THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

63/2016

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Christopher McNamara

Appellant

JUDGMENT of the Court delivered on the 3rd day of March 2017 by

Mr. Justice Birmingham

1. On the 24th January, 2014, after a 10-day trial in the Central Criminal Court, the appellant was convicted of murder and sentenced to life imprisonment. He has appealed against that conviction.

2. The background to this case is that the appellant was charged with the murder of James Boyce on the 7th March, 2011, at 150 St. Munchin Street, St. Mary's Park, Limerick.

3. The prosecution case was that on the evening of the murder, the appellant called to the home of deceased some time around 8.00 pm. After a period, he left but returned to that location around midnight. The evidence is that the appellant and the deceased were known to each other and indeed were friendly with each other, despite the fact that there was a significant age gap between them. The deceased was a man in his 70s and did not enjoy good health, while the appellant was a young man. The appellant was a regular visitor to the home of the deceased.

4. In broad terms, the prosecution case was that this was a robbery that went wrong. The deceased was not a spender, he lived very frugally and it seems kept his savings in his home. Much of the trial was devoted to tracking the movements of the appellant on the night of the murder and in the period after the murder and to establishing that although a person of very limited means, during this period he had access to large sums in cash. The prosecution case was this was the proceeds of the robbery.

5. When arraigned, the appellant pleaded not guilty, but by the end of the trial and certainly after the closing speech on behalf of the defence, it was clear and indeed was expressly stated by defence Counsel in that speech that the only issue in the case was whether the appropriate verdict was one of murder or one of manslaughter. It is not without relevance in the context of this appeal that in the course of a debate at the requisition stage, the trial judge commented "effectively . . . your closing was really the first time that it was fully indicated in the trial that you were effectively admitting manslaughter" to which defence Counsel said "I think that's fair to say". At that stage, defence Counsel referred to what he had said in the context of an application to have the murder charge withdrawn from the jury. It does seem that while there may have been indications earlier that the case would come down to murder or manslaughter, that only really became clear during the course of the defence closing speech. This is of relevance in a situation where the only ground of appeal argued related to the judge's charge and how he dealt with requisitions. The notice of appeal had indicated that there was a second ground which was that the verdict was perverse and against the weight of the evidence, but that ground has not featured either in written or oral submissions and understandably so.

6. At trial s. 22 of the Criminal Justice Act 1984, was utilised extensively. This saw the number of prosecution reduced from 148 to 40 and of these 40, 17 were not required to come to court and statements were read to the jury by agreement. One particularly significant witness statement that was read to the jury was that of the appellant's mother who stated that her son admitted to her to having been involved in the death of Mr. Boyce. In a situation where there is now universal agreement that the only issue to be decided was whether the appropriate verdict was murder or manslaughter, it is not necessary to review much of the evidence at trial.

7. Really, the only portion of the evidence of significance to this appeal was that of the State Pathologist, Professor Marie Cassidy. It was a case where it was always apparent that her evidence would be of significance. In opening the case, Counsel for the prosecution had told the jury that it was his case that the appellant murdered Mr. Boyce using a weapon "which is believed to be a sweeping brush". The reference to a belief that the murder weapon was a sweeping brush was suggestive of some element of uncertainty about the precise mechanics by which the injuries were inflicted which resulted in death. The examination, cross-examination and re-examination of Professor Cassidy is helpfully summarised in the written submissions of the appellant. Her evidence was that she had carried out a post-mortem, but that prior to doing that, she had attended the scene at St. Munchen Street, Limerick where she had seen the body of an elderly male lying face up on the bed in the bedroom. There were obvious injuries to the neck and the face and there was dried blood around the deceased's nose and mouth.

8. The State Pathologist said that on the right side of the deceased's neck there were four almost parallel and overlapping, tramline or rectangular bruises. As well as extensive bruising and swelling of the soft tissue on the right side in the front of the neck and some patchy bruising on the left side, there were multiple injuries to the Adam's apple. There were fractures of the larynx and a fracture of the neck spine, but no injury to the spinal cord. Professor Cassidy said that depending on the object used, the injuries were caused by at least six but up to nine blows.

