THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

115/14

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Paul Henry

Appellant

Judgment of the Court delivered on the 1st day of May 2015, by

Mr. Justice Birmingham

1. On the 29th April, 2014, the appellant stood trial for murder before the Central Criminal Court, sitting in Castlebar, and on the 1st May, 2014, the jury returned a verdict of not guilty by reason of insanity and thereafter, following the appropriate inquiries, the appellant was committed to the Central Mental Hospital. He had faced one count of murdering his mother on the 17th September, 2011. When arraigned, Mr. Henry had pleaded not guilty to murder, but guilty to manslaughter by reason of diminished responsibility. That plea was not acceptable to the prosecution and the hearing proceeded.

2. There was no real factual dispute between the parties at trial and the facts were dealt with by way of an agreed statement of facts. Instead the issue between the parties related to the mental state of the appellant at the time of the incident. The prosecution contended that he was insane and that the appropriate verdict was that of not guilty by reason of insanity, relying in that regard on the evidence of Dr. Brenda Wright, Consultant Forensic Psychiatrist of the Forensic National Health Services. The defence urged that the appropriate verdict was not one of not guilty of murder by reason of insanity, but guilty of manslaughter by reason of diminished responsibility, and they relied on the evidence of Prof. Tom Fahy, Professor of Forensic Mental Health, at the Institute of Psychiatry, Kings Hospital London. So, in essence, the sole issue for the jury was whether the verdict should be one of not guilty by reason of insanity or one of guilty of manslaughter by reason of diminished responsibility. Four grounds of appeal are referred to in the notice. They are as follows:-

> (i) The learned trial judge erred in law in directing the jury that the onus of proof shifted from the prosecution to the defence in circumstances where the prosecution raised as an alternative verdict the defence of not guilty by reason of insanity.
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> (ii) The learned trial judge erred in law in failing to direct the jury that the onus was on the prosecution to prove the alternative verdict of not guilty by reason of insanity and the standard applicable was beyond reasonable doubt.
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> (iii) That the learned trial judge erred in law in directing the jury that the onus and standard of proof was for the defence to prove the alternative verdict of not guilty by reason of insanity on the balance of probabilities, in circumstances where the prosecution raised the defence of insanity as an alternative verdict.
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> (iv) The learned trial judge erred in law and in fact in failing to accept the requisition of the prosecution that he redirect the jury on the onus and standard of proof to be discharged by the prosecution and more particularly that he redirect the jury that the correct standard of proof to be discharged by the prosecution when the prosecution was raising the defence of insanity is beyond reasonable doubt, not on the balance of probabilities.

3. The matter before the Court raises a number of questions for consideration. These are (i) whether the Court has jurisdiction to entertain the appeal where the complaint is of a misdirection by the trial judge in the course of his charge to the jury, (ii) if the Court has jurisdiction to entertain the appeal, whether the trial judge's charge amounted to a misdirection, (there is a considerable measure of agreement that there was in fact an element of misdirection) (iii) if there was a misdirection, what was the extent of the misdirection and what ought the judge have said to the jury and (iv) what, if any, consequences flow from the misdirection.

4. In summary, the case raises for determination the question of where the onus of proof lies and what the standard of proof is when it is the prosecution that is contending for a verdict of not guilty by reason of insanity.

5. This question first emerged as an issue during the opening statement by prosecution counsel when she said the following:

> "Now, ultimately when you have heard all the evidence you – it seems to me likely that the issues will reduce themselves in real terms to whether or not he is entitled to the verdict of insanity of whether the appropriate verdict is diminished responsibility and that decision that you have to make is one the prosecution view, and I hope it will be seen as correct by the trial judge, is that you decide that issue on what is called the balance of probabilities. So, that is a standard essentially where if you think it is more probable than not that he was labouring under what the law calls insanity, and I know it is a pretty old fashioned and may be archaic term, but it is the word in the statute, so that is why I use it, if you are of the view, that he probably fulfils the criteria for insanity, then that is the verdict you go for. Whereas if you take the view, that he was probably labouring under diminished responsibility but not insanity then that is the verdict you would go for and it wouldn't be a question of you being satisfied beyond a reasonable doubt of either of those two. It would be on the balance of probabilities."

