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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE KING

v

JOSEPH DORRIAN

**Mr Brendan Kelly KC with Mr Stephen Toal (instructed by KRW Solicitors) for the
Appellant
Mr Gavan Duffy KC with Mr Steer (instructed by the Public Prosecution Service) for the
Prosecution**

Before: Keegan LCJ, Treacy LJ and Sir Paul Maguire

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against conviction for a single count of manslaughter brought with leave of the single judge. Following conviction, the appellant was sentenced by His Honour Judge Geoffrey Miller KC (hereinafter referred to as the judge) on 26 January 2021 to a determinate custodial sentence of three years imprisonment, half to be spent in prison and half on licence. At the outset of this case, Mr Kelly KC, withdrew the sentence appeal and so we are concerned with the safety of the conviction only.

[2] This appeal engages one net point which is to whether the judge's directions on self-defence were correct. The appellant, Joseph Dorrian, accepted that he killed Darren O'Neill with a single punch but said that he was acting in lawful self-defence. In these circumstances it is for the prosecution to prove that he was not acting in lawful self-defence.

[3] The test that we apply on appeal derives from the case of *R v Pollock* [2004] NICA 34. At para [32] Kerr LCJ sets out the principles to be applied in looking at the safety of a jury's verdict which are as follows:

- “(i) The Court of Appeal should concentrate on the single and simple question ‘does it think that the verdict is unsafe?’
- (ii) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
- (iii) The court should eschew speculation as to what may have influenced the jury to its verdict.
- (iv) The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.”

[4] In *R v Pollock* at para [27] Kerr LCJ also cites *R v Pendleton* [2002] 1WLR 72 where Lord Bingham referred to the respective roles of judge and jury as follows:

“17. My Lords, Mr Mansfield is right to emphasise the central role of the jury in a trial on indictment. This is an important and greatly-prized feature of our constitution. Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to a jury.”

[5] We reiterate the point that emerges from the above that each case has to be considered in the light of its own facts. This appeal also highlights the importance of fashioning jury directions to the issues in the case. We therefore begin by setting out the background facts and the evidence heard at trial before examining the judge's charge.

Background Facts

[6] Darren O'Neill, the deceased, died on 29 June 2019, however, it is the events of Thursday 27 June 2019, two days before, which form the nucleus of this case. On that day the appellant and the deceased who were friends and lived close to each other in West Belfast decided that they would go to the beach for a day out. They had discussed this the day before and made a plan as it was to be a hot and sunny summer day. The deceased asked a young woman, Leona Stanley, to go along with them and she in turn invited her friend, Niamh Phillips. It is uncontroversial that the deceased and Leona Stanley knew each other but he did not know Niamh Phillips and the appellant did not know either girl. All of these young people were in their early twenties on the day in question.

[7] The group of four set out some time after 3pm on Thursday 27 June 2019 with the intention of arriving at Tyrella beach near Downpatrick for their day out. The appellant provided the transport by obtaining his father's car, a Seat Arona. At the time the appellant was able to drive as a restricted driver. The car he borrowed was a motability vehicle and was described by the appellant as being "the family's pride and joy." It is common case that at the girls' request the first stop was at an off-licence on the way to the beach located on Shaws Road in Belfast. There the girls purchased a large bottle of cider and the deceased chose two 10 packs of beer which was paid for by the appellant.

[8] As part of the evidence CCTV imaging was available from the off-licence. From the footage it appeared that the deceased was exhibiting signs of being under the influence of some substance in the off licence. He subsequently told the others, including the appellant, that he had taken a "bud" which is a term used for the prescription drug Lyrica otherwise known as Pregabalin. Analysis of a blood sample taken hours after his admission to hospital later that day established that he had four times the normal prescribed dose of this drug in his system. Notwithstanding this when the deceased appeared unresponsive at the beach after the fatal punch the appellant did not tell the emergency services about the deceased's drug consumption, even though he knew, that the deceased had taken this prescription drug. This is a matter to which we will return.

[9] On the journey to Tyrella beach whilst in the car the two girls between them consumed most of the contents of a bottle of wine they had brought with them. Thereafter, whether in the car or later at the beach they also consumed part of the bottle of cider. Ms Stanley described them as being "a bit tipsy." The deceased also consumed several tins of beer both in the car and at the beach. He was described at the beach and just before the incident, as being under the influence of something by witnesses who described him variously being "blocked, hyper and acting the eejit and like a maniac."

[10] It is an uncontroversial fact that the group arrived at Tyrella beach sometime after 5pm. After parking the car in the car park the four made their way to the beach.

It appears that there they spent some time during which the men ran to the sea where they swam for a short period. During this time the two girls stayed on the beach. Thereafter, it was reported that there was some horseplay between the two boys with them engaging in a sand fight. The deceased was covered in sand and he decided to go and wash this off in the sea. The deceased then asked one of the girls, Ms Stanley, to accompany him and in her evidence she described him as being incapable of walking down to the water as he was stumbling about. She assisted him into the sea and back to the beach where the others were sitting.

[11] At this point it appears there was a discussion about the group going to Newcastle. This prompted the party to make their way back to the car, which was in the car park. There the appellant opened the doors, put down the window and turned on the radio to listen to music.

[12] There were some witnesses, unconnected to the party, who noticed the group. They described hearing loud music and were generally concerned about the behaviour of the young people. Mr Murray, was one such witness whose caravan overlooks the area. Mr McKenzie was spending the afternoon at the beach in the company of his wife. He was also concerned about the fact that somebody in the group might actually drive the car. It was Mr McKenzie who phoned the police to alert them as to his concerns prior to leaving the car park that evening.

