



THE COURT OF APPEAL

Record Number: 110/2021

**Edwards J.
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT**

- AND -

STEPHEN GIBBONS

APPELLANT

JUDGMENT of the Court delivered on the 27th day of July 2022 by Ms. Justice Isobel Kennedy.

1. This is an appeal against conviction. On the 11th May 2021 at Meath Circuit Criminal Court, the appellant pleaded not guilty to two counts, an offence contrary to section 27A(1) of the Firearms Act 1964, as substituted by section 59 of the Criminal Justice Act, 2006, as amended by section 38 of the Criminal Justice Act, 2007 being the possession of a firearm and an offence under the same section, being the possession of ammunition. On the 14th May 2021, the jury returned a unanimous guilty verdict in respect of count 1 and a not guilty verdict in respect of count 2.

Factual background

2. On the 15th January 2020, Gardaí were on patrol in the Gormanstown and Laytown areas of County Meath. At approximately 8:45pm, they turned into the laneway entrance to Rockleigh House where they encountered the appellant standing on the left-hand side of the laneway halfway down the length thereof.
3. Gardaí stopped their vehicle and asked the appellant his name and purpose for being there. The appellant provided his name, indicated that he was resident at Rockleigh House and told Gardaí that he was out for a walk as his legs were stiff. Gardaí turned the vehicle around and, at this point, could see the appellant returning towards the direction of Rockleigh House.
4. At approximately 9:35pm that same night, Gardaí returned to Rockleigh House where, again, they observed the appellant standing on the left-hand side of the laneway. Gardaí

engaged the appellant in conversation for a second time and he told them he was out walking his dog. When questioned as to why there was no dog with him, the appellant explained that the dog had run away, and he was out looking for it.

5. Gardaí became suspicious of the appellant and informed him that they were going to search him. Gardaí noted that the appellant was wearing a woolly hat, black jacket, green waterproof leggings and trousers. Nothing was found on the appellant's person, and they decided to further search the vicinity.
6. At approximately 11:25pm, 2 hours later, Gardaí located a black plastic bag within an undergrowth at the edge of a ditch. Gardaí retrieved the bag using a fresh pair of gloves and untied it. Inside the bag was a firearm and small glass jar. The magazine of the firearm contained a number of rounds of ammunition and there was also a round of ammunition in the gun breech. Inside the glass jar, there were two gloves, one placed into the other which contained twelve rounds of ammunition. These objects were found approximately 100 metres away from where the Gardaí first spoke with the appellant.
7. The Ballistics Section of the Garda Technical Bureau identified the firearm retrieved as a 9 millimetre Makarov calibre PM-63 RAK submachinegun and the ammunition in the jar as 9 millimetre Makarov calibre rounds of ammunition.
8. The black plastic bag, the firearm, the glass jar and the ammunition were provided to Forensic Science Ireland for analysis. 12 hairs or hair-like material were removed from the firearm and only one of these had follicular root material suitable for DNA profiling.
9. On the 28th April 2020, at approximately 7am, Gardaí arrested the appellant and conveyed him to Ashbourne Garda Station where a buccal swab was taken from him. This buccal swab was transferred to Forensic Science Ireland.
10. Forensic Science Ireland generated profiles from the hair with follicular root material and the buccal swab of the appellant and concluded that the DNA profiles generated matched.

Grounds of appeal

11. The appellant appeals his conviction on the following sole ground:

"The verdict is perverse in the circumstances and should be quashed."

Submissions of the appellant

12. The appellant acknowledges that only under rare and exceptional circumstances would this Court quash a conviction based solely on an assessment of the evidence which went before the jury. The appellant submits this case falls into this exceptional category.
13. It is the appellant's position that it is inherently contradictory that the appellant should receive a unanimous guilty verdict in respect of the count relating to possession of the firearm and receive a unanimous not guilty verdict in respect of the count relating to possession of ammunition where both items were found together within the same tied plastic bag.

14. The appellant submits that the divergent verdicts in respect of the two counts are explainable by assuming that the jury placed considerable weight on the fact that a hair with a matching DNA sample to the appellant was located on the firearm.
15. It is submitted that such a determination must be considered in light of the evidence provided by Dr. Breslin that:
 - a) A hair is a moveable object which was capable of being placed on the gun by secondary transfer including in circumstances where the person who shed the hair has long parted company with it.
 - b) It was not possible to say anything about the age of the hair which could have been shed quite some time ago.
 - c) Multiple sources of DNA were in contact with the firearm, either by direct or secondary contact, and it was entirely possible some of the people whose DNA found its way onto the firearm never actually had contact with it at all.
 - d) It was not possible to exclude the possibility that the hairs weren't actually inside the bag before the firearm was placed in it.