6. However, by the time counsel came to make her closing speech, her position had evolved somewhat. On this occasion this is what she had to say:-

> "Now, I said to you at the beginning of the trial, I addressed you about the burden of proof and the standard and I said

> to you something that in retrospect I think it may be safer if the prosecution take a different view on, although it may have been technically correct, about the standard of proof on insanity. In this case, the accused is putting forward a defence of diminished responsibility as you have heard, and the prosecution are saying it should be insanity and in those circumstances, it seems to me, and the judge will ultimately direct you on which is the correct approach, but it seems to me it may be better that the prosecution prove insanity beyond a reasonable doubt. It seems to me on reflection, having read some legal authorities overnight, that that may be the safer course. So, I may ultimately be corrected by his Lordship, but for the time being, I would suggest that you consider insanity on this basis, that first of all you decide did we prove beyond a reasonable doubt that he committed the act, second of all, have we proved a beyond a reasonable doubt that he falls within the definition of insanity. Now, if you are satisfied beyond a reasonable doubt of those two issues, well then it is the insanity verdict that you should go for, but if you are not satisfied, and you have a reasonable doubt as to whether he was insane, and I mean that in the legal sense, well then you go on to consider the next issue, which is diminished responsibility and I am sure my friend, Mr. Madden, will address you more about that, but as you have heard the test for that is that a person does not fall within insanity, but nonetheless the mental disorder was such as to substantially diminish his responsibility. So, if you come to the view, as I say, that we haven't proved the insanity defence because the onus is on us to prove it, if you are not satisfied that we have proved it, you then move on to consider diminished responsibility and it would only be if you ruled out diminished responsibility that you would consider that he could be guilty of murder and in reality in this case, I don't think anyone, but ultimately it is a matter for you, no one can tell you what to do, but nobody, in terms of the Barristers or the psychiatrist is suggesting to you that the psychosis was not a factor in all of this. On the contrary, everybody is agreed that this was a major factor in his mental state at the time. So, diminished responsibility then is something that the defence having raised it, have to prove on the balance of probabilities. If you remember I spoke about that at the beginning. They have to prove it is more likely than not, that he was operating, that his responsibility was substantially diminished because of the delusion that he was suffering from."

7. Naturally the issue was addressed by the trial judge in the course of his charge. He first did so by referring to ss. 5 and 6 of the Criminal Law (Insanity) Act 2006, when he commented:-

> "Section 5 provided for a verdict of not guilty by reason of insanity and s. 6 provided for bringing a verdict of not guilty of murder, but guilty of manslaughter on the grounds of diminished responsibility. Now these two sections are set out in very clear terms, which a judge can give effect to easily, giving words their natural and clear meaning. The sections have only been operating since 2006, and there haven't been that many cases going through the courts in relation to them. I have absolutely no doubt that in the fullness of time, when the Court of Criminal Appeal has its way with them, and when academic lawyers have had their way with them, that these sections will change to matters of great complexity from their present clear status, but by the time that happens I will be gone."

8. The judge then indicated that he needed to check certain things that had been said by counsel and would defer dealing with the question of the onus of proof and the standard of proof until after lunch. Thereafter, he returned to the topic as follows:-

> "In relation to the question of a verdict of not guilty by reason of insanity, you first of all have to find the accused person committed the acts alleged against him and the burden of proving that would rest on the prosecution to the standard of beyond reasonable doubt, but there is no issue in relation to that between the parties. They are both agreed that he committed the acts alleged, but we are all presumed to be sane, and therefore in relation to setting up a defence of insanity, the onus of proof is on the accused to prove that. The onus shifts over to him to prove that, but the standard of proof required of him, is a much lower standard. The standard of proof is on the balance of probabilities. Is it more probable than not, so that is a significantly lower standard of proof and that is the standard or proof which rests on him. Now, also in relation to diminished responsibility, the onus is on the accused man to establish that and the standard of proof resting upon him is the lower standard of proof on the balance of probabilities."

