THE COURT OF APPEAL

63/2014

Birmingham P.
Edwards J
McCarthy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND –

PRZEMYSLAW TREBACZ

APPELLANT

JUDGMENT of the Court delivered on the 21st day of February 2019 by Mr. Justice McCarthy.

1. This is an appeal by Mr. Trebacz against his conviction on the 18th December, 2013 for the murder of a Mr. Cretu on the night of the 13th October 2012. He was sentenced to imprisonment for life accordingly on the 17th February 2014. The conviction arises as a result of disputed events which took place at 2 Connolly Court, Connolly Street, Cavan. The accused went to the premises just after eleven o'clock on the night in question, in his contention, for the purpose of availing of the services of a prostitute. It is not in dispute that when he arrived there were present in the apartment one male (the deceased) and two females, Florentina Sotir and someone called "Stropp" who was not properly identified and could not be found thereafter. Thus the prosecution was reliant to a significant degree on the evidence of Ms. Sotir to prove the immediate circumstances of the death in the premises and her credibility was accordingly at the core of the trial. It is not in debate that the deceased received two stab wounds, one of which (contended by the prosecution to be that first inflicted) was fatal.

2. The accused in the company of two males, one "Marcin" and a second, who was unnamed, and who left before anything untoward occurred, went to the premises in a taxi driven by one Gary Malone. During the course of the journey, he heard reference to a "*Soviet attack*" (a term explained by the accused when being interviewed by the Gardaí on the 15th October 2012 as "an expression in Poland when people want to get aggressive and fight, it comes from fighting the Russians") and what he understood to be an allegation that the deceased had sexually abused children with the need to protect people from him. That witness described the accused as having had "something solid" concealed in a sock held in his left hand. He saw the accused bang on the front door of the building in which the apartment in question was situated, kick it in and enter (with the second male), the duo returning some five to ten minutes later at that stage with their faces covered. CCTV footage of the outside showed that when the accused approached he was carrying a long object in his left hand. The prosecution contended that the item seen by the taxi driver and on CCTV as carried by the accused was the murder weapon. It appears from the evidence of the State Pathologist, Professor Cassidy, that what was the first (and fatal) wound inflicted on the deceased was "suggestive of a (knife) being swung across his body in an arc-like manner, the knife held in the left hand of the assailant if both parties were facing each other" in circumstances where there was a deeply penetrating wound to the front of the chest.

3. Florentina Sotir had made three statements to the Gardaí on the 14th, 15th and 16th of October, 2012 and on the 3rd of January, 2013. She contended that the truth of what had occurred was contained in that made in January, whatever she may have said previously. She was cross examined at very considerable length because the earlier statements were admittedly untruthful or incomplete. Many deficiencies were apparent in her evidence, though she remained adamant that following banging on the door by the accused, he and the second man broke into the apartment (although she did not see them do so herself) and stabbed the deceased in the chest whilst the latter was in the middle of the hallway. She said in evidence that the assailant had held a knife to her throat and that the contents of her wallet was stolen. Perhaps unwisely, the trial judge was moved to give his own opinion as to her credibility describing it as being "totally shot" in an exchange with prosecuting counsel in the absence of the jury, indicating that he would not express that view to the jury since her credibility would be a matter for them.

4. The following grounds of appeal were relied upon: -

> "*Having regard to all the circumstances, the trial was unsatisfactory and the verdict unsafe because:*
>
> ***Ground 1 (a):*** *Having regard to the evidence and demeanour of the main prosecution witness mid-way through her cross-examination, the trial judge himself took the view that Ms Sotir was an unreliable witness. There must be concerns over whether Ms Sotir witnessed the incident in the manner she says. It was the duty of the trial judge to exercise extreme caution with the evidence of Ms Sotir to ensure that the appellant received a fair trial.*
>
> ***Ground 1 (b):*** *The failure of the trial judge to give a warning in relation to the reliability of the prosecution witness, Florentina Sotir, as to her location in the subject apartment and in particular her ability to observe the incident the subject matter of the prosecution.*

Ground 1 (c): *The failure of trial judge to give a sufficient modified "Lucas" warning in circumstances where the prosecution in closing its case placed great weight upon a number of lies told by the appellant in relation to a number of matters to support its case that the appellant intended to kill or cause serious injury to the deceased.*

Ground 1 (d): *The failure to carry out a proper investigation. There were shortcomings in the prosecution case that inhibited the appellant having a fair trial in due course of law. There was a distinct lack of cooperation from a number of potential prosecution witnesses in this case, namely 'Stropp' and 'Bogdam'.*

