Neutral Citation no [2004] NICA 19 | *Ref:* **KERF4162**

Judgment: approved by the Court for handing down | *Delivered:* **21.05.04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MARTIN MURPHY

Before Kerr LCJ, McCollum LJ and Campbell LJ

KERR LCJ

Introduction

[1] On 1 February 1999 after a trial before Nicholson LJ and a jury the appellant was convicted of the murder of Geraldine Mills on 4 May 1998. Leave to appeal was granted by the single judge.

[2] At the appellant's trial he did not dispute that he had killed Mrs Mills. He claimed, however, that he had been provoked into doing so. No evidence was given as to his mental condition. Subsequently, the appellant sought leave to adduce evidence on the appeal from Mrs Olive Tunstall, a clinical psychologist, and Dr Ian Bownes, a consultant psychiatrist, about his state of mind at the time of the killing. Leave was granted and on the appeal the court heard evidence from these witnesses and Dr Ian Hanley, a consultant clinical psychologist called on behalf of the Crown.

Factual background

[3] The appellant is an unmarried man now aged 65 years. For many years before her death in 1989 he lived with his mother at 10 Elizabeth Gardens, Comber. Mrs Mills worked as a home help for Mrs Murphy and she and the appellant formed a friendship that, according to the appellant, led in time to a sexual relationship. This continued on and off until some time before the events of 4 May 1998.

[4] After the sexual relationship ended Mrs Mills continued to see the appellant occasionally. She brought him meals and tidied his house from time to time. For his part the appellant was keen to remain in contact with her. He brought vegetables to her home and he gave her money and presents. In the account of a friend of Mrs Mills he was described as being obsessed with her. Mrs Mills' children have said that the appellant stalked their mother.

[5] In January 1995 Mrs Mills met John Lightbody and they began a relationship soon afterwards. Mr Lightbody lived with Mrs Mills until January 1998 when they split up for a short time. They resumed their relationship on 14 April 1998 and Mr Lightbody began living with Mrs Mills again towards the end of that month. The appellant was aware of the relationship between Mrs Mills and Mr Lightbody; he knew that they had split up but appears to have discovered that they were living together again only on 3 May 1998.

[6] According to the appellant he became aggrieved by the fact that Mr Lightbody was once again living with Mrs Mills. He felt that she had taken the money that he had given her under false pretences. He confronted her about this and she agreed to go to his house to sort the matter out on the evening of 4 May 1998. His account of what happened when Mrs Mills came to his house that evening is sparse. Initially he claimed only to be able to remember Mrs Mills arriving at his house and he then "blanked out" and could remember nothing else until he saw her body lying on the floor. When his trial was imminent he found (or so he maintained) that he had recovered some further recollection. Significantly this claimed memory related directly to his defence of provocation. He alleged that Mrs Mills had taunted him about his sexual prowess and that this shocked him greatly and caused him to experience a great sense of shame. This, he suggested, was the last thing he remembered until he found himself standing over her dead body.

[7] Mrs Mills died as a result of multiple stab wounds to the neck. She had also been stabbed many times in the trunk and limbs. From the number and location of the wounds the pathologist who conducted the autopsy concluded that she had been the victim of a sustained attack.

[8] It appears that after he had killed Mrs Mills, the appellant took several tablets and slashed his wrists. He left a suicide note. He was discovered by friends and members of Mrs Mills' family, however, and taken to hospital where he made a rapid recovery.

Evidence of the appellant's mental condition

[9] The appellant was first examined by Mrs Tunstall on 11 December 1998. The purpose of the examination was "to determine whether there [was] any evidence to suggest that Mr Murphy may be suffering from some form of amnesia which might account for [his] loss of memory". On this question Mrs Tunstall concluded that Mr Murphy's abuse of alcohol might have caused some memory impairment but that nothing had been revealed by the psychological tests that suggested organic intellectual deterioration or memory loss. In other words no reason for the professed amnesia was found. Significantly, Mrs Tunstall gave it as her opinion that there was "no plausible explanation, in terms of his cognitive functioning, for Mr Murphy's claimed experience of having 'blanked out' at the time of Mrs Mills' death". She recommended that a psychiatric opinion be obtained but this was not done.

