THE COURT OF APPEAL

[153/2015]

Birmingham P.
McCarthy J.
Kennedy J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

OLIVER KIERANS

APPELLANT

JUDGMENT of The Court delivered on the 12th day April of 2019 by Mr. Justice McCarthy

1. On 27 February 2015 the appellant was convicted of manslaughter (having been charged with murder), possession of a firearm in suspicious circumstances contrary to section 27 A of the Firearms Act, 1964, as amended, and possession of a firearm with intent to endanger life contrary to section 15 of the Firearms Act, 1925, as amended. He was sentenced to terms of imprisonment of nine years for manslaughter, eight years for that of possession in suspicious circumstances and twelve years for that of possession with intent to endanger life, the sentences to run concurrently. It is not in dispute but that the offence of manslaughter was committed by virtue of his gross negligence. He appeals against the convictions and sentences.

2. The appellant was married to the deceased Patricia Kierans for 33 years and they had four children all of whom had grown up and were living in or were en route to Australia at the time of the homicide. Difficulties had arisen in the appellant's relationship with his wife in the spring or early summer of 2013 and she had left the family home as a consequence. The appellant had licences for a rifle and a shotgun but he had sawn off a length of the barrels and also the stock: obviously a sawn off shotgun is useful only to kill or cause serious injury and not for any legitimate purpose, and, indeed, the appellant said that he had adapted it so that he could use it to commit suicide. He said he had the firearm in his possession during the fatal incident, which occurred in a bedroom in the family home, so that he could threaten that he would take his own life if his wife did not believe his denial that he was not conducting an extramarital relationship which she apparently erroneously suspected. The appellant denied that he had intended the killing and that the gun had "discharged accidentally" due to the unexpected movement of a bed consequent upon a sudden movement either by him or the deceased. The possession of a firearm (the sawn off shotgun) with intent to endanger life related to the fact that he sought to shoot a Garda Fay when he sought to arrest him.

3. Four grounds of appeal were pleaded in the notice of appeal but one abandoned and those now relied upon are that the learned trial judge erred: -

> (i) in failing to properly direct the jury as to the law in relation to intention as it applied to the alleged offence and to the particular factual circumstances of the case;
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> (ii) in not instructing the jury that, when considering the issue of whether the appellant was in possession of a firearm in circumstances giving rise to a reasonable inference that he did not have it in his possession for a lawful purpose, the ought to acquit even if they prefer the prosecution case, if the version advanced by the appellant was reasonably possible;
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> (iii) in how she charged the jury in respect of the allegation of possession of a firearm with intent to endanger life.

4. Each of these grounds relate to supposed deficiencies in the judge's charge. The first thing to be said is that every charge must be considered as a whole and it is wholly illegitimate to attempt to isolate and take entirely out of context elements thereof either with respect to particular topics as has undoubtedly occurred here. We need hardly quote authority for this rudimentary proposition. We do not intend to repeat it when addressing each one individually although it applies equally to all of them. We cannot, needless to say, quote in this judgment the entirety of the charge but we think that the general observation will suffice.

Ground 1

The learned trial judge erred in law in failing to properly direct the jury as to the law in relation to intention as it applied to the alleged offence [of manslaughter] and to the particular factual circumstances of the case.

5. As the appellant concedes, the learned trial judge gave a very comprehensive charge in respect of the constituent elements of the offence of manslaughter as it arose on the evidence in the case and in particular manslaughter by gross negligence. It is suggested that this was done in a manner which did not permit of the jury to find the appellant not guilty *simpliciter* of murder. He further submits that the judge erred in failing to explain to the jury "that they would be required to find each of the criteria has been proven beyond reasonable doubt by the prosecution". Taking the charge as a whole, no rational juror nor jury could not but have been aware of the fact that the responsibility for proving every element of the prosecution of any charge before them lay at all times on the prosecution and never shifted to the accused, that the standard of proof is proof beyond a reasonable doubt, that the benefit of any

reasonable doubt must be given to the accused and that if more than one view of the evidence, being one favourable to the accused and one favourable to the prosecution arose, the view favourable to the accused should be taken. When addressing the particular topic of manslaughter the learned trial judge plainly explained, on any view of the transcript, each element of it by reference to the evidence and the want of an explicit reference in that passage of the charge to a verdict of not guilty *simpliciter* rather than not guilty of murder but guilty of manslaughter, is an example of what we have deprecated above, namely, declining to have regard to the charge as a whole but rather isolating and taking out of context the portion dealing with a particular topic.

