



THE COURT OF APPEAL

[15/13]

**The President
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

MICHAEL MCDONALD

APPELLANT

JUDGMENT of the Court delivered the 28th day of November 2019 by Birmingham P.

1. On 23rd November 2012, following a trial in the Central Criminal Court, the appellant was convicted of one count of murder and another count of assault causing harm. He was convicted of the offence of murdering Ms. Breda Cummins and assaulting Mr. John Lawlor, causing harm. He now appeals against that conviction.
2. By way of background, it should be explained that the appellant had been involved in a relationship with the deceased, Ms. Cummins, for a period of some five or six years. The relationship had, however, come to an end some seven or eight weeks prior to the events of 13th May 2010 which resulted in the charges before the Central Criminal Court. Ms. Cummins moved out of the appellant's residence in Castledermot, County Kildare, and commenced a relationship with Mr. Lawlor. She began residing with Mr. Lawlor at the home of a friend of his located in Athy. The trial heard that on the night in question, the appellant had armed himself with a kitchen knife at his residence and had then travelled by hackney cab to the dwelling in Athy.
3. At trial, while there were some divergences as to what occurred in the dwelling in Athy, it was not in controversy that Mr. McDonald had killed Ms. Cummins. Indeed, Mr. McDonald pleaded guilty to the manslaughter of Ms. Cummins at the start of the trial. The key issue, therefore, was whether the appropriate verdict was one of murder or manslaughter. On that issue, the jury returned a verdict of murder.
4. Thereafter, Mr. McDonald appealed against his conviction and his original legal team formulated a number of grounds of appeal. However, at some remove from the trial, a new legal team was appointed and they indicated that only three of the original grounds

of appeal would be pursued, these being Grounds 7, 10, and 11 as set out in the Notice of Appeal. These grounds were as follows:

"7. That the learned trial judge erred in law in failing to properly direct the jury regarding its approach when considering the defence of diminished responsibility, in circumstances where it was common case that the accused was an alcoholic and suffered from Alcohol Dependence Syndrome and had killed the deceased after consuming a large volume of intoxicant, and that the prosecution had an onus to prove beyond reasonable doubt that his impaired responsibility arose because he was drunk or otherwise intoxicated and not because of his underlying mental disorder and/or Alcohol Dependence Syndrome...

10. The learned trial judge erred in law or on a mixed question of law and fact by failing to charge the jury adequately or at all regarding the distinction that ought to be made between the adverse effect that Alcohol Dependence Syndrome has on brain functioning and voluntary intoxication.

11. The learned trial judge erred in law or on a mixed question of law and fact by failing to charge the jury adequately or at all regarding the Alcohol Dependence Syndrome from which the applicant/appellant suffered, which is and/or ought to be a recognised mental disorder within the definition of mental disorder provided under section 1 of the Criminal Law (Insanity) Act 2006."

5. In the course of written submissions, the appellant summarises the issue in the appeal as being that the trial judge erred in law by directing the jury that Alcohol Dependence Syndrome could not be a mental disorder for the purpose of the Criminal Law (Insanity) Act 2006, because intoxication was expressly excluded as a defence. The appellant was submitting that this was a misinterpretation of the 2006 Act, and incorrectly deprived the appellant of the defence of diminished responsibility. The appellant acknowledges that the interpretation of the 2006 Act, which is now urged on this Court, was not one that was advanced before the trial judge and accepts that a question therefore arises as to whether the appellant should be permitted to make the argument, or whether the appellant is precluded from making the argument, having regard to the principles set out in DPP v. Cronin (No. 2) [2006] 4 IR 329.

6. Before turning to address the matters in controversy in the course of this appeal, it is convenient, for ease of reference, to refer to the relevant statutory provisions. Section 6 of the Criminal Law (Insanity) Act 2006, so far as material, provides as follows:

"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,

the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

(2) Subject to section 5 (4), where a person is tried for the offence specified in subsection (1), it shall be for the defence to establish that the person is, by virtue of this section, not liable to be convicted of that offence.

(3) . . .”

