STATE OF NEW JERSEY,
Respondent
v.
MICHAEL COLLINS
Defendant - Appellant

A-01-1234-T3

Superior Court, Appellate Division

Submitted August 21, 2000 - Decided September 21, 2001

Before Judges GRIM, REAPER and MERCY.

OMAR BARIFF, Bussein, Smith and Cohen L.L.P., attorneys for the defendant-appellant (Mr. Bariff, of counsel and on the brief).

WILLIAM PERES, Assistant Middlesex County Prosecutor, for the State of New Jersey (Donna Katami, Middlesex County Prosecutor, attorney; Mr. Peres, of counsel and on the brief).

REAPER, J.A.D. joined by GRIM, J.A.D.

This case arises out of the April 19, 2001, decision of the Superior Court, Law Division, Middlesex County, to declare a mistrial during the defense case in this homicide prosecution and the trial court's denial of defendant's subsequent motion to dismiss the charges based on double jeopardy.

The mistrial was ordered, *sua sponte*, over defendant's objection, during the testimony of a defense witness. The witness invoked his privilege not to testify after testifying at some length on direct and for a brief time on cross-examination. The trial judge held that the invocation of the privilege was appropriate, that striking the testimony already given would have been highly prejudicial to the defendant as well as unfair to the state, and that granting use immunity to the witness was inappropriate because a strong governmental interest countervailed such a step.

The trial court thus concluded that there was no viable alternative to termination of the trial and held, thereafter, that double jeopardy was no bar to retrial.

We agree in every respect. We hold that the circumstances surrounding the testimony of the defense witness gave rise to manifest necessity for a mistrial and that the double jeopardy clause does not bar retrial.

The Facts

Defendant Michael Collins is an Irish national, a truck driver and legal alien living in Piscataway, New Jersey. He is charged with capital murder pursuant to N.J.S.A. 2C:11-3(c). The charges relate to his alleged involvement with the terrible tragedy which occurred on September 12, 2000, in New Brunswick, New Jersey, when members of a rogue faction of the Irish Republican Army (IRA) detonated a truck bomb at the offices of a company it believed was supplying low-cost medicines to the Protestant-controlled Ulster Defense Force. Thirty-five people died when the bomb exploded, severely damaging the offices of Jackson & Jackson.

The evidence presented at trial before the mistrial was declared was directed at proving that defendant had rented and driven a green truck which had transported the explosives used in the attempt to destroy the Jackson & Jackson headquarters. On that fateful morning at about 10:30 a.m., that truck pulled into the parking lot of the Jackson & Jackson office complex in downtown New Brunswick. According to a surviving security guard, the truck driver told the security officers via intercom that he was making a water delivery. He was allowed to pull in and stop right by the rear service entrance of the main building. The guard testified that he heard the driver get out of the truck and ask another guard for permission to use the restrooms before unloading the truck. That other guard, who did not survive the blast, allowed the driver into the building and pointed him towards the front of the building. Two minutes later the truck exploded, destroying part of the building and killing 35 people. The Irish Liberation Front, a rogue element of the IRA, claimed responsibility. No-one who survived the blast had actually seen the truck driver and therefore the identity of the person who rented the vehicle was critical to the case.

Following an intense investigation, defendant was arrested and charged with being the driver and one of the leaders of the Irish Liberation Front. He was indicted in Indictment No. L-1234-00-CR on 35 capital murder counts.

Trial began before the Hon. Henrietta Bissinger, J.S.C., on April 9, 2001. Defendant had been held without bail since his indictment. He therefore was held in the courthouse lock-up during all court recesses. After the lunch recess on April 19th, just before the defense was to rest its case, defendant told his lawyer that he had had a conversation with another Irish national who was being held in the courthouse lock-up on an immigration detainer. He told defense counsel that the detainee, Joseph Kennedy, had told him that “everyone knew [defendant] wasn't involved and that it was Bobby Fitzgerald who rented the truck and that he had seen him do it.”

