# THE COURT OF APPEAL

**UNAPPROVED** **NO REDACTION NEEDED**

**[34/2016]**

**Neutral Citation Number: [2021] IECA 163**

**The President**

**Edwards J**

**McCarthy J**

**BETWEEN**

**THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**SEAMUS MORGAN**

**APPELLANT**

**JUDGMENT of the Court delivered (*via* electronic delivery) on the 4th day of June 2021 by Birmingham P.**

**1.** The appellant has appealed against his conviction of the offence of murder on 19th January 2016 following a seven-day trial in the Central Criminal Court.

**2.** A number of grounds of appeal have been advanced. In summary, these are, first, that the trial judge erred, in the particular circumstances of the case, in taking the view that if the defence raised the previous convictions of the deceased in evidence, then the previous convictions of the accused would also be admissible. Secondly, the judge's charge in relation to the issue of recognition was inadequate to the extent of amounting to a misdirection of the jury. Finally, a number of aspects of the judge's charge are subject to criticism. These are really on points of detail, not all were pressed to any great extent.

**Background**

**3.** The background to the trial is to be found in the fact that on 19th July 2013, the deceased, Mr. Lawrence Keane, was found badly beaten at St. John's Lane, Greenhills Estate, Athy, County Kildare. The deceased and appellant were known to each other, and indeed, it was not in dispute that they had been together, in each other's company, in the period prior to the laneway incident. The deceased was unsteady on his feet and required the use of a crutch.

**4.** At trial, the case advanced on behalf of the appellant was that he had walked the deceased to the end of the laneway in order to provide mobility assistance and that the assault, which turned out to be a fatal assault, occurred after the two men had parted. Evidence was given by two eyewitnesses, Mr. Nathan Robinson and Mr. Ricky Moriarty, who said they had witnessed the assault and identified the appellant as the assailant.

**5.** In the course of the investigation, footwear worn by the appellant was seized and blood was discovered on it, and when that blood was subjected to DNA analysis, it matched the deceased's DNA. In essence, the prosecution case was one based on recognition evidence, the recognition evidence of two witnesses supported by circumstantial evidence.

**Previous character**

**6.** For ease of reference, it is convenient to refer here to the statutory provision which was in issue. Section 1A of the Criminal Justice (Evidence) Act 1924 (as inserted by s. 33 of the Criminal Procedure Act 2010) provides as follows:

> "1A.— Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either

deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person —

(a) the person may do so only if he or she—

(i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or

(ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,

and

(b) notwithstanding section 1(*f*), the person may be called as a witness and be asked, and the prosecution may ask any other witness, questions that—

(i) would show that the person has been convicted of any offence other than the one wherewith he or she is then charged, or is of bad character, or

(ii) would show that the person in respect of whom the offence was alleged to have been committed is of good character.".

**7.** It may be said that this was a case where the issues raised by s. 33 of the Criminal Procedure Act 2010 were of considerable substance. The deceased had a number of previous convictions recorded, including, of particular note, one for possession of explosives recorded in the Special Criminal Court, in respect of which a sentence of ten years imprisonment was imposed. On the other side of the coin, the appellant also had previous convictions recorded, including, most notably in his case, a conviction for manslaughter in the Central Criminal Court in July 2005, in respect of which a sentence of eight years imprisonment was imposed.

**8.** This was not a case where any notice had been served in advance of trial. Rather, it was an issue that surfaced during the course of the trial. On Day 4 of the trial (14th January 2016), after the prosecution had completed its evidence, counsel on behalf of the appellant sought leave to put before the jury evidence in relation to previous convictions of the

deceased. He explained that he was doing so in circumstances where the prosecution case had, in part, depended on three potential eyewitnesses: Mr. Robinson, Mr. Moriarty and Mr. O'Connell, one of whom, Mr. O'Connell, to use the colloquialism, did not 'swear up'. Counsel introduced the topic by referring in passing to the fact that two of the three had previous convictions, though not convictions of great moment. Counsel referred to the fact that he had not canvassed the previous convictions, even though he had been assured by counsel for the prosecution that there was no impediment to him doing so, in the sense that it would not trigger an application by the prosecution for leave to refer to the previous convictions of the accused.

**9.** Counsel referred to the fact that the witnesses had, in different ways, referred to being in fear and not wanting to get involved, and he explained that his concern was that the jury might conclude that their fear was related to Mr. Morgan, whereas he indicated that was not necessarily so. Indeed, Mr. Moriarty, when interviewed by Gardaí, had referred to the fact that his fears related to 'the Keane crowd'. Counsel explained that he had been told by his colleague that if the previous convictions of the deceased were introduced, that the prosecution, in turn, would seek to introduce the previous convictions of the accused.

