THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Record No: CCA 236/2013

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Waldemar Solowiow

Appellant

JUDGMENT of the Court delivered on the 12th day of April 2016 by

Mr. Justice Edwards

1. On the 31st October, 2013, the appellant, following an eight day trial, was convicted of the offence of murder. This was a case where the appellant had offered a plea to manslaughter, but that appeal was not acceptable to the Director, and at trial there was no dispute about the fact that the appellant had killed the victim in the case, Mary Ryan, in an apartment where they lived at No. 3 Upper Sherrard Street. The only issue was whether the appropriate verdict was one of murder or one of manslaughter.

2. The background facts may be briefly stated. The appellant and the deceased were in a relationship. They lived together in an apartment at No. 3 Upper Sherrard Street, Dublin. Their relationship was a tempestuous one, and they had been told to leave the apartment by the landlord in the days preceding the incident that resulted in Ms. Ryan's death. The events with which the jury was concerned occurred between the 18th and 19th May, 2012. It seems that the behaviour of the deceased and the appellant was the cause of concern to other tenants in the building and that, by the 18th May, the landlord had decided that he had no alternative but to evict Mr. Solowiow, and with him Ms. Ryan, and he communicated that fact to them.

3. It appears that they quarrelled, and Mr. Solowiow assaulted his partner. On the following morning of the 19th May, he rang a friend to say that Ms. Ryan was in a bad state and to ask what he should do. He was advised to ring an ambulance, which he did. In addition, he made a phone call to the gardaí at approximately 11.00 a.m. that morning. In that phone call he told the gardaí that his girlfriend, Mary Ryan, was unconscious and that she had been attacked.

4. The Assistant State Pathologist, Dr. Jabber, concluded that the deceased had died as a result of a larynx fracture and blunt trauma to the head. On the morning of the 19th May, the appellant in a voluntary statement to the gardaí indicated that the injuries sustained by the deceased were a result of her being assaulted by a group of three men. The following day he was arrested by gardaí and detained, and during the course of that detention was interviewed on eight occasions. During the first six interviews, he maintained that the injuries had been inflicted by three assailants, but in the seventh and eighth interviews he said that is was he who had killed the deceased; however, he said that he did so in a fit of rage and that he did not intend to harm her.

5. A number of grounds of appeal were formulated. These were as follows:-

> (i) The trial judge erred in law in failing to instruct the jury adequately or at all in relation to the subjective nature of provocation.
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> (ii) The trial judge erred in law in failing to instruct the jury adequately or at all in relation to the subjective nature of provocation and that they must consider the defence of provocation from the perspective of the accused man.
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> (iii) That the trial judge erred in law in failing to instruct the jury adequately or at all in relation to the mental element of the offence of murder.
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> (iv) That the learned trial judge erred in law in failing to instruct the jury adequately or at all in relation to the operation of the presumption provided for in s. 4(2) of the Criminal Justice Act 1964 (the Act of 1964).
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> (v) The trial judge erred in law in the manner in which the majority direction was given to the jury.
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> (vi) The trial judge erred in law in failing to tell the jury that if they were satisfied that the appellant had told lies that it was not necessarily probative of guilt.
>
> (vii) That the judge erred in directing the jury as to the manner in which they were to receive the evidence of the pathologist.

6. Really, there were five issues which were the focus of attention, namely provocation, lies told by the appellant, the mental element of murder, the effect of s. 4(2) of the Act of 1964 and the instructions in relation to the expert evidence of the pathologist.

7. The issue of provocation arose in circumstances where, in the course of the seventh interview conducted by the gardaí, the appellant gave an account of the killing which involved himself and the deceased being at home; the landlord arriving and telling the deceased that she should leave straightaway. The appellant says that he indicated that they would leave the next day and that he

then started speaking to his partner at the table. He became aggressive. He said that he felt bad and had bad feelings towards Mary, the deceased, as they would be walking the streets with their bags. He continued that he became aggressive, hit the table once and then hit the table again. He said that Mary started telling him something, that her tone changed, that he stood up and slapped her face, and that she jumped up at him grabbing his chest. She fell to the sofa, and they started fighting.