Section 1 of the 2006 Act, the definition section, defines mental disorder as follows:

“Mental disorder’ includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication.”

In summary, the appellant’s contention is that, while it is accepted that the 2006 Act precludes regarding intoxication simpliciter as a mental disorder, Alcohol Dependence Syndrome is not intoxication simpliciter, but rather, is a condition which falls within “disease of the mind”.

7. It is appropriate to refer in some greater detail to aspects of the evidence relevant to the issue which has now emerged. The hackney driver gave evidence of collecting the appellant at an address in Castledermot and of observing the appellant’s stagger. He described the appellant as “having a few drinks on him”, and under cross-examination, accepted that the appellant had urinated in his front garden before they left. They arrived at approximately midnight. The hackney driver waited for the fare to return, but ultimately, was sent away by the householder. There was evidence that the occupants of the premises in Athy consumed significant amounts of alcohol earlier that day.
8. At trial, there was evidence from the Deputy State Pathologist, Dr. Michael Curtis. He was of the view that the deceased had been stabbed on at least seven occasions. While one wound was superficial, there were six other wounds in the chest region, entering the chest cavity and producing injuries to both lungs and multiple wounds to the heart. The appellant did not dispute that he had repeatedly stabbed Ms. Cummins.
9. Of particular relevance, in the context of the issue now sought to be raised on appeal, was the psychiatric evidence offered by each side’s respective experts. On Day 8 of the trial, the Court and jury heard evidence from Dr. Stephen Monks, consultant forensic psychiatrist in the Central Mental Hospital in Dundrum in Dublin. Notice having been given by the defence of an intention to call evidence in relation to the mental state of the accused, Dr. Monks was asked by the DPP to examine the accused and report on a full psychiatric assessment, with particular reference to s. 6, the diminished responsibility section, of the Criminal Law (Insanity) Act 2006. Dr. Monks reviewed the Book of Evidence, the videos and transcripts of interviews conducted by Gardaí with the appellant,

the appellant's psychiatric notes and his medical records, and undertook a psychiatric assessment of the accused over a period of some three hours. Having considered that material, he formed the opinion that the appellant fulfilled the criteria for a diagnosis of Alcohol Dependence Syndrome. Dr. Monks concluded his direct testimony by outlining the findings that he had reached, having regard to the provisions of the 2006 Act, which were as follows. He reached the conclusion that Mr. McDonald was fit to stand trial and, indeed, this is not a matter in any controversy. He also considered the appellant's mental state around the time of the alleged offences and came to the opinion that the consumption of large quantities of alcohol and benzodiazepines were a factor in the hours leading up to the alleged offence, and that there were descriptions of Mr. McDonald's behaviour in the hours leading up to it that would suggest a degree of intoxication. He continued:

"[t]he descriptions which I have mentioned already were of an unsteady gait, a stagger or sounding drunk on the phone which appeared in witness statements. The description of his behaviour immediately after the incident when he went to Mr. Martin Byrne's house [a friend's house visited by him] were not really consistent, in my opinion, with that of a man who was psychologically aroused following a violent altercation and in the context of a degree of intoxication with alcohol. The following day, or the following morning, rather, in Garda custody, he did not appear intoxicated when medically examined. He did not exhibit any symptoms of alcohol withdrawal and he did not present with any signs of a mental disorder or mental illness during the course of those interviews on 13th and 14th May 2010. So, I came to the opinion that Mr. McDonald was not suffering from a mental disorder or a mental illness at or around the time of the alleged offence, and my opinion, therefore, was that he did not qualify for a mental state defence under sections 5 or 6 of the Criminal Law (Insanity) Act."

