THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

339/12

The People at the Suit of the Director of Public Prosecutions

V

Zhao Zhen Dong

Appellant

Judgment of the Court delivered on the 26th day of June 2015, by

Mr. Justice Birmingham

1. On the 5th December, 2012, Zhen Dong Zhao was convicted by a jury (a majority verdict of ten to two) of murdering Noel Fegan, at Wellington Quay, Dublin, on the 20th May, 2011. The question of "provocation" occupied a central position at trial and now the only issue on this appeal relates to how the trial judge dealt with the question of provocation in his charge.

2. The ground of appeal as originally formulated was "that the learned trial judge erred in law and fact in the manner in which he explained and charged the jury in respect of the issue of provocation". On the 30th April, 2015, the day before the appeal was heard, a notice of motion was brought on behalf of the appellant to expand upon the ground so that it would read "that the learned trial judge erred in law and fact in the manner in which he explained and charged the jury in respect of the issue of provocation and further, the learned trial judge's charge should have been carefully tailored to circumstances and facts of the instant case, furthermore the jury were inadvertently misdirected in relation to these matters". At the outset of the appeal, when the application to amend was moved, the Court indicated that in its view, the application was unnecessary since the ground of appeal as originally formulated provided adequate scope for advancing any and all criticisms which the appellant wished to make of the trial judge's charge.

3. In his oral submissions to this Court, counsel on behalf of the appellant referred to and sought to criticise certain remarks made by prosecution counsel during the course of her closing speech. In a situation where there had been no criticism of the prosecution closing speech at the trial, where the issue had not been raised in the notice of appeal or even in the notice of motion of the 30th April, the Court refused to permit the argument to be advanced. The Court so refused, despite the fact that counsel for the appellant contended that the closing words of the amended ground of appeal "furthermore, the jury were inadvertently misdirected in relation to these matters" was sufficient to cover the issue. In the Court's view, anyone reading the notice of appeal and seeing the reference to misdirection would have believed that what was being sought to canvass was an alleged misdirection on the part of the trial judge.

4. Before turning to examine in detail what the trial judge had to say about provocation, it is appropriate to refer briefly to the background to the trial. The basic facts are that the appellant, who is a Chinese national who has made his home in Ireland, was running a small business, an internet café and call shop on Wellington Quay in Dublin. The centre provided computers and telephones for customers to use in order to make phone calls or access the internet. On the 20th May, 2011, the deceased, Mr. Noel Fegan, along with a friend of his entered the call centre and the deceased proceeded to use a telephone as he was anxious to return a call which he had received from his daughter. Having made his telephone call, the deceased went to leave the premises without paying for it. The appellant indicated to the customer that he would have to pay for the use of the telephone. The deceased suggested, untruthfully it would appear, that he had been unable to connect to the number that he had dialled and that as a result there was no payment due. The appellant who was sitting behind a computer screen at the entrance to the shop showed the deceased on the computer screen that, contrary to what was being claimed, the call had in fact connected and as such that there was a requirement for payment. The deceased threw one or more coins on the counter, which did not cover the cost of the call.

5. There were a number of witnesses to the incident and their accounts do not tally in all respects. However, it is clear that an argument ensued and that in the course of that, the deceased man struck the appellant by slapping him in the face. There was some evidence that the first slap was, or certainly may have been, delivered by the appellant. The deceased left the premises. Again there was some disagreement as to whether he ran out of the premises or was pushed out. One way or another, he ended up on the ground outside and again there was a disagreement as to whether he tripped or fell or whether he was dragged or wrestled to the ground. While the deceased was on the ground, he received a number of kicks from the appellant, including kicks to the head area.

6. CCTV footage and telephone records make clear that the entire incident was a very brief one. CCTV footage shows the deceased entering the appellant's premises at 15.50.03 and then at 15.53.39, that is 3 minutes and 36 seconds later, the accused is seen kicking the deceased on the ground outside the premises. During the intervening period, the accused had made a phone call which lasted 89 seconds and terminated at 15.52.32. The argument between the deceased and the appellant took place over 1 minute and 7 seconds. The actual physical altercation outside the shop which resulted in the death of Mr. Fegan took place in a very short period indeed of perhaps 10 seconds or less.

7. At 4.55 pm on the 20th May, 2011, the appellant was arrested and brought to Pearse Street garda station where he was interviewed (with the assistance of a Chinese interpreter) on four occasions.

