THE COURT OF APPEAL

Record Number: 210/2021

Birmingham P.
McCarthy J.
Ní Raifeartaigh J.

BETWEEN/

RENATO GEHLEN

APPELLANT

-AND-

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

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

The issue in the case

1. This is an appeal in which the net issue is whether the trial judge erred in failing to leave provocation to the jury as a defence potentially reducing the charge of murder to manslaughter. The appellant was convicted of the murder of his wife, Ms. Anne Colomines, on the 24th of October 2017. She died as a result of stabbing injuries after a short (less than ten-minute) interaction during which she produced a knife and threatened to harm herself. There was a more general background that the relationship between the parties had broken down and that Ms. Colomines was planning to leave the appellant. The appellant's account during Garda interviews, and his defence at trial, was that the injuries were either accidentally inflicted or self-inflicted by Ms. Colomines. However, he also applied unsuccessfully to the trial judge to have the partial defence of provocation left to the jury. The only issue on appeal is whether the trial judge erred in his decision to refuse to leave provocation for the consideration of the jury.

The evidence before the jury

2. Ms. Colomines was a French national who had been living in Ireland since about 2010. Shortly after coming to Ireland, she met the appellant, a Brazilian national living in

Ireland, and the two of them married in 2012. They lived together in a duplex style apartment in Dublin's north inner city and both of them were employed by the company PayPal at the time of her death.

3. In the month leading up to the fatal incident, it had become apparent that the marriage between the appellant and the deceased was in very serious difficulty. Ms. Colomines had told the appellant that she wished to divorce him and the appellant was trying to keep the marriage going. Ms. Colomines had come back to Ireland on the 23rd of October 2017, after a short vacation in France. The appellant collected her at the airport and they went home. It seems that Ms. Colomines still wished to divorce and the appellant had made arrangements to secure alternative accommodation for himself.

4. On the evening of the fatal incident, the appellant met a friend, a Mr. Ralph Comendador, and discussed the breakdown of his marriage. They parted company at approximately 7.30pm. After the appellant had left his company, Mr Comendador called Ms Colomines, with whom he was also friendly. She did not answer the phone at that time but she called him back later. He told her that the appellant was very upset and sorry. After that, Mr Comendador called the appellant and told him that when he got home *"just to have a clear head, don't start arguing just talk to her."*

5. Mr Comendador himself continued to socialise in town. While doing so, he received a Facebook message from the appellant saying: *"The same shit, bad, no talk, cold, avoiding"*, followed by an emoji and letters, "F U C", and then six K's and then, *"I really want to stab",* and then followed by a red, emoji face.

6. Mr. Comendador replied, *"What, chill bro."* He tried to call the appellant but got no answer. He said after that he received a missed call, he called the appellant back and when the appellant answered the phone, he said:

> *"Sorry I killed Anne, now I'm going to kill myself ".*

7. Emergency services were called to the apartment where the deceased had lived with the appellant. Gardaí and members of Dublin Fire Brigade forced entry into the apartment and found two people in the upstairs bedroom. Ms. Colomines was dead. The appellant had a knife protruding from him but still had signs of life. Emergency resuscitation and treatment was given to the appellant at the scene and he was ultimately brought to the Mater Hospital for lengthy treatment necessitated by his injuries..

8. Whilst in the Mater Hospital, the appellant's room was guarded by Garda McGovern. On waking and seeing Garda McGovern, the appellant asked to speak to her. She cautioned him and wrote down what he said. Her evidence was as follows:

> "He said that they had a fight about another man in their flat, that they started yelling at each other… Then he stated that *she said if he came close to her that she would cut herself.* She then said to leave her alone, so he stated then that he left her alone for approximately five to 10 minutes, then after that he went back and asked to speak to her. He then stated that *she pressed a knife against her own neck.* They then went on to have a conversation about her boyfriend. Then he stated they had a small argument where *she went upstairs with a knife* and that he stayed downstairs. He then stated that he went up to check on her. They had another small fight. Mr Gehlen then told me that he took her computer to check who she was talking to, so when he was looking at the computer she asked what he was doing. Then he stated that *she had a knife in her hand and that he went to grab the knife off her and that she was stabbed.* He stated that it was a 50:50 blame on both sides." (Emphasis added)

9. On the notes being read over to him, the appellant told her also*: 'I had the yellow knife and she had the red knife'*, and he also wanted to change the locations: *"…that he went upstairs and she stayed downstairs."*

10. The appellant was later arrested and interviewed by An Garda Síochána. In interview on 10th November, 2017, the appellant said of this account given to Garda McGovern that he had given it when he had just woken from sleep. He said that it was a resumé of what happened, but that there were more details. The appellant gave a further account in interview on that date which was read into evidence by Detective Garda Keyes as follows:

> "During the day I was outside looking for a new flat because she needed space. I was outside all day looking for a flat. I know that she came back from work around half 5. So, to give more space to her I preferred to stay and make some more. Around 8 o'clock I came home. I arrived home. She was sat on the sofa, I said 'hi', she didn't reply. I sat on a different sofa in the living room. She stand up and went to take a shower and then 10, 15 minutes she finished her shower and stayed upstairs with her laptop. After 15 minutes I went to have a shower and after that I went down to watch some movies in the living room. After a couple of minutes, I went upstairs, and I sat in front of her, and I told her that I found a flat. I told her I found a flat and the only question I had for her if the reason our marriage finish is she has someone because I told her, 'if you have someone, just let me know. I don't look for you anymore but if you don't I keep my hope.' Because we were planning to go to Brazil to visit my family, she said it's not something that you ask from your wife. Then she stand up from the bed and start to walk downstairs and I follow her just to say, 'I just need to know if you have I leave you alone, you don't I keep my hope. Either way I give you space. I'll find another flat and then you

decide what you want in your life.' Then I followed her downstairs. She entered the kitchen, drank a glass of water. I just kept asking her, 'let me know.' I told her if she finds someone, I won't look for her. This is the unique way that we would know that if she had somebody or if she had somebody it would mean that she does not love me anymore and I will walk away. Then she said, 'just give me space.' *We keep a craft blade on the table in the kitchen to open letters and mail things. Then I said, 'just tell me.' Then she got the blade and I stepped back. I asked her, 'what are you going to do?' She started to cut herself,"* [and then there's an indication in the memo of Mr Gehlen pointing to his neck].*But it wasn't deep because it didn't bleed.* I tell her to stop and don't be an eejit. I told her to stop, stop, stop and then she stopped and went upstairs. This time I stayed downstairs. I didn't speak to her, she was upstairs. I started to watch TV again and after 5 to 10 minutes I went back upstairs and I sat in front of her again and I just said, 'just let me know, I don't care.' Then she put the computer on the bed, and she went downstairs. This time she thought I followed her. I took her computer to see who she was talking to. She went downstairs and came back upstairs really quickly. I tried to find who she was talking to but there was many, many windows open. We have two sets of stairs so on the second one she started saying, if I going to fuck me up, I'm going to be sure, they're going to fuck you up very well.'" [he then spoke to the interpreter who indicated that what he meant was:] "If you want to like damage me or fuck me like, do you know, destroy me, I'm going to destroy you even worse". [there was further discussion about what precise language would capture what she had said, and he said that she had said:] "If you're going to fuck me up, I'm going to be sure to fuck you up very well."

11. He continued:

"I saw that she was coming. She saw me with the computer. *Her eyes were wide open. She had the knife with the red blade. I didn't wait for her to do anything, and I jumped up and grabbed the knife and she wouldn't let go. Then she grabbed with her second hand the knife, the moment I pulled the knife she was holding very strongly, and she came at me, and the knife stayed between us. We keep struggle for the knife. I tried to take the knife and she tried to take the knife*. *Then she screamed,* 'ah'**...[discussion of what she screamed] or 'aye'**. And then this time I just release, and I lost my balance as I fall back on the right side of the bed on the floor. She lost her balance as well and she fall and sat on the left side table of the bed with the knife in her hands and I look at her and say, 'stop at this.' And she just look at me with big eyes and she lock her teeth, *stabbed herself in this area around the abs*"; [he pointed at his own abdominal area]. And I also saw some part of her skin in her right hand side but it wasn't bleeding". After this happened, I called her Nêmia, that's how I call her. It's small in Portuguese. I said, 'Nêmia, Nêmia' but she was locked jaw and after the stabbing she contract. She was breathing but some bubbles you were coming from her mouth. Then she didn't answer back. I saw she was unconscious. I took the knife and put it on the floor. I took her body, she was totally contract. I put her on the floor. I put my hand

behind her head. I tried to open her mouth. After I opened mouth her arms and legs relaxed and she began to breathe very strong and fast. Then I tried to talk to her, 'Nêmia, Nêmia, wake up, can you hear me?' Then she started, the breaths were strong but slower. She had this breath for average 10 to 20 seconds. Started very strong but then went slower and slower and then she stopped to breathe. I started to shake, to cry, to be panicked, I got desperate. I didn't know what to do so I got the phone, I didn't know what to do and I just pressed the first number, that was my best friend. The moment I was kind of feeling guilt to push her, emotions, her strings, to give the answer I want. I told my friend, 'I guess I killed Anne and I'm going to kill myself.' I felt the guilt would push her because I know that if I didn't, if I just move on and try to talk another day, none of this would have happened. Then I switch off the phone. I grabbed the red knife. I stabbed my abs a few times, then I started to cut my arms but the blade wasn't too sharp. I wasn't bleeding so I took the arts craft blade that she had upstairs and then I started to cut my neck, but it was just hurting, not bleeding, not having an effect. I was just desperate, I just wanted to kill myself. I went downstairs, I got another knife, a yellow one, a carver. I went into the bathroom, and I started to slice my arms and legs. It was sharp and I start to bleed very bad. And then I switch on the bath with water, and I continue to slice my arms. I laid down for a few seconds, I felt I was bleeding but not enough. I stand up, come close to Anne's body and then I saw her. I got angry with myself, and I started to stab myself everywhere and I was bleeding quite a lot. I wanted to finish. I looked for my heart, but I got my lung, all of the air was coming out of the hole. At the same time the knife was stuck there I start to get dizzy, so I went to take the knife and stabbed my eyes to get my brain because I knew it would be over, but I was so dizzy my vision was blurred. And then I just hug her, and I wake up in the hospital, that's it. That's what I remember of the night". (Emphasis added)

