



THE COURT OF APPEAL

Record Number: 220/17

Whelan J.
McCarthy J.
Kennedy J.

BETWEEN/

THE PEOPLE AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

ALAN CAWLEY

APPELLANT

JUDGMENT of the Court delivered on the 16th day of December 2019 by Mr. Justice Patrick McCarthy

1. The appellant/accused ("the Appellant") was convicted on the 25th July, 2017 of the murders of John (Jack) Blaine and Thomas Blaine on the 10th July, 2013. They were elderly brothers living together in Castlebar and were unlawfully killed by the appellant in the small hours of the morning of the 10th July, 2013. The appellant had been in Castlebar for a number of days following his release from Castlerea Prison on the 5th of July and had been invited into their house by John. There he attacked him, and when he encountered Thomas he killed him also. Whilst the appellant had pleaded not guilty *simpliciter* on his arraignment, he thereafter made admissions pursuant to s.22 of the Criminal Justice Act, 1984 that he had unlawfully killed them. It was his defence that at the time he was suffering from a mental disorder such that his responsibility for their deaths was substantially diminished in the sense contemplated by s.6 of the Criminal Law (Insanity) Act, 2006 (the 2006 Act) and accordingly that he was not guilty of murder but guilty of manslaughter by reason of diminished responsibility. The focus of this appeal is upon the judge's charge to the jury, with special reference to the manner in which he dealt with that issue of diminished responsibility.
2. For whatever reason, no formal plea of not guilty of murder but guilty of manslaughter was entered, nor were the jury told the basis of any such defence for any such plea before the commencement of the evidence. We might comment if it would have been better if the defence had been formally put on record, or at least, that the jury knew from the start what they were being called upon to decide. In any event, the case proceeded solely upon the basis of that partial defence, and there was never any issue in the case as to whether or not the natural and probable consequences of the violence inflicted by the appellant upon the deceased was to cause death or serious injury, nor whether or not he had the intention to do so. In that context alone the issue of consumption of drink and intoxication arose.
3. On the appellant's arrest on the 10th July, 2013, after he had been informed by the arresting officer, Inspector Gary Walsh, of the reason for his arrest he was cautioned in the usual way to the effect that he wasn't obliged to say anything unless he wished to do

so; but whatever he said would be taken down in writing and might be given in evidence. The appellant denied any involvement in the murders and stated that he had been drinking.

4. In the first of six interviews after arrest and detention, when asked about his activities on the 5th July (following his release from prison he went to Castlebar) he said that he had "release money" which he "squandered" on "alcohol" and drank for most of that day. When asked where he had obtained the alcohol, he said "Centra/Costcutter beside Staunton's Chemist, got some bottles of wine there, cans of Guinness yesterday in Dunnes..." [but it is not clear from the context on which day some or all of those purchases were made] An enquiry was made of him as to whether or not he could remember any public houses in which he might have been drinking, either on the 9th of July or a previous day, he said "Bungalow Cox's I think it's called..." and then on further enquiry as to whether or not he had been drinking there on the evening of the 9th July he said, "Could have been but not sure". He stated that when he awoke on the morning of the 10th of July he found amongst other things [two] bottles of wine, a couple of pints, maybe six pints of Guinness. He said he didn't know whether or not he had brought anyone back to his accommodation on the night of the 9th, and when asked why (as he had asserted to be the case) he found that his bedroom was messy on awakening; he described himself as having been "extremely intoxicated. I was probably falling and banging into things", that he was nearly sure he had obtained the alcohol in more than one place and that he would "have hit the pub straight away, I'm guessing that's what I usually do" when he left his accommodation.
5. When asked about a number of different public houses his answers were uncertain. He said that he assumed he had purchased some Nurofen, having regard to the fact that an empty packet was found in his bedroom, and when asked as to the amount of alcohol which he "would" take to "get a buzz" he told the gardaí that he tries "that but I always have too much and go to blackout", conceding that he was "in a blackout" when he had committed "some" previous crimes. In further questioning it was put to him by one of the interviewing gardaí that: - "as it stands you can't assist us any further in regard to your late-night movements. It was suggested to him that "all we have established about yesterday, you drank two bottles of wine, Nurofen Plus 'box' went drinking in some pub in Castlebar and had four/six pints of Guinness" and effectively indicated that he supposed that this was so, and remembered drinking bottles of wine.
6. These statements were made by him in the context of his explicit rejection (or want of recollection) of involvement in the homicides but, later, in interview he made comprehensive admissions at variance with the former.
7. The sole ground of appeal is that: -

