THE COURT OF APPEAL

[94/17]

The President
Edwards J.
Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ROY WEBSTER

APPELLANT

JUDGMENT of the Court delivered on the 20th day of December 2019 by Birmingham P

1. Mr. Webster was charged with the murder of Anne Shorthall on 3rd April 2015 at Murrough in County Wicklow. Having pleaded not guilty to murder, but guilty of manslaughter, he was found guilty of murder on 24th March 2017, and he has now appealed against that conviction.

2. The appellant seeks to appeal against his conviction on the grounds that the trial judge failed to adequately charge the jury in relation to the partial defence of provocation and also in relation to the required mens rea for murder. While the late Ms. Shorthall met her death at the hands the appellant on 3rd April 2015, the background to the trial commences earlier, on 20th December 2014. On that occasion, the appellant was socialising with a number of others in a licensed premises in Wicklow Town. There, he met with the late Ms. Shorthall. His case at trial was that he then proceeded to have unprotected consensual sex later that night with her in her home in Wicklow.

3. Ms. Shorthall was experiencing severe financial difficulties, she was unemployed and her marriage had broken down and she was having difficulty meeting household bills. On 11th March 2015, she was given one month's notice to vacate the property that she was living in. The appellant's case was that on or about 25th March 2015, Ms. Shorthall was in contact with him, and in the course of that contact, told him that as a result of their liaison in December 2014, that she had become pregnant. The appellant agreed to meet with Ms. Shorthall on 2nd April 2015, and, according to him, at that point, she indicated that she required the sum of €6,500 to cover the cost of an abortion. Ms. Shorthall was not in fact pregnant, and the suggestion, emanating from the appellant, is that she required the €6,500 to defray her debts.

4. On the morning of Ms. Shorthall's death, the appellant arranged to meet her at the Leitrim Lounge in Wicklow and he then drove both of them to Murrough, a location on the coast, north of Wicklow Town. According to the appellant, at one point, Ms. Shorthall became angry and aggressive. She got out of the appellant's vehicle and threatened to immediately tell the appellant's wife about what had happened and that she would "ruin" the appellant. Later, the appellant would give the following account to Gardaí:

> "[m]y head was spinning, I could just see me whole world crashing down. At that point, I said to myself, this one has me backed to a wall, she's going to ruin me and my family and then at that point, without thinking, I swung open the side door of the van and grabbed the first thing near me, which was a hammer, and I hit her on the head with it in the middle of the forehead. At that stage, she fell back into the van. I hit her a belt in the head and she just fell back into the van. She was still conscious. She said 'you fucking prick, I'll ruin you'. At that point, when she fell back into the van and said 'I'll ruin you', it was like I was looking down at myself doing it and I hit her again. It was like as if I was looking down at someone else doing it, but I could see it was me doing it. So, as soon as I had hit her a few blows with the hammer, there was blood pouring out of her head. I couldn't believe how much. I've never seen so much blood. The blood seemed to be pouring out of the back of her head and pooling under her head. It was like looking down at someone else doing it. It was like you were watching a horror movie. I hit her once and she fell back into the van, but she was propped up and saying 'I'll ruin you' so I hit her again and she fell back into the van. I'd say I hit her about three or four times. At that point, I couldn't believe what had happened."

5. When members of Ms. Shorhall's family became concerned for her, they made contact with the Gardaí. At an early stage, the appellant became a person of interest to Gardaí. Initially, he told Gardaí that he and the deceased had parted company at the Murrough when she had got out of his vehicle and had walked away, but later, he confessed to having killed Ms. Shorthall.

6. At trial, the prosecution placed some emphasis on a number of actions of the appellant after he had struck Ms. Shorthall with the hammer. These included placing tape on her, washing his hands with white spirits in the back of the van, driving home, phoning his wife on the way and going to a local Centra, the fact that having arrived at home he was observed to be "completely normal", having dinner, interacting with his children, and perhaps having a glass of wine before falling asleep. Further emphasis was placed on the events of the following day, Saturday, including the fact that prior to removing the body of Ms. Shorthall from the van into his workshop that the appellant did some baby shopping in another vehicle, accepting that when he eventually took the body of Ms. Shorthall out of the van, that he "probably would have rubbed it down with a rag", and the fact that the body of Ms. Shorthall was concealed behind wooden panels.

