THE COURT OF APPEAL

Approved **No Redactions Needed**

Record Number: 0146/2022

Bill Number: DUDP 566/2019A

Edwards J.

McCarthy J.

Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

VICTOR AKINLADE

APPELLANT

JUDGMENT of the Court delivered on the 14th day of March 2024 by Ms. Justice Ní Raifeartaigh

Nature of the case

1. This is an appeal against conviction in circumstances where the appellant was convicted of violent disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994, assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997, and production of an article in the course of a dispute contrary to section 11 of the Firearms and Offensive Weapons Act 1990. There are two main issues in the appeal. The first is whether the trial judge should have made a decision as to whether the Garda entry into a dwelling was lawful

so that the appellant could then have relied on this as being the objective legal position in his closing speech to the jury. The second is whether the trial judge erred in the manner in which she dealt with an issue which arose in relation to the physical composition of a baseball bat (which was accepted by the appellant as having been produced by him), namely whether it was made of metal or wood.

2. The trial took place in the Circuit Criminal Court in May 2022 and the jury returned a unanimous verdict of guilty on all three counts. The appellant was tried with a co-accused, one Mr. T who was charged (and convicted) with a different offence arising out of the same incident, namely issuing a threat.

Background/evidence

3. The relevant events took place on the evening of the 28th April 2018 in the area of Ballyogan Avenue in Carrickmines, Dublin 18. At 7:15pm on that date, two plainclothes Gardaí, Garda Ryan and Garda Ennis, were on duty in an unmarked patrol car when they observed Mr T exiting premises at Ballyogan Avenue. They decided to search him and planned to intercept him as he walked along a public footpath. Garda Ryan exited the vehicle and immediately deployed his baton, identified himself and told Mr T that he was going to be searched under the Misuse of Drugs Act. Mr T stopped briefly and then took off running in the direction of Ballyogan Avenue. Garda Ryan said that while Mr T was running away from him, he shouted "Gardaí, stop, you're under arrest". With Garda Ryan in pursuit, Mr T jumped over a small side wall into number 46 Ballyogan Avenue and banged on the front door to gain entry. This was the home of the appellant.

4. Garda Ryan followed him over the wall into the front garden, losing his left shoe and stumbling on rubble on the other side of the wall in the process. Mr T shouted "you can't be in here, you can't come in here". What happened precisely at the front door of the house was the subject of some dispute at the trial. It is clear that the front door of the premises was opened to the extent of enabling Mr T to enter the house. It also seems that Garda Ryan tried to prevent him from doing so by grabbing hold of him by the hood or collar briefly but Mr. T managed to get inside. It is also clear that Garda Ryan applied force of some kind to the door as a result of which the glass panel on it shattered. It seems one of the appellant's sons was just inside the door at this stage. The appellant's version of events (as given later to the Gardaí in interview and by way of a statement) was that he was at the back of the house when he heard a bang and he came instantly to the front of the house, that his son said, "look what they've done to my face", and the appellant saw blood on his son's face and a nasty looking cut to his left cheek. Garda Ryan's evidence was that he persistently identified himself as a Garda, and that he shouted that the appellant was under arrest, but the appellant's version of events was that he did not know Garda Ryan was a Garda because he never said so, and that Garda Ryan was dressed in such a way that he thought he was a "junkie" or a "traveller".

5. Garda Ryan's evidence was that he turned from the house and went to retrieve his shoe. When he turned, he saw two males leaving the property and coming towards him, one of them saying "you can't be in here, get the fuck out". It later transpired they were two of the appellant's

sons. Garda Ryan gave evidence that the appellant came to the front door armed with the metal baseball bat; the appellant's version was that he retrieved a baseball bat from the garden. Garda Ryan said that he shouted at the appellant "Gardaí! Gardaí! Return to the house" but that instead the appellant came towards him and swung the bat, striking his left shoulder. Garda Ryan said he began to retreat back over the wall and stumbled backwards while trying to cross over it. The appellant's version of events was that he did not strike Garda Ryan with the bat, whether inside the garden of the house or outside of it.

