21st ANNUAL NATIONAL PROSECUTORS' CONFERENCE SATURDAY 14th OF NOVEMBER 2020

IMPLICATIONS OF THE SUPREME COURT JUDGMENT IN *DPP V MCNAMARA* FOR THE DEFENCE OF PROVOCATION

1. Introduction

1.1. A number of years ago at this conference, Brendan Grehan SC delivered a paper entitled "*Provocation - Still a Graveyard for Judges*". The title to the paper invoked the line frequently used by Mr Justice Paul Carney when charging a jury in relation to the partial defence of provocation.

1.2. The line reflects the difficulties which trial judges have encountered, over the years, in explaining the defence and the high number of successful appeals as a result of identified shortcomings in that explanation.

1.3. In a somewhat barbed remark made by the Court of Appeal in 2015[1], it was stated that the difficulties experienced by trial judges in these cases was not due to any uncertainty in the law but rather had *"typically been due to the non-application of well-established principles…"*.

1.4. Whether this is a fair observation may be a matter of debate. What is clear is that, in more recent years, provocation is a defence which is frequently raised but rarely successful other than to provide a ground of appeal and retrial. In an Irish Times review[2] of the 124 murder trials which took place in the Central Criminal Court between October 2013 and December 2018, provocation had been raised in 31 cases but only resulted in a reduced verdict of manslaughter in four of those cases. During the same period, there were 13 appeals relating to the defence, in which seven of the appellants were successful in having their convictions quashed and a retrial ordered.

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[1] *DPP v Murphy* [2015] IECA 314.

[2] *Irish Times, 8 December 2018*

2. The Law prior to *DPP v McNamara*

2.1. Provocation is a common law defence and therefore its elements were to be found in the common law of England and Wales which was carried over into the law of the Free State in 1922.

2.2. Under that law, the actions of the accused were to be assessed by reference to the response of a *"reasonable man"* in the circumstances. In *R. v Welsh*[3], Keating J. stated:

> *"The law is that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to the lead the jury to ascribe the act to the influence of that passion."*

2.3. This was the law as it was understood to apply in this jurisdiction until 1978 when the Court of Criminal Appeal decided the case of *The People (DPP) v MacEoin*[4]. There, the Court in quashing a conviction for murder, decided it would be appropriate to address the issue of how a jury on any retrial should be charged. This led to a critique of the *"reasonable man"* test with the Court concluding that the objective test was *"profoundly illogical"* and should be declared to be no longer part of our law. Thus, the Court ruled, the enquiry to be made by the Judge first and then by the jury must centre *"not on the reasonable man but on the accused and on his reaction to the conduct or words which are said to be provocative"* (the subjective test).

2.4. While the Court in its Judgment did add the qualification that consideration should be given to the question of whether the provocation bore a reasonable relation to the amount of force used, subsequent decisions such as *DPP v Kelly*[5] held that this went only to the credibility of the defence and did not describe a material element thereof.

2.5. Thus, *MacEoin*, as subsequently interpreted, became associated with a wholly subjective test for provocation in Irish law.

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[3] (1869) 11 Cox C.C. 336.

[4] [1978] IR 27.

[5] [2000] 2 IR 1.

3. Background to the Appeal in *McNamara*

3.1. The facts of this case were somewhat unusual as they arose out of a territorial dispute between members of rival motorcycle clubs in County Limerick. The Accused was a member of the Caballeros Motorcycle Club, largely based in Limerick City, whereas the victim, Mr O'Donoghue, was a member of the Road Tramps Motorcycle Club. The latter had their clubhouse located in a rural part of the County not far from where the Accused himself lived.

3.2. On the evening prior to the murder, the Accused and his wife were set upon by three member of the Road Tramps club as they left a pub in Doon, Co. Limerick. The Accused had his waistcoat bearing the distinctive Caballeros *"colours"* forcibly taken from him, ostensibly, as a punishment for socialising in *"Road Tramps"* territory. Sometime shortly after this incident, other members of the Road Tramps club drove by the home of the Accused brandishing a firearm and issuing threats.

