THE COURT OF APPEAL

Record No. 227/2013

Birmingham J.
Mahon J.
Edwards J.

Between/

The Director of Public Prosecutions

Respondent

- and –

Ciprian Grozavu

Appellant

Judgment of the Court delivered on the 25th day of July 2016 by Mr. Justice Mahon

1. The appellant was convicted of the murder of Mr. Jonathan Duke on 12th November 2011 in Bandon, Co. Cork by a unanimous jury verdict at the Central Criminal Court sitting in Cork on 26th June 2013, following an eleven day trial. He was sentenced to life imprisonment on 17th July 2013.

The background facts
2. The appellant and his girlfriend at the time, Ms. O'Connor, resided in an apartment in the town of Bandon in Co. Cork, adjacent to a bridge over the Bandon river. The deceased, Mr. Duke, was murdered in that apartment on 13th November 2011, and his body was dumped in the Bandon river, where it was discovered later that evening. The occupants of another apartment in the building gave evidence of witnessing the appellant and Ms. O'Connor throwing the deceased's body over a railing outside the front door of the building, into the river. Yet another occupant of the apartment building, John Forrester, was murdered in his apartment on the previous evening, and his body was also thrown into the same river, but was not found for some days afterwards.

3. The appellant and Ms. O'Connor were charged and convicted of both murders in four separate trials. This appeal relates only to the appellant's conviction for the murder of Mr. Duke. He has separately appealed in respect of his conviction of the murder of Mr. Forrester.

4. In essence, the appellant's defence to the charge of murdering Mr. Duke was that the deceased was murdered by Ms. O'Connor without participation on his part, but in his presence, and that he and Ms. O'Connor disposed of the deceased's body in the Bandon river, adjacent to their apartment. The appellant, in his evidence to the trial, maintained that he had attempted to intervene to stop Ms. O'Connor assaulting the deceased, and was himself injured while doing so. The appellant maintains that he was at all times acting in fear of Ms. O'Connor, or more particularly, her brothers, whom he claimed she threatened him with if he attempted to intervene to stop the assault on Mr. Duke, and unless he assisted her in disposing of the deceased's body.

The grounds of appeal
5. The following grounds of appeal are submitted on behalf of the appellant:-

(a) Failing to discharge the jury at the conclusion of the prosecution case.

(b) Directing the jury on the law of common enterprise / design when the prosecution case was not opened or run on the basis of common design.

(c) Failing to inform counsel in advance of her charge that he would be addressing the jury on the issue of common design, and failing to invite submissions on the issue.

(d) Failing to discharge the jury after the charge on the basis of his direction to the jury in relation to common design.

(e) Failing to adequately re-charge the jury in relation to common design by failing to inform them that the case had not been opened or run on that basis.

(f) Failing to adopt a consistent approach to the appellant and his co-accused, Ms. O'Connor, in that he acceded to an application by counsel for Ms. O'Connor on the 17th day of July 2013 not to mention common design in his charge to the jury in her case.

(g) Prejudicing the jury against the appellant by stating that if they found him not guilty that would mean that he was a "callous spectator", when his defence was that he failed to interfere out of fear of Ms. O'Connor rather than callousness.

(h) Failing to properly put that defence before the jury.

(i) Failing to discharge the jury on the grounds that he made the "callous spectator" comment.

(j) Failing to answer simply "yes" to the jury's questions "if we believe that there were two people involved in an unlawful killing, can we find one guilty of manslaughter without prejudicing the verdict in the other?"

6. In her written submissions to the court the respondent has usefully summarised the appellant's grounds of appeal into five separate categories of appeal, as follow:-

(i) The failure of the learned trial judge to discharge the jury, (or direct it to acquit) at the conclusion of the prosecution case.

(ii) The learned trial judge's direction to the jury on the law of common enterprise / design when the prosecution case was not opened or run on that basis, and his failure to inform counsel of this in advance or to discharge or adequately re-charge the jury subsequently.

