THE COURT OF APPEAL

Record No: 123/2023

Edwards J.
McCarthy J.
Kennedy J.

IN THE MATTER OF SECTION 34 OF THE CRIMINAL PROCEDURE ACT 1967 (AS AMENDED)

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

V

R.M.

RESPONDENT

JUDGMENT of the Court delivered on the 8th day of April 2024 by Ms. Justice Isobel Kennedy

1. This is an application brought by the Director of Public Prosecutions pursuant to s. 34 of the Criminal Procedure Act, 1967 (as amended) referring a question of law for determination by this Court. The question posed is as follows:-

"*Was the Learned Trial Judge correct in law in admitting into evidence the statement of the defendant made to his solicitor on November 4th 2022?*"

2. The relevant portion of s. 34 provides:-

"34.—(1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General in any case, or if he or she is the prosecuting authority in the trial, the Director of Public Prosecutions may, without prejudice to the verdict or decision in favour of the accused person, refer a question of law arising during the trial to the Court of Appeal for determination or, in the case of a person who is tried on indictment in the Central Criminal Court, make application to the Supreme Court under Article 34.5.4° of the Constitution to refer a question of law arising during the trial to it for determination."

3. For the reasons we set out hereunder, we answer the question posed in the negative.

Background

4. In November 2022, the respondent was tried on five offences relating to alleged events on the 14th/15th March 2020. It is unnecessary to set out a precis of the evidence, which concerned alleged incidents at a dwelling, leading to the appellant being charged with aggravated burglary, threat to kill, threat to damage property, production of a knife and endangerment.

5. On the 29th April 2020, the respondent was arrested, detained and interviewed. He received legal advice before and during his detention. In interview, the respondent outlined elements of his background but declined to comment about the alleged incident.

6. The trial began on the 4th November 2022 and at lunchtime on that date, a statement made by the respondent to his solicitor was furnished to the prosecution by defence counsel. The statement was dated the 4th November 2022. In essence, the statement was exculpatory of the accused, although the respondent contends that it is not wholly exculpatory. However, the statement contradicted the prosecution evidence as to what occurred on the night of the alleged offending. The defence proposed to put the statement in evidence and in so doing relied on the judgment of *People (DPP) v JD* [2022] IESC 39.

The Question for this Court

7. During the trial, an issue arose regarding the admissibility of the unsworn statement made by the respondent to his solicitor on the 4th November 2022. The trial judge admitted the statement in evidence.

The Voir Dire

8. Submissions were made before the Circuit Court after which the respondent gave evidence. It was not in dispute that the respondent consulted with a solicitor prior to his arrest and during his detention.

9. Counsel for the respondent indicated that the defendant was essentially fluent in English. He stated that he had lived in Ireland since January 2016 and had resided in the UK from 2007 until 2013. The gardaí contacted him prior to his arrest and advised him to speak to a solicitor. He spoke with a solicitor in the criminal defence section of an immigration firm and received advice. Subsequently, he was arrested. He spoke to the solicitor again before and during his detention.

10. He was furnished with a notice of rights by the member in charge. In interview he made no comment concerning the events in issue but did speak to his background. He was informed that he could make contact with his solicitor at any time during the interview process.

11. Subsequently, he changed his solicitor and on the 4th May 2022, the unsworn statement was furnished to the prosecution. Regarding the statement in issue, he said that he prepared the statement himself using his own words.

12. The defence contended *inter alia* that in circumstances where the respondent is a non-national with no relevant previous convictions, who was arrested for aggravated burglary and who was advised to make no comment in interview, he would not have had the same knowledge of procedures and investigations as somebody who resided in this jurisdiction. As such his opportunity to present his case was adversely affected but this could be remedied by the admission into evidence of the prepared statement.

13. Prosecution counsel submitted that an exculpatory statement is inadmissible and offends the rule against hearsay and that no issue of fairness arose.

14. A portion of the respondent's evidence is as follows:-

A. I was advised by my solicitor.

Q. Yes. Did you provide a statement of your position to your solicitor before you received that advice, over the telephone?