Ground 1 (e): *the failure of the trial judge to put the appellant's case to the jury. The trial judge in his charge did not set out the defence case by reviewing the overnight transcript of what counsel for the appellant had said in closing. It is submitted that this did not sufficiently set out the precise defence upon which the appellant sought to rely.*

Ground 1 (f): *The failure of the trial judge to direct the jury to acquit the applicant of murder. The main contention by counsel was that there was not sufficient evidence for a jury to conclude that the appellant had formed an intention to kill or to cause serious injury. Having regard to the concerns as to the reliability of Ms Sotir, it was not safe to ask the jury to decide the issue of murder upon her evidence.*

Ground 2: *The failure of the trial judge to advise the jury that Florentina Sotir conceded that she could not observe the incident by reason of her position in the apartment.*

Ground 3: *The refusal of the trial judge to re-charge the jury in accordance with the requisitions made on behalf of the Appellant that his assertion to the jury that Florentina Sotir's evidence had been that she was not at the window at the time (of the incident) was not borne out by the transcript of her cross examination on day 4 of the trial. The transcript contained her repeated assertions that she was "sticking" to her statement of the 3rd of January 2013 which placed her at a window and behind a coffee table from where it was conceded by her that she could not have observed the incident.*

Ground 4: *The failure of the trial judge to properly put the alternative verdict of not guilty simpliciter to the jury, or in the alternative, the trial judge erred in fact and in law by stating to the jury that no party had argued for such a verdict.*

Ground 5: *The repeated references by the trial judge to the term 'Soviet Attack' to the jury at a time when they had already spent some 8 hours and 37 minutes in deliberation and shortly before they returned a majority verdict."*

5. There is considerable overlap between the grounds of appeal potentially engendering a degree of confusion. Counsel for the appellant, Mr. Toal and Mr. O'Connor, who did not appear at the trial, divided the oral submissions between them but the overlap in the written submissions, perhaps inevitably, was carried through to those made orally. We will, however, for the purpose of clarity, seek to deal with each ground in turn in the order in which they have been pleaded. We make the exceptions in respect of Ground 1(a) which pertains to the alleged unreliability of the evidence of Ms. Sotir (which we think is inextricably bound with grounds 2 and 3 which clearly pertain also to issues of credibility), and Ground 1(e), which relates to whether or not the accused's case was before the jury and is similarly linked with Ground 4.

Ground 1(a), Ground 2 and Ground 3

Ground 1(a)

The unreliability of the evidence of Ms Sotir.

Ground 2

The trial judge erred in failing in his charge to the jury to properly summarise evidence of the prosecution witness, Florentina Sotir, as to her location in the subject apartment and in particular her ability to observe the incident the subject matter of the prosecution. The trial judge erred by omitting to advise the jury that Florentina Sotir conceded that she could not observe the incident by reason of her position in the apartment.

Ground 3

The trial judge erred in refusing to re-charge the jury in accordance with the requisitions made on behalf of the appellant that his assertion to the jury that Florentina Sotir's evidence had been that she was not at the window at the time [of the incident] was not borne out by the transcript of her cross examination on day 4 of the trial. The transcript contained her repeated assertions that she was "sticking" to her statement of 03 January 2013 which placed her at a window and behind a coffee table from where it was conceded by her that she could not have observed the incident. In circumstances where Florentina Sotir was the sole eye witness to the incident, the trial was unsatisfactory and the verdict is unsafe.

6. Counsel sought to engage extensively with the merits of the prosecution with special reference to Ms. Sotir's evidence, and his starting point in respect of the latter was the judge's view. The appellant referred to the portion of the transcript in the course of which the trial judge described Ms. Sotir's credibility as being "totally shot". We cannot see how it could be said that there is any want of safety in the verdict or that the trial was in any way unsatisfactory because of any issue of credibility of this witness. Issues of credibility, as the judge rightly said when refusing an application for an acquittal on the murder charge at the close of the prosecution case are matters for the jury.

