THE COURT OF APPEAL

[CCA 159/2012]

[CC0002/2009]

The President

Birmingham J.

Sheehan J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V.

STEPHEN CAHOON

APPELLANT

JUDGMENT of the Court delivered by The President on the 4th day of March 2015

Introduction

1. On 1st May 2012, the appellant was convicted of murdering Ms. Jean Quigley on 26th July 2008, at an address in Derry City. The trial took place in the Central Criminal Court pursuant to the provisions of the Criminal Law (Jurisdiction) Act 1976. The appellant admitted killing Ms Quigley but denied it was murder because he did not have the intention to kill or cause serious injury or, alternatively, by reason of provocation.

2. Three issues arise in this appeal concerning the learned trial judge's charge to the jury before and after requisitions. First, the appellant alleges that the judge's instruction on the law in respect of provocation was incorrect. Secondly, he argues that the judge made a significant error of fact in regard to police questioning of him, which had an adverse impact on his position in the eyes of the jury. Thirdly, he contends that the charge as a whole was unbalanced in that the judge spent a disproportionate amount of time on the prosecution case compared with that of the defence.

Background

3. The appellant and the deceased, Ms. Quigley, had a relationship that began around mid-March 2008, and continued until early July. They had not lived together but he had often stayed overnight at her home and she had sometimes stayed at his apartment. At the time of her death she was ten weeks pregnant with his child. The relationship broke down in mid-July but some communication continued and they met and spent time together in two public houses in Derry on the night of Wednesday 23rd July. Ms. Quigley went home alone at about 2.30 am on the Thursday morning, but before the babysitter left the appellant arrived and stayed for a short time. Following his departure, the appellant and Ms. Quigley exchanged text messages for some hours. There were more text messages on Friday 25th.

4. In the early hours of 26th July, after a night out with friends, the appellant took a taxi from the city centre area of Derry to a place close to the home of Jean Quigley. He made his way into her home in circumstances that are a matter of dispute. At 6:30am, he called a taxi using a false name and alighted close to the building where his own apartment was located.

5. Later on the same day, at about 1.00pm, Jean Quigley's body was discovered and the police were notified and began investigating the crime. It was clear that the victim had been strangled and she also had other signs of injury on her body. Police found that the lock on an inner door was broken. DNA tests established that the appellant and the deceased had had? sex, and such tests made other connections between the appellant and the scene.

6. When the police came looking for the appellant following the discovery of the body of Jean Quigley, he had disappeared.

7. Gardaí arrested the appellant in Donegal town on 5th August 2008. They questioned him about the death of Jean Quigley but nothing of evidential value came of it in circumstances in which the appellant chose to rely on his constitutional right to silence, as Counsel expressed it at the hearing of the appeal.

The Trial

8. The trial took place in the Central Criminal Court, pursuant to the Act of 1976. The appellant made formal statutory admissions for the purpose of his trial of which the most important was that he had killed Ms. Quigley. He gave evidence. His defence included a plea

of provocation that arose in the following circumstances. He said that he and Ms. Quigley had had sex on two occasions, which was consensual, and which involved one or other being voluntarily restrained. They smoked cigarettes together between the occasions when they had intercourse. When they were having sex for the second time, his mobile phone rang and subsequently Ms. Quigley asked who had called and became very angry when he told her the name of the caller, a woman who was a friend of his. He said that Ms. Quigley shouted at him demanding that he leave immediately. He refused, because he maintained that she had agreed to his staying overnight and he was not accepting her change of mind. During these angry exchanges, he testified, Ms. Quigley said that the baby she was having was not his and that she was going to have an abortion. He said that she repeated these statements. The appellant then gave the following evidence:

> "That's when I lost it, I just grabbed her.
>
> Q. You lost it. What do you mean by you lost it?
>
> A. I snapped, I just saw red and grabbed her.
>
> The appellant went on to describe his reaction further:
>
> "Q. And can you tell us, when you say you grabbed her, can you give us more detail on that?
>
> A. I just grab her, like. I put my hand here and put my hand here and just grabbed her and pushed her on the bed and grabbed her by the throat then.
>
> Q. And why did you do that?
>
> A. Just I don't know, I lost it. I just wanted her to stop saying the things she was saying, like, to be quiet, like. It just riled me up, so it did.
>
> Q. Sorry, what was that you said?
>
> A. She just riled me up, she got me mad, like. I just lost it."
>
> Under cross-examination, the appellant said:
>
> "Well, I just lost control, I don't know. I just seen red and snapped and that was it."
>
> "Yes, I lost control, I didn't know what I was doing, you know what I mean."
>
> "Yes, I wasn't thinking straight, you know."

9. Provocation is a partial defence reducing murder to manslaughter. There is a low threshold test for it to arise, but the topic does not arise automatically. It may arise either by direct evidence including the accused's own evidence or by inference from the evidence as a whole. It is a preliminary matter to be determined by the trial judge by an assessment of the evidence to determine if there is an issue fit to be left to the jury. When it does arise, the prosecution must prove beyond reasonable doubt that the accused was not provoked so as to suffer total loss of control, see People (D.P.P.) v. Davis [2001] 1 I.R. 146. In light of the evidence, the trial judge decided that the issue of provocation should be left to the jury.

Charge on Provocation, Requisition and Recharge

10. The judge dealt with the issue of provocation early in his charge, in terms that are not subject to criticism on this appeal, as follows:

> "In the present instance, ladies and gentlemen, the accused man has admitted, as I say, to the killing, but he says that what occurred was a matter that occurred as a result of provocation. Now, provocation, ladies and gentlemen, is a partial defence to a charge of murder. It does not entitle a person to an acquittal. But it entitles a person to have what otherwise would be a murder conviction left at the level of manslaughter. And what is provocation? Provocation consists of either words or actions or a combination of words and actions, which, having regard to the accused man's temperament, character and circumstance, cause him to lose control of himself at the time of the act, so that at the time he lost control of himself, he was not the master of his own mind.
>
> Now, a short tempered reaction is not provocation. One can have a short tempered reaction, and one can be totally in control of what one is doing. One can know precisely what one is doing and one can know precisely what they have in mind when they're doing it. But to be provocation, it must be a sudden loss of complete control, as I say, so that one is not master of one's own mind, at the time the killing is carried out. And having regard, ladies and gentlemen, to where the onus of proof lies in a criminal case, now where an issue of provocation of raised by the defence, it is for the State to satisfy you, beyond reasonable doubt, that the accused man was not provoked, and that is what they have set out to do in this case."

11. The judge also dealt with a point that he considered had arisen as a result of the cross-examination of the accused, from which he took it that prosecuting counsel was suggesting that the accused man had tailored his evidence in respect of provocation following a perusal of the book of evidence and in order to fit in with the evidence. The judge thought that since the trial was being conducted in the State, and not Northern Ireland, the accused must have been transferred to this jurisdiction in circumstances where he had not been questioned by the police in Northern Ireland or by the Gardaí in the State. The judge told the jury that "there was no account requested of the accused man as regards events and, as I say, it wasn't until the matter came to court that an account was given." In fact, the appellant had been questioned at length by Gardaí, but had exercised his right to remain silent.

12. Counsel for the appellant requisitioned the judge at the end of the charge, seeking to have the jury recalled so that the judge could emphasise to them the subjective nature of provocation. The fundamental point that counsel wanted to have reiterated, or more fully emphasised than had been done earlier, was that provocation was not to be decided by reference to the standard of a reasonable person, but according to the nature and character and disposition of the particular accused person, and he submitted that the judge had not sufficiently made that clear in his charge.

