THE COURT OF APPEAL

Sheehan J.
Mahon J.
Edwards J.

334/12

The People at the Suit of the Director of Public Prosecutions

Prosecutor/Respondent

V

Michael Collins

Accused/Appellant

JUDGMENT of the Court delivered on the 28th day of July 2016 by Mr. Justice Sheehan

1. On the 29th November, 2012, following a six day trial in the Central Criminal Court the appellant Michael Collins was convicted of murdering Patrick Hogan at Glen Road, Blarney, Co. Cork on the 10th February, 2011.

2. He now appeals his conviction on two grounds namely that there was extensive and unfair judicial comment on the defence case and secondly that the trial judge failed to direct the jury on the issue of unlawful and dangerous act manslaughter and gross negligence manslaughter.

3. In order to consider these grounds of appeal, it is necessary first of all to set out the background to the offence.

Background
4. Prior to February 2011, the appellant confronted the deceased about the fact that he was supplying his brother with drugs. He told him to stop doing this. At that time the appellant had already discharged a number of his brother's drug debts to the deceased. Following this confrontation a number of vehicles belonging to the appellant were burned out and he felt obliged to move home. The appellant also believed that the suicide of another brother of his was attributable to the deceased, who had previous convictions for violent crime. The gardaí stated in the course of evidence that the deceased had posed a credible threat to the life of a person known to the appellant.

5. The appellant had made various complaints to the gardaí and called to Blarney garda station on the 6th February, 2011, to inquire about the progress of the investigation into his complaints. He expressed dissatisfaction with the way the investigation was proceeding and said as he was leaving that he would take care of matters himself.

6. Four days later he armed himself with a firearm and persuaded his brother to drive him towards the deceased man's business premises. The deceased and a Mr. Kerry Pat O'Brien happened to be driving along the road when they were overtaken by the appellant and his brother. The appellant directed his brother to park their vehicle on the roadway so as to block the passage of the deceased's vehicle. The appellant left the vehicle wearing a balaclava and got into a nearby ditch with the firearm from where a shot was discharged. The appellant then left the ditch wearing the balaclava and walked towards the vehicle in which the deceased man was now stopped, sitting in the driver's seat. The gun was pointed towards the driver side window and when the appellant was within six feet of the driver's side window, another shot was discharged through the window of the deceased's vehicle. This shot entered the chest of the deceased and resulted in his death a short while later. The deceased man and Mr. O'Brien both left the vehicle and went some distance down the road. The appellant fired another shot from the gun and then got into the deceased's van and drove off. A short while later he was arrested by the gardaí and interviewed. He made a number of admissions to the gardaí, but maintained at all times that all he had intended to do was to fire warning shots to frighten the deceased.

7. Evidence from the Deputy State Pathologist confirmed that the cause of death was a single gunshot wound to the deceased's chest. Garda ballistic evidence confirmed that the firearm in question was a single action German made Rhoner rifle, designed to discharge 0.22 inch calibre ammunition and was mainly intended for hunting and controlling vermin. The ballistics expert stated that the gun had to be cocked manually before it could be discharged, that it had no safety mechanism and that due to the lightness of the firing mechanism, it could unintentionally discharge if it struck the ground or if it was carried over rough ground.

8. It was the defence case that the appellant had merely been attempting to frighten the deceased on the day in question as opposed to intending serious bodily harm and that in respect of the fatal shot, the rifle in question had discharged of its own accord.

Ground 1, the fairness of the trial judge's charge
9. The relevant comments of the trial judge are to be found in the transcript of day 5 of the trial at p. 25, lines 20 to 21, and p. 26 lines 10 to 17. At the opening of his charge to the jury, the learned trial judge stated at day 5 (28th November, 2012) p. 25, lines 20 to 21:-

> "I'm a bit troubled by the frequency with which Mr. Giblin (counsel for the defence) uses the word 'assassination'. We don't have to be in assassination territory at all, an unlawful killing is at a minimum manslaughter, and where the statutory intent is established in relation to that killing it has escalated to murder. So we don't have to be looking at matters in terms of assassination all the time. However this is a matter that I will be coming back to at a later stage"

10. Thereafter, the trial judge then proceeded to make the following remarks, at Day 5 (28th November 2012), p26 lines 10-17:-

> "It follows from what I have said to you that if counsel say anything in relation to matters of law which is in conflict with what I say to you in relation to matters of law. You take me as being absolutely correct and this is a case where I would

> have substantially different perspective to Mr. Giblin's. But again I emphasise to you that both the Supreme Court and the Court of Criminal Appeal have ruled that I cannot stop you from bringing in a verdict of not guilty no matter how perverse it might seem. That is your absolute right and Mr. Giblin certainly was correct when he indicated that to you."

