THE COURT OF APPEAL

[Record Number: 219/2018]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE [AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS]

RESPONDENT

- AND -

JOHN CONROY

APPELLANT

JUDGMENT of the Court delivered on the 16th day of December, 2019 by Mr. Justice McCarthy

1. This is an appeal against both the appellant's conviction at Galway Circuit Criminal Court on the 8th June, 2018, after a trial, on one count of endangerment contrary to s.13 of the Non-Fatal Offences Against the Person Act, 1997, one of unlawful seizure of a vehicle contrary to s.10 of the Criminal Law (Jurisdiction) Act, 1976, and thirteen of dangerous driving, contrary to s.53 of the Road Traffic Act, 1963, as amended and his sentences. The trial judge sentenced the appellant to four and half years imprisonment in respect of the count of endangerment, and to four months imprisonment for each count of dangerous driving, to run concurrently. The trial judge sentenced the appellant to three and half years imprisonment in respect of the unlawful seizure of a vehicle count, to run consecutively to the sentence for reckless endangerment. This amounted to a term of imprisonment of eight years, which was reduced to six and a half years, the final year of which was suspended for a period of five years on certain terms. The was also disqualified from driving for a period of ten years. Both aspects were dealt with together.

2. When the appeal proceeded to hearing three grounds pertaining to conviction were pursued, namely: -

    (1) that the judge erred in admitting into evidence the certain statements of Thomas Ackroyd (the principal prosecution witness) pursuant to s.16 of the Criminal Justice Act, 2006;

    (2) that the judge erred in refusing an application for a directed acquittal by reference to the supposed absence or paucity of evidence identifying the appellant as the wrongdoer;

    and

(3) that the judge erred in failing to charge the jury as to the absence of any DNA evidence to connect the appellant with a certain item (a blue t-shirt) and to the vehicle in question.

3. The circumstances were that on the 31st May, 2016 Gardaí O'Halloran and Dolan, at Salthill, Knocknacarra, Galway, at about 10.50pm observed a black Volkswagen Golf travelling in the opposite direction to them (in their patrol car) and on the incorrect side of the road. The Golf was in the process of overtaking a taxi and was on the crest of a hill when first seen. The gardaí gave pursuit to the vehicle and it continued at high speed around Galway city; the pursuit involved another garda car and at a given stage such was the speed at which the vehicle was being driven and due to the traffic conditions it was necessary for the gardaí to call off the pursuit given the dangers involved. The vehicle at one stage was being driven at a speed in excess of 160 kilometres per hour. Eventually the vehicle was crashed by the driver and when the gardaí arrived, the appellant, Mr Thomas Ackroyd (the owner of the vehicle), and two others, were present at the scene. A demand was made of Mr Ackroyd, who had originally been driving and was subsequently forced to sit in the back seat in the vehicle, for production of his Certificate of Insurance or exemption in respect of the vehicle and indeed he did so in due course. Objection was taken at the hearing to any conversation which may have been had between Garda O'Halloran, who made the demand, and Mr Ackroyd so we do not know what else passed between them, if anything.

4. The gardaí to whom we have referred were, in substance, capable of proving the manner of driving. The evidence primarily relied upon for proof of the offences of reckless endangerment and unlawful seizure, and without which it would seem difficult to see how their prosecution could have been possible, was that of the owner of the vehicle Mr Ackroyd. He made three statements to the gardaí, one on the 7th of June and the second and third on the 17th June, 2016 of which the first and one of those on the latter date pertained to the substance of the matter. In particular, he identified the appellant as one of two persons who had entered his car whilst it was stopped in Ballinrobe, County Mayo, and effectively forced him to drive them over an extensive area. In his first statement he referred to one of the two who had entered, unbidden, into his car as John Conroy (with the qualification that his surname may have been Sweeney) and a Mr Kensey. Taking both of the substantive statements, on any view, it is clear that he identified one John Conroy as one of the duo. At their order a third man, described as T.J., was picked up during the course of the evening.

