



**THE COURT OF APPEAL**

**Peart J.  
Birmingham J.  
Mahon J.**

**The People at the Suit of the Director of Public Prosecutions**

**[178/16]**

**Respondent**

**V**

**David Mahon**

**Appellant**

**JUDGMENT of the Court delivered on the 7th day of December 2017 by**

**Mr. Justice Birmingham**

1. This is an appeal against severity of sentence. The sentence under appeal is one of seven years imprisonment in respect of the offence of manslaughter that was imposed in the Central Criminal Court on 13th June, 2016. The sentence was imposed in circumstances where the appellant had stood trial for murder but had been found not guilty of murder, but guilty of manslaughter by the jury.

2. As sentence appeals go, this one is somewhat unusual. Most sentence appeals are based around the argument that the sentencing judge picked a starting point that was too high and/or failed to give sufficient credit for mitigating factors present. Applications to review on grounds of undue leniency are normally a mirror image of this. Unusually, the case made here is that the judge when sentencing did not sentence in accordance with the verdict of the jury. It is said that the jury's verdict must mean that they formed a particular view of the facts of the case but that the judge passed sentence on an altogether different basis. The defence says that this was a trial at which two starkly different accounts of the events leading to the death of the deceased were put before the jury. The prosecution sought a verdict of murder, contending that the appellant had deliberately stabbed the deceased causing his death, whereas the defence contended that the case was one of self-impalement by the deceased onto a knife that was being held by the appellant. The issue raised on the sentence appeal makes it necessary to consider the contents of the judge's charge to the jury and even to some extent, what was said by counsel on either side in their closing speeches.

3. Before considering the issues raised on the appeal it is necessary by way of background to explain that the trial was concerned with events that occurred on 26th May, 2013 which resulted in the death of Dean Fitzpatrick, who is the step-son of the appellant. There was evidence in the trial that the relationship between the deceased and the appellant was not an easy one. In the days leading up to the incident, the appellant had asked for his step-son to be barred from the gym where they were both members for interfering with his bicycle and stealing a bottle of water from it. On the day of the offence, the appellant had been drinking and wanted to see his step-son. At about 9 p.m., the appellant rang the partner of Mr Fitzpatrick, Ms Sarah O'Rourke, looking for him and he told her to tell him to come up to the apartment. Her evidence was that the appellant sounded drunk. When she informed him that she did not know where her partner was, the appellant became aggressive and said that if she did not tell her partner to ring him, he would get a knife and stick it in her head. At about 10 p.m. that evening, the appellant made contact with a friend of his, a taxi driver Carl O'Toole, and asked him to come to his apartment. Mr O'Toole said that the appellant told him that he had split up with his partner, the mother of the deceased. When he met the appellant, it seemed to him that the appellant was drunk and agitated. They initially went to Mr O'Toole's house before returning to the appellant's apartment. When they arrived back there, they were joined by another friend of the appellant, John McCormack. Mr O'Toole said that the appellant rang the deceased asking where he was and asked him to come to the apartment. Mr Fitzpatrick did so. Mr O'Toole's evidence was that when Mr Fitzpatrick arrived, that the appellant confronted him over him taking his water bottle from the gym, and that they both became agitated. After they had calmed down, Mr McCormack took Mr Fitzpatrick out of the apartment and the appellant followed them out. Mr O'Toole did not see what happened outside the apartment, but after approximately a minute, the appellant returned into the apartment holding a large knife, saying "you have to get me out of here." This was the first point at which Mr O'Toole had seen the appellant with a knife. The appellant fled the scene with Mr O'Toole, who had his taxi right outside the building. As they were driving, the appellant told Mr O'Toole that he thought Mr Fitzpatrick was dead, and that the knife had gone right through him. They went for a drink in the Balrothery Inn, and Mr O'Toole advised the appellant at this stage to go to the Gardaí. Shortly after they left the pub, Mr O'Toole had to fill his car with diesel, and the appellant got out of the taxi before they drove into a garage, as he did not want to be seen on CCTV. The appellant told Mr O'Toole to stay off the motorway. Eventually Mr O'Toole drove the appellant to the home of his father.

