COURT OF APPEAL

Record Number: 283/18

President
McCarthy J.
Donnelly J.

BETWEEN/

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

RESPONDENT

-AND-

ANTHONY WALSH

APPELLANT

JUDGMENT of the Court delivered on the 26th day of November 2019 Ms. Justice Donnelly

Introduction

1. The appellant was convicted on the 23rd October, 2018 of the murder of Dermot Byrne on the 16th July, 2017.

2. The appellant appeals his conviction on two grounds: -

    (a) That a transcript of a voice recording made by him on 17th July, 2017 should not have been admitted in evidence, and

    (b) that the jury was not properly directed on the burden of proof in respect of a defence of provocation.

Background

3. The background facts are that the appellant and the deceased were unknown to each other before the night of the 15th/16th July, 2017. The appellant was socialising with friends in Swords and alcoholic drinks were consumed. The deceased was also socialising and drinking alcohol in a number of establishments around the same time. The paths of the appellant and the deceased crossed a number of times in the early hours of the morning of 16th July, 2017. Apart from the actual killing of the deceased their interactions were caught on CCTV.

4. The first interaction was an incident over a cigarette, the second interaction was where the deceased appeared to challenge the appellant on the street but was pulled away from the non-reactive appellant. A few minutes later, CCTV showed the deceased walking alone in the same direction the appellant and his friends had already travelled.

5. About 45 minutes after that last sighting, 300 meters further up the street, the deceased was found by a passer-by, naked and still breathing. Despite attempts to resuscitate him, he was declared dead in an ambulance a few hours later.

6. The prosecution relied on the evidence of the State Pathologist, Dr. Bolster, and on the various admissions made by the appellant to prove the offence of murder; including evidence adduced from the appellant's Facebook Messaging page, which was downloaded from one of his phones, purchased in the aftermath of the night of the 15th/16th July, 2017. The appellant was tracked down by investigating Gardaí, and was arrested on the 17th July, 2017, having left a trail of evidence in his wake. The appellant made admissions at the time of his arrest, and during the course of interviews. The appellant also gave a statement which was read into evidence as part of his interviews. These admissions raised the issue of self-defence and provocation and both these defences were before the jury for their consideration.

7. Dr. Bolster, forensic pathologist, gave evidence of multiple injuries on the deceased (approximately 150 separate injuries), these included multiple bruises to the face and the scalp, multiple fractures of all the facial bones, including the mandible or the lower jawbone, bruising to both eyes, multiple bruising with abrasions and lacerations to the upper limbs, lower limbs and body, multiple fractures of the ribs, inhalation of the blood, extensive laceration to the liver and hematoperitoneum (blood in the abdominal cavity).

8. At the trial the appellant pleaded not guilty to murder but guilty of manslaughter. That was unacceptable to the DPP and the trial proceeded. As it is relevant to one of the grounds of appeal, the appellant was represented by a different senior counsel on the appeal but retained the same solicitor and junior counsel.

The Appeal

Ground One

***The learned trial judge erred in law and in fact in admitting evidence, namely, a transcript of a verbal voice recording made by the Appellant on the 17th July, 2017*.**

9. As stated above, the prosecution relied on various admissions made by the Appellant to prove the offence being tried, as well as the state pathologist's evidence of the injuries sustained to the deceased.

10. There were essentially three branches of such admission evidence.

11. The first set of admissions were by way of Facebook Messages. These messages had all been transmitted on the 16th July, 2017. The first were a series of messages to ANR. In these the appellant admitted that he had killed that fella in Swords last night; saying he was "fucked". He referred to the deceased just coming at him and giving him two warnings. ANR asked the appellant if he gave him one dig and the appellant replied "tell me about it, I do some damage. No gave him about 30". There were then a number of emojis in the messages. These were both crying emojis and smiling emojis.

12. In a second set of messages to FB he admitted to killing someone and said he wanted to "get offside".

13. In a third set of messages sent to KH, a photograph of a newspaper article referring to the death was included. Again, the appellant said the deceased kept coming at him, that he was in bits over it. He also sent a picture of his own injured knuckles. He was asked why the deceased was naked and he said he did not have a clue.