11. Counsel for the appellant submitted that the same logic and principles applicable to interventions by the trial judge in the course of a trial should also be applicable to the trial judge's comments in his charge, namely they should be balanced and appropriate.

12. Counsel further submitted that the re-charging of the jury was not sufficient to address the concerns that have been raised and that it was open to the appellant to argue this point on appeal, despite the fact that the matter had not been pursued further following the re-charging of the jury.

13. Counsel for the Director of Public Prosecutions submitted that the trial judge's comments were entirely correct and appropriate in that they served to avoid emotive language and to bring clarity and focus to the jury in their understanding of the offences charged. In addition, counsel also submitted that although the trial judge was commenting on a question of law, there was no rule of law precluding a trial judge from passing comment on the evidence adduced provided the jury was properly charged as regards deciding the case solely on such evidence.

14. Counsel further submitted that it was not open to the appellant to now revisit this matter on appeal given that the trial judge's offer to further re-charge jury had been declined.

Discussion

15. In the course of his closing address counsel for the appellant had stated that the prosecution were making the case that his client was a cold blooded assassin. Again while urging the jury to hold that his client had merely intended to frighten the deceased, counsel again used the term assassin. It was in this context that the trial judge stated that legally speaking "assassination" was not the standard of *mens rea* required for a murder conviction.

16. Following requisitions that he had been unfair to the defence the trial judge recharged the jury as follows:-

> "Madam Foreman, members of the jury, I am prepared to accept that my charge to you was unhelpful in a number of respects and I want to refer to those. I made reference at the outset to cold-blooded assassination. Now, I was dealing with concepts of law in the abstract when I used those – that expression. It did not relate to Mr. Giblin's case and shouldn't be imputed to the defence. It was not a criticism of the defence case. I have to deal with law in the abstract and I generally keep totally away from the facts of the particular case. So, when you're dealing with law in the abstract there may be a temptation to say, well, that does relate to the particular case but it doesn't. So, it was unhelpful of me to use the expression – that expression. So, be quite clear that it's not a criticism of the defence and don't take it as such."

17. Even if the initial charge might have been perceived to have been unfair to the defence, we are satisfied that the subsequent recharging as outlined above was sufficient to undo any unfairness that might have arisen from the trial judge's original comments and particularly those which criticise the language used by counsel for the appellant. We are strengthened in our view by the fact that the defence counsel did not raise any issue by way of further requisition in relation to this aspect of the trial judge's re-charging of the jury despite having been invited to do so by the trial judge.

18. In relation to the trial judge's comments regarding the perversity of an acquittal on all counts, the Court notes that once again counsel for the defence in his closing speech invited the jury as follows:-

> "I would suggest to you that the proper verdict on each count is one of not guilty *simplicitor* and I say that, ladies and gentlemen because you are the judges of the facts . . . you represent the standards of society and I suggest to you ladies and gentlemen that the application of the standards of Irish society, right thinking members of Irish society, to the evidence in this case should result in an acquittal for Mr. Collins and as Mr. O'Leary said to you the DPP assumes the burden in a sense of proving me wrong on that proposition. "

19. Particular offence was taken by counsel for the defence to the phrase "no matter how perverse it might seem" and the trial judge responded to a requisition in respect of these remarks by stating the following to the jury:-

> Also, it was unhelpful of me to use the expression 'perverse to acquit'. Again, I was trying to deal with a concept of law. There are two cases, one in the Court of Criminal Appeal and one in the Supreme Court. The one in the Court of Criminal Appeal was called *Davies* and it was about 40 years ago and the Supreme Court held – the trial judge in that case told the jury that they couldn't do something and the Supreme Court held that he went beyond his powers in that regard, and they held that a jury could do certain things even though it might seem perverse, and again in the case of *DPP v Padraig Nally* [2006] IECCA 128, in which I was the trial judge. The Court of Criminal Appeal in that case said that the judge couldn't restrict the jury from doing certain things on the grounds that it would be perverse for them to do so. So, when I used that expression I was trying to deal with abstract concepts of law and I recognise that you might find it difficult to appreciate when I'm dealing with abstract concepts of law and when what I say should be related to the particular case. So, I say my use of the words 'perverse to acquit' should not be related to the particular case. I was dealing with abstract concepts of law, and maybe I should have kept away completely from trying to deal with abstract concepts of law. On reflection I think I probably should have done so."