[13] One other fact we note is that at some stage Ms Stanley needed to go to the toilet and decided to go into a field near to the car park. The deceased accompanied her to this location.

[14] It is common case that the mood throughout the day up until this point was very good. However, the atmosphere changed when the deceased said that he wanted to drive the car to Newcastle and the appellant refused to agree to this. Thereafter, there was an interaction between them in relation to the car. The deceased got into the driver's seat and then sped around the car park for several minutes. At this time the car park was busy with vehicles and the car was driven at speed in the car park by the deceased to effect several handbrake turns. It is common case that the manner of the driving was reckless. After the deceased had driven the car recklessly in the car park he got out of the car and there was an interaction between the two men.

[15] At this stage there are various versions of exactly what happened. It seems clear that there was an argument which happened after the deceased got out of the car and then towards the back of the vehicle. It is there that the appellant punched the deceased to the face and he fell straight back. He got up few seconds after the punch but soon thereafter fell and was clearly in trouble. At this point paramedics were called. It is common case that the appellant assisted the deceased but he was unresponsive.

[16] This broad outline of the facts is supplemented by the various accounts given by the witnesses and the appellant himself who gave evidence at the hearing. These

accounts are crucial because they set the scene for what happened and obviously influence how a jury direction should be fashioned. We will therefore examine the evidence given at trial in some further detail.

The evidence of the core witnesses

[17] First, the evidence of Leona Stanley is summarised by the judge in the following terms:

“When she left the field to go to the toilet it is common case that the deceased accompanied her. She said that when they came back she sat in the car and he [the appellant] came over and asked her for a kiss. She said no and then went over and told the deceased what the appellant had said. On her account the deceased then said words to the effect of ‘what are you doing, she is my girl?’ It was after this that the deceased got into the car and suggested driving to Newcastle to which the appellant said ‘No, look at the state of you.’ It was then that the deceased moved over into the driver’s seat and took off round the car park. She said that the appellant seemed a bit agitated and she thought he said ‘I’m going to slap him’ mentioning that she thought he referred to the car as belonging to a family member.”

[18] The judge also recounts the evidence of Ms Stanley when the car was brought to a halt. In her evidence she recalled hearing the appellant saying to the deceased through the closed window “what are you doing, that’s a DLA car.” In her evidence she said that the deceased got out of the car and the two men were then shouting at each other with about a metre between them standing near the driver’s door. She said she and her friend, Niamh, were on the nearside that is at the passenger side of the vehicle, and at the back. She recalled the two men were “screaming and shouting” and that the appellant said “you’re wrecking my car, it’s a DLA car.” The judge also recounts part of this evidence whereby Ms Stanley said that the appellant was “tapping his cheek and saying hit me.” She said that the deceased then hit him and the appellant slapped him back. She said that she wanted to go home and she tried to intervene getting between the two telling them “you’re best friends.”

[19] However, the judge recounts that the argument continued and moved towards the back of the vehicle. Ms Stanley then saw the appellant punch the deceased to the face and he fell straight back. He was only down for a few seconds before getting up and walking towards her and Niamh. The appellant she said then said “why are we fighting, we are best friends.” She said they then hugged and started apologising to each other before the deceased collapsed. The judge recounts that it was put in cross-examination to her that whilst waiting for the ambulance she had said to the appellant

“you are not in the wrong.” She denied saying this but asserted that she had told him “it’s okay.”

[20] The next witness, Niamh Phillips, also gave evidence. She said that by the time they were on the beach the deceased was in good form but seemed very drunk. This witness confirmed that he had told her that he was on Lyrica but she had not seen him take any. She said that while she was not really drunk she was tipsy. She said she saw the appellant having a few beers. She said back at the car park when the deceased took the car she did not know if the appellant had said he could or could not do so. She described the car skidding and that it was recklessly driven. She noted that the appellant seemed angry, he was saying he was going to hit him as it was a DLA car. This witness gave evidence that when the deceased pulled up that the appellant went over and the deceased got out. She said they then got into an argument over the manner in which the deceased had driven the vehicle squaring up to one another. She said she and Ms Stanley were beside each other, facing the car, but on the other side to that where the boys were standing in other words on the passenger side.

[21] With the passage of time she could not recall what was said at that point. It was her evidence that when the deceased got out of the car the appellant had hit him. The deceased was also saying to the appellant “hit me” and the appellant slapped him. She recalled that after the appellant punched him they said sorry. She thought that the deceased had stumbled back, fell to the ground, and that the appellant was trying to hold him up. She said she had no recollection of hearing the appellant saying “are you going to hit me?” and she had no recollection of hearing him saying anything. She said that the deceased had said to the appellant to hit him and had made gestures with his arms towards the appellant when he had said “hit me.” She did not know if the deceased had punched the appellant or not.

[22] The next witness who gave evidence and who the judge refers to is a Mr Dermot Murray. He was in the living room of his caravan with sight of these events. His attention was drawn to extremely loud music coming from a car in the car park. He saw two males and two females get out of the car and he gave descriptions of each. He described them as being noisy, laughing, joking in a good mood. He then went back to play on his PlayStation. He noted that the music suddenly stopped and there was a tremendous slap, as he described it, followed by a muffled sound of arguing which he assumed to be coming from inside a car. He said the sound then became clearer, suggesting that the people were outside the vehicle. His evidence is that he went back to the window at this point and observed the smaller of the two males who by common case is the deceased repeatedly saying “what did you slap me for.” He noticed the car was now in a different position to which he had previously observed it to be in. He then heard the taller male who is by common case, the appellant, say “I told you not to touch my handbrake.” He said the two males were in each other’s faces and there were a lot of hand gestures. When he first observed them they were near the front of the car but then they moved towards the back with some pushing and shoving going on. Mr Murray was unaware of where the girls were at this stage.

