

Prof. CALLAN

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Finlay C.J.
Barron J.
Blayney J.

THE COURT OF CRIMINAL APPEAL

112/85

THE DIRECTOR OF PUBLIC PROSECUTIONS

v.

NOEL CALLAN

JUDGMENT OF THE COURT delivered on the 14th day of May 1986 by
FINLAY C.J.

This is an application for a Certificate of Leave to appeal against a conviction by the Special Criminal Court on the 3rd December 1985 on Count No. 1 for the capital murder of Sergeant Patrick Morrissey on the 27th day of June 1985, he then being a member of the Garda Siochana acting in the course of his duty, and on Count No. 2 for a robbery contrary to Section 23 of the Larceny Act 1916, as inserted by Section 5 of the Criminal Law (Jurisdiction) Act 1976, from Sean Boyle of approximately £25,000 in cash.

The uncontested facts as to what occurred at the Labour Exchange at Ardee where the robbery occurred and thereafter prior to the shooting of Sergeant Morrissey

were thus set out in the verdict of the Special Criminal Court and are a convenient description of the events out of which these charges arose.

"1. At 9.55 a.m., approximately, on the 27th day of June 1985, Sean Boyle the Manager of the Social Welfare Office at Dundalk Road, Ardee in the County of Louth was robbed of the sum of £25,000 in notes and a quantity of silver amounting to £250 approximately.

2. The robbery was executed by two men wearing combat jackets of a different type, balaclavas, and carrying firearms which were used during the execution of the robbery.

3. The two men took possession of Mr. Boyle's car, a Stanza motor vehicle, registration No. RZY 777, made good their escape from Ardee, travelling first in the Dunleer direction and then back in the direction of the Drogheda Road.

4. While the robbery was in progress an official garda car being driven by Guard Long in which Guard Brendan Flynn was travelling as a passenger and who were in garda uniform, came to the scene.

5. They slowed down as they approached the Social Welfare Office and noticed a man wearing a balaclava and a camouflage jacket and carrying a shotgun, emerge from behind Mr. Boyle's car.

6. The car then accelerated in the direction of Dunleer and as it was doing so two shots were fired in its direction by one of the raiders, the raider

wearing the balaclava and the multi-coloured camouflage jacket.

7. The Stanza car sped in the direction of Dunlee and as it did so Mr. Cluskey threw a stone through the passenger window, shattering the glass therein.

8. Garda Long and Garda Flynn turned the patrol car at Dawson Demesne and returned to the Social Welfare Office and then proceeded to Castle Street where they collected the late Sergeant Patrick Morrissey who was in full garda uniform, and they then travelled in the direction of Tallanstown where they set up a roadblock.

9. The raiders abandoned Mr. Boyle's car at or in Farrell's Field, Pepperstown, Ardee, where it and a black tin containing £25,000 which had been taken from Mr. Boyle's car were subsequently discovered.

10. Shortly after setting up the roadblock, a motorcycle approached, turned right at the junction on the incorrect side of the traffic island.

11. Garda Long noticed that the driver of the motorcycle was wearing a camouflage jacket similar to that worn by the raider who had shot at the car in Ardee, and that the pillion passenger was wearing a combat jacket.

12. Sergeant Morrissey, Guard Long and Guard Flynn got back into the patrol car and followed the motorcycle in the direction of Rathbrist Cross.

13. They had the motorcycle in view from a distance of approximately 200 yards until it rounded the left-

hand bend at Rathbrist Cross.

14. When they rounded the bend Garda Long and Garda Flynn saw the same two men who were on the motorcycle running across the road and going into the main entrance to McDermott's house.

15. The motorcycle had crashed into a motor vehicle registered No. 346 TZU, the property of Mrs. Mallon.

16. In the immediate vicinity of the scene of the crash was found

(a) a green carrier bag containing a sawn-off shotgun and a sawn-off rifle similar to the guns used in the execution of the robbery at Ardee

(b) a bag containing coins

(c) a blue balaclava

(d) a black glove

(e) considerable quantities of broken glass and a black glove of knitted material."

There was further uncontested evidence of the subsequent events. Two of the occupants of Rathbrist House, Sean Pierre McDermott and Mary Kindlon, heard a shot being fired and Mr. McDermott then saw one of the persons who had been on the motor-bicycle standing over Sergeant Morrissey on the avenue, close to the house, and firing a second shot which killed him. Almost at the same moment Mr. McDermott saw the second man at the front of the house

walking in the direction of where Sergeant Morrissey was, and so in a position from which he must have seen the shooting. This second man appeared to have blood on one of his hands which he held over his head.

Evidence was then given of a trail of blood from Rathbrist House through fields, lanes and roads, which eventually led to a barley field some distance away where the applicant was found in a ditch, partly covered by grass and other vegetation, in an injured condition, bleeding from the hand. Another man who was the co-accused with the applicant, Michael McHugh, was found in the same field. In the field, not far from the applicant, was found the gun established to have been used in the shooting of Sergeant Morrissey, and a balaclava helmet. The applicant was arrested and taken from the ditch by a number of members of the Garda Siochana. As he was being escorted from the field and being linked by the Gardai, he asked: "Is the guard dead?", and was informed that he was. He was then cautioned by Detective Sergeant Finnegan.

