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COURT DISMISSES APPEAL BY LIAM WHORISKEY

Summary of Judgment

The Court of Appeal[1] today delivered its reasons for dismissing an application for leave to appeal against conviction and sentence by Liam Whoriskey who was convicted in October 2019 of the manslaughter of Kayden McGuinness, a 3 ½ year old boy.

Liam Whoriskey ("the applicant") was convicted in October 2019 of two offences: the manslaughter of Kayden McGuinness and cruelty to the same child but on a date prior to the child's death. The cruelty charge consisted of a wilful assault on the child in a manner likely to cause him unnecessary injury to health. The applicant was originally charged with the murder of Kayden but this was reduced to manslaughter at the trial following an application by the defence that the applicant had no case to answer. The applicant contested this charge and was found guilty by a jury. He was sentenced to 13 years' imprisonment for manslaughter and a consecutive term of two years for the assault charge. In total the sentence imposed was one of 15 years' imprisonment. The applicant sought to appeal against conviction and sentence.

The applicant began a relationship with Kayden's mother in February 2017. He was not Kayden's father. The Crown Court heard evidence of several incidents involving Kayden, including one which occurred on 15 August 2017 giving rise to the applicant's conviction for assault. The applicant alleged that Kayden had dropped a small toy car which hit him in the face. The following day Kayden had a swollen nose and two black eyes and his mother posted a photo on Facebook. This came to the attention of a social worker who passed it to the police for investigation.

The next incident was on 16 September 2017 when the applicant was seen on a shop's CCTV holding Kayden roughly and pulling him back to his feet from the floor. A witness gave evidence that the child had been crying and the applicant was swearing at him. Later that evening, Kayden's mother went out with family members. She thought the child's behaviour was "strange and "weird"" but attributed this to him being tired after this day out. She stayed overnight with friends and got a call from her sister the following morning saying that Kayden was dead. The court heard that the applicant had fallen asleep on the sofa after drinking and did not check on the child until close to 10.00am when he found him lying on his bed with foam coming from his mouth and significant bruising to his face. The applicant, while accepting that no one else had entered the flat to his knowledge, could give no account of how Kayden had died.

The medical evidence concluded that Kayden died as a result of severe blunt force trauma of the head which resulted in bleeding over the surface of the brain. The pathologist said the multiplicity of the injuries and their pattern and distribution clearly indicated that they were "non-accidentally sustained and were the result of his being assaulted, possibly repeatedly over a period of time." None of the medical experts was able to identify a specific time of death.

Grounds of Appeal

[1] The panel was Keegan LCJ, McFarland J and Sir Paul Maguire. Sir Paul Maguire delivered the judgment of the court.

Grounds 1, 2 and 3 – Photographs

The applicant contended that a booklet of photographs taken by a police photographer and showing the injuries to the child's head and face should not have been shown to the jury. The trial judge had considered the introduction of the photographs and decided that the booklet should go before the jury as it was entitled to "know everything" about the case and to have sight of the injuries which the photographs captured. The Court of Appeal did not consider that the trial judge acted outside the boundaries of the discretion he possessed under Article 76 of the Police and Criminal Evidence (NI) Order 1989 and was of the view that the jury should have been able to see for itself the photographs which depicted the child's condition in the immediate aftermath of the discovery of his death:

> "We do not accept that the jury seeing the photographs would excite prejudice against the applicant or would gratuitously disable him from being able to make the best defence he could. In our view, the jury had a vital function to perform and there will be cases where that function will involve it seeing materials, including photographs, which though at times difficult to look at, aid the jury's understanding of the evidence and the implications which arise from it, even if at a later stage, there will be a variety of experts who may be able to provide and convey their views of the situation. In short, we do not consider that in this case any unfairness arose by reason of the jury seeing the photographs of the deceased, as they did."

The court noted that when considering issues of this nature it should not ignore that the trial judge was able to ensure that any evidence of this nature was viewed by the jury in its correct context. In this case the judge, in his summing up, was anxious to drive home to the jury that it must act without fear or favour and on the basis of the evidence alone, avoiding any possible risk of the jury failing to have regard to the limits of the evidence provided from whatever source it was derived. The court dismissed these grounds of appeal.

