THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hedigan J.

Record No: 100/2016

THE PEOPLE AT THE SUIT OF

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

ZOLTAN ALMASI

Appellant

JUDGMENT of the Court delivered on 26th July 2018 by Mr Justice Edwards.

Introduction
1. The appellant in this case was charged with a single count of the murder of Mr Joseph Dunne ("the deceased") on the 16th of May 2014 at Harbour View, Naas, Co. Kildare. On the 24th of February 2016 he was arraigned and pleaded not guilty. Following a 12 day trial he was convicted on the 10th of March 2016 by a majority jury verdict.

2. On the 16th of March 2016, the appellant was sentenced to the mandatory penalty of life imprisonment pursuant to s. 2 of the Criminal Justice Act, 1990.

3. The appellant now appeals against his conviction.

Summary of the evidence before the jury
4. On the 16th of May 2014, the deceased had been consuming alcohol in a place known as the Harbour which was on the canal and in the proximity of the main street in Naas, Co. Kildare. At approximately 10.30 p.m., the deceased, together with at least four other persons, made their way back from the canal to take the bus to Kildare town. It was established in evidence that the deceased was quite drunk and in a bad mood and that as the group proceeded, the deceased confronted another man who he did not know, with a view to provoking him into some sort of violent altercation. He was persuaded by his friend to desist from this and was guided away. The group then passed by the appellant's van which was parked outside his residence. As he was passing the appellant's van, the deceased apparently struck the appellant's van in some fashion and then continued on. There was a conflict on the evidence as to how many times the appellant had struck the van. However, it was clearly established that the appellant's van was interfered with.

5. The appellant, who worked as a courier driver, had arrived home from work a short time earlier and had just finished showering when he heard the noise of his van being struck. He picked up a baseball bat which was sitting at the doorway of his house and pursued those he believed had been involved in striking his van. The appellant told the Gardaí at interview that this baseball bat had not been purchased by him but had been in the house when he had rented it and moved in.

6. The group, including the deceased, became aware of the appellant pursuing them and ran away, scattering in a number of directions. The appellant pursued the deceased. CCTV footage was available and used at the trial which showed the deceased running while being pursued by the appellant who was holding the baseball bat in his right hand.

7. The deceased ran past a restaurant known as the Vie De Châteaux. A number of witnesses to this chase gave evidence at the trial. One such witness was Maria Flood who at the time having emerged from the restaurant with her husband, had returned to their car which was parked nearby and had just sat into the vehicle when she saw people in front of her and heard shouting. She described seeing a young fellow in a blue and white tracksuit top, a girl in a white hoodie top and another girl. She gave evidence that she then heard a shout of *"what are you doing with the baseball bat?"* and a reply coming *"you broke my car"*. The young fellow, who was doing the shouting, was being pulled back by one of the girls. She was able to give a description of the person who had replied *"you broke my car"* and agreed in cross-examination that she had said in her statement that he had a baseball but that *"he was holding it down"*. She agreed she did not see him swinging it. She said that shortly after the exchange she had witnessed that *"it all dispersed"*.

8. The trial court also heard from Donal Dockery, who had also dined at the Vie De Châteaux restaurant, accompanied by his wife and some friends. Towards the end of his meal he had gone outside for a cigarette and a coffee. His evidence was that he *"could see some people on the opposite side of the road, opposite the patio where we were sitting, one either side of a vehicle…. And they were arguing."* He said: *"Both men were agitated"* and that *"[o]ne of them was carrying a baseball bat"*. Mr Dockery had also heard one man saying *"[s]top messing with my car"* and the person opposite saying *"[d]rop the baseball bat and come over here"*. He gave evidence that *"they were both aggressive towards each other"*, and that the man with the baseball bat was concerned about his car. He heard him say that *"[t]his has happened before"* and that *"I've had enough"*. Mr Dockery stated that he then went over and said to them *"look, stop this, there's no need for this"* but that they ignored him and were shouting loudly at each other. Mr Dockery's evidence was then that, a short time later, as he and his party were leaving the curtilage of the restaurant, *"the guy with the baseball bat had gone to the left, down towards the canal, to the harbour. And we looked up towards the right and there was a guy lying just right at the corner of the adjacent building, lying on the ground. So we went over to him and he was alive when we went there, because I grabbed his hand and we called 999, because we could see he was bleeding."*

9. A number of witnesses who had been with the deceased, gave evidence as to the striking of the deceased by the appellant. There

was a conflict on the evidence as to whether the appellant had struck the victim more than once. The evidence of Mickey McDonagh, Gavin Breen and Zoe Drewitt was that the appellant hit the deceased with the bat on one occasion. However, Alannah Piercy gave evidence that the appellant hit him once in the head, and then *"Jo Jo* [i.e., the deceased] *hit to the ground and your man hit him again to the head"*. Under cross-examination Ms Piercy initially accepted that she had stated to the Gardaí that *"He only hit JoJo once"*.. however, she then stuck to her assertion given in evidence that the deceased had been struck twice. She then purported to blame the Gardaí for mis-recording what she had said.