7. Counsel's observations about Ms. Sotir extended to the fact that apparently for a not insignificant period, after the emergence of the accused and his friend from the apartment (they were in it for approximately four minutes), she was engaged in tidying it or cleaning it, and that the knife could not be found nor a bag which was speculated to contain whatever she removed. A great deal of emphasis was placed in the course of Mr. Toal's submissions to us and, it is fair to say, to a degree in the appellant's written submissions, upon the proposition, going to Ms. Sotir's credibility, that she could not have seen the stabbing as described by her because of where she happened to be at the time. In her third statement she said she was "standing by the window (in the kitchen)" and was "close to the balcony behind the table or coffee table". This submission was based on the lay-out of the apartment as shown in a plan in evidence. He submitted that she was a very fluent liar. On these bases, he contended that the judge had what might be termed an exceptional or special duty to address the jury about her credibility.

8. Counsel also referred to a supposed failure by the trial judge to "properly summarise the evidence of the prosecution witness, Florentina Sotir as to her location in the subject apartment" with special reference to an alleged omission to advise the jury that she had conceded that she could not observe the incident by reason of her position, and proceeded to make a related criticism based upon the rejection by the trial judge of Mr. Fitzpatrick's requisition about that aspect of her evidence (rejected by the judge on the basis that the summary of the evidence which he had given on the topic in question was inadequate). The relevant portion of the charge is as follows:

> "*And it was suggested to her, ladies and gentlemen, that in her statement of the 3rd of January, she had told the Gardaí that she was standing by the window. In that regard, ladies and gentlemen, there was certain discussions between counsel and myself, you will recall, and the portion of the statement was then read out. The portion that was read out reads, "I told Catalin, "do not go to the door, please, let it be, whatever it is just let it be." The very same moment the entrance door was broken, Catalin in the meantime, before the door was broken, proceeded towards the door halfway down the hall. They stabbed him and pushed him towards the kitchen where me and Stropp were. Stropp was on the couch and I was standing by the window, I was close to the balcony behind the coffee table…" – "the table or coffee table. She said that she wasn't close to the window when those matters occurred. And that in effect, ladies and gentlemen, was the evidence on day four."*

9. It is not contested that this part of the charge contained a quotation from Ms. Sotir's statement of the 3rd January, which was given verbatim from the evidence. The inadequacy is alleged to be capable of being seen when a more extensive portion of the cross examination in that regard is considered and that is as follows:

> '*Q. I will ask you about what you said on Friday in due course, okay. Okay. "I told Catalin do not go to the door, please let it be, whatever it is, just let it be. The very same moment the entrance door was broken. Catalin in the meantime, before the door was broken proceeded towards the hall, halfway down the hall. They stabbed him and pushed him towards the kitchen where me and Stropp were. Stropp was on the couch and I was standing by the window. I was close to the balcony behind the table or coffee table." Did you say that to the guards on the 3rd of January?*
>
> *A. I didn't say something – I didn't state this in a – generally. The questions are different. I wasn't close to the window. Nothing to commentate.*
>
> *Q. Excuse me?*
>
> *A. I can't comment. I stick with my statement from January.*
>
> *Q. You stick with your statement from January? Okay?*
>
> *A. Let it be like this.*
>
> *Q. Well, your statement from January is what I've just read to you. You're sticking with that are you?*
>
> *A. Yes. I understood.*
>
> *Q. Okay. If your statement from January is correct, you couldn't have seen what you say occurred in the hallway near the door; isn't that right.*
>
> *A. That's correct, the way you say it.*
>
> *Q. Okay. So, I'm suggesting to you that a lot of very important answers that you give are attempts by you to account for things you didn't actually see?*
>
> *A. I have nothing more to comment.*
>
> *Q. Okay.*
>
> *A. That's my statement there and I …*' [Transcript Day 4, pages 18 – 19]

10. We simply cannot see any inadequacy. There can be no debate about the fact that the judge's obligation is to fairly summarise relevant evidence. It seems to us beyond doubt that that was what he did. He was right to refuse the requisition.

11. Accordingly, we reject grounds of appeal 1(a), 2 and 3, respectively.

<u>Ground 1(b)</u>

The failure of the trial judge to give a warning in relation to the reliability of the evidence of Ms. Sotir.

12. It is submitted at this Ground that whilst it was accepted that Ms. Sotir was not an accomplice what was described as a specific cautionary warning should be given about a witness who is shown to be unreliable or where that witness has told lies in the course of being interviewed, when making statements relating to the crime or where the witness may have an improper motive. In this regard, reference has been made to *R v. Makanjuola* [1995] 3 All E.R. 730 and the *DPP v. JEM* [2001] 4 I.R. 385. These cases relate to the circumstances in which a warning to a jury as to the dangers of acting on the uncorroborated evidence of a complainant in a sexual offence case should be given. They are clearly distinguishable and irrelevant in the present context.

