APPROVED **REDACTED**

THE COURT OF APPEAL

Record Number: 56/2023

Birmingham P.
Kennedy J.
Burns J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

CC

APPELLANT

JUDGMENT of the Court delivered on the 2nd day of November, 2023 by Ms. Justice Tara Burns

1. This is an appeal against conviction. On 11 November, 2022 the appellant was convicted by majority verdict of the jury of the single charge before them, namely murder of Urantsetseg Tserendorj on 29 January, 2021. As the appellant was a minor at the time of sentencing, he was sentenced to detention for life with a review after 13 years which was backdated to 21 January, 2021.

2. The appellant had previously pleaded guilty to attempted robbery of the deceased, contrary to common law, and production of an article capable of inflicting serious injury, contrary to s. 11 of the Firearms and Offensive Weapons Act, 1990.

Background

3. On 20 January, 2021, at approximately 9.30pm, the deceased was walking home from work along Custom House Quay, Dublin 1 when she was accosted by the appellant. The area was deserted, presumably because this was during a Covid lockdown period. The location where the appellant interacted with the deceased is covered by CCTV cameras. The footage downloaded from the CCTV cameras depicted the appellant approaching the deceased, very

quickly, on a bicycle. He got off the bicycle and walked towards the deceased, whereupon he produced a knife from his pocket and swiped it at the deceased who attempted to avoid his attack by walking backwards and raising her arms. The appellant again swiped the knife at the deceased but on this occasion towards her neck. Contact was made with the deceased's neck following which he separated from her. The deceased began to touch her neck and appears to talk to the appellant. She showed him her backpack. He got on his bicycle, cycled towards her and then cycled away.

4. The deceased continued on her journey home but walked at a slower pace and can be seen on the CCTV footage holding her neck. She rang her husband and spoke to him about what had just occurred. He told the jury that she told him "*there was one guy with black hat and black mask…he asked me, just give me the money, then she said that I don't have money. He just stab her, then go away… cycling away*." The deceased said to her husband that she was dying and for him to hurry up. Her husband ran to meet her on her route home. He met her at Connolly station where he summonsed the assistance of a taxi man. The deceased again said to her husband "*Umba, I am dying and what shall we do, I am dying*". Ambulance staff and members of An Garda Síochána interacted with the deceased at this location.

5. The deceased was brought to the Mater Hospital. It transpired that the deceased had sustained a significant, life-threatening laceration to her carotid artery which had been partially transected. Various procedures were carried out in an attempt to save her life, however she was declared brain dead on 29 January, 2021, and died on 4 February, 2021, when life support was turned off.

6. In relation to the appellant, when he heard on the radio the next day that a woman had been hospitalised following a robbery and an assault, he confessed his involvement to his family, whereupon it was agreed that he would go to the gardaí. As it happened, members of An Garda Síochána arrived to his house in relation to another matter very shortly after this decision was made. The appellant admitted to the gardaí that he stabbed the deceased. Having been cautioned, the appellant stated to the gardaí *"I pulled the knife out of my pocket. I panicked and stabbed the woman in the neck. I done it. I didn't mean to do it. I'm sorry for it*". The appellant was subsequently arrested and detained in garda custody for the purpose of interview. In the course of an interview with members of An Garda Síochána, the appellant stated *"I did not mean to stab that woman, you know, it was an accident. And if I could sit in front of her now, I'd say I'm sorry."*

7. Twenty five minutes after the attack on the deceased, the appellant was involved in another incident with another woman. On this occasion, the appellant tried to grab an iPhone from this woman's hand but was unsuccessful. Words passed between this woman and the appellant resulting in the woman challenging the appellant's assertion that he was only messing. She cursed at him during this exchange. The appellant then said to the woman

"*what did you say*" and continued "*that could have been a lot worse for you*" as he opened up his jacket and took out a knife. The woman said "*sorry*" to which the appellant replied "*right*" and put the knife back into his jacket. He then departed the scene. The appellant had been charged with attempted robbery and production of an article capable of inflicting serious injury in relation to this event and had pleaded guilty. Evidence of this interaction was adduced before the jury. When questioned by An Garda Síochána in relation to this matter, the appellant stated "*It's true, I did it. I'm sorry but I did it… I was just out of my head. I didn't know what I was doing and I wanted money… I was out of my head, that's all*."

