THE COURT OF APPEAL
CRIMINAL

Record Number: 285/18

Birmingham P.
McCarthy J.
Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

PAUL WELLS

APPELLANT

JUDGMENT of the Court delivered on the 30th day of November 2023 by Ms. Justice Ní Raifeartaigh

The issue in the case

1. The appellant was convicted of murder. In this appeal, he does not seek to rely on any of the grounds listed in his original notice of appeal, but rather seeks by way of motion to add a single additional ground to the effect that the trial judge erred in his charge to the jury on self-defence. There are two issues for the determination of the Court. The first is whether leave may be granted to add the additional ground of appeal. The second, which only arises if the appellant succeeds in his motion and such leave is granted, is whether the trial judge erred by failing to properly charge the jury on the issue of self-defence.

Background

2. The appellant was charged with the murder of one Kenneth O'Brien in the Finglas area of Dublin on a date unknown between the 15th of January 2016 and the 16th of January 2016. Mr. O'Brien failed to return home on the evening of the 15th of January 2016. The deceased's partner, Emer Dunne, received texts purporting to be from Mr. O'Brien, saying that he was leaving her. Ms. Dunne contacted various family members and friends including the appellant, Mr. Wells. The latter was a friend of the deceased and he told her that Mr. O'Brien had been having a relationship with another woman in Australia, showed her photos of another woman, and said that he had run off with her. The deceased's family were unhappy with the explanation for his disappearance and reported him missing in the evening of 16th January.

3. On the 16th of January 2016 in the Ardclough area of Kildare, some walkers observed a suitcase floating in the canal, which when opened was found to contain a human torso. This was the subject of a post-mortem examination, and DNA testing subsequently confirmed it to be the body of Mr. O'Brien. A search was conducted of the surrounding area, and on the 24th of January, bags which had been weighed down by bricks were recovered from the canal. They contained the deceased's limbs and skull. An examination of that skull revealed a contact bullet entry wound at the back of the head. The amputation of the body parts occurred in a manner consistent with the use of a high-speed mechanical saw.

4. An extensive investigation was conducted by An Garda Síochána, and it emerged that during 2014 and 2015 Mr. O'Brien had been sending money (approximately €52,000) from Australia back to Ireland into an account belonging to the appellant. On the 6th of February of 2016, the appellant was arrested. Forensic evidence revealed that Mr. O'Brien was shot at the appellant's address and his body dismembered there.

5. After initially lying to the Gardaí, the appellant acknowledged that he had shot Mr. O'Brien but asserted that this was done in self-defence.

6. He said that Mr. O'Brien had wanted Ms. Dunne to be murdered and had asked the appellant to do it. According to the appellant, the topic of murdering Ms. Dunne was canvassed by Mr. O'Brien on a number of occasions, but it was not something that the appellant wanted to do. He said that at approximately 5pm on the 15th of January 2016, Mr. O'Brien arrived at his address, and they had a conversation concerning the prospective murder of Ms. Dunne. This culminated in Mr. O'Brien producing a gun. A dispute ensued between them at the backyard area of the house, and the gun fell to the ground. Mr. O'Brien reached for the gun and at that point the appellant also reached for the gun, obtained it and fired it, on his account pulling the trigger a number of times. He said he dismembered Mr. O'Brien because he panicked as a result of what had happened.

7. The defence at trial pointed to a number of circumstances which they asserted constituted evidence of the existence of the conspiracy to kill Ms. Dunne, including evidence about the CCTV not functioning and a code having been changed, the cancellation of a birthday party which was to take place that day on the basis of a lie by the appellant that he had to go to work in Limerick, the removal of the appellant's passport from the safe and the placing of a suitcase in the boot of a car, the removal of phone numbers from Ms. Dunne's handset, the fact that keys were cut that day, and evidence about two phones and a SIM card. This was said to be indicative of the elements being put in place by the deceased so that later in the evening of the 15th, when his partner would return home with the child, he would use some pretext to take away the child and the appellant would then attend and murder Ms. Dunne.

The trial judge's charge

8. The trial judge charged the jury on a Friday and requisitions were dealt with on the following Monday. As the new ground of appeal sought to be added to this appeal makes a number of criticisms of how the trial judge dealt with the issue of self-defence, it will be

necessary to set out certain portions of the charge at some length below. It should be noted that no requisitions were made in relation to the specific issue of how the trial judge dealt with the law on self-defence, although requisitions in relation to other matters were raised. It may also be helpful at this stage to summarise the criticisms made by the appellant of the charge on self-defence, which are as follows:

(i) that it provided an insufficient and/or incoherent explanation of the defence of self-defence;

(ii) that it presented the options other than murder as "theoretical" options only;

(iii) that it misstated the burden of proof by saying that the accused must raise some 'reasonable possibility' regarding his innocence;

(iv) that there was a failure to give a "*Palmer* direction" (that the jury should take into account that in a situation of self-defence, a person may not be in a position to weigh the amount of retaliation required to a nicety);

(v) that there was a failure to tell the jury that a person may legitimately strike/attack if he is anticipating an attack ("anticipatory self-defence").