13. This proposition has been primarily advanced on the authority of *R v. Beck* [1982] 1 All E.R. 807, in which it was held that whilst a warning of the type formerly necessary in sexual offence cases does not arise in cases involving a supposedly unreliable witness, there is an obligation at common law to "advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive" even though such a person was not an accomplice. It is suggested that this is the case here. There is no rule of Irish law to that effect, and hence there is no basis for this proposition.

14. For the sake of completeness, we might refer to *Chan Wai-Keung v. R* [1995] 1 WLR 251. However, we do not consider this case to be in point, as it is clearly distinguishable from the circumstances of the present case. There, the principal witness for the prosecution was approached and told that should he agreed to appear as a witness he might seek an adjournment of a scheduled

hearing for his sentencing for unrelated offences, until he had given evidence with a view thereafter to seeking a mitigated sentence for assisting the Crown. Sentence was in fact postponed on his application and when the sentencing hearing was resumed, whilst the accused trial was still in progress, evidence as to the assistance he had given to the Crown in the prosecution was adduced whereby he did, indeed, receive a reduced sentence. The Judicial Committee of the Privy Council held that there were circumstances which might justify calling a witness who stood to gain by giving false evidence provided that the potential fallibility of such evidence had been put before the jury (which had been done, apparently, in that case). Again, this is not the law of Ireland and there is no evidence to suggest, in any event, the evidence of Ms. Sotir falls into what might be described as that suspect category. *R v Asghar* [995] 1 Cr. App. R. 223, pertains to evidence given by those who were or could be characterised as accomplices.

15. Therefore, for the reasons we have indicated, we reject ground of appeal 1(b).

Ground 1(c)

The failure of the trial judge to give a sufficient modified "*Lucas* Warning".

16. It was submitted that a *Lucas* warning should have been given to the jury on the basis that the prosecution was said to have relied upon the lies of the accused, told in the course of his interviews with the Gardaí whilst under arrest between the 14th and 15th of October, 2012 as evidence of guilt.

17. The leading authority on this issue is now *The People (DPP) v Solowiow* [2018] I.E.S.C. 9, where MacMenamin J approved the principal test, elaborated in *R v Lucas* [1981] 1 Q.B. 720, that where the prosecution rely on the accused's out of court lies as evidence of guilt the jury ought to be instructed that there are many possible reasons why people lie and that before relying on the lie as evidence of guilt, it must be satisfied that the motivation behind it was a realisation of guilt and a fear of the truth. *R v Burge and Pegg* [1996] 1 Cr. App. R. 163 merely sets out the current English law on the topic, to which reference has been made. *Lucas* of course was a case where the issue was whether or not the evidence of the complainant in a sexual offence case was corroborated and it was suggested that such corroboration was to be found in the accused's lies: of course, if such lies are evidence of guilt they can constitute such corroboration.

18. Prior to his commencement of the charge on the tenth day the trial judge stated that: "*I should say, gentlemen, that in the light of the manner in which the State closed this case, I do propose to give the jury a Lucas type warning*" to which Mr. Greene for the appellant responded "*Yes, I was going to well, perhaps I should have said that, it was something I was going to raise if it wasn't done, maybe it's better that we're all clear now at this stage, yes.*" On the following day the charge was continued and the trial judge raised this issue again as follows: -

> *JUDGE: I did indicate that I would give the jury a Lucas type warning.*
>
> *MR GREENE: Yes.*
>
> *JUDGE: I am just concerned with that, Mr McGrath has suggested to the jury that there are untruths in the interviews.*
>
> *MR GREENE: Yes.*
>
> *JUDGE: Mr McGrath hasn't argued for the proposition that the untruths can be used as corroboration. Now, I wonder in those circumstances would a Lucas type warning cause more harm than good and should I simply say to the jury, there may be untruths, but people can tell untruths for a myriad of reasons.*
>
> *MR GREENE: And that they shouldn't use it as supporting evidence in their consideration.*
>
> *JUDGE: And just leave it at that, rather than*
>
> *MR GREENE: That might*
>
> *JUDGE: taking them through the relevant proofs, so to speak, in Lucas.*
>
> *MR GREENE: Well, certainly*
>
> *JUDGE: You might like to*
>
> *MR GREENE: it's attractive what you're saying at this moment, but can I mention it at 2 o'clock?*
>
> *JUDGE: Think about it over lunch, Mr Greene.*
>
> *MR GREENE: Yes.*
>
> *JUDGE: It's just as I say, it occurred to me that I might be doing more harm than good.*
>
> *MR GREENE: Yes.*
>
> *JUDGE: From your point of view.*
>
> *MR GREENE: That may well be true, and I'll address you briefly*
>
> *JUDGE: Or do I simply stay- simply stay away from it.*