20. We are satisfied that the judge adequately explained to the jury what their role was and in particular that they had an entitlement to acquit the accused on all three counts. (It should be noted here that the accused man was also on trial in respect of a charge relating to the possession of the firearm and another charge relating to the possession of ammunition, but that this appeal is concerned solely with the appeal against the conviction for murder.)

21. Following his recharging of the jury the trial judge addressed counsel for the defence and asked him in front of the jury if his concerns had been met. It is correct that the jury should not know the origin of a requisition, however in the particular circumstances of this case we do not consider that anything turns on the fact that the jury could identify who had made the requisition. Accordingly we are satisfied that any unfairness contained in the original charge was adequately rectified by the subsequent recharging of the jury and this ground of appeal must fail.

Ground 2 the adequacy of the trial judge's charge in respect of manslaughter

22. Counsel for the appellant submitted that the trial judge had failed to adequately direct the jury on unlawful and dangerous act

manslaughter and that he had also failed to direct the jury on the possibility of gross negligence manslaughter.

23. The submissions of counsel for the appellant centred on the proposition that it had not been explained to the jury that merely because a life had been lost on account of a dangerous and unlawful act, it did not automatically amount to a natural and probable consequence of the accused's actions. In other words, it was not explained to the jury that if they found causation, but with no intent to kill, they should acquit the accused of murder.

24. In particular counsel submitted that although the trial judge had stated the correct principles of law in relation to the subjective nature of the test for *mens rea* regarding manslaughter, in the circumstances of the present case the trial judge should have gone further and explained that death was not necessarily a probable consequence of the accused's actions in approaching the vehicle as he did when armed. Accordingly, counsel submitted that the direction in this regard was confusing and inadequate.

25. In addition, counsel submitted that it had not been adequately explained to the jury that they must first consider whether there was an unlawful and dangerous act by objective standards before considering the *mens rea* of the accused in respect of it.

26. Counsel submitted that given the charge as it stood, there was a very real danger that the jury was left with the impression that the only available verdicts left to them were conviction or full acquittal i.e. once the jury rejected the possibility of an accident, there was a very real danger that they may have found the accused guilty of murder without considering the middle ground namely manslaughter.

27. Consequently, counsel submitted that the trial judge's charge had failed to adequately explain and set out the various categories of manslaughter, thus distinguishing it from murder and as a result the charge was such as to render the verdict returned unsafe.

28. In reply, counsel for the respondent submitted that the approach which the appellant was taking did violence to both the approach taken by the defence at trial and the careful consideration of the trial judge who had directed the jury as he did in relation to manslaughter in order to be fair to the case advanced by the defence at that time.

29. Counsel submitted that the defence had made a tactical decision to attempt to obtain a not guilty verdict and accordingly the case was presented on a guilty or not guilty basis with regard to intent as opposed to one of manslaughter or murder.

30. In particular counsel highlighted that defence counsel had stated to the jury that the issue was what was in the mind of the accused and whether he had intended to cause the deceased death or serious injury. In addition, counsel highlighted that after the requisition on the issue of the subjective nature of the *mens rea* test, the trial judge had asked the defence as to whether or not this was sufficient and they had answered that it was.

31. Counsel argued that once the jury found that an unlawful killing had occurred in circumstances where death or serious injury was intended, then the question of whether it occurred during a criminal and dangerous act did not arise. In other words, once the killing was determined to be unlawful, the only question for the jury was whether death or serious injury had been intended. If the jury found it had, then they did not need to consider the question of manslaughter. Consequently it was submitted that the distinction between the various types of manslaughter had no application to the circumstances of the present case.

32. In addition, counsel submitted that the issue of gross negligence manslaughter did not arise where the act in question had been unlawful and that at no point did the defence requisition the trial judge on the basis of how the jury must assess the unlawful and dangerous act. Consequently those points could not now be raised on appeal.

33. Further counsel emphasised that no guilty plea had been entered in respect of manslaughter by the accused before the trial.