10. In cross-examination, Dr. Monks discussed in further detail what he saw as the differences between simple intoxication and Alcohol Dependence Syndrome which he agreed would be referred to colloquially as alcoholism. The evidence of Dr. Monks was that the psychotic symptoms that the appellant had previously exhibited:

"[o]ccurred in the context of intoxication and following a period of heavy and prolonged alcohol consumption. This can happen in Alcohol Dependence Syndrome and substance abuse where people have been using very large quantities of alcohol and drugs. It can also occur in the context of somebody withdrawing from alcohol, so as part of an alcohol withdrawal syndrome. So, my opinion is that these symptoms are directly attributed to the physiological effects of alcohol and drug use. There is not any evidence that the psychotic symptoms were sustained outside the use of alcohol and drugs and that they were brief in duration rather than enduring, as might be the case in a primary psychotic disorder, like Schizophrenia or Bipolar Disorder in which you can get psychotic symptoms".

Dr. Monks was asked about the significance of the fact that when he had seen Mr. McDonald, it was at Cloverhill Prison and was after a period of abstinence from alcohol.

His response was that there was no evidence of mental illness, on his assessment, and that combined with the psychiatric assessment from the Mental Health Team in Cloverhill Prison, it would appear that over a period of four months' abstinence from alcohol, that there was no evidence of mood disturbance or mood disorder or psychosis. In short, there was no evidence of a mental illness.

11. In cross-examination, Dr. Monks accepted that there were mental disorders that relate to alcohol, including "alcoholic hallucinosis" and "substance induced psychosis". In re-examination, Dr. Monks confirmed that his evidence was that at no stage in the life of Mr. McDonald had he suffered from a mental disorder or a mental illness. Again, in re-examination, Dr. Monks was clear that he did not see Alcohol Dependence Syndrome as a mental illness or a mental disorder. He was of the view that it, as with other addictions, were not considered a mental illness per se, instancing drug addiction or gambling addiction, which were not mental illnesses. In his professional opinion, mental illnesses were confined to psychotic disorders, mood disorders, and anxiety disorders as distinct from addictions.

12. On Day 10 of the trial, the Court heard from Dr. Alan Byrne, a psychiatrist, practising in Kildare, who first had contact with Mr. McDonald in 1998 at the Lakeview Unit, the Adult Psychiatry Unit attached to Naas General Hospital in 1998. He had occasional contact with him thereafter. The contact might be described as sporadic, in part, because Mr. McDonald lived a somewhat chaotic and nomadic existence, sometimes moving out of the catchment area of Naas General Hospital. The extent of his interaction with the psychiatric services indicated a reluctance or failure to engage with the psychiatric services as having been a feature from day one. Dr. Byrne felt that Mr. McDonald was someone who did not want to be seen as an individual with mental health problems, and that therein lay the problem because as a result, he did not get the help he needed. In the course of his direct evidence, Dr. Byrne commented as follows:

"[s]o, my gut feeling at the time, and obviously there were substances involved and his continued use of alcohol and that sort of thing was always perilous, it was always going to put him at significant risk. I would significantly believe that this man has a mental health problem. He has a mental illness which probably is, I think, somewhere between Bipolar and Schizophrenic. So, schizoaffective would be what I would be thinking of. It is obviously, I think, made worse by the ingestion of substances. So, that was very often when he would present in hospital, he would present in this chaotic, psychotic, disorganised state which would sort of clear from time to time, but over the years, this man went from being a functional person involved in the educational system, to being a completely dysfunctional person who was barely able to look after themselves, living in semi-isolation, writing bizarre diaries about non-sequiturs that do not seem to have made a whole lot of sense, and certainly are not very comprehensible now, and sadly, he avoided interaction with the services."

13. When the evidence in the case concluded, the jury was sent for an extended lunch and the trial judge indicated to counsel that it was necessary to sort out what the issues were

that were to go to the jury. The discussions that followed touched on the question of self-defence and provocation, but in the present context, what is of interest is what was said in relation to mental illness and diminished responsibility. The topic was introduced by prosecution counsel who said:

"[t]he only thing that I was concerned, that I would like to know, if I might, I would like to have an indication as to how the jury is going to be charged in relation to the question of mental illness under the Act. Now, I think that, in the absence of any authorities on the issue, I think that the general consensus is that one should stick as closely as possible to the definition in the Act, which is, as we know, a mental disorder is a mental illness and dementia and mental disease, which was recited by Dr. Monks, when he was asked about this, he certainly gave his understanding of it. Mr. Kavanagh [Senior Counsel for the defence], on the other hand, seems to have been contending that the definition is more open-ended than Dr. Monks believed it to be."