**10.** In reply, counsel on behalf of the prosecution indicated that while he could imagine a situation where the issue of previous character might arise, such as where a defence like provocation was being run, that in this case, where there had been a plea of not guilty and where the accused had told the Gardaí that he had left the company of the deceased when he was alive in a laneway, that he did not see what the purpose of introducing the material was other than to injure the character of the deceased. Counsel for the prosecution contended that this was a case where the cliché that "what was sauce for the goose was sauce for the gander" was applicable. Counsel for the accused floated the possibility that the matter might be dealt with by him asking a member of An Garda Síochána, who would, by agreement, respond by

saying that insofar as witnesses had referred to being frightened, that that was nothing to do with anything that Mr. Morgan had done or said and that that position was accepted. In response, prosecution counsel said he did not see how he could possibly agree to that because he did not know why the witnesses were frightened; maybe they were terrified of the accused.

**11.** The trial judge deferred ruling on the matter until after a lunch break, but then ruled that he would permit the defence to adduce the evidence sought, but that in accordance with s. 1A(b) of the Criminal Justice Act 1924 (as amended), he would allow the prosecution to adduce evidence of the previous convictions of the accused. The defence indicated that they would like some time to consult with their client, a request which was facilitated by the trial judge, and then, after two non-contentious witness statements were read to the jury, at the request of the defence by prosecution counsel pursuant to s. 21 of the Criminal Justice Act 1984, the trial moved on to the closing speeches phase without hearing further evidence.

**12.** The approach to be taken by a trial judge when called on to exercise a discretion was addressed by Ackner LJ. in *R v. Burke* (1985) 82 Cr. App. R 156. There, he observed as follows:

> "1. The trial judge must weigh the prejudicial effect of the questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and the defence…
>
> 2. Cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there may be some tenuous grounds for holding it technically admissible … Thus, although the position is established in law, still the putting of the questions as to character of the accused person may be fraught with results which immeasurably outweigh the results of questions put by the defence and which make a fair trial of the accused almost impossible…

3. In the ordinary and normal case the trial judge may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section...

4. In order to see if the conviction should be quashed, it is not enough that the court thinks it would have exercised its discretion differently. The court will not interfere with the exercise of a discretion by a judge below unless he has erred in principle, or there is no material on which he could properly have arrived at his decision…"

**13.** It will be recalled that in the seminal case of *DPP v. McGrail* [1990] 2 IR 38, the Court of Criminal Appeal was of the view that s. 1(f)(ii) had to be construed as applying only to imputations made that were independent of the facts of the particular case. The Court, per Hederman J., commented at para. 62:

"In the view of the Court [s. 1(f)(ii)] must be construed as applying only to imputations made on the character of the prosecutor or his witnesses independent of the facts of the particular case, as, for example, when it was suggested that the witnesses are of such general ill-repute that they are persons who are not to be believed. To put to a prosecution witness that he fabricated the evidence he is giving or that he and other witnesses for the prosecution combined together to fabricate evidence for the particular trial in question may be necessary to enable the accused to establish his defence, if in fact, his defence is that he made no such statement to one or more of the prosecution witnesses.

[…]

A distinction must be drawn between questions and suggestions which are reasonably necessary to establish either the prosecution case or the defence case, even if it does involve suggesting a falsehood on the part of the witness of one or the other side. It is otherwise when an imputation of bad character is introduced by either side relating to matters unconnected with the proofs of the instant case."

**14.** In this case, the ostensible justification for seeking to introduce details of the deceased's previous criminal record was to guard against the risk that a jury might take the view that the reason why witnesses were fearful or anxious not to be involved was because they were fearful of the accused. While the issue was not discussed in any detail at trial, in passing, it may be observed that it is not easy to see why eyewitnesses to a fatal assault would be fearful about giving evidence because of their fear of the deceased or individuals associated with him. At its height, it appears that there was hope on the part of the defence that if the material was introduced, that the jury might contemplate that perhaps it was the situation that the witnesses were fearful of the deceased or associates of his. In a situation where the accused had previous convictions, at least as relevant as the previous convictions of the deceased, that prosecution counsel would have made the observation he did about what was sauce for the goose being sauce for the gander is entirely understandable.

**15.** We find ourselves in agreement with the approach of the trial judge on this issue. Certainly, we can no find basis whatsoever for concluding that the trial judge's approach involved an error in principle, or that it was the situation that there was no material on which he could properly have arrived at his decision. Therefore, we dismiss this ground of appeal.

**Criticism of the trial judge in relation to recognition evidence**

**16.** The prosecution sought to rely on the recognition evidence of two witnesses; Mr. Nathan Robinson and Mr. Ricky Moriarty. Both testified that they had seen the appellant

attacking the deceased with an object, a stick or a bar, shortly before the body of the deceased was recovered in St. John's Lane. The accuracy and the veracity of the evidence was challenged by the appellant. While the possibility of mistaken identification or recognition was not ignored, the essential challenge was to the credibility and veracity of the witnesses. The question of the quality of lighting was explored a trial and it must be said that different witnesses had different things to say in that regard, but in a situation where the individual recognised as the assailant had been in the company of the deceased until minutes before he was attacked and met his death, it was perhaps not surprising that the defence felt it necessary to go beyond raising the possibility of error.

