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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

ANDREW GEORGE MAWHINNEY

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Lord Chief Justice, Nicholson LJ and Campbell LJ

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NICHOLSON LJ

[1] This is an application for leave to appeal to the Court of Appeal against the conviction of Andrew Victor George Mawhinney ("the applicant") for the murder of Robert McMullan ("the deceased") on 11 July 2000.

[2] The applicant was tried before McLaughlin J with a jury at Antrim Crown Court, sitting at Coleraine, was convicted of murder by the jury and sentenced to life imprisonment by the trial judge.

[3] Leave to appeal against conviction was refused by the single judge, Sheil J, on 6 November 2001.

[4] The application was renewed before the full court on 10 April 2002.

The facts relating to the death of the deceased

[5] The applicant lived with his partner, Janice Wilson, and her two children at 2 Kenbane Avenue, Coleraine. On 11 July 2000 a girl called Roberta Saunders who had, it appears, been burnt out of her house two doors away was living with them. The deceased lived next door to the applicant with his partner Rose Kelly at 4 Kenbane Avenue On 11 July he had been drinking with the applicant, their partners and Roberta in the applicant's house. The two men argued. There was evidence that the deceased

threatened the applicant, his partner, her family and Roberta. A fight ensured during which the deceased was attacked by the applicant with a knife outside the house. After the attack the applicant was seen by eye witnesses with three weapons. The description of these weapons matched the hatchet, knife and piece of wood which were used in the fight. When the police arrived, the applicant said "It's me you're looking for" and was arrested for attempted murder. After arrest and on his way to the police station he said "I think I killed him. … I just lost my temper."

[6] The deceased was taken to Coleraine Area Hospital where he died at 10.30 pm on 11 July 2000. He had been stabbed seven times with a knife in the chest and these wounds were fatal. In addition there was medical evidence on which the jury could have concluded that a hatchet and a plank with nails had been used in the attack on him, and that it took place while he was lying on the ground.

[7] Both men were drunk when the attack took place. The central issue in the trial was whether the applicant should be convicted of murder or found Not Guilty of murder but Guilty of manslaughter on the ground of provocation.

The applicant's medical history, the evidence about his personality and the provocation

[8] The applicant gave evidence on his own behalf. He stated that he suffered from depression and severe migraine headaches, took alcohol to excess, had a lot of mood swings. His sleep pattern, he said, was "all screwed up". He said that he tended to bottle things up. He was on anti-depressants. He had a problem with his temper because he knew it was starting to get out of control and he felt like killing himself on many occasions. When he was in prison he went to anger management classes. This was seven years before giving evidence. The depression got worse after 1994.

[9] He became acquainted with the deceased when he went to live in Coleraine. He expressed regret at his death. He lived next door to the deceased. The deceased and his partner tended to come to his house where he lived with his partner and her two children. The deceased and his partner drank very heavily. He himself was starting to drink again. The deceased seemed to be very headstrong and liked to get his own way. When he was drinking he always tended to cause a row. He and his partner heard that the deceased fought regularly. They were always cautious with him. He heard talk about a supposed affair between him and the deceased's partner which was laughed off by him and his partner.

[10] On the date that the deceased died the deceased seemed a bit uptight and his partner told the applicant that the deceased thought that she and the

applicant were having a fling. The deceased had never said to him that he suspected an affair.

[11] He said that on 11 July 2000 a girl called Roberta was living with him and his partner because an attempt to burn her house had been made two days previously. He took his medication that day. The deceased and his partner came to his house with a carry-out of Pernod, cider and beers. They had been drinking. Later his partner and Roberta brought into the house a bottle of gin and a 12 pack of beer for him and Roberta brought him a 2 litre bottle of cider. The deceased started getting "narky" making snide remarks especially at Roberta. He told the deceased to "knock it on the head". Later he left the house and on his return found the deceased outside the house. When he went into the house he was told that the deceased had stormed out in a temper but the deceased returned. At a later stage he asked the deceased and his partner to leave. His own partner tried to force the deceased's partner to leave. There was a bit of a struggle between him and the deceased who said "I'll be back. Trust me. I'll kill youse." He thought that the threat was real.

[12] He telephoned the police and told them what was said by the deceased. He alleged that his wife said "Sure you can't fight anyway". Later he heard "There he is coming back" and the deceased shouting "I'll kill youse. I'll burn youse out". He said "Go away, the peelers are coming". Then he saw the deceased with a big bit of wood and shouting "I'll fucking kill youse." He was scared and angry. He could not remember a great deal after that. He knew that he must have done something. He saw blood and he saw the deceased lying on the ground.

