THE COURT OF APPEAL

Record No: 204/2020

Birmingham P.
Edwards J.
Kennedy J.

Between/

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

RESPONDENT

V

MARK CRAWFORD

APPELLANTS

JUDGMENT of the Court delivered by Mr. Justice Edwards on 31st of March, 2023.

Introduction

1. On the 31st of August 2020 the appellant was tried before the Central Criminal Court in relation to a charge of the murder, contrary to common law, of a Mr. Patrick O'Connor (i.e. "the victim") on the 7th of July 2018 at Fitzgerald's Bar, Sexton Street, Limerick. On the 10th of September 2020 the appellant was convicted of murder by a unanimous jury verdict. He was then remanded in custody for sentencing.

2. On the 2nd of October 2020 the appellant was sentenced to the mandatory penalty of life imprisonment.

3. The appellant now appeals against his conviction for murder.

Background to the matter

4. Both sides have produced summaries of the main evidence at trial in their helpful written submissions. The Court has read the full transcript and is happy that, subject to one caveat, the summaries provided are accurate, and intends to draw on both. The caveat expressed is not with respect to the actual evidence given, but rather with respect to differing interpretations of it in one critical respect as between prosecution and defence.

5. The evidence is uncontroversial that at approximately 11.30pm, while the appellant and the victim were present at a seating area in Fitzgerald's bar, Sexton Street, Limerick, to the left of the main entrance as one enters that premises, there was some interaction (to use a neutral word) between the appellant and the victim in the course of which the appellant came to fatally stab the victim. Six stab wounds were inflicted, being to the

neck, chest, back and arms, with the fatal wounds being those to the neck and the chest. The appellant then fled the scene.

6. The parties' respective interpretations of the incident differ in this way. According to the appellant's summary, at approximately 11.30pm there were raised voices between the appellant and the victim. It was said that "*a fight broke out*" and the appellant stabbed the victim six times. It is relevant in that regard that the case was subsequently defended by the appellant on the basis that he had acted in self-defence.

7. The prosecution's summary of the evidence joins issue with the suggestion that "*a fight broke out*", and it is contended that that represents a mischaracterisation of the evidence. It was the State's case that there was no fight but that the deceased was attacked by the appellant while he was sitting on a chair and in circumstances where the attack was so fast that he did not have a chance to defend himself and had no defensive injuries. On the State's case, this was supported by the fact that the appellant was closer to the bar door than he was to the deceased and that if he was under attack, or threat of attack, at any stage he could simply have left the bar rather than stay and stab the deceased six times. This was said to have been particularly the case in circumstances where there was uncontroverted evidence that shortly before the stabbing the parties had been outside the bar having a cigarette but had re-entered together and sat down and continued drinking.

8. In the light of the different interpretations of the evidence, it will be appropriate to set out as neutrally as possible the actual evidence received by the jury concerning the circumstances in which the critical event occurred, and this will be done at the appropriate point in the chronology. There is little dispute between the parties concerning the remainder of the chronology and, as indicated, the summary which follows borrows from the written submissions of both sides and is supplemented where necessary from the transcript.

9. The jury heard evidence that on the 6th of July 2018, the day before the critical occurrence, the appellant and his sister, a Ms. Sandra Crawford, had met the victim in a local bookmaker's premises. The appellant gave the victim his phone number and was subsequently contacted by the victim who asked him and his sister out for a drink. The appellant and his sister joined the victim and after having some drinks, cocaine and a takeaway they returned to Ms. Crawford's home at 36 Distillery View, Thomondgate, in Limerick where the appellant also happened to be staying. The appellant later told the gardaí when they interviewed him following his arrest and detention, that while there the victim and the appellant's sister had kissed. According to the appellant's account his nieces, who also lived in the house, were upset by the victim's presence there. On the following morning sharp words were exchanged between the appellant and his nieces, and the appellant told his nieces that his sister had been kissed by the victim. The appellant's sister subsequently communicated what the appellant had said to his nieces about her and the victim, to the victim.

10. The victim, having been so informed, called to the appellant's sister's home. The appellant subsequently claimed while being interviewed by gardaí that he was frightened that the victim had called.

11. Evidence was given by a Mr. Matthew Hickey that while staying at his girlfriend's house at 44 Distillery View, Thomondgate, Limerick, on the morning of the 7th of July 2018 he heard an argument between the appellant and his sister. Later that morning, through an open window, he heard the voices of two males, believed by him to be those of the appellant and the victim, who was a cousin of the witness's girlfriend. He described the voices as initially mumbling before then becoming progressively louder, although not shouting or roaring.

12. The victim went to Fitzgerald's bar on Sexton Street in Limerick at 11:00am and alternated between drinking in the bar and visiting a nearby bookmaker's premises throughout the day. At a certain point the appellant rang the victim to apologise for the exchange that had occurred earlier, following which he met up with the victim at Fitzgerald's Bar at a time estimated as being between 16.45pm and 17.00pm. For much of the rest of the evening until the critical incident the pair then drank together with some others as part of a group, with people coming and going from where the group was seated to and from the smoking area, and to and from the toilets where cocaine was being consumed (including by both the appellant and the victim). The others present in that group included a Mr. Mark Duggan, his partner Lisa, and a Mr. Anthony Ryan (known as "Gaga Ryan"). When asked to characterise the atmosphere, Mr Duggan, said "*everything was happy*" and that "*the mood was good*". There was a match on television between Russia and Croatia. The evidence was that Mr. Duggan and his partner Lisa left Fitzgerald's pub after the match was over, but that the remainder of the group i.e., the appellant, the victim, and Gaga Ryan remained on there.

13. Numerous witnesses confirmed that the victim met and socialised with various people while he was in Fitzgerald's pub in the company of the appellant and Gaga Ryan, the latter remaining at all stages with the appellant and the victim up to the critical incident giving rise to the charge of murder. Initially they were seated in the smoking area to the rear of the pub but subsequently moved to a table in the bar area to the front of the establishment. Witness accounts stated that the appellant was seated nearest the door with his back to the front window and that Mr Ryan was seated next to him. The victim was seated on the other side of the table.

14. Throughout the evening the group alternated between the smoking area, an area outside at the front of the pub where people also smoked, the lounge area and the aforementioned table located in the bar just inside and to the left of the front door of the establishment.