5. At the place where the vehicle was found in its crashed state, the four persons present gave their names, and one was of course the appellant. He was wearing nothing from the waist up and a blue t-shirt was found in the back of the vehicle in circumstances where a Garda Leonard had said that the driver of the vehicle, at a given stage, was wearing a blue t-shirt. Mr Ackroyd was of course acquainted with the appellant and the others. DNA evidence was obtained; this was to the effect that Mr Ackroyd's DNA was extracted from a blood sample taken from the rear seat of the vehicle.

6. The statements had been taken by a Sergeant Kearns who gave evidence as to the circumstances in which she had done so. The first was read back to the appellant on the 17th of June and videotaped. It has not been in debate that what was written down is what the appellant said. On the latter day he accompanied her on what might be called a tour of various places in County Galway over which Mr Ackroyd said he had journeyed. He said that Mr Kenzie pulled him out of the driver's seat, at a given stage, and forced him into the back, whereupon he that was described as Mr Conroy took over the driving.

7. Mr Ackroyd was taken to hospital on the 31st of May and released on the 6th of June. Sergeant Kearns said that Mr Ackroyd came to Tuam Garda Station on the 7th June in the company of his sister. There she took the first of the statements. She considered that he was fit to make a statement after caution in the presence of his solicitor. The only thing untoward she noticed was that he seemed to be in some degree of physical pain so far as his arm was concerned.

8. In any event, those (two) statements, or perhaps more accurately the contents thereof, were admitted into evidence pursuant to s.16 of the Criminal Justice Act, 2006. This arose when Mr Ackroyd was called to give evidence. In the presence of the jury, and we do not think it necessary to set out his evidence *verbatim*, he said he did not recall "one hundred percent" making a statement on the 7th of June but he accepted that he had signed those produced to him and effectively asserted that he did not remember the contents. S.16 of the 2006 Act states inter alia as follows: -

> "*(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as "the statement") may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—*
>
> *(a) refuses to give evidence,*
>
> *(b) denies making the statement, or*
>
> *(c) gives evidence which is materially inconsistent with it.*
>
> *(2) The statement may be so admitted if—*
>
> *(a) the witness confirms, or it is proved, that he or she made it,*
>
> *(b) the court is satisfied—*
>
> *(i) that direct oral evidence of the fact concerned would be admissible in the proceedings,*
>
> *(ii) that it was made voluntarily, and*

(iii) that it is reliable,

and

(c) either—

(i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or

(ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

(3) In deciding whether the statement is reliable the court shall have regard to—

(a) whether it was given on oath or affirmation or was videorecorded, or

(b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,

and shall also have regard to—

(i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or

(ii) where the witness denies making the statement, any evidence given in relation to the denial.

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—

(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or

(b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

(5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.”

9. The judge was plainly conversant with the provisions in question and having adjourned the matter after argument to consider his decision.

10. In his submissions the appellant contends that the threshold for admission of statements made out of court was not met. He says that the legislation envisages safeguards by the prescription of certain minimum criteria as conditions precedent to their admission. It is said that those criteria were not met or were misapplied. It is further submitted that one cannot know from the judge's ruling how he addressed the requirements or exercised his discretion. Particular emphasis was placed on the issue of whether or not the judge could have been satisfied that the witness was aware when he made the statements of the necessity to tell the truth. It was suggested that he failed to have proper regard to the fact that the statements were made under caution, that he must have been a suspect for the offences under investigation and that he had an interest in the outcome of the investigation. It was also submitted that the judge failed to take into account that the first of the two statements was not video recorded when being made and effectively delegated and did not see and accordingly consider the filmed record, "delegating" this to the parties, when referring to it as having been available to the appellant. The proposition was also advanced that he put too great an emphasis on the fact that the first statement was read over on camera.

