THE COURT OF APPEAL

[214/2014]

Birmingham P.

Mahon J.

Hedigan J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

GRETA DUDKO

APPELLANT

JUDGMENT of the Court delivered on the 11th day of June 2018 by Birmingham P.

1. On 22nd October 2014, following an eleven -day trial in the Central Criminal Court, the appellant was convicted of the offence of murder and she now appeals against that conviction. The prosecution case against Ms. Dudko had been that, she had murdered her mother, Ana Butautiene at an address at 4, Station Court Hall, Clonsilla, Dublin on 24th December 2010. It is to be noted that when Ms. Dudko was arraigned, that she pleaded not guilty to murder, but guilty to manslaughter. At trial, there was no dispute about the fact that the appellant had killed her mother and had done so unlawfully. The only issue was whether the appropriate verdict was one of murder or manslaughter. The routes to a manslaughter verdict that were canvassed by the defence were:

i. provocation; and

ii. a contention that the prosecution had not proved beyond reasonable doubt that there was an intent to kill or cause serious injury.

For completeness, it may be noted that the trial judge dealt very briefly with the issue of self-defence in the course of his charge, but this issue had not really featured in the trial.

2. Some ten grounds of appeal have been formulated as follows:

i. That the trial judge erred in law and in principle in failing to adequately put the defence case to the jury;

ii. That the trial judge erred in law and in principle in failing to put the defence case to the jury in a fair and balanced manner;

iii. That the trial judge erred in law and in principle in failing to refer to the cross-examination of Dr. Curtis, the Deputy State Pathologist, during the course of his charge in circumstances where evidence elicited during the cross-examination was crucial to the issue of the applicant's credibility;

iv. That the trial judge erred in law and in principle in failing to refer during the course of his charge to the evidence elicited during the cross-examination of Dr. Khan. Dr. Khan, it should be explained, was, from the prosecution point of view not a particularly significant witness. He was called to the crime scene and pronounced the deceased dead . Further, he was called to the Garda Station to examine Ms. Dudko while she was detained. However, the defence cross-examined him at some length about issues in relation to intoxication and related matters;

v. That the trial judge erred in law and in principle in specifically indicating to the jury during the course of the trial that he did not intend to refer during the course of his charge to the jury to the evidence that was elicited during the cross-examination of Dr. Khan;

vi. That the trial judge erred in law and in principle in failing to marshal the evidence in relation to the evidence of intoxication and its relevance to the defence of provocation;

vii. That the trial judge erred in law and in principle in failing to deal adequately or at all with the evidence of intoxication;

viii. That the trial judge erred in law and in principle in failing to deal adequately with the defence of intoxication;

ix. That the trial judge erred in law and in principle in deeming photographs of the deceased at the crime scene admissible;

x. That the trial judge erred in law and in principle in failing to contextualise the Lucas warning in order to deal with the defence of provocation.

3. The appellant summarises the main issues arising on the appeal as being:

i. The extent and operation of the obligation on a trial judge when charging a jury to adequately put the case raised by the defence in a fair and balanced manner;

ii. The extent and operation of the obligation on a trial judge during his charge to summarise for the benefit of the jury evidence elicited from prosecution witnesses on cross examination where such evidence is important to the case put forward by the defence;

iii. The extent to which it is permissible for a trial judge to comment on evidence elicited in cross examination during the course of the trial;

iv. The extent and operation of the obligation on a trial judge when charging the jury to marshal evidence relevant to issues raised by the defence, and in particular in this case evidence relevant to the defence of intoxication and evidence of intoxication relevant to the defence of provocation;

v. The extent and operation of the obligation on a trial judge when charging a jury to contextualise a Lucas warning, where given, and in particular to deal with it in the context of the defence of provocation;

vi. The admissibility of photographic evidence of the body of the deceased at the crime scene.