[10] When he was examined in December 1998 the appellant was found to have an IQ on the Wechsler Adult Intelligence Scale – Revised (WAIS – R) of 77. On the basis of this result Mrs Tunstall concluded that the appellant was a man of low intelligence with an IQ falling within the borderline mental handicap range. This was "reasonably compatible" with his educational and occupational record. He was found to have an abnormally compliant and unassertive personality. He had an N score (denoting 'neuroticity') of 15.

[11] Mrs Tunstall examined the appellant again on 3 September 2001. He was able to give a fuller account of the events of 4 May 1998. He said that Mrs Mills came to his house and threw a ten-pound note at him and then "lit" on him. He remembered her telling him that he was no good at sex and that she had had better sex with other men and would do so again. On hearing this the appellant experienced an overwhelming sense of shame such as he had never felt before. It came as a great shock to him that Mrs Mills had not enjoyed having sex with him because he believed that she had valued their sexual relationship. After this he could not remember anything until he was aware that Mrs Mills was lying dead on the floor.

[12] On the occasion of the second examination Mrs Tunstall found that the appellant's IQ had deteriorated markedly. His full scale IQ was found to be 56. At this examination Mrs Tunstall had administered a different test of IQ, the Wechsler Adult Intelligence Scale III (WAIS –III), which might account for a difference of up to three points. In the view of Mrs Tunstall the discrepancy was otherwise inexplicable. It was suggested on behalf of the appellant that the divergence in the test results might be explained by the fact that at the time of the first test he was receiving treatment for depression and that he may have been suffering from this condition when the second examination took place and this could have caused his performance in the tests to suffer.

This explanation cannot be accepted. It is true that the appellant was suffering from depression at the time of his admission to prison but all the indications are that this was successfully treated and he had not required medication or even medical attention for a considerable period before Mrs Tunstall's second examination.

[13] On the second examination Mrs Tunstall found that the appellant scored 20 on the N rating. This represented a significant increase on his score of 15 in the earlier test. He scored 18 (out of a possible 21) on the L component of the Eysenck Personality Questionnaire. This test is frequently used as an indicator of the patient's reliability, the 'L' signifying 'lying'. In her evidence Mrs Tunstall asserted strongly that it should not be interpreted for that purpose in the appellant's case. She declared that the appellant was, in her estimation, trying as best he could to complete the test and that the test result should be attributed to a degree of social naïveté on his part or a tendency to conform. We are not disposed to accept this view. The timing of the claimed recovery of memory, its limited content and the nature of the events recalled all point strongly to the appellant having consciously 'remembered' only those aspects of the incident that served his purpose in promoting a provocation defence and being 'unable to remember' aspects of the incident that would be difficult to explain on the basis of a sudden loss of control. In particular we have in mind the fact that the appellant must have deliberately armed himself with a knife to carry out the attack on Mrs Mills.

[14] Mrs Tunstall's principal conclusion from the personality test results was that Mr Murphy was "of an anxious, worrying disposition, likely to over react emotionally and to experience abnormally high levels of emotional arousal from which he is slow to recover". He was likely to be more vulnerable than the average person as a result of these personality traits and his abnormally low intelligence.

[15] Dr Ian Bownes examined the appellant on 5 December 2003. Dr Bownes is a consultant forensic psychiatrist. He had treated the appellant on his admission to prison. At that time he diagnosed the appellant's condition as a "depressive reaction to his situation". He prescribed medication. Initially there was no improvement and in July 1998 a moderately strong anti depressant was recommended for what was then considered to be a reactive depressive disorder. After this the appellant's condition improved to the extent that he was discharged from the outpatient psychiatric list on 3 September 1998 and he discontinued the medication on 6 May 1999. Since that time he had not consulted prison medical staff with any psychological complaints, although he has been treated for various physical ailments.

