P v CUMMINS

177 Record No 25/81.

Mr Justice Griffin
Mr Justice Gannon
Mr Justice Keane

COURT OF CRIMINAL APPEAL

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

v.

LAURENCE CUMMINS

JUDGMENT OF THE COURT delivered on the 20th day of December 1983 by GRIFFIN J.

The appellant, Laurence Cummins, was tried and convicted before the Central Criminal Court on two charges of robbery with violence and possession of a fire-arm and ammunition with intent to endanger life. At his trial, when the case for the prosecution was closed, counsel for the appellant informed the learned trial Judge, Finlay P., that his client would be making an unsworn statement. The appellant then entered the witness box, and was not sworn. The following then appears in the transcript:-

"MR. LAURENCE CUMMINS, in the WITNESS BOX,

EXAMINED BY MR. McENTEE

1. Mr. Cummins, did you participate in the robbery with which you have been charged? - No.

2. Did you make the statements to the Guards which you are alleged to have said (sic) that you

participated in this robbery with Mr. McCormack? - No, I never did."

This was the entire of the "unsworn statement" of the appellant.

In the course of his charge to the jury, the learned trial Judge stated:-

"Now, in relation to the proof by the prosecution, it can only be on the evidence you have heard in the witness box in this case and the prosecution cannot prove anything merely by the statement of Counsel or anything else. It is only on the evidence that you have heard that you can consider this case and that applies, of course, ladies and gentlemen also in relation to the unsworn statement that was made by the accused person this morning, Mr. Cummins. There is no obligation of any description on an accused to give evidence. An accused is entitled to give sworn evidence and if he gives it, it becomes part of the evidence in the case but if he gives sworn evidence as every other witness, he can be examined and cross-examined but an accused also has a right which was exercised by Mr. Cummins this morning, to make a statement unsworn and when he does that, no one can ask him any questions. That is what Mr. Cummins did this morning and the position of that in the case is exactly identical as a matter of law, to the submissions made by Mr. McEntee on behalf of the accused. You have regard to what he said. You

> listen to the point or points that are made but it does not form part of the evidence in the case and therefore in this case, you are left in the situation that you look at the case as being all the evidence that was called by witnesses taking the oath and giving evidence and being examined and cross-examined by the exhibits which they produced and proved and that is the evidence in the case. It is on that, at the end of the day, you ask yourself the question, has the prosecution proved to my satisfaction beyond a reasonable doubt that the accused is guilty."

When the jury retired, Mr. McEntee submitted that this passage did not correctly state the law, since it did not attach a sufficiently weighty status to the unsworn statement of the appellant, and he asked that the jury should be redirected on this matter. The learned trial Judge, in refusing this application, said that he was satisfied that the direction he had already given to the jury was adequate and that if he recalled the jury he would have to underline the difference between an unsworn statement and evidence on oath which, he thought, might highlight the matter in a way that would be prejudicial to the accused.

At the conclusion of the trial counsel for the appellant applied

to the learned trial Judge for leave to appeal to this Court on a number of grounds including one submitted by counsel in the following terms:-

> "The charge to the jury in relation to the unsworn statement made by Mr. Cummins was unduly unfavourable to him and unduly restrictive of the jury's function in regard thereto."

The learned trial Judge refused leave to appeal on all grounds save on that ground quoted, in relation to which matter it was observed both by the learned trial Judge and by counsel that "we have no modern Irish decision on that". On the certificate of the learned trial Judge that this is a case fit for appeal upon that ground, this Court has heard the submissions of counsel for the appellant and counsel for the Director of Public Prosecutions. Although an application for leave to appeal on seven other grounds was filed, it was not moved by counsel and the hearing was confined to the hearing of the appeal on the certified ground.

The most recent Irish decision in which reference is made to the status (as it has been called in the course of argument) of the unsworn statement of an accused is The People (Attorney General) v. Riordan (1948) I.R. 416. That was a decision of the Court of Criminal Appeal

and the judgment of the Court was delivered by Gavan-Duffy P. There he referred to the unsworn statement of an accused as being "an integral part of the evidence upon which the jury had to find a verdict." Counsel for the accused in this case cited that statement as authority for the proposition that the unsworn statement of an accused is evidential in quality. This Court cannot agree that the case is authority for that proposition. What Gavan-Duffy P. there said was said only in the context of an omission to include the unsworn statement of the accused in the transcript which was before the Court, the Court being of the opinion that it was clearly necessary that the transcript should include this statement, as "it is the duty of the official stenographers to report every case fully and in every detail" (per Kennedy C.J. in A.G. v. Joyce and Walsh (1929) I.R. 526).