A. No, I was trying to tell them to tell them and explain what happened, but I was told just carry on saying no comment.

Q. And did you know any local solicitor where you were arrested?

A. At the time, no.

Q. And did you contact any other solicitor or try to?

A. I wasn't given a chance to find a solicitor here.

JUDGE: What did you say, he wasn't given to chance to?

A. I wasn't given a chance to find a solicitor locally.

MR O'HANLON: Did you understand that the Gardai, well the interview speaks for itself at the end of page 17, at the end of my book of evidence, three questions up. You indicated you had contacted a solicitor and you were told you could contact your solicitor at any time; is that correct?

A. Yes.

Q. And you were prepared to proceed on the basis of the advice you had received?

A. Yes.

15. Defence counsel also made the submission that conflicting answers were given by the respondent at the outset of his interview with gardaí, and no attempt was made to explore the inconsistency by the gardaí. This submission was made in the following terms:-

"…if one looks at the first and second questions of interview number one. It appears clear that my concern is that the defendant's full appreciation of how to deal with things where the same question produces two contradicting responses and there doesn't seem to be any effort to -- he's asked does he understand the reason for his arrest and he says yes and then he is asked, does he understand the reason for his arrest or why the reason you have been arrested and he says, no. And there is no attempt made."

16. Central to the respondent's argument at trial and before this Court is the decision of the Supreme Court in *JD*. In particular the respondent relies on the following at paras. 99-100:-

"One final point remains. It is simply that, if it had been shown there had been unfairness, there was a resolution to the issue which might have been available before, or even at, the trial. The judgment in Healy v. Donoghue makes clear that the term "due course of law" means more than a mere technical compliance with the letter of the law. Rather, it conveys a trial is to be conducted in accordance with the concept of justice (cf. Gormley).

It is common case that one possible resolution of the issue would have been for the appellant to be invited to furnish a statement at a Garda station. One could go further. If the Circuit Court judge had felt that there was clear identifiable unfairness, then, subject to all else being equal, or being made so, the appellant could, even at a late stage, have been given the opportunity to furnish a written response to the endangerment charge. Whether or not such memorandum of interview would have been admitted in evidence would remain a matter for the judge to determine, in accordance with the general principles outlined earlier. But equally, if it was thought there had actually been some unfairness or omission, the appellant might have volunteered to furnish some additional matter if he felt there had been an omission. See in the abstract, a determination on

admissibility might well have been relatively easy in this instance. The appellant had no "right" to be arrested for the purpose of allowing him to make a statement."

The Ruling

17. The trial judge agreed that there was no right to have such a statement admitted but that it could be admitted if fairness dictated it. He was satisfied that the admission of the statement was permissible, provided that the jury were given the context in which it was made. He ruled the statement admissible on the basis of the nationality of the respondent, his unfamiliarity with legal affairs, the inability of his solicitor to attend at the interview, the heightened tensions as a result of Covid-19 and his change of legal advisers. The judge was satisfied that the admission of the statement was fair in the context of the trial and would ensure that the trial was conducted in due course of law.

Submissions of the Parties

18. It is the Director's position that an out of court statement is inadmissible as it offends the rule against hearsay.

19. Reliance is placed on *McCormack v Judge of the Circuit Court* [2008] 1 ILRM 49 where the applicant complained that the unstructured and chaotic nature of his garda interview deprived him of an opportunity to answer the charge alleged. Charleton J declined to stop the trial and stated as follows:-

"The police are entitled to make rational choices as to whether they put matters to a suspect or as to what matters they put to a suspect. It is not for this court to determine how the police should go about investigations, apart from laying down general principles for their guidance. This has already been done in the cases cited and I would go no further. I would expressly hold that it is not the purpose of a police interview to enable the accused to make a case on video so that it can be played as part of the prosecution case in front of a jury. The accused has, for that purpose, the option of cross-examining witnesses at trial, of calling evidence or of giving evidence himself or herself. Whether an entirely self-serving statement by an accused, that is repeated again and again, is admissible as to every repetition as an exception to the rule against self-corroboration, is a matter for the trial judge."