13. There was a discussion in the course of the requisition application in which a difference emerged between Counsel and the judge. Counsel for the accused, Mr. Paul Burns S.C., submitted that there was a distinction to be drawn between a person's intention to kill or cause serious injury and the issue that arises on provocation. He said that an accused person who raises the defence of provocation may have the intention to kill or cause serious injury. Moreover, unless the person has the intention to kill or cause serious injury, the question of provocation is not going to arise. Murder requires an intention on the part of the perpetrator to kill or cause serious injury and if that is absent the verdict is manslaughter. It follows that the intention to kill or cause serious injury is something that must be present before provocation comes to be considered. The judge said that provocation meant that there was no murderous intention because the accused was not master of his mind.

14. The relevant part of the exchange on provocation during the requisition is as follows:

> "JUDGE: Mr Burns, the defence have not tried to ride two horses here.
>
> MR BURNS: Yes.
>
> JUDGE: They have solidly nailed their colours to the mast of provocation.
>
> MR BURNS: And lack of intent.
>
> JUDGE: Provocation is the defence in this case, Mr Burns.
>
> MR BURNS: Well, you recollect that when I closed to the jury, I said to them, if they weren't satisfied about the intention, and I would have in terms of how the jury might approach the matter.
>
> JUDGE: The jury have been told how they must approach it, what the State must prove.
>
> MR BURNS: Yes. Well, the Court, of course, can disregard what I'm saying, the suggestion that first they have to look at the mens rea, if they're satisfied if they're not satisfied that he had an intention to kill or cause serious injury, then it is manslaughter.
>
> JUDGE: Well, what is the natural or probable consequence of grabbing somebody by the throat and holding them by the throat while they're struggling.
>
> MR BURNS: That's for the jury to determine.
>
> JUDGE: I know it is, Mr Burns, but it's self evident.
>
> MR BURNS: Well, I still am saying to the Court, the Court should tell them if they're not satisfied that his intention was to kill or cause injury, serious injury, then the prosecution have not established the necessary mens rea and the verdict should be manslaughter. Even if they are satisfied that he intended to kill or cause injury, then they go on to consider the question of provocation. That's
>
> JUDGE: The whole concept of provocation is that there is no intention, because the man is not master of his own mind.
>
> MR BURNS: Yes, but they the appellate courts have said that it is not a question of provocation negating intent, that isn't that isn't the nature of the defence, that you can intend and yet still have provocation, that it is not that's why even if the prosecution satisfy you as to what the intent was, you still go on to consider provocation. Because obviously if you come to if you come to a conclusion on the first test that the prosecution haven't satisfied you about intent, well then clearly it's not murder and it's only if they have satisfied you about intent that you go on to consider provocation and whether there was a loss of control as a result of provocation. Those are my requisitions, Judge."

15. The judge recalled the jury and gave them a further instruction about provocation. He had earlier correctly stated that for provocation to have existed the accused person had to experience a complete loss of control so as "not to be master of his mind", and that once the question was raised it was a matter for the prosecution to prove beyond reasonable doubt that that was not the situation. He told the jury:

> "In relation to the issue of provocation, ladies and gentlemen, I think I've made it clear to you that it is not the effect that the words or actions might have on the reasonable man, but they are the effect of the words or actions on the particular individual, having regard to his nature, temperament, character and the circumstances. I think I made that clear, just in case I haven't made it clear, ladies and gentlemen. And, of course, the question of the loss of control, and not being master of his mind, applies at the time he is committing the act. And, in that regard, ladies and gentlemen, the accused man gave evidence to you. He said, on a number of occasions, that he had lost it, that he'd lost control, that he did not know what he was doing. But that's a matter for you to consider, ladies and gentlemen, in the context of the entirety of the evidence that he gave and the description he gave as to what was happening.
>
> As I said to you, ladies and gentlemen, the position is one whereby the State have to if they're to secure a conviction for murder, they must establish (1) an unlawful killing and then they must upgrade, if I might use that expression, manslaughter from that level of an unlawful killing, to murder by showing that the accused man intended to kill or to cause serious injury. So, that is the position and if you're satisfied, ladies and gentlemen, that that is the position, that there wasn't that in the normal course of events, what happened was such that there would have been an intention to kill or cause serious injury, but having regard to provocation or loss of self control, no such intent was there, because what provocation presupposes is that you don't have a rationalising mind. You're somebody who doesn't know what he's doing, doesn't realise what he's doing, he's just completely out of control. He's not master of his own mind at the time the events happen. And, as I say, it's for the State to negative that and the State say to you that they have negatived it when you look to the entirety of the events and the circumstances of what happened." [Italics added]

