THE COURT OF APPEAL

Record Number: 111/2021

Edwards J.
McCarthy J.
Ní Raifeartaigh J.

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

EDMUNDAS DAUKSA

APPELLANT

JUDGMENT of the Court delivered on the 13th day of October 2023 by Ms. Justice Ní Raifeartaigh

1. The appellant appeals his conviction for murder on the ground that the trial judge wrongly refused to leave the (partial) defence of provocation to the jury. He also contends that the trial judge failed to deal adequately with the issue of intoxication in his charge to the jury.

Background Facts

2. The appellant and the victim of the killing the subject of this appeal, Ms. Ingrida Maciokaite, were the parents of a young child. They were not living together, and the appellant had been the sole custodian and primary carer of the child, "L", for the six years prior to the date of the fatal incident. L had lived with the appellant and his wife as part of an informal agreement between the parties. It seems that Ms. Maciokaite had little contact with her daughter until 2017 when she returned to live in the same area and started to have greater access to her daughter, including sleepovers. Difficulties arose between the parties, however, and this included a breakdown in access for three weeks prior to Thursday, 13th September 2018. On this date, the deceased arrived at the appellant's address with two friends seeking the return of her daughter. The Gardaí were called but no further action was taken as it was treated as a civil matter.

3. On the following day, Friday the 14th September, Gardaí arrived at the appellant's house and took L away on foot of a court order requiring her to be produced before the District Court. The appellant was taken by surprise as he was unaware of the existence of any court proceedings or that an application had been made for such an order.

4. He attended at the District Court without legal representation and, following a hearing which he says lasted a little over four minutes, the child left the court in the custody of the deceased.

5. The appellant was greatly aggrieved and distressed by this turn of events. His son gave evidence at the trial that the appellant spent the weekend drinking and taking painkillers, but not sleeping or eating. His wife described him as *"completely destroyed as a human being"*. The appellant left messages on the deceased's Facebook account threatening to go on hunger strike and saying that he would fight the court decision to the end. One message in particular stated that the child *'had been ripped from her family after six years by a person who had no interest in her'*.

6. On Monday, 17th September 2018, both parties visited the child's school to make arrangements arising from the change in custody. There was evidence from the school principal of the appellant's distressed state, and also that the deceased appeared to be somewhat confused about the effect of the court order and seemed somewhat surprised at the speed with which matters had moved.

7. The appellant's wife said that on the morning of Tuesday, 18th September 2018, the appellant made an attempt on his own life. He was drunk, took sedatives and appears to have tried to harm himself with a knife. She stopped him and together with her son, helped him to bed. She said that later in the day his mood improved because he was given to understand that the deceased was going to bring the child over to the house after school. He had not seen the child since Friday morning when the Gardaí took her from the house.

8. At 2.01pm, however, the deceased phoned the appellant's wife and told her that *"that she is not going to bring [the child] around and that's it"*. The appellant's wife conveyed this message onwards to the appellant. She said that he said he was going to speak to the deceased, but that he was in *"very bad form"* and had been drinking and she refused to let him drive. He left the house on foot. His wife's evidence was that he left around 2.30pm but she was not completely sure. The message received at 2.01pm and

conveyed to the appellant represented a *volte face* on the part of the deceased as to an informal arrangement between them and was the act relied upon by the appellant as constituting provocation, albeit in the context of what had gone before.

9. It seems that the appellant took a knife with him when he left his own house. There was CCTV footage of his movements, which showed him walking towards the deceased's address at 2.30pm, and arriving at 2.36pm. The footage shows the deceased coming out of her house with the child and following the appellant into an alleyway. What happened thereafter was not visible from the footage. After about three and a half minutes, the footage shows the child running away from the alleyway, and a woman and a man are seen running into the alleyway (to assist the deceased, as it later emerged). The man telephoned the Gardaí at 2.44pm. The total time from the phone call at 2.01pm was therefore of the order of 43 minutes, but the time-frame from when the appellant received the message and left the house was less than that, perhaps under 20 minutes.