Grounds of Appeal

8. By notice of appeal dated 7 March, 2023, the appellant appealed against his conviction and sentence and set out his grounds of appeal as follows:-

> *"1. The Learned Trial Judge erred in failing to discharge the Jury following the opening speech of Counsel for the Prosecution, in circumstances where a sensationalist and purely prejudicial comment had been made that the Appellant had 'gone for the jugular'.*
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> *2. The Learned Trial Judge erred in law in admitting into evidence a hearsay account of the assault given by the deceased to her husband, and erred in particular in finding that the hearsay account fitted the criteria of a valid dying declaration.*
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> *3. The Learned Trial Judge erred in permitting the Prosecution to call evidence of an attempted robbery by the accused that took place shortly after the fatal assault and of comments made during that robbery, in circumstances where this evidence had no probative value at all, or alternatively, where the prejudicial effect of the evidence was disproportionate to any probative value it might have had.*
>
> *4. The cumulative effect of the prejudicial evidence and other circumstances of the Appellant's trial are such that the verdict is unsafe."*

The Appellant's Case before the Jury

9. The sole matter at issue before the jury was the question of the appellant's intention, namely whether the respondent had established beyond reasonable doubt that the appellant intended to kill or cause serious injury to the deceased when acting as he did. It was accepted by the appellant that he had stabbed the deceased and that the injury he perpetrated caused her death.

10. Section 4 of the Criminal Justice Act, 1964 sets out the intentional element which must be proved by the respondent to establish the offence of murder. It states:-

"(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury, to some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted."

11. The intention which must be proved is the subjective intention of the actual accused rather than the intention of some other individual. This is a difficult task for a jury, however they have a number of tools available to them. Firstly, they have the benefit of the presumption that an accused is presumed to have intended the natural and probable consequences of his conduct, although this presumption may be rebutted. Accordingly, a jury are entitled to determine what the natural and probable consequences of an action are and presume that the accused intended such consequences unless they are not satisfied beyond reasonable doubt that the accused before them so intended. Secondly, the jury are entitled to have regard to the surrounding factual circumstances in determining an accused's intention. By implication this means that the surrounding factual circumstances are highly relevant to the determination of what an accused's intention was when carrying out the criminal act which caused death.

12. The Supreme Court decision in *DPP v. FN* [2022] 1 ILRM 279 Charleton J. provided the following analysis regarding the issue of intention:

"4. ….As to that [the intention of an accused] the question may sometimes be asked: how is the jury to look into the accused's mind? The answer is that people may be inferred to have intended what they have done where the circumstances so suggest; in other words, to have as their purpose what naturally flows from what they have done. A person who on all the available evidence goes up to someone and hits them may be inferred to have intended this action. But this is not in any way an inflexible legal rule: it is simply a commonsense way whereby intention may be inferred: there is no rule requiring any jury to make that inference since interpreting the facts are for them…

…

6. …[I]ntent means nothing more complex than that the purpose of the accused was to bring about the criminal wrong; that he or she acted purposely, and not, as might happen in the context of an apparent assault, accidentally…."

Misconduct Evidence

13. The prosecution intended to adduce, before the jury, evidence of the interaction between the appellant and the other woman to whom he produced a knife, shortly after he had assaulted the deceased. This was objected to by the appellant. Having heard legal argument, the trial judge refused to accede to the defence objection to exclude the evidence.