8. The defence did not call evidence, but following the close of the prosecution case, counsel for the accused submitted that the jury should be permitted to consider the issue of provocation. Very properly and realistically, having regard to the low threshold that applies in such cases, the application was not opposed by the prosecution and accordingly, the question of the defence or partial

defence, as it is sometimes referred to, of provocation was addressed by counsel on both sides in their closing speeches and by the trial judge in his charge.

9. The issue on this appeal therefore, is how the trial judge dealt with the issue of provocation in his charge, in response to requisitions and in responding to questions asked by the jury.

10. The trial judge, McCarthy J., turned to the issue of provocation having addressed the ingredients of the crime of murder, including the mental elements of the offence. When dealing with the provisions of s. 4 of the Criminal Justice Act 1964, which he did without referring to the section by name, the judge stressed to the jury that they were dealing with Mr. Zhao and not anyone but him, that they were concerned with Mr. Zhao's subjective state of mind rather than the objective state of mind of an average person, a reasonable person. Having touched on the issue of self defence, which he correctly said had not been pushed very much, he turned directly to the question of provocation. Given the centrality of this to the present appeal, as it is in reality the only issue in the appeal, it is appropriate to quote from this section of the charge in some detail:-

> "The second issue which arises, and – is that of provocation. This also has been described as a concession to human weakness. And again, if the provocation arises in the legal sense, and I am going to explain it to you now, if provocation arises in the legal sense, again it causes a reduction, so to speak, of a conviction or charge from murder down to manslaughter and not, as it were, in either case a complete acquittal. And provocation, as I think one of my most esteemed colleagues, Mr. Justice Carney, is a veritable judicial graveyard in legal terms, but I am going to read out a passage and I will elaborate it – upon it as may be necessary, from one of the decisions of the courts, which is hopefully clearly one which sets out the law in relation to the matter.
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> > 'It will not be sufficient for the defence to show merely that the accused lost his temper or merely that he was easily provoked or merely that he was drunk, though all of these may be factors in the situation. The loss of self control must be total and the reaction must come suddenly and before there has been time for passion to cool. The reaction cannot be tinged by calculation and it must be genuine in the sense that the accused did not deliberately set up the situation which he now invokes as provocation. To justify the plea of provocation, there must a sudden, unforeseen onset of passion which, for the moment, totally deprives the accused of his self control.'
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> I will read that again 'It will not be sufficient for the defence to show merely that the accused lost his temper or merely that he was easily provoked or merely that he was drunk, though all of these may be factors in the situation'. So, I say two things about that. It will not be sufficient for the defence to show, lest there be any doubt about it that does not mean that there was any responsibility on the accused, to make out or prove any defence of provocation. The responsibility of the prosecution is to exclude, negative, rule out any defence of provocation, beyond a reasonable doubt and the same applies, of course in the context of self defence. It would not be the responsibility of the accused, for example, to show, in the sense of the issue of self defence, as it has arisen here that he thought the force he was using at the relevant time was reasonable. What would be required would be that the prosecution would find it – would need to exclude beyond a reasonable doubt that state of mind on his part. I trust that is clear, because if there was anything else, it would mean that there would be some responsibility case on the accused. I actually think that phrase is meant in a different way. You, know, in other words, it doesn't – it actually watered down the rule. But anyway I hope that's clear to you.
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> Now this man lost his temper lose- loss of temper – provocation merely is easily provoked or drunk, for example. The position is – those are just examples, the position is that if you take a person, when you are dealing with the state of mind, either in the context of provocation or self defence, or intention, or in any aspect of the case where you have to judge his mental state, as you find him, as I said, this man, with his experience of life, with his strengths, his weaknesses, his baggage. You take it – you take them both – you have regard to all of that, including the particular circumstances on the occasion in question. So, therefore, you can see that if you were not to do that, then in this instance you would be failing to focus solely on the man who is before you. When I speak about his background, his baggage, and otherwise, of course I mean also not just the type of person he is, but his experience in business, his experience in the shop, the problems he has had and so on all of that is part of the background. I don't tell you what emphasis to place on any of these issues. I merely tell you, as a matter of principle, on the evidence, all of these matters are potentially relevant, because you decide what's relevant.
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> In any event I read on:
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> > 'The loss of self control must be total and the reaction must come suddenly and before there has been time for passion to cool.'
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> Well I can't really add to that can I? The reaction: 'The reaction cannot be tinged by calculation and it must be genuine . . .' Well obviously: in the sense that the accused did not deliberately set up the situation which he now invokes as provocation. To justify the idea of provocation there must be a sudden unforeseen onset of passion which, for the moment, totally deprives the accused of his self control. So that then, ladies and gentlemen is the defence of provocation."