**17.** In the course of his initial charge to the jury when summarising the evidence, the judge referred to what different witnesses had said about the lighting quality, observing that the question of the lighting was a matter for the jury. Following the conclusion of the charge, by way of requisition, the prosecution sought a specific direction to the jury on how to deal with recognition evidence and confirmed that a *Casey* warning (*People (AG) v. Casey (No.2)* [1963] I.R. 33) was required. The judge confirmed that he was happy to give such a warning and readdressed the jury as follows:

> "…there is evidence of people who are saying that they saw Mr Keane and Mr Morgan and recognition evidence is generally more reliable than the identification of a stranger where you might have a person being robbed and appear -- and then having to try and pick someone out in an identity parade but that it may be more reliable but you should be reminded as a jury that mistakes in recognition of close relatives and friends are sometimes made. That's something to be taken into account in relation to the issues of identification, recognition made by the various witnesses who have identified or recognised the two -- Mr Morgan and Mr Keane.
>
> […]

There has been contradictory evidence in relation to the lighting. Mr Quinn states that it was pitch black but nevertheless saw the body. Sergeant Muldowney said that it was an amber orange light and that there was good visibility and Mr Lammon said that it was a bright night. This is perhaps of importance in relation to the evidence of recognition but the issues of whether or not there was sufficient light to identify what was alleged to have taken place by the prosecution, and it is denied by Mr Morgan, is a matter for you."

**18.** The appellant says that the warning given, such as it was, was wholly inadequate in the circumstances.

**19.** On behalf of the Director, it is submitted that on the particular facts and the flow of evidence in the case, the warning in respect of recognition evidence was more than adequate.

**20.** We do accept that the warning given in relation to recognition could not be described as a strong one. However, the context in which the judge came to deliver his warning has to be considered. The challenge to the "recognition witnesses", which was robust, was almost exclusively based on their honesty, or lack of it, and it was not suggested to the witnesses that they were mistaken in their recognition of the appellant, rather that they had made up their evidence. The individual "recognised" as the assailant was somebody who had been in the company of the deceased until very shortly before the fatal assault, and was somebody who, on his own evidence, had brought the deceased to the top of the laneway where he met his death.

**21.** In the circumstances of this case, where the issue was the veracity of the witnesses, we believe that the judge's directions, while they could not be described as a strong or as a textbook warning, were adequate.

**22.** We are not prepared to uphold this ground of appeal.

**Further requisitions on the charge**

**23.** When the trial judge completed his charge, defence counsel raised a number of requisitions. We think it would be fair to describe these requisitions as ancillary, rather than raising issues of real substance in the context of the case. Essentially, they were issues that were raised or canvassed rather than pressed. Some were addressed by the trial judge, though not necessarily in the precise terms that the defence would have wished. The issues raised included reference to the evidence relating to the quality of lighting and level of visibility on the occasion; what was said about the accused being entitled to the benefit of the doubt; the times that the accused and deceased were visible on CCTV; the fact that when summarising the evidence, the judge did not summarise the evidence of some witnesses whose evidence was read pursuant to the provisions of s. 21 of the Criminal Justice Act 1984; and the evidence of forensic scientist, Dr. Hilary Clarke.

**24.** Dr. Clarke's evidence related to the fact that when she had examined a pair of shoes of the accused, there were traces of blood on them, and when a DNA profile was extracted, it matched the blood of the deceased. The point made was that it was established in cross-examination that Dr. Clarke had also examined other items of clothing, including jeans and boxer shorts, and no traces of blood linked to the deceased were found on these items.

**25.** In the context of the trial, we do not believe that these amount to substantial criticisms of the judge's charge. When the judge's charge is read as a whole, together with what he had to say in response to requisitions, then, in our view, there is no room for doubt but that what the judge had to say to the jury was adequate and indeed appropriate.

**Conclusion**

**26.** Overall, we have not been persuaded to uphold any of the grounds raised. We have not been persuaded that the trial was unfair or the verdict unsafe, and so we dismiss the appeal.

**27.** By way of postscript, we would add a reference to the fact that after judgment on the appeal was reserved, the member of the Court who was taking responsibility for the preparation of the judgment – the President of the Court – began to suspect that he may have had an earlier involvement with the appellant, and more particularly, that he may have been defence counsel in the trial in the Central Criminal Court when the appellant was charged with murder and convicted of manslaughter. Thinking about the matter further, he was of the view that if the trial that he had in mind where he had defended was, in fact, the trial of the appellant, that in that case, the prosecution had been represented by counsel who was now another member of the Court, McCarthy J. The Court decided to reconvene and informed the parties what they believed might be the position and indicated that if that was, in fact, the position, and if either side wanted the judges who had an involvement in the earlier trial involving Mr. Morgan to recuse themselves, that would happen and the appeal could be reheard before a differently-constituted panel. An opportunity was provided for consideration and the taking of instructions, and later that day, both sides contacted the court registrar to inform him that there was no objection to the Court, as constituted, proceeding to deliver judgment.