The Submissions

Appellant

16. The first submission that the appellant makes is that the trial judge was mistaken in law in his charge on the defence of provocation. During the charge to the jury, it was felt by defence Counsel that there was insufficient emphasis placed on the fact that it was a subjective test. During exchanges in requisition between the trial judge and Counsel, it became clear that the trial judge felt that provocation negated the need for *mens rea*: "The whole concept of provocation is that there is no intention, because the man is not the master of his own mind." In his recharge, the trial judge said to the jury that "…no such intent was there, because what provocation presupposes is that you don't have a rationalising mind." It is submitted that this is a misunderstanding of the law of provocation, and that provocation does not equate to the absence of *mens rea*.

17. In *People (D.P.P) v. Bambrick* [1999] 2 I.L.R.M. 71, the Court of Criminal Appeal held that these were two separate concepts. It is submitted that given this direction, the jury could only have found that provocation would succeed as a defence if there was no intention. It was submitted that the jury should first have been asked to decide whether there was intent; if not, it was a case of manslaughter. It was only if this issue was decided affirmatively that the jury should have gone on to decide on the defence of provocation, and the error of the trial judge prevented the appellant from gaining the legal protection of such a defence.

18. The second point is that there was a misstatement of fact as to the circumstances of the questioning of the appellant. The appellant argues that this left it open for the jury to draw an adverse inference from the appellant's exercise of his right to remain silent, which is of course impermissible, following People *(D.P.P) v. Finnerty* [1999] 4 I.R. 364. Counsel for the appellant argued during requisitions at the trial that this was not a matter which could be rectified by further direction due to the risk of compounding the error.

19. The third submission is that the summing up by the trial judge was unbalanced because there were 45 lines of transcript devoted to the prosecution case as opposed to 14 lines summing up the defence position. It is therefore argued that not only did this summation lack balance, but it also gave the impression that the trial judge felt the appellant's evidence was not credible.

Respondent

20. The respondent does not take issue with the manner in which the appellant has set out the law on provocation. In response to the claim as to the lack of clarity on the issue of the subjective nature of the test, the respondent points to the recharge on that issue. In addition, Counsel for the respondent cited *People (D.P.P) v. David Bourke* [2013] IECCA 2, where the Court of Criminal Appeal, albeit obiter, approved a charge on provocation which he described as being "almost identical." However, it does not appear from the judgment of the Court in that case that the trial judge expressly told the jury that provocation, if present, meant that there could not be murderous intent.

21. On the issue of conflating *mens rea* with provocation, the respondent submits that the trial judge dealt with the issues of intention and provocation separately, referring to and explaining first the concept of *mens rea*, before later turning to provocation, and showing that it is a partial defence which reduces murder to manslaughter. It is further submitted that the recharge of the jury continued this dual approach, and that the overall tenor of the charge as a whole would have left the jury under no misapprehension. Counsel for the Director did not, however, contend that it was a correct statement of law that the effect of provocation is to prevent the formation of murderous intention.

22. On the second ground, the respondent submits that although there was a factual misstatement, at no point did the trial judge invite the jury to draw an adverse inference. The impression given was that the failure to give an account was as a result of the cross-jurisdictional nature of the circumstances of his arrest rather than a decision of the appellant, an impression which may have had a positive effect for the appellant. The respondent also submits that the case of Finnerty was qualitatively different from the present case in that the jury were never informed that the appellant had chosen to remain silent. The issue of tailoring his account to suit the book of evidence did not arise because the appellant failed to give an account to the Gardaí but was raised as an independent proposition in cross-examination and in his closing speech by prosecuting Counsel.

