Neutral Citation: [2017] NICC 3 | *Ref:* **MCB 10221**

Judgment: approved by the Court for handing down | *Delivered:* **03/02/2017**
*(subject to editorial corrections)**

THE CROWN COURT OF NORTHERN IRELAND

THE QUEEN

v

CHRISTOPHER O'NEILL

Ruling on No Case to Answer

McBRIDE J

Introduction

[1] After the Crown closed its case the defence submitted that the evidence did not disclose a case to answer in respect of the count of murder. The defence accepted however, that there was a case to answer in respect of an alternative charge of manslaughter.

Relevant legal principles

[2] The leading authority on the test a trial judge should apply in determining whether there is a case to answer is R v Galbraith (1981) 2 All ER 1060. Lord Lane CJ said at page 1042 B to D:

> "How then should the judge approach a submission of 'no case'?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.
>
> …
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[3] The defence application is based on the second limb of the test set out in Galbraith. The second limb of Galbraith leaves a residual role for the court to assess the reliability of the evidence and as Blackstone Criminal Practice 2016 at para D 16.57 states:

> "… The court is empowered by the second limb of the *Galbraith* test to consider whether the prosecution's evidence is too inherently weak or vague for any sensible person to reply on it. Thus, if the witness undermines is own testimony by conceding that he is uncertain about vital points, or if what he says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness's evidence, and therefore (in the absence of any other evidence) there is no case to answer."

[4] When such an assessment of the reliability of the evidence adduced by the prosecution is required, as Turner J is Shippey (1988) Crim LR 767 noted, taking the prosecution at its highest did not mean "picking out all the plums and leaving the duff behind."

[5] Archbold Criminal Pleadings Evidence and Practice 2017 Edition at para 4.365 notes *Shippey* was a decision on its own facts but confirms the principle that the judge should assess the evidence as a whole. If the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness.

Murder/Manslaughter

[6] The difference between murder and manslaughter relates to intention. The mens rea for murder is "intention to kill or to cause grievous bodily harm". In contrast the intention for manslaughter is to cause "some harm".

[7] In this case the prosecution was not making the case that the defendant intended to kill Carragh Walsh but was seeking a conviction for murder on the basis that the defendant had the intention to cause Carragh Walsh grievous bodily harm which means serious bodily harm.

Submissions of Defence counsel

[8] Mr Lyttle QC, who appeared on behalf of the defendant, submitted that the evidence of Dr Mangham, now Professor Mangham, was so inherently weak, inconsistent and manifestly contrary to reason, the Court was entitled to hold that no reasonable jury, properly directed, could rely on it. In these circumstances, he submitted, there was no case to answer in relation to the charge of murder.

[9] Professor Mangham, a consultant pathologist with experience in histopathological assessment of bone diseases and fractures, was asked by Dr Lyness, the State Pathologist, to examine bone specimens of the deceased child, Carragh Walsh, for evidence of bone disease, presence/absence of fractures and if fractures were present to give an estimate of their age at the time of death. In his initial report, Professor Mangham reported that the deceased had sustained the following fractures:-

1. Fracture to the right proximal tibia.
2. Fracture 15 millimetres distal to the proximal tibia physis
3. Fracture to the left proximal tibia
4. Fracture to the right distal humerus
5. Fracture of the left distal femur
6. Fracture of the left sixth rib.

He reported that all the factures, save fracture (2), the facture 15 millimetres distal to the proximal tibia physis, were sustained within a few hours, possibly even minutes, immediately prior to death. He further opined that fracture (2) was approximately 2 to 4 days old and this fracture clearly predated fracture (1), that is, the CML fracture to the right proximal tibia. Subsequently, Dr Lyness, phoned Professor Mangham and after this conversation Professor Mangham provided an addendum report dated 29 September 2014. In this addendum report he indicated that he had failed to fully appreciate the extreme state of profound cardiovascular shock Carragh Walsh was in at the time of admission into hospital. Taking this into account, he then opined that all the identified fractures could have been sustained prior to the last 2 days of her life. As such the factures could have occurred on 5 February 2014, namely the time at which Carragh Walsh was in the sole care of the defendant.

Professor Mangham was called as an expert medical witness on behalf of the Crown and this was the evidence he gave at trial.

[10] Mr Lyttle submitted that there were credibility and reliability issues in respect of Professor Mangham's evidence. His evidence was contradictory as he had changed his opinion and Professor Mangham had given no logical or rational explanation for the change in his conclusion about the dating of the fractures. Further, Dr Lyness, stated the evidence in respect of the fractures was most "concerning", "troubling" and Dr Mangham's findings in respect of the dating of the fractures was "paradoxical".

[11] Mr Lyttle further submitted, if facture (2) predated all the other fractures, and the Crown medical experts accepted that this fracture occurred in the hospital due to insertion of an intra osseous needle, then no reasonable jury, properly directed could find that any of the fractures occurred whilst Carragh Walsh was in the sole care of the Defendant.