[23] The next thing he saw was the appellant straightening up and the deceased throwing a punch. He said this connected but the impact was not strong. According to Mr Murray the appellant barely flinched. Three to five seconds later he said the appellant punched the deceased in the face. It was Mr Murray's perception that the deceased did not expect it and he went to the ground. Mr Murray gave evidence that his view was impaired at this point, however, he thought that the appellant jumped back as if to continue the fight. He said that the deceased got up but appeared disorientated and this went on for a period of time.

[24] Mr Murray said that he had contacted the police to inform them of what he had heard and seen a couple of days later after police appeals and so he made a statement six days after the incident on 3 July 2019. He was not aware of the car being driven dangerously prior to the fatal assault. He said the music had been playing loudly for an hour or more, in his estimation, before it stopped. He said his view was hindered because the males were on the off-side of the car and he could only see their heads. However, he described what was happening as "an explosion of noise, like screaming." He said that the deceased said over and over again into the appellant's face "why did you slap me?" and that the appellant responded "I told you not to touch the handbrake."

[25] It was Mr Murray's opinion that the appellant was the calmer of the two men. The screaming calmed down but the argument continued though the witness could not hear what was being said at this point. It is part of the evidence that Mr Murray did not see anything that amounted to a threat at the point when the punch was thrown that made it necessary for the appellant to strike the deceased, or that it made it necessary for the appellant to hit the deceased back.

[26] There was also evidence given by Mr McKenzie who was spending the afternoon at the beach in the company of his wife. He is the witness who phoned the police to alert them as to his concerns prior to leaving the car park that evening. The relevance of this evidence is the timing of events. Mr McKenzie's call was received at 7:02pm and finished at 7:07pm. This was before the fatal blow was struck. A further 999 call was made from Ms Stanley's telephone and logged at 7:20pm. The report from this call was that the deceased had collapsed.

[27] The rapid response paramedic team arrived at the scene at 7:32pm and the first patrol of police comprising Constables Robertson and Curran arrived at 7:38pm. The main ambulance arrived at 7:44pm. A second police patrol, comprising Constables Gilmore and McAllister, arrived at about the same time as the ambulance. Body worn cameras were activated by police at the scene and comments were made by the appellant among others on these cameras. The ambulance can be seen arriving indicating this was between 7:40pm and 7:50pm. The ambulance left the scene with the deceased and they headed for the Royal Victoria Hospital at 8:20pm arriving there at 8:57pm.

[28] Sean Murnin was with his partner, Ciara Tumelty, and also witnessed events. They had arrived for a walk on the beach with their two dogs. As they walked down the path beside the car park Mr Murnin saw the Seat car being driven erratically in the car park. He described it as travelling at high speed and effecting handbrake turns and that this lasted one and a half to two minutes. He also reported that when the car stopped he saw another male, who is by common case the appellant, open the door and pull the driver, the deceased, out of the vehicle. The evidence of this witness was that the appellant was shouting "what are you doing, that's my ma's DLA car."

[29] This witness said that he had an unobstructed view of this and that the appellant pulled the deceased out by his T-shirt. In relation to this account the judge rightly pointed out that the deceased was in fact bare chested at the time. In any event, this witness Mr Murnin, observed the deceased "sort of hit the appellant a wee slap. "He then said that he heard him say "why did you pull me out of the car?" This witness said that an argument ensued for about 40 seconds although the witness could not hear what was actually said.

[30] This witness and Ms Tumelty continued to walk on a couple of metres when he heard two loud thuds which made him turn back. He did not see any blows being struck and although he initially said that the second thud could have been the sound of the deceased striking the ground he subsequently admitted that when he had turned round he saw him fall which would contradict that assertion as the judge pointed out. He described some of the aftermath. It was this gentleman, as we have said, who called the ambulance using Ms Stanley's telephone, and he then followed the advice of paramedics and administered CPR until someone else took over. His statement was made the day after the incident on Friday 28 June.

[31] Ms Tumelty also gave evidence and described seeing the car being driven very fast and in a dangerous manner. When it came to a halt she heard the appellant saying "what are you doing that's my DLA car." She gave evidence that she observed the appellant open the door after which he gave the deceased "a small slap on the face." She told the court that this was also accompanied by him saying "what are you doing, wise up." She said that the deceased then went to punch the appellant to the face but he hit his chest. She said that there was a bit of shouting and heard the words "get out of the car." She then said that the deceased got out of the car and she heard him say "I didn't mean to hit you, hit me back." She said the two males were near the back of the car and the next thing the witness noticed was the appellant hit the deceased on the face near his jaw or cheek. The deceased dropped to the ground and she lost sight of him. She said he tried to get up but was very unsteady and she said she heard the deceased saying "I'm sorry, I'm sorry" and the two men hugging. Her statement was also made on 28 June 2019.

[32] In addition to these civilian witnesses, evidence was given by a medical witness, Dr Christopher Johnson. He is the Assistant State Pathologist for Northern Ireland, and he conducted a post mortem of the deceased on 1 July 2019. At the time he was struck it was estimated that the proportion of alcohol in the deceased's

bloodstream was in the region of 130/160mg per 100ml, this being up to twice the legal limit for driving. He also had 22mg of Pregabalin or Lyrica in his system which he equates to four times the normal daily prescribed dose. Although the exact amounts could not be determined, there was also evidence of cannabis traces in his system. The cause of death was commented on by the medical witness as a blow to the left side of the jaw, which caused the left vertebral artery to rupture, leading to subarachnoid haemorrhage around the base of the brain. Cardiac arrest followed and this ultimately led to the death of the deceased two days after the fatal incident.