8. The thrust of the appellant's submissions relating to provocation is that the trial judge failed to outline in clear terms that the test for provocation is subjective. The appellant also submits that the trial judge did not sufficiently contextualise the subjective test for provocation by reference to the specific evidence in the case and that he did not explain to the jury the relationship between provocation and *mens rea*. It must be said immediately that this is not an easy argument for the appellant to make because it is clear that the judge was very alive to the importance of bringing home to the jury that provocation is to be considered from the subjective perspective of an accused.

9. So, the judge commented as follows to the jury:-

> *"Now, in addition to that, when one is looking at the state of mind of a person, you are here, not to try some theoretical or notional case, you are here to try this man for the offence with which he is charged. So, when you are dealing with a person's state of mind, when you are dealing with a person's intention, then of course you are talking about the subjective state of mind of the particular person who is before you. You might, if there was an animal as it was known to the law, as the man on the Clapham omnibus in the English books which we use for years. An objectively reasonable person against whom you could benchmark, so to speak, certain standards in law. You might call it the average reasonable citizen on the Luas [which] we shall say [is] a man, because we are dealing with a man, the average reasonable man on the Luas. Now an accused person in a given case might not be reasonable at all, he mightn't be that average reasonable man, his actions and his views might be objectively unreasonable or irrational in a given case. But you're actually dealing with him, subjective speaking and his state of mind…*
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> *[To this issue secondly] … at the risk of repetition, in judging the state of mind of the person in the context of provocation, you look at this individual, this gentleman subjectively speaking, I am not talking about some theoretical reason, I have told you about that concept as a tool in order to reach a decision on his state of mind."*

10. There were other occasions. On one occasion, he commented as follows:-

> *"Now, … I have told you in the context of the issue of a person's state of mind that you are dealing subjectively with that person. And this is a point which I am going to address now,… which is of general application and does not just apply in respect of, for example, manslaughter and provocation. His character, his history, the circumstances of the events surrounding the offence which have been disclosed to you in the evidence. You look not only at a state of mind at the time, for example something like the extent to which you might have consumed drink. But you look at him, or you attempt to do so in the round in the context of the case with all his strengths and weaknesses of an individual with all the baggage, I use that in no derogatory sense, which you may carry. … without … detracting from the general proposition, when you are looking at the question of provocation you have regard to his subjective state of mind with all that baggage in the circumstances of the case."*

11. The judge once more sought to emphasise the importance of having regard to how the alleged provocation impacted on the appellant in his subjective situation, rather than how it might have impacted upon a normal or reasonable man. So, he said:-

> *"Now in relation to the question of provocation, one of our judges said this and it may be of some assistance: 'when this topic of provocation arises, the judge is required ask you to examine the evidence upon which the plea is based'…. I am supposed to point out to you, as I do that 'you are not obliged to accept this piece of evidence anymore than you are obliged to accept any other evidence in the case'. This is in the context of evidence you may think bears upon this question of provocation. You are obliged, however, to carefully consider a piece of evidence and decided whether or not it may be credible.* ***The question you have to decide is not whether or not a normal or reasonable man would be have been so provoked by the matters complained of as to totally lose self control, but whether this particular accused and his particular history and personality were so provoked****." (Emphasis added)*

12. Reading the charge as a whole, and indeed having regard to the entire transcript, it is clear that the judge and all the lawyers in court were very conscious of the fact that the Irish courts have firmly and repeatedly rejected an objective test for provocation. It is striking that there were no requisitions from either side on this topic. The Court attaches some significance to this. This was a case that was all about provocation. Both sides will have been intensely interested in what the judge had to say on this topic. Both sides will have been aware that there have been a number of cases where convictions have been quashed because the trial judge's charge was not sufficiently clear. Provocation has been described as a graveyard for judges. Yet, nobody who participated in the trial and who heard the charge delivered found it necessary to requisition. Lawyers practicing in the area of criminal law will be aware that the question of whether the test of provocation is subjective or objective has given rise to controversy in a number of jurisdictions, even if the issue has been firmly settled in Ireland. Jurors will know nothing of these controversies, and if they are told that the focus of their attention has to be the individual accused on trial, there is no reason whatever why they should find such a direction difficult to follow. In the Court's view, the judge left the jury in no doubt that the test was subjective and that their interest was in the situation of the accused on trial.