3.3. On the following day, the Accused left his home armed with a sawn-off double-barrelled shotgun and drove to the Road Tramps clubhouse nearby. At this time, the Accused had become aware that his stepson was involved in the pursuit of a car driven by one of the assailants from the previous evening and that it was travelling in the direction of the Road Tramps clubhouse.

3.4. When the Accused arrived outside the clubhouse, he observed the victim and another man standing at the gate waiting upon the arrival of the Road Tramp who was being pursued. The Accused exited his vehicle and shot the victim at close range.

3.5. At trial, the Defence sought to have the issue of provocation left to the jury, relying upon the events of the previous evening as provocation. Immediately, it can be seen that the defence were in some difficulty in this, in view of the significant passage of time and the fact that the victim had not, in any way, been involved in the events of the previous evening. The Trial Judge declined to allow the defence of provocation to be considered,

ruling that certain essential elements of the Defence were missing on the evidence.

3.6. On that ruling, the Accused appealed to the Court of Appeal who dismissed the appeal, ruling that to have permitted provocation to be considered in this case would have involved a dramatic expansion of the traditional law on provocation.

3.7. The Appellant sought leave to appeal arguing, in effect, that the wholly subjective nature of the defence of provocation meant that there was essentially no role for the Trial Judge in acting as a filter for the defence and that any question of passage of time went to the credibility of the defence only and was therefore to be assessed by the jury.

3.8. The Supreme Court in granting leave to appeal, identified four points of general public importance in relation to provocation, namely:

(i) Must provocation always come from the victim;

(ii) To what extent can background circumstances found or inform the defence;

(iii) Should the defence contain any objective element;

(iv) Is there a role for the Trial Judge in excluding the defence from the jury.

3.9. The Court in a single judgment delivered per Charleton J., on the 26th of June 2020[6] dismissed the appeal but took the opportunity to clarify and restate various important elements of the Defence.

4. The judgment in *McNamara*

4.1. The judgment contains an impressive analysis of the history of the defence of provocation with particular reference to the requirement for an objective standard in relation to the behaviour of the accused. This analysis goes up to *MacEoin* and beyond.

[6] [2020] IESC 34.

4.2. Developments in other common law jurisdictions are noted reflecting either the application of objective standards of behaviour or the abolition of the defence in its entirety.

4.3. Ultimately, the Court concluded that objective elements have never been *"entirely abandoned in this jurisdiction"* from the application of the defence of provocation and while provocation required the loss of self-control to be *"genuine and not contrived"*, this was something which had to be judged on the basis of *"societal standards"* as without such standards there was nothing for the jury to apply.[7] This reasoning is reflected in the concluding section of the judgment which outlines in some detail how a jury should be instructed with regard to the defence. However, before dealing with this aspect of the judgment, reference will be made to how the Court dealt with the other three issues set down for argument in the case.

5. Role of the Trial Judge

5.1. In respect of the role of the Trial Judge, the Court noted that in *MacEoin*, the Court of Criminal Appeal expressly acknowledged that the Trial Judge had a role in deciding whether or not it was appropriate for the defence to be considered by the jury. Reference was made to the *"air of reality"* test applicable in the Canadian jurisprudence for the purpose of determining whether any defence should be considered by a jury.[8] The burden was on the accused to produce some evidence *"capable in law of amounting to provocation"*. The threshold to be passed was formulated in the following terms, namely:

> *"If the jury would be acting perversely in finding provocation, the Judge cannot leave the defence for their consideration"*.[9]

5.2. There is nothing new about formulating the threshold for the defence of provocation in these terms. The Court of Appeal in the case of *DPP v Paula*

[7] See paragraph 39.

[8] See *R v Cairney* (2013) SCC 555 and *R v Pappas* (2013) SCC 56.

[9] See paragraph 52.

