IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

MICHAEL MALACHY MURRAY

HUTTON LCJ

This is an application for leave to appeal against sentence by Michael Malachy Murray.

In November 1992 he was tried at Omagh Crown Court before a jury on the charge of murdering Raymond Andrew Pollock on 1 January 1992. The jury found him not guilty of murder but guilty of manslaughter. It is clear that the jury acquitted him of the charge of murder but found him guilty of manslaughter on the basis that he had killed Raymond Andrew Pollock under provocation. The learned trial judge, McCollum J sentenced to 10 years' imprisonment for the offence of manslaughter, and it is in respect of that sentence that he now seeks leave to appeal.

The background facts to the killing were as follows. The deceased, Raymond Andrew Pollock, was a man aged 28 years who lived with his parents in Edenreagh Road, Killen, Castlederg in County Tyrone. The deceased had had a steady girlfriend named Siobhan Lynch who lived with her 3 children in a house at 40 Crilly Park, Killeter, Castlederg. Miss Lynch shared that house with her sister Collette Breen who had 3 children, and who lived in that house with her boyfriend Thomas Caldwell.

The deceased had had a steady relationship with Siobhan Lynch for a considerable number of years and he visited her in the house, 40 Crilly Park, 2 or 3 times a week and on occasions stayed overnight with her in that house.

On the morning of 1 January 1992, about 3.00 am, the deceased arrived at the house 40 Crilly Park, after he had been drinking in a number of public houses and the report of autopsy on the deceased states that at the time of his death, which occurred not long after 3.00 am, the concentration of alcohol in his blood was 258 mg per 100 ml, which indicated that he was heavily intoxicated.

When he arrived at 40 Crilly Park the deceased banged on the front door of the house to get in. At this time the applicant Murray, together with his son, aged 15 years, was passing in the street outside and words were exchanged between the deceased and the applicant. There was a substantial body of evidence to the effect that the exchange of words was started by the applicant who said words to the effect

"What the fuck are you banging about" and "could you not bang a bit easier". There was evidence that from a Crown witness that the deceased responded to this by saying to the applicant "What are you chatting about?". Whatever were the precise words said between the applicant and the deceased, and whoever started the exchange, it is clear that angry words were exchanged between them and after the exchange of words the deceased walked towards the applicant and took off his sweatshirt. It seems clear that he took off his sweatshirt as an indication that he was prepared to have a fight with the applicant. However it appears to be clear that no fight took place at that stage. Miss Lynch asked the deceased to come into the house which he did, putting on his sweatshirt again, and the applicant moved away.

At this time a Mr Joseph McGoldrick was sitting in the applicant's house at 30 Crilly Park, and the evidence of Mr McGoldrick was that the applicant came into the house in a terrible rage. He went over to the television in the corner of the sitting room and took out a dagger (and we interpose the comment that this dagger was in fact an old bayonet) from behind the television set and rushed out of the room again waving the dagger about and shouting "Pollock will die tonight".

It appears to be clear that armed with the dagger the applicant went back to the house at 40 Crilly Park where he began to bang at the back door shouting "come out you Orange bastard. Come out". Thereupon the deceased went out through the back door, and it appears to be clear that the deceased was prepared to accept the applicant's challenge and went out to fight with him. The deceased was a muscular man who was 6 feet tall aged 28, where the applicant was then aged 38, he was not as tall or as muscular as the deceased and he suffered from considerable ill-health. Therefore it is apparent that the 2 men were not well matched, and that the deceased was younger, bigger and stronger than the applicant. As soon as the deceased went out through the back door he and the applicant began to fight. At the start the fight consisted of them punching and wrestling. It appears that at the start they were on their feet but after a short time they were fighting on the ground, and it appears that the fighting went on for a period of minutes.

It is clear that in the course of the fight the applicant used the bayonet which he had brought from his home to stab the deceased in the neck. The blade of the bayonet had passed downwards through the left sternomastoid muscle of the neck severing the left external jugular vein, and the blade had then passed into the upper part of the chest and through the top of the right lung with the tip of the blade just penetrating the muscles between the third and fourth right ribs. The length of the track of the wound within the body was approximately 24 cm. Bleeding from this wound would have caused the rapid, but not immediate death of the deceased. In addition the deceased had suffered a second stab wound on the left side of the lower abdomen, the blade having passed upwards, slightly backwards and to the right into the abdominal cavity. Whilst the abdominal injuries caused by this wound were serious they would not necessarily impose an immediate threat to the life of the deceased. In addition the deceased had a number of minor stab wounds, none of which had penetrated the body cavities or damaged any vital structures, on the front

of the chest, on the left flank, on the left side of the lower back, and on the front of the left shoulder, on the front of the neck, on the front of the abdomen, on the right upper arm and forearm and on the inner side of the left thigh.

