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International Society for the Reform of Criminal Law Conference
15 July 2008, Dublin

A SINGLE OFFENCE OF UNLAWFUL KILLING?

Ever since the abolition of the death penalty as a punishment for murder, arguments have arisen in favour of merging the offences of murder and manslaughter into a single crime of unlawful killing. Proponents of such a change claim that this would encourage a greater number of guilty pleas, reducing the incidence of lengthy murder trials and releasing overburdened court resources.

Charleton, MacDermott and Bolger[1] have noted that "in the majority of murder trials the issue is not whether the accused killed the victim, but whether in killing he intended to kill or cause serious injury to the victim": put simply, whether the case is one of murder or manslaughter. The mandatory life sentence for murder is frequently held responsible for this situation, with many arguing that the mandatory sentence serves as a deterrent to those wishing to plead guilty, encouraging them to take their chances that a verdict of manslaughter will be returned at the trial. It is further argued that the stigma associated with the term "murder" makes juries reluctant to convict for "murder" opting instead for the lesser charge of "manslaughter". In addition, it has been claimed that complex legal definitions surrounding the separate offences have resulted in jury confusion, whereby clear cases of intentional homicide have been returned as manslaughter. Proponents of a single offence argue that a simpler definition of unlawful killing would overcome many of these difficulties resulting in a more expeditious system for ensuring that justice is served.

However, in spite of the above criticisms, it may be argued that the distinction still serves an important role in the Irish justice system. In a recent report on Homicide[2] the Law Reform Commission has declared itself "totally opposed to the idea of abolishing the distinction between murder and manslaughter"[3]. The Commission highlighted the importance of the term "murder" in today's society as a term to denote the most heinous and culpable type of killing. It felt that the distinction was necessary to ensure "appropriate labelling" of criminal offences. Proponents of a single offence argue that the term "murder" attaches too great a stigma for the vast range of crimes covered. In criticising the mandatory sentence Ivana Bacik has observed:

> "The category of murder is therefore over-inclusive in fact. Cold-blooded and premeditated murders are placed together in the same category with killings that are almost manslaughters, but on a murder conviction the judge cannot take any circumstances into account, and must impose the same indeterminate life sentence on all those convicted of murder, irrespective of mitigating factors. This amounts to a real and ongoing injustice in our system."[4]

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[1] Charleton, McDermott, Bolger, *Criminal Law,* (Butterworth's, Dublin, 1999) at page 495.
[2] Law Reform Commission, Report - Homicide: Murder and Involuntary Manslaughter, January 2008, LRC 87 – 2008
[3] *ibid*. page 6
[4] Bacik, *"If it Ain't Broke"— A Critical View of the Law Reform Commission Consultation Paper on Homicide: the Mental Element in Murder*, (2002) 12(1) ICLJ 6.

However, if one were to abolish the distinction between the two offences, the category into which heinous murders would fall, already criticised for being too broad, would become far more extensive. The only distinction between the various forms of killings would be drawn out at sentencing. This would simply move the contentious legal battles from the trial proper to the sentencing stage.

Where there has been a plea of guilty to the umbrella offence accused persons would be likely to claim that the killing was not intentional in an attempt to reduce their sentence. Similarly, they might claim that the factual circumstances surrounding the killing reduced their culpability. For example, it could be claimed that there was provocation or duress. In such circumstances the sentencing hearing would become a mini-trial in which the facts surrounding the murder would have to be determined. Creating a new crime of "unlawful homicide" in place of murder and manslaughter does not, however, mean that the court will not still have to decide what type of homicide it was. Is it a planned, premeditated homicide? Or is it a homicide where the perpetrator acted in self defence but using an excessive degree of force? Is it a homicide where the victim died because of reckless conduct by the defendant? The answer to such questions will determine what the appropriate sentencing range is to be, with the actual sentence potentially lying anywhere on a scale ranging from life sentence at one end to a suspended sentence at the other.