(iii) The learned trial judge's failure to adopt a consistent approach to the appellant and his co-accused, Ms. O'Connor, in that he acceded to an application by counsel for Ms. O'Connor on 17th July 2013 not to mention common design in his charge to the jury in her case.

(iv) The learned trial judge's prejudicing the jury through his statement that if they found the appellant was not guilty this would mean that he was a "callous spectator", when his defence was that he failed to intervene out of fear of Ms. O'Connor, rather than callousness. The learned trial judge's failure to put that defence to the jury and his failure to discharge the jury as a result of the callous spectator comment.

(v) The learned trial judge's failure to answer simply Yes to the jury's question "if we believe that there were two people involved in an unlawful killing, can we find one guilty of manslaughter without prejudicing the verdict in the other?"

The failure to discharge the jury or direct a 'not guilty' verdict

7. At the close of the case for the prosecution, Mr. Creed S.C. on behalf of the appellant applied to the learned trial judge to direct a not guilty verdict in respect of his client. The kernel of his application was that there had been no evidence led which could in any way establish that the appellant had participated in the assault on the deceased, and that the only evidence before the jury linking the events of that evening with the appellant related to his involvement in assisting Ms. O'Connor to dispose of Mr. Duke's body.

8. In the course of his submission to the learned trial judge for the direction, Mr. Creed stated:-

> *"…it is submitted that in order for a jury properly charged to be satisfied that the accused kill Jonathan Duke, either with intent or otherwise, the prosecution must at a minimum prove an assault on the deceased by the accused. And the prosecution case is open to the jury, it was not a case based on common design or joint enterprise, nor was such a case pursued by the prosecution in the course of the evidence at the trial before the jury. At the very least therefore, the onus is on the prosecution to satisfy the jury that the accused assaulted the deceased. Nor is it opened to the jury properly charged to satisfy themselves that the accused assaulted the deceased without involving themselves is speculation."*

9. In support of his application, Mr. Creed relied on the judgment of Lord Lane CJ in *R v. Galbraith* [1981] 1 WLR 1039.

10. For his part, counsel for the respondent, Mr. O'Leary S.C., submitted that there was sufficient evidence from which the jury could reasonably conclude that the appellant had participated in the assault and killing of the deceased. He referred to the strangulation of the deceased by the application of a ligature, and which was stated by the pathologist to have been one of two factors in the deceased death, the presence of the deceased's blood spattered around the apartment and on the stairs leading to the appellant's apartment, the deceased blood found under the appellant's finger nails, the evidence of loud banging and shouting coming from the appellant's apartment and the witnessing of the deceased's body being dragged down the stairs and being thrown into the river. It was submitted that the evidence was such as would allow a jury draw an inference that the appellant had actively participated in the assault of the deceased leading to his death.

11. In his ruling on this issue, the learned trial judge stated:-

> *"I think Mr. O'Leary is absolutely correct in submitting that there is an air of total unreality in relation to this application. There is not direct evidence of this killing. It may have been heard and it is, of course, a matter for the jury to interpret that evidence. There is no direct evidence but there is an abundance of circumstantial evidence. And my text book of criminal law, which is an old one, when I used it about fifty or sixty years ago, and it pertained to the days prior to CCTV, said that there is nothing second class about circumstantial evidence. It is what is used in the majority of cases, because nobody commits a crime with a policeman at his elbow. There is the hearing of the events, which Mr. O'Leary referred to. It is a matter for the jury to decide what was heard. There is a wealth of circumstantial evidence, and it is a matter for the jury to decide whether all that that combines in such a fashion as to exclude innocence as a rational hypothesis. I am allowing the case to go to the jury."*

12. Generally, a trial judge will permit a case to go to the jury where there is at least some evidence, even evidence of a relatively weak nature, on which it might reasonably reach a verdict of guilty. The evidence need not be strong or compelling. In *R. v. Galbraith*, Lord Lane CJ explained the approach properly to be taken by a trial judge faced with an application of no case, when he stated:-

> *"How then should the judge approach a submission of "no case"?*
>
> *(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*
>
> *(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
>
> > *(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.*
> >
> > *(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."*

13. The court is satisfied that the ruling of the learned trial judge was correct. There was sufficient circumstantial evidence on which

the case could properly go to a jury, and for a jury to decide, having considered all of the evidence, that the appellant was directly involved in the killing of the deceased.