The applicant himself had 2 wounds, which appeared to have been caused by the blade of a knife or dagger, on his legs.

After he had inflicted the fatal stab wound of the deceased it appears that the applicant then banged on both the back door and then the front door of 40 Crilly Park and shouted for Thomas Caldwell to come out, but he did not do so and remained inside the house. The applicant then went away and was apprehended a short time later by the police.

The basis upon which the issue of provocation was raised at the trial on behalf of the applicant, it being clear that the jury accepted that the Crown had not disproved the issue of provocation once it had been raised, was that in the first exchange of words between the deceased and the applicant when the applicant was knocking at the front door of 40 Crilly Park, the deceased shouted at the applicant calling him names, and one of the things he shouted at him "What are you doing over here you crippled B you". The applicant had suffered from severe sciatica which made him lame, and the case was made on behalf of the applicant that the taunt that he was a cripple provoked him, particularly as the taunt was shouted at him when his son was present. This contention that the applicant was provoked and that he was still acting under the stress of the provocation when he stabbed the deceased with the bayonet, having returned to his home to obtain the bayonet, was clearly accepted by the jury, and the trial judge and this court must accept and respect that finding.

In sentencing the applicant the learned trial judge said:

"Michael Malachy Murray, the jury have found you not guilty of murder but guilty of manslaughter and it is quite clear from their verdict that they have done that on the grounds of provocation. Nonetheless while I entirely respect their verdict I have got to say that I regard it as a bad case of its kind because it was not a case of someone who immediately and instinctively reacted to whatever was said or done at No.40 but there is an element of organisation in the fact that you went away and got a weapon in your own house, this ugly bayonet, which you were apparently keeping in your house for some unknown reason. You got that and you went back. You got the deceased man out of his house and so far as the evidence goes there is no suggestion at all that you gave him any fore knowledge that you were armed in the way that you were. You lured him from his house or rather the house that he was in. He did not know that you were armed and there was no preparation at all for what was ahead of him. You struck this blow with a degree of determination even although it may not have taken much force but it certainly required the knife to be guided and guide in such a way that you intended to take his life.

Accordingly, as I say, I regard this as a serious offence. There are no doubt cases of provocation in which a much lesser sentence would be appropriate but in my view this is a case which calls for a severe sentence and in view of what you did and the way that you went about it I regard the appropriate sentence to impose on you is one of 10 years' imprisonment".

For the reasons which he stated in passing sentence, we consider that the learned trial judge was fully entitled to take the view that this was a bad case of its kind which called for a severe sentence, and this court is in full agreement with that view expressed by the judge.

A considerable number of grounds were set out in the notice of appeal, and we have taken them all into account. The main grounds advanced by Mr John McCrudden on behalf of the applicant were the following.

Counsel submitted that the sentence of 10 years was excessive in the light of the authorities. Mr McCrudden referred us to a number of decisions. These included the following: In R -v- Edmunds [1983] Crim LR 406 the accused, being provoked, took a knife from one of his companions and stabbed the deceased in the abdomen. He was sentenced to 9 years' imprisonment which the English Court of Appeal reduced to 7 years. In R -v- Jama [1968] Crim LR 397 the accused knocked down the deceased with his fists and then hit him with an iron implement which he used in the course of his work, and the deceased died. He was found guilty of manslaughter and the jury indicated that they considered there was provocation and no intent to cause grievous bodily harm. The accused was sentenced to 10 years' imprisonment, which the English Court of Appeal reduced to 3 years, having regard to the view of the matter apparently expressed by the jury. In R -v- Whitmore [1989] 11 Cr.App.R (S) 288 the deceased, after a trivial argument, picked up a kitchen knife which he was using to cut bread at the time, and stabbed the deceased in the back of the armpit which severed the deceased's main artery and caused his death. The applicant was sentenced to 7 years' imprisonment and this sentence was upheld by the English Court of Appeal. Delivering the judgment of the court Auld J stated:

"In our view, this case falls at the upper end of the scale for offences of this type. Such provocation, in the non-legal sense of that term, as there was, was minimal. The appellant's ready use of a kitchen knife over a trivial argument, with the fatal consequences that it has, must be treated with severity. Such knifing incidents are all too common. Those who take deadly weapons in their hands to use them on others, whatever their intent, must appreciate the serious risks that they take with other peoples lives, and that they will be severely punished by the court.

The sentence of 7 years' imprisonment was neither wrong in principle nor manifestly excessive. The appeal is dismissed".