The Alleged Failure to put the Defence Case, particularly in relation to the Evidence of Dr. Khan and Dr. Curtis

4. Dr. Khan was called to give evidence on 16th October 2014, Day 7 of the trial. In his direct evidence he reported being called to the crime scene at 4 Station Court Hall where he pronounced Ana Butautiene dead at 21:52 on 25th December 2010. He went from the crime scene to the Garda station where he was asked to see Ms. Dudko, who had been arrested and brought there shortly before. He was told by Ms. Dudko that she had been taking the antidepressant tablet Lexapro, 10 mg daily, starting this treatment just three days before having received a prescription from her general practitioner. Ms. Dudko said that she had been taking the sleeping tablet, Stilnoct, taking one daily for the last four months. Further, Ms. Dudko said that she had been taking Librium, 10 mg, relating to withdrawal from alcohol, three times daily for the last month. She also told him that she was taking the painkiller Tramadol 50 mg daily.

5. The cross-examination initially focused on certain suggested shortcomings in his note-taking and reporting. His report had referred to the fact that Ms. Dudko had an injury to the left eye, but the evidence at trial, including the custody records, produced suggested that the injury was to the right side of Ms. Dudko's face. Again, his report had referred to the fact that the appellant had been on career leave for the past three months, whereas other evidence suggested that she had been on leave for a period of two weeks at that stage, but was to return to work in March. It emerged that there was a discrepancy between the notes taken at the time by Dr. Khan and the report as subsequently written up. The notes had referred to her being out of work for three weeks but the report, when written up, had referred to "currently on career leave for the last three months". Again, the report had not referred to the fact that he had seen Ms. Dudko on a second occasion on the 26th / 27th December at a time when she was detained for the purpose of charge. On that occasion, he had administered not only a Paracetamol tablet, as he had on the first occasion when she was complaining of a headache, but also a Diazepam 5mg tablet, sometimes referred to as Valium. It was accepted that Ms. Dudko had said certain things about her alcohol consumption which were not altogether consistent. At one stage, she appears to have said that she had had two glasses of wine on the morning of Christmas Day. At another point, she is recorded as saying that she had not eaten in four days and had stopped drinking two days ago. She was also recorded as having said that after the incident with her mother, she had consumed 200 mls of vodka and then fell asleep.

6. The cross-examination focused, in particular, on the fact that a blood sample was taken from Ms. Dudko at 4am on 26th December 2010. It was subsequently analysed at the Forensic Science Laboratory and found to contain 151 mgs of alcohol per 10 mls. It was suggested to Dr. Khan that 151 mgs of alcohol would represent in the region of six glasses of vodka, or possibly even higher, that the body eliminates alcohol at a rate of 15 – 20 mgs per hour. It was put to him, that if the blood alcohol reading was 151 at 4.00am on St. Stephen's morning, that it must have been higher at the time of her arrest at 9:42 pm on 25th December. On the basis that the body eliminates 15–20 mgs of ethanol per hour, that would indicate that the reading was higher by the equivalent of 4–6 glasses of vodka at the time of arrest. In further cross-examination, after the lunch break, it was suggested that the level could have been higher again at midday on Christmas Day by as much as 200 mgs of alcohol which would represent a level of 471 mgs of alcohol. Dr. Khan accepted that the level calculated, 471 mgs of alcohol, would represent a near-lethal level. It was emphasised that anything over 400 mgs could be near-lethal, causing death or a coma. Dr. Khan was asked whether he would accept that people with very significant difficulties with alcohol would sometimes have issues with other intoxicants as well, such as prescription medication, he responded "possibly". He was asked about the concept of cross addiction. He was asked whether alcohol could cause depression and he responded that this was a "known fact". Dr. Khan indicated that when his medical practice was dealing with a person whose life was becoming very heavily affected by alcohol, that they responded with a multidisciplinary team, involving psychologists and a social team. Dr. Khan was asked about the possibility of the drugs which had been prescribed to Ms. Dudko giving rise to a so-called paradoxical reaction. At a point very well into the cross-examination the judge intervened. He commented:

> "I'll just remind the jury that the voluntary consumption of alcohol or drugs is not a defence under Irish criminal law. They may form a factor in relation to certain issues that arise."

Defence counsel responded:

> "[y]es, my Lord, and those issues dealing with the partial defence of murder to manslaughter, my Lord."

And she then proceeded to address further issues in relation to Tramadol.