6. Garda Ryan said that he felt relief when he was outside the garden and reached the green area outside the appellant's property because it was a public place. However, he said, the appellant's sons and the appellant followed him into the green area and the appellant struck him across his left shoulder and upper arm, and he blocked two further swipes from the bat with his baton. A further swing struck him in the left hand and left ear, he said.

7. Garda Ennis came on the scene and saw the three males in front of Garda Ryan. Garda Ennis went into the *melee* and placed herself between her colleague and the three males and deployed her pepper spray. She said she was being called names and jostled. There was shouting from members of the Akinlade family and two females who were now present in the garden. Other Gardaí who arrived on the scene described it as chaotic and several members of the Gardaí mentioned that some members of the Akinlade family were shouting abuse to the extent that they were foaming at the mouth. The appellant's case was that at no stage throughout the incident did he know that Garda Ryan was a Garda and that as far as he was concerned, some unknown person was trying to break into his house, had smashed the door glass and injured his son, and that his action in wielding the baseball bat was to frighten him off. He persistently maintained that he did not strike the appellant. It was suggested by his counsel during the trial that the injuries sustained by Garda Ryan, which included concussion, a fractured clavicle, a fractured finger, and a bruise to his left arm, were self-inflicted by his attempting to force the door and later tripping over the wall.

8. During his evidence, Garda Ryan maintained both that he had already arrested Mr. T at the time the latter disappeared into the house, and that he sought to enter the house pursuant to s.6 of the Criminal Law Act 1997 for the purpose of effecting his arrest. In the course of submissions (which will be addressed below), counsel submitted to the trial judge that none of the conditions existed for the exercise of the power to gain entry without warrant under s.6 of the 1997 Act. In particular, he said that the offence which Garda Ryan had identified as the one for which he wanted to arrest Mr. T was a *summary* offence (obstruction of a drugs search) which did not fall within the power in s.6. It is important to note that there was no legal issue as such at the trial as to whether or not Mr. T (or indeed the appellant) had been lawfully arrested or whether the house had been lawfully entered. The issue arose only to the extent and in the context that will be described below.

9. There was some lack of clarity at certain points during the appeal and even during the trial itself as to whether the appellant was relying on defence of another/defence of property pursuant

to s.18 of the Non-Fatal Offences Against the Person Act 1997. S.18 provides that the use of force by a person does not constitute an offence if it is "such as is reasonable in the circumstances as he or she believes them to be" if it is for the purpose *inter alia* of protecting a member of his family from injury, or to protect his property from damage caused by a criminal act or from trespass or infringement. S.18 (6) provides that notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if he or she knows that the force is used against a member of the Garda Síochána acting in the course of the member's duty or a person so assisting such member, unless he or she believes the force to be immediately necessary to prevent harm to himself or herself or another.

10. In our view, from a reading of the transcript as a whole, it is clear that the appellant *was* relying on the s.18 defence although the primary focus was on trying to establish certain *facts* that would support the legal elements of the defence. As noted, the appellant's defence was that he saw his son inside the door of their house with blood on his face, saw an unidentified man outside who had just smashed the glass of the door, and that he picked up a baseball bat in the garden and wielded it to frighten away the person who he honestly believed to be an intruder. He said this was in a context where the garda was not wearing a uniform and had not identified himself as a Garda, and in circumstances where his house had previously been the subject of attacks from random individuals. It is fair to say that defence counsel for both accused also sought at the trial to portray Garda Ryan in general as having escalated the situation by unnecessarily drawing his police baton from the very outset and by giving aggressive chase to Mr. T, culminating in his smashing in of the appellant's front door causing facial injuries to one of the appellant's sons. There were significant factual disputes at the trial in relation to a number of matters, including whether Garda Ryan identified himself as a Garda and whether the baseball bat was used by the appellant to strike Garda Ryan. Those factual matters were relevant as they in turn fed into whether the s.18 defence would be available to the appellant.