20. Reliance is also placed on *R v Pearce* (1979) 69 Cr App R 365 where Widgery LCJ said:-

"(3) Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible."

21. Further reference is made to *R v Blinkhorn* [2006] All ER (D) 365 where an appellant declined to comment during interview but later presented police with a statement. The Court of Appeal upheld the finding that the statement was exculpatory and the refusal to admit the statement and commented as follows:-

"The real question was whether the appellant could have required the prosecution to adduce them, or whether the appellant could have put them before the jury without giving

evidence himself. Although modern legislation gave the prosecution greater opportunities to rely on statements, the prosecution had not sought to do so, and the appellant had not been entitled to oblige them to do so. The appellant had also not been entitled to adduce the statement himself, without giving evidence, and if he had given evidence, he would not have been entitled simply to supply the statement. Accordingly, that ground of appeal failed."

22. In addressing the *JD* decision, the Director seeks to distinguish the facts of that case from the facts of the within case. The comment referred to above in relation to the potential for the tendering of a statement in circumstances of unfairness is described as *obiter*. It is submitted that the respondent in the present case had the substance of the allegations against him put to him and had the benefit of legal advice in electing to exercise his right to silence in response to those allegations.

23. It is submitted that the respondent's nationality is of no relevance and that the asserted unfamiliarity with criminal matters is a trait he shares with the vast majority of the Irish population. Regarding the inability of his solicitor to attend the garda station, it is submitted that this is of no relevance in light of there being no evidence that the respondent wished to have his solicitor present, had requested his solicitor be present or that the solicitor declined to attend.

24. It is further submitted that there is nothing to suggest that the pandemic had any particular effect on the respondent as he did not give any evidence of this or any other factor influencing his capacity to act on apparently cogent legal advice.

25. It is the respondent's position that the *JD* decision is authority for the proposition that an "out of court statement" can be admitted in the interest of fairness and the discretion as to whether that statement should be admitted rests with the trial judge.

26. The respondent also cites the summary of the Supreme Court's judgment in *JD* at para 115:-

"This judgment, therefore, holds:

- *That the procedure adopted by the Circuit Court judge in addressing the application to stop the trial was, on this occasion, not in accordance with law.*
- *That, in the event that the appellant had wished to raise an issue as to his entitlement to be questioned, and to respond on the indictable charge of reckless endangerment contrary to s.13 of the Non-Fatal Offences Act, 1977, the matter should have been raised in the course of the trial of the appellant, and not by way of preliminary application where there was no evidence adduced.*
- *That, if such issue does arise, it is the duty of the trial judge to consider an allegation of unfairness in an investigation giving rise to an unfair trial and to determine that issue on the evidence in a voir dire, and to determine the consequences, if any, which flow from such determination. But the scope of the inquiry is within the framework of the need to determine whether there is a real risk of trial which is not in due course of law which cannot be remedied.*
- *That the constitutionally guaranteed rights to silence and protection against self-incrimination are guaranteed under Article 38.1 of the Constitution.*

- *A person under investigation is entitled to fairness in the course of an investigation. In the event of finding that there was fundamental unfairness, the judge should make such orders or directions as are necessary to remedy the position. An order to stop the trial will arise only in a truly exceptional case."*

27. It is argued that if there is an identifiable unfairness or omission that the trial judge can adjudicate on the admissibility of a written response. Attention is drawn to the fact that the respondent was arrested and detained in respect of one count, aggravated burglary, despite facing a further four counts and that he gave evidence that he tried to convey his side of the story to his solicitor but was advised to respond to questions in respect of the detail of the alleged offence by way of "no comment."

28. In addition to the above factors, the respondent's nationality, his lack of knowledge of legal procedures or investigations and the fact that there were contradictions in his interview which failed to be explored by the gardaí are reprised.

29. It is submitted that the trial judge was correct in determining that the statement should be admitted in the interests of fairness and justice on the particular facts of the present case. It is also pointed out that the admission of the statement was subject to safeguards including that the judge highlighted during the course of his charge to the jury that they should bear in mind in assessing the statement and the credibility of same, that this evidence was not subjected to cross-examination.