10. A witness, Mr. Callan gave evidence that he passed the parties shortly before the fatal stabbing. He heard some loud words being spoken but was not sure whether by a man or a woman. The deceased was leaning up along the archway on her right shoulder out towards the street, and he could see a child in the archway. There was a man leaning in on her three to four feet away, as if talking to her. He thought it was a domestic row and he continued on.

11. Another witness, Mrs Awosanya, heard screams which brought her from her apartment to the scene. She saw the little girl running in the courtyard. She saw the man and woman in the archway, and she saw the woman falling to the ground. The appellant was at the gate turning around, and he sat slumped at a small wall a short distance away and remained there until the Gardaí arrived. He did not make any attempt to leave the scene and was arrested. He showed the Gardaí where he had thrown the knife, which was 15.5cm in length. Various other witnesses described arriving at the scene and seeing the appellant sitting there, with his hand to his head or looking at his phone. One described him as looking "confused".

12. According to Dr. Linda Mulligan, Pathologist, a total of 19 stab wounds were inflicted upon Ms. Maciokaite. Dr Mulligan opined that death was caused *"due to multiple stab wounds to the chest and back, and contributing factors were the stab wounds to the face and left arm".* The pathologist was also satisfied that the stab wounds on the left arm were in keeping with defensive type injuries on the deceased.

The first issue: Provocation

The trial judge's ruling

13. The appellant applied during the trial to have the defence of provocation left to the jury, on the basis that the phone call from the deceased at 2.01pm cancelling the child's visit constituted the provocative act. Having heard submissions from both sides which addressed the Supreme Court decision in *People (DPP) v. McNamara* [2020] IESC 34, [2021] 1 IR 472 *("McNamara")*, the trial judge ruled against allowing the defence to go to the jury, in the following terms:

> *"It seems to me on the evidence that, under this scenario, that if the provocation in considering the provocation issue, he appears to have armed himself just before or after hearing about the phone call, there is a required intention to kill or cause serious injury, a sudden lack of self control to such an extent that it continues at that level for the period from his hearing about the phone call and continues up to the time that he kills the deceased and the lack of self control in that instance must be total. There mustn't be any degree to which any of this is premeditated or is the result of revenge. We have the footage of the walk through the town. We have the footage of his going up to the door of Bridgewater Mews and the mother of the child, Ingrida, leaving, following him out over to the arch, standing for a period looking back at the child, going under the arch and then the events followed under the arch. Bearing in mind that he told his wife that he was going to talk with the deceased and bring [the child] back.*
>
> *The time period within which this occurred was 20 to 25 minutes and perhaps up to 44 to 45 minutes. They are the time ranges that might be contended for for (sic) this continuing total loss of self control which is said on the evidence to exist. There is a significant interval on either assessment within which to not only, for the purposes of the act, to view this loss of self control as occurring but also to regain control. It is said that there is a view of the evidence open to the jury that his loss of control was total up until the stabbing, notwithstanding the fact that he doesn't engage with her violently at all when meeting her at the Mews. Indeed they don't have a there's no altercation in the courtyard. There is a period clearly before the stabbing occurs under the archway and the child only becomes distressed after the interval which was identified on the CCTV footage.*
>
> *In all the circumstances, I have come to the conclusion, bearing in mind the test and bearing in mind the McNamara review of the test and its considerations in that judgment, that, and for the reasons which have been advanced by [counsel for the prosecution] in relation to the matter, that this is a case in which I am satisfied that there is not a basis upon which a jury properly instructed could, on the evidence available, conclude that there's a reasonable possibility that the accused was operating without any control under the archway when he stabbed the deceased*

because of the phone call received at 2.01. So, on either scenario, I'm not satisfied that provocation is open as a defence."