How is such a vital issue to be decided? One of the proponents of the single offences of homicide, Mr. Justice Paul Carney, has argued in favour of merging murder and manslaughter in a single offence of unlawful homicide on the basis that it would significantly reduce the backlog of cases, cut down on legal and other administrative costs and reduce the suffering for victims' families.[5] Implicit in this argument is the assumption that the issue of what type of homicide has been committed can be decided by the judge alone at a sentence hearing rather than by a jury. Leaving aside the problem that this would amount to an encroachment on the role of the jury as the finder of fact in the criminal justice system, the judge would have to base any finding on evidence. That being so it is hard to see how a hearing before a judge which would have to determine the same issue as at present arises where the jury has to decide whether an offence amounts to murder or manslaughter could be answered in a one-day or a half-day plea rather than the present average length of a contested murder case which in 2003 Mr. Justice Carney stated was 11 days.

The right to trial by jury is constitutionally mandated under Article 38.5 of the Irish Constitution. Hogan and Whyte stress that as a general rule "all relevant issues of fact must be left to the jury for their consideration and the shadow of

[5] In a paper "Decriminalising Murder" delivered at the National University of Ireland (2 LAW CPS 2003) on 29 October 2003 (available on http://www.nuigalway.ie/law/papers.html). See also Law Reform Commission Report on Homicide: Murder and Involuntary Manslaughter [LRC87-2008] at para 1.18

unconstitutionality will hang over legislation which seeks to deprive the jury of any portion of their fact-finding role."[6]

In relation to cases other than murder, to which a mandatory life sentence applies, any move to attribute a greater fact finding role to the sentencing judge would be constitutionally suspect.

The role of the sentencing judge in determining the factual matrix surrounding an offence has been questioned in cases where the accused argues that the factual circumstances surrounding the crime, while not sufficient to establish a defence such as provocation or duress, should be considered as mitigation for sentencing.

Such an issue was discussed in the case of *The People v DK* [2002] 3IR 534. The appellant pleaded guilty to eight counts of section 4 rape against his daughter. When considering sentencing Mr. Justice Carney referred to statements contained in the book of evidence. The accused appealed his sentence on the basis that:

> "…[W]here a trial judge obtains information from a book of evidence he is required to put that information before the parties to ensure that it is accepted by them or that there is evidence to support it. To base a decision on material which has not been admitted or given in evidence would, counsel submitted, constitute an unfair procedure."

Murphy J. giving the judgment of the Court of Criminal Appeal observed that:

> "Not infrequently it has happened that an accused who has pleaded guilty to a charge expressly disputes the circumstances in which the Director of Public Prosecutions or a complainant alleged the offence to have been committed." (at p 537)

The learned judge went on to discuss the UK case of *R v Newton* (1982) 4 CrAppR.(S.) 388 from which the term "Newton hearing" has developed. He summarised the Court's ruling as follows:

> "The English Court of Appeal decided that where there was a plea of guilty but a conflict between the prosecution and the defence as to the facts concerning the offence, the trial judge should approach the task of sentencing in one of three ways. First, a plea of not guilty could be entered to enable the jury to determine the issue. Secondly, the judge himself might hear evidence and come to his own conclusions - this is what is usually described in the UK as the "Newton hearing" or, thirdly, the judge might hear no evidence and listen to the submissions of counsel but in the event of a substantial conflict remaining between the two sides the version of the defendant must be accepted as far as possible."

[6] Hogan and Whyte, Kelly: The Irish Constitution, 4th ed., 2003, Dublin, Lexis Nexis Butterworths page 1227.

Turning to the facts of the case, Murphy J. noted that the argument in the instant application was based on principle rather than fact, as there was no evidence of any dispute as to the circumstances nor was the book of evidence produced to indicate what such a dispute might be. Murphy J. observed that where there is a dispute as to any of the surrounding facts it would not be unreasonable "to expect that an accused pleading guilty to the offence should qualify his admission expressly in that regard." However, such an issue was not held to arise in the instant application. The applicant's appeal was refused.