Discussion

30. The Director's contention is twofold; first that the out of court statement made by the respondent is inadmissible hearsay and second, while she argues that the comments contained at para. 100 of the judgment in *JD* are *obiter*, nonetheless, the Director concedes that there remains a residual discretion to admit an out of court statement where fairness demands of it, but that this was not such a case.

31. The rule against hearsay to which there are many exceptions is, as McGrath observes in his text on *Evidence,* 3rd ed., well explained by Kingsmill Moore J. in *Cullen v Clarke* [1963] IR 368:-

> *"[I]t is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert,…This is known as the rule against hearsay."*

32. There are many reasons underpinning the rule, but clearly if admitted, hearsay evidence denies the opposing party of the opportunity to cross-examine the author of the statement to test the reliability of what is said.

33. Among the many exceptions to the rule concerns the admissibility of a statement against interest in the form of a confession or inculpatory statement. The rationale for this is plain to see and well-acknowledged. Exculpatory statements do not fall within the exception to the hearsay rule, although frequently, statements may contain exculpatory and inculpatory material; a mixed statement. In *People (AG) v Crosbie* (1961) 1 Frewen 231 the Court of Criminal Appeal found that once such a statement is admitted into evidence, it becomes evidence of both the inculpatory and exculpatory material.

34. In *McCormack* which concerned an application by way of judicial review, Charleton J. at para. 5 observed:-

> *"The rule that statements by an accused person were admissible in evidence was grounded on an exception to the hearsay rule that an admission against interest should be considered by the tribunal of fact. A self-serving statement does not fall within that exception, but the vast majority of cases of this kind, as in Clarke's case, are mixed; proving, if accepted, some facts for the prosecution and asserting a defence for the accused."*

He goes on to say at para. 8:-

> *"The duty of the gardaí in investigating crime is to act reasonably and practicably so as to attempt to gather together such statements, and items of evidence, as may assist in a true judgment in the case; Ludlow v. The DPP [2005] I.E.H.C. 299. In consequence, on arresting a suspect it is fair for the gardaí to put forcefully to the accused such portions of the case as might reasonably suggest suspicion. The accused has a right to silence and evidence of an admission is not admissible unless it is proved by the prosecution to have been a voluntary emanation arising from the choice of the suspect; Re National Irish Banks Limited (No. 2) [1999] 3 I.R. 190. The legal burdens cast upon the police in investigating crime are sufficiently well defined. The police are entitled to make rational choices as to whether they put matters to a suspect or as to what matters they put to a suspect. It is not for this Court to determine how the police should go about investigations, apart from laying down general principles for their guidance. This has already been done in the cases cited and I would go no further. I would expressly hold that it is not the purpose of a police interview to enable the accused to make a case on video so that it can be played as part of the prosecution case in front of a jury.*
>
> *The accused has, for that purpose, the option of cross examining witnesses at trial, of calling evidence or of giving evidence himself or herself. Whether an entirely self serving statement by an accused, that is repeated again and again, is admissible as to every repetition as an exception to the rule against self-corroboration, is a matter for the trial judge."*

35. The above passage is apposite not only in the context of the law on the admissibility of statements, but also in terms of the role of the gardaí in investigating crime.

36. The argument is advanced by the Director in the present case that the out of court statement is wholly exculpatory and so inadmissible. The respondent argues that the statement is not in fact wholly exculpatory, and could be said to be a mixed statement.

37. We emphasise that the reason inculpatory statements are admissible is due to the fact that it is presumed that a person would not make a statement against interest unless that statement were true. To state the obvious, the same cannot be said for wholly exculpatory statements and so, as such that category of statement falls foul of the rule against hearsay.

Conclusion on Hearsay Issue

38. In our view, the out of court statement was wholly exculpatory and should it have been made in a garda station, one would expect that the prosecution would not introduce it in evidence.