14. The appellant asserts that the trial judge was incorrect to admit this evidence before the jury. It is argued that this evidence was not of relevance to the issue of intention having regard to the purpose for which the respondent indicated she wished to adduce the evidence. In the alternative, it is argued that the prejudicial effect of this evidence far outweighed its probative value such that the trial judge was incorrect to permit it be adduced. The respondent argues that the evidence is relevant to the issue of intention and that its probative value outweights its prejudicial effect.

15. In the application before the trial judge seeking to rule out this evidence, Counsel for the prosecution said:-

> *"[T]his is evidence that's material to an understanding of his state of mind and his state of mind in particular in relation the use of a knife and what it means to use a knife. In particular, in terms of proving the requisite intent in relation to causing serious injury or death.*
>
> …
>
> *"what we say is that the comment evinces a state of mind, a state of understanding about the seriousness of use of a knife, which a jury can reasonably infer would also have been in existence half an hour earlier and that therefore informed his state of mind.*
>
> …
>
> *"I just want to be clear, that is for the purpose of proving intention, because the intention is then an inference from the proven fact."*

16. Both before this Court and before the trial judge, Counsel for the appellant emphasised that the appellant's state of knowledge regarding the seriousness of using a knife was not in issue and therefore this evidence should not have been permitted as it went to a matter which was not in dispute.

17. The trial judge, having considered the matter overnight, ruled as follows:-

> *"I'm satisfied that that statement in those circumstances shortly after what had just happened, is in fact a sufficiently wide window into his state of mind at and around that particular time to be relevant for the jury to consider in determining what the facts of his intention 20 minutes earlier were. …. But in my view this shows a deliberate decision to expose the knife when he has been, as he perceived it, checked by his potential victim. This has an uncomfortable echo of intervening in a certain way when things didn't go his way or in the way he wished them to go. But more importantly, it shows that he was quite capable of exercising a decision as to whether or not to use a knife that is implicit if not explicit, in the statement and the*

circumstances, "that could've been a lot of worse for you". What does that mean except to say, if I used this knife, you might have suffered very much worse consequences, but I didn't use the knife, because I'm now satisfied because you've apologised. This shows a decisive cast of mind in relation to the use of a knife a short time after. A knife was previously used by him. It is patently and obviously relevant in my view within the formulation put forward by the Supreme Court in the Almasi case, as bearing on what his state of mind in broadly similar circumstances and a short time previously were. …. Well it certainly feeds into the question of whether he was panicked or had some -- was acting in some void of meaning, when he acted as he did…. The evidence is basically admissible as being highly relevant to the fact in issue in this case and I think most people would be surprised if the situation was otherwise. There's a solid legal basis for the admission of this evidence in my view and I so find."

18. In his charge to the jury, the trial judge directed the jury in the following manner regarding this misconduct evidence and how they should approach and consider it:-

"Misconduct -- other misconduct evidence can be relevant and it's admissible only if it's potentially relevant to an issue that you have to consider and of course the issue you have to consider in this case is whether or not it has been established beyond reasonable doubt that there was an intention to kill or cause serious injury.

But it's not … not admitted to … blacken him any further than …. So, I would suggest to you when you look at it fairly and rationally you ignore that aspect of things because it's not there to allow you to think in that way. What you have to look at is the incident, what was said and what was done and ask yourselves: "Well does that have any bearing, one way or the other, on the question?" "Does it give me any window into his intention in relation to the earlier incident?" You know, specifically in relation to panic and intoxication and matters of that kind, members of the jury. But that's the only purpose for which that evidence is put there and it is for you to consider whether or not it is in fact relevant or whether it goes in favour of the prosecution, beyond reasonable doubt, or there's a reasonable interpretation of it consistent with a more innocent view in which case you take that one unless the prosecution have established their view of the matter beyond reasonable doubt….