23. In regard to the suggested imbalance of the charge based on the length of respective summations, the respondent contends that that is of no relevance and the proposition is unsupported by specifics. The charge must be viewed as a whole and the trial judge fairly presented the defence and used a significant and sufficient part of his instruction in describing the appellant's own evidence at trial. There is no obligation on the trial judge to lay out every piece of evidence in a summation.

Discussion

24. The question of the proper charge in regard to intention when provocation is in issue was considered in the leading case that changed the law in this jurisdiction, *People (D.P.P.) v MacEoin* [1978] I.R. 27. There it was held that the defence of provocation is decided by a subjective test considering only the particular accused's character, temperament and circumstances. Although in that respect our law has been described as unique in the common law world and it has given rise to judicial and academic criticism, on the specific question that arises in this appeal the judgment reflects a common approach with other jurisdictions and with subsequent decisions. In MacEoin the Court of Criminal Appeal held that it was a misdirection to instruct the jury that provocation had to be such as to render the accused incapable of forming an intention to kill or cause serious injury.

25. That Court in more recent times confirmed the position in *People (D.P.P.) v. Bambrick* [1999] 2 ILRM 71, as follows:

> "The question of intention is of course something that must be dealt with in the learned trial Judge's charge when explaining to the jury the meaning and effect of Section 4 of the Criminal Justice Act, 1964 including the presumption of intention relating to the natural and probable consequences of conduct and the possibility of a rebuttal of that presumption. The question of provocation is separate and distinct from the question of intention. If there was provocation that may reduce the killing from murder to manslaughter notwithstanding that the accused person intended to kill or cause serious injury."

In People (D.P.P.) v. Curran (unreported, Court of Criminal Appeal 14 December 2011), the Court said:

> "The intersection (or more correctly the lack of it) between the question of intent to kill, and the defence of provocation was also clarified in DPP v. Bambrick [1999] 2 ILRM 71 which made it clear that these were two separate concepts. A person who successfully raised the defence of provocation had, ex hypothesi, the requisite intent to commit murder."

26. It is widely acknowledged in common law jurisprudence that the defence of provocation may apply in the presence of an intention to kill arising from the provocation. The legal interpretation of provocation as something that prevents the formation of murderous intention has historical support but since the latter part of the twentieth century the conventional understanding is that provocation and intention are discrete concepts.

27. The law on provocation has its complications and its difficulties, but they do not arise in this case. The law is not in dispute. Provocation consists of a sudden, temporary and complete loss of control such that the person is not "master of his mind." The appellant in this case emphasises the distinction between the formation or existence of murderous intent and the issue of provocation. The point he makes is that the absence of an intention to kill or cause serious injury defeats a charge of murder and leaves only manslaughter. But there can be an intention, which would or could be inferred from the conduct of the accused by way of inference, that a person intends the natural and probable consequences of his actions or it could be that the person, in the view of the jury, had express as opposed to implied murderous intent. Such a mental state is not incompatible with provocation. If the intention is absent for whatever reason, the case is not one of murder but of manslaughter. But provocation arises as an issue when the case would otherwise be murder, that is, in the presence of intention to kill or cause serious injury whether deduced by way of inference from actions or found to have existed in some more express manner.

28. In this case, the judge's original charge to the jury on provocation was correct and no complaint is made about it in this appeal; that is the direction on provocation in the body of the judge's charge. Counsel for the defence submitted that the judge had inadequately expressed the subjective element of the test, although that does not appear from the transcript to be justified, and sought by way of requisition that the judge would expatiate on that aspect in further direction to the jury. The judge did so, and again the direction on subjectivity cannot be faulted.

29. The judge went on to make further comments, however, that give rise to this, the principal part of the appeal. The judge told the jury that provocation prevented a person from forming the necessary murderous intention. That was wrong according to the authorities, and as explained above confuses or conflates two separate legal concepts. Therefore, that part of the judge's direction was incorrect as a matter of law.