13. As mentioned at paragraph 8 above, the appellant also makes the related and subsidiary complaints that the trial judge failed to contextualise his remarks on provocation and the subjective nature of the test with reference to the evidence in the case, and also that he failed to explain to the jury the relationship between provocation and *mens rea*.

14. This Court has considered the judge's charge as a whole. It included thorough and comprehensive directions on the law relating to provocation in which, as illustrated by the quotations above, the trial judge emphasised again and again that the test was subjective and that the claim of provocation had to be judged from the perspective of whether this particular appellant with his particular temperament and character, and in his particular circumstances, had lost control of himself at the time of the wrongful act. They had also been clearly directed that it was for the prosecution to prove beyond reasonable doubt that the appellant had not been provoked before a verdict of guilty of murder could be recorded. The charge included a very detailed review of the evidence in which the trial judge paid particular attention to the statements made and the evidence given before the jury by the appellant, including his account of his relationship with the deceased, the events that had occurred in the lead up to the killing and his claim that he had been provoked. With reference to the specific claim in the evidence of the appellant that he had been provoked, the trial judge told the jury:-

> *"Asked about his mood as the fight continued, he said, he was even worse, he was angry because Mary had attacked him and she, 'Provoked me actually ... ' I notice, I'll have to come back to this because it is important, 'She provoked me actually against her and my hands actually started working so I started using my hands.' I will get that for you again, ladies and gentlemen, because in terms of the provocation it has been submitted to you that it is important, obviously it's considered only in the context of the totality of the evidence."*

15. The Court is completely satisfied that there was adequate contextualisation in the circumstances of this particular case. As provocation cases go, the facts of this particular case were relatively straightforward, and little if any supplementary explanation of the basic principles was required. The evidence surrounding the alleged provocation was clear, and the jury would have had no difficulty in relating the principles of law in respect of the partial defence of provocation to the factual matrix of the case once that had been determined by them. However, it was for the jury and the jury alone to determine the facts. A key issue for them was going to be whether the prosecution had proven beyond reasonable doubt that the appellant had not in fact been provoked, as he claimed he was. In that regard, they had been reminded in great detail of the evidence with respect to the appellant's character and temperament as well as the evidence concerning the circumstances obtaining at the time, as the appellant claimed to have perceived them both in his statements and in his evidence before the jury. In our view, no further contextualisation was necessary in the circumstances of this case. It is also once again relevant that no requisition was raised complaining about inadequate contextualisation. We find no error of principle in terms of how the trial judge contextualised the principles in respect of which he had instructed the jury.

16. As to the complaint that the trial judge failed to explain the relationship between provocation and *mens rea*, we are satisfied that this complaint is also groundless in the following circumstances.

17. The trial judge dealt firstly with the *mens rea* for murder and then with the partial defence of provocation. In dealing with the *mens rea* for murder, he said inter alia:-

> *"… since nobody can be convicted of murder, unless at the time of the killing, they have an intention to kill or cause serious injury, a person say charged with murder in that situation, would and should be convicted only of manslaughter."*

18. And he further elaborated that:-

> *"… in every case of murder, irrespective of … any special issue which may arise, the prosecution must prove that intention or that state of mind. And if that state of mind or intention doesn't arise, but the action is still unlawful, … if you weren't satisfied beyond a reasonable doubt, [of] we'll call it the intention for murder, you'd have a duty to acquit of murder and convict of manslaughter."*

19. Then, immediately afterwards, when introducing the concept of provocation to the jury, and as a preface to his detailed directions on that topic, the trial judge said:-

> *"Okay, to come on then to the question of provocation, there are circumstances in which to use the phrase from one of the law books, as a concession to human weakness, a person who is provoked in the legal definition of that term, … to inflict death or serious injury* ***with the intention of doing so****, is … to be found guilty of manslaughter, rather than murder." (Emphasis added).*

20. The jury was therefore told at the very outset of the trial judge's remarks concerning provocation that it can provide a partial defence to murder, notwithstanding the existence of an intention to kill or cause serious injury, as a concession to human weakness. This was in circumstances where they had already been told that the *mens rea* specified in s. 4(1) of the Act of 1964 must exist before an unlawful killing can possibly be murder. They were also correctly told elsewhere in the charge, as we reiterate below at paragraph 29 of this judgment, that if *mens rea* was not present then manslaughter was the correct verdict.

