



THE COURT OF APPEAL

[39/21]

[2023] IECA 59

The President

McCarthy J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JEAN LOUIS FANCONY

APPELLANT

JUDGMENT of the Court delivered on the 15th day of March 2023 by Birmingham P.

Introduction

1. On 30th November 2020, following a trial at Limerick Circuit Criminal Court, the appellant was convicted of an offence of causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997, and an offence of production of an article in the course of a dispute, the article being a bread knife, contrary to s. 11 of the Firearms and Offensive Weapons Act 1990. Subsequently, on 3rd February 2021, he was sentenced to a term of seven and a half years imprisonment which was backdated to 22nd July 2019.

2. The background to the case related to events that had occurred on 22nd July 2019 at an apartment at Bishop's Quay in Limerick. The apartment where the incident occurred was that of the appellant, Mr. Jean Louis Fancony. In or around March 2019, the injured party, Mr. Tim Crowley, was looking for accommodation to share or to rent in the Limerick city centre area. The victim made contact with the now appellant and agreed to move into the apartment

on a shared basis in April 2019. According to Mr. Crowley, after a period, the behaviour of the appellant became erratic. Mr. Crowley considered that the appellant spent a great deal of time on his computer and was propounding a number of strange conspiracy theories, including theories relating to the Irish Government's involvement in the rolling out of the 5G network. It appears that the appellant became suspicious of Mr. Crowley, and, in particular, formed the view that Mr. Crowley had been instrumental in the appellant not getting a job that he was seeking to obtain. It is not in dispute that, on the occasion in question, an altercation developed in the apartment, and indeed the appellant admitted that he had a bread knife and that he stabbed the injured party with it, though he contended that the injured party was the aggressor and that he, the appellant, was acting in self-defence.

Grounds of Appeal

3. The grounds of appeal are paraphrased as follows:
 - (i) The trial judge erred in fact and in law in admitting into evidence the following words (or similar words) allegedly spoken by the appellant to one Garda Enda Clifford at the time of his arrest, *inter alia*: "I met with destiny today...I knifed the guy".
 - (ii) The verdict of the jury was perverse and unjust in circumstances where there was lost and missing evidence in the case and the Garda investigation was fundamentally flawed to include:
 - (a) absent/missing CCTV footage from the custody area at Henry Street Garda station, Limerick, at the time of the appellant's initial arrest;
 - (b) a missing fork, alleged to have been found on the appellant's person at the time of his initial arrest (which was at all times disputed by him);

- (c) an absent/missing bible and rosary beads allegedly found on the appellant's person at the time of the initial arrest;
- (d) absent/missing CCTV footage of the entrance and exit ways of the apartment building shared by the appellant and Mr. Crowley at the time of the alleged offence herein, showing the alleged movements of Mr. Crowley on the date of the alleged offence, which movements were disputed by the appellant;
- (e) the absence of any statement taken from the occupant of an apartment neighbouring the appellant's said apartment, notwithstanding the fact that said occupant was spoken to;
- (f) the fact that the appellant was not interviewed in relation to the alleged offences, despite his desire to be interviewed;
- (g) the disputed facts surrounding the appellant's second arrest and trip from Limerick University Hospital to Henry Street Garda station in the back of a Garda vehicle;

In addition to these grounds of appeal, there was a motion seeking to adduce additional evidence. The new evidence sought to be admitted, which it is said should lead to the conviction being quashed, is that a prosecution witness, Garda Clifford, who was centrally involved in the arrest of the appellant, had, in 2012, while a serving member of the Gardaí, been convicted of driving without a licence, driving without tax and driving with two bald tyres, and had been fined a total of €900 in the District Court. These were matters which came to light following a fatal collision.

Background

4. Before turning to the grounds of appeal and the application to adduce additional evidence, it is necessary to say a little more about what is known about the circumstances of the incident. According to the injured party, he had gone home to Kildare for the weekend and returned to his flat in Limerick on the Sunday evening. He attended work the following day and then returned to the apartment for lunch, at which point he saw the appellant at the table with a knife beside him. A conversation followed and the injured party went to his room. After a period of time, the appellant, according to the injured party, burst into that room, and proceeded to ask the victim whether he could trust him. The injured party says he merely stated that he really did not have time for such a conversation, at which stage the appellant left the room and went back to his computer located on the kitchen table. Once more, the injured party went to the kitchen area and noticed that the knife was still located beside the appellant. The injured party states that the appellant then proceeded to ask the injured party for a loan in the sum of €200. He rejected this request, as he had made a decision to leave the apartment and feared he would not be paid back. However, the injured party did agree to loaning a sum of €100 to the appellant, provided that such sum would be deducted from the rent owed, as this had been done in the past by the appellant and the injured party.