The reference to joint enterprise / common design in the charge to the jury
14. In the course of his charge to the jury the learned trial judge stated the following:-

> *"But if parties are acting together, if they are in a joint enterprise together to effect a certain end, if they are acting in common enterprise or a joint venture, then each is responsible for everything that takes place within that enterprise, providing it is within the scope of the enterprise."*

15. It is contended on behalf of the appellant that the learned trial judge's detailed reference in his charge to the jury on the law of joint enterprise / common design was so prejudicial to the appellant, notwithstanding, following a requisition made to him in relation thereto, the fact that the jury was recalled and specifically instructed to ignore the earlier references to joint enterprise / common design, that the jury ought to have been discharged having been rendered incapable of returning a verdict based on the evidence heard by them. When addressing the jury on the issue the learned trial judge went on to give an example of joint enterprise to the jury.

16. At the conclusion of the charge to the jury, Mr. Creed, on behalf of the appellant, raised with the learned trial judge his reference in the charge to joint enterprise. It was pointed out to the learned trial judge that joint enterprise had never been part of the prosecution case, nor had the evidence and the cross examination of witnesses dealt in any way with that issue. Mr. Creed sought to have the jury discharged, and submitted that any re-addressing of the jury by the learned trial judge in relation to the concept of joint enterprise would not adequately redress the wrong that had taken place by his reference to the concept in the first place, as what had been said to them on this subject was now firmly in their mind. Mr. O'Leary submitted that it was quite appropriate for the learned trial judge to address these issues to the jury. He submitted that joint enterprise was a possibility, and could be clearly inferred from the facts as presented to the jury. He rejected as unrealistic the application on behalf of the appellant to discharge the jury.

17. The learned trial judge refused the application on behalf of the appellant to discharge the jury. Faced with such refusal, Mr. Creed then requested the learned trial judge *to "at the very least…put to the jury that the concept of common design was never part of the prosecution case."* The jury was then recalled and was further charged as follows:-

> *"The point is taken that I referred to question of common design and I gave you the legal principles in relation to that concept, but I am told I should not have done that, because common design was not part of the prosecution case, so ignore anything I said in relation to that. I also told you what you might be finding if you entered a not guilty verdict in the box, and I am told I should not have done that, and that the only thing that should be read into a finding of not guilty is that the accused did not participate in an assault and was not involved in the ligature to the deceased's neck."*

18. As to whether or not the learned trial judge was wrong to address the jury in relation to joint enterprise is not a matter for determination by this court. It is none the less a fact that the trial judge's reference, in the course of his charge to the jury, to the appellant's alleged involvement in the assault and killing of the deceased being possibly part of a joint enterprise with Ms. O'Connor was, following a requisition on behalf of the appellant, deemed by him to have been erroneous in circumstances where the prosecution had not opened the case to the jury on that basis, and the prosecution witnesses had not been cross examined on behalf of the appellant in the context of that case having been made.

19. The requisition in relation to this issue on behalf of the appellant having been made, and the jury having been recalled and instructed in plain and succinct terms by the learned trial judge that they should ignore his earlier references to common design, it is, in the court's view unlikely that this retraction by the learned trial judge caused such confusion in the minds of the jury that they were rendered incapable of fully understanding the evidence as presented to them and reaching a verdict on that basis.