9. Bearing those complaints in mind, the passages in the trial judge's charge concerning self-defence and related matters may now be examined. The judge charged the jury in relation to the presumption of innocence and the requirement of proof beyond reasonable doubt:

> "One of the protections, the main protection that applies to an accused person in the course of criminal trial is that there is a presumption that he is innocent of the offence charged against him. Now, that's not a glib thing, that's a fundamental right of every citizen, whether you're charged with a road traffic offence or charged with murder. Whether it's me or whether it's you or whether it's Mr Wells. You come before the court with a presumption of innocence and that's simply an important a way of saying that the burden of proof is on the prosecution to establish each and every element of the offence beyond a reasonable doubt. And that burden does not change during the course of the trial, and that presumption does not change during the course of the trial. And you carry that presumption and he carries that presumption all the way through the trial right into the deliberations that you have in your jury room. And that presumption does not end unless, and until, and if he is found guilty of an offence in accordance with the law that I'll outline to you.
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> So that's one of the great protections of the jury system, that the burden, and it's a high burden is placed on the prosecution to establish the case beyond a reasonable doubt".

10. He said that the burden on the prosecution did not change at any time during the trial and that the accused did not bear any burden at all to prove his innocence:

> "So the prosecution seek to prove their case on the basis of the evidence which they call. And in that context, it's very important to realise as has been stated to you, that the accused bears no burden in this case. He does not have to… he does not have to prove his innocence of the charge laid against him. That's another cornerstone of the system that we operate. And that is something that has happened in this case, the accused has chosen not to give evidence. You cannot in any circumstances hold that against him, that is his right.
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> It is again your right if you were charged with any kind of an offence, road traffic or anything else, it is your right not to give evidence. And that cannot be laid against him or held against him in any way. It's a fundamental right and I want to emphasise that in case there's any misapprehension about it. It's a matter that is highly important and it is not to be held against him in any sense".

11. He referred again several times to the requirement of proof beyond a reasonable doubt, and he went on to contrast the civil and criminal burdens of proof. He said that if there were two possible ways of looking at all of the evidence or any part of it, and one was consistent with innocence and the other consistent with guilt, the jury should adopt the view that is most favourable to the accused, unless the other view has been established beyond a reasonable doubt. He said the same approach applied to any inference to be drawn and that it needed to be proven beyond a reasonable doubt.

12. The judge gave the jury a definition of murder and a description of the elements of the offence, again emphasising the burden of proof beyond a reasonable doubt borne by the prosecution. He then followed with a summary of the evidence as to how Mr. O'Brien died.

13. He then went on to describe the law on self-defence:

> "Now, the -- it's a matter for you to decide whether you're satisfied beyond reasonable doubt that in discharging the firearm into the back of the late Mr O'Brien's head, this was intended to cause him death or serious injury. A homicide is not murder if it is committed in reasonable self-defence. That's self-defence in this case of oneself, Mr. Wells defending himself. The consideration of this defence arises in circumstances where you're satisfied that the accused killed the deceased. He maintains that the killing was in self-defence and as a matter of law, the defence of self-defence arises in the following way, if Mr. Wells in the circumstances of this case killed Mr. O'Brien because **he honestly believed that the level of force that he used, that's to say in discharging the firearm into the back of his skull, was at that time and place necessary to defend himself or others. But [if] in doing so, he used a greater degree of force than a reasonable man would have considered necessary in the circumstances, he may have been guilty of an error of judgment in a difficult situation. The defence of self-defence in those circumstances reduces a charge of murder to manslaughter**. And the appropriate verdict if you consider it to be appropriate when applying this test is not guilty of murder, but

guilty of manslaughter. **The honest belief that the force was necessary is a subjective belief. It's a belief that Mr. Wells Senior says he had. So it's not an objective test, it's not a reasonable test, it's his subjective belief in the circumstances that applied at the time. You're considering what he actually believed at the time was necessary**. That's to say at the time he killed Mr. O'Brien.

The test in respect of the degree of force used by him and whether it is greater than that which a reasonable man would have considered necessary is an objective test. It's one which is a reasonable man test. You are entitled, if you consider it to be the case, to conclude on the evidence if the prosecution have established this beyond reasonable doubt, that he did not believe that any force was necessary in the circumstances. And you may simply reject the propositions which he has put up in answers to questions put by An Garda Síochána. You may reject his answers, you may reject any other evidence that was relied upon by him which he maintains point to his honest belief that force was necessary in the circumstances.

Matters of credibility in that respect are matters for you. You must examine his statement of his belief and his state of mind as expressed in his interviews and to be inferred from other evidence and indeed the submissions that have been made for you and the manner of the shooting and the events leading up to that. They're all factors that contribute and feed into your understanding on the evidence in the case of what happened. If you're not … **if you're satisfied that the prosecution have not established beyond reasonable doubt that he did not have an honest belief that the force used was necessary, you then go on and you should consider whether that force was greater than a reasonable man would consider necessary**. And that brings into force into focus the application of again your assessment of the circumstances surrounding the discharge of the firearm. And you bring to bear your common sense and your ordinary life experience in that regard.

In that sense, again you must consider all of the evidence in the case. What you accept and what you understand to be on the basis of the evidence the situation. How Mr O'Brien came to be at the house, why he was there, what happened, what ensued after he arrived? You consider the description given by the accused of what he says transpired. You must consider the nature of the row or fight that developed as described by Mr Wells. You must consider the credibility of all that case in relation to that.