Having referred to the statutory definition of mental disorder, counsel continued:

"[n]ow, my recollection, off the top of my head, of Dr. Monks' evidence, was that in his opinion, Alcohol Dependence Syndrome, which I know is not the syndrome or the mental disorder that Dr. Byrne or the defendant is contending for as being the relevant mental disorder. But he did say that it is somewhat of an issue in the case insofar as Dr. Byrne did insist that that, too, is a mental disorder, in his opinion. Now, he said that, leaving aside the Act, it was listed as a mental disorder in the diagnostic manuals, the ICD10, and I think the DMS4 as well, but I do not think it is being contended for as a relevant mental disorder and maybe it is best just to avoid it altogether."

Defence counsel interjected:

"I am not abandoning it, I should say."

Prosecution counsel added:

"[b]ut it is one of the issues that we need to thrash out, whether or not it is in the case as a relevant mental disorder on the defendant's contention, or whether it is just the question of Schizoaffective Disorder, which Dr. Monks, I think, accepts would be a mental disorder within the definition. So, there is no difficulty there."

14. The discussion then turned to the question of provocation, but counsel for the defence returned to the matter. There followed this exchange:

"Senior Counsel for the defence: Insofar as intoxication is concerned, there is, of course, voluntary and involuntary, and the problem with the Alcohol Dependence Syndrome, and there is some material that I can point to that might be of some assistance, I know the definitions are different in the United Kingdom, but where, for example, one is compelled to consume alcohol and cannot resist that compulsion by virtue of a disease known as Alcohol Dependent Syndrome, it is not in the same category as the voluntary consumption of alcohol and voluntary intoxication, it is more involuntary intoxication, and

it is in that regard that I was hoping to keep alive this question of the fact that it is agreed by both consultant psychiatrists that he did suffer from Alcohol Dependent Syndrome, and that therefore, if, at the end of the day, the jury were satisfied that he did what he did as a consequence of his responsibility being diminished substantially by virtue of the Alcohol Dependent Syndrome, because there seems to be a disagreement as to whether or not that is a mental disorder or a mental illness, and it was to explore that area that I wanted the Court's direction.

Judge: Okay, my feeling on that, Mr. Kavanagh, is that this is not the case for that, the Act rules out intoxication, obviously.

Defence SC: And intoxication is defined in itself in the Act there.

Judge: Yes, as being under the influence. So, you cannot rely on intoxication as affecting your brain for the purposes of mental disorder. Now, you are saying I, but there is an underlying syndrome, I think.

Defence SC: Again, I will be thinking about it myself over lunchtime. I do not want to confuse the issue either.

Judge: I think it leads you to a circular argument, that because he had Alcohol Dependent Syndrome, therefore, he became intoxicated, therefore he did what he did, where intoxication is specifically ruled out by the Act, but I think what your evidence is pointing to is of a different and less confusing nature and the battle lines are rather more clearly drawn where Dr. Monks says there is no evidence of a mental disorder, just Alcohol Dependent Syndrome, and Dr. Byrne says there is and he has given a diagnosis of it, and neither of them are saying that Alcohol Dependent Syndrome caused the alleged act.

Defence SC: No, I appreciate that.

Judge: So, I would prefer not to go down that road.

Defence SC: Yes."

15. In the course of her charge, the trial judge dealt with this issue as follows:

"However, if you have no doubt on that issue [the intention to kill or cause serious injury], then in this case, you move on to what the two sides have spent most of the case in reality debating and that is the question of diminished responsibility. Now, to define diminished responsibility, I first have to define insanity, which may seem to you to be an odd thing to do because nobody in this case is saying that insanity arises . . . now, I might just say to you, Ladies and Gentlemen, when I am finished with this charge, I am going to give you a sheet of paper with some of those definitions written out on it because I am going to be throwing quite a lot of information at you and I am not expecting you to remember it, take it all in and remember it. But briefly, insanity means, firstly, that there is a mental disorder, and because of the mental disorder, either the person did not know what they were doing, or they did not know that it was wrong, or

they knew what they were doing, knew it was wrong, but could not stop themselves because of the mental disorder.

