



THE COURT OF APPEAL

[105/14]

Birmingham J.

Mahon J.

Edwards J.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

V

SIMON MCGINLEY

APPELLANT

**Judgment of the Court (ex tempore) delivered on the 21st day of November 2016 by
Mr. Justice Birmingham**

1. On the 3rd April, 2014, the appellant was convicted of the offence of murder and also of burglary and false imprisonment. He had pleaded guilty to the offences of burglary and false imprisonment and had also offered a plea of guilty to manslaughter but that manslaughter offer was not acceptable to the Director of Public Prosecutions. He has now appealed his conviction for murder and has also appealed against the severity of the sentences that were imposed in respect of the burglary and false imprisonment charges. The sentences being appealed being one of seven years in respect of the burglary offence and one of ten years in the case of the false imprisonment offence.
2. The appellant has formulated a large number of grounds of appeal and they have in common that none of them were points that were raised at trial. In summary the grounds involve multiple criticisms of the trial judge's charge, in particular how he dealt with the mental element of murder and dealt with the distinction between murder and manslaughter. At trial in the Central Criminal Court there were no requisitions raised arising from the judge's charge whatever by the defence. The requisition from the prosecution side was confined to asking the judge to explain to the jury that if they wished to return a verdict of manslaughter that they had to write that verdict onto the issue paper. While a large number of grounds have been formulated, not all the grounds have been pressed in oral argument.
3. The background to the trial is that on Wednesday the 19th/Thursday the 20th September, 2012, the appellant entered the home of the deceased man Mr. Eugene Gillespie at Old Market Street, Sligo, in the course of a burglary. Mr. Gillespie was 67 years of age and lived alone. He was a very well respected figure in the Sligo community and his death

was a great loss to his extended family. A powerful and indeed moving victim impact statement was presented to the court by Ms. Ashling Tinsley, a niece of the deceased.

4. The prosecution case at trial as outlined by counsel in his opening was that while Mr. Gillespie was in his home, he was subjected to a serious degree of violence, he was pummelled, the evidence was such that it would lead the jury to infer that Mr. Gillespie was subject to a violent assault and had been subjected to repeated blows. In the course of the incident the house was ransacked, one witness described it as being "like a bomb went off". A number of pieces of furniture were broken and it is also the case that at one stage during the incident, the appellant restrained Mr. Gillespie by tying his hands behind his back with a cord that he had found in the house. Then the stage was reached where the appellant left the house, leaving his victim behind tied up.
5. At around 1.35 pm on the 20th September, the appellant rang the emergency services, robbing a phone in order to make the call. In the course of that call to the emergency services, he referred to a house across from the station with a brown gate, and that there was a man there tied up in the house. In fact the house where the accident occurred, that he thought was brown, was in fact red, but there was a house with a brown door or gate opposite the garda station. The gardai called to that house and they found nothing untoward. That the phone call was made was a matter in which the defence placed considerable emphasis during the course of the trial and again it is featured prominently on the hearing of this appeal.
6. So it was that it was not until 9.20 pm on Friday the 21st September that Mr. Gillespie was found tied up in his home. He appeared to the family members who found him to be unconscious and was having difficulty breathing. Medical assistance was summoned and Mr. Gillespie was brought to the hospital. He had experienced a brain bleed and a swollen brain, a skull fracture and a fractured jaw. He had also suffered significant hand injuries arising from the fact that the cord had constricted the veins.
7. The appellant entered a plea of guilty to manslaughter in the presence of the jury and so at trial the only issue was whether the case was one of murder or of manslaughter. This was the issue for the trial judge when he came to charge the jury. Mr. McGinley was represented at trial by a very experienced legal team and they had no criticisms to make of the judge's charge. However, his current team who did not appear at trial have formulated a large number of criticisms. It is contended in the course of the written submissions that the judge should not have read out and re-phrased s. 4(1) of the Criminal Justice Act 1964: the judge is criticised for not providing an explanation of the meaning of the word "intent": while the jury was told that the test of intent was subjective and that they should have regard to the personal circumstances of Mr. McGinley in deciding whether he had the specific intent required for the offence of murder, it is said that they were not given an adequate explanation in practical terms: it is submitted that the judge should have directed the jury as to the particular significance of foresight in determining whether the appellant had the necessary intent for murder: it is said that the jury should have been told that they could not convict of murder if they

felt that Mr. McGinley was merely reckless: the point is made that the jury was not provided with an adequate explanation as to how they might assess whether death or serious injury was a natural and probable consequence of the appellant's actions: it was submitted that the jury was not directed, that the presumption might be rebutted on the facts of this case: the point was made that the judge did not sufficiently clarify the distinction between the offences of murder and manslaughter: it is said that the judge should have explained what was meant by the term manslaughter and by assault/unlawful and dangerous act manslaughter: it is said that the jury were not given sufficient explanation as to what was the mental element of manslaughter and it is said that the jury should have had clarified for them that while foresight of serious injury or death is necessary in order for there to be a finding of murder, that that is not a necessary requirement for manslaughter.

