THE COURT OF APPEAL

[212/2015]

Birmingham P.

Mahon J.

Hedigan J.

THE PEOPLE AT THE SUIT OF THE DPP

RESPONDENT

V.

PAULA FARRELL

APPELLANT

JUDGMENT of the Court delivered on the 20th day of June 2018 by Birmingham P.

1. On 17th July 2015, the appellant was convicted by a unanimous jury, after a trial that had lasted 16 days in the Central Criminal Court, of the offence of murder. She had stood trial charged with the murder of Wayne McQuillan on 1st January 2014. A number of grounds of appeal were formulated and were the subject of written submissions. However, at the start of the trial, counsel on behalf of the appellant indicated that there was one issue and one issue only in the appeal, namely, that the trial judge had erred in refusing to allow the partial defence of provocation be considered by the jury.

2. The background to the case is that the appellant lived at an address at Rathmullen Park in Drogheda. At the time of the events in issue at the trial, she was 40 years of age. She had started going out with Wayne McQuillen. He was about 30 years of age at the time of his death, and at that stage they had been in a relationship for about a year. At the time they started going out together, he had been living at home with his parents. He was an only son. He began to spend time at the home of Ms. Farrell and gradually the periods that he would spend at her home would increase. Also living in the home of Ms. Farrell was her young son who was aged 7 or 8 at the time of the incident.

3. It appears that both Ms. Farrell and Mr. McQuillen had a tendency to drink to excess. In particular, they were both drinking on New Year's Eve, and some time around 1.30am or 1.45am on New Year's Day in the course of an incident, the appellant took a large kitchen knife from a block of knives that was in the kitchen and then stabbed Mr. McQuillen four times. Mr. McQuillen was able to make his way to the door of the house. There were a number of people around and he shouted at some teenagers who were outside to get an ambulance, that he had been stabbed. Ms. Farrell came to the door and told the people who were around not to call an ambulance and then went back into the house and began to clean up and an ambulance came to the house. Gardaí were quickly at the scene and there was interaction between Ms. Farrell and a number of Gardaí at her own home and the nearby home of her mother to which she was initially brought. The trial court heard details about that interaction. Within a short period, the appellant was brought to the local Garda station where she was detained and questioned. At trial, the contents of a number of memoranda of interview were put in evidence. At trial, it was never seriously in dispute that Ms. Farrell had caused the death of Mr. McQuillen, but the issues that arose were to identify what were the legal consequences of her actions. Among the many issues canvassed in the case were whether the prosecution could prove the requisite intent for murder i.e. an intent to kill or cause serious injury; the question of diminished responsibility; self-defence; what was described as full self-defence and partial self-defence and provocation.

4. When all the evidence in the case had concluded, it was a case where the accused gave evidence on her own behalf and where the defence also called expert evidence, as they had to do given the reliance on the defence of diminished responsibility, counsel on both sides and the trial judge had a discussion in relation to the issues that arose before the prosecution and defence delivered their closing speeches and before the charge of the trial judge. A number of topics were canvassed, however, as already indicated, only the issue of provocation remains live. In that regard, counsel for the accused submitted to the trial judge that his client had suffered a sudden and temporary loss of self-control in relation to the conduct of Wayne McQuillen and was unable to prevent herself from committing homicide. He drew attention to the fact that she had talked at one point in the Garda interview about being "provoked". At that stage, counsel began to make a reference to the evidenced of Dr. Brenda Wright, consultant forensic psychiatrist, who had been called as a defence witness to deal with diminished responsibility. The judge responded to that submission by asking counsel where the evidence of that was in the totality of the evidence in the case. Counsel said that it flowed from the accused's own description of events in several points along the way, her description of the events in her own evidence, direct and under cross-examination. It also flowed from the Garda interviews. Counsel said that in point of fact, his client talked at one point in the Garda interview about being "provoked". At that stage, counsel began to make a reference to the evidence of Dr. Brenda Wright, consultant forensic psychiatrist who had been called as a defence witness to deal with diminished responsibility. Counsel then said:

> "The provocation flows from this: that there is very clear evidence that it was what occurred in terms of the stabbing of Mr. McQuillen, was almost instantaneous response to what the accused says preceded that in terms of the physical and sexual assault upon her. And she talks about it in such a way and gives evidence in such as way that it seems to me that it is open to the jury to conclude that she suffered a sudden and temporary loss of self-control in response to what was

being done to her. And I say, therefore, that the issue of provocation flows in that particular way."