11. That this was the case being put forward by the defence appears not only from the questioning of the prosecution witnesses but also from the closing speech of counsel for the appellant, which included the following passages:

> "Now look at it from Victor Akinlade's perspective. We've heard that he was sitting in the back room watching match results or whatever it was on a computer. He hears a commotion outside and he goes out into the hall. When he gets out into the hall he sees his son bleeding. Now, the extent to which he was bleeding or otherwise, I'm not really interested in that, that's a matter for yourself, he was injured, there was blood, there was broken glass and there was commotion…
>
> … his mentality is informed by the fact that he's coming from a situation where his house has been attacked before. So he goes out to defend his house and his family and whatever. When he goes outside, he sees Jonathan Ryan. He responds to the fact that he sees an individual outside, not a garda crucially, he sees a man, dressed

in a hoodie, and we have seen the picture of what Garda Ryan looked like that day, indeed the way any other person might be, just as an ordinary civilian. … So he [Garda Ryan] says he identified himself but Victor Akinlade has been consistent about this from the word go, from the moment that he was arrested he said I didn't know he was a guard.

…

And Garda Ryan is the only person who has told us that he identified himself as a garda. And he said he's doing it all the time. But astonishingly again, he says Victor Akinlade didn't say a word to him. In absolute silence, according to Garda Ryan, Victor Akinlade came out, picked up a baseball bat and went over and tried to hit him on the head.

… Victor Akinlade, remember, thinks this man is attacking his house and his family, so of course he raises the baseball bat… And he wielded it, if I can put it in those terms, to defend his house and to deal with this person he saw to be an intruder. And even after the fact you will get the interviews the gardaí describe him as a garda and he says you say garda or officer in fact is the word, "you say officer, I say intruder". Because that is what he thought was happening and he went out to deal with this man.

…

But there is a really important factor in this which is not a detail, and is that Garda Ryan says that Victor Akinlade hit him, and he gives three instances of it, with the baseball bat. And he says that he did so deliberately and that he hit him with a view to injuring him. Victor Akinlade says very clearly that he did not do that. And he is absolutely unwavering in his statement that he did not hit Garda Ryan. He does say he swung the bat. He does say he raised the bat over his head. But not hit him. Didn't make contact with him….

From the word go, as I say, this was escalated by gardaí. It was heightened. The ASP [the baton] was drawn right at the start. There was what I suggest to you was an unlawful entry into somebody's home which is protected by the Constitution. He tried to break down the front door of that house…

…in that heightened environment isn't it possible that Mr Akinlade was genuinely and understandably confused by what was happening. If he was, then there is a basis on which he cannot be blamed for what happened.

Now it doesn't get him around the strikes on Garda Ryan, because if he did then that's a different category, but he says he didn't. And that's why I am going to ask you to look at the injuries involved there…"

12. It is clear therefore that the defence was effectively one relying on the appellant's honest but mistaken belief that he was acting reasonably in defence of his family and his property. This provides the context for the first ground of appeal.

The first issue: failure to rule on the legality of the entry into the appellant's dwelling (Ground (a) in the Notice of Appeal)

13. The appellant contends that the trial judge erred in failing to make a ruling on the legality or otherwise of the entry by Garda Ryan into the appellant's home. It was the appellant's position that there was an unlawful entry by Garda Ryan when he went into the appellant's garden and tried to force his front door. The manner in which this issue arose at the trial was somewhat curious.

14. There was, as already noted, no legal issue as such on the question of unlawful entry by Garda Ryan onto the appellant's property. No evidence had been obtained from the entry and nothing in terms of the arrests of either accused man turned on it. Accordingly, there was no *voir dire* on the issue in the way that there would be if there was a challenge to the admissibility of evidence. Instead, what happened was this. At the conclusion of the evidence and before the closing speeches, counsel on behalf of the appellant requested the trial judge to rule on the legality of the entry because, he said, he wanted to rely on the illegality in his closing speech to the jury and he wanted to ensure that he was correct in so stating the position and did not want the trial judge to contradict him in her charge. He confirmed that it was not an application for a directed acquittal and said that it was simply "*to facilitate my saying something to the jury that I don't want to say if the court feels that I am not correct in law in saying it and that's why I make the application before the speeches are made*". He added that the only reason he was raising it with the trial judge was that he wished to say it to the jury and that he would not say it if the court did not agree with them because he did not want to be contradicted after the fact. He repeated that it was his view that it was an illegal entry.

