THE COURT OF APPEAL

UNAPPROVED **NO REDACTION NEEDED**

[229/19]

The President

Donnelly J

Ni Raifeartaigh J

IN THE MATTER OF SECTION 34 OF THE CRIMINAL PROCEDURE ACT 1967 AS AMENDED

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

A.C.

RESPONDENT

JUDGMENT of the Court delivered on the 21st day of December 2020 by Birmingham P.

1. In February 2018, the respondent, A.C., stood trial in Dundalk Circuit Criminal Court charged with two offences: one count of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997; and one count of assault causing serious harm contrary to s. 4 of the same Act. The trial related to events that had occurred on 19th June 2016 at a licensed premises in Dundalk. The prosecution case was that the respondent had struck the injured party in the head/face region with a barstool, causing the injured party to suffer a significant eye injury.

2. The prosecution had intended to rely on two certificates from medical practitioners. One of the reports was prepared by a consultant in Emergency Services at Our Lady of Lourdes Hospital in Drogheda. That certificate was not the subject of any controversy and

was admitted in evidence. However, at trial, the defence challenged the admissibility of a second certificate which had been provided by Professor Colm O'Brien, Consultant Ophthalmic Surgeon, at the Mater Hospital in Dublin. The challenge was advanced in circumstances where it was clear from the certificate that Professor O'Brien had not personally seen the injured party and that his report, and therefore the certificate, was based upon "the clinical notes collected in the Ophthalmology Department [of the Mater Hospital] on the dates of the 19th and 20th June 2016". The certificate was challenged on the basis that it was hearsay and that it could not be admitted in evidence in a situation where Professor O'Brien had not examined the injured party. The judge upheld the challenge to the certificate. The effect of this was that there was a directed verdict of not guilty in respect of count two on the indictment, the count of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997.

3. Arising from the exclusion of the certificate, the DPP has, pursuant to statute, referred the following question of law to the Court of Appeal:

> "Was the learned trial Judge correct to exclude evidence tendered by way of a Certificate pursuant to Section 25 of the Non-Fatal Offences Against the Person Act, 1997 on the grounds that the medical practitioner who prepared the said Certificate had not personally performed the examination referred to in the said certificate?"

4. It appears that the late Judge Hannon was consulted, but did not have any observations on the issue that was being referred. Section 34 of the Criminal Procedure Act 1967, as amended, provides as follows:

> "34.–(1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General in any case, or if he or she is the prosecuting authority in the trial, the Director of Public Prosecutions may, without prejudice to the verdict or decision in favour of the accused person, refer a question of

law arising during the trial to the Court of Appeal for determination or, in the case of a person who is tried on indictment in the Central Criminal Court, make application to the Supreme Court under Article 34.5.4° of the Constitution to refer a question of law arising during the trial to it for determination.

(2) Where a question of law is referred to the Court of Appeal or the Supreme Court, as the case may be, under subsection (1), the statement of the question shall be settled by the Attorney General or the Director of Public Prosecutions, as may be appropriate, after consultation with the trial judge concerned, or, in the case of a Special Criminal Court, with the member of that Court who pronounced the decision of the Court in the trial concerned following consultation by that member with the other members of the Court concerned and shall include any observations which the judge or that member, as may be appropriate, may wish to add."

5. Before dealing with the arguments that were advanced in support of excluding the certificate at trial, and which have been repeated before this Court in opposition to the Director, it is probably helpful to provide a little more detail by way of background.

Background

6. The respondent was originally charged with an offence contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, relating to an incident at the licensed premises on 19th June 2016, and was sent forward to the Circuit Court on that single charge. Thereafter, the matter was adjourned from time to time to allow the prosecution to obtain a further report specifically addressing the question of whether a more serious charge should be brought against the respondent. When the indictment was ultimately lodged on 12th February 2018, a second charge was laid arising from the same incident, being a charge of causing serious bodily harm to the same injured party contrary to s. 4 of the Non-Fatal Offences

Against the Person Act 1997. The trial proceeded on 13th February 2018. On the day prior to the trial commencing, the prosecution served a certificate pursuant to s. 25 of the Non-Fatal Offences Against the Person Act 1997. It would seem that this report had been provided previously by way of disclosure but it was only on the day prior to the trial commencing that it was served as additional evidence. We feel bound to say that we regard this aspect of matters as unsatisfactory. However, the lateness of service was not a determining factor at trial and, given the terms of the question of law that has been referred to this Court, it is not directly in point at this stage. At trial, the opposition to the certificate was on the basis that it was hearsay and therefore inadmissible. There was no request for an adjournment of the trial with a view to obtaining independent medical reports to assess the significance of what Professor O'Brien was saying.

7. Had there been a request for an adjournment then, given the late service of the certificate, it would seem inevitable that the application would have been acceded to. We would express the view that in any case where the prosecution is proposing to rely on a certificate, it is incumbent on them to serve the certificate in good time, which really means well in advance of the trial so that the defence have an opportunity to consider its contents and, if deemed appropriate, to take independent advice in relation to it.

