

Peopl - BURKE

3 Frewen 92. (98 and 99 of ~~1984~~)

THE COURT OF CRIMINAL APPEAL

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The Chief Justice,
Mr. Justice Gannon,
Mr. Justice Lynch

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF
PUBLIC PROSECUTIONS

.v.

DOMINIC BURKE AND JOHN O'LEARY

Judgment of the Court of Criminal Appeal delivered the 10th day
of *March* 1986 by Lynch J.

The Court will deal first with the appeal of the accused John O'Leary.

The first ground of his appeal is that "the learned trial Judge erred in law or alternatively in the exercise of his judicial discretion in failing to grant separate trials herein".

The main argument advanced in support of this ground of appeal is that the accused Dominic Burke made a number of confessions which implicated the accused John O'Leary. It is correctly submitted that Dominic Burke's statements are not evidence against John O'Leary and it is further submitted that it would be impossible for the jury to have excluded such statements of Dominic Burke from their minds when considering the admissible evidence against John O'Leary.

It is well settled law that the fact that one or both of two accused make statements incriminating the other accused is not of itself a reason why separate trials must be ordered. The People .v. Murtagh (1966) I.R. 361: Attorney General .v. Joyce and Walsh (1929) I.R. 526: The People .v. Carney (1955) I.R. 324. It was therefore clearly within the learned trial Judge's discretion to refuse the application for separate trials as in fact he did and this Court sees nothing wrong in his exercise of his discretion in so refusing. However, this

Court is of the view that it should also consider whether in fact the refusal of separate trials has operated in such a way as might have given rise to a miscarriage of justice as the trial actually ran. There was ample evidence admitted at the trial to justify the verdict of the jury against John O'Leary. The learned trial Judge gave a very clear explanation and emphatic warning to the jury to the effect that the statements of each accused were evidence only against himself and were not in any way evidence against the other accused. This Court is accordingly satisfied that this ground of appeal fails.

The second ground of appeal is:-

"The learned trial Judge erred in law in failing to formulate or leave to the jury on the trial within a trial herein separate questions in respect of each and all of the issues of fact raised by the accused."

This ground of appeal raises questions as to how the trial within the trial regarding the admissibility of the statements made by John O'Leary should have been conducted. The Court was referred to the decisions of the Supreme Court in the People .v. Lynch (1982) I.R. 86 and a Judgment as yet unreported of the Court of Criminal Appeal delivered on the 6th June, 1985 in the People .v. Conroy.

John O'Leary alleged that he was promised that he would be charged with a lesser offence and would be given bail if he made the statements which are the subject of this ground of appeal. If these allegations were not proved to be untrue then the statements would be inadmissible in evidence as having been obtained by an inducement. John O'Leary also made a number of subsidiary allegations to the effect that he was untruly told that the Gardaí had found his fingerprints at the scene of the

crime: that they had a witness who knew him for some eleven years and could identify him as having been at the scene of the crime on the day of the crime and further that he was refused an identification parade and was told that the Gardaí had got convictions on less evidence than they had against him.

The learned trial Judge left appropriate questions to the jury on the issue as to whether John O'Leary was promised bail and promised that he would be charged with a lesser offence than murder and the jury brought in a verdict for the prosecution on these issues. It is submitted on behalf of John O'Leary that questions should also have been left to the jury regarding the issues as to whether the Gardaí had told John O'Leary that they had found his fingerprints at the scene of the crime and had told him that they had a witness who could identify him as having been at the scene of the crime and had refused him an identification parade.

It would seem to this Court that these allegations even if substantiated would at most amount to the Gardaí having obtained evidence by means of a relatively minor trick or subterfuge without any actual illegality. There being no actual illegality these complaints could not in themselves constitute grounds for excluding the statements of John O'Leary. It is clear to this Court that this was the view taken by the learned trial Judge and accordingly this ground of appeal fails.

This Court does not decide whether or not it was necessary for the learned trial Judge to submit for the verdict of the jury the questions which he did submit to them or whether he might not have tried these questions himself.

The third ground of appeal is:-

"The learned trial Judge erred in law in holding that

Sergeant Lynagh was not in breach of the Judges' Rules in telling the accused that another person had made a statement implicating him in the crime."