[33] The medical evidence also focussed upon the degree of force required to cause this fatal injury. In this regard of particular relevance was a microscopic fracture present in the bone of the neck. It was Dr Johnson's opinion that the injuries were entirely consistent with having arisen as a result of a forceful blow such as a punch. He also said that a slap would not have been sufficient to cause these injuries. During the course of cross-examination, Dr Johnson agreed that it was not possible to say with certainty the degree of force required, but he asserted that more than minimal force had to have been exerted. Furthermore, he stated that the level of intoxication through drink and drugs could he said lead to a dilation, that is enlarging, and therefore weakening through stretching of the organs, which could have made the deceased more vulnerable to the tear resulting in his death as described.

The evidence of the appellant: at the scene: at interview and at trial

[34] Police witnesses also gave evidence. This included evidence of what the appellant said at the scene and so it is particularly important. Body worn camera footage was taken at the scene. A police witness also gave evidence in relation to the interviews of the appellant. In relation to the transcript compilation from body worn video we highlight the relevant portions which contain the appellant's accounts as follows:

(The abbreviations used are: Constable Stuart Robinson SR, Niamh Phillips NP, the appellant JD):

“SR: Who has just collapsed down there?

JD: He's collapsed there.

SR: What's he taken today?

JD: I don't know honestly.

SR: Is he a mate of yours?

JD: Yeah, he's my best mate.

NP: He said earlier that he had taken Lyrica.

JD: He told you?

NP: Yeah.

SR: Any drink or drugs?

NP: Yeah, he took tablets.

SR: Any drugs?

NP: Yeah, he took tablets.

SR: Do we know even what type of tablets because the paramedics are going to need to know?

NP: Lyrica.

SR: Lyrica, ok.

JD: She knows.

SR: You hear that, Lyrica and some alcohol ok.

JD: She knows more than me mate I don't know, did he tell you that?

NP: Yeah, he did, he told me.

JD: Did he?

SR: Did you witness anything, did you sir?"

[35] In the police vehicle at the scene the appellant also volunteered some information to police. It is recorded in the following transcript it reads as follows:

(The abbreviation CG refers to Constable Clare Gilmore)

"JD: Thank you very much for the update.

CG: What's your name buddy?

JD: Joseph Dorrian.

CG: Joseph Dorrian.

JD: Yeah, I didn't mean for all this to happen Miss, honestly to be fair he hit me a dig on the chin and I says "Darren", he says "hit me", I say's no, he hit me a dig on the chin and he stand back and he says hit me a dig on me and I just went like that and I just threw my arm and hit him, I didn't mean to hit him that hard and there's two proofs there and he walked from me over to them bushes and walked back and says 'eh Joe' and I grabbed him like that in my arms and I held him up and then I put him in the recovery position and rung the ambulance.

CG: Are you friends?

JD: Best friends.

CG: Right okay. So obviously not looking great here at the minute.

JD: Not looking great.

CG: Most likely might have to take up the road for an interview, have you been drinking all day?

JD: No, nothing at all. I'm sorry about this.

CG: Andrew Kims ringing.

JD: Sorry about all this, I didn't mean for this to happen, honestly it was just a heat of the moment type of thing if you get me.

CG: Yeah.

JD: He hit me a dig and I was stunned and I realised and he go hit me a dig back, so I just threw my arm and like him a tip, honestly and that's what they will say."

[36] There is further evidence captured on body worn video which demonstrates that the appellant was keen to tell police at the scene that in his words what happened was "self-defence, mate, know what I mean." When advised by the officer not to say anything at that time he continued "no, no, no, I want it recorded there in your camera that you put on I have witnesses there anyway so."

[37] During police interview the appellant did not repeat what he had volunteered on body worn video at the scene about why the fatal punch had come about although he maintained his position that he acted in self-defence. By this stage the appellant had legal representation.

[38] The appellant's evidence at trial is the next part of the sequence of his accounts of what happened. We analyse this in some detail as it is an essential feature in this case. The salient aspects of the appellant's evidence are as follows.

[39] First, the appellant accepted that there was an altercation between them in relation to the car and how the deceased had driven the car. In his evidence he said "our heads bent forward, touched each other." The deceased turned to his left, I said "what are you going to do, hit me?" The deceased then threw a punch which glanced off the appellant's right shoulder and hit his chin.

[40] The appellant continued that at this stage he had not hit the deceased at all, he said "I just reacted, frightened of receiving anymore punches, just wanted it to stop. I pushed my clenched hand out to get him to stop, didn't want to hurt him, he fell, I didn't hit him again." The appellant claimed that neither he nor the deceased had said "go ahead, hit me" at any point and he said he did not have time to think what to do next after the deceased said "hit me." He said he wanted the fight to be over and he said "I thought my punch was reasonable enough to get him to stop, didn't intend to hurt him, never hit him before."

[41] In the course of cross-examination the appellant was shown the body worn camera footage of what he had said to the police at the scene. He accepted that when asked what, if anything, the deceased had taken he told a lie. His response at the scene was "I don't know, honestly." However, after Niamh Phillips had told the officer that the deceased had taken Lyrica, the appellant then expressed surprise saying "she knows more than me mate, I don't know." When asked why this was he said he did not want to portray the deceased in a bad light when he was not able to defend himself. The issue of self-defence was raised by the appellant at the scene and that was also put to him during evidence. A further point that was put to him was that it was the appellant who bought the alcohol in the off-licence.