20. Generally speaking, juries are well capable of understanding and applying the directions of the trial judge. Experience has shown that they are profoundly adept at listening carefully and taking on board the directions of the trial judge. When a jury is provided with incorrect information, or something is said to them that ought not to have been said, save in exceptional circumstances, they will also be capable of understanding such instruction as is given to them to exclude same from their minds in the course of their deliberations. Nevertheless, there will however be occasions when what is said to, (or seen by), a jury is so prejudicial to an accused that their discharge is unavoidable. In his book, The Criminal Process (2009), Prof. O'Malley states at p. 835:-

> *"…the appeal courts have generally expressed a preference for the continuation of the trial in these circumstances, provided of course the trial judge gives an appropriately strong warning to the jury. This preference stems, in turn, from the high level of confidence traditionally reposed in juries to obey judicial instructions and ignore evidence which they are not meant to take into account."*

21. In this case the court is satisfied that the learned trial judge was correct to refuse the appellant's application to discharge the jury or otherwise direct them to acquit the appellant. In its view the learned trial judge sufficiently and correctly instructed the jury to ignore or exclude from their minds a direction earlier given by him and which he considered ought not to have been given. No prejudice is likely to have occurred.

The 'callous spectator' comment
22. It was a crucial part of the appellant's defence in the course of his trial that he had not been involved in assaulting the deceased, and that although he requested Ms. O'Connor to desist from that assault, it was his contention that he did not physically intervene to stop the assault and had merely assisted in the disposal of the deceased's body. He maintained that his decision not to physically intervene to stop the assault and to assist with the disposal of the body stemmed from his fear of reprisal from Ms. O'Connor and her brothers. He vividly described the threats made to him in this respect.

23. The appellant contends that the reference by the learned trial judge to him being a *callous spectator* in relation to the assault and killing of the deceased was unfair and prejudicial to him. It was contended that such a reference did not truly reflect the evidence in that it did not accurately represent the appellant's explanation as to his failure to stop the assault on the deceased, or his involvement in the later disposal of the deceased's body. In the course of his charge to the jury, the learned trial judge stated:-

> *"If you write in the words "Not guilty" what you are finding is that the accused was a callous spectator in relation to the killing of Jonathan Duke by Ms. O'Connor and that he just stood there looking and did'nt lift a finger."*

24. In his closing speech to the jury, Mr. Creed, on behalf of the appellant referred to the explanation of the appellant for his non-intervention in the assault on the deceased and his involvement in the disposal of the deceased's body, and in that context stated *inter alia* the following:-

> *"So, the mere fact of being there, may I say for the moment, the law is that standing idly by and watching somebody get murdered is not a criminal offence in our jurisdiction. It may be an act of extreme cowardice but it is not … non participation is not an offence. So you can be a coward and you can stand idly by and you can do nothing about it and you can watch a person being killed and the law says you are not guilty of any crime. That is the law, ladies and gentlemen."*

25. In his charge to the jury, the learned trial judge reminded the jury of the appellant's evidence that he had pleaded with Ms. O'Connor to stop her assault on the deceased, and of her threat that her brothers would attack him if he did not shut up, or if he left the apartment.

26. The *callous spectator* reference was the subject of a requisition by Mr. Creed, but the jury was not re-addressed on the issue by the learned trial judge.

27. The *callous spectator* reference was a correct statement of the law, and this is accepted on behalf of the appellant. The term *callous* suggests a degree of calculated disinterest, insensitivity or lack of humanity, and as such may not have accurately represented the explanation provided by the appellant as to his reasons for not stepping in to stop the assault on the deceased. To this extent it may have been an unfortunate turn of phrase. However, its use has to be considered in the context of the immediate prior reference by the learned trial judge to the appellant's reasons for his lack of interference to protect the deceased, and the fact that the appellant's position had been also fully canvassed with the jury by Mr. Creed in his closing speech. Indeed, it might be said that while the term *callous spectator* may well sound harsher than the term *idle spectator*, (the expression used by Mr. Creed in his speech to the jury), there is no great gulf between the two. In these circumstances it is unlikely that the jury were in any way prejudiced by the use of the term *callous spectator* in the particular circumstances in which that comment was made. Importantly, either term absolutely clarifies the legal fact that a witness to a murder commits no offence by his mere presence, and for his decision not to intervene, even if it was likely that such intervention might have avoided the crime or saved the victim's life. The fact that this message was clearly conveyed to the jury was advantageous to the appellant.