Defense counsel immediately arranged to have the sheriff’s officers produce Mr. Kennedy from the lock-up to appear as a witness for the defense. The transcript reflects the following occurred immediately after Kennedy was called to the stand and sworn in:

Q: [by defense counsel] Mr. Kennedy, would you state your full name and spell your last name for the record, please?

A: (turning) Judge, may I ask...

Court: Mr. Kennedy, your job is to answer questions, not ask them. Okay?
A. Okay.

Defense counsel then resumed his direct examination of the witness. The examination continued without interruption through a number of preliminary questions, and then the following exchange took place:

Q: And Mr. Kennedy, did you have occasion to be at or near the Truck Rental Shop in Piscataway on the morning of September 11, 2000?
A. Yes, I did.
Q. Did you during that time observe anyone in the process of renting a green truck?
A: (turning) Judge, I really….
Court: Again, Mr. Kennedy, you need to just answer the questions unless you don't understand them. Is there anything you don't understand?
A. No.
Court: Then you can answer the question.
A: Yes. I did see someone.

Further questions established that the defendant was not the man Kennedy had seen and that one Bobby Fitzgerald had been the man to rent the truck. The prosecutor then proceeded to cross-examine the witness. After 10 minutes or so of cross-examination, the following exchange took place:

Q: Mr. Kennedy, it is your testimony that at the time in question, while you were at the Truck Rental Shop in Piscataway, you observed an individual in the process of renting a green truck. Is that correct?
A: Yes.
Q: And in fact, you knew this individual intimately, didn't you?
A: Judge, I really can't…..I really need a break right now, really.

The judge, after looking at his watch, ordered that the court be recessed for the afternoon break. Kennedy was returned to the lock-up, where he met with his counsel, William Maguire, who had come to the courthouse for a previously-arranged appointment with his client. Upon hearing that Kennedy had been called as a witness in the Collins case, counsel instructed Kennedy not to answer any additional questions and immediately sought a conference with Judge Bissinger.

In open court but outside the presence of the jury, the witness's counsel then informed the judge that, upon his advice, Kennedy was claiming his privilege against self-incrimination and that, in fact, had he had advance notice of his client's testimony, he would have advised him to do so at the outset.

Judge Bissinger, recalling the instances the witness had turned to her during his testimony, asked the witness what he had been trying to say when she had stopped him. He replied: "I was going to ask to speak with my lawyer."

The trial judge dismissed the witness, dismissed the jury for the day and then asked both defense counsel and counsel for the State for their positions on what action she should take as the result of the aborted testimony.

Defense counsel argued that the witness did not have a valid privilege since he waived it by testifying, and even if the court concluded that he could invoke the privilege, he should be given use immunity and compelled to testify further. The prosecution said that the State was vehemently opposed to use immunity and urged the court to strike the witness's testimony in its entirety.

The trial judge then found that: (a) the witness could claim privilege, especially since she had not allowed the witness to consult with counsel; (b) immunity was not appropriate in this case; and (c) striking the testimony was not an adequate solution since it would be unfair to the State and harmful to the defense. Judge Bissinger therefore, *sua sponte*, declared a mistrial based on manifest necessity and ordered a new trial.

On May 1, 2000, defendant filed a motion to dismiss based on double jeopardy. He argued that the trial judge had abused her discretion in determining that a mistrial was necessary based upon manifest necessity since (a) the witness had waived his privilege by testifying and could therefore be compelled to continue to do so and (b) there was a viable alternative to such a mistrial in the form of a grant of use immunity. Argument was heard on May 21, 2001, and on May 23, 2001, the trial court entered an order denying the motion. Defendant sought leave to appeal by motion filed on May 30, 2001, and this court granted the motion on June 8, 2001.

Discussion

We hold that the trial court was correct in declaring a mistrial due to manifest necessity and to serve the ends of justice. Thus, defendant is not entitled to dismissal of the charges based on double jeopardy considerations and that the State may proceed with a retrial on Indictment No. L-1234-00-CR.