10. The jury also heard evidence from Dr Michael Curtis, Deputy State Pathologist, who testified that the injuries suffered to the deceased's head were consistent with the interpretation that he had been struck once with the baseball bat, and that the deceased had been struck by the tip of the descending baseball bat, striking at the rear of his head, causing him to fall to the ground. Dr Curtis gave very detailed evidence of his examination of the deceased and of various small injuries to the head and neck. He also gave evidence of abrasions and other injuries to the hands and other limbs of the deceased. He said that these were in keeping with what he described as *"a collapse, or fall or terminal collapse"*. His evidence was also that the deceased had been struck by a blow to the upper occipital region of the back of the head, centrally and this had resulted in a comminuted depressed skull fracture. There was a left sided haematoma amounting to 100grams of blood clot which had caused pressure effects on the brain with brain swelling and left sided tentorium herniation. In layman's language this meant the brain was displaced and pushed against a rigid membrane, namely the tentorium membrane, leaving a groove on the surface of the brain. In addition, there was a subarachnoid haemorrhage into the brainstem area. Any bleeding in this area is irritant to the vital centres controlling basic functions such as heartbeat, blood pressure and respiration and causes rapid death.

11. There were other marks of injury on the body including abrasions on the face and head which were possibly indicative of the deceased's involvement in a scuffle. Dr Curtis also stated that a toxicology report indicated that the deceased had a blood alcohol level of 231 mg. per cent, a urine alcohol level of 362 mg. per cent and that no drugs were detected.

12. Dr Curtis gave the cause of death as blunt force trauma to the head. He offered the opinion that the injury was infinitely more likely to have been caused by a blow with a baseball bat rather than a fall. He was asked to deal with evidence that the baseball bat did not reveal any traces of the deceased's blood or DNA and he offered the opinion that the first blow with an implement usually does not lead to a contamination with blood or tissue. On cross-examination he confirmed that the toxicology confirmed a high level of alcohol. He also confirmed that the injury was consistent with being struck by the very tip of the baseball bat.

13. Garda Stephen Flaherty told the jury that he was on patrol duty on the night in question along with his colleague Garda David Maher. Having received a call at approximately 10.20pm on the evening in question, Garda Flaherty was one of the Garda who arrived at the scene. He gave evidence of coming to the scene and speaking to the appellant. He then related that he cautioned him and asked him again if he had witnessed anything and he noted the replies which were:

> *"Coming home, I parked my car behind garage. I went into house for sugar. This was after work; I finished at 21:30 in TNT Dublin. I heard bang, bang, bang. Four guys, one girl were outside my house and they were damaging my car. I came out with baseball bat and they started running. I ran towards restaurant after one guy and two had been quick and ran. I ran past restaurant. I followed him. He fell to the floor and I turned for the others in the car. I understand I have been cautioned."*

The appellant then signed these notes.

14. The appellant was arrested for the offence of assault causing serious harm pursuant to. s. 4 of the Non-Fatal Offences Against the Person Act 1997. He was brought to Naas Garda Station where he was detained under s. 4 of the Criminal Justice Act 1984. He was interviewed at length while in detention, and made a number of admissions. He admitted that he had given chase to a group of youths who had been interfering with his vehicle and that on running out the door he had picked up and carried with him a baseball bat. He was adamant that he had not swung the baseball bat at the deceased, nor had he struck the deceased. When shown CCTV footage in one of the interviews, he accepted that it showed that he had swung the bat in the direction of the deceased, but claimed to have no recollection of doing so. The following exchange then ensued:

> *"Q. Do you think it's possible that the very tip of the bat hit Joe's head?*
>
> *A. I don't know.*
>
> *Q. Do you think it's possible?*
>
> *A. I don't know, I ddn't feel it hitting him. It's possible but I didn't feel I reached him.*
>
> *Q. Do you think you caused this man to die?*
>
> *A. Definitely it wasn't deliberately.*
>
> *Q. Was it an accident?*
>
> *A. Most likely it was an accident.*
>
> *Q. Do you accept that you swinging this bat caused this man to die?*
>
> *A. It could be possible but I didn't realise I reached him or hit him."*

15. The appellant denied at all stages during interview that he had been in a rage, but conceded that he had been angry when he saw his vehicle being interfered with. However, he maintained that he had not given chase out of anger. He maintained that he had exhibited aggression when giving chase, not because he was angry but because *"it's my opinion that if I would talk to them nicely or politely they could attack me"*. He added *"I wasn't angry, the point of shouting and running was to scare them"*, and further that *"[m]y only option was to chase them away. I couldn't do anything else and I had to act aggressively to that male behind me because I saw he wasn't afraid of me or the bat in my hand."*

16. On the 18th of May 2014, he was charged with assault causing harm pursuant to s.3 of the Non-Fatal Offences Against the Person Act 1997. On the 20th of August 2014, the charge was amended on the directions of the DPP to one of murder. On that date, the appellant was charged with murder, having been cautioned in the usual manner. As indicated at the outset of this judgment, the

appellant was ultimately convicted of murder and is appealing against this conviction.