Submissions of the parties

14. The appellant submits that provocation should have been left to the jury as a potential defence. The appellant had recently lost custody of his child without warning after six years of being her primary carer and custodian, and the immediately provocative act was the message from the deceased at 2:01pm abruptly cancelling the arrangement for him to see his child for the first time since the Gardaí arrived to take her away without warning on the previous Friday. Counsel for the appellant relied upon a passage in the textbook *Criminal Law, Charleton and McDermott*, which suggested that the overall background to the final provocative act may be taken into account. Indeed, a similar point was made by Charleton J. in *McNamara* at para 49. Counsel submits that insofar as there is an element of societal value judgment within the defence as to what may constitute provocation, this is a matter quintessentially for a jury.

15. The appellant relies on the judgment of the Supreme Court in *People (DPP) v. Almasi* [2020] IESC 35, [2020] 3 IR 85 ("*Almasi"*) and *People (DPP) v. Davis* [2001] 1 IR 146 for the proposition that the defence may be left to the jury even where there is no direct evidence of a loss of self-control (and indeed, points out that in *Almasi*, there was evidence from the accused man's Garda interviews of statements that were inconsistent with provocation). He also relies on the following passage from *McNamara*:

> *"…36. Here, as in many cases, the accused did not give evidence and he is not to be faulted for that. While statements in custody admitting to killing the accused are admissible in evidence, assertions of that kind are not tested by cross-examination, nor made on oath. The jury can act on such evidence, provided they are made aware of such infirmities by the trial judge, who must have a role in assessing if any aspect of the claims of the accused properly raises the defence. Similarly, the availability of the defence is judged not on the basis of the accused merely saying so in testimony or in a police interview but on the basis of the objective existence of facts which conform to components of the defence. The existence of facts establishing the applicability of any aspect of the law is what legal certainty is all about." (Emphasis the appellant's)*

16. He submits that in this case there were sufficient facts to lend an "air of reality" to the defence, relying inter alia on passages at paragraph 13 of the judgment of Charleton J in *McNamara*:

> *"The applicability of the provocation defence was, and is, a question of law and has nothing to do with judicial discretion. But, once a threshold of provocative conduct is passed, with evidence realistically suggesting the possible existence of defence in accordance with its definition, and sudden retaliatory conduct results, it becomes a question of fact for the jury."*

17. The appellant also relies on *McNamara* and *Almasi* for the proposition that while the trial judge has an important role in deciding whether, as a matter of law, the defence should be left to the jury, the evidential threshold is quite low.

18. The appellant contrasts the lapse of time in *McNamara* (up to 14 hours) with the time period in the present case: at most 44 minutes, and possibly as little as 15-20 minutes. He characterises the time-period as closer to that in *Almasi.*

19. With reference to the fact that the appellant armed himself with a knife before leaving his own home, counsel submits that the case being made is that the appellant lost self-control as a result of the phone message before or at the time he picked up the knife, and that this continued to operate until the fatal stabbing. He does not make the case that the loss of self-control occurred at or near the deceased's home (and therefore after he had arrived already armed with a knife). It is in effect an argument that the picking up of the knife was part and parcel of the appellant's loss of self-control (or at least could be viewed by a jury in that light, if the defence were left to them).

20. The Director of Public Prosecutions submits that the trial judge was correct in refusing to leave the defence of provocation to the jury. She submits that the evidence demonstrates that, far from suffering a complete loss of self-control, the appellant appears to have been relatively calm after the telephone communication of 2.01pm. After the content of the telephone call was relayed to him, he proceeded to get a knife and walk through the town to the deceased's home. There was no evidence, for example, of the appellant running in a frenzied manner to the home of the deceased. When he met the deceased, he proceeded to spend some time in her company, without any act of violence being observed, before the stabbing occurred.

21. The Director submits further that the initial act of the appellant in equipping himself with a knife must be regarded as premeditative or planned in nature, and completely at odds with the very essence of the defence of provocation.