We agree, first, that the defense witness Kennedy was entitled to invoke his privilege against self-incrimination at any time during his testimony and that the trial judge erred when she refused to let Kennedy explain, before he began testifying, that he wanted to meet with his attorney. His failure to invoke the privilege at the beginning of his testimony, therefore, was not a waiver of his right to invoke it when questions on cross-examination were directly inculpatory. Indeed, as long as an answer "would furnish a link in the chain of evidence needed to prosecute," then it is incriminating. *In re Ippolito*, 75 N.J. 435, 440-441 (1978). It is widely accepted that the privilege against self-incrimination is one of the most important protections of the criminal law and "firmly established as part of the common law of New Jersey." *State v. Hartley*, 103 N.J. 252, 260 (1986). A waiver of this privilege must be knowingly and intelligently given. *State v. Chew*, 150 N.J. 30, 65 (1997), cert. denied 528 U.S. 1052 (1999).

We agree with the trial court that Kennedy, when not allowed to consult with counsel, did not knowingly and intelligently waive his privilege against self-incrimination. As a consequence, the trial court correctly determined that the witness could claim the privilege during cross-examination. Because the witness had the right to claim his privilege, the trial court was faced with three alternatives. The State urged the court to strike the witness's testimony; the defense asked the court to fashion a form of use immunity for the witness; and the court itself considered ordering a mistrial.

We agree with the court that striking the witness's testimony would have been an insufficient remedy. It would have been highly prejudicial to defendant and unfair to the State. Striking the witness's testimony, testimony obviously of crucial importance for the defense, would have confused and prejudiced the jury and no amount of curative instructions would have been effective in eliminating the prejudice to the defense. On the other side, allowing the case to proceed after the jury had heard the exculpatory testimony but the prosecution had been unable to cross-examine the witness might have given the defense an unfair advantage over the State. Though we must be solicitous always of defendants' rights in criminal cases, a defendant's interests no longer have to be the sole consideration when a trial judge declares a mistrial *sua sponte*. There are "important interests other than those of defendant alone ... involved in the trial of criminal cases." *State v. Laganella*, 144 N.J.Super. 268, 287 (App.Div.), app. dismissed, 74 N.J. 256 (1976). The rights of the public must be considered. While the interest of a fair prosecution may not outweigh defendant's rights, when action by a trial judge may fairly be said to serve both interests, it should be held within the court's discretion. *State v. Farmer*, 48 N.J. 145, 175 (1966).

We also agree that there is no authority in New Jersey for the grant of use immunity other than by following the procedures of N.J.S.A. 2A:81-17.3. Defendant's argument that a grant of use immunity to the witness presents a viable alternative to a mistrial flies in the face of common sense and the most basic tenets of public policy. We are dealing here with a witness who may conceivably be deeply implicated in the heinous murder of 35 innocent people. This countervailing governmental interest alone is sufficient to defeat any grant of immunity.

Thus we are left with the clear conviction that the trial court properly exercised its discretion in determining that manifest necessity and the ends of justice required that a mistrial be declared. "Manifest necessity" and "the ends of public justice" are concepts that are highly fact-sensitive. *State v. Farmer*, *supra*, 48 N.J. at 177. Courts must balance two prime factors: the public interest in seeing that there is a fair trial and defendant's constitutional right not to be subject to trial twice on the same offense. The law in this State holds that there may be manifest necessity "'* * * if the trial was terminated or the jury discharged before verdict because of incapacitating illness of the judge or a juror or jurors or of the defendant, or misconduct or disqualification of some members of the jury, or on account of an untoward incident that renders a verdict impossible, or some undesigned matter of absolute necessity, or the failure of the jury to agree upon a verdict after a reasonable time for deliberation has been allowed, subsequent prosecution for

the offense [is] not barred,' for reasons of justice and the public interest." *State v. Romeo*, 43 N.J. 188, 195-196 (1964).

