[2021] IECA 161

APPROVED

NO REDACTION NEEDED

THE COURT OF APPEAL

[209/19]

Birmingham P.

McCarthy J.

Kennedy J.

BETWEEN

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

RESPONDENT

AND

SIDNEY SUTTON

APPELLANT

JUDGMENT *(ex tempore)* of the Court delivered on the 26th day of April 2021 by Mr Justice McCarthy

1. This is an appeal against conviction. On the 20th of June 2017, the appellant came before the court charged with four counts of assault contrary to Section 2 of the Non-Fatal Offences against the Person Act, 1997; one count of assault contrary to Section 3 of the 1997 Act, and one count of production of an article capable of inflicting serious injury, contrary to Section 11 of the Firearms and Offensive Weapons Act, 1990. The appellant pleaded not guilty to all counts.

2. The appellant appeared for sentencing on the 26th of July, 2019, where the following sentences were imposed:-

four months' imprisonment in respect of counts 1 – 4(the s. 2 assaults),

and

two years imprisonment, with the final year suspended, in respect of counts 5 – 6, being the s. 3 assault and the s. 11 possession respectively.

3. All sentences were to run concurrently and were backdated to account for time already spent in custody. An appeal against those sentences as being unduly lenient was taken by the DPP and was ultimately decided by this Court. This appeal was heard in advance of the present hearing against conviction because of the persistent and repeated delays engendered by the appellant. The entire delay since the conviction appeal came before this Court is attributable to the appellant whose actions forced this Court to proceed with the review of sentence in advance of the appeal against conviction. In any event this judgement deals only with conviction accordingly and indeed with only one issue and one ground of appeal, what has been referred to as the *Almasi* ground (Ground iv).

Ground iv

The trial judge erred in refusing to admit sections of the appellant's Garda interviews that evidenced the appellant's case that the injured party had in fact herself caused her own injuries and then wrongfully and maliciously blamed the appellant and that she had done so before and then further erred in determining that that evidence could only be put before the jury by the appellant giving that evidence in court.

4. After his arrest for the investigation of the offence of assault contrary to section 3 of the 1997 Act the appellant was interviewed and prosecuting counsel sought to edit, in part, the first and second of the memoranda thereof. This editing (to which the trial judge agreed) was appropriate in prosecuting counsel's submission both in the trial court and here in that he had been specifically asked (a request to which he acceded) prior to the commencement of the case not to lead any evidence from the complainant pertaining to the prior relationship of the parties; he submitted at trial that in those circumstances the

portions of the interviews pertaining to the prior history of the relationship of the complainant and the accused should not be received in evidence either. As he put it:- *" the same rule ought to apply, Judge, because one cannot request that the prosecution not lead one side of the story in circumstances where one is seeking to have the other side of the story led in evidence."*

5. Defence counsel submitted that the evidence was admissible "by the defence" (an unknown distinction), but he said he had "*no difficulty whatsoever in the complainant being recalled and being told that this evidence would be asserted against her in interview."* There was obviously some breakdown in communication which is not unknown.

6. It seems to us that there is an incompatibility with the express objection to, and indeed an application to discharge the jury because of, evidence pertaining to events in the relationship previous to those on the night in question (which occurred) and opposition to the editing. Whatever else, the defence case as set out in the interviews on the truth of which it was plain that the appellant was seeking to rely, was not put to the complainant as it certainly should have been.

7. The issue of editing the contents of interviews or more properly memoranda thereof with persons in Garda custody has been addressed by the Supreme Court in *DPP v Almasi* [2020] IESC 35 (a murder charge). It is only as a result of that decision that the law on this topic has been clearly set out in this jurisdiction and the trial long preceded it. There, in the course of interview, it appears that what were characterised as questions or observations sympathetic to the appellant by Gardaí, tending to suggest sympathy for the proposition that the conduct of the appellant would not have amounted to murder were pursued (we seek to put the matter shortly). The prosecution sought such editing on the basis that it would be unfair to the prosecution for the jury to have before it material which, in effect,

undermined the prosecution case by reference to the sympathy shown by the Gardaí to the accused there and which was irrelevant.