8. In the course of oral argument the point was made that the distinction between murder and manslaughter should have been contextualised. The treatment of this aspect of the charge by the trial judge is criticised as being "dry and formulaic".
9. There is some further criticisms made of the charge, it is said that the issue of intoxication was not dealt with adequately and that the judge did not charge the jury in relation to its relevance. The judge did tell the jury that intoxication was not a defence, but that it was relevant to the question of formation of intent. It is said it was a case where a circumstantial evidence direction should have been given and also the issue of expert evidence was not adequately dealt with and that the jury should have been cautioned against attaching too much weight to expert evidence. The argument is made that the attention of the jury should have been directed to inconsistencies between experts. This is a reference to the fact that the jury heard from a number of medical witnesses who dealt with the deceased after he was found tied up in his home and brought to the hospital and there were certain differences in what they had to say.
10. It said that the judge did not deal adequately with the question of drawing inferences and that the jury should have been given further directions in that regard and that absent that, it might not have been clear to them that they were entitled to draw inferences different to those that were proposed by the prosecution, by the defence and by the experts.
11. As has already been mentioned there were no substantial requisitions after the charge. The jurisprudence of this Court indicates that when it sought to raise points on appeal, which have not been raised at trial it will usually be necessary to offer an explanation why the points were not raised at trial. In this case the court has no doubt about the reason why there were no requisitions. There were none because the judge's charge was an entirely appropriate one. None of those who participated in the trial had any criticism to make of it and in the court's view very understandably so.
12. A further ground of appeal is that it is said that the offence of murder should not have been left to the jury. This ground is advanced notwithstanding that there was no application to withdraw the case from the jury and it is also advanced in the teeth of the

evidence which indicates that serious injuries were inflicted which clearly provided a basis for concluding that there must have been an intent to cause serious injury at least.

13. There are some additional grounds which have not featured in oral argument. One of those is that inadmissible evidence was put before the jury. That was a reference to the fact that Sergeant Tom Quinn agreed with a question that was put to him by prosecution counsel that the background to his becoming involved was that there had been an aggravated burglary. The defence make the point that this was not an aggravated burglary as there was no evidence that Mr. McGinley had brought a weapon to the scene. However, that misses the point that neither counsel asking the question nor Sergeant Quinn answering it was adverting to the elements of the offence of aggravated burglary, but simply putting in context that the Sergeant's involvement was against a background that a burglary occurred which was a serious or aggravated one.
14. In fact there were many aggravating factors present including the fact that it was a dwelling that was burgled, that it was an occupied dwelling, that the property was then ransacked and that serious violence was inflicted on the occupant in his home.
15. There is also a reference in the written submission to the fact that Garda Tomás O'Gríofa gave evidence of having met the appellant shortly before the burglary, that Garda O'Gríofa had smelled alcohol from the appellant, but that in the view of the Garda, Mr. McGinley was not intoxicated. It is said that this amounted to giving opinion evidence in the nature of expert evidence which Garda O'Gríofa was not qualified to do.
16. Again, there was no objection to the admissibility of Garda O'Gríofa's evidence and indeed the defence had no questions for him. It has long been recognised that intoxication is sadly so common that individuals can express a view when they encounter it.
17. So far as the criticism of the judge's charge are concerned, in the view of the court the charge was one that was clear, concise and accurately stated the law. The court does not find it all surprising that there were no significant requisitions from either side. Quite simply there was nothing to criticise. Those who had participated in the trial and had heard the charge delivered did not find anything in it to complain about.
18. The court notes with approval the fact that when the evidence concluded, the judge indicated to counsel that he saw the case as coming down as a matter of reality to the question of murder or manslaughter and that it was a case essentially about intent and he offered counsel an opportunity to address it, saying that he saw his task as explaining intent to the jury and dealing with the matters around serious injury. The charge that was actually delivered reflected the prior indications that had been given.
19. The court rejects all the grounds of appeal in relation to the conviction. Despite the industry deployed by those who have become involved on Mr. McGinley's behalf after the trial, the court is firmly of the view that no point of substance has been raised and that the appeal against conviction is not a meritorious one.

20. So far as the appeals against severity of sentence are concerned, the court accepts that in a situation where mandatory life sentences were being imposed, that the judge's sentencing remarks in relation to the other offences were less elaborate than they would have been had serious offences been dealt with on a stand alone basis. Likewise, the plea in mitigation was not as full a one as would have the case if there was not a mandatory life sentence in the background. However, the court cannot conclude that the sentences imposed were excessively severe. The burglary and false imprisonment were offences of the utmost seriousness and were committed by someone with a significant prior criminal record. He had 21 convictions in all, but of greater significance is the fact that a number of those convictions were relevant convictions on indictment. On the 11th October, 2012, he was convicted of burglary and possession of articles in the Circuit Court. On the 24th May 2004 he was convicted of assault causing harm in Sligo Circuit Court. On the 13th January, 2004 of an offence of robbery again at Sligo Circuit Court.
21. In the court's view the sentences that were imposed were appropriate and cannot be seen as excessively severe. In those circumstances the court will dismiss the appeals against sentence. The appeal against conviction and sentences are dismissed.