9. Following the conclusion of the judge's charge, a debate took place between counsel for the prosecution and the trial judge. Counsel for the prosecution stated:-

> "My Lord, I think there may be one requisition on each side and it is in fact the same issue. Yes it is simply this My Lord, that you directed as regards insanity that the onus would be on the accused to prove on the balance of probabilities and it is obviously the standard and burden of proof regarding that and this particular case has given me a lot of headache, the difficulty being that the statute does not assist in any way at all. It talks in s. 5 about when the jury have heard evidence and they find the various criteria, the verdict is not guilty and it talks about the prosecution adducing evidence, but it doesn't in any way help in terms of the burden and in those circumstances, I have been checking text books and. ----"

10. At that point the trial judge interjected:-

> "Well so have I. I checked Thomas O'Malley and I am satisfied on the basis of O'Malley with what I have said to the jury."

11. Counsel for the prosecution then continued:-

> "Could I just open to court a passage from the Judge's Charge Text, I don't know if the court has considered that and it is simply that and this is what I suppose changed my own mind. It originally seemed to me that the evidence should fall out and there would be the balance of probabilities, but it was the Judge's Charge in Criminal Trials at para. 14.10 where it said: 'it seems in relation to an evidential burden when it allows the prosecution to adduce evidence'. This is s. 5(4). However, it is submitted that in circumstances the legal burden of proving the defence must also rest on the prosecution. He who asserts must prove and that is stated and then it goes on at paras. 14.14 and 14.15 to say that while there is no Irish law in it, it might be safer to require the burden to be on the prosecution beyond a reasonable doubt, given the indication in cases such as Cronin and it is a matter for the defence to conduct their defence as they see fit and it is a very difficult situation where there is no guidance from case law or the statute."

12. To this the trial judge responded:-

> "Well I have accepted the guidance given by O'Malley."

13. Before considering the applicable statutory provisions it would seem helpful to digress for a moment to consider how we have reached the present situation. Prior to 2006, the Irish law on insanity was to be found in the M'Naghten Rules as glossed by the case

of *Doyle v. Wicklow County Council* [1974] I.R. 55. It was clear that the "special verdict of insanity," which was in fact one of guilty but insane, could only be raised by the accused as a matter of defence and, when it was, that the burden of proof was on the accused to establish the defence and the standard of proof was on the balance of probabilities. Irish law in this area was modernised by the Criminal Law (Insanity) Act 2006. The sections in issue now being ss. 5 and 6. So far as is relevant, these sections provide as follows:-

> "5(1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that –
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> (a) the accused person was suffering at the time from a mental disorder, and
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> (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she –
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> (i) did not know the nature and quality of the act, or
>
> (ii) did not know that what he or she was doing was wrong, or
>
> (iii) was unable to refrain from committing the act,
>
> the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity."

14. Section 5(4) provides:-

> "Where on a trial for murder the accused contends –
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> (a) that at the time of the alleged offence he or she was suffering from a mental disorder such that he or she ought to be found not guilty by reason of insanity, or
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> (b) that at that time he or she was suffering from a mental disorder specified in section 6 (1)(c),
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> the court shall allow the prosecution to adduce evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence."

15. Section 6 provides, insofar as is relevant to the present appeal:-

> "(1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person –
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> (a) did the act alleged,
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> (b) was at the time suffering from a mental disorder, and
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> (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,
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> the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility."

16. Section 6(2) then goes on to state:-

> "(2) Subject to section 5(4), where a person is tried for the offence specified in subs. (1), it shall be for the defence to establish that the person is, by virtue of this Section, not liable to be convicted of that offence."

The Court's jurisdiction

17. Turning first to the question of jurisdiction, which was an issue raised with the parties by the Court, the starting point for consideration of this issue has to be that a verdict of not guilty by reason of insanity is an acquittal. Notwithstanding that, s. 8 of the Criminal Law (Insanity) Act 2006 makes provisions for appeals both in respect of summary matters and matters dealt with on indictment. Section 8(6) is the section that deals with trials on indictment and appeals therefrom. If that section is applied to the present case, then it provides that a person tried on indictment in the Central Criminal Court and found not guilty by reason of insanity may appeal to the Court of Appeal on one or more or all of the following grounds:

> (a) That it is not proved that he had committed the act in question.
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> (b) That he was not, at the time when the act was committed, suffering from any mental disorder such that the accused ought not to be held responsible for the act alleged by reason of the fact that he:
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> (i) did not know the nature and quality of the act or
>
> (ii) did not know that what he was doing was wrong or
>
> (iii) he was unable to refrain from committing the act.