15. Others on the premises who spent some time with the appellant and the victim, in the smoking area and elsewhere, included a Mr. Ian O'Connor who said he was chatting to them for about half an hour (he had put it at 10 minutes in his statement), and a Mr. Wayne Redden. Ian O'Connor said there was just "*general sort of banter*" in the pub, "*a*

bit of slagging and a few jokes". At a certain point Mr. Redden was asked to leave the premises by the management, his presence there having been noted in circumstances where he had previously been barred. Ian O'Connor left in the company of Mr. Redden and as they were leaving, they encountered the appellant, the victim and Gaga Ryan outside the front door. They were smoking and, in Mr. O'Connor's perception, "*there was a bit of words*", but he didn't think too much of it and he and Mr. Redden just walked away. Under cross-examination by defence counsel, Mr. O'Connor agreed that the atmosphere at this point was not as light-hearted as it had been, and that something had changed.

16. Witness accounts described how at a certain point during the evening the victim began individually communicating to other patrons of the bar that he felt he had been "*burnt for a €100 for cocaine*" by the appellant, and that he was not happy.

17. Evidence given by the barman, a Mr. Cyril O'Connor, described hearing some of the occupants of the table to the front of the bar arguing in whispered tones and that he had a "*niggling feeling that something was going to happen*." He also witnessed the group having a conversation outside the front of the pub later in the evening, although he did not witness them arguing. He continued by saying that on one occasion when the group came back in after being outside, his co-worker, a Ms. Pamela Stokes, described the appellant's countenance as having changed from laughing and joking to one of being quite serious. When they returned to the bar, he described the atmosphere between members of the group as being "*edgy*". He also recalled that both himself and his co-worker "*were on edge*".

18. Ms. Stokes, who was working in Fitzgerald's bar in the evening in question, confirmed that the atmosphere had been edgy between the members of the group and that she and Mr. O'Connor were in turn on edge. As to how the critical event unfolded, she stated that she heard a chair move. The sound came from behind her. She was behind the bar at this point. She said:

> *"A. I turned. I seen the backs of two people. One was standing, one was sitting. I realised there was an argument. I ran through back through the doors and I called for my boss, Billy.*
>
> *Q. Okay. And the two people whose backs you saw, were they doing anything that you can remember?*
>
> *A. It just looked like an argument. It looked like there was a fight. I didn't take I didn't take a lot of notice because I wasn't running behind the bar so I needed to go and call the boss.*
>
> *Q. Yes, but there's a number of different kind of fights. Can you remember anything more specific?*
>
> *A. Yes, just looked like punching.*

Q. Punching?

A. Yes.

Q. Okay. And who was punching?

A. I couldn't tell. It was just the backs of two people.

Q. Okay. And can you remember the position of the two people? You just saw their backs. Were they ?

A. Yes.

Q. standing or sitting or can you remember that?

A. One was sitting and the other one was standing.

Q. Okay. And was one or other punching or do you remember? Do you remember which of them was punching?

A. I just remember there was a fight and I ran. That's the main thing that stands in my head."

19. Under cross-examination she confirmed that she didn't see how it started. She reiterated that it looked like an argument, prompting her to go and get her boss. When she came back in she realised it was more serious than she had thought. From her recollection Gaga Ryan was there throughout and was helping out afterwards.

20. In the course of his evidence Cyril O'Connor described the critical incident in this way. He said that the three people in the group (i.e., the appellant, the victim and Gaga Ryan) were in and out and that's why the bar staff were on edge the whole time. On two occasions he went out to see if there was an argument outside but found them merely engaged in conversation. There was no argument, nor were there any loud voices. He estimated that this was at "*about half 10, 10-ish*". They eventually came back in, one by one. They did not all walk in together. They resumed their positions at the table near the front door. He said that he was standing at the top of the bar talking to Ms. Stokes:

"Q. Okay?

A. -- in conversation and next all I heard was a chair move.

Q. Right?

A. There wasn't a word, a shout or a scream, nothing. So I heard a chair move and as I looked to the left, I could see the accused, Mark, striking Patrick in the neck area and, like that, I just ran to stop a fight, I thought. But by the time I got down at them, Mark already on his feet and going towards the exit door.

Q. Yes?

A. So I followed suit and, as I got to the front door, he was just in front of me, grabbed the doors in two partitions, the left and the right --

Q. Yes?

A. -- the main door. He pulled one, the right-hand side of the door, pulled it off the latch --

Q. Okay?

A. -- and he was leaving, he said: "Fuck that", or: "Fuck it", and slammed the door after him, whereas I bolted the door and locked the other half of the door --

Q. Okay?

A. - so he wouldn't come back in. And I knew I knew Patrick was on the ground at this stage, but --

Q. Well, do you mind if, before we come back to that --?

A. Go ahead.

Q. If you don't mind, I'm going to try and break that down a little bit. When you said you saw Mark Crawford hitting Patrick O'Connor --?

A. Yes, rapidly.

Q. Okay. Can you remember about how many times or--?

A. To me it was like four or five times, it seemed, but at this stage I was in flight to stop a fight.

Q. And where were they in relation to each other? Had they moved?

A. He was leaning on Mark. He either had his left arm or on his shoulder or by the neck. He was leaning into him. Patrick was still on the chair.

Q. Okay?

A. And as I said, when I gave chase, I thought I was stopping a fight first. But when I got to the area, Mark was already making his move to leave the premises."

…

"Q. When you say he was holding him with his left hand, does that mean he was hitting him with his right hand?

A. Like when I looked, and I knew I was going down to stop a fight, I wouldn't 100% say, but his left arm was towards his body, either on his shoulder or on his neck.

Q. Yes?

A. He was leaning into him, so he was kind of like using his left arm as a steady.

Q. Okay, and using his right hand then to hit him; is that right?

A. To do, as I said, rapid blows.

Q. Yes. And when you said he was leaning into him, was he he wasn't sitting at this stage; is that right?

A. No. He was on his feet.

Q. Okay. So Mark Crawford was on his feet but Patrick O'Connor was sitting down; is that right?

A. Pa was still seated.

Q. Okay. Now, and I'm sorry, we've gone back and forward a little bit, but then I stopped you at a point where you said what happened to Patrick O'Connor then?

A. As I said, I locked the door. I'd seen Patrick through the corner of my eye as I was running out after Mark. I knew he was on the ground at this stage. He was already off the chair and on the ground. And it wasn't until I locked the door to make sure Mark wasn't coming back in. I walked in and I seen poor Patrick and all I could see was blood."

21. In the course of Cyril O'Connor's cross examination by defence counsel there were, inter-alia, the following exchanges:

"Q. Now, I'm going to suggest to you that -- well, first of all, can I say to you that when you turned around and when you saw this movement -- well, after you heard this movement, the incident, the fight, if I could put it that way, was already going, wasn't it?