7. When the evidence of Dr. Khan concluded the Court took a short break apparently because defence counsel wanted an opportunity to have a word with the Deputy State Pathologist, who was going to be the next witness. When the jury came back to court the judge addressed them as follows:

> "[m]embers of the jury, at the end of this case you get what is known as the judge's charge. I just want to say to you that I hope that you remember all the stuff you're getting now, because you're not going to get it in the judge's charge. The charge is first of all general directions of law as to the manner in which you reach your verdict. Now you then get directions from me as to the legal ingredients of the crime you are trying and finally you get salient features of the

> evidence. Now, it is my intention that the charge I give you in this case will be the shortest one I have ever given in about 23 years in this Court. So just remember all the stuff you're getting now, which you're not going to get again."

This is the second intervention by the trial judge to which objection is taken by the defence, the first being the intervention to point out that the voluntary consumption of alcohol is not a defence.

The Evidence of Dr. Curtis

8. Dr. Curtis told the jury that the death of the deceased was as a result of blunt force trauma to the head. He told the jury that she had received between five and eight blows to the left side of the head. He referred to one wound as having been more likely caused by the bottle. In some instances, he felt that the wound could be attributable to either the wall or the bottle, but in others, he favoured the bottle as the source of the injury. He could not exclude the possibility that each wound was caused by one blow only.

9. The cross-examination then dealt with the ability of the body to eliminate alcohol. In his response Dr. Curtis indicated that he was doing so from memory from a textbook published in the mid-1990s. His recollection was that most people would eliminate alcohol at a rate of 15–18 mgs per hour. A novice drinker might be as low as 9 mgs an hour and a seasoned drinker might equate to 25 mgs per hour. They were at the extreme limits.

10. When the trial judge came to the section of the charge where he was proposing to review the evidence, he prefaced that section by saying:

> "I am going to refer to salient features of the evidence. I am not going to refer to everything and it is not my intention to do so and it is the practice of counsel at the end of a case to address the judge on the basis that he has not rehearsed to the jury their favourite bits of the evidence. Now, I am not into that. It is not what I am trying to do: it is not what I am going to do".

He dealt very briefly with the evidence of Dr. Khan and Dr. Curtis. He did not deal with substance of the cross-examinations and, in particular, did not deal with the questions put to both medics about the ability of the body to deal with alcohol. He dealt with the issue of drink and drugs as follows:

> "[n]ow, in relation to drink and drugs, insofar as they are voluntarily consumed, you have been told they afford no defence under the criminal law of this land. They are however a factor which can be taken into account in relation to the question of intent, and in relation to the make-up of a person. This, you will find, will be relevant under a number of headings which I will be coming to, but without being offensive I would put it to you that there are twelve of you, there's probably one or two who go around with an ambulant level of alcohol. There is probably one or two who go around with an ambulant level of drugs of some type or other, so just bear that in mind.

So far as Grounds 5 and 6 relating to the two interventions are concerned, the Court does not believe that these rendered the trial unfair. As a reading of the entire transcript makes clear, and as the Court will have observed in many other cases, the particular trial judge's approach was a very non-interventionist one. It seems to us that he was entitled to make clear to the jury at an early stage that intoxication was not a defence. Once he had decided that he would not be rehearsing the ground covered in the cross-examination of Dr. Khan when charging the jury, there was nothing wrong in him indicating this to the jury. The reference to the fact that his charge would be, he expected, the shortest that he had ever given is somewhat more surprising, however, in fact, the charge was not particularly brief and instead followed the usual form. The Court has not been persuaded that the judge's interventions rendered the trial unsatisfactory. Neither have we been persuaded that what he had to say in relation to alcohol and medication and his decision not to rehearse the arguments that were advanced by the defence in relation to those topics rendered his charge unfair. The position, therefore, is that the Court has not been persuaded to uphold the grounds of appeal relating to the charge or to the interventions during the course of the evidence by the judge.