12. Also elicited during Garda interview was that the appellant had asked his wife if she "had someone", and she had run downstairs and said "that's not something to ask your wife." She came back with a knife which was about 12 inches long. He was asked: "When Anne grabbed the knife with her second hand in the bedroom, between then and when she fell on the side table, did Anne have the knife at all times?" Answer: "I couldn't take it off her. She was holding it very hard." Question: "Where on the knife was she holding it?" Answer: "I couldn't see it. After I heard Anne scream on the bed, I release."

The application in respect of the provocation defence and the trial judge's ruling

13. The appellant's defence at trial was that he was not responsible for the infliction of the deceased's wounds and that the infliction of the injuries was either accidental or self-inflicted by Ms. Colomine. It was the appellant's case that the deceased had scored her own neck with a knife whilst both parties were downstairs in the kitchen, that there was a subsequent struggle between himself and the deceased for control of a knife in the bedroom, and that during the struggle the deceased may have sustained injury. It was further the appellant's case that the deceased may have ultimately stabbed herself deliberately with a knife.

14. At the conclusion of the evidence in the trial, counsel for the appellant applied to the learned trial Judge to leave the defence of provocation to the Jury in addition to the main defence described above. The provocative act relied upon was the production by the deceased of a knife in the bedroom as described by the appellant in his Garda interviews. Counsel referred to the decisions of the Supreme Court in *People (DPP) v. McNamara* [2020] IESC 34, [2021] 1 IR 472 ("*McNamara*") and *People (DPP) v. Almasi* [2020] IESC 35, [2020] 3 IR 85 ("*Almas*i") and said that he was not relying on the words in text messages between them. He said that the suspected sexual infidelity that was going on in the background was merely "a backdrop" to how this confrontation occurred. He said that the time-frame was of the order of about 8 minutes. He accepted that the appellant himself had not "set out the sort of level of loss of self-control that one would see in an interview if somebody was cleanly setting out that they have provocation", but submitted that the court was nonetheless entitled to look at the overall circumstances as set out in the interview. The application was opposed by counsel for the respondent.

15. The trial judge ruled that the defence should not be left to the jury. He referred in some detail to the judgments of Charleton J. in *Almasi* and *McNamara*, and in the first instance said that it was clear that the trial judge had an important role in deciding whether or not the defence of provocation should be left to the jury:-

> "Now, the role of the trial judge on an application such as this is a limited but important one. It is not a matter for the trial judge to assess the weight of the evidence in relation to provocation. This is a matter for jury assessment, provided as a matter of law there is evidence of provocation which is capable of being acted upon. It is clear from the decision of Mr Justice Charleton in *Almasi* that rulings such as this is not a matter of judicial discretion. It is a question of legal assessment as to whether the jury could justify in the circumstances of any individual case, find that there had been a killing under provocation.
>
> As he also points out at paragraph 35 of his decision, it is for the judge to say whether the elements of the defence are present, on such evidence as a jury might rationally accept as raising a reasonable doubt and which could, if accepted, embrace all of the elements of the test.".

This was an entirely accurate summary of the role of the trial judge as articulated by Charleton J. in *Almasi* and *McNamara*.

16. He then went on to say, as regards the test to be applied:

> "[Charleton J.] added that for the reasons set out in a separate judgment in *DPP v. McNamara,* which was delivered at around the same time, that it was clear that the

> requirement for the defence of provocation contain an object[ive] element. He said the circumstances of the entire event can be taken into account as can any relevant. But the accused is required to act as an ordinary person having his or her relevant fixed characteristics and not on the basis of a wholly subjective response, whether one fuelled by intoxicants or alcohol, and obviously there's no question of intoxication in this case and none has been raised nor does it emerge from the evidence."

This was also an accurate summary of what Charleton J had said in those cases as to the balance between the subjective and objective elements of the defence.

17. As to where the evidence of provocation might be found, the trial judge explicitly said that, having regard to what was said in *Almasi*, it was not necessary for an accused to have advanced a case of provocation in his interviews, and that it could be that the elements of provocation emerged from the circumstances as a whole:-

> "Therefore, it seems to me that the fact that the accused in this case, Mr Gehlen, did not mention provocation or expressly state that he was provoked or that he may not have said expressly that he had a total loss of self control, whereby he was unable to prevent himself from killing Ms Colomines, is no bar to the argument being raised in circumstances where it is done so against the backdrop of the circumstances as a whole".

18. However, it was necessary for there to be some evidence in support of the defence, from whatever source:-

> "Nevertheless, in *Almasi,* the Court as stated observed at paragraph 30 to which I have referred to above, that such a defence should only be left to the jury where there is evidence, either on the prosecution case, or in consequence of testimony from the accused. And that no defence of provocation should be left for the consideration of a jury where the evidence does not comprise legally defined elements, or is so slight that no reasonable jury could conclude that the accused might reasonably have acted under provocation, unless there is some evidence to support the defence it should not be put forward to the jury."