14. The final part of the evidence was a transcript of a voice recording lasting 17 seconds which was recorded by the Appellant and sent via Facebook Messenger to ANR. This was apparently introduced late into the trial having only been retrieved from the phone late in the day by Gardaí. The wording is as follows: -

> *"I'm going to fucking jail yeah. See that there about that poor old fella in Swords last night that got bleeding kicked to death or something poor fucker, haha haha, terrible carry on all right, fucking animals out there, haha haha."*

15. That final voice recording was timed as having occurred at 8:08pm when he was travelling back in the taxi to his mother's house. He was arrested there at 8:15pm. According to the evidence at trial, the second and third set of messages referred to above were clearly sent earlier in the evening. It is not entirely clear at what point the voice message took place in the series of messages he was sending to Mr. Ryan, but it seems to have been part of that conversation.

16. Admissions were made on his arrest on the 16th July, 2017 at about 8:17pm following his arrival home in a taxi. He said "I didn't mean it ma, I didn't mean to kill him. It was only a couple of straighteners. He kept coming at me. I told him to get away from me or I'd murder him". He was noted as being emotional at the time of his arrest.

17. The final admissions were made while in detention. The appellant made a voluntary statement which was submitted to Gardaí through his then solicitor. In this statement he said he recalled a confrontation. He said that he had gotten cornered and the man came swinging punches and kicks at him. He tried to fight back but was rugby tackled to the ground. They both exchanged blows and both fell to the ground. The appellant got to his feet, but the deceased grabbed his leg and tried to bite him. He kicked him in the head to get him away from him and he went unconscious. He said he didn't intend to kill him. He was defending himself. He expressed remorse.

18. An interview took place later that day when the appellant was questioned on the statement. He stood over his statement and added little to it. He said that he himself was caught with a nice few and that he literally had to knock him out to stop him. He said it was a tragic accident.

19. Objection to the admissibility of the transcript of the voice recording was taken by counsel on behalf of the appellant. He submitted that its value was more prejudicial than probative as it did not contain an admission of any sort and at best it might be characterised as kind of tasteless. The prosecution submitted that the probative value exceeded its prejudicial effect.

20. The trial judge permitted its admission on the basis that it was probative of what happened on the night in question. In terms of the prejudicial effect, the trial judge held it was a finely balanced decision. She held that it did not show in any poorer light than the previous evidence.

21. The trial judge agreed, in respect of character evidence, it is not permissible for the prosecution to use the audio message in respect of the accused's state of mind on an occasion at that distance from the event in question.

22. On appeal, counsel for the appellant submitted that this message had to be seen in its context. The voice message appears to have been overheard by the taxi driver and that they were of questionable probative value and obviously prejudicial and going against his character. In relation to prejudice, counsel submitted that any finely balanced evidence had to fall on the said of the presumption of innocence.

23. In the view of this Court, this was evidence that was clearly relevant to the issue of what had occurred on the night in question. The issue for the jury had been one of whether this was manslaughter because of excessive self-defence or because of provocation. It was a matter for the jury to decide if this actually amounted to an admission, but on its face, it is clear that it was an admission. It was an acceptance of wrongdoing *i.e.* going to jail, in the context of the death of the man in Swords who was kicked to death. insofar as it is submitted that it was not an admission, this is rejected.

24. The primary issue before the trial judge was whether its prejudicial value outweighed its probative value. The probative value refers to the weight of the evidence. Counsel for the appellant submitted its weight was quite diminished in the context of all the other admissions. It is important to examine what the meaning and context of what is contained in the voice recording.

25. The reference to going to jail in this voice recording clearly related to the killing of the deceased as it was linking to the second sentence in the transcript; *i.e.* that it was about the death of the man in Swords. The appellant made admissions earlier that clearly linked him to this death. What gave this particular admission significant weight was his admission that the man was kicked to death. This was an admission that had to be seen in the context both of the admissions before, which had only referred to punches, "one dig" then "30 digs" and to his subsequent statement that he gave the deceased one kick. This was an admission by him that he understood that he had kicked the man to death and not merely punched him. It was also an important admission in the context of its timing because it showed the evolution in his admissions as to what violence he had inflicted on the deceased.