Grounds of Appeal
17. The appellant relies on five grounds as set out in their amended Notice of Appeal, dated the 8th of December 2017. They are as follows:

> (i). The learned trial Judge erred in directing the redaction of memoranda of interview to exclude questions put by Gardaí in interview;
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> (ii). The learned trial Judge erred in directing that portions of the interview of the applicant were irrelevant and could not be put in evidence before the jury;
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> (iii). The learned trial Judge erred in law and in failing to permit the partial defence of provocation to be considered by the jury;
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> (iv). The learned trial Judge erred by failing to inform the jury that they could fail to agree on a verdict after the jury had been deliberating for over two days;
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> (v). The learned trial Judge erred in refusing to allow a witness, Michaela Walker, to give certain evidence relating to the demeanour of the deceased.

Grounds (i) and (ii).
18. It is convenient to deal with these together. The background to these complaints is to be found on day 6 of the trial when issues were canvassed with the court concerning what documentary exhibits should be permitted to go to the jury. It was explained to the trial judge that both sides had analysed the videos of the interviews with the appellant and the memoranda of those interviews and it was clear that the written records did not accurately reflect what was on the video record. Significant passages were omitted. A complete and accurate record had been agreed between the parties. However, counsel for the respondent was applying to have certain segments of the full memoranda of interviews, and the related video, ruled inadmissible and that therefore only a redacted version of the written memoranda should be permitted to go to the jury.

19. The basis for the objection was that the impugned material comprised certain statements made, and questions asked, by the interviewing Gardaí, particularly during the third and fifth interviews in time, that were premised upon, or asserted, matters of disputed fact (e.g., that the appellant had not intended to kill the deceased, and that the killing had been an accident) that were not conceded by the prosecution and which went to the ultimate issue.

20. Counsel for the respondent highlighted some of these statements to the trial judge. For instance, the trial judge was referred to page 7 of interview 3, where the following exchange took place:

> *[INTERVIEWING GARDA] Q: " We know you are not telling the truth. A young man is dead. I'm not saying it to be bad. Everything happened so fast. It could happen to any of us. I feel sorry for the position you're in. What happened happened so fast, it could happen to anyone. I feel sorry for you for the position you're in. We want you to tell us the truth. I know you're not a bad man. You have to think. You need for you to tell us the truth. This happened so fast. You didn't mean to kill that man. If you don't tell us the truth all it shows is that you have a bad heart towards what happened. It will look better. Tell us what happened. We know why you arc lying. We understand that. I think you are lying because your life got crazy. For you future (sic) this is a bad situation. This goes to Dublin, in Dublin they read it and go: he lied all the way. Do you understand what a callous heart is? The person who reads this will never meet you and they will read it and think this man does not care, he has no compassion. This is your opportunity to tell the person reading it how you feel about what happened last night, I can see you want to tell us"*
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> *[APPELLANT] A: "A young person is a death, is a tragedy but I didn't kill him."*

21. Later on in the same interview, the following further exchanges occurred:

> *[INTERVIEWER] Q: "We understand you are scared – you should show you care. You meant to scare him, you swung, you didn't mean to hit but you did. Think. You ran after him and hit him. Think of that man's family."*
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> *[APPELLANT] A: "I'm continuously thinking about it"*
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> *[INTERVIEWER] Q: "Truth will help this family. Please think, truth is important, it shows the person in Dublin everything went wrong and you didn't mean what happened."*
>
> *[APPELLANT] Q: "I'm sorry about everything that happened but I didn't hit him."*
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> *[INTERVIEWER] Q: "People will understand what happened. It's a tragic accident. Last night's like a car crash. I understand you didn't run out to hit that man. It won't go away, there is a man dead. If it goes to court how is it going to look that you said no all the time. Tell the truth. Are you aware of where the cameras are at the Harbour?"*
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> *[APPELLANT] A: "You will not see me hit him."*
>
> *[INTERVIEWER] Q: "Did you swing at him?*
>
> *[APPELLANT] A: "I wouldn't swing the bat either."*

22. The respondent's application was to have these statements, and similar type statements of which there were some others, on the part of the interviewer ruled inadmissible, and that the record to go to the jury should be redacted leaving only the appellant's responses to the jury. This application was resisted by counsel for the appellant, for obvious and understandable reasons. It was argued on the appellant's behalf that providing the answers without the full questions that had elicited the answers would deprive the jury of essential contextual information. It was submitted that an accused was entitled to have the full un-redacted memoranda of his/her interviews placed before the jury.