9. Professor Cassidy's post-mortem examination confirmed that Mr. Boyce had been the victim of an assault with an object with a long, narrow striking edge. The fatal injuries were to the neck. The brush head found in the bedroom could have caused the tramline injuries. Professor Cassidy stated that the deceased would have had to have been struck with considerable force to cause the extensive damage to the larynx and a fracture to the cervical spine. There was pressure applied across the front of the neck across the point of the Adam's apple to cause it to crack. Professor Cassidy stated "the mechanism of death due to neck trauma is complex". There were no asphyxia signs. In the course of cross-examination, Professor Cassidy accepted that because Mr. Boyce had previous coronary difficulties, his body was less equipped to cope with that kind of situation than would that of an average young healthy man. She confirmed that the carotid artery and jugular vein are both in the neck and that beside them is a very sensitive

nervous system, which if struck in a particular way can have both catastrophic and instantaneous consequences. Professor Cassidy confirmed that unlike some other injuries, the consequences of which are predictable, injuries like those suffered by Mr. Boyle are "not in the same league". Professor Cassidy stated that "compression on the neck, as opposed to a blow, could induce death in a flash if it is the carotid nervous system". Furthermore, even the tiniest of pushes which induces the closing of the airway may have consequences.

10. In re-examination, Professor Cassidy was asked by Counsel for the prosecution to deal with whether the summoning of help and the attendance of an ambulance at the scene might make a difference. Professor Cassidy said that in some cases, even when the pressure has been released, that once the process has been initiated it is difficult to reverse "once the person has begun to show evidence of cerebral hypoxia, it is very very difficult to make any real difference to them". Professor Cassidy did say though "in some cases you may be able to do something about it".

11. When the trial judge came to charge the jury, his legal directions were very concise. He dealt the issue of the ingredients of the offence of murder as follows:-

> "As you have heard Christopher McNamara is charged with the murder of James Boyce. Murder is defined by s. 4(1) of the Criminal Justice Act 1984, which states and I quote: 'where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill or cause serious injury to some person whether the person actually killed or not' and s. 4(2) that is the next section of the Act, goes on to state: 'that an accused person shall be presumed to have intended the natural and probable consequences of his conduct but that this presumption' – the Act says 'may be rebutted' and the first thing to realise here is that since the onus is on the prosecution at all times, the prosecution is obliged to prove beyond a reasonable doubt that the presumption has not been rebutted.
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> With regard to the question of intention it is important to realise yet again that intention is a matter of fact for you, the jury. You are entitled to infer intention from an accused person's behaviour from what he says and from what the circumstances of the case."

12. Having given legal directions, the judge then reviewed the evidence in the case in considerable detail. He then brought his charge to the conclusion by summarising the case made by the prosecution and the defence. He indicated that the prosecution case was that the confession made by the appellant to his mother, the forensic evidence in the case, including the finger prints on the wardrobe, the CCTV footage and what the various witnesses had told the jury about Mr. McNamara's actions over a two or three day period, as well as the pathologist evidence, that all this evidence, supported by lies told by the accused to the police led to one conclusion, namely that Mr. McNamara was guilty of the murder of the deceased man.

13. The judge told the jury that the defence contended the position was that the confession made by Mr. McNamara to his mother amounted to manslaughter, but that the circumstances of the case however distasteful they might be regarded, were not such as to enable a jury to go any further than that. The judge told the jury that the defence say that the specific intent required to make out a murder conviction has not been established by the prosecution and that while Mr. McNamara was guilty of the very serious crime of manslaughter, he was not guilty of murder.

