PEOPLE (DPP) v. McKEON

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Finlay P.
Hederman J.
McWilliam J.

COURT OF CRIMINAL APPEAL

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

3 FREWEN 2

SEAN MC KEON

Judgment of the Court delivered on the 12th day of December 1984 by Finlay P.

This is an application by the Applicant for a Certificate of Leave to Appeal against his conviction by the Special Criminal Court on the 23rd of June 1983 of an offence of robbery contrary to Section 23 of the Larceny Act, 1916 as substituted by Section 5 of the Criminal Law Jurisdiction Act, 1976 in respect of which he was sentenced to 10 years and of an offence arising out of the same facts of carrying a firearm with intent to commit an indictable offence, namely, robbery in respect of which he was sentenced to seven years.

The Applicant sought an enlargment of time for the application which was late and it was granted at the commencement of the hearing.

The grounds of appeal were five in number and were as follows:-

"(1) The Court of trial erred in its discretion in not acceding to the request of Counsel on behalf of the Appellant to disqualify themselves from hearing the case against the Appellant, two members having sat on a prior trial relating to the Appellant.

(2) The Court of trial erred in not granting a separate trial to the Appellant, such application having been made by Counsel on behalf of the Appellant at the

outset of the trial.

(3) The Court of trial erred in consistently correcting, amending and advising the State their proofs throughout the course of the trial which consequently prejudiced the Appellant.

(4) The Court of trial did not treat the evidence of Gerard Ryan an alleged accomplice and Mary Ryan the wife of the said Gerard Ryan with the utmost caution having regard to the nature of the State's case against the Appellant and in particular having regard to the involuntary nature of the statement made by the said Gerard Ryan and the said Mary Ryan.

(5) The evidence was by its nature insufficient to enable the Court of trial to find the Appellant guilty of charges one and seven."

Counsel on behalf of the Appellant conceded in the course of his submissions that the grounds upon which a separate trial had been sought did not manifest themselves during the course of the trial and that he could not pursue that ground of appeal.

Counsel, with the permission of the Court, argued the grounds of appeal, numbers 3,4 and 5 before he argued ground number 1 and the Court will deal with the grounds in the order in which they were argued before it.

GROUND NUMBER 3

The facts on which this submission was made consisted of a number of instances where the Court of trial either requested witnesses to be

lead in a particular order or indicated that if evidence which the prosecution sought to tender was to be adduced that notices of additional evidence would have to be served. This Court is satisfied that all but one of these instances related to matters which formed a trial within the trial before the Special Criminal Court and related to facts and circumstances surrounding the admission of certain alleged voluntary statements made by the Applicant all of which were, in fact, ruled as inadmissible by the Special Criminal Court. The instance which did not affect the admissibility of statements was where Gerard Ryan a witness as to certain events which occurred prior to the happening of the robbery was called at the outset of the case and before any evidence of a robbery had been tendered and where the Court of trial suggested that it would be more appropriate that he should be called at a later time. Reliance was placed on the fact that at that time replies to two or three preliminary questions seemed to indicate that Gerard Ryan was not then going to give evidence in accordance with the statement from him contained in the Book of Evidence but that when called at a later time in the trial he did so.

In so far as the interventions of the Court affected the admissibility of statements which they excluded there can be no question at all of these interventions prejudicing the accused or causing, in any way, a mis-trial. The Court rejects the submission that the request by the Court to call witnesses in a certain order, which, notwithstanding the ordinary right of the prosecution to call the witnesses in the order in which leading Counsel should decide, the prosecution accepted and complied with, could be prejudicial to the interests of the accused or create any form of mis-trial. This ground, therefore, also fails.

GROUND NUMBER 4

The evidence of Gerard Ryan and of his wife Mary Ryan in so far as it affected this Applicant constituted evidence of the arrival of this Applicant to the Ryans' residence and farm on the morning of the robbery in company with another man, of his departure shortly prior to the robbery, the farm being relatively close to the scene of the robbery, of his return at a time after the robbery had been completed, of the storing or hiding of a tin box and money identified as having been taken in the course of the robbery by Gerard Ryan at the request and with the concurrence of this Applicant and of certain other matters capable of being associated with the crime.

Gerard Ryan was charged jointly with this Applicant and with another person in respect of the offence of the robbery. His case came on some months prior to the hearing of this trial before the Special Criminal Court he pleaded guilty to certain charges and a suspensory sentence was imposed on him. He was, therefore, an accomplice, furthermore, in the course of his evidence he stated that after a suspensory sentence had been imposed on him he made the statement on which his evidence in the trial of this Applicant was based and that he made that because he was told by a member of the Garda Siochana that he would have to make it and that if he did not he could be asked to serve the sentence which was imposed on him.