11. The judge then concluded his charge and, in the ordinary way, an opportunity was provided for requisitions. The prosecution had none. The defence had a number. First, counsel expressed a preference for the judge actually quoting s. 4 of the Criminal Justice Act 1964. The significance of that being from an accused person's point of view, as he contended, was that it contained a specific statement that an offence shall not be murder unless a specified intent was present. Counsel commented that the court had indicated to the jury that if they were not satisfied beyond a reasonable doubt that there was an intent to kill or cause serious injury, then obviously it was not murder but it might well be manslaughter. This, he observed, was, as it were, the first route to manslaughter. At this point the judge interjected to inquire had he not said that and counsel responded ". . . I think you did in fairness, but I think that it is important just in the context of what I am going to say next". Counsel then continued as follows, and this is of some significance in the context of the present appeal:-

> "Because that is the first route to manslaughter. If, thereafter, the jury were to determine that there was an intention to kill or cause serious injury, then the question of provocation arises and I know the court dealt with both provocation and self defence, perhaps somewhat equally in terms of emphasis, but provocation is certainly the matter that is of greatest concern to me. While the jury quoted one passage from the *People v. Keith Kelly*, in my respectful submission, the court

did not actually tell the jury, first of all what is provocation, how it arises and then, as it were relate the principles to the concrete evidence before the jury and, in my submission, there is approximately a page and a half of Kelly which includes a passage that you did quote which, in effect, deals with all these issues and that commences at p. 11 of the report in the Irish Reports."

12. At that stage counsel for the defence physically handed a copy of the report in *People v. Keith Kelly* [2000] 2 I.L.R.M. 426, to the judge commenting that it was as close as we have to a model charge. After some discussion between the trial judge and defence counsel, the trial judge asked counsel to remind him again what was the second point which counsel had said was related to the third. Counsel responded:-

> "Well – the first point was attached to a definition and the second point then was that unless they are satisfied in relation to an intention to kill or cause serious injury, then they cannot – beyond a reasonable doubt, they cannot find murder. But the – that relates then to the third point which is the provocation which is that even if they were to be satisfied beyond a reasonable doubt that there was an intention to kill or cause serious injury that the jury then had to consider provocation."

13. Counsel observed "I am asking for the full blooded definition and direction on provocation, rather than anything any shorter" adding "and I think the passage that is outlined even contemplates that the court should, as it were, identify the matter, whether relevant matters in the evidence before this court". After some further exchanges counsel for the defence continued:-

> "The one particular point that I would ask the court to address, and it is also a part evidentiary point, in the context of the provocation warning is that the provocation warning refers to something sudden and before – before passion has a time to cool. I do think the time log is important in this case, and the court did refer to the phone records and the fact that the call commenced at 15.51, in fact 03, but 15.51 that lasted some 88 seconds thereafter. Which would have it concluding at approximately 15.52 and a half or 15.52.32 in precise point and that the next relevant viewing is on the CCTV where the – what transpires to be the accused is visible at 15.53.39, which is 1 minute and 7 seconds later."

14. Counsel then proceeded to urge the judge to deal with the times that could be established from the automatic records and CCTV. In reply to the requisitions raised by the defence, counsel for the prosecution, as far as provocation is concerned, indicated that she believed that the passage that the judge had referred to from Kelly was the passage which was regarded as definitive. She said that she had no difficulty with the longer passage being read, but that she would point out that there is material in the larger passage that needs to be tied in with the facts of the case. When the judge interjected to say that defence counsel wanted him to refer to one particular aspect which was the time element, counsel responded that she would have a difficulty with that because it was absolutely the law that the intent to kill or cause serious injury can be formed within seconds and she did not want the jury to be left with the impression that because it was a short time frame that the necessary intent for murder could not have been formed. She queried whether the CCTV covered the full incident and therefore the full time frame, referring to the testimony of an eye witness which put the incident as taking a minute or just less than a minute. The judge indicated that he was not going to go into the times and CCTV footage itself in detail, because the question was so fundamental that it was impossible to imagine that the jury would not be placing emphasis on times and CCTV footage for itself. Following some further exchanges between counsel and the trial judge the jury was brought back to court. The judge began by dealing with the mental element of murder, on this occasion referring specifically to the provisions of s. 4 of the Criminal Justice Act 1964. He turned then to the question of provocation in these terms:-