A. Correct, yes.

Q. So firstly you obviously didn't see how the fight started?

A. No.

Q. No. You didn't see for example, you didn't see if at some stage

Mr O'Connor had stood up and Mr Crawford had stood up and had squared up to each other; you didn't see that?

A. No.

Q. But as you've fairly said, you didn't see the start of the fight; isn't that correct?

A. No, correct.

Q. Yes. And you've also said in your evidence there that the movement or the noise that you heard of the chair scraping against the floor is the sort of noise that you would commonly hear when someone moved a chair to stand up?

A. Yes.

Q. Yes, okay. Now, this all happened very quickly as well, didn't it?

A. Correct.

Q. And I'm going to suggest to you that, in some respects, your recollection is incorrect, that in fact Mr -- that you're mistaken when you say that Mr O'Connor was sitting on the chair when he was being attacked by Mr Crawford?

A. No.

Q. And I'm going to suggest to you that in fact what had happened was that Mr O'Connor and Mr O'Laughlin had squared up to each -- sorry, Mr Crawford had squared up to each other, they'd stood up to each other and in fact at that stage Mr Crawford, fearing that he was under threat, his safety or his life was under threat, had used what turned out to be a knife and had stabbed Mr O'Connor a number of times?

A. No."

22. It was suggested to the witness that in his view of the incident had possibly been obstructed by people sitting along the bar, but the witness responded:

"What I seen when I looked down, I'm seeing the striking -- it's a picture in my head, almost like a photograph, and that memory will live with me. It's a photograph in my head of one leaning towards Pa O'Connor and then holding Pa O'Connor and he's striking Pa O'Connor. That's a photographic memory of that.

Q. Can I just -- sorry, I didn't mean to interrupt you?

A. Sorry.

Q. Can I just ask you, you've given that graphic description there and you say "holding"; is that right?

A. Yes, so he either held him on the shoulder or by the neck as he was leaning and using his left hand as a brace to make sure he wasn't going to fall over, because he was leaning on Pa.

Q. Well, are you talking about him having his arm around his neck or what?

A. No.

Q. No. Well, I have to suggest to you that your recollection is incorrect in this regard and I have to suggest to you that in fact what had happened was that there had been a squaring off between the two of them; that as a result of that Mr O'Connor had stabbed or had directed the knife on a number of occasions -- sorry, Mr Crawford, towards Mr O'Connor and that was in fact what had happened and he didn't attack him while he was sitting down on the chair. You disagree with that?

A. I disagree wholly.

Q. Okay. But you would agree that it all happened very quickly?

A. Extremely quickly."

23. Asked if he recalled what Mr. Ryan was doing at this point, and specifically whether Mr Ryan was still sitting on the bench (seating at the table at which the incident occurred consisted of both chairs and a bench), the witness responded:

> *"All I have is that photograph in my head of Mark striking Patrick O'Connor. That's the only image I have of that precise moment because it was so quick, what I seen, that I ran to stop a fight, a fistfight that I thought I was going to stop. I've been in many a situation that I had to get involved to separate the parties and have a peaceful night. I ran out to stop a fight and when I got there Mark was leaving the premises and it wasn't until after I seen the horror that was done."*

24. Another patron of the bar who was present, a Mr. John Twomey, who also gave evidence to the jury, claimed to have witnessed Gaga Ryan breaking up an argument between the appellant and the victim. He said that he was in Fitzgerald's bar with a friend, a Mr. Tony Sheehan. There were three people sitting opposite them. Asked if he knew them, he said he only knew one of them to see. He said they were "*having a bit of a row amongst themselves.*" He then clarified, "*[w]ell, two were, one wasn't*". He went on to say, "*a bit of a hassle started and the lad that I knew to see got in between them and cooled them down*." It then stopped for a while.

25. The following further evidence was then given:

"Q. Okay, okay. And what happened then?

A. After a while then some commotion started and two had a go at each other.

Q. Yes. I'm going to ask you to be as particular as you can. I mean, things like "commotion" and "having a go at each other" are things that can cover--?

A. Well, it happened so fast that the two of them wound up so you don't see the photograph, there's a television on the wall behind me, behind the seat I was sitting on, and I saw one chap thumping, as I thought, the man by the wall.

Q. Okay?

A. He was hitting him.

Q. So you saw one chap punching, as you thought, the man by the wall?

A. Yes, I didn't see any weapon or anything like that; I just saw him hitting him with his hand.

Q. Yes, and what happened then?

A. Next, the lad that I knew said: "Call for an ambulance."

Q. Okay?

A. And the bar staff was called.

Q. Well, the person who had punched the other person, let's just start with him. Did he stay in the bar or what happened?

A. The lad that done the punching ran out of the bar very fast.

Q. Okay, right. And what happened to the person who was punched?

A. He fell to the ground.

Q. Okay?

A. And the lad that was with him went over speak to him, he said: "Call an ambulance."

Q. Yes, okay. And did you see anything about him or did you notice anything about him when he fell to the ground?

A. When he fell to the ground, I saw there was a pool of blood on the floor."

26. Under cross-examination by defence counsel Mr. Twomey accepted that the person he knew to see was Gaga Ryan. He recalled that at one stage the person who was stabbed had his hand held up "*as if to throw a punch but didn't*". It was at that point that Mr. Ryan had intervened to calm the situation down. Mr. Twomey said:

> *"Q. Yes?*
>
> *A. Well, as I say, he lifted his hand, he was sitting down and he got up. I don't know what the conversation was between the two or why he got up. I haven't ----*
>
> *Q. But that stopped any punch being thrown or anything like that?*
>
> *A. It stopped, there was nothing thrown at that stage and they both sat down.*
>
> *Q. And then you said in your statement: "They were shouting at each other and arguing." That's the two lads?*
>
> *A. The two lads, after that they were -- the words got a bit stronger.*
>
> *Q. The words got stronger after that?*
>
> *A. Got stronger, yes.*

27. Mr. Twomey said that after the shouting and arguing got a bit louder a scuffle happened. It happened "*in a flash*", and "*like the blink of an eye*", and the man who unfortunately died ended up on the ground under the TV. He only saw one punch but he agreed with counsel that "it could have been more".

28. The jury also heard a statement read from Mr. Sheehan who said that he heard a load of commotion. He looked over and saw the male that had come into the bar previously with a white tee-shirt and shorts as having a verbal argument with another male. He could see that the male with the shorts on was receiving a few hits from the other male. When he said "hits", he meant that the other male seemed like he was pushing him back with his fists. His hand was going in a forward motion towards his chest area. It happened three or four times. He shouted out, "*Stop that*." Then the man ran out the front door of the pub and he didn't see him again after that.