What it doesn't establish, members of the jury, and this is -- you know, you have to go back to: what was the mind at the time when the fatal act was performed, members of the jury? What I think it doesn't establish is that Mr [C] had any sense in the immediate aftermath of the extent of the damage that had been done…. But the question is: "Equipped with what you know about that incident and what was

said, do you consider it to be of relevance one way or the other to the question of intention?" Because it is something that happened close by and a short time after, members of the jury, and it has some characteristics and echoes -- albeit happily a very, very different ending than the previous incident.

So you're being asked to look at it in a very logical, rational and limited way, and not to get carried away with any prejudicial approaches to it…. But I have to give you a direction to stay on tracks in terms of the fairness of your approach to this particular evidence because of some possibility of prejudice of misuse of it. But that's what I'm telling you, is to look -- is to confine yourselves very narrowly to the issue to which it is directed and to bear in mind what I have told you about the burden and standard of proof and drawing inferences and finding facts."

Discussion and Determination

19. *The People (DPP) v. McNeill* [2011] 2 IR 669, sets out the governing principals in relation to the admission of misconduct evidence. Denham J. stated at paragraph 55 of the report:-

"[T]he mere fact that the evidence adduced tends to show the commission of other alleged offences does not render it inadmissible if it is relevant and necessary to some issue of fact upon which the jury is required to determine."

20. The *People (DPP) v. Almasi* [2020] 3 IR 85, sets out considerations in relation to whether a matter is relevant in a trial. Charleton J stated at paragraph 26:-

"Evidence is admissible where relevant and it is admissible because it is relevant. Unless evidence which is relevant is required by the laws of evidence to be excluded, it is part of the function of a trial in due course of law under Articles 38.1 and 38.5 of the Constitution for the jury to consider it….It is defining what is relevant that may cause difficulties, as here. Evidence is relevant if that evidence renders more probable or more improbable any fact in issue in the trial. That requires a trial judge to have regard to what the building blocks of the prosecution and defence cases are. It is in this context that relevance may be assessed. That is assessed on the basis of ordinary sense and experience… Facts are relevant because of their relationship with facts in issue and assume importance in terms of weight as the jury assesses the facts. Central to any issue of relevance is to ask what case is being made and whether ordinary sense and reason renders a fact disputed as to relevancy more likely in consequence of being considered as part of the overall body of evidence. Such an analysis can also result in a fact being considered more unlikely if it is part of the building blocks of the prosecution case or the defence case to disprove a disputed fact".

21. As already indicated, the sole issue before the jury in this trial was the question of the appellant's intention. Furthermore, the question of whether this was an accident; whether the appellant panicked; and/or whether the appellant was *"out of his head"* were also introduced into the jury's considerations by the appellant.

22. While the respondent sought to introduce the evidence of the appellant's interaction with the other woman on the basis that it showed an understanding by him regarding the seriousness of using a knife and was relevant with respect to the question of determining his intention, this is not the sole reason why the trial judge admitted the evidence. Rather the trial judge admitted the evidence on a wider basis determining that it displayed a decisive cast of mind on the part of the appellant to use a knife at a time period proximate to the assault. In addition, issues of intoxication and panic had been introduced into the case which this evidence had a relevance to.

23. It seems to this Court that this evidence, on the basis it was admitted by the trial judge, was relevant evidence and correctly admitted before the jury by the trial judge. As already referred to, when determining an accused's subjective intention, the jury are entitled to have regard to the surrounding factual circumstances. As indicated by the trial judge, the factual circumstances of what occurred within a short period of time with the other woman was relevant as it shone a light onto the appellant's state of mind with respect to his willingness to produce and use a knife in the circumstance of being challenged, accompanied by an acknowledgment of the serious consequences which might arise for the other party involved. Furthermore, this evidence had a relevance with respect to the assertion of intoxication and panic on the part of the appellant at the time of the assault. In this regard, the misconduct evidence could have been construed by the jury as demonstrating a calm and considered thought process rather than the appellant acting with a chaotic and disordered state of mind.