Photographs

11. The defence contend that the judge erred in allowing photographs of the body of the deceased *in situ* to be adduced in evidence. The defence says that the photographs were more prejudicial than probative, and, indeed, so prejudicial as to affect the fairness of the trial. The judge was required to rule on the admissibility of the photographs on Day 7 of the trial, and having heard argument on the issue, he admitted the photographs. In pressing for their introduction, prosecution counsel stressed that it was not sought to introduce the photographs for reasons of prurience or to provoke an emotional reaction. Rather that their introduction would assist the jury when it came to considering the account of the fight given by Ms. Dudko which involved the deceased falling naturally and without placement onto the bed. The Court is satisfied that the photographs were relevant, and therefore prima facie admissible. The face of the deceased was pixelated in the photographs and overall the issue was handled with as much sensitivity as was possible in the circumstances. The Court is not prepared to uphold this ground of appeal.

Lies and the Lucas Warning

12. In this case, it was clear that at various stages, lies had been told by the accused. Prosecution counsel dealt with the issue in the course of her closing speech in these terms:

> "[i]n this case, you have Greta Dudko's word for what happened and we say that Greta Dudko did not tell the truth to the Gardaí right from the get-go, and that when she did later admit certain things, like that she had destroyed the passport, which was still a valid passport, when she did later accept that she had used a bottle when she had denied originally that she had used any weapon, that the only time Greta Dudko ever shifted was when she was told by the guards that she did not believe it and they were going to find out the truth anyway. And even in the fifth interview, when she is being asked what clothing she was wearing and she describes the clothing that she was wearing, she lies about that too. She talks about the clothing she was wearing, but she does not say she was wearing the sleeveless anorak, DC8, but you will recall the Gardaí found the sleeveless anorak with the blood of Ana Batautiene in two separate places. And where did they find that anorak, Ladies and Gentlemen, that sleeveless jacket? They found it in the washing machine."

The judge dealt with the issue of lies by giving a so-called Lucas warning. He did so in these terms:

> "[n]ow, lying by the accused has been mentioned from time to time, so when that arises there is a warning which I am required to give you in relation to lies by an accused person. This was best formulated in England by a Crown Court judge and I am going to, as I am entitled to so, to adopt his words as my own. Giving judgment in a Crown Court in England, the judge said:
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> 'The second warning is about the lies that each of them has told the police. The mere fact that a defendant tells a lie is not in itself evidence of guilt. You must consider in each case where you are satisfied that a defendant has lied why he has lied. Defendants in criminal cases may have lied for many reasons. For example, to bolster a true defence. They may feel that they are wrongly implicated, and although innocent that nobody will believe them. And so they lie just to conceal matters which look bad, but which in truth are not bad. They may lie to protect someone else. They may lie because they are embarrassed or ashamed about other conduct of theirs which is not the offence charged. They may lie out of panic or confusion, all sorts of reasons. In the case of each of these defendants, if you think there is or may be some innocent explanation for his lies, then take no notice of the lies, but in the case of each, if you are sure that he did not lie for some such innocent reason, then his lies can support the prosecution case'."

13. Counsel on behalf of the appellant requisitioned on the issue, and referred to certain English authorities and also to the Coonan & Foley textbook on 'The Judge's Charge' in support of the proposition that a standard Lucas warning was inadequate in a case where provocation was in issue. The judge declined to recharge, viewing the requisition as an invitation to engage with the evidence and which would have seen him entering the arena. It would have been possible, in our view, for the judge to have said to the jury to bear in mind, when considering the issue of lies, the point made by the defence that the law imagines circumstances where someone kills another because of a loss of self-control and that people in that situation might tell lies. It is, nonetheless, the case that the jury was cautioned about over-reliance on lies and cautioned about jumping to conclusions of guilt simply because of the fact of lies being told. A jury must have been conscious of the fact that anyone who had done something as terrible as killing their own mother might have been tempted to lie and that temptation would be there whether the acts in law amounted to murder or manslaughter. In the Court's view, it would clearly have been preferable if the judge had adverted to the possibility of lies being told by someone who had killed as a result of loss of self-control. Notwithstanding this preference, we have not been persuaded that the failure to do so in express terms renders the charge so unsatisfactory as to lead to a conclusion that the verdict was unsafe. Accordingly, we are not prepared to uphold this ground of appeal.

14. In summary, then, the Court has not been persuaded that the trial was unsatisfactory or unfair or that the verdict was unsafe.

15. In those circumstances, we dismiss the appeal.