Now, I think everyone is agreed in this particular case that does not arise. Nobody is saying that Mr. McDonald did not know what he was doing. There is no evidence to suggest that he did not know it was wrong. Remember, he went to Mr. Byrne's house shortly afterwards and said 'I've done a terrible thing' and nobody says that he could not stop himself. Like, actually could not stop himself. If there was evidence of insanity in a case, and a jury finds insanity, that is an acquittal. In law, it means the person is not guilty of murder. Now, it may mean that they end up in involuntary detention in a psychiatric hospital, but that is a different issue. Diminished responsibility is actually quite different. The first thing is it only arises in murder cases. Insanity can arise in any sort of case. But diminished responsibility purely relates to murder and the only effect of a verdict of diminished responsibility is that it reduces murder to manslaughter. It is not an acquittal. It applies if a jury finds, firstly, that the accused did the act alleged. That is, killed a person with the intent of killing or causing serious injury. Secondly, that the person was, at the time, suffering from a mental disorder. Thirdly, 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. So, this arises if you find that the prosecution has proved its case in relation to the killing and the intent. If you find there is a mental disorder, and the mental disorder is not so great as to bring the person, the accused, inside the definition of insanity, but that it substantially diminishes responsibility for the act, now, that does not mean that the mental disorder had to cause him to do what he did because if it caused him to do what he did, then we would be in the area of insanity. It is a question of whether or not the disorder, if disorder is proved to exist, the question is, does it substantially reduce responsibility? Substantially in this context means not trivial, not small, so it does not have to be the cause of what he did. It just has to have been present, so in a not small, not trivial way, reducing his personal responsibility or his legal responsibility. If you find that that applies in this case, then what you do is you find the accused not guilty of murder, but guilty of manslaughter.

Mental disorder for these purposes – and again, you heard some argument amongst the doctors as to what is or is not a mental illness or a mental disorder. And that is a problem that we have to deal with. Mental disorder includes mental illness, mental disability, dementia or any disease of the mind, but does not include intoxication. Now, some of these are easier than others. Dementia, for example, can be easier to establish because you can see physical degeneration in the brain, in the areas where the doctors know thinking is controlled and so on. That does not arise here. Mental disability could, for example, be a case involving a person with autism, or that sort of syndrome. Mental illness, again, that is a difficult category: some illnesses are easier to identify than others, as, for example, there will be cases where all the doctors are agreed 'this person is definitely schizophrenic' or 'this person definitely has Bipolar Effective Disorder'. But then there are all those areas that seem to be subsets of those kind of illnesses, those kinds of disorders. And that is the area where we are in, in this particular case. Now, this list that I have given you, mental illness, mental disability, dementia or any disease of the mind.

The definition of mental disorder, it includes those things, in other words, this is not an exhaustive list. The only thing that is clearly excluded is intoxication. And intoxication means being under the influence of alcohol or drugs or a combination of substances.

On the facts of this case, it is my view, as a matter of law, that Alcohol Dependence Syndrome is not a mental disorder within the meaning of the Act. And the reason that I say that is because the primary symptom of Alcohol Dependence Syndrome is that obviously the person tends to get intoxicated quite a lot of the time. And intoxication is ruled out. If we were dealing with a case where somebody said, where the defence was that they had alcoholic hallucinosis, which you heard mentioned during the case, I think that might be different. If a person was hallucinating because of their alcoholism, then there might be an argument that it should be considered a mental disorder. What I am saying to you, as a matter of law is, I do not think that arises on the facts of this case. So, really, the question that we are dealing with is, did the accused man, Mr. McDonald, at the time of this case, have a mental disorder other than one resulting in him being intoxicated?

