



THE COURT OF APPEAL

[266/17]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

ALAN MCNAMARA

APPELLANT

JUDGMENT of the Court delivered on the 28th day of May 2019 by Birmingham P.

1. On 31st July 2018, the appellant was convicted by a unanimous jury in the Central Criminal Court of the offence of murder and subsequently received the mandatory life sentence. Mr. McNamara now appeals that conviction.

2. Two issues are raised in the appeal. First, the appellant argues that the Judge erred in refusing to allow the jury to consider the partial defence of provocation. Second, it is said that the Judge erred in failing to discharge the jury when an issue arose about the appropriateness of an individual juror serving. To put these issues in context, it is necessary to say something about the background to the case.

The Facts

3. The appellant was convicted of the murder of one Andrew O'Donoghue on 20th June 2015. He lived in Murroe, County Limerick and was a member of a motorcycle club called 'The Caballeros Motorcycle Club'. Another motorcycle club, 'The Road Tramps Motorcycle Club', was based in Murroe and had its clubhouse there. The appellant's home was situated approximately one kilometre from the motorcycle clubhouse. Indeed, the appellant had, in the past, been a member of the Road Tramps Club.

4. On the evening of Friday 19th June 2015, the appellant and his wife went for a drink in a public house in the village of Doon. As they exited the licensed premises, the appellant and his wife were set upon by three individuals who were members of the Road Tramps Motorcycle Club. During the incident, the appellant's jacket containing the badge of the Caballeros Motorcycle Club (referred to as his "colours") was taken from him. It emerged during the trial that the taking of someone's jacket in this manner was considered a symbolic attack on their honour and that of the club they belong to. Following the events in Doon, the appellant drove back to his home and is said to have been in a state of shock. Present at the residence were the appellant's daughter and her boyfriend, as well as his young son, aged nine years old, who at one stage was playing outside the house. Not long after his return, a car pulled up outside his home. In it were a number of members of the Road Tramps Motorcycle Club and who were carrying had weapons, including a firearm. They issued threats to the appellant's family to the effect of "we're going to kill ye and burn your house down". Counsel on behalf of the appellant placed emphasis on the group's choice of pronoun and suggested that this indicates the threat to have been one emanating from the Road Tramps Motorcycle Club and not merely a threat being issued by the individuals in the car.

5. The appellant had a stressful evening, he slept poorly and his wife provided him with Valium. On the following day, the appellant's stepson: Mr. Robert Cusack who was also a member of the Caballeros, and was driving with two others in a motorcar. They encountered another motorist; a member of the Road Tramps, and a high-speed pursuit ensued. The car being pursued headed in the direction of the Road Tramps' clubhouse. There was phone contact between the appellant and his stepson. Acting on the information he had received, the appellant then drove in the direction of the Road Tramps Club taking with him a loaded sawn-off shotgun. On arrival, he saw two men at the gate of the club premises, one holding a bar or pole, which, according to the appellant, he believed to be a firearm. The appellant stopped the Jeep that he was driving and discharged a round accidentally as he attempted to get out of his vehicle. It is suggested that this accidental discharge is indicative of his stressed state. Having exited the vehicle, the appellant ran towards the gate of the Road Tramps Motorcycle Club and fired two rounds, hitting the deceased, Mr. Andrew O'Donoghue, at close range. Having discharged the single shot which killed Mr. O'Donoghue, the appellant then attempted to reload the weapon. He is said to have had some difficulties in doing so which allowed members of the Road Tramps Motorcycle Club to close the gate and cut off the appellant's access to the clubhouse. The appellant subsequently fled the scene in his vehicle. Thereafter Mr. O'Donoghue was brought to Limerick's Regional Hospital and died later that day.

Failure to Discharge the Jury

6. While this appeal has seen greater focus placed on the issue relating to the partial defence of provocation, the question as to the juror arose first in time at trial, and for that reason it is convenient to deal with that at this point.

7. This issue arises in circumstances where the appellant was arraigned before the Central Criminal Court on 10th July 2017. The appellant's trial began on 13th July 2017. The jury selected a foreman and the appellant was given in charge to the jury. The prosecution opened the case, offering an outline of the facts, including reference to the Road Tramps Club. A number of witnesses gave evidence, including Mr. Seamus Duggan whose testimony was significant in the context of the case. Mr. Duggan was a member of the Road Tramps Motorcycle Club and was one of those involved in the incident outside the public house in Doon. Before he had concluded his direct evidence, the jury went for their lunch.