7. At trial, the jury heard from then State Pathologist, Professor Marie Cassidy. Her evidence was that there were nine scalp lacerations, which she described. There was an injury to

the mouth of the deceased, which she did not think was a blow with the hammer, but could have been the result of a hand held roughly over the mouth. There were hand injuries which could be defensive-type injuries or caused by striking out towards somebody coming towards her. Professor Cassidy also gave evidence that there was grey or silver duct tape wrapped around the head from chin to forehead, completely concealing the face and obstructing the nose and mouth. The wrists were bound by similar duct tape.

8. As indicated, the appellant offered a plea to manslaughter, and so at trial, the live issue was whether the appropriate jury verdict was one of guilty of murder or not guilty of murder, but guilty of manslaughter. The issues raised on the appeal in both written and oral submissions relate to the adequacy of the judge's charge, or whether in various respects he fell into error. The appellant's position is summarised in the written submissions as being that he wants to appeal against his conviction on the grounds that the trial judge failed to adequately charge the jury on the defence of provocation and mens rea. It is, therefore, appropriate to consider what the judge had to say and to identify the criticisms that are advanced of the charge.

9. In relation to the mental element of the offence of murder, the trial judge addressed the jury in the following terms:

> "Now, Ladies and Gentlemen, now having dealt, I suppose with general matters, with the exception, as it were, of this question of alleged lies which arise in this case to the law relating to murder and manslaughter. The first thing, obviously, is that if a person is to be convicted of murder, or indeed of manslaughter, the prosecution must prove that he killed the deceased. Nobody doubts that in this instance. It is not a matter in debate or in contention. It must be proved that the killing was an unlawful one, an illegal killing. There are sometimes in principle where there are occasions where it is legal to kill another person. Nobody suggests that this is, in fact, a situation where there is a lawful or legal killing. Nobody suggests that this is a case where the accused was entitled to kill the deceased. But in addition to what we will call the physical element in a crime, a person at the time of killing must have a certain state of mind, what we call a guilty mind. In other words, no one would be convicted of a serious offence, just because, so to speak, of the physical action. People can only be convicted of offences such as this if they have a certain mental element or state of mind at the relevant time. And in the case of murder, the prosecution, therefore, must prove in addition to the fact that the accused caused the death, that the accused, at the time of causing the death, intended to kill or cause serious injury. Mark that, the prosecution does not have to prove an intention to cause death, they merely must prove at least an intention to cause serious injury. So, the accused, if he has an intention to kill or cause serious injury, having killed the deceased, can be guilty of murder, and I say 'can' because there is a qualification in this case.
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> It is essential, however, in every case before anybody can be convicted of murder that they have that state of mind. In fact, our law's approach…says effectively in

the negative, that nobody should be convicted of murder unless he intends to kill or cause serious injury. Now, that brings me, at this juncture, to the question of manslaughter. Nobody doubts the fact that the deceased was killed by the accused, but what is in debate in this instance, in the first instance, so to speak, in terms of the issue of murder and manslaughter, is whether or not the prosecution has proved beyond a reasonable doubt that at the time of the killing, the accused intended to kill, or at least cause serious injury.

And it is perfectly possible, as a matter of principle. I put it that way because I don't want to trespass on your sphere about the evidence in this case, that a person might kill when intending merely to cause injury, not serious injury or death, but injury beyond something trifling, and what is or is not serious injury is a matter for you, but obviously it is, so to speak, a different situation if I killed somebody with only an intention to cause injury and not serious injury, which I suppose, at the risk of tautology, is more serious, it is a different animal, so to speak, and a more significant state of mind, if I could put it that way to you.

So, you cannot convict the accused of murder unless the prosecution prove, and the issue in debate in the first instance, as I say, that he intended to kill or cause serious injury, but…if the prosecution have not proved that state of mind, the accused must be acquitted of murder and would then, on the evidence of this case, and again it is not in debate, be guilty of manslaughter, because if I kill another person merely with an intention to injure that person and it's an unlawful killing, again, nobody is in doubt about that, that I am merely guilty of the lesser crime of manslaughter.