22. The Director made a careful and nuanced submission that that the allegedly provocative act (the message at 2.01 pm that the child would not be coming to visit) could not as a matter of law amount to a provocative act for the purpose of the defence. In setting out this argument, counsel referred to passages where it was stated in *McNamara* that, in order to constitute provocation, the provocative act *"is required to be outside the bounds of any ordinary interaction acceptable in our society"*. Matters pertaining to child custody and family law are not outside of the ordinary interactions of people, counsel submitted, and indeed, custodial arrangements whereby one party may feel aggrieved or disgruntled are by no means rare. Counsel pointed out that the matters about which the appellant felt a sense of grievance did not entirely originate with the deceased but also involved the actions of various State agencies, such as the judge who made the court order, and the Gardaí who obeyed the court order. Counsel pointed out that the appellant had visited a solicitor on the Monday after the taking of the child and had presumably received advice

as to potential legal steps he could take. He submitted that the mother's message, cancelling the informal arrangement that the child would visit the appellant, merely amounted to the mother standing on her rights which had been ruled upon by the court. This, he submitted, could never be characterized as a provocative act for the purpose of the defence.

23. The Director also submits that the facts of *Almasi* can be distinguished from those in the present case on the basis of the short period of time involved (eleven minutes), the unbroken chain of events from the hitting of the car to the beating, and the evidence of witnesses who heard the appellant say "you broke my car" and "I've had enough". In the present case, there was no independent evidence, or evidence from the appellant himself (whether by way of Garda interview, or testimony in court), of any loss of self-control.

Decision

24. In *McNamara*, Charleton J. pointed out that the evidential threshold for provocation to be left to the jury is the usual one with regard to defences: -

> "53. The burden of proof in the defences generally is that which is generally. That burden was explained in the context of the justificatory defence of the lawful use of force by Walsh J in *The People (AG) v Quinn* [1965] IR 366 at 382*.* The accused carries the burden of adducing a sufficiency of evidence to enable the defence to be considered by the jury*; The People (DPP) v Gleeson* [2018] IESC 53*,* [18-20]. There must be sufficient evidence whereby the jury could rationally hold on that defence for the accused*."*

25. To that extent, the appellant is correct in submitting that the evidential threshold that he must reach in order to have the defence left to the jury is a low one. However, Charleton J. also made it clear that the evidential threshold must be met with regard to all the ingredients of the offence, which include not only that there was a complete loss of self-control but also that there was an act (or acts) capable in law of constituting provocation for the purpose of the defence.

26. So, for example, he said at para 52 *of McNamara*: "*…the burden of proof is on the accused to produce evidence, or to point out evidence on the prosecution case, whereby as a matter of reality a jury would continue to act judicially by finding that the prosecution had failed to negative whatever evidence might be so adduced. But the* ***evidence must be such as to be capable in law of amounting to provocation****. That is a judicial decision. If the jury would be acting perversely in finding provocation, the judge cannot leave the defence for their consideration". See also Almasi para 30: "No defence of provocation should be left for the consideration of a jury where the evidence* ***does not comprise the legally defined elements*** *or is so slight that no reasonable*

jury could conclude that the accused might reasonably have acted under provocation". (Emphasis added)

27. Charleton J. also emphasised that the appellant's subjective view of what might be provocative is not the only consideration, and that conduct deemed to fall within provocation must be *"grounded in socially understandable circumstances of provocation…."* (*McNamara* para 21). See also *McNamara* para 40, where he said that *"social norms must now exclude violent responses to ordinary stresses such as a lover moving on or to phobic reaction to the right of people to choose their own lifestyle or path"*. And para 40: *"The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. 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…."*. And see para 58: *"Loss of self-control must be in response to a genuinely serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour or to any unacceptable ideas as to the proper romantic or sexual conduct of males or females; nor hurt to male pride; nor to gang vengeance."*

28. Thus, it seems that contemporary social norms contribute to the understanding of what may constitute provocative conduct as a matter of law, which provides an element of objectivity over and above the accused person's own subjective ideas about what is provocative, and this injects at least one element of objectivism into the defence. This theme is given considerable emphasis in the *McNamara* judgment and we note that Charleton J. emphasises (i) the objective considerations thereby contained within the defence; and (ii) the fact that the social norms in question are *contemporary* social norms.