[42] During the evidence the appellant said that when confronted by the deceased he was annoyed but he was not aggressive or shouting. He said that the witnesses were wrong when they referred to what they had heard. In particular, the line that one of the witnesses, Leona, had said which was "come on hit me" the appellant denied this but told the court that what he actually said was "are you going to hit me?" He denied gesturing by tapping his cheek or that there had been any pushing and shoving. He said he did not recall hearing the deceased saying "I didn't mean to hit you, come on hit me back", instead his account was that the two men had been head to head and there had only been two blows, first when the deceased struck him and then when he struck the deceased.

[43] It was put to the appellant that his unprompted account on the body worn video was clear and, in particular, the reference to the deceased telling the appellant to hit him back and that this accorded with what other prosecution witnesses were saying. The appellant was asked why he had changed his account the next day when in the formal setting of police interview and in the presence of his solicitor. He claimed that his initial account given on body worn camera footage was wrong. His explanation for this was that words were going through his head, and that he did not know where that false account came from. It was put to the witness that on the basis of that account he was not acting in self-defence, because rather than the deceased threatening to strike him, he, the appellant had actually invited the deceased to hit him back. If true this would mean the appellant was acting as the aggressor and his punch was an entirely unnecessary and unwarranted assault. The appellant denied this and said that he thought his actions were reasonable and that he was afraid he would be struck again.

[44] This point was developed with the appellant in cross-examination by Mr Duffy, some of which we reproduce as follows:

“Q. That he said to you “come on, hit me” before you punched him, isn’t that right?

A. I said it in the back of the police car, yes, because I was panicking and I explained that.

Q. Yes, well, don’t worry about that I am going to come ...

A. Yes.

Q. ... since you raise the question as to who was saying that this thing happened.

A. Em.

Q. I am just pointing out that you also said that it had happened, but – but in any event, if we just take – if we take their account first of all, I am going to come to what you said then and what you say now, but if you take, looking at their account, if this is right, if after his blow striking you there was this gap and he said to you “look, you hit me” and you hit him you were not hitting him in self-defence you would be hitting him at his invitation or in retaliation.

A. Yes that’s true.

- Q. If they are right about that.
- A. If their right, yes. If's a big word.
- Q. Yes, and if they are right about that, if that account is correct do you agree with me that it is not self-defence, because it is not necessary?
- A. Yes, that's not necessary, but, like I say, I don't agree with that, it's not true.
- Q. Yes, ok, I know you don't agree with the underlying facts but if they were accepted that's - if that was accepted that that is what happened do you agree with me that it wouldn't have been necessary or reasonable to punch him?
- A. I'm sorry.
- Q. Even if he was inviting it?
- A. Sorry, I don't know the law, I can't comment on that.
- Q. Ok, well, you were in fact, though - you were in fact though very quick to tell the police that it was self-defence though, weren't you?
- A. Yes, I told the police what happened, yes.
- Q. And, in fact, maybe if we just go back to the - to the transcript, it you have it in front of you, alright, and I think this was played to the jury yesterday so I don't propose to play it again, but the jury will have seen the conversations that you had with the police when you were seated in the back of the car and I will ask you to go to page number four. Alright?"

The Judge's Charge

[45] We have had the benefit of reading the transcript of the judge's charge which is comprehensive. Most of what was said by the judge by way of direction is uncontroversial. It is accepted that the judge accurately summarised the evidence in this case.

[46] At the outset of his charge the judge also explained the different roles of judge and jury in a case such as this. He also referred to this in the following way:

“It is your case and it is your conclusions as to the facts as you find them to be which determines how you approach the legal – how you apply the legal directions that I will give you. So, ladies and gentlemen, you are the final judges of the facts.”

[47] The judge also tells the jury that he will provide written directions as to what lawful self-defence means, but he summarises it as follows:

“So in short form, if, having heard all the evidence, you believe that the defendant was or may have been acting in lawful self-defence he is entitled to be acquitted, he is not guilty. If, however, you are satisfied so that you are sure, you are firmly convinced that at the moment he struck Mr O’Neill he was not acting in self-defence, then you would be entitled to return a verdict of guilty.”

[48] There is no criticism of the judge in relation to his explanation of the burden of standard and proof. This is summarised by the judge as follows:

“For the purposes of the trial, the single most important word in this document is unlawfully. I say that because there is no doubt that Joseph Dorrian killed Darren O’Neill, and, as Mr Kelly observed, the issue is not whether he caused the death, but rather whether he acted unlawfully in doing so. It is Joseph Dorrian’s case that he punched his friend whilst acting in self-defence because he believed at that fateful moment that he was under threat of assault by Mr O’Neill. Now, as I have said to you, that issue having been raised it is for the Crown, the prosecution, to rebut it, to disprove it to the criminal standard.”

[49] Subsequent to the charge, the judge set out his specific legal directions in a document for the jury entitled “Self-defence.” This comprises nine points as follows which we set out:

“(i) Joseph Dorrian has accepted that he killed Darren O’Neill but has said that he was not acting unlawfully but was acting in lawful self-defence. The prosecution have to prove the case so it is for them to make you sure that the defendant at the time he threw the fatal punch was acting as the aggressor and was not acting in lawful self-defence.