8. Counsel on behalf of the then accused raised the issue immediately after the opening speech by the prosecution. He began by explaining that the book of evidence contained a s. 25 medical report certificate, being a report of a Mr. Aseem Rafik, a consultant in emergency surgery at Our Lady of Lourdes Hospital in Drogheda, and he confirmed that he was not taking any issue with that. It was clear that Dr. Rafik had occasion to meet with the injured party. However, he said so far as the report from Professor Colm O'Brien was concerned, he took a different position. He quoted from the report where it stated:

> "This report summarises the clinical notes collected in [the] ophthalmology department on dates of 19th and 20th June 2016."

He referred to a section which had recited that the on-call senior house officer had contacted the duty registrar for further advice and that, at that point, the patient absconded from the ward against clinical advice. An attempt was made to contact the patient by phone but there was no response. Counsel said that it was clear that Professor O'Brien, the author of the report, had never laid eyes on the injured party. He said that in circumstances where everything contained in the report had been garnered from other sources, he was objecting to the admissibility of the report. Counsel said it was entirely based on hearsay and that there could not be any basis in law to admit it in circumstances where it would only ordinarily be admissible under s. 25 of the Non-Fatal Offences Against the Person Act 1997, which provision required an examination. The author of the report had never examined the injured party.

9. When counsel on behalf of the Director responded, he began by addressing the fact that while the certificate was dated the previous day, the report (by reference to which the certificate was prepared) had been compiled much earlier. Counsel on behalf of the then accused interjected to confirm that he was not objecting on disclosure grounds. Addressing the substance of the issue, counsel for the Director said that the position was that the prosecution had produced a certificate purporting to be signed by a registered medical practitioner; it was a certificate that related to an examination of the injured party; and accordingly, they said that until the contrary is proved, it ought to be evidence of any fact certified without proof of any signature therein. He said that what his colleague was doing was inserting into the section the words "by the practitioner" after the words "in relation to an examination". Counsel for the Director said that the correct position was that a medical practitioner, normally a person of authority, would be in a position to certify the medical

position from his or her skill and experience, having examined the file and/or having examined the individual patient concerned. He said that inevitably, a certificate was going to contain a certain amount of hearsay because the consultant would not be in a position to assert the time and date of admission unless he or she was physically present at that stage, and, inevitably, he or she would not be in a position to attest to the medication actually taken by the individual.

10. In ruling on the matter, the judge referred to the fact he was dealing with an application to exclude the report of Professor O'Brien, and the certificate created, as inadmissible hearsay. He referred to the fact that it was submitted by counsel for the then accused that Professor O'Brien's report relies entirely on the notes of others in its preparation as Professor O'Brien never actually examined the injured party himself. He said it was contended that the requirements of s. 25 of the Non-Fatal Offences Against the Person Act 1997 were such that the individual preparing the certificate should be the person who carried out the examination. The judge went on to say that in thinking about the issue over lunch, he had wondered why a certificate was necessary; what purpose did it serve in the context of prosecutions under sections 3 and 4 of the Act of 1997? He said it seemed to him that it was to certify the findings of a registered medical practitioner in order to help a jury to decide if there was any harm to satisfy s. 3, or if there was serious harm sufficient to satisfy the requirements of s. 4. He said that the findings of such an examination must relate to findings that are consequent to that medical examination having been carried out on the person who alleged the assault. He said that the language of the Act of 1997, it seemed to him, was clear and unambiguous in its use of the phrase "related to the examination of that person". He went on to pose the following question:

> "Does that therefore mean that the examination needs to be carried out by the person who was preparing the certificate? Well, it is a certificate that is required

> which begs the question why a certificate and not some class of a report. A certificate is to certify something. But in any event, in my view it does in the context of this particular trial require that the certificate be prepared by the person who has carried out the examination."

He said that the report of Professor O'Brien was "more akin to a report which is furnished for the simple purpose of avoiding the necessity of medics turning up to prove records and treatment", but that "there comes a point where it moves into a stage where opinions are being given". He said the certificate that was required was a certificate "relating to an examination of a person in the context of a jury being asked to decide if they have sufficient evidence to find that harm or serious harm was caused to a complainant". Findings on examination must, therefore, "be important and central to a case such as this". It seemed to the judge that in the context in which they found themselves, the person signing such a certificate "must have done more than simply engage in the review of records". They must have done more than "simply to engage in a file review or a desktop study". The judge continued:

> "Furthermore in circumstances where they give an opinion sufficient to allow a jury to make a finding of serious harm. And in this case, the opinion being that there was likely permanent long-term damage and that satisfies one of the three strands of the serious harm definition, that third strand which says that serious harm can arise in circumstances where there is impairment of the function of any particular bodily organ or member. But in those circumstances, the person so certifying must surely have examined the person.
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> So in [those] circumstances I'm [acceding] to [counsel for the then accused's] application which I take it is not to permit the report go before the jury by way of section 25."