If the offences of manslaughter and murder were merged into a single "umbrella offence" such disputes would arise far more frequently and the need for "Newton hearings" would undoubtedly increase.

The Newton hearing is now well established in the UK[7]. However, as already discussed, in this jurisdiction such a procedure may infringe express constitutional guarantees. It is at least arguable that under the Constitution of Ireland a jury determination of serious disputes concerning the character of an offence was required. In the light of this if there was a dispute as to the factual basis on which an accused is pleading guilty it may be necessary for the prosecution to refuse to accept the plea. This would be important to ensure that an accurate picture of the factual circumstances surrounding the crime was established and the appropriate sentence handed down. It is, in fact, the general practice in my office, where a plea is offered to a lesser offence, to ensure that the basis on which the plea is offered is one which can be accepted by the prosecution. This issue frequently arise where there is a murder charge and a plea is offered to manslaughter. It can be essential from the sentencing point of view that the prosecution is able to explain the basis on which the plea is accepted. This creates an obvious difficulty for the prosecutor in accepting a plea to manslaughter merely on the basis of a likelihood that a jury will convict only of manslaughter where it is difficult to identify a principled basis to accept such a plea.

Paragraph 10.4 of the DPP's Guidelines for Prosecutors (October 2007, available at www.dppireland.ie) provides that "A plea should not be accepted if to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence".[8]

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[7] *R v Hawkins* (1985) 7 Cr App R (S) 351, *R v. Tolera* [1999] 1 Cr. App. R. 29, *Gillan v. DPP* [2007] Crim LR 486

[8] The Prosecution Guidelines for New South Wales allows for the negotiation and agreement as to a version of facts upon which the accused will plead, so long as this would not distort the facts or produce an artificial basis for sentencing. Where such a version of facts is agreed, a written record is kept and signed by representatives of both parties. Similarly the Canadian guidelines state:

> "Where an accused decides to plead guilty, Crown counsel should agree to put before the court those facts that could have been proved by admissible evidence if the matter went to trial. Discussions regarding the facts may properly include the following:
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> - agreeing not to include in representations to the court embarrassing facts which are of little or no significance to the charge; and

In other jurisdictions where the Prosecutor may take a more active role in sentencing, the need to determine the factual basis of a plea has been accepted.

It is submitted that merging the offences of murder and manslaughter would not, as proponents suggest, encourage a greater number of guilty pleas but instead would muddy the system of guilty pleas that already occur. As the range of penalties would be extensive the factual basis would become crucial and the prosecutor would have to reject pleas if it was unclear what level of culpability was being accepted by the accused. An accused pleading guilty would be made aware of the range of sentences available and so would be likely to "qualify his admission", as suggested in *DK* above, by attempting to reduce culpability.

Many other jurisdictions have reviewed the distinction between the two offences, opting for its continuing operation. Suggestions have been made to increase the scope of the offence of murder, to have more defined categories of murder and manslaughter akin to the approach taken in many jurisdictions in the US, and to abolish the mandatory sentence present in many other common law systems. However, the general consensus has been that the distinction, which is "deeply imbedded in our social and legal culture"[9], should remain.

In summary, the distinction between murder and manslaughter creates a crucial distinction between intentional and less culpable forms of homicide. Merging the two offences would simply move the much-disputed question of intention to the sentencing stage of the process, thus removing a crucial role from the jury. This would create a difficult situation for the prosecution who would be unable to predict what factual matrix would be presented at sentencing and for the judiciary who would increasingly be faced with divergent accounts. Such disputes would require substantial resources at all stages of the criminal justice system, the very thing that proponents wish to avoid.

- agreeing to rely on an agreed statement of facts. "

The guidelines further state that it is not acceptable for such agreements to result in or give the appearance of misleading the court.

[9] Law Reform Commission of Victoria, Homicide, Discussion Paper No. 13, March 1988, discussed in the Law Reform Commission, Report - Homicide: Murder and Involuntary Manslaughter, January 2008, LRC 87 – 2008.