The evidence was that the applicant then said: "Why

did he follow us, didn't he know that he would be shot?". The applicant became weak in crossing the field to get to the garda car and was subsequently carried to that car and driven straight to the Casualty Department of the Louth County Hospital.

Sergeant Finnegan on arrival at the hospital made a note of the conversation which it is alleged the applicant had while crossing the field, signed it himself but did not submit it to the applicant to be signed as the applicant was then apparently in a semi-conscious condition, or in a coma. The Sergeant did not at any time proffer the note to be signed by the applicant.

On a later date, when travelling to the Special Criminal Court in Dublin the applicant was accompanied by a number of members of the Garda Siochana and on travelling through the town of Ardee it was alleged that the applicant stated: "It was a bad day we ever came to this town. The Sergeant would be alive only for us." The evidence was that that conversation was taken down almost immediately by Detective Garda Hanley and, on arrival at Dublin, at

the end of the journey, was proffered to be signed by the applicant who, though he had previously acknowledged that it was correct, refused to sign it.

The applicant gave evidence in his own defence. He stated that he had been asked some days before the robbery was committed, by a person whom he knew to be in the Republican Movement to do a job for him which consisted of taking a motor-bicycle and going to a field at Pepperstown near Ardee and collecting a bag or parcel that would be given to him there on the morning of the 27th June. The applicant states that he was not informed as to what was in the parcel or what the purpose of the operation was, but he was merely to bring it home with him where it would be collected. He was given a motor-bicycle for that purpose. He stated in evidence that he cycled to Pepperstown on the morning in question and that when he got to the field he observed another motor-bicycle already parked at the far end of it, so he rode up to it and waited there and that after a relatively short time a car arrived in a great rush; two men got out of it; one of them handed him a bag

that he did not know what was in it, but it was heavy and green, and told him to get up on the pillion of one of the motor-bicycles which this man drove away. The other man got up on the second motor-bicycle and drove away. That he was on the pillion of this motor-bicycle when it crashed into Mrs. Mallon's car; that he dropped the bag but he still didn't know what it contained; that he was very dazed and staggered up the avenue; that he did not hear a shot; did not see Sergeant Morrissey being shot, but after a time continued on in a dazed condition with the assistance of the other man who was beside him and eventually collapsed into the ditch where he was arrested. He denied making the statements on arrest which were tendered in evidence and he denied making the statement in the car travelling through the town of Ardee. He stated that whilst he thought it likely that it was guns he was going to collect on that morning, he was not aware of what was going on and was unaware of any robbery. He said that he did not know a Sergeant had been shot until he came to in the hospital some days after he was arrested.

Grounds of appeal

In all, seven grounds of appeal were submitted, but they may be grouped into certain main headings.

1. It was submitted that the Court erred in law in admitting into evidence the statements made by the applicant in the field immediately after arrest, on the grounds that the Court should not have been satisfied with the explanation given as to the failure to comply with Rule 9 of the Judges' Rules. This point was not taken at the hearing before the Court and no submission seems to have been made to the effect that the non-compliance made this evidence inadmissible nor was any enquiry made as was the basis of the argument before this Court as to the next available opportunity which the Sergeant might have had of presenting it after the applicant had recovered from his apparent coma. Medical evidence strongly supported the view that the applicant, after being treated on immediate arrival in hospital for a number of days maintained a condition of feigned semi-consciousness or unconsciousness, not related to his physical injuries.

The Court is satisfied that there was no injustice in the admission of these verbal statements into evidence, and that there was no error by the Court of trial in the exercise of its discretion under Rule 9.

It was further contended that even if these statements were admissible that what was described as a desire to protect the applicant against the planted verbal admission should have led the Court of trial to reject the statements on the basis of the applicant's denial that he made them. This Court can not interfere with the resolution by the Court of trial of the issue which arose between the members of the Gardai who swore that these statements were made by the applicant, and the applicant who swore that he did not make them. There was evidence on which the Court of trial would have been entitled to decide that issue in either direction and once it does so that cannot be disturbed by this Court on appeal.

It was further contended that the statement: "Why did he follow us, didn't he know that he would be shot?", was wrongly interpreted by the Court in that it should

have been interpreted as indicating that the applicant, even assuming he did make that statement, was referring to the fact that he had discovered for the first time when he saw his companion shoot Sergeant Morrissey, that his companion was a ruthless or desperate man, and was merely reflecting on the fact that the Sergeant in following such a man was doing something perilous.