26. In respect of the issue of prejudice, the appellant submits that this showed him in a callous light and was of a gratuitous nature to go before the jury. In the present case this was evidence of an admission by the appellant as part of a series of conversations mainly through social media messaging he had with his friends. It formed part of his developing narrative of what had occurred less than 24 hours earlier; his unlawful killing of a man he

had never met before. It is difficult to see in that context how it could be said that his own admissions on that very issue could be so prejudicial as to outweigh their probative value. Normally, that would only occur where a completely gratuitous or irrelevant matter was being put before the jury.

27. Occasionally however, there may be a situation where admissions directly relevant to the case are so prejudicial that they must be excluded out of fairness towards an accused person. This is far from such a situation. There was already evidence in the case of a relatively callous indifference on the appellant's part by the inclusion of smiling as well as crying emojis after he had said that he did some damage to the deceased, that he "gave him about 30". These emojis came in the context of admissions where he had already messaged to say he had killed the man. The "haha" comments or indeed the reference to "fucking animals" must be viewed in that context.

28. A judge is entitled to take a view that an issue in a case is finely balanced. A judge is often called upon to determine issues that a finely balanced. The issue is determined by the application of the principles. The main principle at issue was whether this evidence was more prejudicial than probative. There is no basis for holding that the trial judge erred in law or in fact in deciding that the evidence was more probative than prejudicial and in admitting this transcript of the voice recording into evidence.

29. The Court therefore dismisses this ground of appeal.

Ground Two

The learned trial judge erred in law and in fact in failing to correctly direct the jury on the appropriate burden of proof in circumstances where a defence of provocation had been raised.

30. The appellant submits that the trial judge was in error on the burden of proof in respect of the defence of provocation. The trial judge said as follows: -

> *"In considering what happened on the street that night, if you conclude on the evidence that Mr Walsh acting in self defence employed more force than was reasonably necessary, but no more than he honestly believed to be necessary, then you should return a verdict of guilty of manslaughter. If having considered the issue of self defence, you are satisfied [beyond] a reasonable doubt that you may convict of murder, then you should consider the issue of provocation. Before finding the accused guilty of murder, the prosecution must establish beyond a reasonable doubt that the accused was not provoked to such an extent that having regard to his temperament, character and circumstances, he lost control of himself at the time of the wrongful act.*
>
> *There must be evidence of a sudden and temporary loss of self control rendering the accused so subject to passion as to make him for the moment not master of his mind. And there must be some evidence that the loss of self control was total and that the reaction came suddenly, and before there was time for the passion to cool.*

I must emphasise that this burden is not discharged merely by pointing to evidence that the accused lost his temper or was easily provoked. You should examine the evidence upon which the plea of provocation is put forward".

31. In written submissions reliance was placed upon the fact that the appellant had relied on both the defence of self-defence and the defence of provocation. It was submitted that these issues are so highly interlinked that a jury is inevitably vulnerable to confusion between the two, and in such circumstances, there is a duty on a trial judge to be utterly vigilant in his or her charge to ensure any confusion is avoided.

32. In light of that submission, it is a particularly curious feature of this case that counsel for the appellant at the trial made a requisition in respect of self-defence and the burden of proof, but no requisition was made in respect of provocation. The trial judge did not accept that she had erred and stated that she thought she had been fairly careful about the burden remaining on the prosecution. She agreed however that she would remind them the burden lay on the prosecution in considering the defence of self-defence.

33. The jury raised two questions during the course of their deliberations; they asked for the judge to address them again on the definitions of murder and provocation. In respect of provocation, the judge repeated her charge including the reference to the burden as above. Again, counsel for the appellant made no requisition.

34. As has been said in *DPP v Cronin* (No. 2) [2006] IESC 9, "*it would be wrong now to set aside the conviction on foot of matters which were deliberately never raised in requisitions unless this court were of the view that a fundamental injustice had been caused.*"

35. It is a striking feature that the same counsel drafted the notice of appeal which included this ground. It appears that the appellant requested a new senior counsel to represent him at the appeal. His present senior counsel submits that this is not the type of scenario that was so deprecated in *Cronin (No. 2)*. He referred to it as a type of halfway house situation, there was no trawling of the transcript and there had been an early realisation that there was an error and an appeal made on that basis.

36. Senior counsel for the appellant did accept that the importance of the reference to the word "burden" in the charge, "*did not strike those engaged in the trial as being of significance*", to borrow the phrase from *DPP v. Zhao* [2015] IECA 189. Counsel also accepted that the charge was "text book" on provocation. In this regard, it must be said that it can only have been meant that it was "text book" other than this.