5. According to the injured party, the appellant then, suddenly and without warning, stabbed him once on the left-hand side, and then a second time on the right-hand side, of his stomach area. The injured party sought to take the knife from the appellant, resulting in the blade being bent in the process. The injured party recounts moving through the apartment, at which time the appellant was holding his hand whilst holding the knife in his other hand. The injured party and the appellant then came out into the corridor, where the injured party was then stabbed in the shoulder area. The appellant then helped the injured party to his feet, brought him to a nearby elevator and exited onto the street. The prosecution case was that the

appellant then returned to the lift and went back up to the apartment. Upon returning to his apartment, the appellant changed his clothes and left by the fire exit. The appellant walked past where the injured party had collapsed. At this stage, the appellant had the knife, along with some other items on his person, one of which was a bloody T-shirt that he discarded into a nearby derelict garden. On his way along the Dock Road, the appellant called into a halting site looking for water. A Mr. Patrick O'Driscoll, a resident of the site, informed the Gardaí of a man walking by, speaking with a foreign accent, his hands bloodied, and carrying a knife.

6. Members of the Gardaí, including Garda Clifford and Garda Finn, along with an armed support unit, were sent to locate the appellant. Upon approaching the appellant on Dock Road, Limerick, he fell to his knees and put his hands over his head. At this stage, he was cautioned by Garda Clifford. At that point, it was noted that the appellant had blood on his hands and bloodstains on his clothing. The knife was tucked inside his belt with the blade facing upward. Garda Finn seized the knife. In response to caution, Garda Clifford noted that the appellant stated that, "he met with his destiny." Garda Clifford then cautioned the appellant a second time and asked him what he had meant. Garda Clifford recalled and noted the appellant's reply: "I knifed the Irish guy because he was a Satanist and that after 35 years he met with his destiny." It may be noted at this stage that these alleged remarks recorded by Garda Clifford and reported on by him are at the heart of the appeal. The appellant does not accept that he made such remarks, rather, he contends that he said, "I'm French, I'm Catholic I have 37 years old". The remarks were not read over to the appellant at the scene, and he was not asked to sign what had been recorded.

7. Upon arrival at Henry Street Garda station, the appellant made an unusual request. He wanted to speak to a Benedictine priest. Gardaí took the request on board and made contact with Glenstal Abbey. The person who took the call from the Gardaí made the point that one of the priests in the Abbey was a fluent French speaker and offered to put him onto the call.

As chance would have it, the Benedictine monk in question, Father Luke McNamara, apart from being a fluent French speaker, was a medical doctor with a qualification in psychiatry. He spoke by telephone to the detainee. Having done so, he expressed serious concerns as to the appellant's wellbeing, in particular, concerns about his mental health. The caller communicated these concerns to Gardaí, and acting upon such concerns, a doctor was summoned to the Garda station to assess the appellant. The doctor who arrived at the Garda station, Dr. Seamus Kilby, confirmed the concerns of Father McNamara. At that stage, the appellant was committed on an involuntary basis to University Hospital Limerick to the acute psychiatric ward. There was concern about the capacity of the hospital to cope with him and to cater for his needs. Following his discharge from hospital the following day, the appellant was arrested once more, charged and brought before the District Court. The sequence of events that developed meant that the appellant was never questioned about the incident while in custody, and in particular, was never questioned about what he had been recorded as having said at the point of arrest.

8. Subsequently, while in custody, the appellant was seen by a Professor Gulati, a consultant psychiatrist, who confirmed the appellant was suffering from psychosis. He was seen on multiple occasions thereafter, and Professor Gulati was of the view that the appellant satisfied all the criteria for a mental disorder under the Mental Health Act 2001, as amended, and the Criminal Law (Insanity) Act 2006. It appears there may well have been grounds for seeking the special verdict of not guilty by reason of insanity, but that course of action was not pursued.

9. So far as the injured party is concerned, he managed to stagger up the street before collapsing near a shop. It was clear that he was seriously injured, and in fact, it turned out that the injuries he sustained were life-threatening. Fortunately, he was seen by members of the public and they did their best at the time to try and assist him. More fortunately still, a

number of firemen who were finishing a rescue exercise on the River Shannon were about to return to base up the street. They were flagged down and were in a position to offer further assistance. While they were doing so, an ambulance crew was travelling in the opposite direction, and they were flagged down and they too assisted. The injured party was brought to hospital and underwent emergency surgery. There was evidence from a number of doctors that without the emergency surgery, the injured party would have died. He required a colostomy bag for a period of time, but that was removed following surgery. An updated report was provided by Dr. Michael Devine, which expressed concern that there was a 5% to 10% chance that the injured party would face future complications as a result of the incident. The injured party provided the Court with a victim impact statement, and from that, it is clear that not only were there the very serious physical injuries already referred to in outline, but that the incident has left long-lasting psychological scars.