29. Evidence was given by a Ms. Karen Crawford, the appellant's wife, that the appellant phoned her after he had left the scene of the incident and that she had driven with her sister-in-law and niece to collect him. She described the appellant as having a cut hand and being upset when he reached the car. She stated that she then asked her sister-in-law to take her daughter home and she subsequently she drove the appellant to her sister's residence in O'Brien's Bridge, in County Clare. She then returned home. On Sunday the 8th of July 2020 Ms. Crawford drove the appellant to the Abbey Court Hotel in Nenagh, Co Tipperary.

30. On Monday the 9th of July 2020 the appellant presented himself at Henry Street Garda Station in Limerick City having sought legal representation in the meantime. He was arrested on suspicion of involvement in the murder of the victim and was detained for the purposes of the proper investigation of that suspected offence. While so detained he was interviewed on five occasions by the investigating gardaí.

31. In a memorandum of the third interview in time with him, the appellant maintained that he had stabbed the victim in self-defence as he believed he was imminently about to attack him, stating:

> *"He was mouthing off at me. He was saying I want a oner and I said I don't have it to give. I thought he was going to go for me so I took it out, I thought he was going to go for me so I got it out and stabbed him. That's all I remember. I thought he probably would have killed me. I got the fear I was going to be done. I was frightened of my life to leave in case they would follow me and do me."*

32. In relation to the murder weapon the appellant stated in interviews with the gardaí that he had been handed the knife during the evening by an unnamed patron which he had then put in his pocket. During those interviews, the appellant gave conflicting accounts of his disposal of the knife which was never recovered.

33. Evidence was given by a Mr. Michael Cronin who lived near to Fitzgerald's Bar that he saw a man on his phone approaching a white Audi car and in the exchange between the occupants of the car and the man on the phone he heard the words "*Where's the knife*" or "*There's the knife*".

Is it fair to allege a mischaracterisation of the central event by the appellant?

34. Having set out what seem to us to be key aspects of the evidence, we consider that it was not necessarily a mischaracterisation of the evidence for the appellant's submissions to speak in terms of a fight having taken place. A number of witnesses had testified in those terms. For example, Ms. Stokes had said "*It just looked like an argument. It looked like there was a fight*", and that "*I just remember there was a fight and I ran*." Cyril O'Connor had said: "*I could see the accused, Mark, striking Patrick in the neck area and, like that, I just ran to stop a fight, I thought*", and that "*I knew I was going down to stop a fight*."

35. Counsel for the defence cross-examined Cyril O'Connor, without objection by his opposite number, in these terms:

> *"Q. Now, I'm going to suggest to you that -- well, first of all, can I say to you that when you turned around and when you saw this movement -- well, after you heard this movement, the incident, the fight, if I could put it that way, was already going, wasn't it?*
>
> *A. Correct, yes.*
>
> *Q. So firstly you obviously didn't see how the fight started?*

A. No."

36. At a later point in the cross-examination, when being pressed as to the dynamics of what had occurred, Cyril O'Connor stated:

> *"All I have is that photograph in my head of Mark striking Patrick O'Connor. That's the only image I have of that precise moment because it was so quick, what I seen, that I ran to stop a fight, a fistfight that I thought I was going to stop. I've been in many a situation that I had to get involved to separate the parties and have a peaceful night. I ran out to stop a fight and when I got there Mark was leaving the premises and it wasn't until after I seen the horror that was done."*

37. The witness, Mr. Twomey, had also spoken of a "commotion" and of two individuals "*having a go at each other*".

38. In circumstances where the language used by several witnesses connoted a possible fight it was not inappropriate for the defence to adopt that characterisation, whether it was correct or not, where it suited their purposes to do so. However, there was an abundance of other evidence in the case and it was a matter for the jury to weigh all of the evidence and decide for themselves whether in truth what had occurred was correctly to be characterised as a fight or a one sided attack as the prosecution maintains it was. Ultimately, what they were concerned about was the fact that the evidence suggested that the appellant had stabbed Mr. O'Connor multiple times leading to his death, and the issue for them was whether on the totality of the evidence the appellant had been acting in lawful self defence as he had contended to gardaí. They returned a verdict of guilty of murder and accordingly whether they accepted there was a fight, or a one sided attack, they were nonetheless satisfied that in stabbing Mr. O'Connor multiple times with a knife the appellant had not been acting in lawful self-defence. What mattered in terms of their decision was the actual evidence, which we have reviewed, not how either side might characterise it.

Grounds of Appeal

39. The appellant has appealed on two grounds. He contends that his trial was unsatisfactory and unfair, and that his conviction is accordingly unsafe, for the following reasons:

> *"1. The charge of the trial judge was unsatisfactory in all the circumstances including that:*
>
> *a. the trial judge erred in law in her instruction to the jury on self-defence, and in particular on the subjective elements to be considered by the jury in determining whether the prosecution had proved that the killing of the victim by the accused was not carried out in self-defence;*
>
> *b. the trial judge erred in directing the jury that whereas they had to apply a wholly subjective test in considering whether the accused believed he was under threat to his life or person, they then had to apply a wholly objective test in considering whether the degree of force used by the accused, in*

response to any attack or threat he perceived he was under, was reasonable in the circumstances; and

c. the trial judge erred in law in that she did not, adequately or at all, instruct the jury on how to consider the account provided by the accused, and in particular that, if the account provided by the accused could reasonably be true, they must give the accused the benefit of that account.

2. In all the circumstances the verdict of the jury was unsafe and unsatisfactory."

40. In their respective written submissions, counsel for both parties to this appeal dealt with Grounds 1(a) & (b) together, then with Ground 1(c) and finally with Ground 2. For convenience we will adopt the same approach.

Grounds 1(a) & (b)

Submissions

41. Before charging the jury, the trial judge sought submissions from counsel on her charge and the issue of the subjective elements appropriate to self-defence in a prosecution for murder was raised in those submissions.

42. Counsel for the prosecution, who went first, submitted that the long-standing authority on the common law defence of self-defence in fatal cases, namely that in *The People (Director of Public Prosecutions) v. Dwyer* [1972] I.R. 416, applied, and that the law had not been changed.

43. When *Dwyer* was decided, it had long been the position at common law in Ireland that a person was entitled to defend themselves and if they used no more force than was objectively necessary to repel the assault then they committed no offence. Conversely, where a person used more force than was objectively necessary the defence was not available. The Dwyer case introduced for the first time a modification to the traditional common law position, applying only to fatal cases, in that it made provision for a partial defence of self-defence involving the use of excessive force which would operate, where successfully invoked, to result in a manslaughter conviction rather than a murder conviction.