- (ii) The law of self-defence is really just common sense, if someone is under attack or believes that they are about to be attacked they are entitled to defend themselves so long as they use no more than reasonable force. In this case when Joseph Dorrian struck Mr O'Neill he says it was because he believed Darren was about to hit him again, having already landed one blow, which struck his right shoulder and glanced off his chin.
- (iii) You will make your own judgement as to what occurred in the moments leading up to Mr O'Neill striking the defendant including whether or not the defendant had precipitated this by initially slapping Darren's face as some witnesses have attested.
- (iv) You will also consider whether thereafter the situation calmed down and the defendant backed away towards the back of the car where Mr O'Neill then struck him. Finally, whilst you are entitled to consider whether the defendant did, in fact, retreat or not, you should bear in mind that in law there is no duty to do so.
- (v) If, on the evidence, you are sure that Mr Dorrian, at that moment, when he punched Mr O'Neill did not believe he was under threat from him because you are satisfied the latter had actually invited the defendant to strike him, then no question of self-defence arises and your verdict will be one of guilty.
- (vi) If, however, you consider it was or may have been the case that the defendant was or believed he was under attack or believed he was about to be attacked you must go on to consider whether his response was reasonable.
- (vii) If you were to consider that what Mr Dorrian did was, in the heat of the moment when fine judgements are difficult, no more than he genuinely believed was necessary, that would be strong evidence that what he did was reasonable; and if you consider that he did no more than was reasonable, then he was acting in lawful self-defence and he is not guilty of the charge.

- (viii) It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find Joseph Dorrian believed them to be.
- (ix) If, however, you are sure that even allowing for the difficulties faced in the heat of the moment Mr Dorrian used more than reasonable force, then he was not acting in lawful self-defence and he is guilty."

[50] Prior to presenting this written note to the jury there were exchanges by email between counsel and the judge about the content of the written directions. Without recounting the entirety of these exchanges the only real issue that arose, which remains central to this appeal, was in relation to paragraph (v) of the directions we have recited above.

[51] In this regard, we have established that Mr Kelly KC emailed a concern about the direction that if the jury found the deceased did invite the punch there could be no self-defence. He said in his email:

"If he invited the punch but did not expect it ... although less convincing self-defence would still be available."

[52] In reply the judge said:

"I believe that the direction, as amended fairly places the issues before the jury. If they accept that the defendant punched the deceased at the latter's invitation then I do not see how he could avail of self-defence in such circumstances. This being so I do not propose amending the draft further."

[53] The reply one minute later from Mr Kelly to the judge reads:

"Understood, kind regards.

Mr Kelly QC."

[54] Thereafter, the written directions were provided to the jury. There is rightly no criticism of that approach. Rather the appellant takes issue with the phraseology of one paragraph numbered (v) in the written directions.

[55] This part of the direction is now described as a "serious error" by Mr Kelly which he says he raised with the judge at the time. Of course that submission must

be seen in context given that this issue was not dealt with by way of requisition. Whilst not fatal to an appeal the fact that a requisition was not made in relation to what is now described as a serious error is something this court cannot ignore. This is particularly so as Mr Kelly did raise a requisition on another matter after the judge's charge. This was in relation to the inconsistency Mr Kelly said existed between the descriptions given of pushing and punching and how the judge dealt with these. In that application Mr Kelly simply took issue with the judge's direction to the jury in relation to the appellant's evidence which he expressed as follows-"you might want to wonder why it was him being reluctant to use the word punch."

[56] In light of the requisition request there was an exchange in court between Mr Kelly and the judge which we reference as follows:

"Mr Kelly: ... It would be perhaps rounder, may I say, to remind them that he did use the word punch in interview, as well as motioning that he pushed. I doubt I would have complained or sought requisition if the observation had not been made in the way it was. It's just perhaps a fuller account that we would invite that, in fact, on balance, he did use the word punch in interview. It is right to say that I had to, in examination in chief, deal with it in the way that I did, but I did so, because of what had been said in interview, rather than as it were, any other sources of instruction. But your Honour, those are the observations and your Honour knows that I had made submissions just for the record, I don't repeat them at all, as to the part of the self-defence issue and your Honour had made the position quite clear."

Judge: Yes.

Mr Kelly: ... so there is no need to deal with that. But it is the reference to punch in the interview and therein the discussion rests."

[57] It is clear from the above that whilst the content of para (v) was informally raised prior to the written directions being issued it was not specifically pursued by way of requisition or formal legal submissions.

Arguments on Appeal

[58] There are essentially two points made on appeal:

- (i) The appellant argues that the judge has made what is described as a serious error by directing the jury to convict in circumstances where they are satisfied that the deceased had actually invited the appellant to strike him as that would mean that the appellant could not have believed that he was under attack.
- (ii) The argument is made that the judge should have given a “turn-the-tables” direction given the passage of time which some of the witnesses describe between the initial slap by the appellant and the punch thrown by him which caused the fatal injury. This argument is described as being of lesser significance than the first ground of appeal but in conjunction with the first ground creates considerable unease about the legal directions in this case on the key issue of self-defence.

Discussion

[59] A cardinal principle is that the judge in a criminal trial must not usurp the role of the jury. In *R v Wang* [2005] UKHL 9 Lord Bingham referred to this as follows:

“Woolmington v Director of Public Prosecutions [1935] AC 462 is of course remembered above all for the affirmation by Viscount Sankey LC of the onus lying on the prosecution to prove the defendant’s guilt where issues of accident or provocation arise. But in reaching that conclusion he held, at p 480, in terms with which the other members of the House agreed:

‘If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law.’”

[60] Various other authorities have been referred to us all of which confirm the core legal principle that it is the jury who are the fact finders after the judge gives a direction in law. In addition, the law provides that the burden of proof in a criminal case lies with the prosecution. When self-defence is raised by a defendant the prosecution must prove that it is not established. Self-defence is a common sense concept which involves two questions, namely were the facts such that use of force was necessary; and was the degree of force reasonable. Clearly, the first question is

subjective in nature as it involves consideration of the facts. The second question requires an objective assessment.

[61] Cases where self-defence is raised require particular directions by a judge to a jury. This was explained in *R v Harvey* [2009] EWCA Crim 469. In that case Moses LJ giving the judgment of the court stressed the importance of fashioning directions to a jury to the issues of the case. This applied a previous decision of *R v Rashford* [2005] EWCA Crim 3377 where the English Court of Appeal applied the Scottish authority of *Burns v HM Advocate* [1995] JC 154.