[16] As a result of his examination of the appellant and his consideration of his medical records Dr Bownes expressed the following opinion: -

> "The clinical picture presented following Mr Murphy's present committal to prison and review of the medical records supplied by his general practitioner was consistent with personality based 'neurotic' tendencies associated with an inherent vulnerability to the psychological effects of stressful and demanding situations. The immediate psychological impact of exceptionally traumatic experiences can sometimes induce a 'defence mechanism' known as 'repression' that may temporarily prevent the individual from consciously recalling relevant events, and I feel that the nature of his personality is such that Mr Murphy would have genuinely found the emotional reaction produced by provocation of the nature that he has described to Ms Tunstall more disturbing and difficult to cope with effectively than most men his age."

[17] In his oral testimony Dr Bownes explained that as many as 20% of the population would have a similar level of 'neuroticity' as that apparently exhibited by Mr Murphy on the second test administered by Mrs Tunstall. Dr Bownes' estimate of the degree of vulnerability that the appellant suffered as a consequence of this feature of his personality was, of course, based (albeit not exclusively) on Mrs Tunstall's findings on her second examination.

[18] Dr Hanley was asked by the prosecution to comment on Mrs Tunstall's and Dr Bownes' reports. He observed that the account given by Mr Murphy of the conversation with Mrs Mills on the evening of 4 May was "quite detailed". This contrasted with his persistent failure to refer to these matters when questioned by the police. Dr Hanley also remarked that Mrs Tunstall made no reference to the appellant having experienced anger after Mrs Mills had taunted him. It was difficult, Dr Hanley commented, to square feelings of shame and shock with a prolonged and vicious assault. These aspects of the new account obviously raised questions as to the appellant's veracity.

[19] The more substantial reservation expressed by Dr Hanley about Mrs Tunstall's opinion, however, related to the discrepancy between the test results in 1998 and those obtained in 2001. What he described as the "dramatic 21-point drop in IQ" gave rise to an obvious doubt about the genuineness of Mr Murphy's participation in the 2001 test. He considered that the appellant had every reason to present himself in a favourable light and the discrepancy in the scores, taken together with the very high L rating, made the results of the test in 2001 "wholly unreliable".

[20] All the members of this court found Dr Hanley's evidence on the lack of reliability of the 2001 tests compelling. We consider that there is substantial reason to distrust the appellant's performance on those tests and we were not impressed by Mrs Tunstall's explanation of his high rating on the L component of the personality questionnaire. We share Dr Hanley's misgivings about the theory that the appellant would have been provoked into a murderous attack of tremendous ferocity by feelings of shock and shame. We consider it to be far more likely that such an attack was prompted by feelings of jealousy and obsession, traits which the appellant had clearly exhibited in the period immediately before the killing of Mrs Mills.

The appeal

[21] In the skeleton argument furnished for the appellant it was suggested that the learned trial judge's charge on the issue of provocation was unclear and "possibly misleading". This suggestion featured less prominently in the oral submissions made by Mr Lyttle QC for the appellant. We must consider it, however, if only as a backdrop to the principal argument advanced on the appellant's behalf.

[22] At pages 11/12 of the transcript of the judge's charge he is recorded as saying to the jury: -

> "Now the law provides – and I'm going to read you the law because it's in the Criminal Justice Act – that where on a charge of murder there is evidence on which the jury can find that the person charged was provoked, whether by things done or by things said or both together, to lose his self control, the question whether the provocation was enough to make the reasonable man do as he did shall be left to be determined by the jury and in determining that question the jury shall take into account everything both done and said according to the effect which in their opinion it would have on a reasonable man. So if you took the view, for example, that she threw the £10 note at him and said, 'don't bring me any spuds down again' and he got into a rage then you would have to consider whether a reasonable man would have done what he did. If you consider that there is a reasonable possibility that she went further and said to him, 'You're no good in bed. I've had sex with people much better than I've had with you and I'll have it in the future' then again you have to, first of all, come to a view whether or not he

was provoked into doing what he did or you may take the view that he had decided, 'Well nobody's going to have you', that he had some kind of obsession with her and that he had decided to kill her and then take his own life because he wasn't going to let anyone else have sex with her or have anything to do with her. But if you take the view that he lost his self-control and was provoked – and I use the word provoked in the English language – you then have to decide whether a reasonable man would have done what he did. A reasonable man in the circumstances of this case is a man who wouldn't have lost his sense of control in the same way and a reasonable man in this case would be a man of his age, 59, a bachelor living on his own and coming from the same sort of background as he.