44. The partial defence of self-defence involving the use of excessive force as understood and applied post *Dwyer* has operated in this way. If for the purpose of defending themselves, a person knowingly uses excessive force (assessed by objective standards) leading to a fatality, then regardless of whether the threat they are responding to is merely a perceived one or is real, they cannot avail of the defence. If, however, they mistakenly use excessive force (assessed by objective standards) leading to a fatality, genuinely believing it to have been necessary to use such force in order to defend themselves against a threat, whether that be perceived or real, they are still acting unlawfully but, because they held an honest belief that such force as was used was necessary, they must be regarded as having had the intention to commit a lawful homicide or to lawfully to

inflict serious injury, and therefore not to have had the specific *mens rea* required for murder. In those circumstances the appropriate verdict is manslaughter. Moreover, the honesty of their belief as to the necessity to use such force as was in fact used falls to be tested subjectively.

45. It is uncontroversial that once there is sufficient evidence to leave the issue of self-defence to a jury then the burden of proof is upon the prosecution to show that the accused was not acting in self-defence. To establish murder in a homicide case, the prosecution must therefore (as a first limb) satisfy the jury beyond reasonable doubt that the accused was not acting in lawful self-defence, i.e., that in acting as he or she did they were not motivated to defend a legitimate interest (themselves, another, or their property), and further the prosecution must (as a second limb) also satisfy the jury beyond reasonable doubt that the accused used more force than was reasonably necessary in the circumstances. If the prosecution fail to come up to proof in respect of either limb then the accused is entitled to be acquitted. However, if the jury, being satisfied beyond reasonable doubt as to both limbs, considers that while objectively excessive force was used by the accused, it is possible that the accused used no more force than he/she genuinely, subjectively, believed to be necessary to defend themselves in the circumstances, then the jury must record a verdict of manslaughter rather than one of murder.

46. Counsel for the appellant in the present case sought to argue before the trial judge that while *Dwyer* makes clear that in assessing whether self-defence provides a full defence to a charge of murder, the amount of force used is to be objectively assessed, what the judgments in that case do not make clear is whether it is to be so assessed with reference to the circumstances as they actually were or with reference, as the appellant submits must be the case, to the circumstances as the accused person believed them to be. It was submitted that where, as in Mr. Crawford's case, there was the perceived threat of an attack, rather than an actual attack, the difference between the circumstances objectively viewed and as an accused subjectively perceived them takes on a far greater significance.

47. It was submitted to the trial judge, and reiterated before us, that assistance might be gleaned from developments in the law that have followed *Dwyer* and both the court below, and this Court, were referred to the present statutory position in respect of the use of non-fatal force in self-defence as provided for in ss. 18, 19 and 20 of the Non-Fatal Offences against the Person Act 1997 ("the Act of 1997") and in respect of the use of force, both fatal and non-fatal, in defence of a dwelling as provided for in s. 2 of the Criminal Law (Defence and the Dwelling) Act, 2011 ("the Act of 2011"), as well as case law in which self-defence in those contexts received some judicial consideration – *The People (Director of Public Prosecutions) v. Higgins* [2015] IECA 200; *The People (Director of Public Prosecutions) v. Quinn* [2015] IECA 308; *The People (Director of Public Prosecutions) v. O'Brien* [2016] IECA 146; The People (Director of Public Prosecutions) v. Brannigan [2017] IECA 72; *The People (Director of Public Prosecutions) v. Barnes* [2007] 3 I.R.130, and; *The People (Director of Public Prosecutions) v. Anthony Farrell* [2014] IECCA 42.

48. We were also invited to have regard to some academic commentary on self-defence arising in all three contexts, namely at Common Law, in circumstances to which the Act of 1997 applies and in circumstances to which the Act of 2011 applies. We have read this material and while we are grateful to counsel for bringing it to our attention, it should be observed that in two erudite articles, namely "What Is The Test For Self Defence In Fatal Cases" (2015) Irish Law Times 33(14), 212-216; and "A Critical Review of the Court of Appeal Interpretation of Self-Defence in the Non-Fatal Offences against the Person Act 1997" (2018) 28(3) Irish Criminal Law Journal 58, Dr David Prendergast, an Assistant Professor in the School of Law at Trinity College Dublin, casts doubt on suggestions in some of the judgments to date, including judgments of this Court, concerning self-defence in the non-fatal context that the test to be applied to acts of self-defence in that context is subjective at all stages. He argues (and it seems to us that he may be right, and that the language used in some of the earlier cases may have been infelicitous, although we are not required to rule definitively on this in the present case and therefore it may be for another appellate court to do so in a future case), that even in the case of non-fatal offences an element of objective assessment remains at the core of self-defence. The position is nuanced however. In making the assessment as to whether force was justified the jury is required to look at the surrounding circumstances through the eyes of the user of force, or put themselves in his or her shoes. That part of the test would seem to be unquestionably subjective. However, when it comes to assessing the proportionality of the quantum of force used the test is objective: There must be an objective assessment as to whether the amount of force actually used was necessary in the circumstances as the accused believed them to be. Crucial in this regard is the fact that "*belief*" in s. 18(1) of the Act of 1997 is mentioned only in respect of circumstances, nothing is said about belief in the reasonableness of the quantum of force used.

49. The test therefore is not whether the accused reasonably believed that the force used by him or her was necessary in the circumstances as he/she believed them to be. It is whether the objective observer would regard the amount of force actually used as having been reasonable, in the circumstances as the accused believed them to be. For the purpose of making that assessment, s. 1(2) of the Act of 1997 is engaged to the following extent. It is engaged with respect to the accused's asserted belief as to the circumstances obtaining, i.e. in considering whether he or she honestly held the asserted belief, even if it is as to a mistake of fact. What s. 18(1) requires is the identification of the circumstances which the accused genuinely believed to obtain at the time, not the circumstances that he might reasonably or justifiably have believed to obtain at the time. As Prendergast puts it, "*a mistake of fact only has to be sincere; it does not have to be sincere and reasonable in helping to exculpate the defendant*."

50. A similar scheme to that under the Act of 1997 was adopted in the context of s. 2 of the Criminal Law (Defence and the Dwelling) Act 2011 (the Act of 2011).

51. Thus, arguably, and without deciding it definitively, under both of the statutory schemes mentioned the proportionality of force used in response to a threat is to be assessed objectively but there is a subjective element that the assessment as to be conducted with

reference to the circumstances as the accused person believed them to be rather than in the circumstances as they actually were.

52. The appellant argues that to the extent that the approach in regard to fatal cases since *Dwyer* may have different, it is wrong. In his counsel's submission, if it were correct there would exist an unsatisfactory and unnecessary complex patchwork of defences involving self-defence between the common law, the regime under the Act of 1997 and the regime under the Act of 2011.

