THE COURT OF APPEAL

Birmingham J.
Mahon J.
Hedigan J.

No. 279/2015

The Director of Public Prosecutions

Respondent

V

Peter Jackson

Appellant

JUDGMENT of the Court delivered on the 7th day of April 2017 by

Mr. Justice Birmingham

1. On 13th November, 2015 following a seven day trial the appellant was convicted of the murder of David Hamilton. When arraigned, the appellant had pleaded not guilty to murder but guilty to manslaughter so that the real issue at trial was whether the appropriate verdict was one of murder or of manslaughter.

2. The background to the trial was to be found in events that occurred on 4th May, 2012. On that occasion, the appellant who was a drug user, went with a fellow user Pamela McHale, to Cork city in order to purchase heroin. In the city centre they met up with David Hamilton. Mr. Hamilton was also a drug user and he and the appellant were known to each other. There was agreement to share heroin. All three went to the home of Mr. Pat Fennelly in Fairhill. There the appellant injected himself with heroin and then attempted to inject Mr. Hamilton but was unable to find a vein. An argument developed between Mr. Jackson and Mr. Hamilton and at one point the appellant picked up a kitchen knife, about 21 cm long, from a table and stabbed Mr. Hamilton through the chest. The stab wound transfixed the heart. The wound measured 8.5 cm and had gone through the front and back of the left chamber of the heart. Mr. Hamilton bled profusely and he then went into the living room where he collapsed. The appellant and Mr. Fennelly picked Mr. Hamilton up and moved him out on to the roadway outside the house. Thereafter, initially Mr. Jackson's approach was to deny any knowledge or involvement in the stabbing but subsequently, following an arrest and detention, acknowledged an involvement in the killing but said that he had not meant to do what he did.

3. The appellant has formulated a number of grounds of appeal. The written submissions summarised the grounds as follows:

(i) Ground 1: The absence of any intention to kill or cause serious injury and the rebuttable presumption pursuant to s. 4(2) of the Criminal Justice Act, 1964. That ground is elaborated upon as follows:

(a.) That the trial judge erred in law and in fact in failing to give a direction of no case to answer in the absence of any evidence of intent to kill or cause serious harm.

(b.) That the trial judge failed to adequately explain the rebuttable presumption pursuant to s. 4(2) of the Criminal Justice Act, 1964.

(c.) That the trial judge erred in failing, in her charge to the jury, to contextualise the rebuttal of the presumption as to intent provided for under s. 4(2) of the Criminal Justice Act, 1964 in relation to the actions of the accused.

(d.) That the trial judge erred in failing to bring to the jury's attention, when directing them on the provisions of s. 4(2) of the 1964 Act, how it operated, and that they might have regard to the evidence of Pamela McHale and Pat Heffernan, [this is in fact a reference to Pat Fennelly] and the evidence of Dr. Bolster, the pathologist, as rebutting the presumption that the accused intended the natural and probable consequences of his actions.

(ii) Ground 2: That the judge erred in law and in fact in her charge to the jury by undermining the appellant's right to silence by adversely comparing answers in interview to evidence on oath.

(iii) Ground 3: Issues relating to the treatment of the partial defence of provocation by the trial judge. This ground of appeal was not argued by counsel on behalf of the appellant before this Court. In any event, the Court is quite satisfied that the provocation issue was fully and properly dealt with by the trial judge and that no criticisms can be made in that regard.

(iv) Ground 4: The judge erred when she failed to discharge the jury, having made an ill-timed comment on key evidence at a crucial stage of the jury's deliberation. This overlaps with Ground 2 and refers to the fact that the judge when dealing with the memoranda of interviews of the appellant told the jury that they should bear in mind that the interviews cannot be tested by cross examination.

— Notwithstanding the reference to a failure to discharge the jury, there was in fact no application to discharge the jury but there was an application that the judge should recharge the jury and balance the remarks that she had made.

(v) Ground 5: The judge failed to instruct the jury in relation to the option to disagree in a timely manner.

Grounds 2 and 4

4. These grounds arise from the following comment made by the trial judge: —

> "Now, in this instance, you know that the accused man was interviewed by members of An Garda Síochána and you will have, as you have been told, those memoranda of interview with you in your jury room for your consideration and you must look at those interview notes very carefully and you consider them as part of the evidence. You should, however, bear in mind that the interviews cannot be tested by cross examination and such evidence, those being the interviews, was not given in oath after – was not given in Court after the administration of the oath. So, you must proceed to assess the interviews as part of the entire case and you decide what weight to give to the interviews. You may, as in any – as regards any other piece of evidence give considerable weight to the interviews, very little weight to the interviews or no weight at all. It's entirely a matter for you and for your consideration and for your assessment."