23. The trial judge delivered the following ruling: -

> *"What's in issue really are the matters contained in interviews three and in interviews five and what I'm told is that the memo is the ordinary type and then the matters that are in bold have been added and it's only some of those matters that are in dispute between the prosecution and the defence. And it does seem to me, without having to go through them individually, that any place in those documents three and five where comments are made that they should not be allowed to go to the jury, that's comments by gardaí, then they should not be allowed go to the jury. Now, I hope it's not necessary for me to go through them and excise all of that and I hope that can be agreed but I'm ruling that where there are comments by gardaí as to what they think or what they don't think or indeed the man in Dublin that those matters should not be allowed go to the jury because I think the rules of evidence do have to be strictly observed."*

24. In arguendo before us on this appeal, counsel for the appellant submitted that the trial judge's decision to accede to the application to redact the statements or comments of the interviewing Gardaí, was unsound and unfair to the appellant. It was again submitted that the appellant was entitled to have the jury consider all that occurred in his interviews and to view his admissions in their proper context. Counsel for the appellant argued that the whole purpose of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations, 1997, is that, where there is a dispute as to the accuracy of the written memorandum of interview, the recorded version is to be relied upon. The regulations themselves require the recording of all statements and utterances.

25. In response to the respondent's argument at trial that the comments of the Gardaí represented Garda "opinion evidence" on the "ultimate issue", counsel for the appellant argues that such a characterisation is a misrepresentation of the reality as these remarks immediately precede and inspire answers on which the prosecution sought to rely. Consequently, the appellant submits that the jury were deprived of the context in which the answers were given and presented with an inaccurate picture to the detriment of the accused. Counsel for the appellant also submits that the trial judge did not give a sufficiently reasoned explanation as to why she was accepting the submission of the respondent and not that of the appellant in respect of this application.

26. In support of his argument, counsel for the appellant drew the Court's attention to certain remarks of the late Hardiman J in *The People (Director of Public Prosecutions) v McCowan* [2003] 4 IR 349, where he stated (at 354) that: -

> *"Presumably [the Gardaí] ask a question about the offence because they attach some importance to it and if they deem it in their wisdom necessary to ask the same question several times, there is no reason why it should not be recorded on each occasion. Only thus will a true flavour of the interview be given."*

27. Counsel for the appellant also relies on the decision of the Supreme Court in *The People (Director of Public Prosecutions) v Diver* [2005] 1 IR 270, where it was stated, in the context of an issue concerning a general failure to record denials, that there was an obligation on Gardaí to record interviews in as complete a fashion as possible, and that:

> *"It must be a fair record of what was said and it is important to provide sufficient context to allow for an evaluation of what is said, especially where, as here, the accused was allegedly making ambiguous or inconclusive verbal statements and manifesting symptoms of distress. Audio visual recording is, of course, infinitely superior."*

Decision

28. We are satisfied that the trial judge's ruling was correct. One of the trial judge's functions is to ensure a trial in due course of law, i.e., a trial that is fair to both sides. It is long established that interviews may be redacted in the interests of ensuring fairness to an accused person. Accordingly, it is well established that where the memorandum of an interview refers to previous misconduct by, or previous convictions on the part of, the accused, those memoranda should be suitably redacted to remove the unfair and/or inadmissible material, before being allowed to go to the jury. We see no reason why, equally, redaction of material that might unfairly prejudice the prosecution's case should not also be permitted, provided that that can be done without significant impingement upon the ability of the accused to defend the charge by all legitimate means open to him/her.

29. We have carefully considered all of the redactions made in this case in response to the trial judge's ruling. Counsel for the appellant has not identified any specific redaction that has unfairly prejudiced the defence. Though much was made of claims that the jury were denied relevant context, it has not been demonstrated to us that any of the appellant's answers to questions that were ultimately redacted were capable of misinterpretation, or of being misunderstood, because the jury were denied the full context in which those answers had been elicited so as to be thereby deprived of relevant admissible evidence. It would not have been open to the defence, for example, to have put it to an interviewer that he/she believed that the accused had not intended to kill the deceased, or that he/she had concluded that the killing had been an accident, as these opinions, if acknowledged, would breach the ultimate issue rule.