> "In relation to the – we then pass to the question of intent – of provocation and I have been asked to read out to you a passage from our law reports in relation to that, just to be absolutely clear about it, because it is a thing which has given rise to considerable difficulty in the past, quite a long passage, but I believe it is straightforward enough. If the defence of provocation arises on the basis of something done or said by the deceased victim, or by a combination to things done and said, to mean that the accused has totally not – to cause the accused totally lose his self control, the trial judge, meaning me, may invite the jury to consider the evidence on which the plea of provocation is based, so, I am now stating the most rudimentary fact of all, that you should look at the evidence to look and decide whether the whole of the evidence in the case and the provocation – the plea is based. He – is stated in the third person "he will point out to them that they are not obliged to accept this piece of evidence, that upon which is relied upon, either wholly or primarily on the basis of the provocation defence. He would point out to them that they are not obliged to accept this piece of evidence anymore than they are obliged to accept any other evidence in the case. They are obliged, however, carefully to consider it and decide whether or not it may be credible. The question they have to decide is not whether a normal or reasonable man would have been so provoked by the matters complained of as totally to lose self control, but whether this particular accused, with his particular history and personality was so provoked, they are entitled to rely upon their common sense and experience of life in deciding this, as in deciding all other matters. If the reaction of the accused in totally losing his self control in response to the provocation appears to them to have been strange, odd or disproportionate, this is a matter which they are entitled to take into consideration in deciding whether the evidence on which the plea of provocation rests is credible. The court can only give to the trial judge general guidelines, as to the principles to be applied. It is for him to decide these principles, to relate these principles to the concrete evidence before the jury and to point out that there is a certain threshold of credibility. It will not be sufficient for the defence to show merely that the accused lost his temper or merely that he was easily provoked or merely that he was drunk, though all of these may be factors in the situation. The loss of self control must be total and the reaction must come suddenly and before there has been time for passions to cool. The reaction cannot be tinged by calculation. It must be genuine in the sense that the accused did not deliberately set up the situation which he now invokes as provocation. To justify the plea of provocation, there must a sudden unforeseen onset of passion, which for the moment totally deprives the accused of his self control. But in the final analysis, the trial judge will tell a jury it is their job to decide whether or not a normal man or a reasonable man would have lost his self control in these circumstances. It is their job to decide not whether a normal man or a reasonable man would have lost self control in those circumstances, but whether this particular accused, in his situation, with his peculiar history and personality was provoked, or may have been provoked, to such an extent as totally to lose his self control. If they find the accused was so provoked, their duty is to bring in a verdict of manslaughter rather than murder. If after the examination of the evidence relied upon by the defence, they entertain a reasonable doubt as to whether the accused may have been so provoked, then they examine the prosecution case to see if the prosecution has satisfied them, beyond a reasonable doubt, that the alleged provocation could not or in fact did not cause the accused totally to lose his self control in the manner alleged, always remember that the onus on the prosecution is not only to prove its case beyond reasonable doubt, but also to negative, beyond a reasonable doubt, any defence raised by the accused. If, in fact, they find the prosecution has succeeded in convincing them beyond a reasonable doubt that the provocation alleged, could not or in fact did not provoke the accused to the extent that he totally lost his self control, then their duty is to bring in a verdict of murder rather than manslaughter. If, on the other hand, at the end of the case, they still entertain a reasonable doubt that the accused may have been sufficiently provoked by the matters alleged, as

totally to lose his self control, then their duty is to bring in a verdict of manslaughter rather than murder.' Just to add to that, it is the law, of course, that one may form the intention, relevant intention, on the spot, effectively.

15. The judge then continued:-

> "Now, I did not – the issues which are relevant, I told you that what you think is relevant, is what is relevant, is what you think is relevant and that remains the position. And there is – it is – there are pieces of evidence in every case, which perhaps, are not rationally considered to be of any or much relevance. So, therefore, it is very hard for me to single out pieces of the evidence which might be particularly germane to the question of provocation, because all of the evidence must be considered by you, if only to dismiss it. But in that context, there are two aspects which have been brought to my attention of being of particular assistance to you in that regard and that is obviously the time frame within which all these events occurred and obviously the contents of the accused's mind as he elaborated it when he was being interviewed by the gardaí. So I have been asked to refer specifically to refer to these two aspects in the present context."

16. The judge then brought his remarks to a close by dealing with housekeeping issues that would arise if the jury were anxious to view the CCTV footage.

