Neutral Citation No. [2003] NICA 12

Ref:	**CARC3891**

Judgment: approved by the Court for handing down

(subject to editorial corrections)

Delivered:	**07/04/2003**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

SAMUEL ANDERSON

Before: Carswell LCJ, Nicholson LJ and Coghlin J

CARSWELL LCJ

[1] This is an application for leave to appeal against the applicant's conviction for murder on 14 March 2002 by a jury after a trial at Ballymena Crown Court before Girvan J. The applicant sought leave to appeal against both conviction and sentence, which was imprisonment for life with a minimum term fixed of 14 years before he is to be eligible to be considered for release. The single judge refused leave to appeal against conviction, but gave leave to appeal against sentence. We heard the application for leave to appeal against conviction and adjourned the appeal against sentence.

[2] The applicant was charged on the indictment on three counts:

1. jointly with Samuel Paul Campbell, with the murder of Joel Robert Tymon;
2. jointly with Campbell and with Mark Erskine Carson, with conspiracy to cause grievous bodily harm with intent to David Thomas Martin Rolston;
3. jointly with the same two persons, with conspiracy to assault Rolston.

On the first count he pleaded that he was not guilty of murder, but guilty of manslaughter. The judge directed the jury to return a verdict of not guilty on the second count and the applicant pleaded guilty to the third count. His trial then proceeded on the first count.

[3] On the night of 26-27 November 2000 about midnight or just after it the applicant and Campbell pushed their way into a flat at 6A Stirling Street, Antrim occupied by David Rolston (or Ralston). They were described by several witnesses as being very drunk. The only person in the flat at the time was Joel Tymon, whom Rolston had recently permitted to stay there. The applicant and Campbell demanded to know the whereabouts of Rolston, to whom they wished to give a beating. Tymon could not or would not tell them where he was, whereupon the applicant commenced to assault him in an attempt to force him to do so. He punched Tymon in the face a number of times, causing him to fall back on a seat. He picked up a paint scraper and deeply lacerated his face with it. He ended by stabbing him a number of times in the thigh and knee with a large kitchen knife. The evidence was that the events in the flat occupied a period of ten to fifteen minutes. The two men then left the flat, leaving Tymon lying bleeding. One of the stab wounds had severed the femoral vein and artery, causing Tymon to bleed to death.

[4] About 12.40 am the men went to the house of the applicant's cousin Joanne Kerr. They stayed for a while and discussed what had taken place. The applicant stated that he had beaten a wee fellow up the street and had stabbed him two or three times in the legs. He said that he did not know the wee fellow, but hit him because he was Rolston's friend. He said that he had turned the music up to drown his cries and that he had used a knife from the kitchen.

[5] The knife used in the attack was found by the police in a gutter at 12 Orkney Drive, Antrim, after the applicant had told them where he had thrown it away. It was a cook's knife with an eight-inch (19 cm) blade. One of the issues in the case was whether the applicant went into the kitchen and fetched the knife from there, leading to the inference that he obtained it deliberately for the purpose of attacking Tymon, or whether, as he asserted in interview, he found it lying in the sitting room. One fact which the prosecution relied on as showing that he had been in the kitchen was that the scraper was found on top of the fridge-freezer in that room. Moreover, in interview the applicant used the phrase "I walked in with the knife".

[6] The pathologist's evidence established that there were four stab wounds to the legs. The fatal wound was a penetrating wound over the medial, or inner, side of the middle third of the left thigh. The opening was approximately 2.7 cm in length and it penetrated some 9 cm into the tissues. The second wound was to the back of the left thigh, and also was 9 cm deep. The third, which was 8 cm deep, was on the front of the left lower leg. The

fourth was behind the right knee, being some 4.5 cm in depth. The first wound had severed muscle and caused complete transection of the left femoral artery and vein. This led to a fatal arterial haemorrhage, which was also evidenced by the splashes of spurting blood found on Tymon's legs, a nearby lamp and on the wall. Dr Curtis, the forensic pathologist who carried out the post mortem examination, agreed in cross-examination that some at least of the stab wounds could have been inflicted when the victim was in a defensive position, lying back with his legs drawn up to protect himself.

[7] In the course of his police interviews the applicant stated that his intention had been to give Rolston a hiding. He admitted that he had assaulted Tymon and stabbed him in the legs, but repeatedly said that he had not intended to kill him. He also admitted using a wallpaper scraper to scrape him on the face.