30. As will be seen from the illustrations quoted, the impugned questions were typically highly compound ones. The expedient was adopted of redacting numerous objectionable clauses while still leaving an unobjectionable core query. We are satisfied that in the circumstances of the case this form of redaction, and other simpler redactions that were performed, were effective in removing any unfairness to the prosecution without impacting on the meaning of the answers given, or otherwise distorting the appellant's responses. We recognise that in another case it might well be shown that a denial of full context could be of critical importance. However, we are fully satisfied that that was not the case here.

31. We make no comment whatever on the specific interviewing techniques that were employed in this case. Police interviewers are entitled to conduct interviews with suspects in a robust fashion, providing certain lines are not crossed, and they are not bound to adhere to any rules of evidence, of etiquette, of decorum, of good manners, of protocol, of good taste, or of political correctness, in how they question such suspects. It is, after all, the interrogation of a police suspect. What is absolutely impermissible, however, is that the manner of interviewing should be oppressive, or coercive of the will of the interviewee by subjecting him/her to fear of prejudice, or by offering him/her the hope of advantage. In this case no complaint was raised either at trial, or before us, alleging oppression or coercion through fear of prejudice or inducement. The only complaint was of alleged unfairness in terms of the ability of the appellant to mount his defence, by reason of the admission of certain of his answers at interview where the jury were denied full contextual information in terms of receiving the fully formulated questions which elicited those answers. We are satisfied that the allegation of unfairness was not made out.

32. In the circumstances we dismiss grounds of appeal no's (i) and (ii).

Ground (iii)
33. At the close of the prosecution's case, on day 7 of the trial, counsel for the appellant made an application that the partial defence of provocation be allowed go to the jury. Counsel for the appellant, in a lengthy submission to the trial court, submitted that provocation as a possible partial defence should be allowed go to the jury on the facts of the present case. It was acknowledged that the accused in interview did not assert an intentional killing arising from an explicit claim that he had been provoked. However, it was submitted that the defence was inferentially available from the surrounding evidence and the entire circumstances of the case and was not dependent on an express assertion by the appellant.

34. Counsel for the appellant pointed in particular to the evidence of interference with the appellant's van; the assertion that this was not the first time that this had occurred; previous incidents in which the appellant's peaceable enjoyment of his property had been interfered with; the reason given for why the baseball bat was at the door; the situation of and with respect to the appellant's residence; the fact that the van was very important to him, and that he needed it both for his job as a courier and for transporting the dogs that he breeds. Counsel submitted:

> *"Whilst he is getting dressed, as I indicated, he has stated that the noises were continuing outside. He gets dressed. He gives chase. He takes possession of the bat, the presence of which at the door he accounts for as being due to previous incidents which concerned him. This is in effect one constant movement, getting dressed, moving. There's no time during which there was an effective cooling off period, if I could put it that way. He proceeds and the CCTV shows him chasing at speed the deceased. Mr Breen goes one way and then comes back and the entire matter is over in a matter of seconds. In the fourth interview at page 4 he confirms that he was angry at the interference as anyone would.*
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> *In terms of the core incident itself the evidence is of a quick chase and a single blow to the head of the deceased. In terms of Mr Almasi's demeanour there is evidence of him beforehand by I think Ms Augonaiskene of shouts about breaking my car. The Court will recall that her evidence was split into two time periods, that she initially, on hearing shouting, went to look out on the canal basin side of her house and then subsequently, on hearing more noise, looked out the front by which stage the deceased was on the ground. What I say is of particular importance is the precise sequence of events. It's apparent that a blow was struck and almost immediately Mr Almasi and Mr Breen engage in confronting each other around the car and the evidence of a number of witnesses, to include Ms Ryan, indicates that the accused is repeating "What have you done to my car? What have you done to my car?" and Ms Flood confirms that both men appear to be chasing around the car. And what I say the significance of that is that it shows a very agitated demeanour of Mr Almasi immediately after this incident.*
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> *There's one other specific aspect in respect of the manner in which Mr Almasi has addressed this issue in interviews and the Court has heard that what he says to the gardaí is that he didn't strike a blow, that Mr Dunne was outside his reach, that he thought he was outside his reach, he didn't feel it and what I ask the Court to consider is this, the frame of mind of a man who, if the jury found intentionally struck Mr Dunne with the intention to cause him serious injury, immediately turns to Mr Breen and gets involved in an argument constantly repeating 'You've damaged my car, you've damaged my car' and the non recollection, where he says he cannot remember raising the bat, he cannot remember striking Mr Dunne, that non recollection is in my respectful submission to the Court relevant and consistent with a total loss of self control to the extent that he is no longer master of his own mind."*

35. This application was resisted by counsel for the respondent on the basis that the partial defence of provocation could not arise on the facts of the case.