Again the trial judge was entirely correct in his statement of the relevant principle.

19. The trial judge turned then to the application of the principles to the case before him and said:-

> "Counsel for the accused submits that the case made by the prosecution is that the evidence establishes that the accused killed Ms Colomines and that in so doing, intended to do so, or to cause her serious injury and in those circumstances, even

though the case was not made by the accused, it may nevertheless arise if the jury were to reject the explanations and accounts given by him at interview. It seems to me that whether the production of a knife constitutes a provocative event must depend on the entire circumstances in which it is produced. There must, as Mr Justice Charleton said in *Almasi*, be some air of reality about the defence and any plea of provocation must be genuine and actually require the accused to have so completely lost self control as to respond to the provocation offered in the legal manner proven by the prosecution.

Dealing then with the evidence with the ingredients of the defence of provocation. One must ask, what is the evidence capable of -- what is the evidence available or potentially available capable of substantiating that the production of the knife was a provocative act. It seems to me that while, whether the production of a knife constitutes a provocative event, must depend entirely on the entire circumstances in which it is produced. Where is the evidence of the total loss of self control in the face of such act of provocation, either based on the evidence adduced by the prosecution, and/or the basis of what is contained in the memos of interviews.

I am not satisfied that there is any reality to the defence of provocation in this case, bearing in mind each of the ingredients of that defence such that it ought to be permitted to go to the jury. That the defence was never made or explanation given by the accused at interview consistent with such defence is not determinative. Nor, it seems to me -- nor does it seem to me that at interview, the death of Ms Colomines was explained on the basis of self-infliction or accident. While these factors are circumstances and circumstances on their own, or in combination, do not necessarily rule out the potential consideration of the defence by the jury, it seems to me that they are relevant to the inquiry into whether, and where the defence of provocation is to be found in all of the circumstances, and ought to be given some consideration in this regard, which I have done.

It is clear from McNamara that circumstances giving rise to a breakdown in a relationship or infidelity suggested are factual, ought not to be regarded as circumstances of provocation. Thus, it is the introduction of the knife which is the particular act [that] is relied upon, as being the provocative act to be viewed against the overall background circumstances. I'm afraid that I cannot accept this.

A consideration of the evidence adduced by the prosecution in its entirety, including the memos of interview in my view does not disclose any evidential basis for such a claim. There is nothing to suggest in my view that there was such a total loss of self control to the defence that there was such a complete overwhelming of ordinary self-restraint in the face of what was done or said that the accused could not help intending to inflict death or serious injury and could not stop himself from inflicting deadly violence.

Therefore, I'm not satisfied that as a matter of law there is present on a consideration of the evidence in its entirety upon which a jury might rationally

accept as raising a reasonable doubt. And which could, if accepted, embrace all of the evidence of the test, adapting and adopting dicta of Mr Justice Charleton at paragraph 39 of *Almasi*, the elements of the defence cannot in my view be gleaned from the case and all its circumstances, in such a way that a reasonable jury when properly instructed on the defence, might reasonably accept provocation. If there is any such potential evidence of provocation which I'm not satisfied that there is, it is so slight that no reasonable jury could conclude that the accused might reasonably have acted under provocation, and therefore I must refuse the application."

The submissions on appeal

20. The appellant advances his case on appeal, as he did at trial, on the basis that the act capable of constituting provocation was the production of a knife by the deceased. He does not rely upon the breakdown of marital relationship or possible development of another relationship with another man, having regard to what was said by Charleton J. in *McNamara* about what may constitute provocation. Relying on the production of the knife as an act capable of constituting provocation, the appellant submits that the trial judge erred in law in placing weight on the fact that the appellant did not give an account of provocation at interview and instead gave an account of the deceased having sustained injuries by way of accident and self-infliction. He submits that even though the trial stated that these matters were not determinative of the issue, the repeated references to the appellant's account during the interviews and the overall tenor of his ruling shows that the interviews in fact did colour the trial judge's view. So, for example, the trial judge's conclusion that the production of a knife could not in all the circumstances amount to a provocative act was influenced by his view of the actual explanation given by the appellant during the interview, and again his view that there was no evidence of a lack of self-control was again unduly influenced by the account given by the appellant at interview.

21. The prosecution submits that there was no evidence whatsoever in support of the defence of provocation in circumstances where the appellant not only did not refer to loss of self-control in his interviews but positively advanced an account in which the accused himself did not even inflict the fatal injury. Further, there was nothing in the circumstances in their totality which suggested that the appellant had killed the deceased with intention (to kill or seriously injure) during an episode during which he totally lost self-control as a result of her production of a knife.

The law following McNamara and Almasi

22. The law on provocation has a long history which has recently been set out by the Supreme Court (judgment delivered by Charleton J.) in *McNamara*. As the judgment in *McNamara* is quite a lengthy one, and was accompanied by the judgment in *Almasi* delivered on the same date, it may be helpful to set out a brief summary of the facts and outcome in each case, together with a listing of the principles relating to the partial defence of provocation which appear to emerge from these important decisions.