6. The learned trial judge made it clear that three verdicts were open to the jury on the charge of murder, namely, guilty of murder, not guilty of murder but guilty of manslaughter and not guilty *simpliciter*, and, furthermore, that the prosecution were required to prove each matter beyond a reasonable doubt, and that if the jury entertained a reasonable doubt in respect of specific charges they must acquit.

7. We therefore reject this ground of appeal.

Ground 2

Failing to instruct the jury that when considering the issue of whether the appellant was in possession of a firearm in circumstances giving rise to a reasonable inference that he did not have it in his possession for a lawful purpose they are to acquit even if they preferred the prosecution case, if the version advanced by the appellant was reasonably possible.

8. In his submission, the appellant says that "the learned trial judge may have left the jury with the impression that they should choose the version that is more reasonably possible that the other, rather than that they should choose the interpretation consistent with innocence, even if they do not preferred that in her interpretation" (*sic*). We cannot see any basis for this proposition even if one can find oneself confined to the supposedly offending passage. This is to say nothing of the fact that appellant, again in this respect, illegitimately isolates such passage.

9. The appellant further complains of an error in the charge in respect of the allegation of possession of the firearm with intent to endanger life. In this respect it is submitted that the trial judge's description "of what matters ought to be considered by the jury did not fully grapple with either the nature of the allegation contended for by the prosecution nor did reference is engaged way the manner in which the appellant had denied those allegations in his evidence" (*sic*). This charge referred to the use of the firearm when approached by Garda Fay. The Garda had encountered the appellant when he was still in possession of the firearm, subsequent to the homicide. Clear evidence on CCTV footage existed to show him pointing the firearm at that Garda and indeed attempting to pull the trigger.

10. Effectively, the suggestion here is that the jury might have thought that the use of the term "*handling of the gun*" was a "much attenuated characterisation of the prosecution case" and that left the jury with the impression that "the mere handling of the gun and perhaps the issue of in whose direction it faced" was the full extent of the prosecution case, leading in turn to the impression that the attempt to pull the trigger "was not a significant or necessary part of the evidence". We cannot but surmise that the implication here is that the jury would have thought that it was merely, and literally, that the fact that appellant had held, physically, the firearm was enough to prove the charge. This proposition is insupportable on the plain and ordinary meaning of the words used when the sentence in which they appear is taken as a whole.

11. Under this head it was also suggested that the judge ought to have more fully dealt with what was said by the appellant in evidence when cross-examined and in particular his denial that he had attempted to discharge the firearm when pointing it at the Garda. The judge quoted his evidence *verbatim* on that topic, when a judge is not, in general, required to do so. On any view of this ground there is no foundation for it.

12. There was no rational basis for any requisition on any of the issues raised by the appellant since there was no error and accordingly, the principles in *DPP v Cronin* [2006] I.E.S.C. 9, have no relevance.

13. We accordingly reject this ground of appeal also. The appeal against conviction will accordingly be dismissed.

14. We now turn to the appeal against severity of sentence. It is baldly submitted by the appellant that the trial judge erred in imposing the particular sentences. We deal with each offence in turn: -

Manslaughter

15. The appellant submits that the trial judge erred in imposing a sentence of nine years in respect of this count, and that the headline sentence of twelve years was too high. Counsel for the appellant states that greater weight ought to have been given to the appellant's personal circumstances, including the deterioration of his marriage, and the emigration of his grown up children. Despite the fact that the accused did not plead guilty, counsel argued that the appellant was not without remorse for what had happened and that insufficient weight was given to this by the trial judge.

