



THE COURT OF APPEAL

[72/18]

**The President
Kennedy J.
Donnelly J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

BOB

APPELLANT

**JUDGMENT (Ex tempore) of the Court delivered on the 19th day of July 2019 by
Birmingham P.**

1. On 11th November 2017, in the Circuit Criminal Court in Cork, the appellant was convicted by a jury, following a contested trial, of offences of burglary, criminal damage, threat to cause criminal damage and breach of a protection order and was subsequently sentenced on 6th March 2018 to a term of five years imprisonment with the final two years of the sentence suspended, the sentence being backdated to 16th March 2017. He has now appealed against his conviction.
2. The background facts at the trial and now to this appeal relate to events that occurred on 16th March 2017 at various locations in Cork City. There were two injured parties in the case, one being KOB, the estranged wife of the appellant. They had split up on 19th February 2017, thus bringing to an end a 31-year relationship and a 27-year marriage, and the second injured party being AOB, daughter of the appellant.
3. The evidence of KOB was that on 16th March 2017, she was driving the two sons of herself and the appellant to school when the appellant pulled up next to her, whereupon he started screaming and shouting at her and threw the contents of a plastic water bottle at her car. It is the situation that she had previously obtained a Protection Order in respect of the appellant, she had done so shortly after the marriage split up, obtaining the order on 27th February 2017.
4. The evidence of AOB was that on 16th March 2017, she attended at her place of work, which was a hair salon in Gurrabrathar. When she arrived, she found the appellant parked outside. Her evidence was that the appellant had said to her "you better give me my money or I'll burn down your house". She further gave evidence that following receipt of a phone call from her boyfriend, PM, that she returned to her home in Fairhill. She

found the back patio door smashed and a large canister of diesel or petrol on the floor. The walls, floor and stairs of the house were covered in the substance. PM, the boyfriend of AOB who lived with her, gave evidence that when he woke up on 16th March 2017, he found the appellant in the bedroom in which he (PM) had been sleeping. He left the bedroom to find the carpet outside drenched. He saw a canister on the floor and the substance smelled like petrol or diesel.

5. There are three grounds of appeal. The first is that the Judge failed to sever the indictment in respect of count 4, namely, the contravention of a Protection Order. It is said that the offence involved a separate complainant from the complainant in the more serious offences on the indictment and that related to events that occurred in a separate location, and that, in truth, it was unrelated to the indictable offences. It was argued by counsel for the appellant that the inclusion of the count on the indictment was highly prejudicial as it put the jury on notice that the appellant's wife had, prior to the alleged offences the subject matter of the charges, successfully sought a remedy in Court, seeking protection from her husband. Accordingly, it is argued that the inclusion of the count on the indictment impugned the appellant's character.
6. In response, the DPP says that the trial Judge correctly exercised his discretion in refusing to sever the indictment, that the events were closely related in time and place with the other offences. All four of the offences on the indictment were alleged to have taken place over an approximately 3-hour period between 8.30am and 11.30am on 16th March 2017. What might be described as the main offences on the indictment were committed in respect of property in which both KOB and AOB were resident at the time. Accordingly, it is said that the breach of the Protection Order was not unrelated to the other counts, rather, the circumstances surrounding the commission of that offence were part of the same body of evidence and that it was necessary that the jury should be provided with a complete picture of the appellant's campaign of behaviour on the morning in question. Moreover, it is said on behalf of the DPP that the Protection Order had a relevance to the burglary offence, because in that instance, it was necessary to prove that the accused entered the property as a trespasser.
7. In this case, the property in question was property owned by the appellant's daughter in respect of which the appellant had made a contribution towards the purchase price. It was pointed out that it will often be the situation that a father may be regarded as having a form of implied licence to enter the property of one of his children. However, in the present case, the existence of the Protection Order undermined any claim of an implied licence to enter. Thus, it is said, it was a necessary and probative piece of evidence. It is to be noted that the prosecution was careful, in both their opening and closing remarks, to make clear that obtaining a Protection Order was not at all unusual in the context of family law, that it was obtainable on an ex parte basis and that no untoward conclusion should be drawn arising from it.
8. In the Court's view, the submissions of the Director are well made. We take the view that the link between the Protection Order and the breach was a close one, that the initial

contact or confrontation between the appellant and his estranged wife formed the background to what happened later that morning, and in the circumstances, we believe that the Judge was entitled to refuse the application for severance.