23. In *McNamara,* the Supreme Court held that there was no foundation of fact upon which a jury could ever have found for the appellant on the basis of provocation. The facts concerned incidents of violence between members of two rival motorcycle clubs. There had been an incident the night before the killing which involved the appellant and his wife, who were out for a drink, being accosted by three members of a rival gang who ripped off and stole the appellant's sleeveless jacket with the insignia of his motorcycle gang, and violently restrained the appellant's wife who tried to prevent the assault. There was also an incident later that evening which involved three members of the rival club pulling up in a car outside the appellant's home and shouting threats. The next day he received a phone call that his stepson and two other men were pursuing a member of the rival gang. He armed himself with a loaded sawn-off shotgun and drove in the direction of the clubhouse of the rival gang. At the clubhouse he saw one man holding a blue bar which he later said he believed to be a firearm. He stopped his jeep and, he said, accidentally discharged one of the shotgun's two cartridges. He then ran towards the gate and fired the second cartridge, hitting the victim (the man with the blue bar) at close range in the head. One witness said that he shouted *"I got one of them"* (although the precise wording of what he shouted was disputed during cross-examination).

24. The appellant did not testify at his trial and the defence case relied on statements made by him while in Garda custody. The appellant sought to rely on self-defence based on the appellant's fear for the safety of his stepson, and provocation. The trial judge allowed the former but not the latter defence to go to the jury, and the jury convicted the appellant of murder. The Court of Appeal rejected his appeal and the Supreme Court confirmed that there was no foundation of fact upon which a jury could ever have found for the accused on the basis of provocation. There appear to have been at least three reasons for this conclusion.

25. First, the lapse of time between the two incidents was of significance; see para 60 where Charleton J. said:-

> "Where, as here, an accused has time to restrain emotion and to seek lawful means of redress, such as making a complaint of a criminal wrong to the authorities, there is no basis for leaving provocation as a defence to the jury".

26. So too was the fact that the victim of the killing was not involved in the incident the night before; his connection was simply the fact that he was a member of the same motorbike gang as the original assailants (para 60: "the victim was disconnected from the attack and was merely a member of the same group as the original assailants."). Thus, the victim was in effect a third party disconnected from the interaction between the appellant and those who had provoked him.

27. A third reason for rejection of the defence was expressed thus at paragraph 60:-

> "It would also be contrary to any proper analysis of the level of provocation in this case to consider that any ordinary person in this context and of the same age, sex and without mental infirmity, being of general intelligence, could lose control to the degree of shooting someone in the face with a sawn-off shotgun."

28. In *Almasi*, the Supreme Court reached the opposite conclusion on the facts and held that the trial judge had erred in failing to leave the partial defence of provocation to the jury. The accused was in his home when his attention was drawn to a man hitting his van, which was parked outside. The evidence later established that this man who was in the company of four others, was drunk and in bad humour. The accused took a baseball bat from near the doorway of his house and gave pursuit, ultimately killing the man by blows of the bat some eleven minutes later. In Garda interview, the appellant claimed it was an accident; denied being in a rage; claimed he had been following the group to talk to them and was armed for self-defence. Witnesses who saw the pursuit and its outcome gave evidence as to what they had seen and heard.

29. Thus, the time-frame was much shorter than that in *Almasi.* Also, the person who was hitting the car was the person ultimately killed. Laying emphasis on the temporal aspect, Charleton J. said (para 38): -

> "Events unfolded in a deeply regrettable way from [the attack on the van] but there was no break in how they progressed.

And para 39:

> "Within about eleven minutes of that first banging on the van, the unfortunate deceased was dead".

30. In the circumstances as a whole, the Supreme Court held, there was *"some air of reality about the defence"* and while the jury would *"not at all be bound to accept provocation and the… original verdict of murder might be repeated on a retrial"*, the elements of the defence *"could be gleaned from the entirety of the case in such a way as a reasonable jury, when properly instructed on the defence, might reasonable accept provocation".* Accordingly, the defence should in that case have been left to the jury.

31. The judgment in *McNamara* contains a detailed exposition not only of the history of the defence of provocation at common law, but development and amendment in other jurisdictions, and the implications of the Irish jurisprudence on the defence. It addresses all the ingredients of the defence and makes it clear that the defence, notwithstanding the decision in *People (DPP) v. MacEoin* [1978] 1 IR 27, is not entirely subjective, revolving only around whether or not a person lost self-control in response to an event. Charleton J. pointed to a number of matters which he said were indicative of how objective considerations continue to play a role in the defence. It may be helpful, given the length of the judgment, to summarise the main statements of principle therein (and sometimes also from *Almasi*) as follows:

It is a partial defence

i. The defence if successful is a partial defence only, reducing a charge of murder to a verdict of manslaughter.

It reduces murder from manslaughter and therefore only applies where there has been an intent to kill or seriously injure

ii. The defence of provocation only arises where the prosecution can prove/have proved that the accused intended to kill or cause serious injury; the partial defence (if applicable) does not negative the intent for murder, it co-exists with it. The provocation which led up to the killing is the reason the person formed the intent to kill or cause serious injury. (See for example para 54 of McNamara).