15. The judge then asked if it was correct to say that the issue was whether self-defence arose or not, to which defence counsel replied that the case being made was *that the appellant never struck Garda Ryan*. The judge then said they should "*move on*", at which point prosecution counsel intervened and said that it was up to defence counsel what he would do and that the Director's view was that it was not relevant. The judge then said "*it mightn't be relevant, right, but he is entitled to say it. Is not right (sic)*?". Prosecution counsel said that he (meaning defence counsel) was asking for a decision on the issue but that her view was that it was not relevant.

16. The judge then said that she was going to be asking the jury to concentrate on the charges in the indictment. The prosecution counsel responded by saying that "*I think the court has given its view effectively*", and defence counsel simply said "*may it please the court*".

17. After the trial judge had charged the jury, there were some requisitions which did not include the failure to mention the legality of the Garda entry. What was raised on behalf of the

appellant was the question of whether there was lawful force in the context of the violent disorder charge. The exchange was as follows:-

> "MR WARD: One issue arises from my perspective
>
> JUDGE: Yes.
>
> MR WARD: given the violent disorder charge and the use of the term unlawful violence, the court hasn't discussed what that means.
>
> JUDGE: Okay.
>
> MR WARD: Now my case is that Mr Akinlade never struck Garda Ryan
>
> JUDGE: Yes.
>
> MR WARD: but not that there was no violence at all. I mean I think the raising of the bat and the threatening with bat could constitute violence.
>
> JUDGE: Yes.
>
> MR WARD: In the context in which it was given I think that it is lawful violence. And that's why I wonder if the court could explain the difference between them I think it would be helpful.
>
> JUDGE: Why would it be lawful violence?
>
> MR WARD: Insofar as the circumstances in which he found himself as he thought not dealing with a garda and dealing with a person he felt was breaking into his home.
>
> JUDGE: All right. So I am going to ask them to consider whether it was unlawful violence or lawful violence, I am asking them to get into Mr Akinlade's mind at the time and that the methods he was using were necessary to protect himself and his family in that he believed that he says he believes that Garda Ryan was a traveller, his home had been attacked previously and what he said about having the baseball bat was to protect himself and his family.
>
> MR WARD: I am obliged.
>
> JUDGE: Something along those lines, all right, okay."

18. The jury was brought back out so that the trial judge could deal with a number of points that had been raised by counsel. In relation to this specific point, she said:

> "And then the allegation is that Mr Akinlade used or threatened to use unlawful violence, right. Now Mr Akinlade's point is this, right: That somebody had smashed in the window of his door, he'd seen his son with blood on him, he had experienced

before people attacking his house, he said he didn't know Garda Ryan, he thought he was a traveller and he didn't know Garda Ennis, he thought she was his partner, and he said that they never identified themselves as Garda Síochána. He advised the persons in the house to ring the guards and he always rings the guards and the guards are friends of his, he said, and he was told by his wife members of An Garda Síochána, but he didn't strike anybody, but he went out with a bat because he thought that his family and his home were being attacked.

So you have to get into the mind of Mr Akinlade at the time and be satisfied beyond a reasonable doubt that the methods he used were reasonable in the circumstances as he believed them to be and that what he was doing was an act of defence not an act of offence.

So you're asked to get into the mind of Mr Akinlade and be satisfied beyond a reasonable doubt that what he said, what he was doing was to protect himself. First of all, he didn't hit anybody he says, and what he was doing was to protect himself, his family, and his property and the reasons why he came to all that conclusion. So it's up to you to decide whether what he said was an honestly held belief, right, it's up to you to decide whether what he said was an honestly held belief that the methods that he was using were reasonable in the circumstances as he believed it to be and it was an act of defence not an act of offence. And so, I want you to consider that, okay. And that the methods that he was using were reasonable and proportionate. That he says that the door was being smashed in and the methods he was using were reasonable and proportionate. All right.