The Present Appeal

11. In contending that the trial judge fell into error in excluding the certificate, the Director points out that the transcript records the trial judge referencing s. 25 of the Act of 1997 and stating that the section provided (in relation to the preparation of a certificate) reads that it must be relating to *the* examination of the person, whereas in fact the language of the section provides that it must be "relating to *an* examination of that person" (emphasis added). It is acknowledged that it may be that the transcript is not 100% accurate, or it may be that there was an error on the part of the judge and if so, whether that error had any significance on his thinking on the subject remains uncertain. The Director says that what the section allows for is the admission into evidence, in essence, of a medical report which would otherwise be inadmissible hearsay. She says that the purpose of the section is clear; that it obviates the necessity for medical practitioners to attend court in order to give evidence which, in many instances, may be of a routine and uncontroversial nature. The point is made that individuals who are the victims of an assault will often be seen, when they first present in an emergency department of a hospital, by a senior house officer or a registrar, and by the time it comes to obtaining a report in respect of the injuries, the original examining doctor may no longer be working in that particular hospital.

12. The respondent points out that, ordinarily, a document such as the certificate would not be admissible *per se* and that it is admissible only because of the existence of a statutory enactment. However, he says that just because there is a certificate which contains evidence that is relevant, that does not mean that it is automatically to be admitted in to evidence. He says if an issue is raised, it is for the prosecution to satisfy the trial judge that it is admissible, while acknowledging that in most cases, there will be a presumption that the certificate will

be admissible. However, in the present case, there was the obvious difficulty that it was entirely based on hearsay and also involved a blend of fact and opinion.

Discussion

13. In my view, the starting point for consideration of the issue is the actual wording of s. 25(1) of the Non-Fatal Offences Against the Person Act 1997. It provides:

> "25.–(1) In any proceedings for an offence alleging the causing of harm or serious harm to a person, the production of a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person, shall unless the contrary is proved, be evidence of any fact thereby certified without proof of any signature thereon or that any such signature is that of such practitioner."

It seems to me significant that there is a clear and unqualified statement that in any proceedings for a relevant offence, "the production of a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person, shall unless the contrary is proved, be evidence of any fact thereby certified". There is no stipulation that the certificate must emanate from a practitioner who has treated the injured party or has had a direct involvement in the treatment of the injured party. What is required is that the certificate relate to an examination of the injured party. There is no requirement that the examination should be carried out by the person providing the certificate, or that it should have been overseen by that person, or that that person should have had any involvement.

14. On the face of it, the section is unqualified in its terms. Had the Oireachtas wished to confine valid certificates to those created by particular categories of medical practitioners, it was open to them to do so. They did not. We do not find it surprising that the Oireachtas decided to approach the matter in the way that it did. Most medical examinations and

treatments of individuals who have suffered injuries as a result of an assault will involve multiple medical professionals, such as nurses, doctors, junior hospital doctors, registrars, sometimes consultants, radiographers and radiologists, to mention just some. In a situation where numerous professionals are involved, no doubt individuals will be making their own notes and adding their own contributions to the medical file. We find it not at all surprising, and on the contrary, entirely understandable, that provision would be made for the production of a single certificate.

15. As was pointed out on behalf of the DPP in her written submissions, the provision is not at all unique. Attention is drawn to the terms of s. 10 of the Misuse of Drugs Act 1984, as amended, which provides:

> "10.—In any proceedings for an offence under the Principal Act or section 5 of this Act, notwithstanding section 169 of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 the production of a certificate purporting to be signed by an officer of Forensic Science Ireland of the Department of Justice and relating –
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> (a) The receipt, handling, transmission or storage, or
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> (b) an examination, inspection, test or analysis,
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> as the case may be, specified in the certificate of a controlled drug or other substance, product or preparation so specified shall, until the contrary is proved, be evidence of any fact thereby certified without proof of any signature thereon or that any such signature is that of such officer."

What is provided for is a certificate purporting to be signed by an officer of Forensic Science Ireland. There is no requirement that the officer should have personally carried out the examination, inspection, test or analysis; still less, there is no requirement that the examination, inspection, test or analysis should have been carried out by the certifying officer

and the officer alone. However, the Court would like to take the opportunity to draw attention to the fact that it is for the party seeking to introduce the s. 25 certificate to ensure that the medical evidence being presented by certificate is readily understandable to a jury.

16. In the circumstances, we are satisfied that the judge erred in excluding the certificate. Accordingly, we would answer the question that was referred for determination as follows: the trial judge was incorrect in excluding the evidence tendered by way of a certificate, pursuant to s. 25 of the Non-Fatal Offences Against the Person Act 1997, on the ground that the medical practitioner who had prepared the said certificate had not personally performed the examination referred to in the certificate.