(c) That the court ought to have made a determination in respect of the appellant that he was unfit to be tried.

18. The section then provides that if on appeal to the Court of Appeal on the grounds referred to in 6(b) (that the appellant was not suffering from a mental disorder amounting to insanity) the court is satisfied that the appellant committed the act alleged, but, having considered the evidence or any new evidence relating to the mental condition of the accused given by a consultant psychiatrist, is satisfied that the accused was not suffering from any mental disorder of the type referred to in s. 5(1)(b) (ie. a disorder amounting to insanity), the court shall substitute a verdict of guilty of the offence charged ie. murder, or guilty of manslaughter on the grounds of diminished responsibility.

19. In this case there is no doubt about the fact that the appellant did the act in question, nor is there any suggestion that the Central Criminal Court could or should have made a determination that he was unfit to be tried. In seeking to appeal therefore, it is the case that the appellant is contending that he was not insane at the time he committed the act and that there should not have been a verdict of not guilty by reason of insanity.

20. The difficulty arises from the fact that s. 8(8) might be seen as limiting the role of the Court to one of considering the psychiatric evidence, including possibly new evidence, and then, if satisfied that the appellant was not insane, substituting a verdict of guilty of murder, which of course nobody suggests is appropriate, or a verdict of not guilty of murder but guilty of manslaughter by reason of diminished responsibility.

21. The difficulty for the Court is that it has not heard any evidence from a consultant psychiatrist nor have any arguments been addressed to it in relation to the evidence at trial, on foot of which the Court could be satisfied to substitute a verdict of guilty of manslaughter by reason of diminished responsibility for the verdict returned by the jury. That is not at all surprising, as there was never a dispute that both verdicts were properly left to the jury and indeed that both verdicts were open to them. The complaint is that the jury were not properly directed and that accordingly the verdict is unsafe and unsatisfactory.

22. The question is whether the restricted language of s. 8(8) precludes the Court of Appeal from intervening, on foot of a misdirection, if such is established. In this case, it is true that the complaint made about the judge's charge is a limited one. However, it is possible to imagine that there might be criticisms which are much more fundamental. What if the direction to the jury completely misstated what constituted insanity? Could it be, in such a situation, that a person in respect of whom a verdict of not guilty by reason of insanity was returned was left without a remedy? In the Court's view, it is hard to imagine that this could be so.

23. The Court of Appeal is a constitutional court established following a vote of the people. To that extent, its situation differs from that of the old Court of Criminal Appeal. Article 34.4.1 in its current form provides:

> "The Court of Appeal shall -
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> (i) Save as otherwise provided by this Article,
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> (ii) With such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdictions from such decisions of other courts as may be prescribed by law."

24. An appeal from a decision of the Central Criminal Court is an appeal from a decision of the High Court. See People v. O'Shea [1982] I.R. 384.

25. There is well established jurisprudence to the effect that there is a strong presumption against the ouster of this appellate jurisdiction. See in that regard cases such as *A.B. v Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 296, *Clinton v. An Bord Pleanála* [2007] 1 I.R. 272, *Canty v. P.R.T.B.* [2008] IESC 24 and *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13, all of which dealt with the question of appeals from the High Court to the Supreme Court prior to the establishment of the Court of Appeal.

26. Accordingly, in the view of this Court, s. 8(6) cannot be regarded as having provided exclusive grounds by which an appeal to this Court may be brought. Very clear language indeed would have been required to oust the full and unfettered jurisdiction of this Court in respect of decisions of the Central Criminal Court. Accordingly, the Court is of the view that the complaint in relation to the misdirection to the jury by the trial judge can be entertained and that if necessary a re-trial can be ordered by this Court.

27. Therefore, while the structure of the section is far from ideal, the Court is of the view that the provisions made for substituting a verdict of guilty of manslaughter, or indeed a verdict of guilty of murder, are in addition to and not in substitution for the traditional grounds of appeal.