4. On the following morning the appellant presented himself at Coolock Garda Station at 9.45 a.m. where it was noted that he was very emotional and extremely upset. He declined the offer of a solicitor and made a number of admissions in a cautioned voluntary interview and then, when arrested and detained, made further admissions in four subsequent interviews. In these interviews the appellant accepted that it was his fault that Dean Fitzpatrick was dead. He said that they had been fighting for years and that he had asked him to come to the apartment to sort out things. Mr Mahon said that as they were arguing in the kitchen, the deceased pulled a knife on him which came from the kitchen and was waving it around, saying he would stab the appellant. The appellant said he took the knife off the deceased and put it in the back pocket of his jeans. Subsequently at trial there was evidence that the pocket was damaged beyond normal wear and tear.

5. When Mr Fitzpatrick left the apartment, the appellant followed him out and took the knife out of his pocket to show it to him, to ask him why he was after pulling that knife on him. The appellant said that when he did that, that the deceased walked into the knife. He said that he knew that he had cut him but that he thought it was just a graze, and that Mr Fitzpatrick had run down the stairs. He said that he did not see blood at the time but saw some blood on the knife when he was in Mr O'Toole's car and that he threw it out the window. Specifically, the appellant said that he did not mean to kill his son-in-law but that the deceased had walked onto the knife when he took it out to show it to him. He made reference to the fact that the deceased had previously tried to self-harm.

6. The appellant was charged with murder. In advance of trial, he offered a plea of guilty to manslaughter. This was not accepted by the Director of Public Prosecutions and the matter proceeded to trial. At trial, a major issue in the case was whether the deceased had sustained injury as a result of a deliberate stabbing by the appellant, involving the thrusting of a large knife deep into the

abdomen of the deceased, or had the deceased suffered injuries which proved fatal as a result of his self-impale<sup>ment</sup> onto the knife held by the appellant. The judge dealt, as is usual, with the possibility of a manslaughter verdict. She had this to say:

"And one of the categories is manslaughter by an unlawful and dangerous act. And that is where the accused doesn't have the necessary intention for murder, and you now know that that intention, the necessary intention for murder, is the intention to kill or cause serious injury. So it's for you, members of the jury, to decide on the facts of this case. *You might take the view that an instantaneous type action was performed by the accused man without the necessary intention for murder. You might take the view that David Mahon may have intended to frighten Dean Fitzpatrick, or to cause him some physical injury, but that he didn't intend to kill him or cause him serious injury, but that he did, nonetheless, perform an unlawful and dangerous act in producing the knife as a result of which Dean Fitzpatrick died.* And if that is your conclusion on the facts you must convict David Mahon of manslaughter, but not of murder. So it depends very much on the question of intention. And in order for an act to be unlawful it must be a criminal act, and a person has to have the intention to do the unlawful act. *So it is unlawful if a weapon, a knife in this case, is produced, and it is intended to frighten a person, or if there is an intent to put a person in fear, that is technically an assault.* And you have to decide, ladies and gentlemen, in this case was there an offence of assault being carried out by David Mahon on Dean Fitzpatrick. And an assault doesn't have to involve the touching of another person. It can involve that. But it is sufficient to put somebody in fear. And it must be done intentionally and recklessly. So an assault can be a touching which is intentional or reckless, or a putting in fear which is intentional or reckless. And I have explained intention to you already. So you make a judgment on the intention by drawing inferences from the surrounding circumstances, and you look at the totality of the evidence." [emphasis that of defence in written submissions on appeal]

7. Having discussed the concept of recklessness with the jury, the judge then continued:

"So if you produce a knife to frighten somebody, and the person is frightened because of fearing harm, that is an assault. So what would be required in those circumstances in terms of the mental element would be *simply the deliberate carrying out of the act, the production of the knife and that the person deliberately knew that he or she was assaulting the other person.*" [emphasis again that of defence in written submissions]

The jury returned to court, interrupting their deliberations for this purpose, asking for legal definitions of the verdicts open, and at a later stage, specifically asking for examples of manslaughter. Following discussions with counsel, the trial judge agreed that it would not be helpful to give examples of manslaughter but she readdressed the jury at some length in relation to manslaughter. She did so in these terms:

"You might take a view that an instantaneous type action was performed by the accused man, but without the necessary intention for murder and I said to you that you might take the view that David Mahon may have intended to frighten Dean Fitzpatrick. You might take the view that David Mahon had intended to cause Dean Fitzpatrick some physical injury, but that he didn't have any intention to kill him or cause serious injury. And I said to you that, nonetheless, *you might take the view that David Mahon performed an unlawful and dangerous act in producing the knife, as a result of which Dean Fitzpatrick died.* And I said to you that if that was your conclusion on the facts, then you must convict David Mahon of manslaughter but not of murder...