34. Accordingly, counsel maintains that the risk of an unsafe verdict now pointed to by the appellant had been created by the defence itself at trial. In addition, counsel pointed out that in the event that the jury had accepted that it had not been an accident, the evidence that it had been an intentional ambush was overwhelming, particularly having regard to the fact that the appellant had been masked and that he had reloaded and fired the rifle.

Conclusion

35. It was part of the defence case that the appellant had been attempting to frighten the deceased by firing warning shots. No mention at any stage was made of gross negligence manslaughter and we are satisfied on the facts of this case and the way in which the defence was run that a direction on gross negligence manslaughter would have been superfluous and even if this defence was open on the evidence, the same objection identified by Hardiman J. in Cronin referred to hereunder must also apply.

36. Counsel for the appellant maintained that when the trial judge was charging the jury with regard to manslaughter he should have gone further than he did and specifically direct the jury on the constituents of unlawful and dangerous act manslaughter. In our view this ground of appeal must be approached by us in the manner suggested by counsel for the respondent. Failing to raise a requisition in respect of unlawful and dangerous act manslaughter was not in our view an oversight. It was consistent with the defence that was run which sought an outright acquittal on grounds of pure accident.

37. The issue that now arises for consideration is whether or not there was an onus on the trial judge to instruct the jury with respect to an alternative defence that may have been open on the facts, but was not relied on during the trial. The judgment of the Court of Criminal Appeal in *People (DPP) v. Cronin* [2003] 3 I.R. 377 and delivered by Hardiman J. is relevant.

38. Commenting on and quoting from this judgment, Coonan and Foley in *Judge's Charge in Criminal Trials* (Roundhall 2008) noted at para. 22.15 that the root of the decision in this case is grounded in the constitutional law principle that an accused is entitled to decide how best to run his own defence. In the course of this judgment, Hardiman J. said it was difficult to reconcile the English authorities in this area with the rights of an accused person as understood in this jurisdiction. He went on to say:-

> "This is because, on a literal reading, they trench on the right of an accused to conduct his own defence, or have it conducted professionally on his instructions, without its being undermined even by the entirely benevolent introduction of a middle course for which neither he nor the prosecution have been minded to contend . . . the defendant might prefer the alternative course not to be suggested because of its adverse effect on the defence which the defendant actually wishes to assert. It seems to us that this Court should be slow to impose an obligation on a trial judge to intervene in a manner adverse to the prisoner's chosen defence except in very usual circumstances."

39. The Court then went on to conclude that:-

> "Where a competently defended prisoner advances a defence which opens the prospect of a verdict of acquittal if it is accepted, or if it raises a reasonable doubt on any essential matter, it would be a grave responsibility to interfere with its prospects of success by introducing, uninvited, the possibility of what Lord Taylor L.C.J. called 'a compromise verdict'. If the defendant wishes to introduce such topics as provocation or mistake, the threshold for having them considered by the jury is a low one and this fact has presumably been considered by defending counsel. A decision not to introduce them will normally be taken either on the client's express instructions or because of realistic tactical apprehensions which must be presumed to have been discussed with the client. The trial judge cannot, in the nature of things, be privy either to the instructions or the tactical considerations and may run the risk of doing considerable harm to the predetermined defence.
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> The prosecution will normally have complete discretion as to the charges to be brought and the evidence with which to support them. Only unusual circumstances justify interference with this discretion. Equally, only something very unusual could justify the trial judge in interfering with the discretion of defence counsel in the selection and statement of the defence of his client. . . . we do not see merit in imposing an unqualified obligation on the trial judge to put before the jury, without request or discussion, an alternative line of defence for which there is some evidence, and which is inconsistent with the defence actually raised. To the extent that the English cases suggest that such a duty may exist, we would not follow them."

40. In our view, there was nothing unusual about this case which would have imposed a duty on the trial judge to direct the jury on an alternative defence. Had the trial judge directed that an alternative verdict not advanced by the defence was open in this case he could have been criticised for interfering with the defence that was being run. In our view the trial judge's charge was respectful to that defence and he cannot now be criticised for failing to have put an alternative defence even if such was open on the facts.

41. We are satisfied that the overall charge in this case taking into account what was also said in the course of recharging resulted in a charge which adequately dealt with the issue of manslaughter insofar as it related to the defence that was run in this case. Accordingly this ground of appeal fails and the appeal against conviction therefore is dismissed.