30. The question then arises as to whether this misdirection could have misled the jury. It is, after all, a matter of a small number of words which come after a substantial direction on the law and the facts which is not challenged as to correctness on provocation. It is possible to argue, therefore, that this direction did not make any difference to the verdict of the jury. There are difficulties, however, in relation to that possibility.

31. The charge to the jury where provocation is in issue should be viewed as a whole and in its full context. In *People (D.P.P.) v. Curran* [2011] IECCA 9; [2011] 3 I.R 785, the issue was the language used in assigning the burden of proof as to the defence of provocation, and the Court held that:

> "This court, however, cannot accept that the charge taken as it must be, in its full context, was defective. It must be remembered that the charge was delivered orally to the jury and heard by them over an extended period of two days. The question in any case is how the jury may have understood the judge's instructions on the law. It is important therefore to view the charge as a whole, and seek to assess the impact it, and any passage contained in it, may have had on twelve individuals who are hearing it for the first time, albeit assumed to be listening attentively. It is not desirable to select individual words or phrases and subject them to a detailed almost semiotic analysis if a jury would not have done so in the moments in which they heard the charge.
>
> . . . . . .
>
> There is no doubt that giving a clear instruction to a jury on the tangled law of provocation is not an easy task since it involves instructing a jury on unfamiliar concepts, and on the task of considering whether a prosecution had proved a negative beyond a reasonable doubt."

The Law on Section 3(1) of the Criminal Procedure Act 1993

32. Section 3(1) of the Criminal Procedure Act 1993 is the statutory basis for the jurisdiction of an appellate court when hearing an appeal against conviction. It provides:

> "On the hearing of an appeal against conviction of an offence the Court may-
>
> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred), or
>
> (b) quash the conviction and make no further order, or
>
> (c) quash the conviction and order the appellant to be re-tried for the offence, or
>
> (d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence and that the jury must have been satisfied of facts which proved him guilty of the other offence
>
> (i) substitute for the verdict a verdict of guilty of the other offence, and
>
> (ii) impose such sentence in substitution for the sentence imposed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

33. The phrase in parentheses in s. 3(1) (a) is commonly known as the proviso because of its origin in earlier legislation. It is accepted that an error in the conduct of the trial should not allow the application of the proviso, where, as was found in *D.P.P. v C(E*)

[2006] IECCA 69, the issue was seen "as going to a central and critical aspect of [the] whole case."

34. In Fitzpatrick and *McConnell v. D.P.P.* [2012] IECCA 74, the Court of Criminal Appeal held that:

> "The proviso has been part of Irish law since the creation of the Court of Criminal Appeal. It does not, however, invite a court of appeal to make its own value judgment as to the guilt or innocence of the appellant. If there has been a fundamental error in the conduct of the trial and there has been a lost chance of acquittal, then the court cannot apply the proviso simply because it is of the opinion that under the proper trial the appellant would have been convicted. If a departure from the essential requirement of the law has occurred that goes to the root of the proceedings, then the appeal must be allowed."

Conclusions

35. It is obviously not a sufficient answer to the appeal on this ground to find that the words were few and might not have had an impact. The Court would have to be satisfied that they did not actually influence the jury. Secondly, these words came in the course of a brief re-charge just before the jury went back to their room to consider their verdict, and it is at least arguable that their location in the scheme of the judge's instructions gave them a prominence that they might not otherwise have had. Thirdly, although only the judge's words to the jury are relevant, it is, nevertheless, of some significance, and in the appellant's contention of real relevance, that the views the judge expressed on the subject of provocation actually reflected his own erroneous understanding of the matter as revealed in the exchanges with Counsel in the course of the requisitions. If the jury applied that part of the judge's instruction on the law, they would have employed an incorrect test in deciding the case.