...

... So, if you're going to do an act that's unlawful, you must have the intention to do that and I told you that it's unlawful if a person produces a weapon - a knife in this case - and it is intended to frighten a person, or put a person in fear, that that would be an assault. And I also told you that an assault doesn't have to involve the touching of a person. It can involve it, it doesn't have to. So, an assault can be a touching which is intentional and reckless, or a putting in fear which is intentional or reckless. Either of those can be an assault. And I told you an assault occurs where a person, directly or indirectly, applies force or causes an impact to the body of another person, or he causes another person to believe, on reasonable grounds, that he or she is to be subjected immediately to any such force or impact. So, for an assault, what's required in terms of the mental element, the intent would be the deliberate carrying out of the act, that the person deliberately knew that he or she was assaulting the other person. And I said it you for you, then, to decide, on the facts of the case, as to whether the actions of David Mahon in relation to Dean Fitzpatrick amounted to an assault.

Then, coming back to deal with the unlawful and dangerous act, manslaughter, that category of manslaughter. I said that the act itself, the unlawful and dangerous act itself, is judged by objective standards and I said to you, "*What would a reasonable person think about the act of producing a knife in the circumstances that David Mahon produced it?*" I asked yourselves to consider would a reasonable person consider that that was a dangerous act. And then I told you if you were satisfied beyond reasonable doubt that it was an unlawful and dangerous act, but you're also satisfied, beyond reasonable doubt, that David Mahon didn't have the intention to kill or cause serious injury, then, in those circumstances, you'd find him not guilty of murder but guilty of manslaughter." [emphasis that of defence in written submissions]

8. At this sentence hearing, counsel for the now appellant addressed the route by which the jury reached their verdict. He said that he wanted to emphasise the importance of the jury's verdict in a situation in which the key factual dispute in the case was whether or not the knife was used by Mr Mahon to stab Mr Fitzpatrick, or whether he was merely holding the knife and Mr Fitzpatrick had walked onto the knife. He pointed out that on the run of the case there was no other route available to manslaughter such as self-defence or provocation. He submitted that the verdict of manslaughter was left to the jury on the basis that it was open to them to be satisfied on the evidence that in producing the knife in the way that he did, Mr Mahon was reckless as to whether by doing so he put Mr Fitzpatrick in fear of the infliction of immediate personal violence. Unusually, the prosecution sought to, and indeed were permitted to, reply to the defence submissions. Prosecution counsel did so in these terms:

"The second matter is this, Mr Guerin [senior counsel for the defence] surprisingly suggested to the Court that this is a case of accidental death. If it were a case of accidental death there would have been an acquittal, a full acquittal. Mr Guerin suggests to you, he suggests an extraordinarily narrow basis upon which the Court is obliged to take or interpret the verdict. And in my submission, it's simply not amenable to that extraordinarily narrow interpretation. The Court, as I'm sure it does in every such case made it clear to the jury that if they were satisfied that there was an unlawful killing, but were not satisfied as to the intent to kill or cause serious harm, that of course of itself would ground a conviction of manslaughter. And the emphasis today on the rather fine distinction between voluntary and involuntary manslaughter was not something that was made at trial. It was not something that was suggested to the Court in those terms as a matter that should be put to the jury in that way. So it's, in my submission, it's up to the Court to take a view in respect of the evidence, consistent with the verdict. So I'm sure Mr Guerin disagrees with that, but I just want to put on record the

Director's position and of course it's for the Court then to decide."

9. The Court took time to consider the situation and imposed sentence some two weeks after the sentence hearing concluded. The judge's sentencing remarks did not specifically address the basis on which the manslaughter verdict was left to the jury and how the verdict returned by the jury was to be interpreted. The closest that the sentencing judge came to interpreting the verdict of the jury was when she commented:

"By virtue of the verdict of the jury, the jury were satisfied that the prosecution had failed to prove to them beyond a reasonable doubt that David Mahon murdered Dean Fitzpatrick, that is the jury were satisfied the prosecution had failed to satisfy them beyond a reasonable doubt that David Mahon intended to kill Dean Fitzpatrick or that David Mahon intended to cause serious injury to Dean Fitzpatrick."