The trial judge indicated that he might have to come back to counsel for specifics, adding that he was conscious of the provocation issue when listening to the evidence of the accused and when reading the interviews, and that while he might have been wrong, he had not seen anything in the material which could found a defence of provociation.

5. Counsel for the prosecution addressed, first, the question of self-defence, submitting that the essential ingredients were not there for that issue to be considered by the jury. He then turned to the issue of provocation and submitted that there was no basis whatever for allowing provocation to be a live issue. He said it would be perverse on the evidence that they had had in the case to allow the jury consider provocation. He then quoted at length from the decision of the Court of Criminal Appeal in DPP v. Davis [2001] 1 IR 146. The passage that he quoted concluded:

> "[b]ut before leaving the issue to a jury, the judge must satisfy himself that an issue of substance, as distinct from a contrived issue or a vague possibility has been raised."

Counsel then submitted:

> "[t]hat is the legal test, and on the evidence as emerged in this case, it would be perverse to leave a question of provocation open because there is no evidence of a sudden and temporary loss of self-control 'rendering the accused so subject to passion as to make him or her for the moment not master of his mind'."

Counsel submitted there was no evidence that the loss of self-control was total, no evidence that the reaction came suddenly before there was time for passion to cool, and he reminded the judge that the burden on the accused was not discharged merely by pointing to evidence that the accused lost his or her temper or merely that the accused was easily provoked or was drunk. Counsel submitted that the evidence was of a calculated series of events in which the accused thought through each step. She made a decision that she would not leave the house because her son was upstairs; she went to the sink where the knives were and picked one up, having thought through before that, in her own words "I was thinking, I'll kill you". The accused then stood in front of Mr. McQuillen, standing in the doorway, and, as she said herself "I knew what I was doing when I stuck the knife in him". Counsel submitted that it would be perverse in the face of the evidence in the case to leave the issue to the jury. A finding by the jury that there was provocation would be perverse and would involve flying in the face of the evidence that was actually given.

6. In reply, counsel for the defence drew attention to an extract from the memoranda when the accused had been asked the question "and do you think you started it?" and answered "yeah, I don't remember, but going on all past arguments I say that it was me that started it. He probably provoked me". He said it was for the jury to consider whether the situation was, as contended by the prosecution, a thought-through calculated response to what had been done to the accused, or whether the reality was actually quite different. It was for them to conclude that the reality was a stabbing occurring within seconds, not minutes or otherwise, of an incident of which the accused says that she is physically and sexually attacked and responded by getting up from the seat, going and getting the knife from the block and inflicting the stab wounds.

7. The judge decided to consider the matter overnight, though he indicated that his present disposition was that while there was a rational basis for self-defence, there was not a foundation for provocation. In fact, the judge's position did not change overnight in relation to provocation. He ruled as follows:

> "[i]n relation to the question of provocation, I am satisfied there to refuse leave to raise that defence with the jury. It seems to me that in the present case, it would be fanciful to simply seek to hang one's hat, so to speak, on the use of a phrase to the effect that there was provocation by the accused at any given stage. One cannot magnify the use of a particular word or an assertion, indeed, of that kind into a substantive reality which is what we are talking about under the Davies decision. We are not talking about something fanciful. We are not talking about something notional and, as it were, I use this rather colloquial term, the very reference to provocation does not itself trigger, so to speak, if it can put it this way, entry of provocation as a defence into the case and I do not believe, looking at the evidence in its totality, that there is a rational basis for doing so in this case."

8. In moving this appeal, counsel on behalf of the appellant says that the judge focused excessively on the sole reference to provocation made by the accused when interviewed, and that instead, one should be having regard to all the evidence in the case.

9. To provide context for consideration of the provocation issue, it is necessary to say something more about the background and personal circumstances of the appellant and what she had to say at different stages about the events of New Year's Eve into the early hours of New Year's Day. The jury heard a number of accounts of her life history, it was addressed during the course of interviews conducted by Gardaí, was explored by her in some detail when giving evidence at trial and also addressed by three expert witnesses, two consultant psychiatrists, one called for the defendant, and one by the prosecution, and a psychologist called by the defence.