8. When the trial resumed, the Foreman of the jury intervened to say that he had a matter to bring to the Court's attention concerning one of the jurors. The trial Judge then indicated that a note had been handed to him by the jury Foreman stating that one of the jurors knew a former member of the Road Tramps Motorcycle Club. This former member had married an old friend of the juror. The said juror was invited by the Judge to identify himself and, having done so, was asked to separate himself from the jury while the matter was considered. Counsel for the appellant, supported by counsel for the then co-accused; Mr. Robert Cusack, requested that the juror would play no role in the trial and that the jury would then be discharged with the trial starting again before a differently constituted jury. It should be noted that this revelation and the subsequent application both came mid-way through Day 1 of the trial.

9. The Director's position was that if the Court felt that there was a reasonable possibility that the accused would not receive a fair trial because of the continued involvement of the particular juror then the case should proceed with a jury of eleven people. Prosecution counsel submitted that there was no real risk of contamination because the jury had been together only for a very short period of time once it was disclosed that it was a case which involved members of the Road Tramps Motorcycle Club.

10. The response of the trial Judge was to interrogate the juror as to whether there was further discussion with other members of the jury as to his connection with the motorcycle club. The Judge then asked individual jurors to indicate, by raising a hand, whether the information they had received, or now knew about the juror, had any potential to influence their views of the case or the evidence in the case. The jury then withdrew once again and the Judge provided counsel with a further opportunity to make observations. He then rose for a few minutes and returned. The Judge returned to deliver what was, in effect, a judgment on the issue, referring to the concept of objective bias and referring to cases such as DPP v. Tobin [2001] 3 IR 469 and The People (Attorney General) v. Singer [1975] IR 408. Having quoted extensively from Tobin, the Judge said that by reference to the principles set out in that judgment, he regarded it as appropriate to exclude the juror in question. He felt the facts of the present case to be a considerable distance removed from those of Tobin. He referred to what he described as "the minimal influence of any of the information conveyed by the juror in the course of properly bringing [the matter] to the attention of the Court" and went on to hold that it did not, in his view, compromise or potentially compromise the ability of the accused to have a fair trial.

11. In the Court's view, the juror in question behaved very properly and very responsibly in bringing his situation to the attention of the Court below. His links to the Road Tramps Motorcycle Club were very tenuous; an old friend having married a former member of the club. The situation having emerged, it was addressed carefully and conscientiously by the trial Judge. The Judge's decision to excuse the juror in question was a reasonable one, but so, too, in the Court's view, was the Judge's decision that it was not necessary to discharge the jury and that the trial could proceed with eleven jurors. In these circumstances, the Court is not prepared to uphold this ground of appeal.

Provocation

12. The Court turns its attention, therefore, to the issue in relation to provocation which was the main focus of the appeal.

13. While the issue of provocation may have been central to the appeal, it cannot be said that it received such focus at trial. When the prosecution closed its case, senior counsel for the defence said that it was his submission that there were two special matters to be left to the jury, the first being self-defence and the second being the issue of provocation. He then addressed the Court in relation to self-defence at some length. Turning to the second matter, it was argued that undoubtedly, there was provocation when a man is attacked and his wife is attacked outside a public house and his clothing stolen. Further, it was submitted that there was a clear case for provocation when members of his family were assaulted and threatened with firing guns by people who belong to the same club as had stolen his clothing. The defence's position was that they were not maintaining that there was an intention to shoot or cause harm on the part of the individuals who showed up at Mr. McNamara's house. Instead there was what amounted to provocation and it was for the prosecution to disprove that partial defence. Again, the response for the prosecution was directed in the first instance towards the self-defence issue. Counsel then said:

"[i]nsofar as provocation is concerned, Judge, we have a somewhat different position. In our view, there isn't an evidential basis for allowing that defence to go to the jury and there are two principal reasons for saying that. One is that the events of the previous night, the assault and the visit by the maroon car to the home of Mr. McNamara, seem to have concluded on the evidence by about 9pm. The shooting the following day is approximately 3pm. So there is a lapse of time, some 16 hours involved there. It's central to the defence of provocation that there must be a sudden and complete loss of self-control and Mr. Justice Barrington refers, in the case of [DPP v Kelly (Keith)] [2000] 2 IR 1] to the killing having occurred before there was time for passion to cool. Manifestly that could not be, and that's not something which is dependent upon the jury's view of the evidence because the interval of 16 hours is not in dispute."