11. The most significant submission of the respondent is the fact that the trial judge, as stated in a number of authorities, and something which is now trite law, must be regarded as being in a unique position to decide whether or not a statement should be admitted under the Act, *inter alia* because of the fact that he is the one who has the opportunity to hear and observe witnesses in court. Any criticism of the manner in which the discretion was exercised must be considered against this background.

12. It is plain from his ruling that the judge considered all relevant factors and as pointed out on behalf of the respondent his thought process can be seen clearly. It can only be concluded that such matters were what caused him to decide as he did. He referred to *DPP v. O'Brien* [2011] 1 IR 273 where it was held that the issue of liability in the context of s.16 concerned the circumstances and factors surrounding the making of a statement rather than reliability in the sense of the statement being true. It seems to us that on any objective view of the evidence the judge was well within his discretion in the conclusion he reached, took into account the relevant evidence, in circumstances where he was plainly aware of the legal requirements.

13. It is also contended that the judge ought to have acceded to defence counsel's application for a directed acquittal on the premise that there was none or no adequate evidence of identification of the appellant as the culprit identified by Mr Ackroyd in his statements. No dock identification was made nor was an identification parade held. Putting it at its lowest, the evidence of identification of the appellant was what was said by Mr Ackroyd as to the identity of those in the car (including the appellant) and the fact that Mr Conroy was one of four persons who gave his name to Garda O'Halloran at the place where the car was found in a crashed state, and the fact that he was naked from the waist up and

that a blue T-shirt was found on the back seat in the car where there was garda evidence as to the similar colour of the driver's clothing. We think that this evidence was more than sufficient to allow a jury to conclude that the accused and the gentleman named Mr Conroy in the car as stated by Mr Ackroyd were one and the same person.

14. Criticism was made of the charge on the basis that the judge failed to point out to the jury "as to the absence of any DNA evidence to connect the appellant to the blue t-shirt in question or any DNA or fingerprint evidence to connect him to the driver's area of the car". The only evidence pertaining to DNA was extracted from blood lifted from one of the rear passenger seats in the vehicle and compared with DNA extracted from samples taken from Mr Ackroyd and the appellant; the result of that process was that the blood was found to contain that of Mr Ackroyd. It was no part of the judge's business to enter into the arena and make an observation about the absence of evidence. It was a matter for the defence to make a submission to the jury upon it as they saw fit.

15. We accordingly dismiss this appeal against conviction.

Sentence

16. The appellant was born on the July 13th 1994. He is originally from Ballinrobe, Co. Mayo. He was unemployed at the time of the offence, and he is married with two children. He had 26 previous convictions at the time of sentencing of this offence, the most recent being a conviction at Castlebar Circuit Court on the 31st of January 2017, where he received a three year sentence for an assault contrary to s.3 of the Non-Fatal Offences against the Person Act, 1997. On the same date he received a four month concurrent sentence for assault under s.2 of the same Act. At the time of sentence of the present case, the appellant had completed the sentence imposed at Castlebar Circuit Court: this, and a number of convictions under the Road Traffic Acts, are the most significant in the present context.

17. In his plea in mitigation, counsel for the defence had submitted that much of the appellant's wrong-doing arises from drug addiction. The appellant has attended treatment for this issue. A letter from the appellant's General Practitioner and from his wife were presented to the court.

18. At sentencing, the trial judge had this to say: -

> "*It seems to me that these were extremely serious charges and offences. The endangerment count in particular was extremely dangerous. It was sheer luck that nobody was injured or indeed killed, and that wouldn't be necessarily one person, but it could have been many. The driving was entirely reckless and it appears to me that the accused was alone in deciding the nature of the driving; certainly, I heard no encouragement in respect, or sorry, heard no evidence in respect of being goaded on or encouragement by the other two passengers, not counting Mr Ackroyd. It seems to me that I must look at the offence on the scale of gravity, in other words, the headline sentence. I take the dangerous driving and the endangerment together in the sense of aggravating factors, and there was*

obviously drink involved. He was aware of the gardaí chasing him. The extraordinary high risk to other absolutely innocent road-users, including pedestrians, as we've heard evidence of swerving roundabouts, cars getting out of the way, going through red lights.