The Appeal

10. Turning to the grounds of appeal, as we have indicated, at the heart of the appeal are the remarks recorded by Garda Clifford as having been made by the appellant at the time of his arrest. At trial, they were the subject of a *voir dire*. In the course of that *voir dire*, the Member-in-Charge indicated that when, in the usual way, he informed the detainee of his entitlement to consult with a solicitor, that the prisoner was irate, continued to ask who he could trust, and he said he did not want to speak to a solicitor as he did not trust solicitors. He explained that after the appellant first requested that a named person be contacted, and when efforts to contact that person proved impossible, the telephone number given appeared to be that of an accountancy practice, which was not answered when rung, at which point the appellant requested to speak with a Benedictine priest.

11. The Member-in-Charge explained that at 7pm, he contacted Glenstal Abbey, speaking first with Father Cuthbert who explained there was another priest in the Abbey, Father Luke McNamara, who was a fluent French speaker and he would inform him of the situation. At 7.15pm, Father McNamara contacted the Garda station. There followed a conversation between Father McNamara and the appellant which ended at 7.30pm, after which Father McNamara rang back the Garda station. At that stage, Father McNamara explained that he was also a medical doctor and that he was concerned about the appellant's mental health. Father McNamara reported that the appellant had been speaking about bizarre forces threatening Limerick and France. The appellant was convinced he was a defender of France. Father McNamara reported the appellant as having said that his friend had earphones on and was in contact with the enemy and that that was why he attacked him. Father McNamara explained to the Member-in-Charge that he had trained as a psychiatrist, and he believed that the appellant was experiencing psychosis. Father McNamara said the appellant was a risk to everyone around him and he believed him to be a danger and said he needed to be medically assessed.

12. Following that conversation, there was contact with Dr. Kilby who arrived at 8.17pm. The doctor said he had to make a recommendation for the appellant to be "sectioned", to be taken to the psychiatric ward at the University Hospital Limerick. Dr. Kilby completed the necessary documentation, and at 9.50pm, the Member-in-Charge explained to the appellant that he was being released from the provisions of s. 4 of the Criminal Justice Act 1984 and that he was now being held for involuntary admission to hospital.

13. At an early stage in the *voir dire*, counsel on behalf of the prosecution submitted that, while Father McNamara was a witness in the book of evidence, in the context of fairness, the prosecution did not intend to adduce evidence of what was recorded as having been said to him. In the course of the *voir dire*, Garda Clifford gave evidence of coming upon a male on

the Dock Road who matched the description of the male who had been at the halting site. He explained that he and his colleague, Garda Finn, arrived at the same time as the members of the Armed Support Unit. They approached the male, and as they did so, he fell to his knees and put his hand over his head. Garda Clifford said that, at that stage, he went over to the appellant and cautioned him. He illustrated how the suspect had his hands up around his head, how blood could be seen on his hands and there was bloodstaining on his clothes, and that he could see a knife inside his belt with the blade facing upwards. He cautioned him in the usual terms and Garda Clifford stated his reply to that was, “he met with destiny today”. Garda Clifford said he cautioned him a second time and asked him what he meant, and he stated that “I knifed the Irish guy because he was a Satanist and that after 35 years he met with his destiny.” These were the exact terms recorded in the Garda notebook. At that point, Garda Clifford arrested the appellant at 5pm, who was placed in the rear of the patrol car and brought to Henry Street Garda station where he was introduced to the Member-in-Charge. In the course of his direct evidence on the *voir dire*, Garda Clifford also referred to the fact that at 9.50pm on the following day, 23rd July 2019, he had gone to the University Hospital Limerick where he arrested the appellant for the purpose of charge. The accused was duly charged and subsequently appeared before the District Court.

14. In the course of cross-examination of Garda Clifford during the *voir dire*, it was suggested to him that in the course of the car journey between University Hospital Limerick and Henry Street Garda station, the appellant had been encouraged or pressured to sign the notes that had been taken of what had been said the previous day, something which Garda Clifford rejected.

