel concerned was one of the most experienced and senior members of the criminal defence junior bar at the time. We are absolutely satisfied that he was well able to assert his client's rights notwithstanding any ostensible impatience by the trial judge in seeking to progress the trial. That is was so is manifest by his refusal to indicate to the trial judge at that point whether his client intended to go in to evidence or not, as

was his entitlement. It is clear to us that counsel was in no way intimidated or put off by the trial judge's insistence on entertaining a direction application at that point. Moreover, he retained the option of making a renewed application for a direction after any remaining evidence had been adduced. That he did not do so is hardly surprising in circumstances where no further evidence of potential relevance to a direction application on Count No 3 had in fact been adduced. There was therefore nothing more to say. We therefore reject this ground of appeal.

The complaint concerning the charge to the jury

27. We have already alluded to the fact that prosecution witnesses were cross-examined, despite overwhelming evidence to the contrary, on the basis that the appellant, although he had admittedly been a passenger in the van, was not in fact the driver. The prosecution case was based on eye witness identification by Garda Marsh concerning his observation of the driver at Rineroe, by Garda Tierney concerning his observation of the driver at Cloghkeating, Patrickswell, and by those who observed the occupants leaving the vehicle in the field in Ballyneety at which time two persons (neither of whom was the appellant) emerged from the passenger side door of the van and sat down on the ground to await apprehension while the appellant emerged from the driver's side door and ran away on foot, only to be subsequently apprehended hiding in a ditch.
28. It was conceded by the various garda witnesses who were asked about it that there had been no forensic examination of the van for DNA or other trace evidence.
29. In his closing speech to the jury defence counsel submitted to them, *inter alia*:

"What about the forensics? Do you see, Mr O'Sullivan has -- and he has done this very eloquently and he -- I mean he's a long time at this and he did this. I compliment him on the way he did this. I compliment Mr O'Sullivan. In fairness to him he should be complimented for the way he sowed this seed in relation to the DNA. He said to you, "The reason you can ignore the DNA was because Mr Kelly said he was in the car." So, sure, once he was in the car, we don't need to worry about DNA. Let's just brush it under the carpet. No, he didn't say brush the carpet, he did it much more eloquently than that. He said don't speculate and of course you shouldn't speculate. The problem with Mr O'Sullivan's contention however is this: the thin blue line tell us that Mr Kelly was sitting in the driver's seat driving the car. At one stage, they said, he had difficulty getting it into reverse. So what do you do when you sit in the driver's seat? You put your hands on the steering wheel. You put your hands on the gearstick. You put your hands on the door and many other surfaces. Not on the passenger side, not in the back, in the driver's seat. So you see, if there were no fingerprints of Mr Daniel Kelly in the driver side but in the back, or in the passenger's side, would that help you to put him in the driver's seat? If, of course, there were fingerprints and DNA and fibres in the driver's seat connecting that man, wouldn't that help you to say, "Do you know what, I don't need to rely on the thin blue line, because I have all this science in there"? But we don't bother with any of that because the thin blue line tells us.

Now, of course, the problem is that, could you even open the driver's door, down in the field? Because we heard evidence that it was wedged into the ditch. You heard evidence from one guard to say the passenger door was open and there were two people there. There's no mention of the driver's door being open, down in the field. Now, of course you don't have any photographs of the Combi van in situ so you can't look a photograph and say, "Well sure, the driver's door is open down in the field" or "You couldn't open the driver's door down in the field" because this vehicle, mysteriously, by some divine action, jumps out of the ditch and lands inside of the car park of Donoughmore Church. And nobody seems to know how it got there. And it's photographed in Donoughmore Church. And then it's taken away to Bob Sweeney's yard and Jim O'Brien is brought up from Kerry and he inspects the garda vehicle which he finds was pre-collision in perfect mechanical order but the other place is locked and, then, we'll just run into the sand. The Combi van isn't examined because Jim O'Brien heads back down to Kerry and someone of the forensic collision investigators was nowhere there. So is that a thorough investigation? Is that a proper investigation? Is that a safe investigation?

Now, of course, months later, when Mr Kelly is arrested -- he's brought into custody -- what's one of the things the guards do when they get him in there? Take his fingerprints. Wow. I mean, wouldn't it be good to take somebody's fingerprints to find out whether they matched fingerprints on a steering wheel or didn't match fingerprints on a steering wheel? But what was the point in taking his fingerprints months and months later when nobody bothered to get the dabs out the car?"

30. The trial judge in charging the jury made the following observations:

"You are not here to make up for the defence -- now, the evidence you examine is the evidence you heard. And you were perhaps invited to speculate. You know, fingerprints, DNA. There is no fingerprint. There is no DNA. You are aware of that but you can't go looking at the case about, what if there was? Because there isn't. The evidence in this case is the evidence of guards saying we saw him, we identify him. And you are aware that that is the only evidence and you can't speculate about, what if we had a CCTV camera? It showed us. Why didn't the guards have a dash cam on the patrol car? I mean, that's nonsense. They didn't. Put it aside and look at the case within the four walls of the evidence you've heard. Is that strong enough? Is that not strong enough? The evidence that they are relying upon, substantially, for you to convict is the evidence of identification."

31. It is now complained that the trial judge failed to properly present the defence case to the jury. We have not a moment's hesitation in rejecting that complaint. The trial judge's remarks about speculation were absolute apposite and merited. The jury had heard defence counsel's speech concerning the absence of forensics which was presented in very strong and robust terms. They would have been under no illusions as to the case that was being made. However, given the stridency of defence counsel's remarks the trial

judge was absolutely right to caution the jury not to speculate and to decide the case only on the evidence. Moreover, we regard it as being of considerable significance that no requisition was raised on this point. It clearly did not strike anybody who heard the charge at the time that there was anything wrong with it. We are satisfied there was no unfairness in the charge and there was no error on the part of the trial judge. We therefore also dismiss this complaint.

Conclusion

32. The appeal must be dismissed.