Consider the submissions made in relation to that. You consider his description of the gun falling to the ground. The… what is referred to as a struggle to get that gun. His state of mind when he got that gun and what was his state of mind. And in that sense, you must also consider the following, **if you reach a state of mind and view of the case that Mr Wells was in a situation which you accepted**

which you accept justified the use of some force [b]ut he uses more force than he knew to be reasonably necessary in the circumstances, he is guilty of murder and the appropriate verdict is guilty of murder.

The other aspect of the case that you have to consider is this, a very important one, a full offence of the charge of murder is open [i]f in the circumstances Mr Wells killed the late Mr O'Brien using such force as was in the circumstances reasonably necessary. And if there's a reasonable possibility which has not been excluded by the prosecution of that, you simply acquit him, the appropriate verdict is not guilty. That would be a full defence of self defence where essentially, the degree of force used was such as was in all the circumstances, reasonably necessary. Proportionate in essence to the threat which he faced, if he faced a threat and that's a matter for you. The justification for use of force is the necessity of the occasion.

So as has been said, if somebody… if one man attacks another or assaults them, that the other man has a right to defend themselves and to strike a blow in their own defence without waiting to be struck. However, he has no right to take revenge or retaliation on the other. And if the danger is past when the blow is struck or the danger did not exist or does not exist at the time the blow is struck, or in this case the shot is fired, the blow is not necessary for defence. And it's important that you determine whether the prosecution have established beyond a reasonable doubt that when discharging the gun at Mr O'Brien, the accused did not honestly believe that it was necessary to do so. **And if he did have an honest… if the situation was one of honest belief in examining the force used, the prosecution must exclude any reasonable possibility consistent with innocence.**

If you're satisfied beyond reasonable doubt that Mr Wells Senior was the aggressor and that this was a planned assassination and/or that he knew that he did not need to resort to violence to defend himself, that's murder. Now, you've heard submissions made to you in relation to the various elements of the case. The substantive evidence in relation to the killing of the late Mr O'Brien, a great deal of it comes from Mr Wells himself. The credibility of that evidence is a matter of high importance for you, it has to be carefully considered".

(Emphasis added).

14. The trial judge moved at this point in his charge to the lies told by the appellant during his Garda interviews and how they should approach those. At the end of that section, he said it was for the jury to assess the account given by the appellant, and then he said:

"If the account is reasonably possible, if that is your state of mind in relation to the account which he gives, well then you must consider that the prosecution have failed to establish guilt beyond reasonable doubt. **They must as I say, exclude the defence of self defence raised beyond a reasonable doubt, that is their**

burden. And if there's any reasonable possibility consistent, that you think is consistent with innocence, you must act on that. And you can act on it in relation to the full acquittal possibility or option, or the partial defence of self defence. If you're satisfied beyond reasonable doubt that this was an intended assassination by shooting Mr O'Brien at point blank range in the back of the head, if you're satisfied of that beyond reasonable doubt, you must convict".

(Emphasis added).

15. He then moved on to other aspects of the evidence in the case in some detail, as well as what the appellant told the Gardaí during interview, and then returned once again to self-defence in the context of that evidence, as follows:-

> "….The question which was raised by the defence and is the defence in the case is that the exigencies of the gun falling out of the waist band led to an apprehension, a fear on the part of Mr Wells Senior that he needed to get to the gun, he got the gun. And then at this stage, as I understand the description, they were in the rowing position like two rowers in a boat. He had the gun, so effectively he was behind, awkwardly behind Mr O'Brien and on the pathology evidence, placed the muzzle of the gun against the pressed it against the deceased skull and pulled the trigger. That is the context in which the issue of self defence has to be considered. That he was in fear of his life, that if Mr. O'Brien got a hold of the gun, he would shoot him. And he was -- or that it was -- and that it was necessary that he should discharge the that he should fire the gun into the back of his head in the manner in which he did.
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> The issue of self defence has been raised very clearly and if that fear existed and if there's a reasonable possibility that that is so, he is entitled to an acquittal. If the if Mr. Wells had an honest belief that he that force was necessary in the circumstances, but used more force than was reasonably necessary in the circumstances, that would traduce the account of the charge from murder to manslaughter. If you're satisfied that this was a killing in which he had no such honest belief that force was necessary, it's murder. If it was premeditated and intended as suggested by the prosecution, it's murder.
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> These are the alternate verdicts that are open to you. The situation in relation to other aspects of the case reliance was placed upon as I said, the phone as part of the premeditation argument. The defence has outlined very clearly various points at which they say it is important to take into account in relation to what was transpiring on this occasion. And that it is in fairness to Mr. Wells, there are matters which occurred which are incredibly consistent with the carrying out of the intention to kill Ms Dunne which have been detailed to you in closing submissions by Mr. O'Higgins.
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> You must consider all of those matters and if there's a reasonable possibility consistent with innocence, you must act on it. And the prosecution must exclude,

beyond reasonable doubt any reasonable possibility of the existence of a defence of self defence. They must establish every element of the case beyond reasonable doubt. And they must in the course of -- sorry, you must in the course of your consideration consider very carefully each of the interviews which has been put forward in the case, and which is being relied upon by the prosecution and the defence. And the arguments advanced in respect of both.