29. In the present case, the sequence of events began (on the Friday before) with the deceased seeking the assistance of the court with regard to the custody of the child in question. One can readily understand that the appellant was very upset at the abruptness with which the child was taken from his care, after having had such a long period of time as her sole custodian; the Gardaí came without notice to his house on the Friday and simply took her away, without the appellant even having known about the existence of custody proceedings. One can also readily understand that the appellant was very upset when the matter was, on the same date, dealt with at a very short court hearing where he represented himself without the benefit of legal assistance and was not successful in obtaining custody of the child. However, he did have the benefit of legal advice on the Monday, two days later, and must have been told that this was not the end of the road in terms of the custody dispute and the legal options available to him.

30. He clearly brooded during the days between the removal of the child from his custody and the killing. He drank alcohol and took drugs, and was in a very distressed state. The drink and drugs must be discounted, according to the judgments in *McNamara* and *Almasi*.

31. The next important step in the sequence of events was that the deceased agreed that the child would visit the appellant – at which his spirits lifted – and then informed him (via a telephone call to his wife) that she was not allowing this visit – which dashed his spirits again. Again, one can appreciate that his emotions were going through something of a roller-coaster.

32. However, the deceased's decision not to allow the child to visit was, as counsel for the DPP pointed out, something the deceased was entitled to do, as she had been awarded custody by the court. Again, we can readily understand that the appellant was deeply upset and distressed by this turn of events, but we find it impossible to characterise the deceased's conduct, whether it be the last-minute cancellation of the child's visit alone, or that act in the context of the events of the previous few days, as something which could amount to provocation in law. The matter was in the hands of the courts, and the decision to withhold custody from the appellant was that of the court. It is true that it was the deceased who brought the court into the picture, and it is also true that she could have chosen not to stand on her rights and instead allowed the child to visit the appellant, but the fact of the matter is that the issue of the child's custody was within the jurisdiction of, and being regulated by, the court. We find it impossible to say, within that context, that the deceased's conduct in abruptly cancelling the visit could be characterised in law as a provocation for the purpose of the defence. As we have seen, Charleton J. emphasises that contemporary social norms are relevant when considering the nature of the act relied upon an accused as provocation; the point is even more forceful when there is judicial involvement and a court order in the mix.

33. Given the above conclusion, it may not be strictly necessary to decide whether or not there was sufficient evidence of the appellant having lost self-control, this being the other essential ingredient of the defence. Nonetheless it is difficult to reconcile the requirement of an immediate and total loss of self-control with a situation where a man arms himself with a knife, walks (in the manner seen on the CCTV footage) to the deceased's house, and then speaks to her for some time before stabbing her, the whole chain of events lasting at least twenty minutes.

34. For those reasons, the Court refuses the first ground of appeal.

The second issue: Intoxication

The Submissions of the Appellant

35. The appellant's son gave evidence that the appellant stayed in bed for most of the weekend drinking and talking about the child, although alcohol had not been a feature of his life prior to this. As indicated above, this evidence was supported by the appellant's wife, who refused to allow him drive to the deceased's house following the phone call at 2.01pm, due to her concern that he had been drinking. She further stated that he was drinking on Monday evening and was *"very drunk"* on Tuesday morning, although she confirmed that he was in *"much better shape"* after he had slept for a while.

36. The appellant at the requisition stage of the trial referred to the fact that the trial judge had drawn attention to the evidence as to the appellant having been drunk on the morning and taken medication, and that, while he had slept it off to some extent, he still did not drive because of his condition. He asked the judge *"to consider directing that if alcohol is a feature within their deliberations that it is something that may arise to reduce the capacity to form intent".* The judge replied: *"That wasn't a feature of the case. I specifically asked about this during the course of the case and I was told it wasn't part of the case."* The judge also said: *"there was no suggestion at any stage of the case that he was so incapable with alcohol as to be able to form an intent."* Counsel replied*: "May it please the Court. I have no other requisitions, Judge."*

37. It appears therefore that insofar as the issue of intoxication was mentioned, the parties approached the issue of intoxication on the basis of whether the Appellant had the capacity to form the specific intent required for murder, and not whether he had in fact formed the relevant intent.