The Trial Judge's Ruling

53. The trial judge took time to consider the authorities and the articles handed into her but ultimately ruled that Dwyer, as it has been understood and applied to date, remains the law. In so ruling, she stated:

> *"All right. In relation to Mr McGrath's application to me yesterday with respect to the common law defence of self-defence, he has urged upon me that the law should now reflect -- the common law should now reflect what is set out in sections 18 of the Non-Fatal Offences Against the Person Act which portrays a test that the accused should be entitled to avail of the defence of self-defence if he acted as a reasonable person would in the circumstances perceived by him, so a subjectivity test being applied with respect to the circumstances perceived by the accused, but then an objectivity test being applied with respect to how the accused reacted. Now, Mr McGrath has relied on the Barnes decision in attempting to establish that the common law has so developed. When I read the Barnes decision with perhaps a more detailed eye than I had earlier in the day, it is clear that the Barnes decision does indeed refer to section 18 of the Non-Fatal Offences Against the Person Act but it refers to it in discussing and analysing what the lawful response of the deceased person in that case was entitled to be. Now, Mr Justice Hardiman engaged in that analysis in deciding whether an act of burglary was an act of aggression in itself and, as I've indicated, engaged in a very detailed analysis of what the deceased person, who was the owner of the house, what he could have done in terms of acting in self defence. Now, that's very apparent when looks at the actual detail of the judgment.*
>
> *Firstly, the relevant portion that Mr McGrath addressed my attention to is under a heading that refers to burglary and permissible responses to it. So this portion of the judgment wasn't relating to the acts of the accused person in relation to section 18 of the Non-Fatal Offences Against the Person Act. It in fact was engaged in an analysis of what the deceased person, who was the owner of the house, was entitled to do.*
>
> *Now, under that heading, as McGrath has already opened to me, there's reference at paragraph 65 where Mr Justice Hardiman states: "Before going further, it is necessary to note an anomaly in our law. There is a recent statutory codification of the law relating, amongst other things, to self-defence and defence of the property*

in the Non-Fatal Offences Against the Person Act and in particular sections 18 to 20 thereof." He states, however, "But this applies only, as the title suggests, to the use of non-lethal force. Where homicide has occurred, whether of the burglar or the proprietor in a case like this, one must still resort to the common law." But then he goes on to say: "But useful analogies can on certain aspects of the topic be drawn from the statute," and he then refers to section 18.

So it's clear that Mr Justice Hardiman is indicating that the common law is what still applies in respect of lethal force. Now, as I've indicated, the analysis that he engages in with respect to what appropriate force the proprietor of the building could have engaged in is then set out, and he deals with section 18 and he goes on to indicate what the person who was then deceased, the proprietor of the property, could in fact do. But I can't see anywhere in the judgment that there then in fact is an application of the section 18 of the Non-Fatal Offences Against the Person Act test to the actual case in point because, having -- dealing with the appropriate response and the permissible response of the person burgled, he then moves on at page 20 of the judgment to deal with, as he refers to, the person of the burglar. So, while there seems to be commentary in one of the articles that was handed into me yesterday that Barnes is authority for the proposition that the test set out in section 18 of Non-Fatal Offences Against the Person Act is now the developed common law test, I don't read the Barnes case at all as establishing that issue. There most certainly is a discussion in relation to section 18, but this is from the perspective of the permissible use of force by the actual deceased person, the proprietor of the property, so I don't find that in fact the common law is stated to have been developed by Mr Justice Hardiman in the Barnes case.

Furthermore, one of course has to remember that the charge from the trial judge in the Barnes case, who I assume is Mr Justice Carney, that he had charged the jury on the basis of Dwyer. Now, he made a significant error in law in terms of that, and he dealt with that, but in terms of the actual charge it was a Dwyer charge. If Mr Justice Hardiman was of the view that the Dwyer case had been superseded by section 18 of the Non-Fatal Offences Against the Person Act, well, obviously the result in Barnes wouldn't have been what it was. There would have been a retrial in relation to the matter, and that clearly isn't the case.

So I'm against Mr McGrath's proposition that Barnes has developed the common law. As I've indicated, section 18 is clearly referred to, but it's in a particular context of the response, the permissible response, of the proprietor of the property rather than that of the burglar. Dwyer was dealt with, and the appeal was not permitted.

Now, in another one of the articles, or perhaps indeed the same article, there's reference to sentiments expressed by Mr Justice O'Donnell in the Farrell case. […] In relation to the subjective element of self-defence, now, the academic writer emphasises that Mr Justice O'Donnell made reference to subjective tests and that it

wasn't very clear when I read the last paragraph of Mr Justice O'Donnell that isn't at all what he says. He indicates that what was at issue was the second limb of the test, which is obviously the subjective element of the Dwyer case which results in a reduction from murder to manslaughter rather than a full acquittal, and in the course of that Mr Justice O'Donnell indicates that the trial judge's direction was appropriate. So I don't necessarily see where the criticism is being relied in terms of the judgment of Mr Justice O'Donnell. So certainly the Farrell case from the Court of Criminal Appeal and the dicta of Mr Justice O'Donnell don't establish that the common law has changed.

If the common law had changed in such a significant manner, I would had expected that I'd have heard about it well before now. There are several judgments of the Court of Criminal Appeal that have been handed into me and that I'm aware of in terms of the defence of self-defence. I'm of the view that the common law has remained as is stated in Dwyer, and certainly it's on that basis that I'll be charging the jury. All right".

<u>*Analysis and Decision*</u>

54. Having considered the arguments on both sides, and the materials open to us, we agree with the trial judge. Though the position may be anomalous qua that under the two statutory schemes previously mentioned, it seems to us that counsel for the DPP is right in saying that there is no authority to support the submission advanced by counsel for the appellant. The approach taken by the Oireachtas in legislation enacted later than the common law rules at issue here is simply of no assistance in interpreting the Dwyer jurisprudence in which those rules were promulgated.

55. It is also valid to say, as counsel for the DPP has done, that the two statutory schemes concerned are specific to their respective contexts. The statutory scheme established by the Act of 1997 expressly applies, as its name suggests, to non-fatal offences and simply has no application to homicide cases. Similarly, a statutory scheme established by the Act of 2011 relates specifically to the use of force in connection with defence of a dwelling and the present case does not qualify in that respect.

56. It is instructive to consider in some detail the approach taken in *Dwyer*.

57. Both Walsh J. and Butler J. in *Dwyer* had placed emphasis on the wording of s. 4 of the Criminal Justice Act 1964 which provides:

"(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."