36. Having heard argument on both sides, the trial judge ruled as follows: -

> *"… on balance I think that this is not a case where the strength of the evidence would support the defence of provocation going to the jury. I think on balance, taking all matters into consideration, the evidence points certainly to a rage but taking into account the whole of the evidence and the actions of the accused man before and after the event it seems to me that it's not a case where it has been established that there was a total loss of self control and in those circumstances I have to say I don't think there is sufficient evidence to allow sufficient evidence in this particular case to allow the defence of provocation to go to the jury".*

37. It has been argued before us on behalf of the appellant that the trial judge applied the wrong test, in that she seemed to be of the view that it had to be *"established"* that there was a total loss of self-control, before she would be justified in permitting the partial defence of provocation to be considered by the jury.

38. In submissions to this Court, counsel for the appellant has drawn our attention to, and relies upon, the following passages from *The People (Director of Public Prosecutions) v Davis* [2001] 1 I.R. 146 at 155:

> *"…whether the question of provocation will be left to the jury, is to be determined by the trial judge by an assessment of the evidence to determine if there is an issue fit to be left to the jury. A useful approach might well be for the judge to consider whether or not a jury would be perverse in finding that there had been provocation, on the evidence available.*
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> *In making this determination the trial judge must bear in mind that issues of credibility of evidence, as opposed to its existence, are for the jury and not for him. He must also bear in mind that before provocation becomes an issue in the case, fit to be left to the jury's determination, there must be evidence (direct or inferential) suggesting the presence of all elements required for the defence."*
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> And (at 156):
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> *"We entirely accept that the burden on the applicant is not a heavy one but it necessarily involves being able to point to evidence of some sort suggesting the presence of all the elements of provocation. Provocation is not an issue which will automatically go to the jury simply because the defence is invoked. The burden which rests with the accused is to produce or indicate evidence suggesting the presence of the various elements of the defence. This can be produced either through direct evidence or by inference from the evidence as a whole, but before leaving the issue to a jury the judge must satisfy himself that an issue of substance, as distinct from a contrived issue, or a vague possibility, has been raised."*

39. The respondent has referred us to the Court of Criminal Appeal decision in *The People (Director of Public Prosecutions) v Curran*

[2011] 3 I.R. 785, wherein that Court reviewed the general law on provocation. We note that in Curran the Court commented thus with respect to its earlier decision in Davis:

> *"[21] The decision of this court in* The People (Director of Public Prosecutions) v. Davis [2001] 1 I.R. 146 *is very important therefore in providing guidance to courts in ensuring that the structure for the defence is maintained. It emphasises that it is only those cases where provocation as properly defined is genuinely being raised that should be permitted to go to the jury. The court also laid emphasis on ensuring that all the elements of the defence, and in particular those features which distinguish true provocation from mere uncontrolled rage, are maintained. As the judgment pointed out, at p. 158, provocation will involve focusing 'inter alia on the distinction between vexation, temper, rage or cognate emotions and provocation in its technical sense'. A condition of being 'vexed' or even 'in a rage' does not remotely approach evidence suggesting the 'total loss of self-control which alone can palliate a fatal assault'. On the contrary, it was necessary that there should be some evidence whose credibility will fall to be assessed by the jury, that, as stated at p. 158, 'the particular accused was in fact provoked to the extent of total loss of self-control, that he killed the deceased while in this state, in response to the provocation, without there having been time for his passion to cool'. This should also be understood in the context, as outlined at p. 160, that there is a 'minimal degree of self-control which each member of society is entitled to expect from his or her fellow members: without such a threshold, social life would be impossible'. This is important and valuable guidance. In the words of Hardiman J., at p. 158:-*
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> > *'The defence of provocation does not operate in such a way as to allow any person who kills another in a fit of temper to establish that much and no more, and then defy the prosecution to exclude the reasonable possibility of provocation. He must show some, even weak or limited, evidence of all the elements of provocation as that phrase is understood in law, and usually this will involve focusing, inter alia, on the distinction between vexation, temper, rage or cognate emotions and provocation in its technical sense.'*

40. We accept *Davis* as correctly stating the law. The burden to be discharged was not a legal one, but an evidential one in the sense of raising the issue by demonstrating the existence of at least some evidence at a sufficient level of cogency, which could be direct or circumstantial or a combination of both, that the appellant may have acted in circumstances where, having been subjected to a provocation, he had totally lost his self-control. In that regard, it has been expressly acknowledged in a number of cases that the threshold in terms of sufficiency of cogent evidence is low, but that there is nonetheless a threshold to be crossed, before a trial judge would be justified in permitting a jury in a murder case to consider the partial defence of provocation. As Lord Devlin put it in *Lee Chun-Cheun v R.* [1963] A.C. a party seeking leave to rely on provocation must put forward *"a credible narrative of events"* suggesting the presence of the various elements of the defence. There must be sufficient evidence for a jury to find that it was a reasonable possibility that the accused may have acted in circumstances where, having been subjected to provocation, he had totally lost his self-control.