10. What emerged is that Ms. Farrell was born and reared in Drogheda, and with the exception of a short period which she had spent in London aged 16/17 years, had lived all her life in County Louth. She was the eldest in a family of six. She stated that she had been sexually abused by her father when she was between seven and 14 years. On one occasion, the abuse went to the extent of penetrative intercourse. Ms. Farrell recited that she disclosed the abuse when aged 14, her father left the family home in the aftermath of her disclosure and went to Britain.

11. She studied in primary school and secondary school in Drogheda, leaving without any formal certification in second year. An IQ test conducted by Dr. Kevin Lambe, psychologist, produced a score of 70, abnormally low.

12. Soon after disclosing abuse, when aged 14, the appellant "hit the drink". She explained that she drank to block her problems out. Drinking continued throughout her late teens into her 20s and 30s and up to the time of the incident giving rise to the trial at a rate of nine or ten cans of cider per day. She was the mother of three children, two girls whose father M., a young man, a few years older than she was, was the person with whom she had gone to London for a short period. Alcohol was a significant feature of their relationship which ended when M is said to have become involved with the appellant's sister.

13. When she was 31, she had a son with an older gentleman, P. This son was aged eight at the time of the events in issue, and indeed was asleep upstairs in bed when violent events developed below him. Again, heavy drinking was a feature of this relationship.

14. She was introduced to Mr. McQuillan on an occasion that she was out drinking in a public house with her sister and her sister's

partner. A relationship commenced which developed quite quickly. Over a period of time he began to spend considerable periods in her home. She described a typical day in their lives as getting up, Mr. McQuillan going back to his own home to shower and change, returning for a meal which she would have prepared and cooked in the middle of the day, cleaning up afterwards and then settling down to start drinking in the middle of the afternoon. Drinking would continue until late into the evening or indeed until the early hours of the following day.

15. Asked by Gardaí to describe the events of New Year's Eve/New Year's Day, she explained that at one stage, she and Wayne McQuillan were conscious of the fact that Wayne McQuillan Snr., father of the deceased, was alone and that was regarded as not appropriate for the ringing-in of the New Year. In those circumstances she, Wayne McQullan and her son went to visit Mr. McQuillan's father, travelling by taxi. They returned home at approximately 11.30 pm and then played pool in the kitchen for a period. After midnight, the child was put to bed and herself and Wayne McQuillan sat at the kitchen table and began drinking again. She said that the plan was to "go on the beer" and to "go on the beer" again on New Year's Day.

16. An argument developed. When Ms. Farrell was asked what started the argument she said she did not know but that she presumed that it was she who did, as she was the one who always started it, adding: "Sometimes he provokes me. He would be "targing" at me." "Targing" was Ms. Farrell's own word for throwing insults. A slightly unusual feature of this case is that Ms. Farrell has a tendency to make up and then deploy her own words. Other examples are "punnets", used to describe both a tray of eight cans of cider and a pack of 200 cigarettes, and "tilling", her word for grooming/inappropriate touching. The accused said that she probably hit him with a "punch fist", adding "He must have annoyed me to hit him, but I didn't mean to kill him." She then continued:

> "[t]hen we were standing in front of each other and then he pushed me and I landed on the chair. Then he got in top of me and put his hands around my neck and started to choke me."

She said that he was not saying anything but that he had an evil look on his face, a mad look, that he banged the back of her head off the wall behind her chair. She said that he banged her head off the wall.

17. The question and answer continued:

> Q. Where did he grab you?
>
> A. By my hair.
>
> Q. Were you saying anything?
>
> A. I was shouting at him to get off of me.
>
> Q. What were you thinking then?
>
> A. I was thinking "I'll kill you".
>
> Q. Why were you thinking that?
>
> A. Because he was killing me, well not killing me, but hitting me. I just wanted it to stop, I didn't want him to get the better of me.
>
> Q. What does "get the better of you" mean?
>
> A. I didn't want him to kill me. I gave as good as I got. I got away from him and he was standing at the kitchen door when I got away from him. I went to the sink in the kitchen and I grabbed a knife out of the knife-block and walked over to him and stuck it into him. I stuck it into him on the right hand side.