17. The deliberation of the jury took place over two days. When the court reconvened following the overnight break the judge indicated that he had been asked two questions by the jury that he would define provocation again for them and also deal with the definition of serious injury. He also said that the jury had asked for a print out or some statement of the law. The judge dealt with the question of provocation by reading once more the passage from Kelly that had earlier been read to the jury.

18. This appeal really nets down to a complaint that the jury was not told expressly and explicitly that the defence of provocation was still available even in a situation where there was an intention to kill or to cause serious harm. There is no doubt that the defence is available even in situations where there is an intention to kill or cause serious injury and indeed it is only in a situation where such an intention is present that the issue of provocation will fall to be considered at all. This is because unless the prosecution has proved beyond reasonable doubt there was indeed an intention to cause serious harm or to kill the offence will not have been murder. If, however, the prosecution have proved beyond reasonable doubt that the accused intended to cause serious harm or to kill and the defence of provocation is being relied upon, the offence committed may, but will not necessarily, have been one of murder. To convict of murder, the jury would have to be further satisfied, to the standard of proof beyond reasonable doubt, that the accused was not provoked to the extent that he totally lost his self control. If the jury is left with a reasonable doubt on the issue as to whether the accused was, or might have been, so provoked, there obligation would have been to return a verdict of manslaughter. See, in that regard, the recent decision of this Court in *DPP v Cahoon* [2015] IECA 45 where the judgment of the court was delivered by Ryan P.

19. There are distinctions between this case and the *Cahoon* case. In *Cahoon* there was an explicit misdirection on this point at an absolutely crucial stage of the trial: the recharge of the jury following requisitions. Moreover, in *Cahoon* the language of the recharge which contained the clear error that provocation negated the intention to kill or cause serious injury arose from a clearly expressed, though mistaken, view by the trial judge in relation to the issue.

20. In this case there is no comparable clear misdirection. Significantly, neither prosecution counsel or defence counsel raised any specific requisition on this point. The absence of requisitions is always a matter of significance and this is very particularly so in a case such as this one was, where counsel on both sides were highly experienced. However, the absence of requisitions has never been regarded as an absolute bar to a point being raised successfully on appeal. The real relevance of the absence of requisitions is that it provides an indication that a point now sought to be raised on appeal and now said to be important did not strike those engaged in the trial as being of significance.

21. Reading the charge as a whole, this Court is left with some degree of disquiet. Time and again the judge returned to the subjective nature of the defence. He pointed out to the jury and stressed to them that they were concerned with how the incident that had developed had impacted on Mr. Zhen Dong Zhao, that they were not at all concerned how the incident might have affected an average man or a reasonable man. There is no doubt the care with which that aspect of the charge was approached is admirable indeed. However, the issue of the interaction of the requisite intent for murder and the defence of provocation was never really spelled out for the jury. In particular it was never made clear to them that it was not necessary that the circumstances which had or might have provoked the defendant had done so in a manner which meant that he did not intend to kill or cause serious harm. Equally, it was never made clear to the jury that it is precisely in cases where there is indeed an intention to kill or cause serious harm that the issue of the defence of provocation arises for consideration. It is, however, the case that overall it was a careful charge delivered by a trial judge who was obviously very conscious of the complexities of the law in the area of provocation. In these circumstances, when, after the trial, a charge is subjected to criticism on a particular aspect which had not been the subject of requisition, a court may well be disposed to conclude that the point being raised was not one of substance in the context of the run of the trial and that the court should decline to intervene.

22. However, the present case was a particularly finely balanced one. In those circumstances, it was particularly important that the jury should have the assistance of a charge that was clear, comprehensive and easily understood. On this one aspect, the charge was not as clear as it might have been and reading the charge as a whole there has to be a concern that a jury might have been confused and might have believed that they had to consider whether the provocation to which the appellant was subjected prevented him from forming an intention to kill or cause serious injury. In these circumstances the Court is of the view that the appropriate course of action is to quash the conviction and order a re-trial.

23. The Court would add one final observation and does so in a very tentative manner indeed. In a complex area of the law, and undoubtedly provocation is such an area, it is understandable that judges would look to the possibility of reading extracts from authoritative decisions of the superior courts. A number of very experienced trial judges have followed this practice over many years. However, this Court would express some doubts as to whether that is necessarily the most effective method of communicating to the jury what the real issues are in a particular case. It is entirely a matter within the trial judge's discretion, but there may be something to be said for judges, in cases of complexity, giving an outline in advance of what he or she intends to say in the charge, thus offering an opportunity for comment and observations by counsel.