41. To be fair to the trial judge, she spoke repeatedly about *"the strength of the evidence"* and the *"sufficiency of the evidence"*, suggesting an appreciation on her part that there was a threshold. The issue in this case is whether the trial judge applied too rigorous a standard, and in effect regarded the threshold as being higher than that which is in fact required to be met, by requiring the available evidence to be such that it *"established"* that there had been a total loss of self-control.

42. We consider that evidence suggestive, but not going so far as to establish it, that the appellant had totally lost his self-control due to provocation would have been sufficient to meet the threshold. It was not for the trial judge to determine, even on a preliminary basis, whether the appellant had in fact totally lost his self-control due to provocation; merely whether some cogent evidence existed tending to suggest that that might have been the case. Nothing, beyond the existence of a threshold level of evidence of reasonably cogency, i.e., a credible narrative of events suggesting the presence of the various elements of the defence, was required to be *"established"*.

43. However, when the totality of the trial judge's remarks are considered, it is clear that what she had intended to convey was that such evidence as existed did not, in her view, go so far as to suggest a total loss of self-control. Rather, her assessment, which would have been a finely balanced call, was that it only went so far as to suggest the existence of a rage short of a total loss of self-control, and that would not meet the threshold, low though it might be.

44. In the circumstances we are satisfied that the trial judge did not apply too rigorous a standard in assessing whether the defence of provocation should have been allowed to go to the jury. There is no basis for concluding that she was guilty of any error of principle in the exercise of her discretion.

45. Accordingly, we are not disposed to allow the appeal on ground no (iii)

Ground no (iv).

46. The jury spent 11 hours and 13 minutes deliberating before reaching a majority verdict of guilty of murder. At the lunch break on day 11 of the trial, the jury having already spent 7 hours deliberating, counsel for the appellant raised the issue as to whether *"the Court might intend advising [the jury] of the possibility of a disagreement if no outcome is [reached]"*. The trial judge declined to do so at that point on the basis that the jury had recently said that more time would be of assistance.

47. Later that afternoon, after dealing with a question from the jury, in which they requested a definition for *"terminal collapse"*, the issue was raised again by counsel for the appellant where he expressed concern that *"members of the jury may, due to the length of the deliberations, feel themselves forced to go with a majority if there is such a divide between them."*

48. The jury had earlier, just before 3pm on the previous day, i.e., day 10, been told that it was open to them to bring in a majority verdict of not less than ten of them.

49. In light of the renewed expression of concerns by counsel for the appellant, the trial judge stated that she would ask the foreman whether a verdict had been reached and in the event that no verdict has been reached, *"then what I intend to say to the foreman of the jury is that I directed them initially that what I required was a unanimous decision. I then directed them that I required a decision in which any ten or any 11 of them agreed or they could still come back to me with a majority [sic] decision. And I'm simply going to say that anything else is called a disagreement"*.

50. Counsel for the respondent indicated that such a course of action would be against the authorities on this issue and that he would like to address the Court on the law before she said anything to the jury on the issue of disagreement. The trial judge decided

that she would refrain from saying anything to the jury at this juncture and would adjourn the matter until the following day, at which time the parties could address the court on the law if necessary.

51. On the morning of day 12 of the trial, both sides agreed that the authorities were clear that the decision as to whether or not to inform the jury of the possibility of disagreement was a matter exclusively within the discretion of the trial judge, having regard to all of the circumstances of the case. The trial judge then proceeded in the manner that she had proposed. Approximately, two hours later, the jury returned with a majority verdict of guilty.

52. Counsel for the appellant submits that, on the particular facts of the present case, the two requests by counsel for the defence to notify the jury of their right to disagree should have been acceded to by the trial judge. It was conceded that the decisions in *The People (Director of Public Prosecutions) v Cahill* [2001] 3 IR 494, and; *The People (Director of Public Prosecutions) v Byrne* (February 24th 2003 CCA 3004) are authority for the proposition that a trial judge does not have to inform a jury, as a matter of principle, of *"a right to disagree"*; Moreover, in Byrne it had been stated that *"trial judges should not go out of their way to sow in the minds of juries the seed of the wrongful belief that there is some intermediate verdict between guilt or innocence which they can arrive at, namely of disagreement"*. Nevertheless, counsel for the appellant contended, what was involved here was a net issue as to whether fairness required, in the circumstances of the case, that the jury should have been expressly informed, as originally suggested to the trial judge, that they could disagree.