The response to the jury's question

28. Shortly after commencing its deliberations the jury returned to court and addressed two questions to the learned trial judge. The first question concerned the legal definition of manslaughter, and no issue arises in relation to the advice provided to the jury in relation thereto. The second question was:-

> *"…If we believe that two people were involved in an unlawful killing, may we decide that one was guilty of manslaughter without prejudicing the verdict in the case of the other?"*

The 'other' was a reference to Ms. O'Connor who was also facing trial for the same murder.

29. To this question, the learned sentencing judge responded thus:-

> *"That's a difficult one. You are only concerned with the case against Mr. Grozavu. You are only concerned with the case against him."*

30. Mr. Creed indicated his concern as to the learned trial judge's response to the jury. He suggested that the correct answer to the question from the jury was simply *"yes"*, and he correctly observed that it was open to the jury to find the appellant guilty of manslaughter without prejudicing the verdict in relation to Ms. O'Connor. Mr. O'Leary responded to the effect that he saw nothing wrong with the learned trial judge's full response to the jury and believed it, if anything, to be a response favourable to the appellant. The learned trial judge did not re-address the jury on the issue. After approximately three hours deliberation, the jury unanimously returned a verdict of guilty of murder.

31. The appellant contends that a plausible interpretation of the question in controversy put by the jury is that the jury was contemplating a manslaughter verdict as against the appellant, and was concerned that such a verdict might preclude a conviction for murder in respect of Ms. O'Connor. It is contended that the answer provided by the learned trial judge suggested to the jury that it was possible that a verdict of guilty of manslaughter against the appellant might render a verdict of guilty of murder against Ms. O'Connor impossible, or otherwise problematical. It is suggested that such is a reasonable inference to be taken from the learned trial judge's opening response to the question from the jury *"that's a difficult one"*. The answer to the question, it is argued, was not difficult; it was simple and, properly required the response "yes" or such other response as clearly and unequivably conveyed that message.

32. The court agrees that the appropriate response to the question from the jury was, as is contended by the appellant, simply *"yes"*. While the learned trial judge's response must be read as a whole, and that when so read it is certainly arguable that the jury were left in no doubt but that the only verdict they should concern themselves with was that in relation to the appellant, it is possible that they may have considered the opening remark *"that's a difficult one"* as suggesting that there was no clear cut answer to the question posed by them.

Conclusion

33. In this case, the jury was firstly directed on the law of joint enterprise, and then subsequently told to disregard that subject. While it is always unfortunate that a need arises to countermand earlier advice given to a jury it is not unreasonable to assume that the jury was capable of following the direction given on the re-charge and adapting their minds accordingly. Equally, the 'callous spectator' remark was an accurate statement of the law, and was advantageous to the appellant and does not in itself undermine the fairness of the trial.

34. Of concern to the court is the response given to the jury to its question as to the possible knock on effect of a verdict in the appellant's trial on a verdict in Ms. O'Connor's trial, in that it may have had the effect of introducing or confirming a link between the outcomes of both trials which did not, and could not, exist. It may have prompted the jury to withhold an intended verdict of manslaughter, or, as may be more likely, abandon further deliberation in relation to manslaughter, because of their perception that a verdict of manslaughter might prove detrimental to the successful prosecution of Ms. O'Connor for murder. The response was certainly capable of causing confusion in the minds of the jury, and as such renders the outcome of the trial unsafe.

35. In these circumstances, the court will set aside the verdict of guilty of murder, and will direct a retrial of the appellant.