The verdict, the issue in relation to the potential of Mr. O'Brien to engage in this kind of conspiracy to murder his partner, it has been said and there is -- it is pointed to that in his history as put before you, there is sufficient material to give rise to a credible basis for inferring that he had a propensity and a potential to engage in such a criminal conspiracy.[the trial judge then detailed some of the evidence supporting the conspiracy]…"

(Emphasis added).

16. The trial judge finished his charge by once again outlining the three verdicts open to the jury:

"…And ultimately when considering [the evidence] objectively and carefully, you have the three options available to you. You must be unanimous in your verdict. You're entitled to bring in a verdict of guilty of murder, not guilty of murder but guilty of manslaughter or not guilty. They are the three options open to you…".

17. The trial judge then sent the jury away for the weekend and, in their absence, asked for any requisitions. Although it appears from the transcript that the trial judge would have preferred these to be done "spontaneously", he acceded to a request from defence counsel that they be permitted to consider the charge over the weekend and make their requisitions on Monday.

18. On the following Monday, counsel for the appellant made a number of detailed complaints relating to the way in which the evidence had been summarised, which was said to lack balance, and the manner in which the *Lucas* warning had been given. The submission went so far as to request a discharge of the jury. Counsel did not make any requisitions at all in relation to how the judge had directed the jury on the law of self-defence. The trial judge refused to discharge the jury but, having heard from prosecution counsel also, recalled the jury and re-directed them in relation to the seven matters which the defence said supported the existence of a conspiracy to kill Ms. Dunne. There was also a second re-direction in relation to some of those matters upon a further requisition by defence counsel. At no point did counsel make any criticism of the direction on self-defence. Further, the original notice of appeal made no reference to this issue.

19. The background to the application for leave to add a ground of appeal was explained on affidavit from the appellant's solicitor. She simply said that the appellant changed his legal team on the 23rd of September 2021 and that new counsel were asked by the new solicitor to review the case. They reported back that they were of the opinion that there

was no merit in any of the existing grounds of appeal but advised that the new ground of appeal should be added in order to deal with the way in which the jury were directed on the issue of self-defence. Relevant correspondence was exhibited but adds nothing to that simple explanation.

Submissions of the Parties

Submissions on behalf of the appellant

20. Counsel accepts that because of the decision in *People (DPP) v. Cronin (No. 2)* [2006] 4 IR 329, he has a substantial hurdle to overcome in seeking to raise a matter on appeal which was not raised at the trial, but he submits that new grounds can be added where the 'fundamental' or 'essential' justice of the case require it and that this is one of those cases. Counsel seeks to distinguish *Cronin* from the present case on the basis that the appellant in *Cronin* sought to raise a defence on appeal which had not been raised at trial whereas self-defence was the central issue and of 'crucial importance' during the appellant's trial. In this regard, counsel points out that the Court in *Cronin* had referred to *(People) DPP v. Sweetman* (Unreported, CCA, ex tempore, 23rd October 2000) and approved of the proposition that matters of crucial importance can be the basis of grounds of appeal more readily than issues of 'relative insignificance'. Counsel for the appellant submitted that this arises not from a 'trawling through of the transcript' but from a 'plain reading of the judge's charge', and there is no reason to think that a failure to requisition the trial judge arose from some kind of tactical decision at the time.

21. As to the substance of the submission relating to the charge on self-defence, counsel for the appellant submits that rather than providing a coherent and focused charge on self-defence, the issue was dealt with in a disjointed manner. He refers to the following passage which includes a double negative as an example of how confusing the directions given were: *"if you're satisfied that the prosecution have not established beyond reasonable doubt that he did not have an honest belief that the force used was necessary, you then go on and you should consider whether that force was greater than a reasonable man would consider necessary".* Counsel submits that this passage should have been followed by an immediate explanation of assessing the reasonableness of force by the standards of a reasonable person which the judge failed to do. He submits that when the trial judge did offer an explanation for this concept of knowingly using excessive force, the explanation was inadequate and would have required knowledge on the part of the listener as to what 'uses more force than he knew' meant: *"…And in that sense, you must also consider the following, if you reach a state of mind and view of the case that Mr. Wells was in a situation which you accepted which you accept justified the use of some force. But he uses more force than he knew to be reasonably necessary in the circumstances, he is guilty of murder and the appropriate verdict is guilty of murder."*

22. Counsel submits further that the trial judge added to the confusion by dealing with the law on self-defence at three different points in the charge. He submits that in the context of a case where the accused had dismembered a human body after having shot him in the back of the head, he already faced inevitable prejudice from any jury, and it was essential that the law on excessive force and manslaughter was properly explained to the jury. He

submits that the charge set out in *DPP v. O'Sullivan* [2019] IECA 250 was clear and should have been used as a model for the charge.

23. Counsel for the appellant also submits that the trial judge had cast the defence case as at best a theoretical option, by virtue of the fact that the trial judge dealt with the intermediate option of manslaughter before the option of full acquittal, and by virtue of the trial judges' saying *'you can act on it in relation to the full acquittal* ***possibility*** *or option, or the partial defence of self defence'* (Emphasis added by counsel). He cites *DPP v. Clarke* [1995] 1 IRLM 355 in this regard.