10. In the view of the Court, it is going too far to say that the verdict returned by the jury must definitively mean that the jury concluded that the knife had been produced by Mr Mahon in order to frighten. This was but one of a number of possible routes by which the jury could arrive at a manslaughter verdict. The Judge in the course of her original charge had commented,

"You might take the view that an instantaneous-type action was performed by the accused man without the necessary intention for murder."

When re-charging the jury in the course of their deliberations, she again contemplated an instantaneous-type action performed by the accused without the necessary intention for murder. On this occasion she posited another possible route to manslaughter when she observed,

"You might take the view that David Mahon had intended to cause Dean Fitzpatrick some physical injury, but that he didn't have any intention to kill or cause serious injury."

The trial Judge also posited the following in re-addressing the jury, describing the two ways in which an assault can occur:

"So, an assault can be a touching which is intentional and reckless, or a putting in fear which is intentional or reckless. Either of those can be an assault."

She informed the jury that if they were satisfied beyond reasonable doubt that the appellant had committed an unlawful and dangerous act, but that he did not have the intention to kill or cause serious injury, then they ought find the appellant not guilty of murder, but guilty of manslaughter.

11. It seems to this Court that the only thing one can say with certainty arising from the verdict of the jury is that jurors were not satisfied that the prosecution had proved beyond reasonable doubt an intention to kill or cause serious injury. The appellant says that the verdict of the jury must be interpreted as meaning that there was no intention to actually use or make contact with the knife, and that being so, terrible as the outcome of the incident was, that Mr Mahon's culpability was low.

12. The defence say that this was not a case of two alternative defences e.g. provocation or excessive self-defence, each of which could result in a manslaughter verdict being in issue. Rather in this case, the alternatives were between a version contended for by the defence, and an alternative, involving an intentional stabbing without the intention to kill or cause serious injury, for which neither side had contended.

13. One of the routes by which the jury may have arrived at the verdict of unlawful and dangerous act manslaughter was in finding that the appellant committed the unlawful and dangerous act of putting of the deceased in fear. The appellant argues that the sentencing court was obliged to sentence on that basis, this being the basis most favourable to the accused. In that regard, the appellant relies on the decision of the Court of Criminal Appeal in *The People (DPP) v. Dillon* (unreported, Court of Appeal, 17th December, 2003). The Court would not disagree with the suggestion as a general proposition, that if there are unresolved factual issues, that the Court should sentence on the basis most favourable to the accused. However, in the case of murder trials which result in manslaughter convictions, it will sometimes be the case that several different scenarios have been canvassed to a greater or lesser extent. It will sometimes be the situation that a verdict is explained by the prosecution's failure to exclude an issue raised e.g. provocation, beyond reasonable doubt, or the prosecution's failure to prove beyond reasonable doubt the presence of one of the ingredients of murder, in particular the intention to kill or cause serious harm. In such cases it may be appropriate for the sentencing judge to form an overview of the case and to sentence accordingly.

14. In this case, the Judge did not specifically address or rule on the submissions made to her. However, taking an overview of the case, it is the situation that the sentence imposed by her was quite typical of knife manslaughters. Eight years, a sentence a little higher than the sentence she imposed, was the sentence imposed by the Court of Criminal Appeal when resentencing in *The People v. Dillon* (unreported, Court of Appeal, 17th December, 2003), *The People v. Kelly* [2005] 2 I.R. 231 and *The People v. Cooney* (unreported, Court of Appeal, 27th July, 2004). These were all cases where a plea of guilty to manslaughter had been offered.

15. In this case there were aggravating factors, the deceased was followed from the apartment, a large knife was produced during the course of the altercation, Mr Mahon left the scene, medical assistance was not sought. The relationship between the accused and the deceased was of relevance. On the other hand, it was a case where a plea to manslaughter was offered in advance of the trial, and where the appellant came before the Court without any previous convictions of any real relevance. The sentence decided upon by the sentencing judge was not out of line with previous sentences in cases that might be regarded as broadly similar. It was in the Court's view a sentence that fell within the available range and so the Court must dismiss the appeal.