[13] In cross-examination he said that he must have snapped. His memory was then a complete blank until he saw a Mr Alec Tanner. He had a blackout. He said that when he was in the kitchen he had a knife in his hand. He told the police that he had the knife when he went to the front door, that there was a scuffle and fighting with the deceased in the street. He was asked why he could not remember in the witness-box what he had told the police. He said he could not explain this. He then indicated that he did not wish to give any further evidence. He refused to give any further evidence. Medical evidence was called on this issue. The trial was adjourned to the following morning in order that he could receive medication. He did receive it but refused to answer any further questions. His counsel informed him that refusal to answer further questions might result in the jury drawing from his refusal such inferences as were proper.

[14] Dr Evans, his general practitioner, gave evidence on his behalf. He gave a history of bad temper, of being involved in fights. He was referred to a consultant psychiatrist who referred to his very short temper and history of depression and personality disorder. The main problem appeared to be

criminal behaviour and a major alcohol problem. There was no evidence of treatable psychiatric illness and no features of depression. Later he complained of headaches, dizziness, blackouts and losing his temper easily. Later again he complained of mood swings, depression, brief suicidal thoughts accompanied by very aggressive feelings. He had been a very illicit drug taker but stopped. The psychiatrist stated that he displayed features of what is called dissocial personality disorder and emotionally unstable personality disorder of the border line type. These labels were largely academic, he reported. He wished to refer him for anger management. Another doctor reported that he was known to have been very violent and aggressive at times. Another psychiatrist referred to his fiery temper. Dr Evans said that reducing alcohol would help control his temper. He was prescribed anti-depressant medication.

[15] In cross-examination Dr Evans accepted that most of his problems stemmed from abuse of alcohol and drugs.

[16] Dr Bownes, a consultant psychiatrist, referred to his medical history. He stated that he took the view that the applicant suffered from major personality deficits and had difficulty in terms of his thinking and perceiving and reacting to situations and had severe difficulty in coping with situations appropriately. With reduced or absence of alcohol there were still considerable psychological difficulties at play with [the applicant]. A personality disorder was a severe disturbance in the character or logical make-up and behavioural tendencies of the individual. It was associated with considerable personal and social disruption. He diagnosed him as suffering from a dissocial personality disorder, a relatively new term relating to an old term called anti-social personality disorder. Symptoms included fighting, criminal behaviour, a tendency to ignore the rights of others, fighting with people physically or verbally. He suffered from borderline traits, unstable and intense behaviour, impulsive behaviour, mood swings, expressing anger and aggression, behavioural explosions.

[17] He told Dr Bownes that on 11 July he drank eight to ten measures of Pernod, one litre of cider and ten to twelve cans of beer from about 2.00 pm; relationships had become increasingly fractious as the afternoon progressed; the deceased had got paranoid about the applicant and the deceased's partner having an affair and made snide remarks to Roberta.

[18] Dr Bownes said that he had read reports from a Dr McClelland and a forensic clinical psychologist, Dr McCullough. He was of the opinion that the applicant was not suffering from active mental illness or significant intellectual impairment or any mental health problems that would fulfil the criteria for admission to a psychiatric hospital. An alcohol intake of the nature which the applicant described could reasonably be expected to have significant adverse effects on his mood and mental functioning but not to

such a level that he might not have been consciously aware of his actions. If he perceived himself to be in a threatened and difficult situation his underlying personality difficulties would affect his ability to cope with that difficult situation.

[19] In cross-examination he said that the applicant suffered from an emotional disturbed personality disorder. There were elements of dis-social personality disorder. He was strongly challenged about his diagnosis and his general approach to the case as being shoddy practice and about his credibility.

[20] Dr McCullough gave evidence as a clinical psychologist. He carried out a test which indicated that the applicant had a personality disposition found among less than one percent of the population. He suffered from a borderline personality disorder. It was not an illness. The majority of the population would easily identify him as not being normal. The disorder was characterised by three main features. Firstly, a deep sense of insecurity about who they are as people; secondly extremes of mood, intense feelings of anger and frustration; thirdly, their relationships are unstable; they tend to react impulsively to stressful situations. A person with such a personality disorder could behave as the applicant did. He was also cross-examined forcefully and it was contended that his findings were inconsistent with those of Dr Bownes.

The summing up

[21] The trial judge then summed-up the case to the jury. No criticism was made of this summing-up so far as the events of 11 July were concerned. We do not propose to repeat what he said. It was not disputed that the applicant killed the deceased nor was there any dispute as to how he killed him. Nor was there any criticism of his directions to the jury on the legal principles to be applied, save on the issue of provocation. It is for this reason that we have decided to set out his directions on this issue before dealing with the arguments on appeal.