"The trial judge erred in law and on the facts, in failing to charge the jury adequately or at all in relation to the Director of Public Prosecutions' burden of proof on the issue of intoxication."

By s.1 of the 2006 Act: -

"'Mental Disorder' includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication."

and by the same section: -

"'Intoxication' means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances."

and by s.6 (1): -

"Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person—

- (a) did the act alleged,
- (b) was at the time suffering from a mental disorder, and
- (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act."

8. The appellant bore the burden of proof on the balance of probabilities of showing that at the time of the killings he was suffering from a mental disorder, that that mental disorder was not such as to justify finding him not guilty by reason of insanity, but was such as to diminish substantially his responsibility for his actions. As can be seen the definition of mental disorder may well, in a given case, require an accused to address questions of alcohol consumption or intoxication where evidence of either or both exists, and the plea has been raised. This is such a case.
9. Dr. Pawan Rajpal consultant psychiatrist was called on behalf of the appellant and, in turn, Dr. Brenda Wright on behalf of the respondent. Both agreed that at the time of the offences the appellant was suffering from emotionally unstable personality disorder and dissociative personality disorder (the latter apparently also known as antisocial personality disorder). Dr. Rajpal was also of opinion that the appellant was suffering from attention deficit hyperactivity disorder ("ADHD"). They disagreed, however, as to whether or not the personality disorders which existed were mental disorders as defined by the Act. Dr. Wright accepted that in what I might shortly term as an extreme case ADHD might fall into the latter category, if it existed.
10. Both doctors had the benefit of extensive reports and notes (including hospital or medical notes) from as far back as 1998 and the last of which prior to his release from prison was on the 28th of June, 2013. He had had extensive engagement with the mental health services over many years. Further, after his release from prison he attended at the accident and emergency department of Mayo General hospital on the 7th of July where it was noted that he had (presumably on the basis of what he himself had said) been "binging on alcohol and drugs", and he sought detoxification help (as it was described) but was advised that it was not required. The appellant had been admitted to hospitals

and other units associated with mental health services on twenty-one occasions, had attended an accident and emergency department on eleven occasions, out-patient (mental health) services on sixteen occasions, prison psychiatric service on twenty-four occasions and general practitioners on twenty-one. Hospital admissions included admission to the Central Mental Hospital on one occasion. The report of a Dr. Van Velsen who saw the appellant in prison in April 2016 was also available and his diagnosis was of anti-social and borderline personality disorder. He was of the view that it was severe and present at the time of the offence. He also stated that the appellant had been drinking –

"To some extent" during the evening [prior to the offences which occurred after midnight or in the early morning of the 10th of July], but was not intoxicated to an extreme level".