Farrell[10] had previously held that the defence should not be left to the jury if a reduced verdict of manslaughter would on the evidence, be a perverse verdict.

6. Third party

6.1. Again, on this aspect of matters, the Court confirmed what was understood to be the law, namely, that the provocation must emanate from the victim. The victim in this case was an entirely innocent bystander who had no connection with the events of the previous evening. The submission that he was somehow associated with those events through his membership of the same motorcycle club was roundly rejected by the Court:

> *"Any sense that simply because there are gangs or groups, friendly or criminal, genuine or illusory, devoted to good works or to sport, or to charity, or to pursuing ill will, cannot matter and could never been an acceptable application of any defence of provocation".*[11]

6.2. The judgment acknowledges that there are exceptions to the basic rule, namely, where the accused in genuinely mistaken as to the source of the provocation or where, as the result of a misdirected blow, someone other than the intended victim is killed. These exceptions had always been recognised as part of the jurisprudence.[12]

7. Passage of time

7.1. The judgment records that traditionally the defence has required immediacy in terms of the response on the part of the accused, in other words that the reaction must come suddenly *"before there was time for passion to cool"*.

7.2. However, in this regard, the Court noted that there was some scope for flexibility in cases such as domestic abuse where, provocative incidents

[10] Unreported, Court of Appeal, 20th June 2018, Birmingham P.

[11] See paragraph 44.

[12] See, for example, the dictum of Fennelly J. in *DPP v Delaney* [2010] IECCA 123.

insufficient in themselves to trigger violent responses, may *"magnify over repetition"* and trigger a loss of self-control that is delayed but nonetheless incapable of being controlled. Because account needed to be taken of such cases, *"no entirely prescriptive rule may be laid down"*.

7.3. Nonetheless, the basic proposition was that where there has been such delay that the defence *"could not be fairly found"*, this must result in the defence being withdrawn from the jury by the Trial Judge.[13] The delay in this case was such that the defence could not be fairly found.

8. Instructing the jury

8.1. The conclusions set out above were sufficient to dispose of the Appeal. Nonetheless, the Court took the opportunity (much like as in *MacEoin*) to outline how a jury should be instructed with regard to the various elements of the defence.

8.2. Thus, what might be described as *"the business end"* of the judgment is to be found between paragraphs 56 and 59; such is the importance of this part of the judgment, it is worth setting it out here in full:

> *"[56] For provocation, there must be a sudden, and not a considered or planned, loss of self-control. There must be a total loss of all control to the degree that it is not merely losing your temper but, instead, is such a complete overwhelming of ordinary self-restraint, in the face of what was done or said, that the accused cannot help intending to inflict death or serious injury, and could not stop himself or herself inflicting this deadly violence.*
>
> *[57] That total loss of self-control in consequence of provocation cannot be because of intoxication on drink or drugs. The accused's actions are to be considered as if he or she was not acting under the influence of drink or drugs when the accused killed the victim.*

[13] See paragraph 49.

[58] Loss of self-control must be in response to a genuinely serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour or to any unacceptable ideas as to the proper romantic or sexual conduct of males or females; nor hurt to male pride; nor to gang vengeance.

[59] The defence of provocation does not apply in situations where ordinary people, sharing, if relevant, the same fixed characteristics as the accused, as to age, or sex, or pregnancy, or mental infirmity, or ethnic origin, or state of health would be able to exercise self-restraint in the same background circumstances as apply to that accused".

8.3. Immediately, it may be seen that these principles cut down in a very significant way on the scope of the defence of provocation as it has applied in this jurisdiction for some considerable time. The exclusion of intoxication as a factor to which the jury may have regard is, in itself, a significant change given that in *DPP v Kelly*, Barrington J. expressly outlined that intoxication could be *"a factor"*. In practice, the defence is very frequently raised against a background of considerable intoxication on the part of the accused.