While the content placed the respondent at the scene, the statement amounts to a total denial of any wrongdoing as alleged.

39. Applying the rules of evidence, the statement was inadmissible.

JD

40. The issues in *JD* were twofold; the first matter was one of procedure and does not concern us, the second concerned whether a person is entitled to have his defence placed on the record by the gardaí and adduced at trial. The focus of the issue before the Supreme Court was the effect of pre-trial or investigation procedures on the fairness of the trial; Article 38 of the Constitution.

41. The appellant in *JD* was observed by the gardaí driving dangerously and four days later he was arrested, cautioned and charged with summary offences for which there is no power to detain. He made no reply after caution.

42. Subsequently, on foot of the DPP's directions, the appellant was charged with the indictable offence of reckless endangerment. He made no reply after charge and caution. He was not detained or questioned.

43. At trial, it was argued that the appellant was not given an opportunity to put his version of events forward as he was not detained or questioned by the gardaí. The application was made at the outset of the trial before any evidence was heard. On application, the judge directed a not guilty verdict on the endangerment charge on the basis of the absence of a memorandum of interview.

44. The matter was the subject of an appeal pursuant to s. 34 of the Criminal Justice Act, 1967 posing the question whether the judge was correct to so direct in the circumstances. Aside from the evident procedural difficulty, the Court of Appeal answered the question in the negative, which was upheld on appeal to the Supreme Court. The Court of Appeal (Birmingham P.) said:-

> *"…It was open to the accused to respond when charged and cautioned. It was open to him to submit an account of events at any stage, if he wished to do so, and to argue at trial for the admissibility of that account. It was also open to him to participate in the trial, and to put forward his version of events by way of cross-examination and/or by giving evidence."*

45. On appeal, the Supreme Court *inter alia* rejected the appellant's contention that the failure to give *JD* the opportunity to respond could be seen as an infringement of a constitutional right in circumstances where the admission of a memorandum of interview at trial was a matter for a trial judge. It was held that if an issue of unfairness in an investigation arises, the matter should be determined by the trial judge on evidence to determine whether there is a real risk of an unfair trial which cannot be remedied.

46. The respondent relies on para. 100 as support for the contention that the trial judge has a discretion to permit an out of court statement where fairness so dictates.

47. It is clear from *People (DPP) v Gormley and White* [2014] 2 IR 591, that pretrial investigations and procedures must adhere to basic fairness. In that regard, a person accused of an offence should be given the right to respond to the allegation made. However, while pretrial procedures may impact on the fairness of a trial, the assessment of whether or not they have actually given rise to an unfair trial is for the trial judge. Whether the accused's trial can be said to be in accordance with A.38 is an assessment to be made on a case by case basis. A trial may still

be a fair trial even if there is an unfairness or even a breach of constitutional rights in the course of an investigation.

48. As stated in *JD*, the right to know the nature of the allegation is an important entitlement, "*so as to ensure that the defendant's full fair procedure rights can be vindicated at trial, such that it is in due course of law."* It is for the gardaí however, to determine how an investigation proceeds, and what questions should be put to a suspect.

49. The respondent contends that the decision in *JD* is support for the proposition that a trial judge has a residual discretion to permit an out of court statement such as in the present case. The Director does not demur from this proposition. However, the submissions filed on behalf of the Director suggest that the comments at para. 100 are *obiter*.

50. The issue in *JD* did not concern an out of court statement and its admissibility or otherwise, but concerned the procedure adopted in the Circuit Court and the correctness of a directed acquittal where a defendant did not have the opportunity to respond to a charge.

51. The court in that regard emphasised the right to a fair trial and in the event of finding a fundamental unfairness, that a trial judge may make such orders as are necessary to remedy the position, but an order to stop the trial will only arise in a truly exceptional case.