19. Whether or not the lies told were relied upon by the prosecution for the purpose of impugning the accused's credibility or in proof of guilt is a matter of debate, having regard to the speech closing speech of prosecuting counsel. Ordinarily, certainly it is the best practice, if a prosecutor is relying upon lies as evidence of guilt they should be identified with a fairly high degree of specificity and explicitly referred to as relevant for this purpose. That was not done, which would tend to suggest that they were, in fact, not relied upon. However, by definition the prosecution was placed in the position of seeking to undermine or attack the credibility of the accused. The prosecution was placed in the position of seeking to undermine or exculpate the assertions made to the Gardaí by the accused and this would further tend to support the proposition that the lies were referred to for what we might describe as the more

limited purpose of addressing credibility. The judge was in the best position to decide where the emphasis lay.

20. When he resumed the charge, the judge addressed the question of lies, *inter alia*, as follows: -

> "*The state say to you that there are a number of what they describe as significant lies told by the accused man in the course of his interviews. They refer you, ladies and gentlemen, to the fact that he says in his interviews that he had stayed in after he went home that night and hadn't gone out till the following day. Well, they say that's contradicted with the evidence of Mr Malone and Pawel. They say that he says that he told Mr Malone that they had a fight over money, that ladies and gentlemen, is a matter where that is something that is not accepted by Mr Malone and it's a question of credibility. Are you satisfied beyond reasonable doubt that the account given by Mr Malone is the correct version? The state say on his evidence, he said he had no money when he went home, the accused man, and they say when you look to the evidence of Pawel, there he is some short hours later in possession of money. And again, ladies and gentlemen, you can see what he says in the course of his interviews about having taken rent money out with him, which you can look to the notes and see how those matters add up. And they say he lied about leaving his phone in the car, in Mr Malone's car that is, that he flatly denied it, but you have Mr Malone's evidence. And what you have to do there, ladies and gentlemen, as I say, is look to the credibility of Mr Malone, are you satisfied to accept his assertions in relation to matters? And it's only if you accept those assertions that you can say that these are lies or untruths told by the accused man. If you find that these are untruths told by the accused man, then they are matters that affect the credibility of the accused man, but they are not matters that you can call in aid, so to speak, to bolster the prosecution case.*"

21. The crucial part of the charge in this respect is the fact that the judge instructed the jury that the lies affected credibility (if, indeed, lies were told) and that they were not matters which could be used to bolster the prosecution case. Had he not done so an appropriate warning would almost certainly have been necessary. Even if we are wrong in this regard, it is that defence counsel, to put the matter no higher, acquiesced in (if not approbated) the course which the judge had indicated he proposed to adopt, and did not make any requisition thereafter.

22. Whilst there is no doubt now in this jurisdiction on the authority of *Solowiow* that in cases where lies are relied upon as evidence of guilt the warning must be given, it is not authority for the proposition that anything need be said where the prosecution is not relying upon them as evidence of guilt but where there happen to be lies which do, in truth, go to credibility or are relied upon as such. However, the judge took a very prudent course here in making it clear to the jury that they could not rely upon them. The height of the complaint of the appellant can only be that the judge should have told the jury that they could rely upon lies generally, or on one or more specific and identified lie or lies, as evidence of guilt, subject to what we might term the conditions precedent to doing so elaborated in *Lucas* and approved in *Solowiow*. It can only have been to the advantage of the accused that the judge did not give the jury that opportunity.

23. We therefore also reject ground of appeal 1(c).

Ground 1(d)

The failure of An Garda Síochána to carry out a proper investigation.

24. In so far as there is criticism of the Gardaí it appears to be at Ground 1(d) ("the failure to carry out a proper investigation"). There, it is submitted that there was "a distinct lack of co-operation from a number of potential prosecution witnesses" – she who is named as "Stropp" being, allegedly, one of them. Under this rubric is also said to be one Bogdan who was apparently contacted by Ms. Sotir at the time of the incident. He was not amenable to the Court. In that regard it is also submitted that one can speculate that the murder weapon may have been removed from the apartment by Ms. Sotir and further speculate that this would assist the appellant's version of events (by what means is not clear). It is also submitted that the Gardaí failed to locate and take a statement from whatever taxi driver allegedly brought "Bogdan" to the apartment and it is further speculated that he might have been able to give evidence supportive of the appellant's version of events.