15. In relation to what was recorded as having been said at the time of arrest, the Garda said he did not believe he had read what he had recorded back to the appellant and given him an opportunity of signing them on that night. Asked if he could think of any reason why he

did not do that, he responded, “[t]here was a lot going on at the time and we knew we were dealing with a serious incident so it was just unfortunately -- it was just unfortunate that I didn’t read them back over to Mr Fancony.” In the course of giving evidence on the *voir dire*, the appellant referred to the fact of having been asked to sign what he described as a “block note” on the way back from the hospital and that the driver of the car told him that it was his last chance. He stated that, basically, the Gardaí were trying to push him to sign, and he felt intimidated because the Garda on his right side, who he guessed was a Garda Grogan, had a gun in his pocket. It might be noted here that Garda Grogan was a uniformed member of the Gardaí, who would not have been carrying a firearm. He gave his account of what he had said to Gardaí at the time of arrest. He never said he had met with destiny today. He said, “I’m French, I’m Catholic and I have 37 years old”.

Admissibility of the Admission made by the Appellant

16. Following the conclusion of the evidence on the *voir dire*, in the usual way, counsel on each side made their submissions to the trial judge. Counsel for the prosecution began by saying he felt the case he was being asked to respond to was one that questioned the decision to bring the accused to hospital, and the fact that he was detained there under the Mental Health Act 2001, as amended. He suggested that Gardaí had acted properly in obtaining medical advice and following it.

17. He turned then to the live issue in the case, what was recorded as having been said at the moment of arrest. Counsel on behalf of the Director identified rule 9 of the Judges Rules as the rule that was in controversy, which is as follows:

“Any statement made in accordance with the above rules, should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.”

In arguing for the admissibility of what was recorded as having been said, counsel on behalf of the prosecution referred to a number of cases, including *DPP v. Ebbs* [2011] 1 IR 778, *DPP v. Towson* [1978] 1 ILRM 122, and *DPP v. Khalael* [2020] IEHC 33. In the course of his submissions, counsel on behalf of the accused said it was accepted that the only omission was the signature; the procuring of the signature after reading out the words, obtaining approval and then signature. However, he urged that the discretion the court had should be exercised against admission. Counsel said an unusual feature of the case was that soon after the disputed words were or were not uttered, the accused was indicating he would like to make a statement, actually expressing a desire to give a statement, but he was thwarted from giving a statement and, it was submitted, that leans heavily in favour of exclusion.

18. In the course of an *ex tempore* ruling, the judge dealt with what had occurred in Henry Street Garda station and what had occurred at the roadside. As to what was recorded as having been said at the time of arrest at the roadside, he had this to say:

“Now, insofar as the admissions that were made on his initial arrest at the roundabout, in a perfect world the caution would be administered to a person, his reply would be noted, he would be invited to sign the reply, have it read back to him and would be invited to sign but we don’t live in a perfect world but in the context of this case I would have to be satisfied that the admissions were made as such and that the circumstances that prevailed at the time didn’t facilitate a possibility of having them read back and signed by – and the accused offered the opportunity to sign or indeed not sign the matters. I am satisfied that the circumstances that developed in the investigation of this case that I should exercise my discretion and allow the admission of that as such.”

19. Insofar as the judge spoke about exercising his discretion, it appears that he may have been working on the basis that what occurred at the roundabout involved a breach of rule 9 of

the Judges Rules. We are not of the view that what occurred was a breach of the rules. According to the arresting Garda, what was said was in fact recorded. As counsel for the accused conceded in the course of argument before the trial court, the issue then was confined to the failure to read back and proffer for signature. It does not seem to us that the Rule mandates that what is recorded should be immediately read back and immediately proffered for signature. Had matters progressed as they normally would, one would expect that in the course of an interview, and probably the first or certainly an early interview, the detainee's attention would be drawn to what had been recorded which would be read to him and he would be invited to sign. Had that happened, it does not seem to us that there could be any possible objection. However, as we know, that did not happen. The appellant was not interviewed because he was removed to hospital. We will address presently the significance of the fact that the accused was not interviewed during detention and not given an opportunity to provide a response. However, focusing solely on what occurred on the roadway at the roundabout, we are in no doubt that if there was in fact a breach of rule 9, as the trial judge seems to have believed, the judge would certainly have been entitled in the exercise of his discretion to admit the evidence.

The Missing Evidence

20. An issue which has not received major attention, but which was touched on in written submissions was the suggested inadequacies in the investigation. Attention is drawn to the absence of a cutlery fork, a Bible and a set of rosary beads. So far as the fork is concerned, which is the item that has received most attention, the prosecution contended that when the accused was searched on arrival at the station, a fork was recovered from his underclothing. The appellant has always denied having a fork. We do not regard the presence or absence of the fork, the Bible or rosary beads as being of any significance. Also canvassed was the fact that no CCTV was harvested from the entrance/exit area of the apartment, and that a

statement was not taken from the occupier of the neighbouring apartment. We see no substance in these criticisms, which, in fairness to the counsel who appeared at trial, were not pressed with any vigour. We are of the view that the ground of appeal, to the extent that it remains live, can be disposed of without further comment, as being clearly without merit.