52. In our view, it is in this respect that certain resolutions to address the absence of the opportunity to give an account on the endangerment charge were considered. We do not see that the decision is authority for the proposition that a statement made to one's solicitor is admissible per se. Indeed, if one looks carefully to para. 100, the Supreme Court refers to a memorandum of interview when MacMenamin J. says:

> "*If the Circuit Court judge had felt that there was clear identifiable unfairness, then, subject to all else being equal, or being made so, the appellant could, even at a late stage, have been given the opportunity to furnish a written response to the endangerment charge. Whether or not* ***such memorandum of interview*** *would have been admitted in evidence would remain a matter for the judge to determine, in accordance with the general principles outlined earlier."*

53. In our view, a memorandum of interview is clearly different to a statement made to a solicitor. It envisages an interview situation and as it is in a criminal context; this involves interaction with gardaí.

54. We therefore do not agree that *JD* is support for the proposition that a statement made to a solicitor is admissible. Support for this view may be drawn from the comments of the Supreme Court at para. 92 of *JD* in addressing the law on alibi evidence in assessing whether there is a right to be detained and to be able to give one's version of events. The Court took the view that if such right existed, it would:-

> "*radically alter the purpose of the statutory procedures for alibi notices – the notice of alibi could, itself, become the evidence of alibi, without any possibility of cross-examination. If this could be so, it would seem to follow, also, that the contents of any letter written by or on behalf of the accused to the gardaí or to the Director, making exculpatory assertions, would necessarily have to be admissible as evidence of the truth of those assertions. At this point one seems to be very close to finding that the Constitution requires the*

prosecution case to be made by way of sworn evidence, subject to cross-examination, while entitling the defence to make its entire case by way of unsworn assertions".

55. It is quite clear from the above that *JD* does not support the respondent's contention. A statement made to a solicitor is not admissible as evidence of the truth of its contents.

56. It remains the position however, that whether a memorandum of interview made at a late stage to a garda is admissible or not is a matter for the trial judge. Factors which may be relevant to such a determination will vary, but may include that an accused did not have an opportunity to respond to an allegation. However, if he/she did have an opportunity and did not do so, or was dissatisfied with what was said, then, we cannot envisage that an out of court statement of that type would be admitted into evidence. A person may make a statement in a garda station on arrest, as in the present case, or if he/she declines to do so or is dissatisfied with what he or she said or feels the version does not properly reflect the reality of the situation, then the option is always open to give evidence. This is not a breach of the right to silence.

57. As stated at para. 78 of *JD* whether an unsworn statement *"should be adduced in evidence is a matter for the trial judge to determine in accordance with constitutional fairness and the* ***rules of evidence****."*

58. While a response by an accused on an accusation being first put to him or her may be admissible as evidence of consistency should that accused give evidence, this is dependent on an immediate response to the allegation. A statement prepared with legal advice may be furnished to the gardaí, but such a statement is generally deemed inadmissible. In our view, a statement made to a solicitor is generally not admissible even if furnished to the gardaí at the time of arrest. What may happen in those circumstances, is that an accused may be questioned on the statement and that may form part of the body of evidence depending on whether the resulting memorandum of interview is inculpatory or a mixed document in terms of the decisions in *Crosbie* and *People (DPP)* v *Clarke* [1994] 3 IR 289*.*

Conclusion on the Issue of Fairness

59. As we have said, we do not find that a statement made to a solicitor is generally admissible. In any event, fairness did not require that the statement in the present case be admitted.

60. The respondent was afforded every possible opportunity to respond to the allegations. He was advised in advance to seek the advice of a solicitor and he did so. He spoke to his then solicitor before and during his detention. It is clear from the comments of counsel and the run of the trial that he is fluent in English and that was not in issue. He provided background information to the gardaí and chose to make no comment on the events the subject of the allegations.

61. Taking all those factors into account, and excluding the fact that the statement was wholly exculpatory and inadmissible on that basis alone, the statement was also inadmissible in terms of fairness. Fairness did not dictate that the statement be admitted.

Decision

62. The statement made out of court was wholly exculpatory and therefore inadmissible.

63. A statement made to a solicitor is inadmissible.

64. It cannot in the circumstances be said that any unfairness arose which would permit the out of court statement to be admitted ensuring that the trial was conducted in accordance with law.

65. We therefore answer the question posed in the negative.