11. Dr. Rajpal stated that his opinion was based on the past medical history [by which it appears he included the 2016 report, even though it post-dated the homicides], and his clinical opinion was that at the time the appellant, "would have less control over his actions because of these diagnoses. It's the impulsivity that would have played a role in the index event" and agreed with counsel that this would have been more so than someone without such diagnoses and would have contributed to his actions in a more than trivial or minimal way: at one point he said he could not comment on the issue of whether or not they were such as to "diminish substantially" his responsibility, saying that it was not possible to quantify the effect. An enquiry was made of him about the question of alcohol or intoxication. He said he agreed with the view of Dr. Van Velsen on that point [and apparently this was the basis of Dr. Van Velsen's view] that the appellant "had just been out of prison for three days before and he was not that intoxicated that only alcohol will explain what happened". He added that the diagnoses had "played a role in the index offence", qualifying this, however, by saying that "some of the symptoms would have played a role in the index offence. Most of the symptoms are from a mental disorder". Later, in his evidence he said that he had, from a clinical point of view a "mental disorder" which "diminishes his responsibility". The symptoms of the disorders included "low impulse control [and] low frustration tolerance". He told the Court what the appellant had told him when he examined him, and it appears that nothing was said about alcohol or intoxication. Although he had read that the Book of Evidence (including notes of interview) (and had seen the tapes of those interviews) he had not based his opinion upon them.
12. Dr. Wright, in explaining the characteristics of a personality disorder, and her conclusion that it was not a mental disorder as contemplated by the 2006 Act, said that personality, as a general term, refers to an individual's attitudes and their ways of thinking, feeling and behaving; and also to the social ways in which they interact with their environment so that a disorder is what she described as a severe disturbance in the person's character and behavioural tendencies, usually involving several areas of personality and nearly always associated with personal and social disruption. The personality disorder as diagnosed shared the themes of impulsiveness and lack of self-control. She took the view that his personality disorders, and his substance dependence on drugs and alcohol

(something which is not in debate having regard to the history) overlap very significantly.

She said that: -

"while characteristic of certain personality disorders, impulsive behaviour, anti-social behaviour, self-harming or aggressive behaviour is also strongly associated with states of intoxication or withdrawal. So, while it is my view that Mr. Cawley has a dangerous dependence on benzodiazepines, alcohol and opiates and while he has a personality disorder, two different types of personality disorder, certainly the behaviours associated with those disorders would overlap to a very significant degree."

She took the view that a personality disorder did not impair capacity and therefore was not in her view, a mental disorder under the Act. She was of the view that at the time of the offences the appellant was in a state of intoxication. For the purpose of reaching that view she considered the Book of Evidence (including the evidence as to what was said by the appellant to the gardaí) and what he had said to her in his account as to events. She was of course cross-examined extensively for the purpose of testing her opinion about intoxication by reference to the evidence. In any event, her opinion was that at the time of the offences the appellant's state of intoxication led him to act in an extremely impulsive and violent way which resulted in the death of the Blaines. The basis upon which she rejected the proposition that the disorders which were diagnosed were mental disorders within the meaning of the Act was that they did not impair a person's capacity, and she did not regard a personality disorder as a disease of the mind. Both witnesses, accordingly, proceeded on the basis of the records available to them, but she had regard to what the appellant had told her, what he had said to the gardaí (the veracity of which relating to intoxication was questioned on his behalf) and the Book of Evidence. There was no suggestion that we can see that she was not entitled to rely upon any of this material with a view to forming a judgment: what was in debate was the merits of such a judgement. Having the regard to the evidence actually given, we cannot see any basis upon which, when addressing the issue of whether or not an accused person has a relevant mental disorder there could be any inhibition on a psychiatrist, in any event, expressing an opinion as to the cause of the relevant behaviour of that accused. Various hypotheses can be canvassed by expert witnesses.

13. At an early stage in his charge, as is usual, the trial judge addressed the burden and standard of proof applicable in criminal trials, absent any special defence of the kind which arises here. (and of course in doing so, referred to the civil standard of proof), in the following terms: -

"Accordingly, if any doubt as to the innocence of the accused arises from the evidence and that doubt is founded on reason, it is your duty to acquit. Proof beyond all reasonable doubt can be contrasted with the lesser standard of proof that applies in civil cases. Where it is sufficient to prove the case on the balance of probabilities. So, for example, if you are serving on a jury dealing with a defamation matter or an assault matter where the plaintiff brings an action for

damages, that would be a civil case and it would be sufficient for the plaintiff to prove his or her case on the balance of probability. If the scales are tipped by even as little as one percent in favour of one side or the other that determines the outcome of the proceedings..."