[8] The grounds of appeal originally submitted on behalf of the applicant concentrated on the prejudice which it was claimed was created by prosecuting counsel opening at two previous abortive trials facts tending to show a sectarian motive for the murder. When it came to the hearing of the appeal, however, this ground was not relied on. The amended grounds of appeal read as follows:

> "1. The verdict of guilty of murder is unsafe in the light of the evidence of Dr Curtis.
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> 2. The verdict of guilty of murder is unsafe because the learned trial judge failed to give any adequate assistance to the jury on the definition of really serious harm when the location of the fatal injuries on the deceased's legs rendered it necessary for him to direct the jury on the definition of really serious harm.
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> 3. The verdict of guilty of murder is unsafe by reason of the failure of the learned trial judge to advise the jury that the plea of guilty to manslaughter might be relevant to their approach to the issue of lies allegedly told by him.
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> 4. Article 7 ECHR required that really serious harm be defined for the jury.
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> 5. Article 7 ECHR taken together with Articles 3 and 6 ECHR require that a conviction of murder be sustained by a jury finding that an accused has

> intended to cause really serious harm being aware that he may cause death.
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> 6. The learned trial judge ought to have directed the jury in accordance with 5 above."

In addition, counsel advanced an argument, without objection from the Crown, that the judge had failed to give a sufficient direction to the jury on the effect of intoxication on the formation of intent and that the court should on this ground be left with a lurking doubt.

[9] We can deal with the last-mentioned point shortly**.** The judge gave the jury the following direction at page 7 of his charge:

> "Now I must say something about the effect of intoxication by alcohol or drugs on the question of intention because that is a relevant factor and central issue in this case. The fact that a person's mind is affected by drink or drugs so as that he acts in a way in which he would not have acted had he been sober doesn't assist him in relation to this matter provided the necessary intent was there at the time when he did the relevant act. A drunken intent is never the less an intent. But you should have regard to all the evidence including that relating to drink and drugs, to draw such inferences as you think proper from the evidence and on that basis to ask yourselves whether you feel satisfied beyond reasonable doubt that at the material time the defendant had the requisite intent."

It may be seen that this direction is taken almost verbatim from that approved in the judgment of the Court of Appeal in *R v Sheehan and Moore* (1975) 60 Cr App R 308 at 312. The judge then, during his recital of the evidence of the several witnesses who had seen the defendants on the evening in question, reminded the jury about the extent of their drunkenness. In our opinion this was a correct and sufficient direction and we do not consider that this ground of appeal has any substance.

[10] Nor do we consider that the third ground, relating to the effect of the lies told by the applicant, has been established. The judge gave the jury an impeccable *Lucas* direction at pages 21-2 of his charge. It is clear that the instances which he enumerated of reasons why lying may not be proof of guilt were just examples and not a comprehensive list. We do not consider that he was obliged to spell out every possible ground on which it might be

suggested that the applicant's lies might not prove his guilt, especially where, as in the case of the ground suggested here, it might be thought to border on the fanciful. It was suggested that his reason might have been "the result of the accused postponing a due acknowledgment of his role", which was effectively acknowledged in the plea of guilty to manslaughter. The lies in question were about where he threw the knife, about Campbell not being with him and about his intention only to speak to Rolston. None of these could have been intended to postpone admitting his role when he had admitted from the first interview that he had stabbed Tymon. We do not consider that it was incumbent on the judge to refer to this suggestion specifically and we regard his direction as quite sufficient.

[11] The remaining grounds of appeal can be considered together. The pathologist Dr Curtis in the course of his evidence placed the violence used in inflicting the fatal wound at moderate on a scale of mild, moderate, considerable and severe. It was submitted on behalf of the applicant that the thigh was not an area in which an assailant would be likely to stab a victim if he intended to cause death. The judge directed the jury in standard terms that in order to find the applicant guilty of murder they must be satisfied that he intended to cause death or grievous bodily harm, by which term was meant really serious harm. Mr Larkin argued on behalf of the applicant that this direction, although traditionally accepted as a proper one, should not be regarded as sufficient and that in the light of the requirements of the European Convention on Human Rights one should have been given in different terms.

[12] The *mens rea* or intention which must be established in order to convict a defendant of murder is malice aforethought, divided in the usual classification into express and implied malice. This division was confirmed by section 8 of the Criminal Justice Act (Northern Ireland) 1966, which provides:

> "8. Where a person kills another –
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> (a) in the course or furtherance of some other offence; or
>
> (b) in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
>
> the killing shall not be murder unless done with the same malice aforethought (express or implied)

> as is required for a killing to amount to murder in other cases."

Express malice denotes the intention to cause death and implied malice the intention to cause grievous bodily harm, either of which will suffice to constitute malice aforethought. It has not, since the enactment of section 8 of the 1966 Act, been necessary to consider "constructive malice", which no longer suffices as an intent for murder.