And the evidence provided by the defence expert; Mr. Wilson that:

- a) The hair is a moveable item.
 - b) It was not possible to state when the hair was shed, when it was deposited onto the firearm or how it was deposited onto the firearm.
 - c) As a moveable object, hair can be transferred from one surface to another and it doesn't necessarily mean there's direct contact or direct proximity.
 - d) It was possible the appellant's hair could have been deposited or came to be placed on the gun entirely without his knowledge or involvement.
16. In this respect, the appellant submits that if the jury was influenced by the forensic evidence presented in returning a guilty verdict (which appears likely given the divergent verdicts delivered) such a verdict does not safely correspond with the forensic evidence presented especially in light of the concessions of Dr. Breslin and Mr. Wilson as to how the hair may have arrived in situ.
 17. The appellant accepts that exceptional circumstances are required before a jury verdict may be regarded as perverse. This is set out in the case of *The People (DPP) v Tomkins* [2012] IECCA 82 wherein it was held that:

"This court will only quash a decision as being perverse where there are very serious doubts about the credibility of evidence which was central to the charge, or

where a guilty verdict, even by a properly instructed jury was against the weight of the evidence.”

In this context, the appellant submits that the forensic evidence relied upon did not support the guilty verdict ultimately reached.

18. Reliance is placed on *The People (DPP) v Alchimionek* [2019] IECA 49 insofar as it highlights the requirement of the appellate courts to intervene where a jury’s verdict is “not supported by any evidence in the case” or is “against all of the evidence in the case” and therefore, perverse, and also *The People (DPP) v Hearn* [2020] IECA 181 wherein Donnelly J. noted:

“The question that must be answered in the present case is whether a reasonable jury properly charged, applying their minds to the facts of this case, could properly have reached the decision which they did?”

19. The appellant submits that insofar as it applies to the instant case, the answer is emphatically in the negative.

Submissions of the respondent

20. It is the respondent’s position that an appellate court is not entitled to interfere with a verdict on the grounds that it was against the weight of the evidence, as such a task would involve the appellate court substituting its subjective interpretation of the evidence to that of the jury which fundamentally undermines the primacy of the jury’s role and verdict.

21. The respondent quotes what she calls the appellant’s “second leg of the appeal” as follows:

“A reasonable question which might be posed is whether in light of the evidence led by the prosecution there was “credible evidence” to support the verdict and/or whether the verdict was “against the weight of the evidence”? It is respectfully submitted that the forensic evidence, upon which it must be assumed the jury relied heavily, did not support the verdict.”

22. She notes that this is a quotation from the dicta of MacMenamin J. in *Tomkins* and places it in context by reference to the passage immediately prior to the quotation:

“Clearly therefore, the possibility of a verdict being set aside on the grounds of perversity exists, but it is a very exceptional jurisdiction. Also in *The People (D.P.P.) v. C.(P.)* [2002] 2 I.R. 285, Murray J. emphasized the reluctance of the Court of Criminal Appeal to interfere with a verdict in a situation where the credibility of a witness is a sole or principal ground of challenge. Speaking for this court, he said that the assessment of a witness’s credibility and the weight to be attached to that evidence, is a matter “manifestly within the province of the jury” ([2002] 2 I.R. 285 at 296).”

In this way, the respondent says that the appellant, in posing the question as he did, set the standard too low.