And the disorder that the defence evidence is aimed at or geared to is what is being called Schizoaffective Disorder. And just briefly, I will come back to that psychiatric evidence, obviously. But briefly, to remind you, it is said that there is a continuum between Schizophrenia, which is an illness that involves delusions, amongst other symptoms, and Bipolar Affective Disorder which is an illness which involves alternating bouts of depression and manic elation. So if you see those two as being points on a continuum, a person can be somewhere along the line between them and have symptoms of both. And that is what Dr. Byrne believes Mr. McDonald suffers from."

16. The appellant acknowledges that the arguments now advanced were not advanced before the Trial Court, a matter highlighted, if that was needed, by the fact that the response by counsel for the defence to an invitation to raise any requisition that he might have was to say "nothing at all, thank you Judge". However, the appellant says that if the 2006 Act was interpreted incorrectly and to his detriment, then there has been a real injustice which must be remedied. In urging this Court to permit the argument to be advanced and to consider it, reliance is placed on the case of DPP v. Forsey [2019] 1 ILRM 73, a case involving a charge of corruption. In that case, the jury was instructed that the statutory presumption meant that the appellant was presumed to have received the money corruptly unless he proved, on the balance of probabilities, that he did not. It appears that the error was attributable to the fact that the trial judge, and counsel on both sides, had not adverted to a highly relevant authority.
17. In response, the DPP says that the reliance on DPP v. Forsey is misconceived. It points out that the majority judgment of the Supreme Court had made the point that the interpretation of s. 4 of the Prevention of Corruption (Amendment) Act 2001 adopted in this case by the Trial Court and the Court of Appeal was contrary to authority and could lead to violations of the right to be presumed innocent, something that was determined to be a fundamental error. It is said that nothing comparable occurred here.

18. In the Court's view, the point made on behalf of the DPP is well made. Seven years after a trial, at which it was never contended that Mr. McDonald's culpability for his actions had been substantially diminished, in the circumstances now contended for, a new legal team is seeking to make a case quite different to the one that was made at trial. It was not a case where the appellant was denied the opportunity to raise the partial defence of diminished responsibility. He raised it, contending that there was a mental illness, somewhere on the continuum between Bipolar and Schizophrenic i.e. Schizoaffective.
19. This was not a case where there was an error at trial which denied the appellant his right to trial in due course of law. Rather, what is in issue is that the appellant now wishes to advance a defence different to that relied on at trial. In the Court's view, that is not something that can be permitted.
20. The difficulties facing the appellant in seeking to argue a case that was not argued at trial are compounded, if one has regard to the actual evidence at trial. As is already apparent from some of the quotations set out above, it is clear that Alcohol Dependence Syndrome, otherwise alcoholism, was not considered to be a mental illness by Dr. Monks. Dr. Byrne seemed to be of the view that Alcohol Dependence Syndrome should be regarded as a mental disorder, though he seemed to accept that it did not amount to a mental disorder as that term is understood within the meaning of the Act. However, the mental disorder that he felt had substantially diminished Mr. McDonald's responsibility was not Alcohol Dependence Syndrome or alcoholism, but rather, a schizoaffective disorder. He was quite explicit in excluding intoxication as being the cause of the offence, saying "I don't think this was an intoxication-driven event. I think it was a function of the fact that he had a significant mental illness which has affected his capacity to make rational and logical and useful judgments over time". It seems to members of this Court that in those circumstances, one is driven to the conclusion that, while the appellant's advisers may have identified an interesting legal issue which may require to be explored on some future occasion, this was not the case to do that. The appellant may have an interesting point, but his is the wrong case in which to pursue it. The appellant has referred to the legal regimes that apply in neighbouring jurisdictions, specifically, England and Wales, and also Scotland, and also has made reference to the situation in New South Wales. However, the exercise undertaken does not have adequate regard to the significant divergences in the statutory provisions applicable across the jurisdictions.
21. While this is a question that may necessitate an answer, it is not one which was raised at trial and cannot now be canvassed at an appellate level. The rulings by the trial judge and her charge to the jury were correct and proper ones for the case over which she presided. The Court has not been persuaded that the trial was unsatisfactory or the verdict unsafe and accordingly, the Court dismisses the appeal against conviction.