[22] Having set out the legal components of the crime of murder he then dealt with provocation. He told the jury that the issue of provocation was a central feature of the case and that the onus was on the prosecution to satisfy them that there was no provocation. There was no burden on the defence to prove that the applicant was provoked. "Once there is evidence of words or actions that might constitute provocation then it's for the prosecution to remove any doubt about that issue from your minds".

[23] He then described what provocation was in these words:-

> "Provocation has been said to be some act or a series of acts done or words spoken which would cause in any

> reasonable person and actually causes in the accused a sudden and temporary loss of self-control which renders him so subject to passion as to make him or her not the master of his mind for that moment".

[24] He went on to say that it could be an accumulation of events over the course of the afternoon as Counsel for the applicant had told the jury and provocation by word could sometimes be every bit as lethal as provocation by any act or it could be both together.

[25] He pointed out that the provocation could come from some source other than the deceased. So, in this case the defence invited the jury to consider the actions of Jan, the applicant's partner. That was perfectly legitimate. Words or actions or both could come from the deceased or from someone else or both persons together or more than two people.

[26] He then asked the jury to decide whether there was provocation bearing in mind the burden of proof. If there was provocation the next question was: did it cause the accused to lose his self-control? The question dealt with the personal reaction of the accused to the acts or the words that were said or done. But there was also an objective element which looked outside the person. Before the jury could accept provocation as an excuse for what was done they must accept that the circumstances were such as to make his loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter.

[27] The trial judge then went on to review the evidence about the events of the afternoon and evening of 11 July and invite the jury to consider whether the applicant was provoked. He dealt not merely with the evidence of the applicant but his partner and of Roberta. He laid emphasis on the fact that the applicant phoned the police, telling the jury: "Apply your common sense to that. So it was no small thing you might think that he actually phoned the police." He went on to point out that all the witnesses said there were threats by the deceased. Roberta then said of the applicant: "Vinny lost it completely. he went out to get Robert. He ran out with a hatchet."

[28] He then told the jury that, if they came to the view that the applicant was scared, angry, hurt, offended by the allegations of the affair between him and the deceased's partner, faced by the threats which he was taking seriously, the next question was: did they provoke him to lose his self-control? He reminded them of the evidence of the eye-witnesses in the street and the applicant's evidence in the witness-box in which he claimed that he had no memory of events which occurred and said: "if he wasn't out of control what was he thinking of? Here he was in front of his neighbours. This was almost like an arena."

[29] After he had dealt with the effect of the events on the applicant, he turned to the objective side of provocation – whether, in the context of this individual, what he did was sufficiently excusable to reduce the charge from murder to manslaughter. That involved taking account of the personal characteristics of the applicant, recognising that an individual may have certain characteristics which would make it unjust to hold him guilty of murder.

[30] He reviewed the evidence of the relevant personal characteristics of the applicant brought out by the medical evidence. He reminded the jury at this stage that there was no obligation on the defence to call any evidence at all. The burden was on the prosecution. He summarised Dr Bownes' evidence and the applicants medical history and he referred to Dr McCullough's evidence as supporting the diagnosis of Dr Bownes that he had a personality disorder. He directed the jury that certain characteristics were not relevant – pugnacity, excitability, voluntary intoxication.

[31] He told the jury that they had to decide whether or not there was a personality disorder and taking the applicant as he was, leaving out of account drink, excitability and pugnacity, was it sufficiently excusable in all of the circumstances that he did what he did; in the light of his personal characteristics was it sufficiently excusable to find him not guilty of murder but guilty of manslaughter.

[32] He told the jury that the evidence of Dr Bownes and Dr McCullough was there to help them decide the issue of provocation and the extent to which the personal characteristics of the applicant might (our underlining) render it excusable to do as he did and reduce the charge to manslaughter. He reminded them that the prosecution had called no evidence on this issue.

[33] At the end of his charge to the jury he said, "Can I first emphasise again that an accused man doesn't have to give evidence at a trial and doesn't have to prove anything because it is for the prosecution to prove its case". He told them that he had broken down the issue of provocation into individual issues. He reminded them that the burden of proof remained with the prosecution throughout, that they must disprove loss of self-control, if they contended that there was no loss of self-control; and whether what happened could (our underlining) reduce the charge to manslaughter, having regard to the facts and circumstances and personal characteristics of the applicant. The only requisitions in respect of the charge were made on behalf of the prosecution.

[34] We need not set out the grounds of appeal or the detailed skeleton argument presented on behalf of the applicant. Mr Philip Mooney QC, in addressing the Court, gave a resumé of the evidence and indicated very

properly that exception could not be taken as a whole to the trial judge's charge.

[35] There were two possible areas of criticism, he contended At p.66 of the charge the trial judge said:

> "'"You have to decide in the light of all this medical evidence whether or not there was a personality disorder. If you accept the evidence of [Dr Bownes and Dr McCullough] that there was a personality disorder ..."