We acknowledge that the termination of a trial short of verdict implicates Double Jeopardy concerns. Certainly, jeopardy had attached in this case. Jeopardy attaches when the jury is sworn. *State v. Locklear*, 16 N.J. 232, 235, 243 (1954); *State v. Howard*, 235 N.J.Super. 243, 254 (App.Div.), certif. denied, 118 N.J. 206 (1989), cert. denied, 493 U.S. 1094 (1990). Still, New Jersey courts grant trial judges a wide range of discretion in granting a mistrial. *State v. Modell*, 260 N.J. Super. 227 (App. Div. 1992), certif. denied 133 N.J. 432 (1993). We cannot find an abuse of discretion in these facts.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Protections against double jeopardy under the New Jersey Constitution, Art. I, para. 11, are held to be co-extensive with the protections afforded by the federal clause. *State v. Black*, 153 N.J. 438, 443 (1998); *State v. Koedatich*, 118 N.J. 513, 518 (1990), cert. denied, 488 U.S. 1017 (1989).

Nonetheless, not every retrial runs afoul of the protections of the Double Jeopardy clause. Termination of a trial after jeopardy attaches does not automatically bar subsequent re-prosecution. *State v. Lynch*, 79 N.J. 327, 342 (1979). Only improper termination of proceedings by a trial court bars a retrial. *State v. Gallegan*, 117 N.J. 345, 353 (1989). Due consideration must be given to "the ends of public justice." *United States v. Perez*, 22 U.S. 579 (1824). Where the court finds a sufficient legal reason and manifest necessity to terminate a trial, the defendant's right to have his initial trial completed is subordinated to the public's interest in fair trials and reliable judgments. Such is the case here.

We cannot let it go without commenting that twice now within two years, citizens of our fair state have paid the ultimate price in the patriot's games[1] of international terrorists. Let us not forget that in addition to the defendant's right to a fair prosecution there is "the societal right to have the accused tried and punished if found guilty." See *State v. Loyal*, 164 N.J. 418, 438 (2000). Weighed against these concerns is the right of the public to the fair and vigilant enforcement of the criminal laws. The first right of the individual is to be protected from criminal attack. To set free criminal suspects whenever a trial is aborted would deny the innocent the protection due them and defeat the social contract upon which government is based.

It would be a high price indeed for society to pay were every accused protected from punishment because of any technical defect sufficient to constitute reversible error in the

1. "Come all ye young rebels, and list while I sing
For love of one's country is a terrible thing
It banishes fear like the speed of a flame
And it makes you all part of the patriot's game."
-- The Patriot's Game, by Dominic Behan

proceedings leading to conviction. There is an uncontested societal interest in giving the prosecution a complete opportunity to convict those who have violated its laws and a compelling public interest in just judgments. *Downum v. United States*, 372 U.S. 734 (1963). Compelling public policy and the trial court's inherent discretion in determining whether to declare a mistrial militate against the emphasis on technicalities when applying the prohibition against double jeopardy.

For these reasons, we uphold the order of the trial court. Defendant may be retried on Indictment No. L-1234-00-CR.

MERCY, J.A.D., dissenting

I respectfully disagree with my colleagues and would dismiss defendant's case on the ground of double jeopardy.

Unquestionably, a trial court has a discretionary range within which it may properly operate to grant a mistrial whether on its own motion or otherwise. *Gori v. United States*, 367 U.S. 364 (1961). But there are limits. When, as here, the trial court acts, *sua sponte*, over the objections of both parties, the validity of a mistrial depends upon whether it is within the sound exercise of the court's discretion, utilized only in those situations which would otherwise result in manifest injustice. *State v. DiRienzo*, 53 N.J. 360, 383 (1969). Clearly, a mistrial should not be ordered when there is a viable alternative. *State v. Loyal*, 164 N.J. 418, 464-437 (2000).