36. This Court is not concerned with the legitimacy of the claim in respect of provocation. It is sufficient that the trial judge permitted the issue on the basis of the evidence in the case, and there was such evidence given by the accused man. The issue, therefore, for the Court is whether it can legitimately or even rationally conclude that this clear misdirection on the subject of provocation can be ignored on the basis that it was practically incapable of having influenced the jury. Provocation was the major issue in the case and the prime topic in the recharging by the judge so the jury's attention had to be focused on the very question. The incorrect part of the re-charge was brief but it was relevant to the specific defence [and it was incorrect]. In these circumstances, the conclusion is irresistible that the misdirection on provocation at the least could have influenced the jury in their consideration of the case. This ground of appeal must therefore succeed.

37. The conviction must therefore be set aside. It is unsafe and unsatisfactory because the judge made an error in what he told the jury about provocation. That was the principal issue in the case; indeed, on the judge's own view it was the only issue in the case. Since the critical question in the case was provocation and the judge addressed himself to that specific question when he recalled the jury, a mistake at that stage came at a very important point.

38. The appellant also submitted that the trial judge left it open to the jury to draw an adverse inference from the accused's failure to give an earlier account, which invited an inference from silence not permitted by People (D.P.P.) v. Finnerty [1999] 4 I.R. 364. In that case, the Supreme Court held that it was an impermissible interference with the accused's right to silence to tell the jury that the accused person made no comment or reply to questions while in Garda custody:

> "That right would, of course, be significantly eroded if at the subsequent trial of the person concerned, the jury could be invited to draw inferences adverse to him from his failure to reply to those questions and, specifically, to his failure to give the questioning gardaí an account similar to that subsequently given by him in evidence. It would also render virtually meaningless, the caution required to be given to him under the Judges' Rules."

The trial judge told the jury that the appellant was not questioned while in Garda custody for legal reasons because the right to extradite a person was solely for the purpose of being charged and brought before the court and not for questioning. He later said that there "was no account requested of the accused man as regards events and, as I say, it wasn't until the matter came to court that an account was given".

39. The statement by the judge to the jury that the accused man could not have been questioned by the Police Service of Northern Ireland or the Gardaí because of the Criminal Law (Jurisdiction) Act 1976 was an error. The fact was that the accused had been questioned by the Gardaí but nothing emerged material to the case because of the appellant's choice to remain silent in respect of the circumstances of the suspicious death of Ms. Quigley. He was entitled to do that, and in normal circumstances no reference could have been made to that posture. There was no obligation on him to furnish answers. He was entitled to rely on his Constitutional right to remain silent. The reason why no reference can be made to such a position is because a jury might draw inferences adverse to an accused from his silence, even though he was perfectly within his rights to do so. The problem, therefore, was how the judge's misstatement could be corrected without having the correction cause more damage that the original error. The passage in the charge was addressing prosecution Counsel's suggestion that the accused had tailored his evidence to suit the case he was making by reference to the book of evidence. The judge offered the explanation about how the Act operated. In this respect, the judge was endeavouring to counter what he thought might be a potential unfairness to the accused.

40. The decision to do nothing to put the facts right in this regard seems to the Court to have been correct because embarking on any correction would have been fraught with peril. The judge's comments were favourable to the appellant and quite the opposite of prejudicial. The Court's view is that this issue, although unfortunate as an error, did not render the trial unsatisfactory and could not justify upholding the appeal. It would not have been helpful or fair to the accused to say that he had been questioned by the Gardaí but had remained silent, or had not said anything relevant even though he was perfectly entitled to do so.

41. As to the balance of the charge in point of time and words devoted respectively to prosecution and defence cases, the Court is quite satisfied that this point does not have any validity. The trial judge put the prosecution case and the defence case adequately and fairly, and his charge cannot be impugned on the basis that the time spent on the prosecution was disproportionate or in any sense unfair. Counsel for the appellant did not press this issue as being sufficient to stand on its own or as comparable in importance with the first and principal ground of appeal.

42. The Court will accordingly allow the appeal, quash the conviction and order the appellant to be re-tried for the offence pursuant to Section 3(1)(c) of the Criminal Procedure Act 1993.

Approved: Ryan P.