The trial judge decides as a matter of law if the defence should be left to the jury

iii. Whether or not there is a potential provocation defence to be left to a jury is a question of law and not a matter of judicial discretion in the true sense; see for example in McNamara at paragraph 50 onwards in a section of the judgment entitled "Role of the trial judge" ; see also *Almasi a*t para 30; and at para 35: *"Mystifyingly, there are multiple references in the prosecution submissions to this being somehow a matter of judicial discretion. Where does this come from? It is not. It is a question of legal assessment as to whether a jury could justifiably in the circumstances of any individual case find that there had been a killing under provocation".*

iv. If and when the threshold of sufficient evidence in support of provocation is reached, the case should be left by the trial judge to the jury: see, for example, 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".*

The evidence may arise from statements by the accused during interview or from the circumstances as a whole

v. The defence may be available by reason of evidence given at trial, and/or by reasons of statements made by the accused to the Gardaí, although in the latter case (para 36 *McNamara*) *"assertions of that kind are not tested by cross-examination, nor made on oath"* and the jury can be *"made aware of such infirmities by the trial judge".* (see also *Almasi*: para 30 – *"Such a defence should only be left to the jury where there is evidence either on the prosecution case or in consequence of testimony from the accused")*.

vi. However, the defence may be available even if the accused did not "say so" in testimony or police interview, based on *"the objective existence of facts which conform to components of the defence".* Charleton J referred to a passage from the judgment in *People (DPP) v. Davis* [2001] 1 IR 146 where Hardiman J referred to *"the burden… to produce or indicate evidence suggesting the presence of the various elements of the defence.. either through direct evidence by inference on the evidence as a whole",* and also commented that the trial judge must satisfy himself that *"an issue of substance, as distinct from a contrived issue, or a vague possibility, has been raised".*

vii. All of the elements of provocation must be present to reduce an intentional killing from murder to manslaughter, and there are several elements, as follows.

Loss of self-control is still central to the defence

viii. Loss of self-control continues to be at the heart of the partial defence: see para 1 of *McNamara* – "…in consequence of a person *temporarily losing self-control* in response to provocative actions or words". See also repeated references in the judgment to the loss of self-control being *"genuine"* and not *"contrived"* or *"bogus".* And at para 40 of McNamara: *"That deprivation of self-control must be total to the degree that it is not merely a loss of temper but such a complete overwhelming of constraint, in consequence of what was done or said, that the accused cannot help intending to inflict death or serious injury, and cannot at all prevent himself or herself inflicting such deadly violence".* And para 56: *"That must be a total loss of all control to the degree that it is not merely losing your temper but, instead, is such a complete overwhelming of ordinary self-restraint, in the face of what was done or said, that the accused cannot help intending to inflict death or serious injury, and could not stop himself or herself inflicting this deadly violence".*

There must have been a provocation which caused the loss of self-control

ix. Loss of self-control is not the only ingredient of the partial defence: the loss of self-control must be *caused by a provocation*: see para 1 of *McNamara* – *"….in consequence of a person temporarily losing self-control in response to provocative actions or words".* Charleton J. emphasises throughout the judgment that the provocation must be *"serious"* and *"not a mere insult"* (see for example para 40). He also says that the necessary connection between the provocation and the accused's act of killing is illustrated by the general requirement that the partial defence is generally not applicable if the accused retaliates against a third party (see paras 44-7 in the section entitled Third Party).

MacEoin did not exclude all objective considerations nor reduce the defence to a simple factual question of whether an accused in fact lost self-control

x. *MacEoin* did change the law "radically" away from its common law boundaries (see *McNamara* para 17) but it is not correct to say that it completely excluded all objective considerations from the defence. This is evidenced by the fact that the trial judge continued to retain a key role in deciding whether or not to leave the defence to the jury. see paras 17 and 20 *("some objective filtering mechanism whereby the judge could withdraw unworthy cases from the consideration of the jury")* Also para 35*: "If, as the accused has asserted, provocation is entirely in the realm of what the accused thought or felt, what has always buttressed the law in the form of objective requirements for conduct would entirely be removed. That would neither equate with the common law tradition nor would it be just".* See paras 32 –40 in the section entitled "Limitations on Subjectivity" generally. See also *Almasi* at para 37:

> "[I]t 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."

Whether conduct may be deemed to be capable of constituting provocation is a matter of law which is informed by social norms

xii. One aspect of this element of objectivity is that conduct deemed to fall within provocation must be *"grounded in socially understandable circumstances of provocation…."* (para 21). See also para 40 –*"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." Thus, it seems that social norms regulate what may constitute provocative conduct as a matter of law, which provides an element of objectivity over and above the accused person's own ideas about what is provocative, and this injects at least one element of objectivism into the defence.