14. Later in the charge he turned to the defence as follows: -

"However, in this case the defence has raised a partial defence known as diminished responsibility and that is the nub of the case that you must consider. You cannot proceed to convict in this case unless and until you have considered the defence of diminished responsibility. That defence is a statutory defence given by s. 6 of the Criminal Law (Insanity) Act, 2006. It is a partial defence to a charge of murder and if successful it operates merely to reduce the offence of murder to one of manslaughter, but cannot lead to an outright acquittal. In order for the defence to succeed, there must be evidence from which you can find that the accused killed the deceased, and at the time of the killing was suffering from a mental disorder which substantially diminished his responsibility for the relevant act or acts. A mental disorder is defined under s.1 of the Act of 2006 as follows:

"Mental disorder includes mental illness, mental instability, dementia or any disease of the mind but does not include intoxication. The word "include" suggests that the psychiatric diagnoses elicited in the act are not exhaustive, and that the Act includes all psychiatric disorders that are clinically recognised to be mental disorders. Intoxication is not included and (it) means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances. Where an accused on a charge of murder contends for diminished responsibility the onus of proof is on the accused to prove on the balance of probabilities that at the time of the killing he was (a) suffering from a mental disorder, and (b) that the mental disorder from which he was suffering diminished substantially his responsibility for the act."

and he went on to say that: -

"In this case it is accepted that the accused caused the death of the two deceased. Accordingly, the issue that you must consider is whether the defence has established on the balance of probabilities the following:

First, whether at the time of killing the accused was suffering from a mental disorder and if so whether the disorder substantially diminishes responsibility of the relevant acts..."

Further he said that: -

"... (Doctor Rajpal)... opinion is that at the time of the killings the accused was suffering from three mental disorders... all of which he says caused the accused to

be more impulsive and less lacking in control (sic) than persons without these diagnoses."

He referred thereafter to the opinion of Dr. Wright that the disorders identified by him did not: -

"Constitute mental disorders within the meaning of the Act of 2006 because they do not impair capacity."

that the accused: -

"suffers from dependency on alcohol and drugs... (and) ... that much of the accused's criminal and harmful behaviour has occurred within the context of intoxication with alcohol or drugs or with behaviour associated with seeking alcohol or drugs; and in this case you have the evidence that the killing occurred and that he had gone upstairs and pulled out drawers apparently looking for drugs."

and, later, that: -

"So subtracting any element of intoxication, that the issue you have to decide is whether the accused had a mental disorder at the time and if so, whether the mental disorder was such as to diminish substantially his responsibility for the act of intentionally killing his victims."

15. The appellant has contended that if the prosecution was to rely upon the proposition that the accused behaved as he did due to intoxication, the obligation rested upon it to prove the fact of intoxication and to do so beyond reasonable doubt. Thus, where an issue arises as to intoxication or consumption of alcohol in all cases of diminished responsibility, the obligation is not upon the accused to prove on the balance of probabilities that he suffers from a mental disorder otherwise than caused by intoxication. The judge was right in taking the view that this would shift the onus of proof on this defence from the accused to the prosecution.
16. As to whether or not the jury understood where the burden of proof lay, and the distinction between the criminal and civil standards, so far as this topic can be separated from the unfounded proposition that the jury should have been told that it was necessary for the prosecution to prove the fact of intoxication beyond reasonable doubt a requisition on this point was raised after a question by the jury in the following terms: -

"Given the defence of diminished responsibility, who does the onus fall upon, the defence to prove diminished responsibility or the prosecution to disprove diminished responsibility, can you quantify a level of reasonable doubt?"

to which the judge responded: -

"You are required to reach a unanimous verdict, that is the legal position. In relation to the first issue as to who bears the onus of proof, the defence bears the

onus of proof of establishing the defence of diminished responsibility on the balance of probability. That is the level to which they must prove the defence. It's not beyond all reasonable doubt. As a result of concessions that have been made in the case, the net issue is whether the defence of diminished responsibility is made out or not and in respect of that issue, the onus of proof rests on the defence. However, it is not to prove the defence to the level of beyond reasonable doubt, but rather to prove it to the level of the civil standard which is on the balance of probability."