23. The respondent relies on *Alchimionek*. It is noted that in that case, Birmingham P. describes the instances in which an appellate court should interfere with a jury's verdict as "rare and exceptional."
24. Further, the respondent distinguishes the present case from the cases of *The People (DPP) v Maughan* [1995] IR 304 and *Hearns*. In *Maughan*, the jury were directed that the counts on the indictment were alternatives and nevertheless, convicted on each and in *Hearns*, the jury acquitted on one of the counts and convicted on another. In this case there is clear distinction between the counts in terms of possession as they relate to two different items and there is an evidential distinction as there was a forensic connection between the appellant and the firearm and none linking the appellant with the ammunition.
25. It is the respondent's position that the forensic evidence was presented by the prosecution as one piece of evidence in a circumstances-based case. The respondent lists the circumstantial evidence. Furthermore, it is submitted that the mere fact of Dr. Breslin and Mr. Wilson's inability to rule out the proposition that the hair located on the firearm could have been deposited indirectly did not set at nought its evidential significance and that this is something which is clear from the evidence of both experts.
26. Finally, the respondent notes that the trial judge emphasised in her charge to the jury that the mere presence of the accused's DNA at the crime scene is not determinative of his guilt and that the jury requested a transcript of Dr. Breslin's evidence after one hour of deliberations. In this way, it is submitted that it is speculative to suggest that the jury misunderstood the forensic evidence or its role in the trial.

Discussion

27. The focus of this appeal lies with the contention that the verdict was perverse. It is contended that there were, in effect, only two options open to the jury; to convict the appellant of both counts or acquit him of both counts. It is said to convict of one count and acquit of the other on foot of the evidence, where the core evidence was the forensic evidence is perverse. Mr. Orange SC for the appellant argues that while there was other evidence of a circumstantial nature, the DNA was central to the prosecution case and that there is an inherent contradiction in the jury verdicts where the evidence disclosed that both items were located in the same tied bag. This points, it is said, to a misinterpretation or misunderstanding by the jury of the forensic evidence and/or a misunderstanding or misinterpretation of the judge's charge on the legal concept of possession.

The Legal Principles

28. Firstly, in *Tomkins*, MacMenamin J. addressed the role of this Court's predecessor in appeals of this nature wherein he stated at para. 18:

"In response to that contention it is necessary to make clear that the arguments made in this appeal is that the verdict was perverse, this court has repeatedly emphasised that it has no power to substitute its own subjective view of a case for that of the jury."

29. He then emphasised that a decision by this Court that a verdict is perverse is a very exceptional one and quoted from the well-known passage in *The People (DPP) v Egan* [1990] ILRM 780 where McCarthy J. said at p 784:

".....the jurisprudence of the Court of Criminal Appeal since 1924 as, from time to time endorsed by this court is clear. Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it. The concepts of lurking doubt, feel of the case, gut feeling, or back of my mind, are foreign to the judicial role as I understand it. Juries are regularly enjoined to disregard their personal feelings or their subjective assessments and to concentrate on the evidence as it is sworn to in the witness box. In many instances what may be difficult and obscure to a trial judge is crystal clear to a jury; the converse is also very possible. To permit verdicts on criminal trials to be upset upon such subjective consideration would seem to me to be a denial of the validity of trial by jury."

30. The very exceptional nature of this jurisdiction was recently reiterated by Birmingham P. in *Alchimionek*, as follows:

"As has been made clear in cases such as *DPP v. Tomkins* [2012] IECCA 82 and *DPP v. Nadwodny* [2015] IECA 307, a decision to quash a verdict because it is perverse is a very exceptional one. This reflects the primacy of the jury in our system of criminal justice. Ordinarily, it is not for appellate courts to substitute their own view of the evidence for that of the jury. A further practical reason why such situations are rare and exceptional is that in any given case where the state of the evidence is such that a conviction would be perverse or would give rise to a miscarriage of justice, one would expect to see an application to the trial Judge to withdraw the case from the jury. If, in such a case, the issue is in fact considered by the jury, then usually, it will be because a Judge, having heard the matter argued, has come to the view that it is a case where a properly charged jury could properly return a verdict of guilty."

31. As can be seen from the foregoing, the threshold to allow an appeal on the basis of perversity is a high one and requires very exceptional circumstances. In *Alchimionek*, this Court quashed the verdict where the Court found that the jury's verdict "was not supported by any evidence in the case, was against all of the evidence in the case, and in those circumstances, has to be regarded as perverse."
32. In the present case, the prosecution relied on the forensic evidence as but one component of the evidence in a circumstantial evidence case. That evidence was part of the overall evidence presented to the jury in conjunction with the other evidence where the Gardaí

observed the appellant on two separate occasions within an hour of each other in the laneway proximate to where the firearm and ammunition were ultimately located. The jury were entitled to take account of that evidence, of the appellant's responses when asked to explain his presence in the laneway, his demeanour and the clothing worn by him. Whilst the forensic evidence was undoubtedly the primary evidence against the appellant, it was not in and of itself determinative of the issue to be decided by the jury.