24. The trial judge clearly instructed the jury not to consider this misconduct evidence in a prejudicial manner against the appellant. The reason why the evidence was before the jury was carefully explained and the manner in which the jury could consider it was outlined. Indeed, the trial judge's direction to the jury in this regard is not at issue and does not form part of the grounds of appeal.

25. Accordingly, the Court is of the view that the trial judge did not err in this regard and correctly admitted this relevant evidence before the jury. This Court is also of the opinion that the trial judge did not err in determining that the probative value of this evidence far outweighed any prejudicial effect.

The Respondent's Opening and The Jugular Vein

26. In opening the case, Counsel for the respondent summarised the proposed evidence as follows:-

"[H]e simply made a decision to take a knife and to swing that knife violently at the head, neck area of the deceased and that in doing so, he stabbed her in the neck. In common parlance, what he did was he got the knife and he went for the jugular."

27. Counsel for the appellant sought a discharge of the jury on foot of this utterance. This application was refused by the trial judge on the basis that it was a synonym for intentional behaviour, which was the respondent's case.

28. The appellant submits that the trial judge erred in failing to accede to this application. It is submitted that this was a particularly emotive and highly prejudicial comment. The respondent replies by indicating that the comment simply reflected the respondent's case.

Discussion and Determination

29. The comment by Counsel for the respondent was on the high side for the opening address of the respondent. However, the issue is not whether this was an inappropriate comment but rather whether it was of such a prejudicial nature that the jury would not have been in a position to properly determine the case in accordance with their oath or affirmation having heard the comment and therefore should have been discharged.

30. In determining that question, the meaning and the context of the comment must be considered. This was a comment made in the opening address by Counsel for the respondent in circumstances where the trial judge and Counsel for the respondent already had informed the jury that nothing said by Counsel was to be taken as evidence in the case. The meaning of the comment was considered by the trial judge to be that "*one directly and knowingly goes for the weak spot*." The respondent's submission, and the trial judge's assessment, that the comment reflected the respondent's case is accurate. What was at issue in the case was the respondent's intention with respect to his actions and whether he possessed the intention to kill or cause serious injury to the deceased. While the comment was emotive, it did no more than express the case the respondent was making against the appellant.

31. In terms of the question at issue, namely would the jury have been unable to determine the case fairly in accordance with the evidence, the comment was not of such a nature that it raised the prospect of the jury being unable to properly carry out their function. While the Court is of the opinion that the comment was unnecessary, it was not such that it would be appropriate to quash the conviction on this ground.

32. Accordingly, the Court is of the view that the trial judge did not err in failing to discharge the jury in light of this comment.

Dying Declaration

33. An objection was raised by the appellant to the admission into evidence before the jury of what the deceased had said to her husband when she spoke to him on the phone, in the immediate aftermath of the assault on her, on the basis that the legal requirements which permit a dying declaration to be admitted into evidence had not been established. Having heard the evidence of the deceased's husband, the trial judge was satisfied that the deceased had a settled and hopeless expectation of death when she spoke to her husband such that what she said was admissible before the jury.

34. The trial judge made the following ruling in relation to this matter:-

> *"I'm satisfied in this case on the basis of Ms Tserengorj's husband that there was an expectation or belief of death. She made numerous references to this...*
>
> *… The only issue in my view is whether or not this expectation of death was settled and hopeless at the time. This involves an analysis of the evidence that pertains at the time of the making of the statement. In essence the trial judge must be satisfied that the declarant did not entertain any hope of recovery at that time. I have had particular regard to the contents of the utterances in this case and the circumstances in which they were made. There was absolutely no positive assertion there to counterbalance her repeated statements that she was dying, and there is no basis on the facts to draw an inference that she, in the face of these repeated assertions and in circumstances where her artery was gushing blood and I'm satisfied that this was undoubtedly obvious to her, there is absolutely no basis for thinking that there was some counterbalancing or residual hope of recovery in the particular circumstances presenting in this case. There was absolutely nothing to contradict the idea that her knowledge of her impending death, which as it turns out, was correct, was in any way tempered by thoughts or hopes of recovery. On the contrary her constant reference, her repeated reference to death, powerfully and beyond reasonable doubt, displaces any contrary interpretation of the facts from my point of view."*