58. It follows from this statutory provision that in order to convict an accused of murder the prosecution must prove that the killing was unlawful and it must prove beyond reasonable doubt that the accused had the requisite specific intention for murder.

59. With that as the background, Walsh J. considered self-defence in the case of a homicide charged as murder, and observed:

> *"A homicide is not unlawful if it is committed in the execution or advancement of justice, or in reasonable self-defence of person or property, or in order to prevent the commission of an atrocious crime, or by misadventure. In the case of such self-defence, the homicide is justifiable and is therefore not unlawful. In such a case, where the evidence in the trial discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged: see the decision of this Court in The People (Attorney General) v Quinn [1965] I.R. 366. If the prosecution has not satisfied the jury beyond reasonable doubt that the accused had not believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection, the accused must be acquitted of any charge of unlawful homicide. To put it another way, but without suggesting that there is any reduction in the burden of proof on the prosecution, the homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection. In such a case he is entitled to a complete acquittal."*

60. At a later stage of his judgment, Walsh J. added:

> *"For the purpose of testing the question posed in the certificate, I must assume that it deals with the question of voluntary homicide, namely, that it was the intention of the accused to kill or to cause serious injury but that he did so by way of self-defence but went beyond what a reasonable man would consider necessary in the circumstances.*
>
> *If an accused person in such a situation only does what he honestly believes to be necessary in the circumstances, even though that involves the use of a degree of force greater than a reasonable man would have considered necessary in those circumstances, the accused has been guilty of an error of judgment in a difficult situation which was not caused by himself. Should he then be convicted of murder? In such a situation it is not contended that he should go free, as if it were a case of what I have described as full self-defence. If a person uses more force than he knows to be reasonably necessary, then he is guilty of murder. This presupposes a situation where he is justified in using some degree of force short of killing or causing serious injury. In the case of full self-defence the accused intends to kill or intends to cause serious injury but he does not commit any offence because the homicide is a lawful one. Therefore, his intention was to commit a lawful homicide or lawfully to inflict serious injury. Under our statute a person who kills another unlawfully as a result of an intention to do so is guilty of murder. Full self-defence*

permits such a degree of force, up to and including the infliction of death, as may be regarded as being reasonably necessary.

Our statutory provision makes it clear that the intention is personal and that it is not to be measured solely by objective standards. In my opinion, therefore, when the evidence in a case discloses a question of self-defence and where it is sought by the prosecution to show that the accused used excessive force, that is to say more than would be regarded as objectively reasonable, the prosecution must establish that the accused knew that he was using more force than was reasonably necessary. Therefore, it follows that if the accused honestly believed that the force he did use was necessary, then he is not guilty of murder. The onus, of course, is upon the prosecution to prove beyond reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary. If the prosecution does hot do so, it has failed to establish the necessary malice. If, however, at the same time it does establish that the force used was more than was reasonably necessary it has established that the killing was unlawful as being without justification and not having been by misadventure. In those circumstances the accused in such a case would be guilty of manslaughter. For these reasons I am of the opinion that the question raised in the Attorney General's certificate should be answered in the affirmative."

61. Butler J., saying essentially the same thing, put it in these terms:

"A person is entitled to protect himself from unlawful attack. If in doing so he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he kill his assailant. If he uses more force than may objectively be considered necessary, his act is unlawful and, if he kills, the killing is unlawful. His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention in doing the unlawful act was primarily to defend himself, he should not be held to have the necessary intention to kill or cause serious injury. The result of this view would be that the killing, though unlawful, would be manslaughter only."

62. We are satisfied from these quotations that the Dwyer jurisprudence as it has been interpreted heretofore remains the law. Insofar as a question may arise in a fatal case as to whether the quantum of force used was reasonable or not, that issue will fall to be judged according to the circumstances as they actually were, not according to the circumstances as the accused perceived them to be. However, an asserted claim by the accused that he or she used had no more force than they genuinely believed to be necessary falls to be subjectively tested, for the reasons stated by Walsh J. and Butler J. in their respective judgements. In that event, what is being tested is the genuineness of the mistaken belief being asserted. In our judgement it does not involve, and the judgment ought not to be interpreted as requiring, a re-consideration of the reasonableness of the quantum of force used in self-defence in light of circumstances as they were perceived to be by the accused.

63. In the circumstances we are not disposed to uphold grounds 1(a) and (b).

Ground 1(c)

Submissions on Behalf of the Appellant

64. This complaint relates to the following passage from the trial judge's charge which is said to be vague and confusing because of the trial judge's repeated use of the phrase "*appropriate verdict*". She instructed the jury that:

> *"If you accept what the accused said to the guards, having applied the directions which I have given you in relation to self-defence and intention, then the appropriate verdict to return are the ones that I have already gone through with you and I'm going to go through again. However, if you do not accept what the accused said to the guards but believe that it could reasonably be true, then you must return the appropriate verdicts, which I've already indicated and I will go through again. If you do not accept as true what the accused said to the guards or believe that it could reasonably be true but you have a reasonable doubt arising from it, then you must return again the appropriate verdicts which I will go through shortly and I've already indicated. If you do not accept what the accused said to the guards and it does not raise a reasonable doubt about his guilt for you, you still must return to the prosecution case as a whole and ask yourself whether on the basis of the prosecution evidence you are satisfied of the accused's guilt beyond reasonable doubt and whether the prosecution have disproved the defence of self-defence beyond reasonable doubt. If you are, then you must convict the accused of murder."*

65. Counsel for the appellant submitted that it is not it at all clear that if the jury were to accept that the appellant's account could reasonably be true, even if they did not believe it, they should give the appellant the benefit of the doubt. Regrettably, he says, the trial judge did not clearly explain what that meant and how it should affect their analysis of the appellant's conduct.

66. It was submitted that this is of significance as the appellant's case was that Mr. O'Connor had stood up causing the appellant to believe that he was about to be imminently attacked. There was a conflict of evidence about whether Mr. O'Connor had stood up before the accused giving him reason to believe that he was in danger of an imminent attack, and that he did believe that he was to be imminently attacked. In this respect, the accused's account was that Mr. O'Connor had stood up first[1], supported by the evidence of Mr. Twomey. This was consistent with the accused believing that he was in danger of imminent attack as Mr. O'Connor was angry over money he believed the appellant owed him for cocaine, and consistent with the appellant stabbing Mr. O'Connor in that belief.

---

[1] Memorandum of Interview 2, page 25.

67. Clear instruction on how to assess this account and the consequences that flowed form accepting that it could have reasonably been possible, even if not believed by the jury, were required given the centrality of the appellant's account to his defence in this case.