Now, everyone is presumed to intend the natural and probable consequences of his actions. What is the natural and probable consequences of taking a shotgun, pointing it within a foot of someone's chest and discharging both barrels? The natural and probable consequences of that is death. I suppose you could just about say it's a serious injury, but realistically, it's death, and that is a tool, so to speak, which you have available to you, that presumption…when you are seeking to judge the accused's state of mind on given occasions, on this occasion in this case. I do not take, by way of example, the evidence, so to speak, in this case in terms of use of a hammer because I would wish to avoid trespassing in your sphere. I have given you what I hope is a sufficient example of a situation of the operation of that presumption, that one intends the natural and probable consequences of one's actions. Thus, a person who did discharge two barrels into the chest of somebody else, the natural and probable consequences of that action would be death, and in those circumstances, the jury would use that tool to decide what the accused must have been thinking on the occasion in question.

But that presumption can be rebutted, set aside, rendered at naught, discharged, excluded, and the prosecution must prove beyond a reasonable doubt that that has not happened. The prosecution must prove beyond a reasonable doubt that the

presumption has not been rebutted and that is because the responsibility for proof lies at all times on the prosecution."

10. At trial, when the appellant was represented by particularly experienced counsel, there was no criticism of this passage. However, before this Court, the new legal team that now represents the appellant is critical of the fact that the judge did not address what they say is a third route to manslaughter i.e. a route apart from failing to prove the requisite intent and a failure to disprove provocation. They say that third route is provided by a total loss of control rendering an accused incapable of forming any intention, including an intention to kill or cause serious injury.

11. A number of recent provocation cases before this Court and its predecessor have dealt with the interaction of the intention to kill or cause serious injury and the defence of provocation. It is now abundantly clear that the partial defence of provocation is available, even when there has been an intention formed to kill or cause serious injury [see DPP v. Bambrick (CCA, 8 March 1999), DPP v. Zhen Dong Zhao [2015 IECA 189] and DPP v. Cahoon [2015] IECA 45]. In contrast to some of these cases, in the present case, the trial judge was admirably clear on that point, but there are some indications of elements of confusion on the part of the appellant - in that regard, see para. 19 of the appellant's submissions where it is stated "the appellant pleaded not guilty to murder, but guilty to manslaughter, in the Central Criminal Court, on the basis that he lacked the necessary mens rea to have committed murder, since his actions had been the direct consequence of provocation" and again at para. 26, "the appellant's case is that he was not guilty of murder because he was incapable of forming the necessary, subjective, mens rea to have committed murder, since he was, momentarily out of control".

12. In the Court's view, the trial judge's charge was perfectly clear on the central message that required to be communicated, that an unlawful killing would not be murder, and that nobody could be convicted of murder unless the prosecution proved an intent to kill or cause serious injury. If the prosecution could not prove that, whatever the reason for their inability to prove it, then once an unlawful killing was established, the appropriate verdict was manslaughter.

13. Having dealt with the topic of the requisite statutory intent/mens rea, the judge then turned to deal more specifically with the question of provocation. It is of some significance that he did so just before the lunch break. The reason why that is of some significance is that at the lunch break, he invited submissions by counsel in relation to the topic of provocation and in relation to what he had said to that point. Counsel for the then accused had one request which was that the judge should read out the relevant part of the decision in DPP v. Keith Kelly [2002] 2 IR 1. The judge acceded to this request. In the same context, towards the end of his charge on that afternoon, before he sent the jury away to commence their deliberations, he once more invited submissions from counsel on the charge that they had just heard. He was asked to deal with the evidence of Professor Cassidy and another witness, Dr. O'Kelly, but at that stage, there was no suggestion whatsoever that the judge had incorrectly addressed the jury or that there was a need for

greater contextualisation of the defence or anything whatever of that nature. The judge dealt with the question of provocation in these terms:

> "[n]ow, there is a second circumstance in which it would be open to you on the evidence in this case to find the accused not guilty of murder, but guilty of manslaughter, and that would be by virtue of the operation of provocation, and in every case, you cannot convict the accused of murder if you are not satisfied of his guilt beyond a reasonable doubt in terms of an intention to kill or cause serious injury. That is the end of it, so to speak, but even in cases where a person had the intention to kill or cause serious injury…it would be appropriate and it would be open to you on the evidence in this case to find the accused not guilty of murder, but guilty of manslaughter. That has been described as a concession to human weakness, that even though a person with the intention to kill or cause serious injury, kills, he would not be guilty of murder, but merely guilty of manslaughter on the ground that he was provoked, and it is, of course, a matter for the prosecution, as in every aspect of the case, to prove beyond a reasonable doubt that he was not provoked. What is provocation? . . . Now, for provocation to arise, there must be a sudden, unforeseen, sudden unforeseen onset of passion, which at the time when the accused killed the deceased, totally deprived him of self-control. So, at the time when the accused killed the deceased, for provocation to arise, there must be a sudden, unforeseen onset of passion which totally deprives him of self-control, and if that is the case, the defence of manslaughter becomes an issue and it is appropriate in those circumstances to find the accused not guilty of murder, but guilty of manslaughter.
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> Now, it is not enough that the accused has lost his temper, or merely that he was easily provoked. The loss of control must be total, must come suddenly and before passion has had time to cool. The reaction can't be tinged by some form of calculation, by some form of weighing the various pros and cons, but it must be genuine in the sense that the accused has not, as it were, set up the situation which he now says provokes him. So, the reaction cannot be tinged by calculation, and it must be genuine, in the sense that the accused did not set up the situation which he now says provoked him, and the prosecution must prove beyond a reasonable doubt that the accused was not provoked, because the responsibly for proof lies with the prosecution at all times.
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> And, in the event that the prosecution fails to do that, then the accused is not guilty of murder, but guilty of manslaughter on the evidence, and effectively by agreement between the parties in this particular case. One more topic, as I have raised the issue of the accused's state of mind before we go to lunch. You are not trying some theoretical case. You are not trying some theoretical person. You are trying this man in this case. You must approach the matter subjectively, accordingly, not, as it were, objectively, as to what one supposed reasonable person, some supposed average person might have thought on the occasion in question, although since you must start somewhere, it is perfectly obvious that you

> would use the view that you would form as to what a person might be thinking as one of the tools to decide what this man is thinking – was thinking – and I am not suggesting to you, I am not making any comment one way or another as to whether or not, by that yardstick, that objective yardstick, as to what a reasonable person, objectively speaking, might be thinking, that he was not in that position, it is none of my affair, but what I am saying to you is, you look at this man, subjectively speaking, and what might be the objective position is merely a tool which you are entitled to use when attempting to make a conclusion as to this man. Mr. Webster's state of mind – you look at this man in the circumstances which have been proved before you, with all his strengths and weaknesses as a human being, with all his baggage, I do not mean that in a pejorative sense, as I say, the particular factual circumstances of this case, by reference among other things, to the fact that there was certainly, that he may have had drink, perhaps, a considerable amount taken. [In fact, the judge was in error in referring to drink. Drink had featured in the case as a backdrop to the sexual liaison on 20th December 2014, but had not featured in relation to the events of the morning when Ms. Shorthall met her death]."

Having mentioned the question of drink, the judge said:

> "But you are looking at the occasion in question, this man's state of mind, this man's condition, in these circumstances, subjectively speaking."

14. The portion of the judge's charge where he referred to the fact that the jury would use as one of the tools in deciding what Mr. Webster was thinking, what a reasonable person might, objectively speaking, be thinking, is now criticised as introducing excessively objective considerations into the picture.

15. The Court is not moved by the criticisms of the trial judge's charges in that respect, or indeed, any of the criticisms of the charge. The charge was a particularly careful one, as might be expected, given that it was delivered by the judge who then the senior presiding judge in the Central Criminal Court. It addressed all the recent decisions of the appellate courts in the area of provocation. The judge said expressly that he was conscious that provocation has too often been a graveyard for trial judges when it comes to charging juries.

16. In the Court's view, the trial judge's charge was careful and focused and was, in all respects, an entirely appropriate one. Accordingly, the Court is obliged to dismiss the appeal against conviction.