35. The appellant made a similar argument, before this Court, to the effect that the evidence, when considered as a whole, did not establish, to the requisite standard, that the deceased had a hopeless and settled expectation of death. The evidence from a taxi driver at Connolly Station who did not think that the deceased looked very worried but rather looked normal; the deceased's interaction with the emergency services whereby she permitted them to treat her at the scene rather than insisting on going to hospital; and also speaking to the gardaí at the scene, were relied upon in this regard.

Discussion and Determination

36. *McGrath On Evidence, 3rd Ed., (Roundhall, 2020)* explains the rational for the exception to the hearsay rule of a dying declaration as follows:-

"5-254 A statement of a deceased person in relation to the cause of his or her death is admissible as evidence of the truth of its contents at a trial for the homicide of the deceased provided that he or she was under a settled hopeless expectation of death at the time he or she made it.

5-255 The rationale underpinning this exception was outlined by Eyre CB in R. v Woodcock who explained that:

> *"The principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."*

37. *McGrath On Evidence* explains a 'settled, hopeless expectation of death', as follows:-

"5-263 The requirement that the declarant be conscious that he or she was dying at the time he or she made the statement sought to be admitted is closely linked to the rationale for the exception because truthfulness can only be assured in circumstances where "the deceased herself apprehended that she was in such a state of mortality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions". There is Irish authority to the effect that the declarant must have been under a settled expectation of immediate death but the English Court of Criminal Appeal has rejected this suggestion and it appears to be an unduly restrictive approach to take.

5-264 The formula "settled hopeless expectation of death" appears to have been first used by Willes J in R. v Peel and has now passed into common currency. It serves to emphasise that, in order for a declaration to be admissible, the deceased must be aware that he or she is dying and must not entertain any hope of recovery…"

38. Whilst the taxi man was of the view that the deceased appeared "*normal*" and not so distressed, and noting that the deceased did not insist on an immediate removal to hospital, and also spoke to the gardaí before her removal to hospital, it is clear from the evidence of the deceased's husband that the deceased was of the view that she was dying. She repeated to him over and over again – *"What can I do Umbar, I am dying".* She uttered these words in circumstances where blood was pouring from her neck. This establishes that the deceased was of the view that death was imminent and satisfies the test of having a settled, hopeless expectation of death. Accordingly, the test for the admission of this evidence as an exception to the hearsay rule was met and the trial judge did not err in admitting it before the jury.

Cumulative Atmosphere at Trial

39. Finally, the appellant complains that the trial judge displayed an attitude which was negative towards the appellant and inappropriate in light of the fact that he was a child.

40. A trial involving a child accused, of legal necessity, is conducted in a manner different to an adult accused. However, it is a matter for the trial judge to assess what accommodation is necessitated for a child accused. In the instant case, there is a reality to the conduct of this trial in terms of accommodating the needs of the appellant in that he had already been through a previous trial where the jury disagreed. Accordingly, he was familiar with the manner in which a trial of this nature is conducted.

41. More importantly, the manner in which the trial was conducted by the trial judge is not an appropriate matter for this Court to involve itself with unless a legal issue arises with respect to same. The Court has determined that in respect of the legal rulings which have been challenged the trial judge did not err in relation to same. The Court is of the view that the complaints made with respect to the manner in which the trial judge conducted the case have no effect with respect to the fairness of the trial and do not render the verdict in the trial unsafe whatsoever.

Conclusions

42. In circumstances where we have not upheld any of the appellant's grounds of appeal, his appeal against conviction is dismissed.