25. In argument, counsel further submitted that when the Gardaí had taken the third statement of the 3rd January, 2013 from Ms. Sotir, they were then in possession of new or additional information adverse to the accused, and that they should accordingly have interviewed him again. It was contended that the Gardaí have an obligation as a matter of fair procedures to afford him the opportunity to respond to what might have been said, and that since they did not do so, any response which he might have would not have been before the jury when they were considering her evidence or what he had said to the Gardaí when earlier detained. Mr. Toal made to us the unprecedented submission that it would have been open to the Gardaí to seek to interview the appellant notwithstanding the fact that he then stood charged with murder. Drawing on such experience as we have, we have never known of such a course and we would have grave reservations about its propriety were it to have been attempted. Even if it were to have taken place, it is entirely speculative as to whether or not the appellant, upon being interviewed under caution after being charged, would have said anything whether inculpatory or exculpatory. Thus we neither think that the Gardaí could, nor should, have sought to interview the accused. Neither do we think that one can speculate as to what the appellant might or might not have said had such an interview occurred.

26. Moreover, quite apart from the merits of the complaint now being made, we do not see any explicit ground of appeal referring to this supposed obligation by the Gardaí and any deficiency in the trial because of the alleged omission. The complaint requires to be dismissed *in limine* on that basis alone, as it is not legitimately before us.

27. We need hardly say that speculation of the kind invited, or indeed of any kind, has no place in any criminal process. In principle, there may be circumstances in which a prosecution may be restrained or stayed by virtue of the absence of evidence due to some deficiency in investigation where the accused is prejudiced. We cannot see the basis on which that could arise here. In any event trials are concerned with whether or not the accused is guilty or not guilty of the offence with which he is charged and not with whether the Gardaí are to commended or criticised for the manner in which they have conducted the investigation giving rise to the prosecution. The jury must decide on the evidence actually placed before them and not otherwise.

28. We have no hesitation, therefore, in rejecting ground 1(d).

Ground 1(e) and Ground 4

The failure to put the accused's case to the jury.

29. The accused was arrested and detained subsequent to the homicide. The appellant contends that as he was making his way through the hallway of the apartment, he was approached in a threatening manner by Mr. Cretu, who was holding a knife, and that the knife penetrated the deceased's body during the struggle that ensued. In this context, the appellant relies upon what was said by him as follows:

> "*he came at me with a knife; I just fought for my life. I went for girls; you know, prostitute. He first wanted money and I gave him money, €80. He then closed the door. Then I pushed the door in and he jump on me with a knife. I could have died. I wanted to come and tell you but I was afraid.*" [Transcript Day 8, page 10, lines 6-9]

When charged with murder and criminal damage respectively the appellant made a number of responses of evidential relevance as follows: -

> "*I did not want to murder him, I did not try to murder him, I tried to defend myself*."
>
> [Transcript Day 9, page 20, lines 12-13].

The appellant went on to say:

> *"I do not remember exactly if I broke this door or not, but if I did, I can pay for the damage to the door, I just wanted my money back, maybe it wasn't a reason to break the door*" [Transcript Day 9, page 20, lines 12 -22]

Complaint has been made under the heading that the accused's case was not put before the jury with specific reference to what was said by him to the Gardaí, quoted above at para 29 and in that regard they should have been told that they would be entitled to take the view that the deceased was lawfully killed on the premise that, objectively speaking, the accused was acting reasonably in self-defence, apart from any question of an acquittal of murder but a finding of guilt of manslaughter on the basis that the force used was not objectively reasonable but that the accused, subjectively speaking, had thought so. The body of evidence before the jury, included, in particular, the memoranda of what the accused had said. The judge followed the usual practice of merely referring the jury to the fact that they had them available to them in the usual way. It was clear from the charge that verdicts of not guilty *simpliciter* or not guilty of murder but guilty of manslaughter were available to them. This is plain from the following passages of the charge:

> "*In theory, ladies and gentlemen, the issue of an acquittal, which would be not guilty simpliciter, would be open to you in circumstances where the amount of force used by the accused man was reasonable in his mind and also reasonable from an objective point of view. Well, I don't think anybody has argued before you for that proposition. The proposition that has been argued for is the prosecution arguing for murder and the defence arguing for manslaughter.*" [Transcript Day 11, page 31, lines 4-9]
>
> "*As regards matters, the only verdict that I will accept from you at the moment is one in which you are all unanimous, that is all 12 of you agree on it. There are circumstances which may arise at a later stage when I can give you further directions in relation to your verdict. I'm sure you've all heard or read of majority verdicts, there are provisions in law for majority verdicts, but there are certain prerequisites or preconditions had a must be fulfilled before I can consider inviting you to return such a verdict. So for the moment, the only verdict I can take from you is one in which you're all, 12, agreed. Once you retire ladies and gentlemen, as I said to you earlier in my charge, it is a matter for the individual conscience of each individual as to what verdict you return in this case or how you view matters, whether you're satisfied beyond reasonable doubt or not in relation to matters*."
>
> "*In theory, ladies and gentlemen, the issue of an acquittal, which would be not guilty simpliciter, would be open to you in circumstances where the amount of force used by the accused man was reasonable in his mind and also reasonable from an objective point of view. Well, I don't think anybody has argued before you for that proposition. The proposition that has been argued for is the prosecution arguing for murder and the defence arguing for manslaughter.*" [Transcript Day 11, page 31, lines 18-30]

30. No requisition was made at the conclusion of the charge on this topic. The trial judge stated the bald fact that nobody had argued before the jury for the proposition that the amount of force used was reasonable from an objective point of view or in the accused's own mind. The judge said exactly the same thing when he was considering the application for a direction in relation to the murder charge and there was no dissent from that at that stage by defence counsel. Therefore, it cannot be the case that the judge's remarks took the defence by surprise or that they somehow slipped by. The trial judge was clear throughout that this was a murder/manslaughter case and nobody took issue with that. Further, on the run of the case, the jury must have been fully aware of all the issues that arose in relation to the witness.

31. Further reference to the available verdicts was made by the judge on the last or fourteenth day of the trial in circumstances where the jury, in the course of their deliberations, asked a number of questions. In particular, an enquiry as to whether or not there were "any legal principles that might reduce or remove an individual's right to argue self-defence in the case of an unlawful murder". The foreman pointed out that the issue paper merely asked them whether the accused was guilty or not guilty in circumstances where the judge had mentioned the question of manslaughter. He responded as follows: -

> "*Yes. Well, that is the position, Mr Foreman, the count on the indictment is one of murder, and there are a number of verdicts that can be returned in relation to that. You can return a verdict of guilty of murder, or you could return a verdict of not guilty of murder, but guilty of manslaughter. And the circumstances that would arise there are either 1) that the accused man was acting in self defence using no more force than he believed to be necessary from his own personal point of view. But where he used more force than you as a jury considered reasonably necessary in the circumstances. And as I told you in the course of my charge, self defence presupposes a functioning mind that, the accused man knew exactly what he was doing. You can also return a verdict of not guilty of murder, but guilty of manslaughter by reason of provocation, and provocation presupposes a non functioning mind. It arises in circumstances where a person is so provoked by the words or the actions of another, that at the time he commits a particular act, he is not master of his own mind. As I say, in relation to provocation, it's not just a hot tempered reaction to some comment. As I said to you in the course of my address to you, I could lose my temper with somebody, and assault them in the knowledge that I knew precisely what I was doing, and why I was doing it, and I could restrain myself from committing that act, if I wanted to. But simply because I am enraged, I go on, and as I say, hit somebody, then that does not make the defence of provocation available. What provocation does is it reduces what otherwise would be a murder count to one of manslaughter.*

In relation to matters, well, in theory you could return a verdict of not guilty simpliciter, but nobody has argued for that proposition, nobody has argued that the accused man used reasonable force in both his own mind and in the minds of reasonable people. But where a person uses no more force than is reasonably necessary, as I say, from his own point of view, and of the point of view of a jury, then he would be entitled to an acquittal. But what you write down on the issue paper is, if you decide it's murder, then you write down the word, "Guilty." If you decide it is manslaughter, then you write down, "Not guilty of murder but guilty of manslaughter." And if you decide the accused man is not guilty of anything, you write down simply, "Not guilty". [Transcript Day 14, page 1-2]

32. We think that the fact that he was not requisitioned either after the completion of the charge proper or the recharging and answering of the questions indicates that it was not simply being contended there ought to be a complete acquittal. In particular, there is no reason to suppose, that when the judge said that "*the proposition that has been argued for in the prosecution arguing for murder and, the defence arguing for manslaughter*" he was wrong; if he was acting on instructions, competent counsel (and there is no suggestion that counsel were anything other than competent or not acting on instructions) would undoubtedly have intervened. Counsel could not fault the judge in what he had said. Nor could defence counsel have legitimately requisitioned the judge at the end of his charge proper and, even more so, after he had recharged them. In truth, that would have meant that they now wished to reopen their case and make some further submission to the jury or that the judge should do so on their behalf.