8.4. Similarly, the requirement that the provocative act is required to be *"outside the bounds of any ordinary interaction acceptable in our society"* establishes a threshold in relation to the nature and extent of the provocation where none previously existed. Up to now, any apparent lack of proportion between the insult/provocation and the response of the accused went to the credibility of the defence only.

8.5. Finally, the stipulation that the defence does not apply where *"ordinary people"* sharing the same relevant fixed characteristics as the accused would have been able to exercise self-restraint, clearly connotes an objective standard with regard to the exercise of self-control which brings the law here more in line with other common law jurisdictions. It very closely

mirrors the modified objective standard adopted by the Court in the context of the defence of duress in the case of *DPP v Gleeson*[14].

8.6. A brief word may be said about the fixed characteristics to which a jury may have regard in the application of this modified objective standard. The reference to age is unsurprising and is in line with the ruling of the House of Lords in *R v Camplin*[15] (decided around the same time as *MacEoin*) to the effect that the *"reasonable person"* test applicable under section 3 of the Homicide Act 1957 was to be assessed from the standpoint of a 15 year old boy in the same circumstances as the accused and not a middle aged person.

8.7. The reference to *"sex"* could be said to reinforce traditional gender stereotyping which saw men as being more prone to violent outbursts of temper.[16] Nonetheless, it is not difficult to see how gender may be relevant to an assessment of the gravity of a particular form of insult or provocation. In the same way, it is not difficult to see how ethnic origin may be highly relevant in the context of a racial slur.

8.8. Greater difficulty may arise with regard to characteristics such as *"mental infirmity"* and *"state of health"*. In the neighbouring kingdom, there has been a considerable degree of controversy as to what form of mental illness or disability should be considered in the context of the defence of duress.[17] The expression *"state of health"* could potentially cover a multitude but ultimately, the characteristic can only be considered by the jury if it is relevant, that is relevant either to an assessment of the gravity of the provocation offered or the degree of self-control which the accused might have been expected to exercise in the face of provocation.

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[14] [2018] IESC.

[15] [1978] A.C. 705

[16] See in this regard, see The Report of the Law Reform Commission on Defences in Criminal Law, LRC95-2009, at paragraphs 4.26 to 4.31.

[17] See R v. Bowen [1996] 2 Cr. App. R. 157

9. Conclusion

9.1. The judgment in *McNamara*, on its face, has significant implications for the defence of provocation. A curious feature of the judgment, however, is that at no point is *MacEoin* expressly overruled nor does the Court express the view that it was wrongly decided. Indeed, at paragraph 31, the judgment states as follows:

> "Transparently, the common law is what is at issue here, in particular the **limits** of any change introduced by a case, the *MacEoin* decision". (Emphasis added).

9.2. Nonetheless, it is impossible to reconcile that part of the judgment dealing with how a jury are to be instructed with the very clear dicta in the *MacEoin* case rejecting any role for an objective test.

9.3. There may be a measure of debate as to whether that part of the Supreme Court's judgment setting out the modified objective standard is binding on trial courts given that it was not strictly essential to the resolution of the ultimate issue on the Appeal. However, the same observation could be made as to the context in which the Court of Criminal Appeal in *MacEoin* set out its view on the subjective/objective debate. This context did not prevent the celebrated dicta of Kenny J. becoming established law for a period in excess of forty years.

9.4. The results of the *Irish Times* review set out earlier in this paper reflects a possible overreliance on the defence of provocation. Will the narrowing of the scope of the defence as a result of *McNamara* bring about a reduction in the number of cases in which the defence is raised? In all likelihood, not as there is still nothing to be lost by raising the defence and, in many instances, the defence is the only route by which an accused may avoid the mandatory penalty for murder of imprisonment for life.

9.5. In the more immediate term, issues such as the precise scope of the decision and, more importantly, what fixed and permanent characteristics should be considered in the context of any given case, may prove to be a fertile source

of appeals. In this sense, the judicial cemetery which has been the defence of provocation may well be about to expand.

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November 2020.