[12] As Professor Mangham's evidence was so contradictory, tenuous and inherently weak, it was not permissible to leave it to the jury. In these circumstances there would be no evidence on which a reasonable jury, properly directed could find the defendant swung Carragh Walsh by a limb or limbs and therefore there was no basis on which a jury, properly directed could find that the defendant had the mens rea for murder, namely in this case, an intention to cause Carragh Walsh serious bodily harm.

Submissions by prosecution counsel

[13] Mr Hedworth QC, on behalf of the Crown, submitted that the Crown case had a number of strands to it. On the basis of the medical evidence, the Crown case was that Carragh Walsh died as the result of either;

(a) being swung by a limb or limbs with or without impact; or in the alternative

(b) being forcibly shaken with or without head impact.

It was the Crown case, that the expert medical evidence of Dr Mangham relating to the location, nature and number of bone fractures and the timing of these fractures, established beyond reasonable doubt that the defendant had swung the deceased by a limb or limbs with or without head impact, and this had caused Carragh Walsh to sustain the TRIAD of injuries (swollen brain, subdural bleeds and retinal haemorrhages). Mr Hedworth submitted that the evidence of Professor Mangham, was not so tenuous or inherently weak that it should be withheld from the jury. He accepted that Professor Mangham had given changed his opinion in respect of the dating of the fractures but he had given a valid reason for doing so. Such matters of credibility and reliability were matters for the jury to weigh up and assess.

[14] In relation to the sequencing of the occurrence of the fractures, Mr Hedworth submitted that Professor Mangham had explained that all the fractures occurred at the same time. He accepted this represented a change of opinion in relation to the sequencing of the fractures but contended this was a matter for the jury.

[15] Secondly, Mr Hedworth submitted that the prosecution case in respect of the necessary intention to establish a charge of murder did not rest solely upon a finding in respect of the fractures. Therefore the Crown case did not stand or fall on the evidence of Professor Mangham alone. He submitted that the second strand to the Crown case was that the deceased had been forcibly shaken. This was established beyond reasonable doubt by the expert medical evidence relating to the TRIAD of injuries and the bruising. Therefore even in circumstances where the evidence of Professor Mangham was excluded, there remained evidence upon which a jury properly directed could find that the defendant had forcibly shaken the deceased. On this basis, he submitted, even if the case about swinging the deceased by the limb or limbs was excluded, there was other evidence which established the deceased was forcibly shaken and a jury properly directed could find the necessary mens rea for murder on this basis.

Consideration

[15] Professor Mangham gave contradictory evidence about the dating of the fractures. He did however set out reasons for his change of opinion. He also gave conflicting evidence about the sequencing of the fractures but in evidence gave a reason for the change in his opinion. The nature of his evidence therefore gives rise to issues about credibility and reliability. Such issues in respect of credibility and the reliability of a witness are peculiarly matters within the province of the jury. As noted in Brooks v DPP (1994) 1 AC 568 at 581 PC, questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case.

[16] I therefore find that, notwithstanding the disputes in respect of the credibility and reliability of Professor Mangham's evidence, it is not so inherently weak or so discredited that it could not conceivably support a guilty verdict. For this reason I find that it his evidence should not be excluded. In these circumstances, I find that, there is sufficient evidence from which a jury properly directed could reasonably find that the defendant swung the deceased by a limb or limbs and therefore had the necessary intention to cause her serious bodily harm.

[17] In addition, the Crown case does not stand or fall on the basis of the evidence of Dr Mangham. His evidence goes to only one strand of the Crown case. The other strand of the Crown case is that the deceased was forcibly shaken as evidenced by the TRIAD of injuries and bruising. Even if the evidence of Dr Mangham was excluded there is other expert medical evidence before the Court about the TRIAD

and significant bruising. I find that a jury properly directed, could on the basis of this medical evidence find that the deceased was forcibly shaken and the jury, in light of such a finding of fact, could then find the defendant had the necessary intent for murder. Indeed, Mr Lyttle, on behalf of the defence, accepted that if there was evidence before the Court that the deceased was shaken forcibly, then that was sufficient evidence upon which a jury may make a finding that the defendant had the necessary mens rea for murder. Whilst there is a conflict in the evidence of Dr Eagan and Dr Lyness, both Pathologists, as to the mechanism by which the child was forcibly shaken this conflict is a matter for the jury to make a determination about.

Conclusion

[18] I find that there is sufficient evidence from which the jury, properly directed could reasonably find that the defendant is guilty of murder. This is by virtue of the evidence of Professor Mangham. Alternatively, in the absence of his evidence, a jury could make such a finding by virtue of the evidence given by the other Crown medical expert witnesses. For all these reasons, I dismiss the defence application of no case to answer.