[62] In *Burns* the Lord Advocate General said as follows:

“It is not accurate to say that a person who kills someone in a quarrel which he himself started, by provoking it, or entering into it willingly, cannot plead self-defence if his victim then retaliates. The question whether the plea of self-defence is available depends, in a case of that kind, on whether the rationalisation is such that the accused is entitled then to defend himself. That depends upon whether the violence offered by the victim was so out of proportion to the accused’s own actions as to give rise to the reasonable apprehension that he was in immediate danger from which he had no other means of escape, and whether the violence which he then used was no more than was necessary to preserve his own life or protect himself from serious injury.”

[63] At para [17] of *Rashford* the court also said that passage accurately reflects English law and should be more widely known. Dyson LJ giving the judgment of the court said:

“There may be a temptation whenever it is open to a jury to conclude that the defendant went to an incident out of revenge or was the aggressor to direct the jury that if they reached that conclusion then self-defence cannot avail the defendant. If the judge wishes to give a direction along these lines the facts will usually require something rather more sophisticated where the possibility exists that the initial aggression may have resulted in a response by the victim which is so out of proportion to that aggression as to give rise to an honest belief in the aggressor that it was necessary for him to defend himself and the amount of force that he used was reasonable.”

[64] The court in *Rashford* also references a Privy Council case of *R (Shaw) v R* [2001] UKPC 26 and at para 31 states:

“As the Privy Council said in *Shaw* the rudiments of self-defence must be stated in clear and simple terms. The Privy Council was doing no more than repeating what has been said so many times before ‘the directions must be tailored to the factual dispute.’ The directions in law need do no more than to guide the jury as to what the essential factual dispute was and the conclusions to be drawn from the different findings open to them on the evidence.”

[65] We have also been referred to the decision of Hughes LJ in the case of *R v K, R & M* [2010] EWCA Crim 2514. These related cases were heard together as they involved criticisms of the summing up in cases where self-defence was an issue. Paras [3] and [4] of this judgment read as follows:

“3. The purpose of a summing-up, as this court has said on countless occasions, is to tell the jury what the law is which relates to facts which they may find and it is to steer clear of anything that does not relate to facts which they may find.

4. The law of self-defence is not complicated. It represents a universally recognised common sense concept. In our experience juries do not find that common sense concept at all difficult to understand. The only potential difficulty for a judge is that he needs to remember the potential possibility of what lawyers would call a subjective element at an early stage of the exercise, whilst the critical question of the reasonableness of the response is, in lawyer’s expressions, an objective one. In using those lawyer's terms we do not for a moment suggest that it is helpful to use them in summing-up.”

[66] In *K R & M* the court reiterated the law flowing from *Harvey* case that the fact that the defendant either started the fight or entered it willingly is not always a bar to self-defence arising. The court approved the analysis of Moses LJ in *Harvey* and at paras [18] and [19] provided a useful overview as follows:

“18. As to its practical application, we would commend attention to the recent decision of this court in *Harvey* [2009] EWCA Crim 469, which judgment we shall append to the present judgment. We venture to suggest that practitioners will gain a good deal of help from Moses LJ’s treatment in *Harvey* of the proper approach to cases when self-defence arises. In that case the court considered a direction given by the judge inviting the jury to consider

whether 'the tables had been turned.' It seems to us that that kind of homely expression, like 'the roles being reversed', can quite well encapsulate the question which may arise if an original aggressor claims the ability to rely on self-defence. We would commend it as suitable for a great many cases, subject only to this reminder. Lord Hope's formulation of the rule makes it clear that it is not enough to bring self-defence into issue that a defendant who started a fight is at some point during the fight for the time being getting the worst of it, merely because the victim is defending himself reasonably. In that event there has been no disproportionate act by the victim of the kind that Lord Hope is contemplating. The victim has not been turned into the aggressor. The tables have not been turned in that particular sense. The roles have not been reversed.

19. Thirdly, however, in the present case the central proposition advanced on behalf of this defendant contains a fundamental flaw. It may well be true that if D provokes V to hit him and succeeds so that V gives way to the invitation, V is acting unlawfully when he does so. It does not however follow that D thereby becomes entitled to rely on self-defence. There are many situations where two people are fighting and both are acting unlawfully, by which we mean other than in self-defence. It is true of every voluntary fight, challenge laid down and accepted. It is true of most fights in which one person deliberately incites and the other cheerfully responds with an unlawful use of force. We need to say as clearly as we may that it is not the law that if a defendant sets out to provoke another to punch him and succeeds, the defendant is then entitled to punch the other person. What that would do would be to legalise the common coin of the bully who confronts his victim with taunts which are deliberately designed to provide an excuse to hit him. The reason why it is not the law is that underlying the law of self-defence is the common sense morality that what is not unlawful is force which is reasonably necessary. The force used by the bully in the situation postulated is not reasonably necessary. On the contrary, it has been engineered entirely unreasonably by the defendant. Exactly the same point emerges clearly from Lord Hope's formulation in *Burns*. In the situation postulated there has been no disproportionate reaction from the victim which removes from the defendant the quality of the aggressor and reverses the roles. Of course, it might be different if the defendant set out to provoke a

punch and the victim unexpectedly and disproportionately attacked him with a knife. That is not the case that we are considering.”

[67] In determining the outcome of this case Hughes LJ was of the view that there would have been greater help given by the Recorder if he had explained to the jury how the law of self-defence worked in the two competing versions of events. However, the court ultimately decided that the Recorder’s direction in that case (similar to this case) that self-defence was not available if the defendant was the aggressor or successfully provoked a fight sufficiently identified the issue for the jury on the facts of the case. Therefore, Hughes LJ found that the summing up did not contain the flaw for which counsel contended and the fact that it could have been made clearer for the jury did not in any sense render the conviction unsafe.