It was only in comparatively recent times that a person charged with an offence was given the right to be a witness in his own defence. This right was given in England by s. 1 of the Criminal Evidence Act, 1898, (which did not apply to Ireland), and in Ireland by s. 1 of the Criminal Justice (Evidence) Act, 1924, which corresponds to s. 1 of the 1898 Act. S. 1(h) of the Act of 1924 provides that "Nothing in this Act shall affect the right of the person charged to make a

statement without being sworn", thus retaining the only right an accused person previously had. The corresponding section 1 of the 1898 Act and the status of and the weight which should be given to an unsworn statement, were considered by the Court of Appeal in England in Reg v. Joseph John Coughlan, (1976), 64 C.A.R. 11. Shaw L.J., in delivering the judgment of the Court said at p. 17:-

> "When the Criminal Evidence Act 1898 made it possible for a person charged with an offence to be a witness in his own defence, it expressly preserved by section 1(h) what had until then been the only right of such a person, namely, to make a statement without being sworn. The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness and he does not give evidence. Nevertheless, in preserving his right to make an unsworn statement, the statute tacitly indicated that something of possible value to the person charged was being retained. What is said in such a statement is not to be altogether brushed aside; but its potential effect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the true facts and the inferences to be drawn from them in a

> different light. In as much as it may thus influence the jury's decision they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.....
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> The controversial question is in the end reduced to a mere logomachy. Whatever status may be assigned to an unsworn statement, it can hardly vie with sworn evidence in cogency and weight."

That statement , is, in the opinion of this Court, a correct statement of the law on the questions in issue in this appeal and the Court adopts it as such. In the opinion of the Court, it is unnecessary, and would probably be extremely unwise, for a trial Judge to embark upon an attempt to elaborate for a jury distinctions or refinements in the use of the word "evidence", or to try to define for the jury any particular status for an unsworn statement of an accused. It is sufficient that in his charge to the jury the learned trial Judge puts the matter and content of the unsworn statement in its proper context, and leaves the jury under no misconception as to the

distinction which may be made by them in having regard to an unsworn statement as against evidence given on oath. How this may be done depends on the particular circumstances of each case, on the nature and substance of the unsworn statement, and on the evidence adduced on oath before the jury. The jury should also be told that it is exclusively for them to determine what value, if any, the unsworn statement has, and that they should give the statement only such weight as they think it deserves.

In the instant case, the "unsworn statement" consists only of brief negative replies given by the appellant to two questions put to him by his counsel. During the course of the hearing of the appeal, doubt was expressed as to whether this could properly be regarded as an unsworn statement within the meaning of s. 1(h) of the 1924 Act, but the Court assumed for the purposes of this appeal that it was such an unsworn statement. In his argument to this Court, counsel on behalf of the appellant submitted that the learned trial Judge was wrong in law in equating the unsworn statement of the appellant with an address to the jury by counsel. Each is however persuasive in character, and in the view of the Court the use of such an equation in this case is of no greater significance than a comment on the cogency

of the statement and does not, as submitted by counsel for the accused, give an indication to the jury to disregard it. Counsel also submitted that, by reminding the jury to decide the case only on the sworn evidence given in Court, and by describing the unsworn statement as less than evidence, the learned trial Judge must have conveyed to the jury that they shoud disregard the unsworn statement. The learned trial Judge in fact expressly told the jury to have regard to what the accused said, and in the opinion of the Court the manner in which he dealt with this matter in charging the jury was correct and was unexceptionable.

Having regard to the nature, form, and substance of the unsworn statement, and to the careful manner in which the learned trial Judge repeatedly instructed the jury on their functions, the Court is satisfied that there is no substance in this ground of appeal. It is worthy of note that the manner in which the trial was held and in which the defence was put by the learned trial Judge to the jury, was a model in fairness.

This appeal is accordingly dismissed.