33. It has also been submitted that, in truth, the judge was in factual error when he made his observations concerning the question of whether or not the case had been made by anybody that the force used was objectively reasonable and on this basis that there ought to be an acquittal *simpliciter* on the basis of what the accused had said. Counsel asserted this was so by wrongly characterising what the accused had said as a contention on his behalf that there ought to be such an acquittal. It was of course no such thing but evidence in the case given in the ordinary way upon which one might have built a contention or submission if one saw fit.

34. For the sake of completeness, we note that defence counsel have sought to rely upon *DPP v Davis* [1993] 2 I.R. 1 and *DPP v Nally* [2007] 4 I.R. 145 in support of the proposition, in effect, that the trial judge by his charge in some sense undermined or diluted the right or entitlement of the jury to bring in a verdict as giving them some form of direction as to verdicts. Nothing of the kind occurred here as appears from our analysis of the charge, the recharging and the exchanges with counsel.

35. In the circumstances we reject grounds 1(e) and 4, respectively.

Ground 1(f)

The failure of the trial judge to direct the jury to acquit the applicant of murder.

36. At the conclusion of the prosecution case counsel for the defence at the trial sought a directed acquittal in respect of the count of murder (only). The evidence was insufficient to support the proposition that the accused had an intention to kill or cause serious injury. Quite rightly the judge took the view that there was sufficient evidence upon which the jury could consider that verdict primarily on the basis of the credibility of Ms. Sotir which was a matter for the jury.

37. We therefore also reject ground of appeal 1(f).

Ground 5

The trial judge erred in fact and law by making repeated references to the term "*Soviet Attack*" to the jury at a time when they had already spent some 8 hours and 37 minutes in deliberation and shortly before they returned a majority verdict.

38. It has also been submitted in the context of the use of the term "*Soviet attack*" after the jury had been deliberating for eight hours and thirty-seven minutes and shortly before they returned their majority verdict, that this constituted an inappropriate comment by the trial judge which implied that he was not independent or impartial. Indeed, it is submitted that the reference in question gave support to the case being made by the prosecution. In this context the appellant relies upon *Donnelly v Timber Factors Ltd* [1991] 1 I.R. 553, *Dineen v Delap* [1994] 2 I.R. 228 and *McCarthy v The Director of Public Prosecutions* (Unreported, 1997). The first deals with judicial interventions of a repeated kind and the second emphasises the necessity that justice must not only be done but be seen to be done. The proposition is advanced that the judge's conduct could "*reasonably give rise in the mind of an unprejudiced observer to the suspicion that justice was not being done.*" We do not consider that these authorities are in point, or that they are relevant to the complaint being made. Neither, do we see how the use of the term in question by the judge was in any sense lacking in propriety. The term used did not constitute a comment and there is no reason to suppose, even if it did, that it could have adversely influenced the jury's determination to the prejudice of the appellant. Some emphasis appears to be put on the fact that the jury were deliberating at length and that the verdict was a majority one. The assertion is also made that the trial was "very finely balanced". The length of time for which the jury deliberated is a tribute to them. It is plain that the matter was considered exhaustively. The law does not place any question mark, so to speak, over a verdict by a majority. The capacity to deliver or receive majority verdicts is there for good reason and does not undermine the reliability of the verdict in any way. Many cases are, in the sense apparently relied upon "finely balanced" involving straight forward conflict of fact between witnesses whose credibility or reliability is gravely in issue and the characterisation of the present trial as being of that kind adds nothing.

39. We therefore reject the complaint in ground of appeal no 5.

Conclusion

40. In all of the circumstance, it is clear to this Court that the prosecution had a very strong case. There was clearly sufficient evidence to convict. After a comprehensive review of the issues raised by the appellant, this court finds that none of the points raised, individually or as a whole, raise any doubts over the fairness of the trial or the safety of the jury's verdict.

41. We are therefore satisfied that there is no reason to believe that the appellant's trial was unsatisfactory, or that the verdict is unsafe. We therefore dismiss this appeal on all grounds.