Mary Ryan the wife of Gerard Ryan gave evidence corroborative of many of the details of the evidence given by her husband. Before doing so she protested to the Court that she had, shortly before being called in evidence, been visited at night by armed men who sought to intimidate her from attending and giving evidence. The Court expressly excluded any suspicion that either of the accused before it

was involved in that intimidation. She also gave evidence that she had been informed by a member or members of the Garda Siochana that, having regard to the fact that she had made a deposition in the case in the District Court, she could be charged with perjury if she gave different evidence in the trial.

These pressures put on both of these witnesses to give evidence were properly and strongly condemned by the Court of trial and with that condemnation this Court would very fully agree.

However, it is necessary to consider the way in which the Court of trial approached these two witnesses having regard:-

(a) to the fact that Gerard Ryan was an accomplice and that his wife, Mary Ryan, was his wife with an obvious interest in his welfare, and

(b) to the evidence of pressure which had been given by each of these witnesses in regard to their giving of evidence.

In the course of the verdict of the Court of trial it is stated as follows:-

"The Court is conscious of the fact that it is obliged to consider the evidence of both Mr. & Mrs. Ryan with the greatest care, having regard to the fact that Gerard Ryan was undoubtedly an accomplice of the accused, that Mrs. Ryan is his wife and having regard to what they admitted in evidence was stated to them by members of the Garda Siochana. Having done so and having witnessed their demeanour in the box during their direct evidence and their answers in cross-examination the Court is satisfied beyond all reasonable doubt that they are truthful witnesses

and accept their evidence. Mrs. Ryan was undoubtedly distressed during the earlier portion of her evidence, but subsequently gave her evidence in a clear and definite manner. Mr. Ryan also gave his evidence in a clear and definite manner and both witnesses are regarded by the Court as giving a truthful account of what transpired on the morning of the 12th of February 1982."

Dealing with the effect of the Ryans' evidence the Court continued by saying:-

"Having regard to the fact that Mr. Farrell's Datsun motor car was discovered in the vicinity of Geraghtys' gateway, which is shown on the map proved in evidence, the Court is satisfied, beyond all reasonable doubt, that those engaged in the robbery travelled from Clane in the direction of Athgoe. Accepting, as it does, the evidence of Mr. & Mrs. Ryan the Court is satisfied that both the accused ... returned to the garage on Ryans' land before 11.00 a.m. Mrs. Ryan's evidence that they returned while she was listening to the "Gay Byrne Hour" as it was coming to an end establishes the time of their return and on the basis of Gerard Ryan's evidence that they had, at that time in their possession, the money stolen from Mr. Farrell and the gun containing ammunition and having regard to the time at which the robbery took place, the distance which they had to travel from Clane, the time involved in transferring the money from the Datsun motor car to the green Avenger, the Court is satisfied, beyond all reasonable doubt, that the two accused carried out the said robbery, one of them actually producing the gun to Mr. Farrell and escaping in the Datsun car and the other escaping in a Renault car and that they were engaged in the joint enterprise...."

The Court of trial was entitled to accept the evidence of an accomplice whether corroborated or uncorroborated provided it approached such evidence with the caution provided for by law. The verdict of the Court, a portion of which has just been quoted, very clearly indicates the precise manner in which the Court approached the evidence of Gerard Ryan and of Mrs. Ryan having regard, not only to the status of Gerard Ryan as an accomplice, but to the relationship between the two witnesses and to their statements concerning the pressures that have been put upon them. Their acceptance of the evidence of these two witnesses is expressly and specifically placed upon the impression they made upon them while giving evidence in the witness box and in those circumstances, in accordance with the principles already frequently enunciated, this Court cannot and does not interfere with the finding of fact so made.

This ground of appeal, therefore, fails.

GROUND NUMBER 5

The submission made on this ground was, in effect, a repetition of the submission made on ground number 4 and depended upon the rejection by this Court on appeal of the acceptance by the Court of trial of the evidence of Gerard Ryan and Mary Ryan. Having regard to the view this Court takes with regard to ground number 4 this ground must also fail.

GROUND NUMBER 1

At the commencement of the trial Counsel on behalf of this Applicant applied for an adjournment of the trial and that the trial be taken up before a differently constituted Special Criminal Court. The grounds for this application were, that this Applicant had within approximately two months prior to the date of this trial been tried

on a charge of armed robbery of a Bank by the Special Criminal Court, two members of which were of the Court presiding at this trial, and had been acquitted.

Upon this application being made the following dialogue took place between the Court and Counsel:-

"Presiding Judge: It is rather late to be making this application, Mr. White, isn't it.