The time lapse between the provocation and the killing is relevant

xiii. The time element continues to be relevant (*McNamara* para 21; and see para 35: where Charleton J quotes with approval from *The People (DPP) v. Kelly* [2006] IECCA 2 to the effect that provocation must involve *"a sudden and complete loss of control".* Also para 40*: "There must be a sudden, and not a considered or planned, loss of self-control".* And paras 48-49 in a section entitled Passage of Time, where the discussion culminates in the following (*McNamara* para 49):

> "It cannot be that the defence has become so divorced from its original iteration that a person can sleep on, whether he or she slept or not or perhaps only fitfully, and then take such a considered action as driving to a place with a gun. It must be accepted that provocative incidents insufficient in themselves to trigger violent responses, such as domestic abuse, may magnify over repetition and may cause such a foundation of circumstance that possibly may trigger a loss of self-control that is delayed and results in an explosion of violent, but incapable of being controlled, emotion; *R v R* (1981) 4 A Crim R 127, 178. Further experience is always a likelihood for the courts. This means that no entirely prescriptive rule may be laid down. But there is also a sense in which delay may bring about a situation where it would be contrary to the duty of a jury to judge facts fairly should they find for an accused on provocation. A case where there has been such delay that the defence could not be fairly found must result in the defence being withdrawn from the jury by the trial judge."
>
> It is arguable that the temporal element is more relevant to assessing the genuineness of the loss of self-control (the longer the delay, the less likely a loss of self-control, unless there are special circumstances such as dynamics of long-term domestic violence or some such situation), than as evidencing an objective seam in the ingredients of the defence. Whatever the theoretical characterisation, in any event, it is clear that the time element continues to be a highly relevant factor with regard to the defence.

No allowances are made for intoxication

xiv. The loss of self-control in consequence of provocation cannot be because of intoxication on drink or drugs (para 57): *"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". (See also *Almasi* at para 36).

Objective considerations also come at the point of assessing the loss of self-control

xv. At para 21 of *McNamara*, Charleton J referred to *"a minimal degree of self-control which each member of society is entitled to expect from his or her fellow members".* At para 37, he spoke about the *"social duty of self-control"* and says that *"giving in to a rage"* is not sufficient and it must *"objectively [come] into the realm of the kind of conduct by the deceased which could have tipped the accused into total loss of self-control".* Also at para 39, he said that people *"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"*. At paragraph 40, he said there is a *"a common and sensible standard which takes into account the variability of people as to age or sex or pregnancy and state of health or capability in physical or mental terms". And in the same paragraph, he spoke of "situations where sober people sharing the same fixed characteristics as the accused, where relevant, as to age, or mental infirmity, or sex, or pregnancy, or ethnic origin, would be able to exercise self-restraint in the same background circumstances as apply to that accused".* And at para 59: *"The defence of provocation does not apply in situations where ordinary people, sharing, if relevant, the same fixed characteristics as the accused, as to age, or sex, or pregnancy, or mental infirmity, or ethnic origin, or state of health, would be able to exercise self-restraint in the same background circumstances as apply to that accused. People can be provoked, but juries should always remember that there are degrees of provocation and there are also degrees of reaction to being provoked. What the accused did, and that accused's claimed mental state, must be judged against that background".*

Thus, it would appear that the description of the defence set out in *McEoin* is not considered by the Supreme Court to be entirely correct as the judgment of Charleton J. indicates that the jury should consider whether sober people sharing the same fixed characteristics as the accused, where relevant, as to age, or mental infirmity, or sex, or pregnancy, or ethnic origin, would be able to exercise self-restraint in the same background circumstances as apply to that accused.

There is no separate legal ingredient/requirement of proportionality as between the provocation and the retaliation

xvi. Although *MacEoin* made reference to proportionality in the "mode of resentment". In *McNamara* Charleton J. says that it is not correct to characterise this as a

separate legal ingredient of proportionality of response to the provocation: see para 39 –

> *"in accepting that the accused must first completely lose self-control as a matter of genuine fact, how could it be possibly to fairly say that if the second part of the proposed test is entirely objective that it is unreasonable for the accused, judged objectively, to have picked up a knife as opposed to have punched the victim or merely used bad language"*. (para 39)

See also paras 41 onwards of the judgment in *McNamara* in a section entitled "Mode of Retaliation".

Application to present case

32. In the first instance, it must be said that the trial judge clearly had studied the judgments in *McNamara* and *Almasi* carefully, and had extracted and stated the principles set out by Charleton J. with precision and accuracy. He was aware from the outset that his role as trial judge was merely as a filtering role and that the threshold for leaving provocation to the jury was not a high one, accurately summarising what had been said by Charleton J as to the level of evidence required. However, he was also aware that the issue was not a matter of discretion in the usual sense of that word but a question of law insofar as the role of the trial judge is to ascertain whether there is evidence that meets the legal ingredients of the defence. He concluded that there was not. The question for this Court is whether he was correct as a matter of law.

33. In this case, no issues arise as to either the temporal aspect of the defence (since the injuries were inflicted during an incident which unfolded over a relatively small period of time within the same dwelling) nor as to the much-vexed issue as to the extent to which account should be taken of the appellant's personal characteristics or history (referenced at point (xv) in the summary of principles from *McNamara* above). The issues which are in focus in this case are, first, whether the production of the knife in the circumstances was capable of constituting a provocative act; and secondly, whether there was evidence from all the circumstances (notwithstanding that the appellant had failed to offer an account of a provoked loss of self-control) that the deceased's production of a knife had in fact provoked the appellant to lose self-control and intentionally inflict the fatal injuries.