[at this stage the memo notes that the prisoner stood up and motioned in a downward stabbing motion to the upper left-hand chest area of Garda Sweeney]

That's where I struck it into him. I could feel it going in, not all the way in.

> Q. Where were Wayne's hands?
>
> [At this stage, the memo notes the prisoner motions to hands down by her side]
>
> A. His hands were like this, I think. I think I stabbed him twice but I can't remember where I stabbed him the second time. I have been told he was stabbed four times but I don't remember them times.
>
> Q. What was said between you?
>
> A. Nothing. I couldn't believe I had done it.
>
> Q. So what did Wayne do?
>
> A. He was holding his chest and he turned around and he walked towards the door."

18. In terms of the provocation issues, the interviews might be seen as significant for what was not said as for what was said. There was absolutely no suggestion at any point of any form of sexual assault whatever. It must also be noted that this was not an omission perhaps attributable to the fact that she wasn't asked a specific question. In a situation where according to a number of bystanders Mr. McQuillan had his trousers below his knees when he emerged from the house, questions were put to Ms. Farrell during the course of her detention about the significance of this. In the course of the first interview she was asked

> "Q. When you went out to Wayne and he was out the front, did you see that he had the trousers below his knees?
>
> A. I don't know why that was. I heard they were down but I don't remember seeing that. Sometimes he goes for a piss out the back and maybe didn't close them right.

Q. What was he wearing?

A. Runners, jeans, shirt."

19. The issue was addressed in even more unequivocal terms in an interview that took place on the morning of the 2nd January. On that occasion she was asked, "[d]id Wayne try and come on to you in the house in any way?" She answered "[t]here was nothing sexual happening, nothing like that at all. Definitely not."

20. At trial, initially in the course of a voir dire and then in the presence of the jury, the appellant gave an account of events that included a claim that she was the subject of a sexual assault amounting to rape. As one would expect, Ms. Farrell was pressed strongly in relation to this by prosecution counsel who queried why such a very serious allegation against the deceased was emerging late in the day. Counsel, it may be said, had sought to exclude the evidence, invoking Part V of the Criminal Procedure Act 2010 for that purpose, but when that effort was unsuccessful questioned the then accused on the issue closely. The appellant, in the course of her evidence, said that the first person she told about that assault was her sister Siobhan and that occurred when they were working on putting together a life history of the accused, a task which the solicitor for the defence had asked to be undertaken. Later, she told Dr. Kevin Lambe, psychologist, Dr. Breda Wright, psychiatrist, and Dr. Sally Linehan of the Central Mental Hospital. All of these disclosures took place a year or more after the interviews with Gardaí.

21. The trial judge, having given a first inclination of his thinking on the issue when the discussion with counsel concluded, ruled on the matter the following morning in the terms that we have seen.

22. It appears that the judge may, to some extent at least, have been focusing on the fact that the accused had said at one stage in her Garda interviews that the deceased had provoked her. In doing so, the judge may have been taking a lead from defence counsel who had prayed in aid the remark made by her client.

23. This Court is in agreement with the trial judge that little enough significance attaches to the remark about provocation. The remark made was almost in the nature of a passing remark, and wholly absent from it is any suggestion of a sudden and complete loss of self-control so that Ms. Farrell was no longer master of her own mind, to use the language of earlier authorities. The Court agrees that to permit the issue of provocation be considered by reference to the fact that the word "provocation" was used would, in all the circumstances of the case, indeed have been fanciful. However, before shutting the door finally on the potential partial defence, it is necessary to review some of the other evidence in the case.

24. A significant feature of the appellant's background is that she says that she was the victim of a prolonged and serious sexual abuse as a child. She would say that that has had a profound and enduring impact on her throughout her life and she would link the excess drinking to it. It is interesting to observe that while they were commenting in the context of the issue of diminished responsibility rather than provocation, all three expert witnesses called during the trial were of the view that the appellant had experienced post-traumatic stress disorder as a result of her childhood experiences.

25. In terms of the events that occurred in the early hours of the morning, the fact that the deceased emerged from the house with his trousers down merits consideration. One would expect any decider of facts to view the question of a sexual assault with considerable scepticism as it emerged so long after Ms. Farrell had emphatically denied to Gardaí that anything of the sort had occurred.

