

People v Higgins

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Finlay C.J.
Walsh J.
Henchy J.
Griffin J.
McCarthy J.

THE SUPREME COURT

44/85

BETWEEN

The People

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

and

PATRICK HIGGINS

Appellant

JUDGMENT delivered on the 22nd day of November 1985 by
FINLAY C.J. *hem. diss.*

This is an appeal brought by the Appellant against the Order of the Court of Criminal Appeal made on the 6th February 1984 refusing his application for leave to appeal against a conviction for aggravated burglary in respect of which he was sentenced to ten years' imprisonment. It is brought pursuant to a certificate, dated the 18th February 1985, of the Director of Public Prosecutions, issued under section 29 of the Courts of Justice Act 1924, in which the points of law of exceptional public importance

were identified as being:

(1) Should the question of whether or not an accused person was in unlawful custody at the time when he allegedly confessed to the crime charged be left to and decided by the jury?

(2) Can a person arrested under section 53 of the Road Traffic Act 1961, between 7 and 8 p.m., be lawfully held in custody pending the sitting of the District Court on the following morning if a Peace Commissioner having jurisdiction is immediately available or, alternatively, if the arrested person could properly have been released pursuant to the provisions of section 31 of the Criminal Procedure Act 1967?

(3) Would the holding of a person in custody in the circumstances set out at No. 2 above be unlawful if the motive for the decision so to hold him in custody was to enable him to be interviewed by members of the Garda Siochana regarding crimes unrelated to the offence for which he was arrested?

No ground of appeal other than those contained in

these three questions was argued before this Court.

As is clear from the terms of these questions, the issues on appeal were exclusively confined to the decision of the learned trial Judge to admit in evidence incriminating statements alleged to have been made by the accused whilst in the custody of the Garda Siochana, which statements were made verbally.

The facts

A short outline of the facts out of which these issues arose, as appear from the transcript, is as follows.

Shortly after 7 p.m. on Sunday, the 7th February 1982, a sergeant of the Gardai attached to Kells Garda Station, on report of an accident, saw a crashed motor car at the side of the road some distance from Kells, which he recognised as the property of the Appellant. He went to a nearby public house and met there with the Appellant whom he knew and whose address he knew. He spoke to the Appellant who admitted being the driver of the car on the occasion of the accident. He then arrested him pursuant to section 53 of the Road Traffic Act 1961 on suspicion of

having committed the offence of dangerous driving. He brought him to the Kells Garda Station which was reached some time before 8 p.m.

The sergeant then communicated with a number of other Garda Stations in the area, informing them that the Appellant was in his custody, in the Garda Station in Kells, in case any of the members of the Gardai attached to those stations wished to interrogate him on suspicion of being involved in other offences unconnected with the road traffic accident.

The sergeant then left the Station in Kells and made a further examination of the scene of the motor accident and returned to the Station in Kells some time between 9 and 10 o'clock. He did not make any enquiry as to whether a Peace Commissioner was available for the purpose of holding a special court. No evidence was given as to the availability of a Peace Commissioner. He did not seek to charge the accused with the offence under section 53 himself nor to initiate the granting of bail to him pursuant to the provisions of section 31 of the Criminal Procedure Act 1967.

At approximately 11 p.m. members of the Garda Siochana stationed in Navan arrived at Kells Garda Station and were brought to interview the Appellant who was still in custody. On their evidence, at approximately 20 minutes past eleven, the Appellant made a number of incriminating oral statements concerning the charges the subject matter of this appeal. He was not charged with all or any of those offences but was detained in custody and brought before a District Court on the following Monday morning and charged with the offence under section 53 of the Road Traffic Act 1961.

The accused who was the only witness on his own behalf did not challenge this sequence of events though he denied making any statements of an incriminating nature to the Garda Siochana whilst in custody in Kells Garda Station.

The questions raised in the certificate pursuant to section 29

Section 29 of the Courts of Justice Act, 1924, as its terms show, was designed to enable an appeal to be taken in exceptional circumstances to this Court from a decision of the Court of Criminal Appeal. The special nature of this

Court's jurisdiction to hear and determine an appeal under the section rests on the prerequisite of a certificate by the Court of Criminal Appeal or by the Attorney General and now also by the DPP that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to this Court. While (as has been held in The People v. Shaw 1982 I.R.) this Court is not confined on the hearing of an appeal to the point certified, it is inherent in the section that a point of law certified on those two grounds must be a point arising before the Court of Criminal Appeal and thus involved in its decision. A point of law certified in the abstract or in terms wider than those involved in the decision of the Court of Criminal Appeal cannot be entertained for it would be outside the jurisdiction given to this Court by the section, which is not consultative, but essentially appellate and for the purpose of doing justice in the particular case.

From the above very brief summary of the facts it is clear that some of the questions raised in the certificate

issued by the DPP pursuant to section 29 of the Courts of Justice Act 1924 do not arise in this case for determination. There was no dispute as to the fact of the arrest of the Appellant at or near the scene of the accident nor as to the fact that he was from that time on and at all material times in the custody of the Garda Siochana as an arrested person. No question of fact, therefore, as distinct from a question of law concerning the legality of his custody arose in the case, and the first point of law contained in the certificate can not fall to be determined in this case.

Secondly, there was no evidence before the learned trial Judge of the availability or non-availability of a Peace Commissioner during the period between 8 p.m. and 11 p.m. and, therefore, the second point raised in the certificate, in its precise form, at least, can not arise for determination by this Court.

