



THE COURT OF APPEAL

Birmingham P.
McCarthy J.
Ní Raifeartaigh J.

[Appeal Ref: CCAOT0238/2018]

Neutral Citation Number: [2021] IECA 220

Bill No: CCDP5/2018

BETWEEN

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

Respondent

AND

ADAM O'KEEFFE

Appellant

Ex tempore judgment of the Court delivered by Ní Raifeartaigh J. on 28th day of July, 2021.

The Trial

1. The appellant was convicted of the murder of one Amy McCarthy and sentenced to life imprisonment, to run from the 6th of December 2017.
2. The prosecution case was that throughout the day on the 29th of April 2017, and going into the morning of the 30th of April 2017, the appellant and the deceased, Ms. McCarthy, were together and also in the company of others in the city of Cork. CCTV footage showed that there was a heated argument between the appellant and Ms. McCarthy

at one point. There was evidence from a witness who was with the pair at the time. Apparently the fight stemmed from the appellant's belief that Ms. McCarthy had cheated on him while he had been serving a sentence of imprisonment. A considerable amount of alcohol was consumed throughout the day by the various parties. The appellant and Ms. McCarthy ended up at premises in the City of Cork which served as a "squat" of some sort. Ms. McCarthy was last seen entering this property at approximately 7.10 pm on the 29th of April 2017. She was found dead the next day.

3. The following morning the appellant along with others raised the alarm when Ms. McCarthy would not awaken. Paramedics attended the scene and were directed into the squat and found Ms. McCarthy lying on the floor with injuries. The Gardai were called and the scene was preserved. A post-mortem revealed multiple injuries to Ms. McCarthy and the cause of death was determined as a combination of blunt force trauma to the head due to multiple blows, with brain swelling associated with asphyxia due to manual strangulation, complicated by acute alcoholic intoxication.
4. The appellant pleaded not guilty to murder but guilty to manslaughter. At his trial for murder, he relied upon the defence of provocation as well as lack of intent as a result of intoxication.
5. The trial judge directed the jury on the offence of murder, the requirement of intent or the presumption as to natural and probable consequences. She then went on to direct the jury as follows on the issue of provocation:-

“Before finding the accused guilty of murder, the prosecution must establish beyond a reasonable doubt that the accused was not provoked to such an extent that, having regard to his temperament, character and circumstance, he lost control of himself at the time of the wrongful act. There must be evidence of a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him, for that moment, not master of his mind and there must be some evidence that the loss of self-control was total and that the reaction came suddenly and before there was time for the passion to cool. I must emphasise that this burden is not discharged merely by pointing to evidence that the accused lost his temper or was easily provoked.

You should examine the evidence -- the evidence that you should examine in considering this is the testimony of Dean Nugent and the memos of interview with the accused man himself. In considering whether the accused was provoked, you must consider the evidence carefully. You are not obliged to accept this evidence, any more than you are obliged to accept any other evidence in the case. You must, however, carefully consider it and decide whether it is credible and whether it amounts to provocation. The question you must decide is not whether a normal or reasonable man would have been provoked so as to totally lose self-control, but whether this particular accused, with his particular history and personality, was so provoked. Is there evidence of a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of mind and is there evidence that the loss of self-control was total and the reaction came suddenly and before there was time for the passion to cool? So, I must emphasise that it is a subjective test not an objective test. If you find that the

accused was provoked, then the offence of murder is reduced to manslaughter.

[Day 6 Page 15 Line 15]

6. Counsel for the DPP raised a requisition on provocation which was challenged as being unnecessary by counsel for the appellant. The latter in turn requisitioned the trial judge regarding her charge on provocation and in particular that she had given no direction on intoxication in the context of provocation and how that should be addressed to the jury. He did so in the following terms:-

“MR GREHAN: Yes. And there's only one other thing then: if you are going to do that, and the Court dealt with the subjective test in terms of the accused's circumstances, the only thing that you didn't mention in that regard, if it is to be revisited, that I'd ask the Court consider doing, is the fact that he was intoxicated, having consumed very considerable quantities of alcohol at the time, and for that, I don't know if the Court still has the judgement in Farrell from Mr Justice Birmingham of the 20th of June 2018, but it's specifically referred to, so it just means that the question of intoxication, while I'm quite happy with the way you've dealt with on its own, it actually is a contributor in respect of how the jury view the provocation as well. It's a factor to be taken into account. “ [Day 6 Page 23 Line 15]

7. However, this requisition was not ultimately pursued and instead both counsel agreed to withdraw their respective requisitions.

The Appeal

8. The appeal was brought on the ground that the trial judge erred in the manner in which she charged the jury on the issue of provocation.

9. In submissions lodged with the Court on the 5th February, 2020, it was submitted on behalf of the appellant that the trial judge had erred in failing to direct the jury about how intoxication fitted into the defence of provocation. It was accepted that the requisition was raised and thereafter not persisted with by counsel, due to both counsel mutually withdrawing their respective requisitions. However, it was submitted that nonetheless the trial judge erred in omitting to give a direction on the issue of intoxication when dealing with provocation. The appellant relied upon the decision in *DPP v. Hussain* [2014] IECCA 26, where Clarke J. held that although an appeal court is clearly entitled to take into account and place significant weight on any absence of requisition to the trial judge in assessing whether, on an overall basis, the jury were given appropriate directions on the issue of provocation, there was a jurisdiction to allow an appeal on a point not raised at trial. A relevant factor in this regard was whether or not a requisition had been raised at all or whether it had been raised but not pursued.