24. Counsel for the appellant also submits that the trial judge's charge in effect reversed the burden of proof by saying that the accused must raise some 'reasonable possibility' regarding his innocence, and that it would have confused the jury by saying that they must decide whether the prosecution had excluded, beyond reasonable doubt, the reasonable possibility, of the existence of a defence of self-defence. He submits that this was a convoluted direction on the key issue in the case and in no way could it be argued that the jury clearly understood the law as it applied to the facts in this case.

25. Counsel for the appellant submits that it was not made clear to the jury that a person is not obliged to wait until attacked before acting in self-defence, citing *R v. Deana* 2 Cr App R 75 as an example.

26. The appellant also relies on *Palmer v. The Queen* [1971] AC 814, and submits that while *Dwyer* had rejected *Palmer* to some extent (i.e. insofar as the English courts held that a verdict of murder, not manslaughter, is the only one open to the jury where an accused pleading self-defence used more force than was reasonable in the circumstances), it did not do so in every aspect. Specifically, *Dwyer* had not rejected other aspects of the reasoning in *Palmer*, in particular the '*Palmer* direction', which consists of a judge telling the jury of the extreme anguish that is often felt by those in an unexpected and panicked confrontation:

> "If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken".

The DPP's submissions

27. The DPP relies on *Cronin* for the proposition that a point not raised at trial should not be raised on appeal, and points to the absence of any requisition on the self-defence charge, despite (very experienced) counsel having made extensive requisitions on other points after having had the weekend to consider the judge's charge, and in circumstances where self-defence was central to the defence's trial strategy. The DPP submits that the proposed new ground of appeal does arise in reality from a transcript-trawling exercising, citing *People (DPP) v. Redmond* [2001] 3 IR 390.

28. Counsel submits that the trial judge's charge was not disjointed but clear, comprehensive and easy to understand, and in accordance with the law as stated in *Dwyer*.

29. Counsel argues that the present case is entirely distinguishable from *DPP v. Clarke*, wherein the impugned charge was *"While the verdict is open to you, ladies and gentlemen, and you could in theory acquit him of all responsibility, as I say it appears to me that the facts, even as described in the statement of the accused, hardly admit of the possibility of an acquittal, because there was ample time to avoid the confrontation."*

30. Counsel for the DPP submits that the trial judge never reversed the burden of proof in his charge and points to passages in the charge where the trial judge repeatedly said that the burden of proof to a standard of beyond reasonable doubt lay on the prosecution. Counsel further submits, referring to *AG v. Quinn* [1965] IR 366, that it is uncontroversial to suggest that there has to be some evidence raising self-defence in a case, nor does doing so suggest that the burden of proof is somehow reversed.

31. The DPP submits that *Palmer* directions do not form part of Irish law. Counsel originally suggested that the trial judge gave a similar direction in any event, having told the jury that: *"where you are having this particular debate, you will take into account that this was a fight, people don't get a chance to just sit down and take out slide rules and calibrate and make informed decisions."* However, it was later conceded that these words were spoken by counsel on behalf of the appellant and not the trial judge.

32. The DPP concedes that the trial judge did not direct the jury on a person's entitlement to use force to ward off anticipated violence, and that it was referred to in counsel's closing speech. However, it is pointed out that there was no requisition in relation to this at the trial.

Discussion of relevant principles

33. The principles concerning appeals in which an appellant seeks to raise points which were not raised at the trial were summarised in the leading decision of the Supreme Court in *People (DPP) v. Cronin (No 2)* [2006] 4 IR 329. There, the appellant's defence throughout his trial for murder was that he never had a gun let alone fired one, but on appeal (which was conducted by a new legal team), he contended that the trial judge should have directed the jury on an alternative defence that the applicant may have discharged a firearm due to accident or mistake without an intention to do so, notwithstanding that this alternative had never been raised by the defence at the trial.

34. The matter reached the Supreme Court (Geoghegan J., Fennelly J., McCracken J., Kearns J., and Macken J.) by way of an appeal under section 29 of the Courts of Justice Act, 1924 from the decision of the Court of Criminal Appeal (Hardiman, O'Sullivan and Quirke JJ.) refusing an application by the appellant for leave to appeal. Although the point was a different one from that raised in the present case and concerned the extent of a trial judge's duty to charge the jury in relation to a defence not raised, principles of more general application were articulated.

35. Geoghegan J. emphasised the importance of paying due regard to how the case was run at trial by experienced and competent counsel, albeit that this is not a conclusive or determinative fact when considering whether a trial judge's charge to a jury was correct:

> "*In this particular case*, I have no doubt whatsoever that counsel for the appellant did not overlook the possible alternative defence of accident but deliberately did not pursue it for the very good reason that in the eyes of a jury it might weaken the defence which the appellant himself made in the witness-box. *The Court of Criminal Appeal took the view that in such a situation any requirement as suggested by the English authorities for the trial judge to put an alternative defence to the jury would be "difficult to reconcile with the rights of an accused person as understood in this jurisdiction". The court went on to make the following comment:*
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>> "This is because, on a literal reading, they trench on the right of an accused to conduct his own defence, or have it conducted professionally on his instructions, without its being undermined even by the entirely benevolent introduction of a middle course which neither he nor the prosecution have been minded to contend for."
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>> ….
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>> It is the duty of a trial judge to ensure that the case ultimately presented to the jury represents a fair trial as between prosecution and defence. *In protecting the rights of a defendant the judge cannot be exclusively dictated by the way a defendant chooses to run his own defence. On the other hand, the judge must pay heavy regard to that factor*. A judge must, at the same time, bear in mind factors which a jury in the jury room might themselves legitimately consider relevant. Taking the example of the facts of this case, if counsel for the appellant had in fact run the alternative defence as well as the main defence, I have little doubt that the learned trial judge would have had to specifically deal with the possibility of accident or mistake when addressing the jury. It would not have been enough merely to enunciate general principles and leave to the jury the possibility of a verdict of not guilty but guilty of manslaughter. However, in circumstances such as this, where the alternative defence was not in fact raised, the learned trial judge, in my view, was engaging in a correct and proper balancing exercise by confining his remarks to explaining the possible verdict of manslaughter. That verdict could have no conceivable relevance to the actual defence which was pursued at the trial. Yet the jury was being permitted at least to consider whether the death could have happened unlawfully but without the intention to kill or cause serious bodily harm which the trial judge had made clear were essential elements of murder. To any juror with common sense the possibility that the gun fired unintentionally could only conceivably arise if he or she considered that the gun might have fired accidentally because of being pushed. Otherwise the intention to fire the gun would clearly constitute murder…

For the reasons which I have indicated, I am of opinion that the learned trial judge struck the correct balance in, on the one hand, paying due regard to the defence actually put forward and on the other hand to his duties as a trial judge to ensure that in the interests of the public and in the interests of the jurors when they would retire into their jury room, all relevant issues be identified. The degree of emphasis to be placed on an alternative defence when it has been expressly raised must usually be quite different from the degree of emphasis to be placed on an alternative defence that has not been raised and particularly when it is obvious that it has deliberately not been raised".

(Emphasis added).

36. Kearns J., who agreed that the trial judge had got the balance right, specifically addressed the circumstances in which the Court of Criminal Appeal should entertain a point on appeal which was not raised at trial, saying:

> "It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner.
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> Without some such limitations, cases will continue to occur where a trawl of a judge's charge years after the event will be made to see if a point can be found which might have been argued or been the subject matter of a requisition at the end of the judge's charge at the original trial, even though competent lawyers at the trial itself did not see fit to do so. It is an entirely artificial approach to a review of a trial and one totally disconnected from the reality of the trial itself. For these reasons and for the reasons offered by Hardiman J when this case was in the Court of Criminal Appeal, this court should abhor the practice and strongly discourage it".
>
> (Emphasis added).

37. In one of the pre-Cronin authorities, *People (DPP) v. Moloney* (Unreported, CCA, 2nd March, 1992, the Court of Criminal Appeal) had emphasised the need for an explanation as to why a point, subsequently raised on appeal, was not raised at trial:-

> "We would wish to reiterate the jurisprudence of the Court which has been in place for many years that there is an obligation on counsel on both sides, the prosecution and the defence, to bring to the attention of the trial judge any inadequacies they perceive in his directions to the jury. If an appeal is brought before this Court on a point that has not been canvassed at trial this Court will regard any person making such a new point as having an obligation to explain why it is sought to be made on

> appeal when not made at the trial. That is not to say but that if the essential justice of the case calls for intervention we have an obligation so to intervene".

Hardiman J., in his judgment for the Court of Criminal Appeal in *Cronin*, had commented with regard to *Moloney*:

> "The reason for this rule or statement of principle is not at all a technical one, or one designed to assist in the orderly conduct of trials and appeals. It is to ensure a proper relationship, based in reality, between the conduct of an appeal and the task on which the court is engaged, which is to say whether or not the trial was a safe or satisfactory one."

38. In another pre-*Cronin* authority, the Court of Criminal Appeal had discussed failures to raise matters at trial which arise from deliberate and tactical decisions:

> "There is absolutely no doubt that this Court can refuse to entertain an objection to a Judge's charge where that objection did not from the subject matter of a requisition. But it does depend on the particular circumstances of the case whether this Court takes that course or not. An obvious example where it might take that course would be **where there might appear to have been a deliberate omission to raise the requisition for tactical reasons in the circumstances where perhaps other parts of the charge had been highly favourable to the Accused"** (see *DPP v. Noonan* [1998] 2 IR 439) *(Emphasis added).*

In *Cronin*, Kearns J. commented if a tactical decision lay behind a decision not to raise something a trial, this would almost inevitably mean that the point would not be entertained on appeal:

> "In any case where such a strategy was adopted, I would most certainly decline to allow the point to be argued for the first time on appeal".

39. Thus, it is clear that where an appellant seeks to raise an alleged defect in a trial judge's charge on appeal in circumstances where there was no requisition in relation to the point at the trial:

(i) There should be an explanation as to why the point now sought to be argued was not taken at the trial.

(ii) Decisions taken deliberately for tactical reasons at the time of the trial are unlikely to be the subject of a successful application to raise matters for the first time on appeal.

(iii) The Court abhors the artificiality of searching the transcript after the trial for errors which are divorced from the context of the trial itself (sometimes known as "transcript-trawling").

(iv) The Court on appeal will only intervene if it apprehends that a "fundamental" or "real" injustice has occurred.