I note his previous convictions, while some of them, none of them are directly applicable or relevant to this offence, it does show a disdain for the law in general.

His driving was in a built-up urban area. The recklessness was of such a nature that the acts were continued constantly over a relatively long duration, entirely and utterly oblivious to the consequences. I referred to drink before, it would appear there were two or three crates of Bulmers, obviously I don't know the extent of intoxication, there was evidence from the gardaí in relation to the three individuals, including the accused, being intoxicated at the scene. I'm also not taking into the account the injury to the passenger, Mr Ackroyd, and he did suffer injuries, because it seems to me there's no charge in respect of the driving that led to that, so I will not take that into account, in fairness to the accused. It was prolonged, it was deliberate, it was aggressive driving; overtaking, entering on the roundabouts with cars having to swerve, all red lights broken at speed, particularly speed in an urban area, and he was driving while disqualified."

19. The trial judge then determined the offence of endangerment to lie at the upper region of the middle range of gravity, if not in the low region of the upper range and proceeded to impose a sentence of four and a half years imprisonment upon it. In relation to the dangerous driving, he held that this ought to carry four months in imprisonment on each count, but to run concurrently. In respect of the unlawful seizure of the vehicle, he determined the gravity of the offence to be in the medium range and possibly at the lower end of the medium range in the circumstances. The judge noted the "high tariff" of 15 years as the maximum sentence for this offence, and determined a sentence of three and a half years imprisonment.

20. In mitigation, the judge noted the following factors: the relative youth of the accused, the fact that he is a father and a husband, and that he enjoys a good relationship with his children and is a father figure to them. The court considered that the appellant was dealing with drug therapy, had regard to a letter from Mrs Conroy, the personal circumstances of the accused, and the effect on his family generally.

21. He also decided to divorce the unlawful seizure of the vehicle from the other offences herein, and made the sentence consecutive for unlawful seizure consecutive on that for reckless endangerment, and this amounted to a sentence of eight years imprisonment in total but he then proceeded to reduce the sentence of eight years to six and a half years, and suspended the final year (of the sentence for the former) for a period of five years. An ancillary disqualification from driving for a period of ten years was also imposed on the appellant.

22. In effect the appellant's grounds of appeal are that the trial judge erred in law in failing to have any or any adequate regard to his mitigating circumstances, that the sentence was disproportionate (or unduly severe) and that the judge erroneously exercised his discretion to impose the consecutive sentences aforesaid.

23. Counsel submits that sentence imposed for the count of reckless endangerment was reflective of a case where a much higher risk of serious injury to others arose, which thankfully was not the case here. Further, the appellant submits that the appellant has been attending treatment for drug addiction and has taken steps towards rehabilitation. The sentence imposed was disproportionate in all of the circumstances. Counsel contended that on the facts here, consecutive sentences were not warranted – as the events constituted one transaction.

24. The respondent submits that that offence herein was of a serious nature and, and one that put members of the public at great risk of endangerment. Mitigation in this case was limited and importantly the appellant could not benefit from the mitigation of entering a guilty plea. The appellant was on bail at the time of the offence, which is an aggravating factor to be taken into account. The respondent submits that there was no error in law or principle in the manner in which the trial judge exercised his discretion at sentencing.

25. We cannot see any error in principle in the conclusion of the judge that with due regard to all relevant mitigating factors he fell in to error in imposing the sentences in question, *per se*. However, we think that in the nature of the case the events on the evening in question amounted to one transaction. On the facts in this case we think that, the judge fell into error in the imposition of consecutive sentences (although as a matter of principle this may be done in a proper case even where the transaction may be regarded as one). This in turn gave rise to a disproportionate or excessive sentence. We therefore quash the sentence imposed for unlawful seizure, and impose a sentence of two and a half years to be served concurrently with that for reckless endangerment.