17. We think the judge was right having regard not only to the clarity with which these issues had explained in the charge proper but the form of words used at that stage which was appropriate.
18. We should comment relatively briefly upon the fact that there are extensive written submissions about the responsibility of the prosecution to prove *mens rea* beyond a reasonable doubt in the context of intoxication. These are of no relevance. No one doubts but that it is whilst a drunken intent is sufficient there may be cases in principle where such was the level of intoxication that the intent to kill or cause serious injury might not exist or be in doubt. This is not a case, however, where the issue of whether or not the appellant had the necessary *mens rea* for murder was in issue. Still less is it a case where it was suggested that evidence of intoxication was such as to raise an issue as to whether or not he had such a *mens rea* thus raising as a live issue the obligation of (which is undoubted in a proper case) to negative or exclude the reasonable possibility that the appellant did not have the requisite intent due to consumption of alcohol.

In our view, the judge's approach, was correct in the nature of the case in this context also.

19. In *R v Dietschmann* [2003] 1 AC 1209, Lord Hutton in his speech, characterised this issue as follows: -

"The issue which arises on the appeal is the nature of the direction which the trial judge should give to the jury when a defendant, raising the defence of diminished responsibility, had taken alcohol prior to the killing and was also suffering from a mental abnormality at the time of the killing."

20. The main focus of the appeal however, was the supposed error of the trial judge in failing to elaborate on the issue of causation having regard to the conflicting views of the medical witnesses with respect to intoxication. The submission was based on *R. v. Dietschmann*, also in the case of where the defence of diminished responsibility arose.
21. Both psychiatrists called there were agreed that the accused was suffering from an abnormality of mind arising from an inherent cause or induced by disease (a so-called "adjustment disorder") but a Dr. Palmer believed that he was (also) suffering from alcohol dependency syndrome - alcoholism - at the time of the killing but a Dr. El Azra on behalf of the accused did not think that that was a factor but that the accused had been in a

transient psychotic state at the relevant time. Dr. Palmer thought that alcohol had been a significant factor which had facilitated the release of aggression – if he had been sober he would probably have exercised self-control.

22. In such circumstances Lord Hutton considered that in charging the jury he suggested that the following form of words would be appropriate: -

"Assuming that the defence have established that the defendant was suffering from mental abnormality as described in section 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. [Our emphasis]. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or had he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him."

23. Firstly, we should say that it is by no means the case that "mental abnormality", as referred to in part one, section 2 of the Homicide Act, 1957, is the same thing as "mental disorder" as defined in the 2006 Act, and having regard to the differences between our statute and the former, caution must be exercised in relying on an English decision here.
24. Secondly, on the evidence in this case, there is no basis for saying that intoxication and a mental disorder (if there was one) could *both* have played a part in causing the appellant to behave as he did. The evidence was that either the disorder(s) alleged caused him to do so, or alternatively, intoxication (and the appellant contends this is so here) to tell the jury that a person's mental abnormality and drink both played a part in any impairment of responsibility the defence might still be open.
25. It seems to us that it is appropriate to re-emphasise the fact that a charge is an exercise in communication and that the simpler it is the better. The core issue in cases of this kind is whether or not, if a mental disorder exists, it substantially diminishes the accused's responsibility. As can be seen from the passages quoted from the charge this is what the jury were told in the clearest terms, and so told, and rightly, using a form of words calculated to exclude alcohol from consideration in the sense that intoxication was excluded as a mental disorder. What more was to be said? In fact, with respect to Lord Hutton, we think that the desideratum of clarity and simplicity might be undermined by this type of what we think would be unnecessary elaboration. There is no reason to suppose that the jury could have been in any doubt as to what they had to decide or that they might have been in some way confused by the fact of the introduction of intoxication

into the case or how they should approach it. They must have known what they had to consider. Accordingly, in our view there were no errors in the judge's charge.

26. We accordingly dismiss this appeal.