Our Supreme Court has suggested the following analysis where a case centers on the propriety of a trial judge's *sua sponte* declaration of a mistrial: “Did the trial court properly exercise its discretion so that a mistrial was justified? Did it have a viable alternative? If justified, what circumstances created the situation? Was it due to prosecutorial or defense misconduct? Will a second trial accord with the ends of public justice and with proper judicial administration? Will the defendant be prejudiced by a second trial, and if so, to what extent?” *State v. Rechtschaffer*, 70 N.J. 395, 410-11(1976). In arriving at the decision to declare a mistrial *sua sponte*, “trial judges [should not] foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” *United States v. Jorn*, 400 U.S. 470, 485 (1971).

Such a scrupulous exercise is sorely lacking in this case.

First, it is obvious to me that the trial judge clearly abused her discretion in granting a mistrial. Since Kennedy had freely and validly waived his Fifth Amendment privilege before he attempted to assert it, there was neither legal justification nor manifest necessity for the declaration of a mistrial over appellant's objection. *State v. Loyal*, 164 N.J. at 435. It is well established that a witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about

additional details; the privilege, once waived, is lost. *State v. Toscano*, 13 N.J. 418, 423 (1953); *State v. Bishop*, 187 N.J. Super. 187, 192 (App. Div. 1982). There is therefore no unfairness in allowing cross-examination when testimony is given without invoking the privilege. See *Mitchell v. United States*, 529 U.S. 314 (1999). The legal fact is that the Fifth Amendment is a personal privilege, which must be asserted by the witness and not by counsel. There is not one iota of evidence in this record that this witness would in fact have asserted a privilege not to testify if further questions had been asked. It is clear that the law does not permit a lawyer to invoke a client's privilege, *State v. Jamison*, 64 N.J. 363, 378 (1974), yet that is what happened here.

Even if the trial court was right in its Fifth Amendment analysis, and I submit that it could not possibly have been right due to its failure to establish what the witness would actually have done, clearly there was another viable alternative to granting a mistrial. The trial court could have granted use immunity to the witness and compelled the witness to complete his testimony. Granting a witness use immunity is an inherent power of the court because it attaches to any compelled testimony. In fact the circumstances in this case are extraordinary enough to hold that the judge was required by due process considerations to grant this witness immunity. The fact that the proffered testimony was clearly exculpatory and essential to the defendant's case makes this alternative not only viable but indeed essential. See *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir.1980); *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), cert. denied 441 U.S. 913 (1979).

Because defendant's rights were not scrupulously protected, he is entitled to the protections of the Double Jeopardy clause against retrial on these charges. That protection affords a defendant a "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). As former U.S. District Judge Frederick B. Lacey has said, writing for the Third Circuit in *United States v. McKoy*, 591 F.2d 218, 221-22 (3d Cir. 1979):

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Given the conflicting concerns involved in any "manifest necessity" assessment, the State must shoulder the "heavy" burden of demonstrating that a mistrial was required by a high degree of necessity, in order to avoid a double jeopardy bar. *State v. Gallegan*, 117 N.J. 345, 352 (1989). It has not met that burden here. Double jeopardy bars retrial.

Finally, I too am compelled to comment on the tragedies that have befallen our land. I too am angered and dismayed by the terrorist attacks on our citizens, last year at Jackson & Jackson, and this year at the World Trade Center. But we are a nation of laws and we should not sacrifice our liberties on the altar of antiterrorism. This defendant is entitled to the full and complete protections of the laws, even in difficult times and even when those protections leave us afraid or uncomfortable. The majority's relegation of a constitutional right such as the prohibition against double jeopardy to a technicality flies in the face of every tenet of our constitutional democracy, is morally objectionable and legally indefensible.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-01-522

STATE OF NEW JERSEY	:	
	:	
	:	
v.	:	**ORDER**
	:	
MICHAEL COLLINS,	:	
	:	
Defendant-Appellant.	:	
_____	:	

This matter having been brought before the Court on September 24, 2001, by the defendant-appellant, it is, on this 28th day of September, 2001, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before December 1, 2001.

STEPHEN W. TOWNSEND, Clerk
For the Court