38. As the Supreme Court recently clarified in *The People (Director of Public Prosecutions) v. Eadon* [2019] IESC 98, [2021] 1 IR 417 the correct approach was for the Jury to determine whether the accused had in fact formed such specific intent. If the Appellant had lacked capacity to form specific intent, that would be sufficient for an acquittal, but a lack of capacity is not a prerequisite to an acquittal as the Jury must determine whether he did in fact form such specific intent, in which regard his state of intoxication is relevant. The Supreme Court in *Eadon* set out the appropriate directions to be given to a jury in such a case:-

"… [62] The standard charge in the United Kingdom is that set out in Reg. v. Sheehan [1975] 1 W.L.R. 739. Here the two defendants drunkenly poured petrol over a man and set him alight, causing his death. As stated by the Court of Appeal at p. 744:

> *"[I]n cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, we think that the proper direction to a jury is**, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."***

[63] The matter is clearer still from the judgment in R. v. Garlick (1980) 72 Cr. App. R. 291. The accused was convicted of murder. In his defence he had raised the defence of intoxication...

Lord Lane C.J. stated as follows at p.294:

> *"... they were not invited, as they should have been, to answer the real question, the one I have already pointed out, namely may this man, by reason of the drink he had taken, not have formed the necessary intent."*

[64] In R. v. Brown and Stratton [1998] Crim. L.R. 485, …The court stated that at p. 486:

> *"In a case requiring specific intent … it was necessary to inform the jury that in deciding whether the defendant had the specific intent they must take into account the evidence that he was drunk, and if, because he was drunk, they considered he did not intend or might not have intended to cause the requisite degree of harm he was entitled to be acquitted. For the judge simply to make clear that a drunken intent was still an intent was not sufficient to bring that home."*

…

[73] ... For the reasons set out in the preceding paragraphs, it is necessary to instruct the jury that intoxication is relevant to the issue of whether the defendant in fact had the necessary intent for the crime."

39. The appellant submits that the conviction should be quashed because the jury were not correctly directed as set out in *Eadon*. The Director submits that the trial judge was perfectly correct not to leave the issue of intoxication to the jury for their consideration in circumstances where intoxication did not feature, in any meaningful way, during the course of the trial. This is borne out by the failure by defence counsel to challenge the trial judge's comment on the 5th of May 2021 to the effect that *"I don't think drink is being relied upon at all".* Similarly, there was a complete absence of any comment or suggestion within defence counsel's closing speech that alcohol or drunkenness played a role in the Appellant's stabbing of the deceased on the day in question. While there was some evidence during the trial of consumption of alcohol by the Appellant on the days leading up to the 18th of September 2018 and indeed on the morning of that day, the evidence was that he effectively slept it off and was in much better shape later on, on the 18th of September 2018.

40. The Director also submits that the case can be entirely distinguished on its facts from *Eadon*, where there was evidence that the accused had longstanding abuse issues and that in the 18 months prior to the stabbing incident, he drank large quantities of alcohol almost every day. There was also evidence that the accused had been experiencing paranoid delusions and hallucinations stemming from his consumption of large quantities of drugs in the days leading up to the incident.

41. The appellant did not address this issue in oral submissions and was content to rest upon his written submissions.

42. The Court is of the view that there is no merit in this ground of appeal. Intoxication was not in reality a significant part of the defence case, as appears not only from the evidence but also from the interaction at requisition stage between counsel for the appellant and the trial judge. The appellant did not even pursue the point he had raised. If the facts were different, and intoxication had been a significant part of the defence case, the Court might be prepared to overlook the failure to raise or pursue the issue but the reality is that intoxication was not a significant part of the case and it would be artificial now to elevate it to a significance which it did not assume during the trial, even if the charge to the jury may have been technically incomplete. It may be observed that while Eadon re-states the law with great clarity, it does not alter the pre-existing law in any way and the question has always been whether an accused person has formed the necessary intent in a case of murder, namely an intention to kill or cause serious injury, and whether by reason of intoxication that intent was absent.

43. For all of the reasons set out above, both grounds of appeal must fail and the conviction be upheld.