68. Anticipating an objection by the prosecution that no requisition had been raised on that point, it is urged on us that no tactical benefit could have accrued to the appellant from failing to do so, suggesting that the omission was due to oversight rather than being strategic, and asking the court to overlook the failure to requisition in circumstances where, the appellant says, there is a real risk that an injustice occurred due to the (alleged) deficiency in the judge's charge now being pointed to.

Submissions on Behalf of the Respondent

69. In response to this the prosecution say that the objection is without substance when the trial judge's charge is viewed in the round, and, as the appellant's side anticipated, they further make the point that no requisition was raised by the defence following the charge on the basis that the trial judge had failed instruct the jury how to consider the account provided by the accused, and in particular that, if the account provided by the accused could reasonably be true, they must give the accused the benefit of that account. The Court is asked to apply *The Director of Public Prosecutions v. Cronin (No. 2)* [2006] 4 I.R. 329 and refuse to entertain the point. However, if the Court feels it appropriate to engage with it, we are asked to reject it on the merits.

70. In urging that we should apply the *Cronin (No. 2)* jurisprudence the respondent submitted that no explanation had been put forward for why the point was not addressed either when the trial judge invited submissions in advance of her charge, or after the charge.

Analysis and Decision

71. We do not regard the issue as being properly before us having regard to the failure to raise a requisition and the *Cronin (No. 2)* jurisprudence. Even if there was substance to the appellant's complaint, and we consider that there is none, it has not been demonstrated that any deficiency in the charge was so grave and far reaching as to raise a concern that there is a real risk that an injustice was done. Counsel for the respondent is correct in saying that the charge must be looked at in the round. The trial judge's charge was detailed and thorough. The ingredients of murder, and the circumstances in which a possible alternative verdict might arise for consideration, were clearly set out by her. We have already said that we are satisfied that the instruction on self-defence, both full and partial, was appropriate. The need for the jury to be satisfied beyond reasonable doubt as to all ingredients of the offence before convicting of murder, was repeatedly emphasised. It followed that if they had a doubt on any matter arising from any aspect of the evidence, including the appellant's account as given to gardai, they could not convict of murder.

72. Moreover, in the brief passage relied upon to ground the present complaint, the instruction to bring in "*the appropriate verdict*" was not given in a vacuum. Firstly, it was immediately proceeded by a passage in which the trial judge said:

> *"So, I now wish to return to the interviews conducted with the accused and the manner in which you approach them, and I said to you yesterday that I would do this. Now, you must always remember of course the burden of proof rests on the prosecution and that the requirement [is] on the prosecution to prove every fact that you have to determine to your satisfaction beyond reasonable doubt and also the requirement for you to give the accused the benefit of the doubt if the prosecution fail to prove a matter to you so that you are satisfied of it beyond reasonable doubt. The accused in his interviews asserts that he acted in self-defence and that he did not intend to kill the deceased. As already adverted to, the question of whether he intended to cause serious injury to Mr O'Connor is not specifically dealt with in his interviews with reference to instead that he just meant to stab Mr O'Connor so it's a matter for you to determine the import of that and I've already referred you to that."*

Secondly, it was an instruction stated to be expressly referable "*to the directions I have given you in relation to self defence and intention*." The judge had in that context clearly outlined the possible verdicts that might be recorded if full (i.e. lawful) self-defence was accepted, if partial self-defence (i.e., using excessive force but no more than was genuinely believed to be necessary) was accepted, and if the jury were to reject that self-defence was applicable in any form.

73. The judge also said in the short passage complained of that she would return again to the issue of the verdicts that might be open to the jury, and she duly did so. She did this towards the end of her charge, stating:

> *"[S]o, in summary, what are the verdicts that are available to you? If the prosecution have not disproved the defence of self-defence to you and you are of the view that the amount of force was reasonable and proportionate in the circumstances […] then you must acquit the accused entirely. He is entitled to the full defence of self defence. If the prosecution have not disproved the defence of self defence to you, but you are of the view that the amount of force used by the accused was excessive in the circumstances, although you are of the view that the accused himself did not honestly believe it was excessive at the time, then he is not entitled to the full defence of self defence, but he is entitled to a partial defence and that has the implication that you must return a verdict of not guilty of murder but guilty of manslaughter. If you are of the view that the prosecution have disproved the defence of self-defence to you, but in relation to the intentional element of murder, you are not satisfied beyond reasonable doubt that the accused intended to kill or cause serious injury to the deceased, then you must return a verdict of not guilty of murder but guilty of manslaughter. If you are satisfied beyond reasonable doubt that the accused murdered the deceased and that the defence of self defence*

has been disproved beyond reasonable doubt that the prosecution then you must return a verdict of guilty of murder."

74. Accordingly, the phrase "*appropriate verdicts*" to which objection is taken, when considered in the context of the charge the whole, taking into account what had been said already up to that point, and what was said after the passage complained of (as just set out), was in no sense vague and confusing. The jury received a clear and detailed explication of the possible verdicts and the circumstances in which they might arise. There is no possibility in our view that the instructions would have been regarded as vague and confusing.

75. Moreover, everything said was circumscribed by the overriding instruction, clearly articulated several times during the charge, that the jury had to be satisfied beyond reasonable doubt as to each of the ingredients of an offence under consideration before they could convict of it.

76. Having considered the entirety of the judge's charge we are in no doubt that it was entirely adequate and that the complaint being made that it was vague or confusing as to how the appellant's account was to be treated is simply not borne out.

77. We consider that it is of significance that the appellant was represented at trial by three highly experienced lawyers, and that a very focussed defence was being run. The implication that the alleged deficiency in the charge now being highlighted could have been simultaneously "*overlooked*" by all of them in the circumstances, is in our view fanciful. The fact of the matter is that three highly experienced defence lawyers listened to the charge and it struck none of them at the time that it was in any way inadequate. That, in our view, was because it manifestly was not inadequate. The failure to put forward any cogent reason for why the complaint now sought to be relied upon was not ventilated in a requisition is, we consider, highly telling.

78. Accordingly, we reject ground of appeal number 1(c).

Ground 2

79. This ground advances a rolled-up plea that the verdict of the jury was unsafe and unsatisfactory. The appellant's written submissions say nothing more than that "*the second ground of appeal, in referring to the safety and satisfactoriness of the verdict in this case, addresses what are submitted to be the consequences of the errors complained of in the first ground of appeal.*" In circumstances where we have rejected the alleged errors complained of in ground of appeal number 1 as being without substance, ground of appeal number 2 falls away.

Conclusion

80. The appeal must be dismissed.