[68] We see no reason why the appellate authorities we have discussed above should not apply in this jurisdiction. We also observe that the standout feature of these authorities is that the Court of Appeal in England and Wales has reiterated that the summing up to the jury must be fashioned to the facts of a particular case. We endorse that analysis.

[69] We now turn to the case at hand. It is fair to say that there are some variations in the narrative given in evidence by the various witnesses. However, the legal issues were clear. The appellant clearly caused the death of the deceased by the punch. That was uncontroversial. Therefore, what the jury had to decide was whether or not the use of force was necessary. This essentially involved an evaluation of how the appellant reacted to what was happening in a fight situation.

[70] Whilst there were various stages of this altercation the final act is the punch which caused the death. Whether this amounted to self-defence comes down to a fairly simple proposition which is this. Either the appellant used force against the deceased as a result of an invitation by the victim in which case the force would not be necessary or he hit the victim due to feeling under threat.

[71] The jury were made aware that they had to assess the competing scenarios on the evidence. Most pertinently in a self-defence case such as this the jury were directed to assess the appellant’s own accounts of events which we have set out in the foregoing paragraphs.

[72] It follows that to determine the merits of this appeal it is vital to view paragraph (v) in context, related to the actual evidence given at trial. When viewed in the round, paragraph (v) of the judge’s directions essentially addresses the case made by the appellant in his first account to the police at the scene to the effect that he was invited to hit the deceased. This was an account which he resiled from during interview after he had the benefit of legal advice. It was also an account supported by other independent evidence. This account together with the hugely telling cross-examination is core to the examination of this case.

[73] In truth, the appellant had no proper explanation for resiling from his initial account to police at the scene. Therefore, this was, as we have said, a focused, targeted and contextualised direction. We also consider that on one view the judge could have been seriously criticised had he not addressed this key issue which was front and centre for the jury and which formed the real focus in this case.

[74] It follows that bearing in mind the particular facts of this case which we have set out in some detail above, the appellant's argument does not stand up to scrutiny. That is because the judge was entitled to summarise the main scenario for the jury to consider which is encapsulated in pars (v). He went on to provide direction in para (vi) on the alternative scenario which was if the appellant felt under threat then the jury would have to consider the reasonableness of his actions.

[75] The offending para (v) is therefore, in our view, nothing more than a targeted and contextualised direction addressing one of the evidential scenarios critical to the PPS case as to the two blows struck at the rear of the car. Ultimately, in the specific context of this trial that aspect of the direction makes sense. Therefore, the judge sufficiently identified the issues for the jury on the facts of the case.

[76] In addition, we must observe that if the impugned direction were so objectionable as to potentially undermine the safety of the conviction and if it is such a serious error, it is, indeed, surprising to put it mildly, that the defence lawyers and the PPS did not address the matter head on in detailed submissions with appropriate citation of authorities. We appreciate that there was some email correspondence discussed above but that did not categorically address the issue. A matter such as this cannot be left hanging in the air if it is seen to be so fundamental.

[77] Overall, we have formed the clear view that the written direction on self-defence was a carefully constructed document tailored to the particular facts and issues in the case. The judge was, as the PPS contend, highlighting to the jury a possible factual basis upon which they might conclude that the appellant did not believe he was under threat. This is a permissible fact specific route to take, particularly as the appellant gave evidence and was cross-examined in relation to this very issue and, indeed, said during that cross-examination if his first account which was supported by other witnesses were correct he was not acting in self-defence. This was his own evidence.

[76] We therefore reject the defence argument that inclusion of this scenario took away from the jury determination of factual matters as whether the appellant heard the words and how he reacted. This argument belies the reality of this case because if the jury accepted that the words were spoken the outworking was obvious on the appellant's own evidence. The stand out feature of this case on which our conclusion is based is the appellant's own accounts at the scene, at interview and in evidence which we have set out in the foregoing paragraphs.

[77] Paragraph (v) also has to be read in full and not taken out of context. It has to be seen in the context of the succeeding paragraph and the entirety of the relevant elements of the judge's charge and the evidential context. When this exercise is undertaken we do not consider that this paragraph forms the basis of a misdirection which would lead the jury into error which usurps the jury's function and which is wrong in law.

[78] In addition we do not consider that a "turn-the-tables" direction was required. The jury were well aware of the factual context of this case from the comprehensive summing up that was given. A "turn-the-tables" type direction is not a legal requirement and does not amount to a failure to direct the jury on a core issue.

[79] Overall, we see nothing that would affect the safety of the conviction in this case. As in many cases it is possible to say that the judge could have been clearer in setting out scenarios. However, summing up to a jury is not a counsel of perfection and any failing here is not of such significance to upset the conviction.

Conclusion

[80] It follows that for all of the reasons we have given above, we do not consider that the judge erred in his direction on self-defence by way of misdirecting the jury by virtue of paragraph (v) of his written directions. We arrive at our conclusion on the particular facts and evidence that was heard in this case. We also repeat our concern that neither experienced counsel in this case specifically raised or debated this point in court when now it is raised it as a point of fundamental and critical importance. Criminal law practitioners should remember that they have an obligation, not just to their client but to the court. If they consider that there is a serious error in law it should be properly raised in court with legal authority for the trial judge to consider rather than resurrected at an appeal before the Court of Appeal which is obviously at a remove from the immediacy of a trial. This should be the established practice going forward.

[81] Accordingly, we have decided that the conviction is safe and we therefore dismiss this appeal.