Ground 4 – admission of bad character evidence

The applicant contended that the trial judge was wrong to adduce evidence of his previous convictions for assault as evidence of bad character as they involved adult victims and were not evidence of a propensity to be violent towards a child. The first conviction was for assault occasioning actual bodily harm in 2013 and the second conviction was for common assault in 2015. The latter conviction resulted in the applicant being made the subject of a restraining order prohibiting him from intimidating and harassing a former partner with whom he had a child.

The prosecution contended that the previous convictions showed the applicant had a propensity to behave violently, to indulge in aggressive behaviour and lose control within a domestic setting. In his ruling granting the application, the trial judge said he would give a direction to the jury on how to deal with this evidence. The applicant's former partner gave evidence stating that the applicant became violent when drinking and would slap their child and leave red marks.

The applicant submitted that the judge's ruling was flawed and that the material admitted as bad character evidence did not demonstrate propensity on the basis that the alleged behaviour was directed at adults, not children. He claimed that any red marks on the child could be properly viewed as no more than the outcome of chastisement and in that context both his former partner and he had acted similarly. The applicant claimed that this was a long way away from someone

assaulting a child while in a bad temper and that shouting at a child or acting aggressively to a child would not amount to propensity, even if at the time alcohol had been consumed, in the absence of the use of violence to the child.

The court, however, considered that the trial judge was acting well within the ambit of his authority when he reached his conclusion to admit the evidence of bad character:

> "There was, in our opinion, more than sufficient evidence to raise serious concern that the applicant was (and is) a person who could rise to acts of violence, including domestic violence. His convictions alone showed this and, as is so often the case, his consumption of alcohol appears to have been a factor in several of the instances of loss of control and aggression, though his tendencies to misbehaviour cannot alone be linked to this factor. It appears that even in such an apparently innocuous situation as him watching the television he could "get mad" by the presence of a young child playing in the vicinity leading to his shouting and abusing the child."

The court also rejected the view that the bad character evidence admitted by the trial judge was not relevant to the issues in the trial and/or did not demonstrate propensity. It said it was clear that the applicant was a person who had a propensity to violence and to engage in aggressive behaviour within a domestic setting and, if correct, it was difficult to see how this could be other than important evidence in respect of a case such as this one, where the applicant was in charge of a very young child, who was later found dead, and where he appeared to have, in all probability through the consumption of alcohol, failed conscientiously to attend to the child's welfare at the level of checking him regularly. The court further rejected the argument that any propensity for violence which was relevant existed only in respect of violence to adults rather than a child. It said this overlooked the fact that the events arose out of a domestic setting and, on the evidence available, involved all of those who populated that setting, including children: "Domestic violence, in short form, hurts adult partners and children alike, and the judge's analysis in this regard, in our view, is not flawed." The court dismissed this ground of challenge.

Ground 5 - the nasal injury

It was contended that "it was against the weight of the evidence for the jury to conclude that a nasal injury sustained by the deceased on 15 August 2017 was inflicted by the applicant." This ground was only fleetingly addressed at appeal. The court said the jury's conclusion in respect of this issue depended on how it resolved and/or reconciled the different positions adopted by the prosecution and the defence. It said the jury saw and heard the relevant witnesses in support of the different positions and had then come to a decision which inevitably involved a judgement of fact, applying the normal burden and standard of proof:

> "It seems to us that their conclusion cannot be impeached in this court. The matter was simply one for the jury and turned on the evidence the jury accepted. If they believed the applicant or thought his version might possibly be true they should not have convicted. They were, however, entitled to reject the applicant's account and accept the prosecution case. We dismiss this ground of appeal. "

Grounds 6 and 7 - issues decided against the weight of the evidence

The applicant contended that it was against the weight of the evidence for the trial judge to permit the jury to rely on the medical evidence as being capable of establishing perpetrator identification.

The case made by the applicant was that as there was not an established time of death there was a reasonable possibility that the blunt force trauma may have occurred at a time when the applicant did not have sole care of the deceased. Moreover, it was submitted that the medical evidence did not "singularly point to the applicant as the individual responsible for an unlawful act resulting in the unintended death of the deceased."

