THE COURT OF APPEAL

[2018 No. 204]

The President
Edwards J.
Donnelly J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DARREN MURPHY

APPELLANT

JUDGMENT of the Court delivered on the 10th day of March 2020 by Birmingham P.

1. Mr. Darren Murphy was charged with the murder of one Olivia Dunlea at her home in Passage West, Co. Cork, on 17th February 2013. On arraignment, the accused pleaded not guilty to murder, but guilty to manslaughter. However, in circumstances where the plea was not acceptable to the prosecution, the matter proceeded to trial. On 15th June 2018, he was convicted of murder by a unanimous jury verdict following a nine-day trial in the Central Criminal Court and sentenced to life imprisonment. He now appeals that conviction.

2. Two grounds of appeal have been canvassed before this Court:

   (i) That the prosecution ought not to have been allowed adduce evidence of the bad character of the accused; and

   (ii) that the judge's charge, particularly when dealing with the issue of provocation, was deficient.

   It may be noted that this was the third occasion on which Mr. Murphy had stood trial for the murder of Ms. Dunlea. He had initially been convicted of the murder in 2014, but that conviction was overturned by this Court in late 2015 (see DPP v. Murphy [2015] IECA 314). A second trial took place in 2017 in which the jury failed to reach a verdict.

Background

3. To provide some context, it should be explained that the deceased and the appellant were in a relationship for some six to eight weeks prior to her death. On 16th February 2013, the late Ms. Dunlea and Mr. Murphy were socialising with a number of friends at the Rochestown Inn public house. At approximately midnight, they left the premises by taxi to go to the home of the deceased and that journey is estimated to have taken some five

minutes. The taxi driver, Mr. Michael Aherne, gave evidence at trial that while Ms. Dunlea was in seemingly good spirits, the appellant was, by contrast, "grumpy, kind of frosty" and that there was maybe a "tension" in the air.

4. At about 1.20am, the Fire Services were called to a blaze that had broken out at the home of the deceased. It later emerged that two fires had been started at the house. One was in the kitchen and caused limited damage, but another in the bedroom of the deceased was much more serious in nature. It was in this bedroom that the body of Ms. Dunlea would be discovered. There, she was found in a face-down position and much of her upper body had suffered extreme fire/heat damage.

5. The body of Ms. Dunlea was examined by the then State Pathologist, Professor Marie Cassidy, and she identified six stab wounds on the body, two directly behind the right ear and four to the front of the neck. Professor Cassidy was of the opinion that the cause of death was a combination of the stab wounds to the neck and the inhalation of fire fumes.

6. The appellant initially feigned shock when alerted to the fire. He had arrived to the scene in different clothing to that which he had been wearing previously, having earlier hidden those clothes, and gave a statement saying that he left the deceased's home in the wake of a verbal argument. Following the post-mortem, the Garda investigation was upgraded to a murder enquiry and significant disparities with regard to the appellant's initial account began to emerge.

7. On the evening of 17th February 2013, the appellant was arrested on suspicion of murder. During the course of his subsequent detention, he was interviewed a number of times and under cautioned admitted to the killing. In summary, he asserted that an argument had developed in relation to a previous boyfriend of the deceased, "Fas". The narrative advanced by the appellant was that they argued, that the deceased threw him his keys, and told him to leave. The deceased then went upstairs and he followed behind her. She told him to leave because Fas was calling. She then proceeded to take off her clothes. He stated that he asked her what she was doing and she replied by saying "what do you think, Fas was calling". At that point, he claims to have become so enraged that he just went blank and lost it. He grabbed a knife which had been at the side of her bed and stabbed her twice with it. Thereafter, he put a phone which had been ringing down the toilet and put the knife in her sink. According to his version of events, he knew her children were coming home and he did not want them to find her so he set fire to the house. He did this by setting alight the quilt that was on her bed as well as a kitchen roll that was downstairs.

Bad Character Evidence

8. One of the witnesses called on behalf of the prosecution was Ms. Shirley Farrell, who at one time was a next-door neighbour of the appellant and someone who would have known him from childhood. It appears that Ms. Farrell was also very friendly with the late Ms. Dunlea. Having learned by phone that there was a fire at the home of the deceased, Ms. Farrell made her way to the scene. In direct examination, the prosecution adduced evidence that she saw Darren Murphy there and spoke to him. She asked him about Ms.

Dunlea's whereabouts and he said that they had had an argument. When she asked what had happened, the appellant reportedly said they had an argument over "fricking Fas". Ms. Farrell also remarked that the appellant was shouting "Where is she? Where is she?".

9. In the overall context of the case mounted by the prosecution, Ms. Farrell was a peripheral witness. During the cross-examination, defence counsel asked the witness to confirm that in her first statement to Gardaí, she had described Mr. Murphy as a "gentle giant" and had also described him as a "great neighbour". Further, she was asked to confirm that she was aware that he had been involved in a previous relationship with a woman called "Siobhan", and that Mr. Murphy took the break-up of their engagement very badly, slitting his wrists as a result, and ending up in the In-Patient Psychiatric Unit of Cork University Hospital.

