**THE COURT OF APPEAL**

**Sheehan J.**
**Mahon J.**
**Edwards J.**

**Record No. 28/2011**

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

**Respondent**

**and**

**Alexsander Nadwodny**

**Appellant**

**Judgment (ex tempore) of the Court delivered on the 18th day of December 2015 by Mr. Justice Mahon**

1. The appellant pleaded not guilty to a sole count of murder contrary to Common Law. His trial commenced before the Central Criminal Court on 17th January 2011, and on 27th January 2011 the appellant was convicted in respect of the count of murder by a unanimous verdict of the jury. The victim of the murder was Mr. Kieran Cunningham. The appellant was duly sentenced to life imprisonment.

2. This is an appeal against that conviction. There is a single ground of appeal, namely:-

*That the verdict of the jury was perverse and contrary to the evidence in the case.*

**Background facts**

3. The case against the appellant was that on 2nd June 2009, the deceased, Mr. Kieran Cunningham, went out with his friends socialising in Galway city centre. At a certain stage of the evening, and indeed in the early hours of 3rd June 2009, the deceased left Karma Nightclub and walked up the lane towards Williamsgate ahead of his friends. At a certain stage he passed two people sitting on a kerb side outside an O2 shop. While Mr. Cunningham was standing on the other side of the road at Williamsgate, the man who was sitting on the kerb side stood up and walked across the road, holding what transpired to be a knife, and stabbed Mr. Cunningham three times. Mr. Cunningham was taken to Galway University Hospital where he died.

4. The prosecution alleged that the appellant was the man who stabbed Mr. Cunningham three times, and that at that time he intended to either kill Mr. Cunningham or cause him serious harm. During the course of his evidence, and during interviews with An Garda Síochána, the appellant accepted that he had stabbed Mr. Cunningham. It was accepted at the trial that the killing was an unlawful killing. What was in issue was the appellant's state of mind at the relevant time and the decision that had to be determined by the jury was whether the prosecution has satisfied it beyond reasonable doubt that there was an intention to kill or cause serious harm to Mr. Cunningham, and that the presumption in s. 4(2) of the Criminal Justice Act 1964 had not been rebutted, namely that the appellant had intended the natural and probable consequences of his actions.

5. A significant amount of CCTV footage was played to the jury including footage of the killing itself in which it is accepted that it showed the appellant approaching Mr. Cunningham and stabbing him with an object, having crossed the street over a distance of sixty eight feet.

6. The CCTV footage was played to the jury showing a man and a woman walking arm in arm at the top of Ballally Lane towards the entrance to the Karma nightclub, and then entering that premises at about 12.50 a.m. on 3rd June 2009. The man was wearing black shoes, light blue denim jeans and a navy t-shirt with the words "Sao Paolo 09". The woman was wearing a navy top, three quarter length trousers with a handbag across her body. The same couple are then seen leaving the night club at 2.10 a.m. walking towards Eglinton Street in Galway. On the same CCTV footage Mr. Cunningham is observed leaving the night club at 2.11 a.m. approximately and is observed coming from the night club onto Ballally Lane wearing a red t-shirt and in the company of two men, in an agitated stated. Further CCTV footage showed Mr. McDermott, who was a friend of Mr. Cunningham, walking towards Mr. Cunningham and bending down and appearing to engage in conversation with somebody before re-appearing.

7. The jury was also shown CCTV footage of the man wearing light blue jeans observed in the company of the female crossing the road from the right hand side followed by the woman walking towards a jewellers shop at 2.15 a.m. It was the prosecution's contention that this was the moment when the appellant crossed the road and walked back towards Mr. Cunningham and proceeded to stab him.

8. Central to the appellant's case is the contention that he had, in the hours proceeding the fatal assault on Mr. Cunningham, consumed a substantial amount of alcohol, initially in a house in the suburb of Galway, then in the Kings Arms pub in the city and finally in the Karma night club, and at the time of the stabbing he was so intoxicated as to in effect have had no control or limited control over his actions. It was the appellant's case that he had merely been prompted by his companion, Ms. Zlotnik, to confront him because of something Mr. Cunningham has supposedly said.

9. A further aspect of the appellant's case is that Ms. Zlotnik was an untrustworthy person and that her evidence was unreliable, and that she had prompted the appellant to confront Mr. Cunningham although aware that he was severely intoxicated.

10. The jury in this case heard evidence over a number of days from a number of witnesses, including Ms. Zlotnik, and also from the appellant himself. They also viewed the CCTV footage and in so doing, and to use the description of Mr. O'Higgins, S.C., almost had a ringside seat of the events that occurred. They were also made aware from the evidence that the appellant was intoxicated at the time.