The court considered there was no basis which came close to supporting the view that these grounds have any prospect of success. It said the function of a medical witness in a case such as this is to assist the jury but conclusions as to what weight to give to the variety of points which may emerge, especially when there are a whole series of witnesses, is very much reserved to the jury who, must have regard to all the evidence. The court said the suggestion that there was no proof of non-accidental injury was not well made nor was there any proven substance to the contention that there may have been a failure on the trial judge's part to alert the jury to the issue of whether the child had been acting weirdly. The court dismissed these grounds of appeal.

Ground 8 – failure of the trial judge to direct the jury as to the offence of manslaughter
Ground 9 - failure to direct the jury as to the fact that the case against him was a circumstantial case

These supplementary grounds of appeal were raised in September 2021 after the applicant appointed new counsel.

The purpose of being able to requisition a judge in the aftermath of his charge to the jury (or before if the charge is delivered over different days) is to facilitate the judge being able to correct any error of substance or omission on his part prior to the jury retiring. Where there is no requisition in respect of a given point, this will normally indicate that the legal representatives are content with the accuracy and completeness of what the judge has said. In these circumstances, it will usually follow that if a point is taken in the Court of Appeal which has not been preceded by a requisition at the time the trial judge's charge was given, this will tend to indicate that it is likely that the legal representatives who were involved at the time considered that the judge had acted properly. The court said this should be the starting point from which to consider these grounds.

The grounds centred on the alleged failure of the trial judge to explain the ingredients of unlawful act manslaughter to the jury and an alleged failure by the judge to explain to the jury that the case against the applicant was a circumstantial one. There were, it was claimed, no "meaningful directions" on these issues. It was further claimed that there was no direct evidence to prove who had caused the injuries to the child so that the Crown case was both inferential and circumstantial.

The court outlined relevant case law, legal texts and Crown Court guidance on circumstantial evidence and considered whether there was an obligation on the trial judge to direct a jury in a particular way in such cases. It said it was not convinced that there was substance to ground 8:

> "We consider that it must have been obvious to the jury what its function was in respect of the charge of manslaughter and what they needed to direct their minds to. While the judge's charge dealt specifically with this issue briefly, the words used, we consider, must be read within the overall context of the information available to the jury. The jury was told in simple terms what they had to look for *viz* the existence or otherwise of the perpetration of an unlawful act or acts which caused Kayden's death. After three and a half weeks of hearing evidence, it may be inferred that the jury would not have had difficulty in understanding that the unlawful act being searched for was

> linked to actions on the part of the applicant which may have been responsible for the condition in which the deceased was found. It cannot be doubted that the jurors will have been aware (from the medical evidence and from other evidence) that the injuries sustained by Kayden arose from physical harm and, as non-accidental injuries, the actions giving rise to them could not be other than creating the risk of harm to the child in a manner that all sober and reasonable persons would recognise."

In respect of ground 9, the court said it would have been desirable for the trial judge to have specifically addressed to the jury the points suggested in the Crown Court guidance. It noted that the trial judge did not summarise those aspects of the evidence based on circumstantial factors; the conclusions which might be drawn from this; and highlight alleged points of inconsistency relied on by the defence. The court noted, however, that it was in no serious doubt that the jury will have been well aware of the need for it only to convict in circumstances in which they were satisfied beyond reasonable doubt that the defendant was guilty. But equally it was not in doubt that a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say they were satisfied of guilty beyond reasonable doubt:

> "Overall, we are of the opinion that while there were failures on the part of the judge to follow the guidance which the … documents contain, such would not be sufficient for the court to hold that this ground of appeal is made out with the consequence that the applicant's conviction in relation to ground 9 should be overturned."

Conclusion

The court concluded that the appellate test had not been satisfied and the verdict should stand.

In considering the application for leave to appeal against sentence, the court said it had no hesitation in holding that the sentencing for manslaughter was well within the range of discretion open to the sentencing judge and that the sentence was not manifestly excessive or wrong in principle.

Overall, the court found no merit in the grounds of appeal as a whole and was of the opinion that the convictions of the applicant are safe. It refuse leaved to appeal in these circumstances.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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