10. Ms. Farrell gave her evidence on the second morning of the trial. On Day 6 of the trial, as the prosecution evidence was drawing to a close, prosecution counsel indicated that it was their intention to call a witness to give evidence in the nature of character evidence. They felt that the defence had introduced evidence, through cross-examination, as to Mr. Murphy being a "gentle giant", entitled the prosecution to call the evidence to contradict same pursuant to s.1(f)(ii) of the Criminal Justice (Evidence) Act 1924. This evidence was to take the form of oral evidence from a former girlfriend who would say that in the aftermath of their relationship coming to an end, that she was harassed by means of phone calls and so on by Mr. Murphy, and that on one occasion, she had a bottle thrown at her in a bar by the appellant.

11. In the absence of the jury, counsel for the prosecution read the statement of evidence of the witness it was proposed to call, Ms. Melissa Keane. In the statement, Ms. Keane outlined that she had been previously in a relationship with the appellant. She referred to the fact that she had fallen asleep one night, at which time the appellant went through her phone and saw that she had texts and calls from other males who were wondering if the club, a GAA club where she worked, was open for drinks. The appellant was angry and upset with her. On another occasion, Ms. Keane had stayed at a friend's house in Passage West in February 2008. She awoke during the night and found the appellant was in bed beside her. He had his shirt off and was wearing his tracksuit pants. On that same evening, he is said to have gone through her phone and deleted some numbers. At this point, Ms. Keane outlined that she told him to leave and said they could no longer be friends. Thereafter, she received up to twenty calls a night from blocked numbers that would go to voicemail. Breathing could be heard on the other end of the phone. There were a couple of calls where she could hear the appellant calling the name of the person that she was seeing at the time. Ms. Keane said that she recognised the appellant's voice. She reported the matter to Gardaí, but they were unable to trace the calls as the phone was a "pay as you go" phone and so was the appellant's. The statement also referred to an incident that is said to have occurred in November 2009. Ms. Keane had attended a licensed premises, the Ferry Inn Arms bar, and it was there that, quite suddenly, the appellant threw an empty bottle in her direction. The bottle flew over her head, just missing her.

12. Having opened the statement, counsel for the prosecution said that there was already evidence of the appellant's possessive nature in the case, but he submitted that the specific evidence sought to be advanced would contradict the suggestion that Mr. Murphy was a "gentle giant". Instead, it would corroborate the evidence that he was a possessive person and prone to violence if there was a break-up. Counsel quoted from McGrath on Evidence at para. 927:

"[i]t would be inimical to the adjudicative function of the Tribunal of fact if an accused could adduce evidence of good character and then shelter behind the exclusionary rule in relation to bad character. It would leave the Tribunal of fact with a misleading impression as to his or her character. As Coburn CJ explained in Rowton [1865] CCR, it has been put that evidence in favour of the character of a person on trial raises a collateral issue. I can hardly think it is a collateral issue in the ordinary sense of the term. It is one of the pivots on which the jury are to find their verdict and take into their consideration with the evidence, and if the prisoner thinks proper to raise that issue as one of the elements for the consideration of the jury, nothing can be more unfair and unjust and fatal to the proper administration of justice than that the evidence should go to the jury altogether one-sided in its nature, and that the prisoner should have, on the consideration of his guilt or innocence, the advantage of an assumed unblemished character when, in point of fact, if his true character were known, it would be found to be just the reverse and therefore that is a ground, and a reasonable ground, for not excluding it'. "

Counsel submitted that the accused had put his character in issue by eliciting evidence to suggest that he was a gentle giant. He said that it was his understanding that the accused would be seeking to advance the defence of provocation, of a sudden and temporary complete loss of self-control resulting in the incident, whereas he said that it was in fact the opposite, that the accused was completely controlling, that was the type of character he was.

13. Counsel for the defence said there was no comparison between what the prosecution was seeking to put in evidence and the situation at trial in circumstances where it was admitted that Mr. Murphy had killed a person. This was a murder trial where the key question was whether what had occurred was murder or manslaughter. It was further highlighted that the relationship that the prosecution were proposing to give evidence about was from eleven years prior. There had been complaints with no follow-up to the Gardaí, and now, because of one phrase in a statement of a prosecution witness in the Book of Evidence, it was proposed to put the character of the accused in issue. It was the defence's submission that to do so would be a completely unfair course of action because what the prosecution was proposing to do was to blacken the appellant's general demeanour.