What is referred to in this ground of appeal is Rule Number Eight of the Judge's Rules which apply in this State. Unfortunately, while John O'Leary can write his name he is otherwise illiterate and therefore no purpose would have been served by the Gardaí leaving a copy of the statement of Dominic Burke for the benefit of John O'Leary. If on the other hand the Gardaí had read the statements of Dominic Burke to John O'Leary because he was illiterate that would appear to be in breach of the express terms of the rule.

There is no suggestion by John O'Leary that the Gardaí read to him extracts from the statements of Dominic Burke or asked him questions about the statements. The only thing that John O'Leary alleges is that he was told that the Gardaí had a statement from another person implicating him in the crime.

This Court is satisfied that there was no breach of the spirit of Rule Eight of the Judge's Rules. Moreover, Counsel for the Prosecution in his submissions pointed out that the rule applies only when two or more persons "are charged" with the same offence and at the time of the alleged statement by the Gardaí to John O'Leary he had not been charged. That being so there was no breach of the letter of the rule any more than a breach of the spirit of the rule. There is therefore no substance in this ground of appeal which fails.

The fourth and fifth grounds of appeal can be taken together:-

"(4) The learned trial Judge erred in law in failing to properly or adequately put to the jury the accused's

Defence.

(5) The learned trial Judge erred in law in failing to recharge the jury on each of the matters raised by Counsel for the accused on his requisitions on the learned trial Judge's charge to the jury."

When it came to his substantive defence in this case John O'Leary relied on an alibi. His defence was that he was never at the scene of the crime on the occasion when the crime was committed and it was emphasised by the learned trial Judge that unless the jury were satisfied beyond a reasonable doubt that John O'Leary was present at the scene of the crime when the crime was being committed then he could be guilty of nothing.

The trial commenced on the 26th November, 1984 and continued on the 27th, 28th, 29th, 30th November and 3rd and 4th of December, 1984. John O'Leary's evidence commenced on the afternoon of the 30th November and continued into the 3rd December and his wife Mrs. Mary O'Leary gave evidence on the 3rd December supporting his alibi. On the 4th December another witness a Mr. Hyde gave evidence also supporting John O'Leary's alibi and this evidence was then followed by speeches from Counsel and the learned trial Judge's charge and the verdict of the jury all taking place on the 4th December, 1984.

In charging the jury the learned trial Judge did not re-read his note of the evidence in the case. As already pointed out, however, he emphasised that John O'Leary could be guilty of no offence unless he was present at the scene of the crime and that there was no onus on him to establish that he was not present; that the onus was on the prosecution to prove that he was present.

The fact that the learned trial Judge did not read extracts of the evidence given by the witnesses if anything favoured the accused John O'Leary because his witnesses were most recently in the minds of the jury. While this Court agrees that both the case for the prosecution and the case for the defence must be fairly left by the trial Judge for consideration this Court is of the opinion that this requisition was satisfied in this case and accordingly these grounds of appeal fail.

The last ground of appeal of the accused John O'Leary is that the trial was unsatisfactory. This Court is satisfied that there is no substance in this ground and accordingly the appeal of John O'Leary wholly fails.

The Court now turns to the appeal of Dominic Burke. The main ground of this appeal is the refusal of the learned trial Judge to order separate trials.

As this Court has already pointed out it was within the learned trial Judge's discretion to refuse the application for a separate trial and there was no wrong exercise of his discretion at the time when he made his order refusing the separate trial. As in the case of John O'Leary, however, this Court is of the opinion that it must now consider whether in fact in the case of Dominic Burke the refusal of separate trials operated in such a way as might have given rise to a miscarriage of justice as the trial of Dominic Burke actually ran. In the case of Dominic Burke also there was ample evidence admitted at the trial to justify the verdict of the jury. The Court has already referred to the learned trial Judge's very clear explanation and emphatic warning to the jury as to the statements of each accused being evidence only against himself and not against the other accused. The Court is accordingly

satisfied that this ground of appeal fails.

Dominic Burke also appeals on the basis that the verdict of the jury was perverse and against the weight of the evidence and such that no reasonable jury could have arrived at. As the Court has already said there was ample evidence from the statements of Dominic Burke himself, the evidence of Dr. Harbison and the evidence of John J. O'Leary nephew of John O'leary upon which the jury could arrive at their verdict. There is therefore no substance in this ground of appeal and accordingly the appeal of Dominic Burke also fails.

21/3/86.

Approved.

A handwritten signature in black ink, appearing to read "Kevin Lynch", written over a horizontal line.