5. Insofar as the suggestion is made that these remarks undermine the right to silence it is noted that at a somewhat earlier stage of the charge the judge had commented,

> "Now, in this case, the accused man did not give evidence and you cannot attach any significance to that and you cannot speculate about that and you are not entitled to take that into account in any way whatsoever. There is no reason why he should give evidence because the onus is on the prosecution and remains on the prosecution at all times to prove the Director's case, that is the Director of Public Prosecutions, and it never shifts to an accused person to prove or to disprove anything."

6. The Court is quite satisfied that the remarks made did not undermine the right to silence in an impermissible manner. The judge was careful to make it clear to the jury that it was for them to decide whether to give the memos considerable weight, very little weight, or no weight. At the requisition stage, counsel for the appellant asked the judge to tell the jury that the questioning in Garda interviews is at least as rigorous and as searching as cross examination in court. That suggestion was opposed by counsel for the prosecution. The judge then dealt with the application as follows: —

> "I do not intend to recharge them either in relation to the position as to interviews, interviews are not conducted with the benefit of the oath, nor are they subject to cross examination, that is simply a matter of fact, and it is for the jury to attach whatever weight they consider to be appropriate to any item of evidence and the interviews are no different in that particular respect, and I told them that."

7. The Court does not believe that there was any obligation on the judge to recharge the jury on this topic. Quite simply, the remarks made were ones that the judge was entitled to make. Accordingly these grounds of appeal fail.

Ground 5 — The failure to advise the jury that they could disagree

8. This issue arises in the following circumstances. The judge concluded her charge and the jury was given the issue paper at 1.15 pm on 11th November, 2015 (Day 5 of the trial). The jury was sent away for the day at 3.38 pm, the judge had a commitment in the Four Courts, having deliberated by that stage for one hour and twenty four minutes. The jury had returned to court in the meantime and requested that the evidence of Pamela McHale be read to them, which was done. The jury resumed their deliberations the following morning and were sent home at 4.19 pm. Then, when the Court reconvened on the next day the judge gave them the majority charge. During the course of that day, there was a lunch break and a number of short smoking breaks. During the course of the afternoon, the judge sat in the absence of the jury at the request of defence counsel. Counsel indicated that the jury at that point had been deliberating for three hours or a little more since they were told of the option of a majority verdict, he said that he was concerned that there might be jurors prepared to change their position in order to arrive at a verdict on a Friday afternoon, and he requested the judge to tell the jury that they were allowed to disagree if they were hopelessly divided.

9. The judge indicated that she would tell the jury they could return a unanimous verdict, a majority verdict (11/1 or 10/2) or they could disagree but she was not going to go further than that because there was no indication from the jury that they were deadlocked or anything like that. She also reminded the parties that she had referred to the possibility of a disagreement during the course of her charge, something which counsel for the appellant indicated had slipped by him. The jury was brought back to court at 3.49 pm at which stage the judge addressed them as follows: —

> "Thank you, ladies and gentlemen. I just want to remind you of something. As you already know you're entitled to bring in a unanimous verdict, alternatively you're entitled to bring in a majority verdict, that is a verdict of 11/1, 10/2, it never drops below 10/2. If you are unable to reach a verdict, you're also entitled to disagree and you write the word 'disagree' on the issue paper. Now, obviously a verdict is preferable and you're entitled to take as long as you wish. There's absolutely no time constraints on you whatsoever. You can continue deliberating this evening for a period of time and then you may continue your deliberations on Monday morning. So, there's absolutely no time constraints whatsoever. So, if you can resume your deliberations please. Thank you."

10. The jury returned to court at 4.15 pm having spent a total of nine hours and thirty four minutes considering their verdict and convicted the appellant of murder by an 11/1 majority.

11. The judge might well have declined the defence request that the jury be told of the entitlement to disagree but given that she did not and in fact acceded to the defence request, the Court sees no merit in this ground of appeal whatever. Accordingly, this ground is also rejected.