Previous Misconduct and Application for Fresh Evidence

21. We turn then to consider the argument in relation to the Road Traffic Act convictions recorded against Garda Clifford. The background to this is that subsequent to his conviction, the appellant changed his legal advisers, instructing the firm of John Feaheny & Co., Solicitors, on 1st April 2021. On 29th March 2022, that firm received an email from the DPP in relation to a news report in relation to Garda Clifford. The report is from RTE and is dated 19th April 2012. The covering note refers to the fact that the road traffic convictions were not disclosed to the previous solicitors in advance of trial, but that since receiving correspondence, Detective Garda O'Shea has searched the Garda database and there were no summonses associated with the incident and no associated previous convictions. It appears the matter was investigated by Garda Síochána Ombudsman Commission at the time.

22. On behalf of the appellant, it is said that the credibility of Garda Clifford was in issue at the trial as he gave uncorroborated evidence that the appellant had made an admission, which was denied and not signed. Had this material in relation to the previous Road Traffic Act convictions been available to the appellant, it could have been deployed by the appellant to undermine the credibility of Garda Clifford. We begin our consideration of this issue by saying that while what was recorded might, on one view, not have amounted to a direct admission, by any standards, it was significant and had the potential to undermine to a significant extent the defence of self-defence which was being advanced.

23. The question that arises is as to whether new information about the fact that the appellant was convicted in 2012 in relation to offences under the Road Traffic Act 1961, as amended, might reasonably be expected to affect the verdict of the jury. We are firmly of the view that is not the case. The situation would be different if the offences involved dishonesty, misrepresentations or telling untruths. However, we believe the suggestion that road traffic convictions which were dealt with by a fine some ten years ago would have affected the jury as fanciful. In the circumstances, we are not prepared to admit the additional evidence sought because we are of the view that the proposed evidence would not have been material.

Failure to Interview

24. Finally, we turn to consider further the significance of the fact that the appellant was not interviewed, and because he was not interviewed, he was not given an opportunity to comment on what Gardaí had recorded him as having said at the moment of arrest. At the outset, we should say that we are quite satisfied that no criticism can be made of the Gardaí for the manner in which they dealt with the accused following his arrest. On the contrary, we think the Gardaí are to be commended for their efforts in seeking to give effect to the unusual request by the detainee for access to a Benedictine Priest. Again, we believe the Gardaí are to be commended for the way in which they took on board the concerns expressed by Father McNamara. The decision to call a medical doctor to the Garda station was an entirely appropriate one, and the decision to act on foot of the doctor's advice, to release the detainee from s. 4 detention and to have him brought to University Hospital Limerick under the provisions of the Mental Health Act 2001, as amended, was also entirely proper.

25. At one level, the fact that we are quite satisfied that the appellant was treated properly at Henry Street Garda station is sufficient to dispose of the issue as to whether what was said on the roadside was properly admitted. On this view, there was no breach of rule 9 on the roadside, and if there was, then the judge was within his rights to exercise his discretion in

favour of admission. Nothing untoward happened at Henry Street Garda station in terms of the treatment of the appellant; on the contrary, he was treated with every possible consideration.

26. However, we are left with a certain sense of disquiet. It seems clear that the appellant was behaving strangely at the roadside and continued to behave strangely when brought to Henry Street Garda station. Indeed, we would infer that the reason he was treated with such concern by the Gardaí there was because they had concerns about his welfare and his mental health, concerns which were reinforced when the detainee spoke by phone with a priest, who had medical and psychiatric qualifications, and further reinforced when Gardaí had the clear advice from the medical doctor who they had called to the station. It appears nobody in University Hospital Limerick had any doubts about the extent of the appellant's needs. Their concern was that his needs were so great that they were not in a position to respond to them and to keep him and others safe.

Concluding Remarks

27. The combination of the views of Father McNamara, Dr. Kilby, the authorities at University Hospital Limerick and Professor Gulati would all suggest that the appellant was suffering from psychosis at the time he was engaging with Garda Clifford on the roadside.

28. In these circumstances, we have concerns about the overall fairness of allowing remarks made by a person in that situation to be admitted. In the unusual situation that developed, we believe the remarks on the roadside at the roundabout should have been excluded. Being of that view, we feel the conviction must be quashed. We will hear the parties on the question of a retrial.