Such an inference appears to this Court to be strained in the extreme, and the inference which was put on by the Court of trial on this statement, seems not only a justifiable one but the only reasonable one, and that was to the general effect that the applicant must be taken from that statement to have been aware that he was engaged at that time in an enterprise in which if he or his companion were being thwarted or likely to be caught, they were prepared to shoot their pursuers, including the Gardai, so as to avoid being arrested.

With regard to the statement alleged to have been made by the applicant while driving with the Gardai through the town of Ardee, it is firstly submitted that because three Gardai gave a different version of the part of the length,

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Main Street of Ardee which the car was travelling through at the time when the statement was made, that the Court was bound to reject the truth of the Garda evidence that the statement was made and was bound to give the benefit of the doubt to the applicant's evidence in which he denied the making of the statement. This Court is not satisfied that it can impose upon the Court of trial any such requirement or standard. The Court listened to and heard the evidence of the three Gardai who swore to the making of this statement, and they heard the evidence of the applicant who denied it, and their resolution of that issue of fact must remain undisturbed by this Court on appeal.

It was contended further, however, that the inference which the Court of trial drew from this statement, namely, that the applicant was involved in Ardee in the actual robbery on the 27th June of the Labour Exchange, was an incorrect inference or construction and that the proper construction which should have been put on as being the one more favourable to the applicant was that he was referring to a gang of persons of whom he was one, by the

plural "we" and that it was consistent with his evidence that he had not been in the town of Ardee at all on the 27th June, but that it was merely a statement that his companions had

Again this Court is not satisfied that there is any warrant for putting such a construction on this statement, and is satisfied that the inference which the Court of trial drew from this statement, once it was satisfied that it had been made, is the correct inference and was inevitably to lead to the conclusion that the applicant was admitting that he was in Ardee on the day of the robbery and of the murder and that, therefore, he took part in the entire enterprise. It was clear from the activities in which the raiders took part in Ardee and, in particular, from the firing at the Garda car in that town, that this was an enterprise in which they were prepared to shoot their way out of trouble, irrespective of whether civilian or Gardai were the victims of their shooting.

The other grounds of appeal were to the effect that whereas in relation to Michael McHugh, evidence was given of the finding of firearm residue on a glove in the pocket

of his clothes, and evidence was given of the finding of glass similar to the glass in the window of Mr. Boyle's car, in his clothes, that neither of these two findings was made in the examination of the clothes of the applicant

It is said that this negative finding is inconsistent with the applicant's presence in Ardee and his participation in the raid on the Labour Exchange. It is clear from the verdict of the Court of trial that the point was put to it and that it considered this point. This evidence, was, however, neutral. It was not a necessary consequence of the applicant being in Ardee that he should have had firearm residue on his clothing or glass from the window of Boyle's car. The absence of any firearm residue could be accounted for by such residue being dissipated while he was on the motorcycle and travelling through the countryside, and the absence of any glass could be accounted for by his not having been sitting beside the window of the car which was broken. The presence of firearm residue on the glove in the pocket of his co-accused, McHugh, could be accounted for by the firing which the evidence indicated

he did at Rathbrist House.

Once the Court of trial was satisfied that the verbal admissions which have been dealt with in this judgment were made by the applicant and once it put upon those the construction or inference it did, there was no inconsistency having regard to this evidence of the absence of findings of glass or firearm residue, in the Court's conclusion that the applicant was in Ardee and participated in the robbery.

Lastly, it was urged on this Court that the Court of trial did not appear to pay sufficient regard to the applicant's sworn testimony in his defence.

In referring to the evidence of the applicant the Court of trial stated as follows:

"The Court has considered the entire of his evidence with the greatest of care and in the light of the evidence adduced by the Prosecution and in the light of submissions made by Counsel on his behalf for the purpose of determining whether it or any relevant portion thereof could possibly be true, because if the Court had any doubt, the accused is entitled to the benefit of such doubt as of right.

Relevant to the consideration of this evidence

are the statements made by the accused to different members of the Garda Siochana."

The Court subsequently went on, having dealt with various details of the evidence, to state that having carefully considered the evidence of the accused with regard to his non-involvement in the robbery in Ardee on the morning of the 27th June, that it was satisfied beyond all reasonable doubt that the evidence in this regard was untrue and must be rejected by the Court.

This Court is satisfied that that was a conclusion on the evidence which was open to the Court of trial to reach and which was well supported by the evidence adduced.

In these circumstances, this Court is satisfied that none of the grounds of appeal urged on behalf of the applicant have been made out, and on an examination of the entire of the trial, the evidence and the verdict of the Court of trial, it is satisfied that the trial was a satisfactory and just one and that the verdict of the Court was one supported by the evidence before it. This application for leave to appeal must, therefore, be

refused. The Court, accordingly, orders pursuant to Section 6(2) of the Courts of Justice Act 1928 that the sentence of death pronounced at the trial of the said Noel Callan shall have effect as if for the day therein mentioned, the 3^o day of May 1986 was substituted and that meanwhile the said Noel Callan be detained in a lawful prison and be taken thence to a place of execution.

approved.
J. A. F. J.
15 May 1986