9. On ground two, it is said that the Judge erred in law in failing to discharge the jury when AOB, in the course of her evidence, during cross-examination, indicated that the appellant had committed criminal offences which did not appear on the indictment. The context of this was that AOB was being questioned about her encounter with her father outside her place of work. She was asked whether he had said what she recorded in a calm and collected manner, and she responded "I wouldn't say – I wouldn't say he was calm. His eyes were very dilated as he said it, and I said 'Da, please relax', I said, you know, 'just leave me alone'. I was trying to go to work, you know said things like this before, you know".
10. There followed an application to have the jury discharged on the basis that the complainant had given evidence that the appellant had committed offences which were not on the indictment. A matter of some note is that the statement of evidence from the complainant, AOB, that appeared in the book of evidence, contained references to previous threats. The prosecution had been conscious of this and had been careful not to introduce the evidence. The defence, too, had been conscious in the Book of Evidence and had formulated their questions in the knowledge of what the Book of Evidence contained. Unlike, in some other jurisdictions, here, witnesses are not prepared or coached before giving evidence at a criminal trial. Inevitably, this means that sometimes witnesses will respond to questions in a way not totally expected. However, the occasions when a response requires the discharge of the jury are likely to be exceptional. In the context of this case, against the background of the family difficulties that the Court and jury was hearing about, we do not see these remarks as having the significance contended for. The Court is satisfied that the trial Judge was quite entitled to take the view that this was not a case for discharging the jury.
11. Coming then to ground three, this relates to the fact it is said that the Judge erred in failing to discharge the jury following evidence given by AOB that her father had been incarcerated in Cork Prison. The context of this was that she was being cross-examined about whether she had continued to pay money to family members who had supported her in the purchase of the house, including the appellant, and she responded "well, to be honest, when all this happened on 16th March, he was brought up to Cork Prison, so I haven't seen him since to give him the money". This gave rise to a further application for the discharge of the jury. In arguing this ground, counsel has referred to the case of DPP v. Zachary Coughlan Ryan where judgment of this Court was given by Mahon J. In that case, what had happened is that a witness at trial, when asked when she had first come across the accused, responded "whenever he got out of the jail the last time".
12. The Court sees the remarks in Coughlan Ryan as being of quite a different character to the remarks in the present case. The remarks in Coughlan Ryan informed the jury that the accused had been in prison previously for unrelated criminal activity, and more than

that, that he had been in prison on more than one occasion previously. Here, there was no suggestion that the appellant had been in prison for prior criminal behaviour. His unavailability was specifically linked to the matters before the Court. It is the case that the response to the question could not have been expected. It may be said that it might have been preferable if the remark had not been made, but the Court is clear in its view that the remark was not of such a character in the circumstances of the case as to require the discharge of the jury.

13. Counsel for the appellant makes a further point and says that his complaints are cumulative. He says that apart from focusing on the individual complaints, he says that there is a cumulative effect, that if one looks at the inclusion of the breach of the Protection Order on the indictment, the reference by AOB to what had been said on previous occasions, things said similar to the conversations on the day in question that the jury was hearing about, and the fact that the jury heard that the appellant was lodged in prison in the aftermath of the incident, that the effect of all of that was to damage the appellant seriously in the eyes of the jury.
14. This Court agrees that it is appropriate to step back and to view the overall impact of these matters and we have sought to do that. However, having done so, the Court has not been persuaded that the trial was unfair or unsatisfactory, or, specifically, that this was a case where the jury should have been discharged. The Court has not been caused to have any doubts about the fairness of the trial or any doubts about the fact that the verdict was safe.
15. Accordingly, the Court will dismiss the appeal.