Ground 1: Mens Rea for murder and the relevance of s. 4(2) of the Criminal Justice Act, 1964

12. The appellant contends that this was a case where there should have been a direction on the murder charge. The application for a direction was advanced by reference to the first limb of the *Galbraith* case, based on a suggestion that there was no evidence of an intention to kill or cause serious injury. It is said that there were three possible sources of information as to the intention of Mr. Jackson; the evidence of Ms. McHale, the evidence of Mr. Fennelly and what Mr. Jackson had to say when interviewed by the Gardaí. Ms. McHale, when cross examined, confirmed that when she gave a statement to the Gardaí, that it had included the sentence "I'm genuinely not backing up for anyone but Peter [Jackson] did not mean to stab Dave [Hamilton]" and she said that that was right. She was asked whether a little further on in her statement she had said "It was a horrible, horrible accident"? and she responded, "It was. It was a tragic accident". At an earlier stage in her evidence, she said that she had seen Peter Jackson pick something off the table, it was a knife but it could have been a biro or it could have been tin foil, he was not looking himself and it could have been anything.

13. Mr. Fennelly's evidence, it was accepted, was relevant primarily to the provocation issue. In the course of his interviews Mr. Jackson had said that he knew that what he did was wrong, asked why he had stabbed Mr. Hamilton he responded "a spur of the moment thing". Asked what he had stabbed him with, he answered "I don't know what it was, it was on the kitchen table". In

response to a question as to whether Pamela and Pat were in the house before him, he responded "I think so. I can't remember. I did keep him alive. I didn't mean to do this." At another stage he said "I didn't mean for this to happen." At other stages he said "I didn't set out to do this" and "I didn't set out to do that. Anyone who knows me will tell you that" and many similar remarks to the like effect.

14. The judge ruled on the application for a direction as follows: —

> "I'm satisfied that there is evidence for a jury's consideration in this respect. The question of intent is entirely a matter for a jury. Intent is a question of fact for a jury to assess. Intent can be inferred from a person's conduct, a person's behaviour and the surrounding circumstances. The view and the evidence of Ms. McHale as to the question of intent is a matter which forms part of the jury's deliberation and consideration on the issue of intent, as does the content of the accused man's own statements where he indicates that he did not mean it. It's simply another matter for the jury to assess.
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> The position as regards every witness in every criminal trial is that a witness's evidence or his testimony or her testimony can be rejected entirely, accepted entirely, parts can be rejected or parts can be accepted. The credibility or analysis of any witness is entirely a matter within the remit of a jury. I'll be informing the jury as to the issue of intent, the proofs required for a murder, the presumption pursuant to s. 2(2) of the 1964 Act and as to where the offences lies in respect of each and every ingredient and limb of the offence alleged. So, in those circumstances I'm satisfied that it's a matter which ought to go to the jury."

15. This Court entirely agrees with the judge that this was not a case for a direction. It was manifestly a case which required to be considered by the jury. It is argued on behalf of the appellant that once it was decided to allow the case go to the jury that it was incumbent on the judge to adequately explain and address the rebuttable presumption pursuant to s. 4(2) and that she failed to do. It was argued further that the judge, when dealing with the rebuttable presumption, did not engage with the facts of the case and did not contextualise the presumption issue. It is accepted that the judge dealt with the question of the presumption at several stages during the course of her charge but she is criticised for using the same language on each occasion and it is argued that this was merely repetitive and that returning to the issue did not provide any greater clarity or context for the jury. The Court has fully and thoroughly considered the arguments and in the light of those arguments reread the judge's charge. Having done so carefully, the Court is quite satisfied that the criticisms of the charge are unfounded. In the Court's view the charge dealt with the ingredients of the offence of murder, the mental element required for murder and the relevance of the rebuttable presumption in an impeccable manner. The phrase "textbook charge" is one that comes to mind.

16. In this case, the two persons other than the appellant who were present at the time of the killing were clearly well disposed towards the accused, Ms. McHale was a long-time friend and indeed had been in a relationship with him for a period. That their evidence would be sympathetic to the accused was hardly surprising and provided the building bricks for the defence to construct a case that this was a manslaughter and not a murder. The difficulty for the defence, though, was that if one stabs someone in the chest with a steak knife with a 10 inch blade the conclusion that at least serious injury was intended is overwhelming. Having considered the various grounds of appeal that have been raised, the Court is not persuaded that the trial was in any way unsatisfactory or that the verdict is unsafe. The Court will dismiss the appeal.