11. No direction was sought during the trial, and no requisitions were made in relation to any matter following the charge to the jury. This fact alone creates a hurdle for the appellant to overcome having regard to the decision in *DPP v. Cronin* [2006] 4I.R.329. It is of course open to this Court to allow an appeal where a Cronin point is evident, if to not do so would result in a fundamental injustice to

a convicted person.

12. This appeal is based on the contention that the verdict of guilty of murder is perverse in that the only verdict that the jury could reasonably have reached was one of guilty to manslaughter.

13. The Court is satisfied that such a contention simply does not stand up, for a number of reasons. The jury heard and saw a number of witnesses, and was in a position to assess their demeanour, including that of the appellant himself. Such evidence included first hand eye witness accounts of what occurred. Additionally and most importantly, the jury were given a bird's eye view in the CCTV footage of the attack on Mr. Cunningham. There are many cases involving assaults, including fatal assaults, which come before the courts, and which have nowhere near the extent of the detailed and eye witness testimonies as was available in this case, but which nevertheless result in convictions. The learned trial judge's charge to the jury was instructive as to the relevant legal considerations, and was absolutely fair to the extent that it referred to evidence heard by the jury.

14. A finding that a jury verdict is perverse is only ever made in cases where the basis for same is very strongly made and where there exist exceptional circumstances. In *DPP v. Tomkins* (CCA 16th October 2012) the following is stated by MacMenamin J. in delivering the court's judgment:-

> *"In response to that contention it is necessary to make clear that the argument made in this appeal is that the verdict was perverse, this court has repeatedly emphasised that it has no power to substitute its own subjected view of a case for that of the jury. While the passage which follows is well known, it is necessary to re-iterate the apposite remarks of McCarthy J. in the Supreme Court in DPP v. Egan [1990] ILRM 780, where he pointed out that the Court of Criminal Appeal may not substitute its own subjective view of the evidence in place of the jury's verdict. A decision that a verdict was perverse is a very exceptional one, as he pointed out in the following terms:-*
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> > *"The jurisprudence of the Court of Criminal Appeal since 1924 has, from time to time endorsed by this Court is clear. Save where a verdict may be identified as perverse, if credible evidence supports the verdict, the Court of Criminal Appeal has no power to interfere with it. The concepts of lurking doubt, a feel of the case, gut feeling, or back of my mind are foreign to the judicial role as I understand it. Juries are regularly enjoined to disregard their personal feelings or their subjective assessments and to concentrate on the evidence as it is sworn to in the witness box. In many instances what may be difficult and obscure to a trial judge is crystal clear to jury; the converse is also very possible. To permit verdicts in criminal trial to be upset upon such subjective consideration would seem to me to be a denial of the validity of trail by jury."([1990] ILRM at 784)*
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> *However, the possibility of a perverse jury verdict being set aside is not to be entirely discounted. O'Flaherty J. observed in his judgment in Egan:-*
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> > *"Similarly, if tenuous evidence were left to the jury and the jury acted on it, I have no doubt that the Court of Criminal Appeal would be entitled to intervene. A verdict founded on such unsatisfactory evidence would mean that the trial itself was unsatisfactory and that the verdict founded upon it was unsafe and unsatisfactory."*
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> *Clearly, therefore, the possibility of a verdict been set aside on the grounds of perversity exists, but it is a very exceptional jurisdiction. Also, in DPP v. C (P) [2002] 285, Murray J. emphasised the reluctance of the Court of Criminal Appeal to interfere with a verdict in a situation where the credibility of a witness is a sole or principal ground of challenge. Speaking for this court, he said that the assessment of a witness's credibility and the weight to be attached to that evidence is a matter "manifestly within the province of the jury" ([2002] 2 I.R.285 at 296)."*
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> *Thus, this court will be very slow to intervene where it is satisfied that a judge has placed all relevant matters before the jury, and is fully and properly instructed them as to the burden and standard of proof. However an appeal court may intervene if the judge's direction to the jury is inadequate either concerning witness credibility, or some matter of law. This is entirely distinct however from finding fault with the verdict of the jury (see O'Malley, The Criminal Process, Round Hall, 2009, para. 23.12 and 23.13). This court will only quash a decision as being perverse, where there are very serious doubts about the credibility of evidence which was central to the charge, or where a guilty verdict, even by a properly instructed jury was against the weight of the evidence (see DPP v. Quinn 23rd March 1998, CCA; DPP v. Morrissey CCA, 10th July 1998). In assessing this point the court will look at all the evidence which was before the jury, not selected portions of that evidence."*

15. A similar approach was taken more recently by this Court in the case of *DPP v. Arundel* [2015] in its judgment delivered by Edwards J.

16. In this appeal the court is satisfied that it was open to the jury on the evidence heard and seen by it to return a verdict of murder, as indeed it did, and that verdict is not perverse. The appeal is therefore dismissed.