21. We are satisfied in these circumstances that the jury would have adequately appreciated the relationship between provocation and *mens rea*, and that further explanation was not required in the circumstances of the case.

22. Accordingly, the grounds of appeal related to provocation fail.

Lies told by the appellant

23. The background to the complaint under this heading was a situation in which the appellant had initially told the gardaí that his partner had been attacked by three men on the street and that she had suffered the injuries from which she died in the course of this attack.

24. He maintained this position during the course of the first six interviews while detained.

25. In his evidence at trial, the appellant said that he had lied to gardaí because he "*was afraid*". The lies told by the appellant were of interest to the prosecution. Counsel for the prosecution referring to them in his closing speech as a "cock and bull story".

26. In this case the trial judge did direct the jury on how the telling of lies should be approached. He did so by giving what might be described as a modified Lucas direction. His remarks were in these terms:-

> *"Now, there is a commonsensical proposition of which you will all be aware, which is of course that one can tell lies, potentially for a number of different reasons, not necessarily indicative of guilt. And you must therefore bear that proposition in mind when considering whether or not the lies constitute evidence of guilt on the part of the accused. There are, to put it shortly, other reasons why people might tell lies. It is a matter of common sense. In many instances of course, there is a debate as to whether lies have actually been told, but this has not in fact been in debate in the present case. So I just want to tell you perhaps … in a little more precise terms.*
>
> *Yes, now, one of the judges has put the matter in this way, that the judge should warn you quite clearly that a person – and I do so, that a person may have lied for a reason other than his guilt, such as something that he wishes to conceal from his family because it might disgrace him in the eyes, for example, of members of his family. That is … merely an example of the type of lie which might be told indicative of something other than guilt… 'You must be satisfied that the motivation for the lie is a realisation of guilt and fear of the truth. Every case of course is dependent on its own facts, but you will know that people may lie for many reasons other than guilt, including shame, a desire to conceal disgraceful behaviour from their family, an attempt to bolster up a just cause, out of panic, misjudgement, confusion, out of*

indignation at the suggestion that they have done wrong when they haven't, or an attempt to hide the fact that they or others have been engaged in what we call other criminal wrongful conduct.' So in this particular instance some of these factors, might as a matter of principle, be present and they are what you bear in mind, well as much as anything else, which as a matter of commonsense may recommend [itself] to you, which is a matter for you, when you are deciding on the significance, so to speak, of the admitted lies told by the accused."

27. The appellant's written submissions criticise the modified Lucas warning given by the trial judge for not adverting to the specific explanation given by the appellant for the lies that he told, "*rather than simply recit[ing] in general terms explanations that defendants might give in various undefined circumstances*".

28. In fact, the trial judge did refer to what the appellant had had to say. On day 7, the judge commented as follows:-

"He, [the accused] said that everything was okay during the night time into the morning hours. He was afraid later and then thought about telling the gardaí about the three guys. It was put to him that he had put that story together by the time he had phoned his friend. He said he didn't know whether or not she was going to die."

29. In the Court's view, in the particular circumstances of this case, the lies told were not as significant as they might have been in other cases. The lies went to the question of whether the appellant killed Ms. Ryan. However, by the time of trial that was not in issue. That is not to say that the lies were completely irrelevant. Obviously, they potentially impinged on the credibility of the appellant, and any damage to this credibility did not assist in making out the defence of provocation. However, in the Court's view, the trial judge's treatment of this issue was more than adequate. The Court is reinforced in its view by the fact that there were no requisitions on this issue.