26. However, the trousers opened is possibly consistent with sexual activity. The alternative canvassed with Ms Farrell during interview that perhaps Mr. McQuillan had gone outside to urinate but had failed to pull his trousers up properly is not really terribly convincing.

27. Garda Leonard, one of the first Gardaí to the scene, gave evidence of the fact that he observed that the appellant had a bump on her forehead. Dr. Mara Marillo, an on-call medical doctor who visited Drogheda Garda Station at 7 am on the 1st January, shortly after the appellant had been brought there, gave evidence of observing a scrape or excoriation on the face of the appellant. A statement from another doctor, Marlene Meaney, was read pursuant to s. 21 of the Criminal Justice Act 1984. It contained the following passage:

> "[t]here were two areas of slight bruising or swelling on the left side of her scalp and also the right side of the scalp. [The accused] had a mark on her right cheek which appeared to be a bite mark. She had a large vertical bruise on the right side of her neck. She had bruising and tenderness above her left collarbone and a small area of bruising on the top of her left breast bone. I saw early signs of on both her upper arms. Finally, I saw an abrasion on her left knee. These injuries were all fresh injuries."

28. The reference to a bite mark on the face attracted the interest of the defence, and understandably so, as a bite to the face might give rise to a strong and violent reaction. However, the prosecution point out that the finding by the doctor is quite qualified "a mark on the right cheek which appeared to be a bite mark". Ms. Farrell has never claimed to have a recollection of having been bitten. One might expect that someone, even someone who was intoxicated, who was bitten on the cheek would be conscious of this at the time and would remember it.

29. While there are aspects of the evidence relating to the 31st/1st which are of interest to the defence, what is absent from the interviews with Gardaí and from the evidence at trial is any clear statement or any obvious suggestion of a sudden and total loss of self-control. One does not expect a suspect being interviewed in a Garda station, or indeed an accused when giving evidence at trial, to use the language of the McEoin decision and other authorities but one would expect to be given the sense that the activities of the deceased had a significant and dramatic effect on the accused causing him or her to act as he or she did because of being so overwhelmed that he or she could not stop themselves acting in that way. Such language or any form of equivalent language is absent from the various accounts of the incidents given by the appellant.

30. In these circumstances it was not surprising that prosecution counsel would have argued against allowing the partial defence of provocation be considered, and to have argued that a conclusion that the appellant was provoked in the technical legal sense of that term would be perverse, referring to DPP v. Davis [2001] 1 IR 146 in that context. That is really the question we have had to ask ourselves. In doing so, we remind ourselves that the threshold is a low one but also that there is a threshold. We remind ourselves too that the role of the trial judge is to rule on whether there is any evidence of provocation which, having regard to the accused's temperament, character and circumstances, might have caused her to lose control. DPP v. McEoin [1978] IR 27. We note that in DPP v. Halligan, a decision of the Court of Criminal Appeal of the 13th July 1988, O'Flaherty J. had formulated the test in terms of whether there was any evidence, any evidence at all fit to be considered by a jury.

31. With considerable hesitation we have concluded that it cannot be said that if a jury returned a verdict of manslaughter by reason of provocation, that they would necessarily be perverse in doing so. Despite the obvious difficulties facing the defence, we feel there is just about enough for the matter to have been considered by the jury. Among the factors to which we have regard are the accused's background and temperament, her "baggage", to use the rather unattractive language of the earlier authorities, as a victim of child sex abuse whose response to that was to seek comfort in alcohol, who has experienced a number of difficult relationships with different men and she would say that those difficulties were contributed to by her childhood experiences, the fact that she is a person of very low intelligence, that she was intoxicated having consumed very considerable quantities of alcohol. We have regard too to her account of the incident involving physical and sexual violence. In our view, it is for a jury to determine where the truth lies in relation to the claims of physical and sexual activity, though we have already referred to factors that might cause a trier of fact to be sceptical, in particular about the claim involving untoward sexual activity on the part of the deceased. However, there are aspects of the evidence which might lead a jury to the view that the accused's narrative was not completely without substance.

32. Overall, we have come to the conclusion that the state of the evidence at the conclusion of the trial was such that the judge should have left the issue of provocation to the jury.

33. In those circumstances we will therefore quash the conviction and order a retrial.