53. Counsel for respondent has submitted in reply that the trial judge was best placed to make the assessment as to whether the jury was having difficulty in reaching a verdict and how this should be addressed. It would have been clear to the trial judge in this case, both from the jury foreman's affirmative response to the question as to whether more time would be of assistance, and the later seeking by the jury of additional substantive assistance by way of a question to the trial judge, that the jury remained engaged in diligent deliberations. This was not suggestive of hopeless deadlock.

54. We agree with the submission made by counsel for the respondent. While deliberations had been going on for some time, there was no indication of hopeless deadlock. It is correct to say that the trial judge was best placed to decide how best to proceed in terms of apprising the jury of the possibility of a disagreement. We consider that the instructions given to the jury by this trial judge were appropriate and that they are not to be legitimately criticised. We consider there was no unfairness in her approach, or in allowing the jury to deliberate for as long as they did.

55. We therefore dismiss ground of appeal no (iv).

Ground no (v).

56. On day two of the trial, the prosecution called Michaela Walker. Before she was sworn in to give her evidence the prosecution had made it known to the defence that they proposed not to lead portions of her proposed evidence, and that they would object to any attempt by the defence to cross examine her upon the matters in controversy, on the basis that it represented inadmissible evidence, both in terms of not being relevant and also pursuant to s.1A(a) of the Criminal Justice (Evidence) Act 1924 ("the Act of 1924") as inserted by s.33 of the Criminal Procedure Act 2010 ("the Act of 2010").[Prosecuting counsel incorrectly referred in his submission to s.31 of the Act of 2010, but it is clear from the context that he had intended, and was understood by all concerned, to be referring to s.1A(a) of the Act of 1924 as inserted by s.33 of the Act of 2010].

57. The defence were unhappy with the prosecution's proposed means of proceeding, and in the circumstances the prosecution asked that the trial judge conduct a *voir dire* and rule on the correctness or otherwise of the position that the prosecution wished to adopt.

58. Section 1A(a) of the Act of 1924, as inserted, provides:

> *"Where a person charged with an offence intends to adduce evidence, personally or by the person's advocate, of a witness, including the person, that would involve imputations on the character of a prosecution witness or a person in respect of whom the offence is alleged to have been committed and who is either deceased or so incapacitated as to be unable to give evidence, or evidence of the good character of the person—*
>
> *(a) the person may do so only if he or she—*
>
> > *(i) has given, either personally or by his or her advocate, at least 7 days' notice to the prosecution of that intention, or*
> >
> > *(ii) has applied to the court, citing the reasons why it is not possible to give the notice, and been granted leave to do so,"*

59. In the course of the *voir dire* the prosecution particularised the portions of Ms Walkers's statement in the Book of Evidence that they wished not to lead. The objectionable part her statement, from the prosecution's perspective, was her claim that at one stage she saw the deceased *"smash a glass bottle of Bud or Bulmers, a brown bottle anyway off the wall. I saw him put the broken top piece into his hoody pocket, he was smiling and laughing when he put it into his pocket."* The prosecution contended that it added nothing of relevance to any issue that the jury would have to consider, and that the defence wanted it in solely for the purpose of blackening the character of the deceased. Moreover, no notice of an intention to seek to elicit and to rely upon such evidence had been served by the defence within the seven day period specified by the statute, nor had any application been made to the trial judge for permission to do so on the basis that it had not been possible to serve the required notice, and explaining why that was so

60. Counsel for the appellant submitted to the trial judge that it was not for the prosecution to pick and choose the evidence that they wished to lead. In response, counsel for the respondent submitted that it was indeed the prosecution's entitlement to choose what evidence they intended to lead, and what evidence they did not intend to lead. Counsel for the respondent adopted the position that he was not disposed to lead the evidence in controversy in chief as it was inadmissible, and further he was entitled to object on the same basis to any attempt by the defence to cross-examine it into the case.

61. The trial judge ruled that it seemed to her that these particular facts were not relevant but could only serve to blacken the character of the deceased, and she ruled that they should be omitted from the witness's proposed evidence on that basis. The appellant now seeks to have the matter re-visited on appeal, and submits that the trial judge's ruling was erroneous. The case is made that the evidence was relevant in that it was part of the overall context in which the killing of the deceased had taken place, and that it tended to corroborate or support the defence's contention that the deceased had been out to cause trouble and that this

disposition had culminated in his involvement in a confrontation with the appellant which he had provoked by interfering with the appellant's vehicle.

62. In reply, the respondent maintains that, in circumstances where the broken beer bottle had not been produced to the appellant, and the appellant was unaware of it, and it formed no part of, or played no role in, the actual confrontation which resulted in the death of the deceased, it was irrelevant and of no probative value.

63. We agree with the submission made on behalf of the respondent and consider that the proposed evidence was correctly ruled to be inadmissible.

64. In the circumstances we are not disposed to uphold ground of appeal no (v).

Conclusion

65. In the circumstances outlined we dismiss the appeal.