40. An excellent example of the above principles in operation is *People (DPP) v. Sweetman* (Unreported, CCA, ex tempore, 23rd October 2000), albeit that it pre-dates the decision in *Cronin*. Here the only evidence linking the appellant to the offence was his alleged confession. It was alleged by the Gardai that he had told them that he went with others "to frighten a farmer" but that the plan did not involve the infliction of violence. His co-accused was alleged to have confessed to planning to inflict a shot-gun blast on the farmer. They were tried together, and the trial judge when charging the jury omitted to tell the jury about the fundamental evidential rule that the confession of one accused does not constitute evidence against his co-accused. No requisition was raised in relation to the matter by either side. Quashing the conviction on this ground alone, the Court of Criminal Appeal said:

> "It is right to say that the problem for the learned trial judge was compounded by the fact that unfortunately no requisition was raised in respect of this aspect of his charge. The explanation given to us today on behalf of the applicant is that counsel on the occasion in question, who are not the same counsel as argued the case here in court today, may have been concentrating so much on whether the statements had been made at all, because it was contested vigorously that they had not been made, simply overlooked the fact that they should have drawn the trial judge's attention to the fact that he should have charged them on this basis.
>
> …
>
> There are also cases in the context of the whole trial and what is of issue being of relative insignificance, this court can overlook a defect in the charge and can take into account a failure to raise any requisition. This court is satisfied that this is not such a case because this was central to the trial, it was a matter of crucial importance, it was the critical evidence against the applicant and consequently the court is satisfied that that ground of appeal has been made out".

41. In contrast, it may be noted that the Court of Criminal Appeal did *not* quash the conviction on another ground which had been raised, namely that a verdict of manslaughter should have been left to the jury. Here, the Court rejected the ground of appeal on the basis that counsel at trial (different from those appearing on the appeal) had expressly been asked if they would like to make a submission that manslaughter should be left to the jury and declined the invitation, preferring to leave a straightforward issue of murder or acquittal to the jury:

> "Two extremely experienced counsel in the criminal law who were engaged in the court below said unequivocally that they were perfectly satisfied that it was not an appropriate case in which to leave manslaughter to the jury and that of itself is a considerable hindrance to this ground of appeal which is now being relied on by different counsel in this court … of itself probably fatal to this ground of appeal".

42. Thus, in Sweetman, one of the points raised on appeal did *not* lead to the quashing of the conviction because the failure to pursue it at trial was considered to be a tactical decision made by the (entirely competent) legal team acting for the appellant at the trial. Another point *did* however lead to the quashing of the conviction because it was considered to be a fundamental matter going to the core of the evidence in respect of the appellant, and there was therefore a possibility of real injustice; further, it may be noted that there was an explanation for the failure to raise this issue at trial, namely an oversight in relation to this issue (the rule that the confession of one accused cannot be evidence against a co-accused) arising by reason of the intense focus on the trial on a different matter (whether the confession had in fact been made to the Gardaí).

Application of the principles to the facts of the case

43. The appellant in the present case in effect makes five distinct criticisms of the trial judge's charge as follows: (i) that it provided an insufficient and/or incoherent explanation of the defence of self-defence; (ii) that it presented the options other than murder as "theoretical" options only; (iii) that it misstated the burden of proof by saying that the accused must raise some 'reasonable possibility' regarding his innocence; (iv) that there was a failure to give a "*Palmer* direction"; and (v) that there was a failure to tell the jury that a person may legitimately strike/attack if he is anticipating an attack ("anticipatory self-defence").

44. As to the first of these complaints, the Court has reviewed the charge as a whole. There are different ways of explaining self-defence to the jury and it is not necessary for a trial judge to follow any particular model, provided the essential matters are explained to the jury. The Court is satisfied that the trial judge in fact did so. One might quibble with whether certain points might have been expressed more simply in certain places, or whether the structure adopted was the best possible structure, but the bottom line is that if one reads the charge as a whole, the jury can have been in no doubt as to where the burden of proof lay for a murder conviction, and when the verdicts of manslaughter or acquittal would arise. The Court is of the view that this is precisely why, having had the weekend to focus on the issue of whether they were satisfied with the trial judge's charge, the defence counsel (who were in fact highly experienced defence counsel) raised no requisition at all in relation to the manner in which the trial judge charged the jury on self-defence, while, in contrast, raised detailed requisitions about other matters.

45. This was in circumstances where self-defence was the key issue at the trial and had been the subject of extensive reference in the closing speeches. In those circumstances, the failure to raise requisitions as to how the trial judge had charged the jury on self-defence cannot possibly have been an oversight by the legal team representing the accused at the trial and the inference must be drawn that they failed to raise this as an issue because they must have considered that the jury had been properly and adequately instructed on self-defence. Accordingly, the motion to add a new ground of appeal has all the hallmarks of an exercise conducted by a new legal team of combing the transcript for errors many years after the trial itself, in an exercise which is divorced from the reality of

the trial itself and the impressions of counsel who were on the ground at the time. Of course, the latter's impressions are not determinative of the matter, but as we have seen, the authorities do place a considerable emphasis on taking into account the decisions made at trial by experienced and competent counsel. We accept of course that there was no question of a tactical decision to withhold criticisms of the charge on self-defence at the trial and then 'spring' them at the appeal. But that is not the end of the matter. As we have said, we consider the circumstances to be strongly indicative of the view being taken at the time of trial that there was nothing wrong with the trial judge's charge on self-defence, and having studied the charge carefully in that regard, we are of the same view. The case is entirely distinguishable from Sweetman where there was an accidental omission to direct the jury in respect of a crucial evidential rule applying to the only evidence in the case (the alleged confession) connecting the appellant to the offence.