16. The respondent submits that the appellant was charged with a very serious offence, for which the maximum sentence is life imprisonment. The trial judge assessed the offence as falling within the lower end of the upper range of gross negligence manslaughter and determined a headline sentence of twelve years, and after mitigation, arrived at a nine-year sentence, resulting in a 25% reduction from the headline sentence, notwithstanding that fact that the appellant was precluded from relying upon mitigation afforded by a guilty plea. The judge expressly took the appellant's family circumstances and his previous good character into account. It was submitted that the sentence arrived at in the circumstances was entirely fair.

17. The aggravating factors present in this case are significant. Firstly, in respect of count one, the appellant made use of a firearm. The appellant re-loaded the firearm after his wife was killed. This was a case of domestic violence - a woman was killed by her husband in the family home. In modern times, the Courts have become fully cognisant of this aggravating factor. The appellant fully contested the charges throughout, so no mitigation can be afforded for a guilty plea. We think that this diminishes any real evidence of remorse. Nonetheless, the judge still afforded the appellant some mitigation in this respect, by her finding of regret going "*beyond his own mere self interest*." Further, the appellant failed to seek any medical or emergency aid after the homicide and instead left the scene.

18. We think that the sentence imposed was well within the margin of discretion afforded to the trial judge. We can detect no error in principle.

S.27A Offence

19. The appellant submits that the trial judge erred in imposing a sentence of eight years in respect of the s.27A offence, and that the judge failed to have specific regard to the lack of any relevant previous convictions of the appellant, which was a significant factor, and ought to have afforded a greater degree of mitigation.

20. The respondent submits that the sentence was appropriate as the offence fell within the upper range of seriousness based on the facts.

21. We think that the offence was correctly assessed at the higher range. This offence was intimately connected with the manslaughter. A sawn off shotgun has no purpose other than to inflict death or serious injury. Again, therefore, we think that the sentence was well within the margin of discretion of the trial judge. We can detect no error in principle.

S.15 Offence

22. The appellant submits that the trial judge erred in imposing a sentence of twelve years' imprisonment in respect of the offence of possession of a firearm with intent to endanger life. Notwithstanding the absence of a guilty plea, there was considerable evidence of remorse on his part and he showed considerable insight into the harm caused by his actions. The trial judge ought to have afforded greater mitigation having regard to this factor.

23. The respondent submits that despite the fact that the appellant contested the criminal charges put to him, the trial judge still found elements of remorse, and afforded in mitigation to the appellant by reason thereof. While no physical injury occurred in the public house, the risk of endangerment to those present was extreme, and, importantly, endangered a member of the Gardaí.

24. At the appeal hearing, the Court had the benefit of viewing the CCTV footage concerning this offence, where the appellant can be observed holding the firearm and checking the weapon after it failed to fire when aimed at Garda Fay. Further, a barman can be seen ducking in fear behind the bar for his own protection. The calmness of the appellant is clear, he can be seen checking the weapon, and he made no attempt to escape. He had re-loaded the firearm after the homicide some hours before.

25. Further, since the incident occurred in a public house, the appellant would have been aware of the probability of encountering members of the public. The fact that he put an unarmed member of An Garda Síochána in fear of his life in these circumstances is the most serious aggravating factor, when we in this country have the privilege of having an unarmed police force. When Garda Fay approached the appellant, he showed intention to actually discharge the firearm, since he can be seen to pull the trigger. The gravity of the offence was correctly assessed by the learned trial judge as being in the upper range.

26. We accordingly think that the sentence imposed was well within the margin of discretion afforded to the trial judge. We can detect no error of principle.

27. It is important to stress the necessity of the application of the principle of general deterrence in sentencing in cases involving the use, or threat of use, of firearms against members of the An Garda Síochána, which are actions to be abhorred.

28. The appeal against sentence is accordingly dismissed.