Mental element of the offence of murder

30. In the course of his charge, the judge summarised in the ordinary way for the jury the *mens rea* required if the offence of murder is to be made out. He specifically told the jury that if the *mens rea* was not present, or was insufficient, then manslaughter was the correct verdict. On appeal, it has been submitted on behalf of the appellant that the jury should have been directed in more specific terms with respect to the standard of malice that must exist in order for an unlawful killing to constitute murder as specified in s. 4 (1) of the Act of 1964. Specifically, it is said that the jury should have been told in terms that if they were satisfied that the appellant intended to cause harm which fell short of serious harm, he ought to be acquitted of murder. Again, it is said that there should have been specific directions on the difference between harm and serious harm.

31. Further, the appellant also complains that the trial judge's directions in relation to the significance of s. 4(2) of the Act of 1964 were inadequate. It was submitted in that regard that it was incumbent on the trial judge's charge to explain to the jury that they should first consider whether they were satisfied to the criminal standard that the natural and probable consequences of the appellant's actions were death or serious injury before going on to consider whether, if so, the resulting presumption had been rebutted. It was submitted that the guidance actually provided had the potential for the jury to conflate the two-stages of the approach which they were required to take.

32. The respondent, on the other hand, submitted that the trial judge had provided the jury with a clear statement of the mental element of the crime of murder. Moreover, it was submitted in relation to the criticism of the guidance provided with respect to s. 4(2) of the Act of 1964 that as long as the trial judge's charge states the law correctly in a fair and balanced manner, which the respondent maintains he did, he was not to be confined to any formulaic approach.

33. It is necessary to consider what the trial judge actually said. With respect to the standard of malice that must exist in order for an unlawful killing to constitute murder, he directed the jury as follows:-

"… [T]o be guilty of murder one must be shown to have unlawfully killed a person. That is what we call the physical act, the actus reus … the physical act constituting a part of the offence. Obviously, that is necessary in every case, but … in addition in any serious crime, one must have a mental element, a guilty mind, as it is sometimes called by the lawyers, mens rea, guilty mind a mental, a particular mental state. You can see that the conviction of a person of a serious criminal offence on the basis of, say, his physical actions alone, without taking into account anything he might have thought, would be grossly wrong. And of course in the law pertaining to murder, it could never occur. What is required of the prosecution is not merely to prove that by my action I have killed the deceased, but also when I did that, I had a certain state of mind, and that state of mind is an intention to kill or cause serious injury. So I kill another person, … I murder another person, if I killed that person and at the time of killing I intended to kill her or cause serious injury. You will see it as enough for the prosecution to prove in the case of the mental element an intention merely to cause serious injury. They do not have to prove what you might call the more serious state of mind of an intention to kill."

34. The appellant is critical of the fact that the judge did not draw a sufficient distinction between harm and serious harm.

35. In fact, the judge did address this. He did so by way of giving an example of a fatality following on from an aggressive push. He directed the jury as follows:-

"So for example, in circumstances where I aggressively push someone, for example, and the person falls over and bangs his head against the pavement and cracks his skull and is killed, well of course, I would be committing a criminal act by assaulting that person, by aggressively pushing that person. And my action would therefore be unlawful and death would result. Now I might – the highest intention I might have in that situation, the most serious intention would be presumably an intention to cause mere injury so speak, not to kill or cause serious injury. So if you think about it, since nobody can be convicted of murder unless at the time of the killing they have an intention to kill or cause serious injury, a person say charged with murder in that situation would and should be convicted of manslaughter. So that arises in every – that can arise from time to time."

36. In this Court's view, the trial judge's treatment of the standard of malice issue was quite adequate in the circumstances. Again, the Court is reinforced in its view by the fact that there were no requisitions on this issue and that the charge did not strike those who listened to it as objectionable.

37. In so far as the trial judge's charge was concerned with s. 4(2) of the Act of 1964, the trial judge told the jury:-

"Now, in addition to that, and this is a matter of common sense, although it is stated in one of the Acts of our Oireachtas … everybody is presumed to intend the natural and probable consequences of his actions."