37. As was acknowledged in *Cronin (No. 2)*, there has to be some error or oversight of substance which is sufficient to ground an apprehension that a real injustice has occurred before the court should allow a point not taken at trial to be argued on appeal. In *Cronin (No.2)*, it was stated that there had to be an explanation as to why the point was not taken at trial. At best in the present case, there is an indication that the error in the charge was only realised after the conviction and before grounds of appeal were drafted.

This does not appear to be a case where it can be construed as a situation where the defence were trying to obtain a tactical advantage in not bringing this requisition to the attention of the trial judge.

38. The issue is whether there has been an error of substance which grounds an apprehension that a real injustice has occurred. At the outset, it can easily be rejected that this was a case where the trial judge failed to differentiate between the two defences. She did so scrupulously and warned the jury accordingly.

39. The core of the issue is that by reference to the burden not being discharged merely by pointing to evidence that the accused lost his temper or was easily provoked, this suggested an onus on the accused.

40. Is important to recall the basis on which a plea of provocation is left to a jury. In the first place, the judge must decide if there is evidence capable of raising the issue of provocation. Thereafter, it is a matter for the jury to determine the credibility of that evidence. As Barrington J. stated in *People (DPP) v. Kelly (Keith)* [2000] 2 IR 1: -

> *"If the accused has been permitted to raise a plea that he was so provoked by something done or said by the deceased victim, or by a combination of things done and said, as totally to lose his self-control, the trial judge will invite the jury to examine the evidence on which the plea of provocation is based. He will point out to them that they are not obliged to accept this piece of evidence anymore than they are obliged to accept any other evidence in the case. They are obliged however carefully to consider it and to decide whether it is or may be credible".*

41. Counsel for the appellant relied upon the following "model charge" indicated by Barrington J. in *Kelly* above: -

> *"If after their examination of the evidence relied on by the defence they entertain a reasonable doubt as to whether the accused may have been so provoked then they examine the prosecution case to see if the prosecution has satisfied them beyond a reasonable doubt that the alleged provocation could not, or in fact did not, cause the accused totally to lose his self-control in the manner alleged, always remembering that the onus on the prosecution is not only to prove its case beyond a reasonable doubt but also to negative beyond reasonable doubt any defence raised by the accused."*

42. In her charge to the jury, the trial judge repeatedly referred to the burden of proof being on the prosecution. She repeated this several times when charging them specifically on the defence of provocation. Indeed, her final words to them when she repeated her directions on provocation were as follows: -

> *"So I must emphasise it is a subjective test, not an objective test. If you find that the accused was provoked, then the offence of murder is reduced to manslaughter. And as in all matters, the burden rests with the prosecution."*

43. Her reference to a burden not being discharged merely by pointing to evidence that the accused lost his temper or was easily provoked has to be seen in context. It was in the context of referring to the evidence on which the defence had asked and were permitted to raise provocation. This was evidence that the defence had pointed to the jury as evidence of the provocation of the appellant to the legal standard *i.e.* total loss of control. While this is not a burden in a legal or evidential sense, the reference in the course of the charge to "burden" cannot be said to have indicated to the jury that the appellant had borne any such burden. This was a particular use of the phrase to indicate that it was not sufficient for the evidence to be that the appellant lost his temper or was easily provoked. It was an invitation to the jury to examine that evidence, which examination is clearly called for in the decision in *Kelly* above.

44. With the value of hindsight, including those who represented this appellant at trial, a better way of phrasing this could have been used. Does this phraseology in an otherwise "textbook" charge give rise to an apprehension that there is a risk of injustice? On careful consideration, this Court is satisfied it does not do so. The charge was perfectly clear throughout as to the burden remaining on the prosecution. It was repeated specifically in the context of the defence of provocation. The use of this word in its context at the trial did not strike any of the experienced practitioners on both sides (bearing in mind the duty on counsel for the prosecution) that this charge was in any way defective or impinging on the presumption of innocence. It is also clear that the last words the jury heard were that the burden remained on the prosecution to disprove provocation.

45. This ground of appeal is also dismissed.

46. Accordingly, the Court will dismiss the appeal.