The real issue which arises is as to whether on the facts of the case the learned trial Judge erred in law in holding as he did that the alleged incriminating statements were admissible.

The resolution of this issue largely depends on certain questions and answers in the evidence of the sergaant who effected his arrest.

"Q. 124. Why having arrived at the station was not put in train arrangements for holding a special court at the earliest moment, whether to have it at 8.30, 9, 10 or 11, or whatever, if no Peace Commissioner was immediately available. Why didn't you put in train arrangements to hold a special court on the dangerous driving charge?

A. I was aware that there were members on the way from Navan, that I had been told. When I got a chance to deal with them and when I got a chance to speak with them, the persons that were with them looked after. These men arrived from Navan."

"Q. 127. So the reason then you didn't and if you don't understand the question, hesitate to answer it, sergeant, was a reason - should I put it this way - was a reason that you didn't put the matter of holding a special court in train after or immediately or at any time after you arrived at the station at 8 p.m., among other reasons, was that you knew personnel from Navan would be on their way to question my client about robberies.

A. Yes, I had been told that there were members on the way from Navan to speak to Higgins.

Q. 128. You left the matter at that, in the expectation that these members would eventually arrive

and would question my client; is that the position?

A. That is correct, Judge.

Q. 129. (Judge) On the other hand, sergeant, what would you have done if you drew a blank?

A. I would have released Mr. Higgins on bail to the next court on the charge."

Earlier on the sergeant, when being questioned about the actual arrest, having agreed that he was aware of the identity and address of the Appellant and that his documents, such as certificates of insurance and driving licence, were in order, was then asked at Q.92 and the following questions as follows:

"Q. 92. So I ask you then why didn't you let him go on his way?

A. I wanted to question him.

Q. About what?

A. In relation to the accident at that particular time.

Q. I see. Anything else? Was that a subsidiary part of the reason you wanted to get him to the station - that you wanted to question him about the accident?

A. I wanted to alert other stations.

Q. That he was in the station?

A. That he was in the station.

Q. And in alerting other stations, am I right in

saying that it had nothing to do with the accident but in case the guards there wanted to have a word with him?

A. That is correct Judge.

Q. Why did you not consider asking him would he voluntarily come to the station with you if he was willing? Why did you not adopt that course?

A. Well, I had made my mind up, had made my mind up to charge him with dangerous driving.

Q. Yes, but that could be done by summons, couldn't it.

A. I wasn't prepared to leave it to summons.

Q. Why not?

A. From I wanted to satisfy myself that other stations would be alerted that he was present and that he could be questioned if other stations were interested in him."

This man was arrested on suspicion of having committed an offence contrary to section 53 of the Road Traffic Act 1961. Shortly before 10 p.m. the sergeant who had arrested him and was investigating that offence had returned to the Garda Station from his examination of the scene. The Appellant was then held in custody and the only possible inference that could be drawn from the evidence I have cited is that he was held not for any purpose associated with charging him with

that offence but specifically for the purpose of making him available for interrogation by other members of the Garda Siochana in respect of other crimes.

It has been frequently stated by this Court that the obligation of a member of the Garda Siochana arresting a person on the suspicion of commission of an offence is to bring him as soon as reasonably possible before a Court or Peace Commissioner for the purpose of being charged. This is merely a confirmation of the principles originally laid down in Dunne v. Clinton, reported in the High Court at 1930 I.R. and in The Supreme Court at Frewen, page 563. In the decision of the Court of Criminal Appeal, in The DPP v. O'Loughlin 1979 I.R., it was held that as soon as that period has terminated, further detention of the arrested person for the purpose of interrogating him is clearly unlawful. This matter was also dealt with by this Court in The People v. Walsh 1980 I.R., where at page 299, O'Higgins C.J. stated as follows:

"It has been stated many times in our courts that there is no such procedure permitted by the law as 'holding for questioning' or detaining on any pretext

except pursuant to a Court Order or for the purpose of charging and bringing the person detained before a court"

At the time he was alleged to have made the verbal admissions the Appellant was not being detained for the purpose of being charged or brought before a Court but specifically for the purpose of being interrogated. He was therefore detained unlawfully to the knowledge of the gardai concerned and, consequently, in conscious and deliberate violation of his constitutional rights; these statements are, therefore, inadmissible in evidence.

Having regard to the fact that in his charge to the jury the learned trial Judge indicated that any evidence tending to incriminate the Appellant in the commission of these offences, other than the alleged oral statements made by him, was insufficient, and, having regard to the agreement of Counsel at the hearing of this appeal that that is the situation, I am satisfied that as has already been ruled by this Court, this appeal must be allowed and the conviction set aside.

The only appeal before this Court was one against conviction, but I feel I should mention, for the assistance of judges trying criminal cases, that I observe from the

transcript of evidence and the other records before this Court, that the accused having been convicted on a number of charges arising out of the same incident but varying in a sense in their seriousness, the learned trial Judge imposed upon him a sentence in respect of one count only and took the other counts into consideration. Having regard to the possibility that always exists of a court of appeal setting aside on some technical or other ground the conviction on a particular count, but leaving undisturbed the convictions reached on other counts on the same indictment, even though they arise out of the same incident, this would appear to be an undesirable and unsatisfactory procedure. Appropriate sentence should, in my view, be imposed on all counts in respect of which an accused person is convicted by a jury.

approved. J. a. Finlay

22:11:1985