8. Charleton J. had this, *inter alia*, to say:-

> *"What is to be sought in this context is a rule justifying the exclusion of evidence because it does not suit the prosecution case. There is no such rule. Examples of prejudice to the accused which might enable the trial judge to edit out either a question put to the accused or an answer may readily be found. For instance, an interviewing officer puts to the accused that he, arrested for burglary, is a complete liar, not just as a provocative question but for the stated reasons that he is a liar as two of his nieces have accused him of rape. That is to be excluded because an accusation of rape does not advance any aspect of a burglary charge. Again, for example, where an accused arrested for murder is asked about a violent sexual assault conviction against him, the relevance of such evidence will fall to be assessed in terms of how the proof of the commission of any such offence, likely to evoke prejudice, could logically advance the elements of the building blocks of the prosecution's contention that the accused committed the homicide charged. Normally, it would not but the analysis of any exception is outside the scope of this appeal."*

and

> *"It is illogical for the prosecution to argue that evidence may be excluded because it runs counter to the case proposed on behalf of The People. The prosecution's duty is to present such evidence as is relevant to the trial of an accused. That may be helpful to the contention that the accused committed the crime charged or ambiguous or even unhelpful. What matters is that the evidence is relevant and that no rule of law excludes its admission. Again, it is the rules of evidence that come*

into play and not any concept of fairness that would reduce the rules of evidence to what has been argued for here to be some kind of ill-defined subsidiary role."

He went on to say that:-

"Under the ordinary rule in R v Christie [1914] AC 545, it has generally been held that statements made in the presence of an accused are admissible in evidence; see Ulster Bank Ireland Ltd v O'Brien & Others [2015] 2 IR 656. It would be facile to translate the French expression 'Qui ne dit mot consent' into a rule that failure to deny an accusation amounts to an admission. The law does not so hold in all circumstances. An ancestral adage comes closer: 'Is ionann toil's éisteacht', silence can be, not must be, acquiescence in a statement. Silence in the face of accusations of fact that would reasonably require an answer may be held against a person. It is not persuasive, however, that simply because an accused gave a laconic answer to the expression of a view that he or she might be innocent, or remained silent, that that dialogue is not admissible under the ordinary rule that what is said in the accused's hearing is evidence. Simply because it does not suit the prosecution case does not alter the general duty to produce the evidence. Here, matters went further. Without fully analysing the underlying rules, which are not in contention here, it may be generally be stated that if the prosecution does not accept a witness's evidence, the duty of disclosure is fulfilled in passing the evidence to the accused to call that person if their proposed testimony is adjudged to be of help. Here, however, the accused was effectively shut out of calling admissible evidence, or of asking the interviewing officers did they accept that the truncated version presented had a different basis because of questions asked by them, on a basis unknown to the law. The proper approach was that there was no reason to edit these statements based either on the prejudice to the accused and

their limited probative value, or prejudice to the right to a fair trial of other parties, or a statutory exclusion of the name of a victim of sexual violence or other exception. Rather, a simple statement by the trial judge would have cured any difficulty. That would have been to the effect that anything said by the gardaí, any view they might appear to have held during the interviews or during the trial, meant nothing and that the case was to be judged solely on evidence."

9. It is contended by the prosecution here that *Almasi* is not to the effect that there is an absolute prohibition on the editing of the contents of interviews with the Gardaí only on the application accused.

10. It is submitted that the portions edited out related to the prior relationship of the parties in circumstances where the accused had agreed that no evidence of such prior relationship be introduced and, indeed, had objected to it and sought a discharge of the jury when ,it was said, some such reference had been made; further it was submitted that aspects of the prior relationship in question were not put to the complainant as being part of, or constituting, the defence when that ought to have been done. We have expressed our view above on the latter point.

11. The question is, therefore, whether or not on the facts of this case such editing ought to have taken place. We think that the material excluded was of considerable significance to the appellant and, indeed, it appears constituted his defence at least in part. We do not necessarily read *Almasi* as excluding all editing of interviews of a person's custody in Garda stations in all circumstances at the instance of the prosecution; we do not need, however, for the present purpose to decide that issue because we think on the facts the material in question should not have been edited out since it went in a core way to the appellant's defence.

12. In the present case it seems it would have been possible to recall the complainant (regrettable though that would have been so that the issues in question could be canvassed with her, distasteful though they are and perhaps lacking in credibility; in a proper case the judge in his discretion, may, wholly exceptionally, allow this.

13. Given the recent decision in *Almasi* we find an error in law and accordingly, we will quash the conviction and allow the appeal.

14. At the date of approval of this judgment we have already made an Order for a retrial.