10. The Director in her written submissions argued that the trial judge's direction was correct. Citing *DPP v. Bambrick* [1999] 2 IRLM 71 and *DPP v. Curran* [2011] IECCA 95, it was accepted that a person may be intoxicated to such an extent as to be unable to form the requisite intention to commit an offence of specific intent, but that this was a separate and distinct issue from that of provocation and that the failure of the trial judge to deal with intoxication in the context of her provocation direction was not erroneous. It was submitted that the trial judge had separately and correctly dealt with the issue of intoxication and intent.

11. The respondent also submitted that the appellant was precluded from raising a matter on appeal in circumstances where he had withdrawn his requisition on this very point, citing *(DPP) v. Cronin (No. 2)* [2006] IESC 9.

12. Subsequent to the lodging of the appellant's submissions, the Supreme Court delivered two significant judgments on the issue of provocation: *DPP v McNamara* [2020] IESC 34 and *DPP v Almasi* [2020] IESC 35 (judgments delivered by Charleton J. on the 26th of July, 2020.) Counsel on behalf of the appellant very properly addressed the Court at the appeal hearing in relation to the impact of those decisions on the instant appeal; he also filed supplemental submissions dealing with those decisions. He accepted that although the issue of intoxication and provocation was not directly in issue in either of those cases, the Supreme Court had very clearly indicated its attitude to the interaction between intoxication and the defence of provocation in certain passages in the judgments. Although these passages were *obiter*, he accepted that they carried significant weight and that the Court might consider that they were dispositive of the appeal. The Court's attention was drawn to the following passages:-

"It is also common sense that a hot-tempered person who has used violence throughout a lifetime may respond violently to a trivial insult or take matters to the level of lethal violence. This is not acceptable. All are required by the limits on the defence of provocation to exercise control over themselves and all are to be judged on the basis of their sober, and not intoxicated or drugged, selves. The law makes allowance for complete loss of self-control but not for drunken rage." (paragraph 39, McNamara)

“That rage must not be fuelled by intoxication on drink or drugs....The defence does not apply to warped notions of honour and the proper sexual conduct of males or females, or mere hurt to male pride, or to gang vengeance or to situations where sober people sharing the same fixed characteristics of the accusedwould be able to exercise self-restraint in the same background circumstances as apply to that accused.” (paragraph 40, McNamara)

“People can be provoked but there are degrees of provocation and there are degrees of reaction. In ordinary people who are not intoxicated or drugged, people assess what is done as against what provocation was allegedly offered by the deceased. What the accused did, and his claimed mental state must be judged against that background. Such total loss of self-control to the degree of an intentional use of fatal violence must be genuine.” (paragraph 43, McNamara)

“The total loss of self-control in consequence of provocation cannot be because of intoxication on drink or drugs. The accused’s actions are to be considered as if he or she was not acting under the influence of drink or drugs when the accused killed the victim.” (paragraph 57, McNamara)

*“In no jurisdiction is a person to be judged on the basis of his or her state of mind as fuelled by drink, as in *The People v McEoin* [1978] IR 27 or as in *The People (DPP) v Kelly* [2000] 2 IR 1 or as in *Curran*, where both amphetamines and drink were lethally involved. The subjective test cannot be so extended that the limited nature of the defence of intoxication is extended to allow any drunken or drugged*

notion to partially excuse a complete lack of self-restraint; The People (DPP) v Eadon [2019] IESC 98 where the elements of the defence of intoxication require a complete loss as a matter of fact of the specific intent to kill or cause serious injury before a homicide charge can be classified as manslaughter. Here, however, the accused was sober but enraged.” (paragraph 36, Almasi)

“For the reasons set out in the separate judgment in The People (DPP) v McNamara [2020] IESC 34, it is clear that the requirement for the defence of provocation contain an objective element. The circumstances of the entire event can be taken into account, as can any relevant background, but the accused is required to act as an ordinary person having his or her relevant and fixed characteristics and not on the basis of a wholly subjective response, whether one fuelled by intoxicants or alcohol.” (paragraph 37, Almasi)

13. Counsel on behalf of the Director agreed that these passages were relevant and submitted that they were dispositive of the appeal and that they confirmed that the trial judge’s direction had been correct.

Decision of the Court

14. The precise contours of the defence of provocation has a long history in this jurisdiction, as in other jurisdictions. Leading cases prior to *McNamara* and *Almasi* included the seminal decision in *The People (Director of Public Prosecutions) v. MacEoin* [1978] I.R. 27, as well as more recent decisions such as *DPP v. Kelly* [2000] 2 IR 1 and *Farrell v. DPP* [2018] IECA 190. It is not necessary for the purpose of this judgment to

analyse the precise manner in which the judgments in *McNamara* and *Almasi* alter the position as set out in those earlier cases and/or the balance between subjective and objective considerations in the defence of provocation under Irish law. It is sufficient for present purposes to note that the position regarding intoxication in particular was addressed in the passages set out above, albeit that the comments were *obiter*. Given the context, namely two Supreme Court decisions in which the defence was the subject of detailed and general discussion, as well as the number of Supreme Court judges involved in those decisions, these *obiter dicta* carry significant weight. When applied to the present case, they support the position which had been adopted by the respondent Director, namely that there was no error in the manner in which the trial judge in the present case dealt with provocation insofar as she failed to address the issue of intoxication in the course of her direction on provocation.

15. In those circumstances, the Appellant's submission concerning *Hussain* becomes entirely moot. In that case, the court was disposed to allow the point to be argued on appeal despite the fact that a requisition had not been pursued at trial, in circumstances where the initial direction was incorrect. In the present case, the trial judge's charge was not incorrect, as has now been put beyond doubt by the decisions in *McNamara* and *Almasi*.

16. The appeal is dismissed.