38. He continued:-

> *"… [I]f I were a contract killer for example, and I was employed for the purpose of killing say a gangland figure, regrettably these things are all too common. And I did so by jumping off a motor cycle, running into a pub, and killing the person with an automatic pistol or something of that type.… [T]he natural and probable consequence of me shooting a person at short range with a pistol or sub machine gun would be to kill that person. Nobody could ever in the real world, say, 'Well, look I didn't intend to kill him', it would be nonsense. And so … you can take that … as … a clear example of circumstances where a person would be presumed to intend the natural and probable consequences of his actions. The natural and probable consequences of stabbing somebody into the heart with a carving knife is to cause him death or serious injury. The natural and probable consequences of an assault or of throttling someone might well be, it will be a matter for you, … to cause that person death or serious injury, okay. Now, of course, that presumption cannot (sic) be rebutted, set aside, discarded, excluded. And it's for the prosecution to prove that that hasn't happened, that it hasn't been rebutted, set aside, discarded. In other words ... where on the evidence it might be suggested … the natural and probable consequences of the particular attack … would be to cause death or serious injury. If there was some evidence which might lead to the proposition that perhaps this was not the case … it would be a matter for the prosecution to exclude or negative the reasonable possibility that the actor, killer, didn't intend the natural and probable consequences of his actions."*

39. Although the trial judge did inadvertently say that the presumption could not be rebutted, it is clear to us from the passage read as a whole that he had meant to say, and intended to convey, that the presumption could be rebutted. Any ambiguity or confusion that might have existed in the minds of the jury as a result of the judge's accidental misstatement was undoubtedly dispelled when the issue was revisited by him following upon some questions from the jury, who asked him, inter alia, to explain again the concept of natural and probable consequences. In revisiting the issue, the trial judge told the jury:-

> *"… a rule which exists throughout the law is that everybody is presumed to intend the natural and probable consequences of his actions. But that presumption may be rebutted, set aside, destroyed. And the prosecution's duty to prove the case extends to proving beyond a reasonable doubt that it has not been set aside or destroyed. That is to say that it has not been rebutted. So that's the position in principle, that's where that rule was concerned."*

40. In so far as this Court is concerned, while the original direction did contain an inadvertent error, the re-direction was correct, succinct and a model of clarity. It was not necessary for the judge to go further and prescribe for the jury the two stage approach to evaluating the consequences of the appellant's actions that has sometimes been adopted, and which counsel for the appellant has suggested would have been appropriate in this case. The re-direction was sufficiently clear in our view, and we do not consider that the jury would have had any difficulty in applying the principles outlined therein to the circumstances of this relatively straight forward case. Moreover, there is absolutely nothing to suggest that the jury engaged in any conflation of concepts. After the trial judge had completed his re-direction, the Foreman of the jury confirmed to him that the jury was satisfied with the sufficiency of the further explanation with which they had been provided, and again there was no complaint, protest or requisition from counsel on either side. We are not therefore disposed to uphold this ground of appeal.

The expert evidence

41. It is acknowledged that the trial judge, when summarising the evidence, reminded the jury of the evidence of the pathologist Dr. Jabber and also of a neuro pathologist, Dr. Farrell. However, the appellant complains that no instruction or advice was given to the jury on how to treat such evidence. The appellant submits that it was necessary that the jury be reminded that they were not bound by the opinion of the experts.

42. In fact, the judge did tell the jury that they were not obliged to accept expert evidence. He did so in these terms:-

> *"Now, in terms of the evidence generally - - you are entitled to accept some of the evidence and reject other parts of the evidence. We do that all the time when people say things, or we apply the power of reason to say technical evidence, like say medical evidence in the courts. You are now called upon to do that, experts. In other words you address them, you address what they say by the light of human reason, this is to trial by expert, so to speak. Common sense is brought to bear and an expert opinion might or might not be rejected. I am not suggesting necessarily it should happen here in all or in part. I merely take it as an example of the fact that you can accept some evidence, and reject other parts or take the evidence and accept particular evidence of a particular subject in whole or in part."*

43. This was not a case where expert evidence sought to supplant the function of the tribunal of fact. The evidence of Dr. Jabber set out in detail his findings at the post-mortem. In the absence of any contrary evidence, the jury was entitled to accept those findings and were indeed likely to do so.

44. Once more, the Court attaches some significance to the fact that there was no requisition on this issue either. Accordingly, this ground of appeal also fails.

45. In summary then, the Court rejects all grounds of appeal and will uphold the conviction.