14. The jury was told that in support of those submissions, counsel for the defence pointed out the weaknesses and limitations of the statement from the mother of the accused and that they were being asked by the defence to consider those limitations in light of the various possible causes of death which Prof. Cassidy had agreed arose under cross examination. The jury was also told that the defence was submitting to them that because of what they said was a lack of information in the case, that a jury could not be satisfied beyond a reasonable doubt that Christopher McNamara, at the relevant time had the intention to kill or cause serious injury to Mr. Boyce.

15. Following the charge both sides had requisitions. Counsel for the prosecution said that when the court had moved to the stage in the charge of summarising counsels' arguments that there was an outline and summary of the defence arguments on the murder versus manslaughter issue, but that that was not the same in relation to the prosecution perspective. Prosecution counsel reminded the judge of matters that had featured in the closing prosecution speech, the fact that the victim was a defenceless older man, the level of force used in the admitted killing, the robbery context, the absence of any evidence of help being summoned, notwithstanding that there was plenty of opportunity for that and the absence of any indication of a sudden mistake with "red mist" of loss of control or any immediate indications of regret. Counsel indicated that he wondered whether it might be useful to the jury in assessing the only issue that they now had to address, mens rea, if they were given further guidance on this discrete issue.

16. Defence counsel began his requisitions by saying that he agreed that the judge's charge was very precise and very careful and yet packed a lot in and certainly got the flavour of the case. He explained that he had four requisitions. The first of those was that while the judge had pointed out to the jury that the accused person was entitled to the presumption of innocence that no illustration was given as to what the presumption of innocence entailed. He referred to the fact that the formula sometimes used is to refer to how one would instinctively react if the allegation was being made in respect of somebody known to the juror so that the immediate reaction of that juror would be "that couldn't be true".

17. The second issue raised related to the prosecution reliance on the rebuttable presumption that one intends the natural and probable consequence of one's actions. Counsel said that had to be seen in the context of the acceptance by Prof. Cassidy that plenty of people had suffered the type of injury in question without any side effects at all. Counsel said that the jury should be told that if they accepted Prof. Cassidy's observations then that was something that had to be taken into account in deciding whether the injuries were the natural and probable consequences.

18. The third requisition related to the summary of Prof. Cassidy's evidence. Counsel referred to the fact that the pathologist when dealing with injuries towards the back of the tongue had commented that those injuries were more consistent with crushing using the phrase either "more likely" or "most likely" and the judge was asked to remind the jury that "most likely" was considerably short of beyond a reasonable doubt.

19. The final point raised by counsel was that he complained that the defence case was put in generalities. He said that a central part of the defence case was that there was not much evidence about the circumstances of the killing itself and in that circumstance the case was made to the jury that if they were left in a position where they had insufficient information to know what happened or if they were left requiring more information in order to decide what the intention was at the time the injury was inflicted that in that situation their obligation was to acquit of murder.

20. After further exchanges between counsel, the judge indicated that he was going to rise for a moment to consider the matter and

then returned to tell counsel what he was proposing to say to the jury. He indicated that he proposed to say that the summary he had given of the prosecution and defence positions was a brief one and he proposed to rectify that by saying that in urging the jury to bring in a verdict of murder, the prosecution in closing relied on the extent of the injuries the deceased received, that he was a defenceless man, that no help was summoned for him, despite an ambulance being in the area and that his death occurred in the course of a robbery. Whereas the defence, he said, in arguing a manslaughter verdict urged the jury to take into account Prof. Cassidy's evidence and the uncertainties raised by the various possible causes of death and in particular that the jury should consider Prof. Cassidy's evidence when considering whether or not the prosecution had discharged the onus of proving that the presumption that the person intended the natural and probable consequences of his actions had not been rebutted.