33. The trial judge advised the jury as to how to approach the expert testimony and cautioned the jury not to attach undue weight to the evidence when she stated:

"So, you also need to evaluate the expert evidence for its strength and weaknesses. And again, ladies and gentlemen, as with every other form of evidence, this is a matter for you. Do you understand? All of the evidence in the case. Expert evidence. All of the evidence is a matter for you. You are the judges of fact. The fact that someone is an expert doesn't take from you your role as judges of fact. Do you understand? You will evaluate that evidence just as you evaluate the other evidence in the case. Remember that while experts deal with particular parts of the case you receive all of the evidence in the case and it is on all of the evidence that you must reach your final decision. Do you understand, ladies and gentlemen? In relation to the DNA evidence you decide what weight you wish to attach. Do you understand, ladies and gentlemen? It is important that you know that mere presence of DNA at a crime scene should not be enough itself to prove guilt beyond a reasonable doubt. There could be an innocent or an accidental association. It's up to you to decide whether there is or there is not such a possibility on the evidence. So, for this reason you must look at all of the evidence in relation to Mr. Gibbons and to decide the issue of guilt or innocence in light of all of the evidence in the case. Do you understand? "

34. It is apparent from the evidence that the hair which was analysed and linked to the appellant was found adhering to the thick lubricant on the firearm. This lubricant was, on the prosecution evidence, there in order to prevent rusting if the weapon were stored outside. The ammunition was found in a glass jar in the same bag in which the firearm was located, which on any rational analysis, could amount to weaker evidence against the appellant insofar as constructive possession is concerned. One could say that this jury clearly followed the trial judge's directions to consider each count separately and concluded that there was evidence of guilt to the required standard regarding the firearm but not so regarding the ammunition.
35. The judge provided the jury with a comprehensive summary of the evidence in the case, which, of course, included the evidence from the prosecution and defence experts. It must also be said in the context of the assertion of misunderstanding/misinterpretation that there appears to be little distinction between the two experts, although it is said that in light of their evidence the verdict did not safely correspond with the verdicts returned. This is advanced on the basis of the evidence disclosed that a hair is a moveable item which could be placed on the firearm by secondary transfer, that it could have been shed

at any time or that it could have been deposited on the weapon without the appellant's knowledge.

36. Insofar as the above is concerned, these were matters of evidence entirely within the remit of the jury to accept or reject as it thought fit. On no analysis could it be said that the verdict was not supported by any evidence or that the verdict was against all of the evidence in the trial. On the contrary, the verdict may well be indicative of a careful jury assessing the entire evidence and carefully observing the directions of the trial judge.
37. Insofar as it is said that the jury may have misunderstood or misinterpreted the directions on constructive possession, again, the judge carefully and properly directed the jury on this aspect and there is no reason to believe the jury failed to follow her directions or indeed ignored her directions in this or in any other respect. In fact, it could be said that the jury followed her directions most carefully in that it clearly considered each count separately.
38. The comments by O'Malley in his text on *The Criminal Process* at para.14.153 on inconsistent verdicts are apposite where he says:

"Irish law, which follows English law in this respect, is somewhat more flexible in dealing with inconsistent verdicts, and it is guided by two fundamental principles. First, the onus of proving inconsistency rests squarely with the party challenging the verdict. Secondly, the test is one of substantive rather than formal inconsistency. It is not merely a question of asking if a conviction on one charge is formally incompatible with acquittal on another. Rather the question is whether a reasonable jury, applying their minds to the facts of the case, could properly have reached the decision which they did. It is only if this question must be answered in the negative that a conviction will be quashed for inconsistency."
39. It seems to us in the present case that there was evidence on which a jury, properly charged could have reached their verdict. There is no suggestion in the present case that the jury were not properly charged. Although there was evidence which, if accepted by the jury could have led to a guilty verdict on both counts, there was specific evidence in respect of the possession of the firearm, that of course being, the hair adhering to the viscous substance on the weapon. The verdicts did not amount to an unlikely view of the evidence, but one which the jury could, on the evidence properly have concluded. The fact that the jury did not return a guilty verdict on the count of possession of the ammunition in the circumstances, but did so in respect of the other count, did not render the verdict inconsistent
40. Accordingly, the appeal is dismissed.