The onus was on the prosecution to prove that he did not have a personality disorder. The error of the trial judge was compounded by the Crown's attack on Dr Bownes, which was not accompanied by any Crown evidence-in-chief or by way of rebuttal: see pp.60, 61 of the trial judge's charge.

[36] Reference was also made to pp.41, 46, 47, 48 and 51 of the charge. Emphasis was laid on the passage at p.51:

> "It is not your job to decide what kind of personality disorder he has. If that has not been established to your satisfaction you can just leave it aside. If you are satisfied that he has a personality disorder of a particular kind then by all means give full consideration to that".

It was submitted that this was confusing and the confusion was increased by the passage cited at p.66. But at p. 50 he had correctly summarised the onus of proof.

[37] It is very easy to single out passages in a lengthy charge to a jury which on one view can be stated to place the onus incorrectly on the defence. It was for this reason that we summarised the judge's charge before dealing with the issues on appeal.

[38] We consider that the judge's charge on the issue of provocation as summarised at paragraphs 22 to 33 of this judgment was a model of fairness and that the passages singled out by counsel do not do justice to the emphasis repeatedly placed by the trial judge on the onus of proof resting on the prosecution to disprove all the elements of the issue of provocation beyond all reasonable doubt.

[39] The second area of criticism related to the inferences to be drawn from the refusal of the applicant to continue to answer question in cross-examination. At p.120 of his charge the trial judge had said:

> "“... he failed to remain in the witness box ... The defendant in any criminal trial enjoys the right of silence. He is not obliged to give evidence ... In this case he chose to give evidence and completed his evidence-in-chief ... He was then cross-examined and part way through the evidence ... he indicated that he did not wish to give evidence ... If the only sensible explanation for his action is that he has no answers to the questions being asked or none that would stand up to cross-examination by Mr Weir then you can take it into account ... It can't prove guilt on its own but with all of the other evidence added together, if it leads you to be satisfied beyond reasonable doubt about all of the matters that I have outlined to you, then you can take it into account".

Mr Mooney QC criticised this part of the summing up.

[40] But in our view the criticism does not stand up to scrutiny. Article 4(a) of the Criminal Evidence (NI) Order 1988, as amended, provides that if an accused, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences from the refusal as appear proper provided that his counsel has informed him that such inferences as appear proper may be drawn. His counsel did so inform him.

[41] The judge dealt with this aspect of the case in two passages of his summing up. At pp.44 - he said:

> "Now when he's giving evidence his memory is blank. Did he remember what was happening or is he blanking out his memory because he doesn't want to remember what's happening or is he just dealing with it on the basis that it's an evening not to remember? No one has suggested ... that he has had some traumatic loss of memory ..."

[42] At p.119 he summarised the whole of the evidence in chief of the applicant and his cross-examination up to the point when the cross-examiner was putting to the applicant what he had told the police, and the applicant said: "I don't know how I said that". He was asked was he making it up and he said, "I want a break", and the trial judge responded: "Answer the question". He replied, "I can't remember" and then he took a break and that was the end of his evidence. During the break the trial judge heard medical evidence from Dr Bownes and adjourned the case to the following day so that the applicant could have medication, but on the following day he declined to answer any further questions.

[43] The trial judge said of the applicant's evidence:-

> "That, as you can imagine, is important evidence .. and you must take that all into account and weigh it up and do the best you can with it. That is his account. He did not have to give that. He did not have to answer questions. He could have stayed where he is but he did come to the witness box and you have his evidence for what it is worth. But he failed to remain in the witness box …. in this case he chose to give evidence and completed his evidence in chief …. He was then cross-examined and when part way through the evidence, …. he requested a break which was granted and he did not return to the witness box except the next day when in response to a question from me he indicated that he did not wish to continue to give evidence. Again his right and privilege and I allowed him to resume his place in the dock. After that Mr Mooney confirmed that the accused had been told that a refusal by the accused to answer questions without good cause might result in the jury drawing such inferences as appeared proper from his failure to remain in the witness box and to continue to answer questions."

[44] The trial judge then referred to the evidence of Dr Bownes who indicated that he had observed the applicant and felt that he was experiencing stress and becoming agitated and unhappy and anxious and that he seemed to perceive that his confidence and self-esteem were under threat. He told the jury not to assume that a failure to continue to answer questions was indicative of guilt. It might be just that he could not cope with the pressure and the stress but, on the other hand, it might be that his stress was due in whole or in part to being asked questions for which he could not give satisfactory answer. Later he made the comments of which Mr Mooney complains."

[45] On a fair reading of the whole of this part of the summing-up we consider that the trial judge was entirely justified in the comments which he made.

[46] Accordingly the application is dismissed.