Mr. White: Well they are my instructions.

Presiding Judge: The accused has been aware of the fact that his trial is fixed for this date for some considerable time.

Mr. White: His trial has been fixed for some time, I must concede that, but I wasn't aware that the personnel had been the same until as recently as Friday.

Presiding Judge: The application could have been made on Monday, you have had ample time if there was any validity in your application to enable a separate Court to be constituted and to come in when we are here and all the witnesses are here, to make this application is a bit late in the day.

Mr. White: They are my instructions, to make the application, I should say that I only came into the case on Friday, and it was at that stage ...

Presiding Judge: I am not criticising you at all, Mr. White.

Mr. White: I am not making that as an excuse either.

It was only at that stage that certain matters came to my attention with regard to the matter.

Presiding Judge: The Court will refuse the application made on behalf of the accused. The Court, as constituted of experienced Judges, are perfectly capable of assessing the evidence of each particular case. The case to which Mr. White refers us with regard to the accused having been tried before this Court on a previous occasion, two of the members of this tribunal presided over that trial, the accused was acquitted in respect of that charge. The Court is quite satisfied that it is perfectly capable and will deal with this case purely on the evidence adduced before it and not have regard to any factors in that case."

Having regard to this portion of the transcript, Counsel on behalf of the Applicant submits that it is open to the interpretation that one of the factors leading to the Court exercising its discretion in refusing to withdraw from the trial and have a different Court constituted for it was the lateness of the application and that that would not be a valid ground, whether as a sole ground or as one of many grounds, for exercising a discretion which should solely have been exercised in the interests of the justice of the trial.

Counsel on behalf of the Director of Public Prosecutions, on the other hand, contends that the words used by the presiding Judge "you have had ample time, if there was any validity in your application,..." clearly indicate that what was in the mind of the Court was not any

inconvenience arising from the lateness of the application, but a belief that the application was not bona fide by reason of the late time at which it was made. The question of the review on appeal of the exercise of the discretion by the Special Criminal Court to refuse an application to discharge itself from a case and constitute a different tribunal of that multiple Court was considered by this Court in the case of the D.P.P. v. Thomas McMahon in which Judgment was delivered on the 25th of March 1983. In the course of that Judgment which was delivered by Hederman J. it was stated as follows:-

> "This Court has, of course, a right to review the conduct of the Special Criminal Court and if it is satisfied that the Court wrongly exercised its discretion in continuing with a case after inadmissible prejudicial evidence had been elicited it could set aside the conviction, but before so doing, the Court must be satisfied that the discretion was incorrectly used to the detriment of the accused and vitiated fair procedures."

This Court accepts that succinct statement of the principle applicable and applies it to this case.

This Court is satisfied that the members of the Special Criminal Court presiding over this trial, all of whom are experienced members of the judiciary, would in fact have no difficulty, and almost certainly had no difficulty, in excluding from their minds the evidence which they had heard in the previous trial of this Applicant which resulted in his acquittal. Quite apart from the Special Criminal Court the trial of persons necessarily takes place in the District Court on summary charges by a Judge sitting without a Jury and in the Circuit Court on appeal by way of re-hearing, from summary convictions by a Judge sitting without a Jury, on different charges at different times the particula Judge being inevitably aware of a previous trial and frequently of a

previous conviction. That fact could not be taken as necessarily or inevitably disqualifying the Judge concerned nor vitiating the fairness of the hearing before him.

This Court has considered the interpretation by Counsel on behalf of the Director of Public Prosecutions placed on the remarks of the Court in the extract quoted above, dealing with the lateness of the application and the inconvenience caused by it being made as the trial was about to commence, and it is not satisfied that it must, inevitably, be correct. It could hardly be said that the application to seek a trial by a differently constituted tribunal on a serious charge of armed robbery on a bank, almost identical to a charge on which he had been tried by some of the members of the tribunal on a very recent occasion, was either bogus or frivolous. Having regard to the seriousness of the charges facing this Applicant on his trial and the similarity of the charges on which he had shortly before been acquitted, it could be felt that there was a possibility of prejudice to the Applicant on his trial. It could also be felt that there was a possibility that the Court, in referring to the time factor, had attached importance to it when exercising its discretion not to obtain a differently constituted tribunal from amongst the membership of the Special Criminal Court, which is a court of multiple membership.

As justice must not only be done but must be seen to be done, this Court is of opinion that the conviction and sentence should be quashed and, treating the application for leave to appeal as the hearing of the appeal, so orders. Having regard to the view of this Court on the other grounds of appeal submitted, however, this Court directs a new trial of the Applicant.

20/12/1984