19. In the course of his submission to this Court, counsel for the appellant relies on case law including *Omar v Governor of Clover Hill Prison* [2013] IEHC 579; which refers in turn to *DPP v. Gaffney* [1987] IR 173 for the proposition that the burden lies on the entrant to prove that the inviolability of the dwelling has not been breached and *Freeman v DPP* [1996] 3 IR 565 for the same proposition; *DPP v. O'Brien* [2021] IECA 290; and *DPP v Laide and Ryan* [2005] IECCA 24 for the proposition that the Gardaí cannot retrospectively seek to validate the entry on the basis that he had a power on foot of a statutory provision, because it is necessary for a garda to inform the occupants that they wish to gain entry for the purpose of search and arrest at that time. He also refers to *DPP v. Dunne* [1994] 2 IR 537 where it was stated that the justification for setting aside the constitutional protection of the dwelling must be in "*clear, complete, accurate and unambiguous terms*".

20. The Director responds by saying that no direction application was made and defence counsel was content with how the matter was dealt with during the trial. He was able to say in his closing speech to the jury that this was a case of unlawful entry caused by Garda escalation of the situation, and the trial judge did not contradict him in her charge. Nor was any requisition raised on the issue of unlawful entry.

21. In the Court's view, the question of the legality of the Garda entry to the house was far from central to the appellant's defence. The appellant's defence was essentially that he thought that some civilian (not a Garda) was attacking his property, that he saw his son at the door with blood on his face, that he went outside and picked up a bat with which he threatened (but did not assault) the person in question. The trial judge was requisitioned and charged the jury specifically to the effect that the appellant should be judged on the facts as he honestly believed them to be. This was an important aspect of the defence, and no complaint is made about how the jury were directed in this regard.

22. The issue of illegal (or legal) entry into the appellant's property, however, was a relatively peripheral matter even within this overall defence. The key facts were whether the appellant knew that Garda Ryan was a guard or whether he might honestly have believed he was a civilian trespasser, and whether the appellant struck him with the baseball bat or whether he merely wielded or brandished it. Insofar as the matter of the illegal entry featured at all in the trial, it consisted merely of a last-minute request for comfort from the trial judge with regard to something that counsel proposed to say in his closing speech. Even then, after it was raised, it was not pursued with any vigour. The judge observed that counsel could say what he wanted to say and counsel (as seen from the exchange above) did not pursue it any further. The trial judge did not in fact contradict him in any way in her charge to the jury and counsel did not raise the issue again on requisition. The position might be different if the judge had contradicted what counsel said, but the reality of the situation here is that as far as the jury in this case were concerned, defence counsel was telling them the entry was illegal, that the appellant believed it was illegal and that this was part of the overall matrix of his beliefs at the time, and nobody told them anything to the contrary.

23. In the circumstances, we are satisfied that this was a matter which played a very minor role at the trial, and that the trial judge's failure to make a ruling in relation to the issue was not of any great consequence as is amply demonstrated by counsel's own contemporaneous response to her (implicit) decision not to rule on the issue, namely not to press the issue any further. We are satisfied that no possible injustice could have been caused to the appellant by the failure to rule as requested and that this ground of appeal is not made out.

The second issue: the alleged failure of the trial judge to properly charge the jury in respect of the nature of the baseball bat (Ground (c) in the Notice of Appeal)

24. The indictment referred to production of a metal baseball bat and at all stages of the trial, the appellant says, it was maintained by the prosecution that the baseball bat was a metal one. It was described as such in the evidence of Garda Ryan, in the prosecution closing speech, and by the trial judge in her charge to the jury. After the jury had retired to consider its verdict, a question was raised by it as to the material of which the baseball bat was made by the jury question, "Does it matter that the bat is not metal?". The bat had been provided to the jury as an exhibit.

25. The defence submission was that it should lead to an acquittal if the jury was satisfied that as a matter of fact it was not made of metal. The prosecution submitted that the word "metal" on the indictment did not go to the heart of the issue and that it was not in dispute that this was the implement that was used by the appellant; the dispute centred around whether it was merely brandished by the appellant or used to strike Garda Ryan.

26. In response to their question and having heard those submissions, the trial judge told the jury that this was the baseball bat the appellant himself gave to the Gardaí and that the prosecution case was that he was hit by it. There was no evidence as to what it was made of. She referred to using their common sense and asking themselves whether it would affect their deliberations and whether it affected their conclusion that it was produced or whether the misdescription raised a doubt in their mind. She invited them to read the whole indictment to get the full meaning of it and read the specific charge relating to production of an article in full.