We consider that the present case, for the reasons stated by the learned trial judge, was a much more serious case than the cases which were cited by Mr McCrudden. In R -v- Jama the brief report states:

"10 years is a sentence appropriate to a bad case, one which is nearly murder".

In R -v- Shaw [1984] 6 Cr.App.R (S) [1984] 108 at 109 Griffiths LJ (as he then was) stated:

"The only ground upon which this appeal is urged before this Court is that 7 years should be considered to be the maximum sentence that a court should pass for manslaughter on the ground of provocation, no matter how tenuous the judge may have to regard the provocation. It is right that there have been cases in which the Court has reduced the sentence for manslaughter on the ground of provocation from 10 to 7 years, but no authority has been cited to this Court to show that sentencing policy has so hardened that 7 years should in all cases be considered to be the maximum sentence that the court should impose for a killing which has been reduced to manslaughter on the ground of provocation. The circumstances of cases vary infinitely, and the person best suited to weigh up the appropriate punishment is the High Court Judge who presides over the trial and hears how the matter develops".

and Watkins LJ in a later case, R -v- Hussey [1989] 11 Cr.App.R (S) 460, confirms this:

He says at p.462:

"Cases of manslaughter vary infinitely. Therefore, so does the punishment for it. In Naylor [1987] 9 Cr.App.R (S) 302, in giving the judgment of the Court I stated, at p.305:

'In cases of provocation, such as reduce murder to manslaughter, sentences in the region of 7 years, plus or minus 2 or 3 years, are usual. There are rare sentences reported, however, in excess of that'."

As we have stated we consider that this was a bad case and we are in respectful agreement with Griffiths LJ that sentencing policy has not so hardened that 7 years should in all cases be considered to be the maximum sentence for a killing which has been reduced to manslaughter on the ground of provocation. As Griffiths LJ stated, the High Court Judge who presided over the trial and who heard how the matter developed is the person best suited to weigh up the appropriate punishment, and we consider that McCollum J, having heard all the evidence, was entitled to conclude that the case was a bad one which called for a severe sentence of 10 years' imprisonment.

Mr McCrudden further submitted that the learned trial judge, in imposing a sentence of 10 years' imprisonment, had failed to take account adequately of the degree and nature of the provocation to which the appellant had been subjected. Mr McCrudden submitted that it was extreme provocation for the applicant to be insulted and humiliated in front of his son, aged 15, by being called "a crippled B". We can see no basis for the submission that the trial judge did not take into account the nature of the provocation. The words and actions which can constitute provocation can vary very greatly, and we do not accept the submission that the words used and the occasion on which they were used were such that they constituted an extreme form of provocation which should operate to reduce the sentence passed on the applicant having regard to his conduct after the insult.

Evidence was given by the applicant's general practitioner as to the state of his mental and physical health. The applicant had suffered from attacks of acute depression since 1978 and had been given courses of electric shock treatment. The applicant had had severe right sided sciatica and had also suffered from bouts of severe abdominal pain. His general practitioner said that the applicant was very bad at coping with pain and stated that he had a psychosomatic illness together with the bouts of depression from which he had suffered. The general picture presented was of a man with a very inadequate personality who also abused alcohol on occasions, and it is clear that on the night of the killing the applicant had had a good deal to drink.

Mr McCrudden submitted that these were mitigating factors which the judge had failed to take into account, and that if the judge had taken them into account he would have imposed a sentence of less than 10 years.

It is relevant to remark that the actions of the deceased on the night of the killing were not those of a man with an inadequate personality or who suffered from mental of physical weakness. Rather they were highly violent and threatening actions when the applicant armed himself with a bayonet and then, without revealing that he had the bayonet, challenged the deceased to come out and fight him.

We consider that this was a case of such gravity that the trial judge was fully entitled not to reduce the sentence because of the physical and mental illness suffered by the applicant in the years prior to the killing. We would apply to this case the words of Scarman LJ (as he then was) in R -v- Inwood [1974] 60 Cr.App.R 70:

"But in the balance that the Court has to make between the mitigating factors and society's interest in marking its disapproval for this type of conduct, we come to the irresistible though unpalatable conclusion, that we must not yield to the mitigating factors. The sentence was correct in principle when measured against the gravity of the offences".

Mr McCrudden further submitted that the sentence of 10 years' imprisonment failed to reflect the possibility that the deceased might have used the bayonet in self-defence. We consider that this submission is without any substance. The learned trial judge rightly withdrew the defence of self-defence from the jury. Having regard to the actions of the deceased in return to his home to obtain the bayonet and then returning to 40 Crilly Road to tempt the deceased out to fight him, there is no basis for any suggestion of self-defence.

Accordingly we dismiss the application for leave to appeal.