The onus and standard of proof

28. It should be noted that the new defence of diminished responsibility arises only where there is a mental disorder present which while not such as to justify finding the accused not guilty by reason of insanity, is such as to substantially diminish responsibility for the Act. The Act contemplated that there may be situations where the prosecution would contend that the appropriate verdict is either one of not guilty by reason of insanity or one of guilty of manslaughter by reason of diminished responsibility, while the defence contended for the other available verdict. This case seems to be the first time that the issue has arisen in Ireland, though a somewhat comparable situation was considered by the English Courts in the case of *R. v. Grant* [1960] Crim. LR. 424. As in this case, on that occasion the preference of the defence was for a verdict of manslaughter by reason of diminished responsibility, while prosecuting counsel stated that the appropriate verdict was one of guilty but insane. This was in a situation where the psychiatric evidence was that the prisoner did not know the nature and quality of his acts. Paul J. directed the jury that the defence could establish diminished responsibility by showing that contention was more probable than not: while the prosecution could establish that the prisoner was insane within the meaning of the M'Naghten Rules, only by proving that contention beyond reasonable doubt. This was however, a decision of first instance and it is not clear how fully the issue was debated.

29. Insofar as the question of the verdict of not guilty by reason of insanity is concerned, two issues arise: (i) where does the burden of proof lie and (ii) what is the standard of proof. In a case where it is the prosecution that is urging that there should be a verdict of not guilty by reason of insanity, it seems only reasonable that the prosecution must bear the burden of proof in accordance with the time honoured principle that he who asserts must prove.

30. In a situation where the onus of proof is on the prosecution, there is a tendency to assume automatically that the obligation must

be to prove beyond reasonable doubt. However, that is far from clear cut. The general proposition that the burden of proof is on the prosecution to prove the guilt of an accused person beyond reasonable doubt is anchored in the presumption of innocence. That is not directly in issue in the present case. Moreover, there are some hints in the language of the statute that what is required is not proof beyond reasonable doubt. Section 6(4) of the 2006 Act, in dealing with the entitlement of the prosecution to raise insanity or diminished responsibility, where the defence have raised the other possibility says "the court shall allow the prosecution to adduce evidence **tending** to prove the other of these contentions,…" (emphasis added.) Reference to evidence tending to prove does not sit easily with the suggestion that the requirement is that the evidence proves an issue beyond reasonable doubt. A requirement for proof of insanity beyond reasonable doubt in a situation where the alternatives of insanity and diminished responsibility are under consideration could give rise to some strange results. If a jury felt when considering diminished responsibility that the accused's responsibility was more than just diminished and that he was probably insane, this would appear to preclude a verdict of manslaughter by reason of diminished responsibility. But if, though satisfied that he was as a matter of probability insane, they were not satisfied to the very high standard of proof beyond reasonable doubt that would preclude the alternative verdict, the verdict of not guilty by reason of insanity and in that situation with both insanity and diminished responsibility off the table, the likely outcome would be a verdict of guilty of murder. Such an outcome could not be regarded as satisfactory, and that leads the Court to conclude that the obligation on the prosecution is to prove the case on the balance of probabilities. The court would wish to make clear that the views that it is expressing in relation to the onus of proof and the standard of proof are specific to situations where the prosecution is contending for one of the two available alternative verdicts and the defence contending for the other.

31. That being so, the trial judge ought to have told the jury that, insofar as the prosecution was seeking a verdict of not guilty by reason of insanity, the onus was on them to establish, on the balance of probabilities, that such was the appropriate verdict and likewise insofar as the defence were seeking a verdict of manslaughter by reason of diminished responsibility, the onus was on them to establish that such was appropriate, again on the balance of probabilities. The point can be made, and indeed has been made, that what was actually said to the jury was not, in practical terms, very different and that such difference as there was between what was actually said and what ought to have been said would not justify the intervention of this Court. This Court recognises the force of that argument but is not persuaded by it. The task of a jury confronted with two experts of great distinction expressing different views on the critical and central issue in a case is not an easy one and it is desirable that a jury in that situation should receive the maximum assistance in terms of directions that are clear, focused and concise. Unfortunately, for very understandable reasons, that did not happen in this case. Instead, a significant degree of confusion entered the case, which cannot have helped the jury. Whether a verdict is one of not guilty by reason of insanity or one of guilty of manslaughter by reason of diminished responsibility has very significant practical consequences for the appellant, so in these circumstances, the Court is of the view that it is appropriate to allow the appeal and order a re-trial, so that a jury can return a verdict on this key issue.