46. Further, the jury never raised any question about the charge on self-defence, which in itself demonstrates that it could not have been "incoherent", as the appellant's submissions suggested.

47. As to the second of the appellant's complaints about the trial judge's charge, the Court has no hesitation in rejecting the submission that the trial judge left the possibility of verdicts other than murder as 'theoretical' options only. The content of the charge in the present case (set out earlier) is utterly different from that in *People (DPP) v. Clarke* [1995] ILRM 355, in which the impugned portion of the charge had said:

> "While the verdict is open to you, ladies and gentlemen, and you could *in theory acquit him* of all responsibility, as I say it appears to me that *the facts, even as described in the statement of the accused, hardly admit of the possibility of an acquittal,* because there was ample time to avoid the confrontation. There was ample time to notify the guards. You are not entitled to go and get a lethal weapon and go in search of somebody to protect even yourself and your family if there are other means available to you which you should make use of. And we have been given no suggested explanation why it was not possible to invoke the power of the law on that occasion."

48. Taking the view that the impugned passage "set at naught" the "impeccable" part of the charge which had preceded it, the Court of Criminal Appeal said:

> "To say to a jury that something is only theoretically possible is in effect to invite them not to consider it at all; whereas it was accepted by the judge at the outset of his charge and was accepted by counsel for the prosecution at the trial and before this Court that the defence of self-defence had been raised to the extent necessary for consideration by a jury. Once raised, a charge along the lines described in The People (Attorney General) v. Quinn [1965] I.R. 366 was required. In the extract quoted, the judge went beyond commenting on the particular facts of the case; his direction was bound to be taken by the jury as a direction on a matter of law and that really amounted to a direction to them not to consider in any realistic way the defence of self-defence".

49. Nothing approaching the situation which arose in *Clarke* has arisen in the present case. The trial judge's charge repeatedly referred to the burden on the prosecution, the ingredients of self-defence, and the three possible verdicts of murder, acquittal and manslaughter. Nothing was said in our view that "set at naught" the directions in that regard which had been given and it bears repeating that no requisition to that effect was raised at the time of the trial itself. For the same reason, the criticism that the trial judge somehow reversed the burden of proof is in our view untenable.

50. As to the submission that the trial judge failed to give the so-called "*Palmer* direction", it may be noted that the "*Palmer* direction" required in English trials does not exist in a vacuum but rather in a context where the Privy Council in that case also decided that there would be no 'half-way house' between murder and acquittal in self-defence cases. This stands in contrast to the decision of our Supreme Court in *People (Attorney General) v. Dwyer* [1972] IR 416 to the effect that a person is guilty of manslaughter where he uses more force than was *reasonably* necessary to defend himself but no more force than he *honestly* believed to be necessary. The *Palmer* direction is particularly important in the context of English law, therefore, because the only relevant standard is the objective one of "reasonable force" and it is in that context that the jury must be told that what is reasonable must be considered in the context of a person making a decision in a panic or in the heat of the moment. The Irish 'half-way house' verdict of manslaughter goes even further to protect an accused person because it reduces murder to manslaughter where the person honestly (i.e. personally or subjectively) thought that the force was reasonable in the circumstances. The appellant has not cited any Irish authority for the proposition that the *Palmer* direction is a necessary ingredient of Irish law, and given the different legal contexts arising from the difference between *Palmer* and Dwyer, the Court does not consider, as a matter of principle, that it is fatal to a conviction that a trial judge failed to give a Palmer direction.

51. As to the final complaint on behalf of the appellant, it does appear that the trial judge did not specifically tell the jury that a person is entitled to use force in self-defence if he is anticipating an attack. Again, the Court notes that no requisition was made in this regard. The trial judge dealt with the defence in the context of the specific account given by the appellant to the Gardaí as to how he came to shoot the deceased; it will be recalled that the trial judge said:-

> "….And then at this stage, as I understand the description, they were in the rowing position like two rowers in a boat. He [the deceased] had the gun, so effectively he was behind, awkwardly behind Mr O'Brien and on the pathology evidence, placed the muzzle of the gun against the -- pressed it against the deceased skull and pulled the trigger. That is the context in which the issue of self defence has to be considered. That he was in fear of his life, that if Mr. O'Brien got a hold of the gun, he would shoot him. And he was -- or that it was -- and that it was necessary that he should discharge the-- that he should fire the gun into the back of his head in

> the manner in which he did. The issue of self defence has been raised very clearly and if that fear existed and if there's a reasonable possibility that that is so, he is entitled to an acquittal".

Nothing in any of this could possibly have given the jury the impression that the appellant was not entitled to rely on self-defence; on the contrary, he was telling the jury that they *should* acquit him if they considered that he was in fear that if the deceased got hold of the gun, he would shoot him.

52. For all of the reasons set out above, the Court has no concern that a fundamental or real injustice occurred at the trial by reason of the manner in which the trial judge charged the jury on self-defence.

53. The motion to add the new ground of appeal is dismissed as the Court concludes that there is no apprehension that a real or fundamental injustice may have occurred. As the appellant does not pursue the other (original) grounds of appeal, the appeal is accordingly dismissed in its entirety.