34. We agree with the trial judge's conclusion that there was insufficient evidence in support of the defence to warrant leaving it to the jury. While it is correct to say that it is not necessary for an accused to explicitly describe being provoked and losing self-control either in evidence or from Garda interviews, and that evidence of what amount to the ingredients of the defence (at least potentially) may be gleaned from all the circumstances, this does not mean that the alleged provocative act should be entirely divorced from the evidence which exists such that imaginary scenarios are constructed in favour of the appellant in the teeth of the evidence that is actually there. In this case the appellant offered a detailed account of what had happened in his interviews, and

positively and repeatedly advanced the case that he had not inflicted the injuries. This is not merely the absence of an account which might support the elements of the provocation defence but an account which directly conflicts with them. This, of course, is not the end of the analysis, but it is an important starting point. It should be remembered that the provocation defence operates only where an accused has killed with the intention to kill or cause serious injury; the whole point and *raison d'être* of the defence being that it was the provocative act which caused him to lose self-control and form the relevant intention. It is not an auspicious starting point for an accused to positively claim, as did the appellant, that he did not inflict the injuries at all.

35. Let us assume, as the appellant invites us to do, to consider the situation from the point of view of a jury which has rejected his explanation that he did not intentionally stab Ms. Colomines at all, and are considering whether he intentionally stabbed her in response to a provocation offered by her. What is the provocation in this scenario? The production of a knife is said to constitute the provocative act but knives may be produced in many situations and many circumstances. In and of itself, the production of a knife cannot necessarily be said to be provocative. It all depends on the context. For example, if a masked man bursts into a kitchen where a mother is spoon-feeding her baby, the mother's picking up of a kitchen knife would not be considered provocative but rather an act of defence. One always has to consider matters such as whether there was a prior act which led to the production of the knife, whether the other party was armed, the relative strength of the protagonists, what was said or done at the time of the production (e.g. "Get out of my kitchen", "I'll cut you", or "Give me your wallet and phone") and the lead-up to the production of the knife. The act of producing a knife cannot in and of itself be said to constitute provocation without reference to the context.

36. What, then, is the context in the present case? As already noted, the appellant does not rely on the breakdown of the relationship between the parties as contributing a provocative element to the production of the knife by the deceased; accordingly, the relevant time-frame for the provocation must (on his own submission) fall within the ten minutes or so from the time the appellant arrived back at the house. We have no evidence other than that of the appellant's interviews of what happened next. There were no witnesses. We are, necessarily, driven back to his interviews. The appellant in effect invites the Court to put to one side his denials of having stabbed the deceased at all, and to find both a provocative act and a loss of self-control within the account given by the appellant. Let us look at each of those two essential ingredients in turn.

37. The appellant relies on the production of the knife by Ms. Colomines as the provocative act. When she first produced the knife, she threatened to hurt *herself* and in fact started to do so. The act of one person in threatening self-harm could not possibly constitute a provocative act to another person for the purpose of the defence. Picture it thus: A says, holding a knife, *"I will hurt myself with this";* this causes B to lose self-control and grab the knife and kill A. Frankly, if this were to be accepted as an act capable of constituting provocation, it would make a nonsense of the defence. It lacks reality and smacks more of a "contrivance", to use the language of Charleton J. At a slightly later point in the

sequence of events, Ms. Colomines produced the knife and said something about damaging, destroying or 'fucking up' the appellant if he was going to do the same to her. It will be recalled that the interpreter had a difficulty in finding the right words to capture her utterances (as reported by the appellant during Garda interview). But one way or another, the appellant does not argue that he understood this to be a threat of violence from the knife and it is entirely unclear what was being said by the deceased or what the appellant understood her to be saying. In those circumstances, the Court cannot see any evidential basis for characterising the production of the knife as an act of provocation.

38. Secondly, the Court cannot see any evidence of a loss of self-control. In some cases, even where an accused does not explicitly describe a loss of self-control in interview, one might glean it from the circumstance as a whole or other evidence, such as the testimony of other witnesses who may have witnessed the event and observed the appellant's demeanour, or from the manner and mode of the killing itself. Here the appellant fails to point to anything in support of the suggestion that he may have lost self-control as a result of the act of production of the knife. Significantly, he also fails to refer to all the evidence pointing to the fact that he was very unhappy about the relationship break-up and that he had even used the word "stab" in a text earlier to his friend, in the context of his reaction to his wife not talking to him. The evidence in its totality simply does not support a loss of self-control. The high-point of the appellant's case is merely a theory of what might have happened and if the trial judge had left the defence to the jury, it would in effect have been inviting them to speculate rather than act on evidence adduced.

39. Accordingly, the Court is of the view that, taking into account the evidence as a whole which included but was not in any way confined to the appellant's interviews, there was insufficient evidence of any provocative act, or any loss of self-control, such that the defence of provocation could have been correctly left to the jury.

40. Accordingly, the appeal is dismissed.