He then quoted from an extract of Barrington J's decision in Kelly as outlined in 'The Judge's Charge in Criminal Trials':

"[i]t will not be sufficient for the defence to show merely that the accused lost his temper or merely that he was easily provoked or merely that he was drunk though all of these may be factors in the situation. The loss of self-control must be total and the reaction must come suddenly and before there has been time for passion to cool. The reaction cannot be tinged by calculation and it must be genuine in the sense that the accused did not deliberately set up the situation which he now invokes as provocation".

Counsel later quoted Barrington J. as saying:

"[t]o justify the plea of provocation, there must be a sudden, unforeseen onset of passion which, for the moment, totally deprives the accused of his self-control."

Counsel then continued:

"[t]hat simply is not there on the evidence. There is also this matter to consider that traditionally at least provocation has to emanate from the victim and there is no evidence in this case that Mr. O'Donoghue was involved either in the assault the previous evening or the visit to Mr. McNamara's home. Now, there is perhaps a little bit more flexibility about that requirement in more recent jurisprudence to accommodate a situation where A is provoked by B and as a result intends to kill B but mistakenly kills C but that seems to be as far as it goes."

Counsel said that there was a case of *DPP v. Doyle* in the Court of Criminal Appeal in 2002 which dealt with the situation, but that there seemed to be no question of any form of mistaken identity involved in this case.

14. By way of rebuttal, counsel on behalf of the defence addressed only the question of self-defence. In rebuttal, counsel for the prosecution did not address the question of provocation further.

15. The trial Judge ruled on the matter as follows:

"[i]n relation to provocation, it seems to me that the essential elements of what is regarded as the defence of provocation, the sudden unforeseen loss of possession or self-control, is a central feature of the defence in the context of the raising of a defence. I do not see that evidence at all in the case, even on the material set out, there does not seem to be an act of provocation directed towards the accused at the time and I do not regard the facts of the preceding evening as sufficiently proximate in time to constitute a basis upon which the issue of provocation could go to the jury. It's outside the ambit of the case law which exists in relation to provocation and it seems to me, given that these events occurred at approximately 2.40 in the afternoon, that the matters which had concluded sometime between 9pm and 10pm the previous evening, could not be a sufficient basis upon which to advance a provocation defence in relation to the accused's attendance at the premises and the discharge of a firearm, and particularly having regard to the fact that his encounter with the deceased does not appear to have any element of, or indeed either of the other two present. It does not appear to have any of the elements of provocation that have been referred to in the case law sufficient to justify the Court in leaving it to the jury to consider it as a defence. So I'll refuse that application."

16. In contending that the Judge fell into error, counsel on behalf of the appellant says that too much stress can be laid on the requirement for suddenness and immediacy. He points out that the partial defence has been availed of in cases of domestic abuse, by people such as battered wives, where the situation has been building up over many, many years. It was submitted that the Judge fell into the error of assessing the strength of the evidence on the issue, that his only role was to assess whether there was any evidence of provocation, and that there clearly was in this case. In doing so, the Judge trespassed on what should have been the preserve of the jury.

Discussion

17. The authorities are clear that the threshold for having the partial defence of provocation be considered by the jury is not a high one. However, low as the threshold is, in the Court's view, it has not been reached, or indeed, approached in the present case. Undoubtedly, what happened in Doon and at Mr. McNamara's home the previous evening was quite unacceptable, but it cannot provide any justification for what occurred the following afternoon when a loaded sawn-off shotgun was brought to the Road Tramps Clubhouse and then discharged at close range. While Mr. McNamara's actions were arguably fuelled by emotions running high, it does not follow that he was provoked into doing so in a legal sense and thereby entitled to rely on the defence of provocation in the absence of a sudden response.

18. Permitting the jury to consider the partial defence of provocation would have represented a dramatic expansion of the traditional law on provocation. Such an expansion would be quite unjustified. The Court is in no doubt that the trial Judge was correct in refusing to let the issue of provocation be considered. Accordingly, this ground of appeal is not upheld either.

19. In summary, all grounds of appeal are rejected and the Court will dismiss the appeal.