27. The jury retired again but the appellant raised a requisition as to the manner in which they had been directed. The jury were brought back and the trial judge again addressed the issue. She said that the evidence from the Garda was that he was hit with a metal baseball bat, that this was not a metal baseball bat but was certainly the one that was handed in, and it was up to the jury as to whether they were satisfied beyond reasonable doubt that there was production of an article capable of inflicting injury. She said "…*if you're not satisfied beyond reasonable doubt that he was-that that baseball bat was produced-that a metal baseball bat was produced, you can acquit*". She also added that the indictment referred to a metal baseball bat and that the exhibit was not a metal baseball bat, it was wooden. She said it was a matter for the jury what to make of it. She asked if that helped them and the jury foreman said yes.

28. The jury retired and defence counsel was still dissatisfied with the manner in which they had been charged on the issue. The jury was brought back and told by the trial judge that Garda Ryan had specifically identified this as the bat with which he was hit. The trial judge said they had to be satisfied of every aspect of the indictment and she could not say an error was made; he said it was a metal baseball bat but he identified the exhibit as the bat with which he was hit. She said you have to be satisfied beyond reasonable doubt of each aspect of the case before you can convict on it.

29. On appeal, counsel contends that the trial judge did not properly charge the jury on the question and that they should have been clearly informed that if the element of a metal baseball bat was not present, they should acquit the appellant on that count. They also submit that the failure of the trial judge so to charge the jury rendered the subsequent conviction of the appellant unsafe and unsound.

30. The Director points out that there was no dispute about this being the correct implement because it was produced by the appellant when the Gardaí searched his property and he described it as the bat he used to threaten Garda Ryan (in circumstances where he denied hitting with it). She submits that the composition of the bat and its production were matters for the jury to determine on the basis of the item produced to them.

31. The way the indictment was phrased was perhaps somewhat infelicitous in circumstances where there may have been some doubt as to whether the baseball bat was made of wood or metal. However we are of the view that whether the baseball bat was made of metal or wood had no relevance at all in circumstances where the appellant himself produced the item to the Gardaí after the event and acknowledged it as being the bat which he had produced during the incident. The dispute in the case (or at least one of them) was whether he had merely used it to threaten Garda Ryan or had actually used it to inflict injuries. If necessary, we would apply the proviso in s.3(1)(a) of the Criminal Procedure Act 1993 in order to uphold the conviction as the question of the material of which the bat was made is so peripheral to the real issues in the case as to be irrelevant and no injustice would be caused to the appellant in upholding the conviction even if we were to take the view that the trial judge had not entirely clarified the situation.

Other grounds of appeal in the Notice of Appeal

32. For completeness, I should say that ground (b) in the Notice of Appeal contended that the trial judge failed properly to outline the elements of violent disorder. The appellant's written submissions set out the trial judge's charge in respect of the offence and submit that the jury required "*a clearer explanation of the test that was to be applied*" without in any way specifying any error in what the trial judge said or how it might have been improved upon. The prosecution submits that the charge was clear and that the jury was more than capable of asking for an explanation if they were unclear, as indicated from the questions they did ask in connection with the offence of assault and the nature of the baseball bat. This issue did not feature much, if at all, in the oral hearing of the appeal and we have no hesitation in rejecting this ground of appeal.

33. Likewise we reject ground (d) in the Notice of Appeal which concerned the charge on production of an article. The complaint was formulated in the written submissions in the following terms: "*While the Learned Trial Judge mentioned each of the elements of the offence, it is submitted that she failed to inform the jury of the consequences of the absence of any one or more of the elements, to the jury's satisfaction beyond a reasonable doubt*." Again this was not followed up to any great degree, if at all, in oral submissions and in circumstances where the trial judge clearly charged the jury on proof beyond a reasonable doubt on all aspects of the prosecution case (and no requisition was raised in relation to this issue), we have no hesitation in rejecting this ground of appeal also.

34. In the circumstances, the appeal against conviction is dismissed and the Court will set a date for the hearing of the appeal in respect of severity of sentence.