21. The judge said that he was proposing to say that that depends on the view the jury takes as to what the actions of the accused in fact were. He was proposing to say that the defence also said that if the absence of information concerning the actual circumstances of the death left the jury in doubt as to what the intent of the accused man was then they should acquit him of murder and that finally in approaching the question of intent, that they should take into account all of the circumstances that they thought relevant in assessing whether or not Christopher McNamara had the requisite intent to kill or cause serious injury. Then further exchanges followed between counsel with an element of manoeuvring as each sought to have aspects of the evidence mentioned once more. Eventually the jury was brought back to court and the judge addressed them as follows:-

> "The first thing that I want to say to you was that my summary at the very end of the prosecution and defence cases was a brief one and perhaps too brief and I was just going to expand a little bit on that here. In urging you to bring a verdict of murder, the prosecution in closing also relied on the extent of the injuries the deceased person received, the fact that he was a defenceless man, that no help was summoned for him, despite an ambulance being in the area and that his death occurred in the course of a robbery. The defence, in urging manslaughter, urged you to take into account Prof. Cassidy's evidence and the uncertainty raised by the various possible causes of death and that it would also – that you take Prof. Cassidy's evidence into account when considering whether or not the prosecution had discharged the onus of proving that the presumption that a person intends the natural and probable consequences of their actions has not been rebutted and that of course depends on the view you take as to what those actions in fact were. And again in the context of all of this I would simply remind you that again in cross examination Prof. Cassidy did say to you that certain people can have their necks compressed or struck and have not side effects at all. The defence also said that if the absence of information concerning the actual circumstances of the death of the deceased man, James Boyce, left you in doubt as to what the intent of the accused was at the time that you should acquit him of murder. And finally in approaching this question of intent I should say to you that you take all the circumstances of the case into account that you think relevant in assessing whether or not you think Christopher McCarthy (sic) had an intention to kill or to cause serious injury at the relevant time."

22. The defence took the view that the judge's re-charge did not adequately address their concerns and indeed expressed the view that the reference to the failure to summon help worsened their position. There was an application for the discharge of the jury but this was rejected.

The Appeal

23. Before this Court, the focus of criticism has been on the contention that there was a failure on the part of the trial judge to clarify the distinction between murder and manslaughter. The defence say that this was fundamental unsatisfactory when the only issue in the case was whether the prosecution had established the requisite mens rea and had done so beyond reasonable doubt. The defence draw attention to the fact and indeed emphasise that while manslaughter was one of the verdicts available to the jury, and that was of course the verdict that was being sought, the judge never defined manslaughter and never explained the ingredients of the offence.

Comment

24. In the court's view the criticisms that have been formulated have to be seen in the context of the charge as a whole and indeed the run of the trial as a whole. It is true that the judge dealt with the legal issues quite briefly, but that was in a situation where the trial had not given rise to legal issues of any great complexity. The evidence was reviewed very comprehensively, and the defence can have no complaint about how that was done, as indeed they can have no real complaint about the various rulings made during the course of the trial.

25. In relation to the specific criticism which is really at the heart of this appeal, that the treatment of the offence of manslaughter was inadequate, it must be appreciated that this was a murder trial where everyone was agreed that there were only two possible verdicts murder or manslaughter. Everyone agreed that there had been an unlawful killing for which the appellant bore responsibility. If the prosecution could not prove that the accused had acted with the requisite intention for murder, then by default the appropriate verdict was manslaughter. This is not a case where the judge is criticised or could be criticised for what he said. His definition of murder, while brief, was entirely accurate, but rather is criticised for what he didn't say, for his failure to provide a definition of manslaughter.

26. However, by having the jury focus on the ingredients of the offence of murder, the judge properly equipped the jury to decide whether to return the alternative verdict of manslaughter. If not satisfied that the murder charge had been made out, then the alternative verdict that was available was manslaughter. That was a situation on which all were agreed. In these circumstances the court is not persuaded by the criticisms that have been advanced and takes the view that the charge was in the circumstances of the case satisfactory. The court would simply add that this was always a strong prosecution case. The case was defended with skill and determination, but it must be said that the facts that were established in evidence left the defence very little to work with. In all the circumstances the court is not persuaded that the verdict was unsafe or that the trial was other than satisfactory. In the circumstances the court will dismiss the appeal.