[13] It has been regarded as desirable since the House of Lords' decision in *Director of Public Prosecutions v Smith* [1961] AC 290 not to paraphrase the expression "grievous bodily harm" when directing juries in murder cases. Viscount Kilmuir LC said at page 334, disapproving of the wording then in regular use:

> "My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words `grievous bodily harm' a meaning other than that which the words convey in their ordinary and natural meaning. `Bodily harm' needs no explanation, and `grievous' means no more and no less than `really serious'."

The decision itself in *Smith* cannot now be taken to represent the law (see Smith & Hogan, *Criminal Law,* 8th ed, pp 359-60), but Viscount Kilmuir's statement concerning grievous bodily harm has not been overruled or amended.

[14] What has been questioned, however, is the sufficiency of grievous bodily harm as the intent for murder. In *Hyam v Director of Public Prosecutions* [1975] AC 55 Lord Diplock, with whom Lord Kilbrandon agreed, held in a dissenting opinion that that required intention or foresight on the part of the actor that he was endangering life. The issue was left unresolved, as Lord Cross of Chelsea was not prepared to decide it. In *R v Cunningham* [1982] AC 566 the House of Lords decisively rejected the view espoused by Lord Diplock and affirmed the principle that an intention to inflict grievous bodily harm sufficed to constitute malice aforethought. The policy considerations underlying acceptance of this principle appear clearly from a passage in Williams, *Textbook of Criminal Law,* 2nd ed, p 251:

> "The argument for the rule is that when a person shoots or stabs another, his act is sufficiently grave to justify a conviction of murder if death results, even though his intention was only to disable a person from whom he wished to steal, or to stop a

> pursuer when he was running away after a robbery, or to mutilate someone by way of revenge, or to stop a person giving an alarm. The human body is fragile, and a person who shows himself willing to inflict really serious injury to another, thus causing his death, is so little less blamable than the intentional killer that the law is right in not making a distinction."

[15] The conclusion of the House of Lords in *R v Cunningham* has not been universally accepted. In a cogently expressed opinion in *Attorney General's Reference (No 3 of 1994)* [1997] 3 All ER 936 Lord Mustill criticised it and he and Lord Steyn repeated this criticism in *R v Powell and others* [1999] 1 AC 1. Notwithstanding the force of their criticisms, however, the rule must be taken to represent domestic law until it is changed by Parliament or the House of Lords (as Lord Steyn acknowledged in *R v Woollin* [1999] 1 AC 82), and the judge's direction in the present case was properly framed in accordance with that law.

[16] Mr Larkin argued, however, that in order to comply with the European Convention on Human Rights it was necessary to interpret the term "implied malice" in section 8 of the Criminal Justice Act (Northern Ireland) 1966 as an intention to inflict grievous bodily harm with knowledge or foresight that the actor was endangering life. He submitted that it was necessary so to interpret the term, in accordance with the obligation placed upon the court by section 3 of the Human Rights Act 1998 because of the mandatory and inflexible nature of the sanction for murder of imprisonment for life and the combined effect of Articles 3 and 7 of the Convention. His thesis was that by virtue of Article 7 reasonable certainty was required in the definition of crime and penalty and that the imposition of a mandatory life sentence on those who inflicted grievous bodily harm without any awareness of the possibility that their acts might cause death was in breach of Article 3.

[17] Article 7 of the Convention provides as follows:

> "1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
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> 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was

> criminal according to the general principles of law recognised by civilised nations."

Counsel cited the decision of the European Court of Human Rights in *SW v United Kingdom* (1995) 21 EHRR 363 in support of the proposition that Article 7 requires that a criminal offence must be clearly defined in the law. On this basis he submitted that the concept of grievous bodily harm is so nebulous as it stands that leaving a jury to interpret it was a breach of Article 7. In order to import the necessary degree of clarity and certainty it was necessary to define the concept more closely and this could only usefully be done by importing into the general definition of grievous bodily harm the qualification that the defendant must be shown to have been aware that his act was capable of causing death. We cannot accept this proposition. We consider that the concept of grievous bodily harm, in the meaning of really serious harm, is quite comprehensible to a jury, at least as readily understandable and capable of application as many other concepts in the law. We therefore hold that leaving the concept to the determination of a jury does not constitute a breach of Article 7 and that no altered interpretation of "implied malice" is required.

[18] Nor do we think that there is any substance in the suggestion that a breach of Article 3 is involved in the punishment of imprisonment for life of a defendant whose act has caused the victim's death in circumstances where he intended only to cause him grievous bodily harm, without contemplating or being aware of the possibility that it might cause his death. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

We are unable to accept that the criminal sanction constitutes inhuman punishment, the only part of Article 3 which could possibly be in point. Mr Larkin was not able to produce any authority which supported his submission and we do not regard it as well founded.

[19] For the reasons which we have given we accordingly dismiss the application for leave to appeal against the applicant's conviction for murder.