14. The judge ruled on the matter as follows:

"I am going to receive this evidence in circumstances where I believe it passes the test of relevance. Certainly, it passes that test. That, of course, is not the end of it. As has been argued by Mr. O'Leary (SC for the defence), if there is a degree of unfairness, there can

be, I should say, degrees of unfairness, in the sense that the prejudicial effect will outweigh the probative value of evidence and one must be very conscious of the need to avoid that in cases where it is sought to introduce evidence which might be regarded as evidence of bad character, as is the evidence in relation to the violent incident, if I might describe it as such. The remaining evidence seems to be, in my view, relevant evidence, and similarly not outweighed by its prejudicial effect because of the nature of the relationship is, of course, relevant to what the state of mind was for the event in question. The purpose, as we know, when a person puts his character in issue, the purpose of the evidence in relation to the violent incident is something which must be made quite clear to the jury by appropriate directions, and it must be made abundantly clear, and will be made clear to the jury, that insofar as he has given evidence, so to speak, of evidence being led as to his good character, that is something which, in fact, may or may not be capable of acceptance by them in the light of the other piece of evidence. I agree, in other words, with what had been elaborated from the leading and elderly decision of Chief Justice Coburn. I think this is a case where it is admissible."

Discussion

15. In the Court's view, the defence made a decision to cross-examine Ms. Shirley Farrell. They did so in order that the jury would hear of her view that Mr. Murphy was a "gentle giant" and a "good neighbour", and also so that the jury would hear how he had coped with the break-up of a previous relationship. It seems to us that in those circumstances, if the prosecution had evidence available to further their case and suggest that Mr. Murphy, far from being a "gentle giant", was instead controlling and domineering, then they were entitled to seek to achieve a situation where the jury could properly decide that for themselves.

16. Counsel on behalf of the appellant has pointed out that the evidence adduced by the defence in cross-examination was material that had been included by the prosecution in the Book of Evidence and he suggests that in this context that the judge ought to have declined to admit the evidence. It must be remembered, however, that a criminal trial is not decided on what is contained in the Book of Evidence but rather on the basis of what evidence is heard at trial. Even so, in the Court's view, the source of the information was largely immaterial. What was material, however, was the picture that the defence sought to paint for the jury. Once it was sought to paint that picture, if, in the prosecution's view, the picture was a partial one, and they had evidence which they believed painted a more complete picture, then, in the Court's view, they were entitled to adduce same.

Provocation

17. The issue of the judge's treatment of the provocation issue has been raised in the written submissions, though it was not the subject of oral argument. The appellant's position is that he would wish to see the question of provocation and how it was addressed by the trial judge dealt with as part of the overall appeal, while recognising that the substantial ground of appeal is the first ground, the "bad character" point. In the written submissions, there is a complaint that there was a failure by the trial judge to discuss with the jury how the evidence at trial interrelated with the partial defence of provocation. It is said that there was a failure to properly contextualise same. The complaint was made

that at times in his charge, the judge came perilously close to inviting the jury to approach the defence of provocation in an objective manner. This complaint has its origin in the fact that the judge, in the course of his remarks, commented:

"[y]ou must start somewhere, however, and as a matter of common sense, it's perfectly legitimate . . . to say, look, objectively speaking, what would a reasonable person have done on that occasion? How would such a person have reacted? That is not the test you are going to apply in deciding this, but you must start somewhere, after all, as a matter of common sense. That, however, is only a tool which you might care to use in order to assess the man's state of mind. It is not the test. It is merely a tool which, reasonably speaking, a person might consider as a good starting point in order to consider how someone was thinking."

The passage highlighted, however, cannot be seen in isolation from the charge as a whole. Read as a whole, the charge is a clear, indeed, emphatic direction that what is in issue is not the reaction of the reasonable man, but the subjective reaction of Mr. Murphy. By way of example, at one point the judge said:

"I have referred to . . . the subjective test. You are looking at this state of mind, this man's state of mind, you are asking to put yourselves into the mind of the accused on the occasion in question, and in doing that, of course, you use your powers of reasoning and your common sense."

There followed thereafter the passage on which the appellant places reliance.

18. The Court is not persuaded that there is any great substance in the complaint about the failure to contextualise. The judge pointed out to the jury that the appellant had been interviewed by Gardaí on five occasions. The judge observed, correctly, in our view:

"…it is in those interviews that the core, I think it's fair to say, of the evidence lies on this topic of provocation."

19. In considering how much weight is to be attached to the complaints now made about how the issue of provocation was treated by the trial judge in his charge, the Court regards it as highly significant that no requisitions were raised at the time. The Court attaches significance to this, not as a pleading point or anything of that nature, but as telling that the experienced legal team that represented the appellant at trial did not take issue with what the judge had to say. The question of the partial defence of provocation was front and centre of the trial. The judge and all the lawyers in the case must have been very conscious of the frequency with which appeals have been brought arising out of charges in relation to provocation, and must also have been aware that some of those appeals have been successful. If there were no requisitions on the provocation issue, it can only be because those who heard the charge actually delivered, did not believe that they had heard anything inappropriate or anything of concern.

20. In the circumstances, the Court is not persuaded that the criticisms of the trial judge's charge in relation to the provocation issue are criticisms of substance. That being the case, the positon is that the Court has not been persuaded to uphold either of the grounds of appeal relied on, and so the Court will dismiss the appeal.