A reasonable man is a person who isn't exceptionally excitable but possessed of such powers of self-control as Mrs Mills in this case and every woman in the same sort of situation is entitled to expect from her fellow citizens. You have to consider whether the reasonable man might react to the provocation in the same way as the accused did."

[23] At page 13 the judge said: -

"If there is a reasonable possibility that she did say what he says she said then you have got to ask yourselves was he then provoked, lost his self – control, went into a frenzy, went and got the knife, struck her all those blows and killed her in the way that he did kill her. But the most important question you have to ask yourselves, if that's the stage which you reach on the issue of provocation, is whether any reasonable man of his age and background would have reacted in the same way or might have reacted in the same way having been taunted about his sexual prowess … Apply your own common sense and consider how a reasonable person in those circumstances of his sex, age, background and characteristics would have reacted. But I direct you that if you take the view that he was obsessed with her you don't

> when you're considering a reasonable man put into the equation that the reasonable man is obsessed."

[24] Mr Lyttle submitted that these excerpts suggested a wrong approach in that they proposed that the jury should leave out of account the appellant's personal propensities and because, in the first of the passages cited above, the judge had positively stated that a reasonable man would not have lost self-control.

[25] These criticisms might have some force if matters had ended there. It is now well established that, in determining whether provocation was enough to make a reasonable man do what the defendant did, the jury is required to ask whether the degree of self-control exercised by the defendant was that which reasonable people with his characteristics would have exercised and that all the particular characteristics of the defendant must be taken into account in deciding both whether he was in fact provoked and whether the objective element of provocation was satisfied – *R v Smith (Morgan)* [2001] 1 AC 146. In as much as the trial judge's charge advised the jury to disregard the obsession that the appellant had for Mrs Mills, it was not correct. Likewise the judge should not have said to the jury, "a reasonable man in the circumstances of this case is a man who wouldn't have lost his sense of control in the same way" since this was a matter that the jury, rather than the judge, had to decide.

[26] Matters did not end there, however. The passages from the judge's charge quoted above were uttered by him on Friday 29 January 1999. Having reflected on the matter over the weekend, the judge alerted counsel on the morning of Monday, 1 February to his intention to correct what he had said on the issue of provocation in light of his consideration of the authorities, particularly *R v Dryden* [1995] 4 All ER 987. He invited counsel to address him on the matter but they decided that this was not necessary. He then gave the jury the following direction: -

> "We are coming towards the end of the case now, members of the jury, and what I wanted to do at the outset of this morning is to correct something that I told you on Friday about the law relating to the issue of provocation. I am going to give you a direction now and then I am going to explain to you the mistake that I made in my remarks to you on Friday.
>
> Provocation is some words or acts or a combination of words and acts which actually causes in the accused a sudden and temporary loss

of self-control rendering the accused so subject to passion as to make him or her, whoever it be, for the moment not masters of their mind. That is one aspect of provocation.

The second aspect of it is that if some words or acts or a combination of words and acts which would cause in a reasonable person a sudden loss and a temporary loss of reason and loss of self-control, and in this case a reasonable person means a person who is possessed of such powers of self-control as one is entitled to expect a person to exercise in our society as it is today but in other respects sharing such of the accused's characteristics as you think will affect the gravity of the provocation to him, and whether he might react to the provocation as the accused did.

Therefore I said, members of the jury, that as far as there reasonable person was concerned, given the characteristics of the accused – namely, that he was 59 years of age, that he was a bachelor, that he lived alone, that he was in love with this girl – but what I did say to you that was wrong was that you were not entitled to take into account in judging what a reasonable person might do, that you were not entitled to take into account that he had an obsessional love or an infatuation for a woman, for Mrs Mills. That I take back and I say to you and I direct you, members of the jury, that in considering what a reasonable man might do, reacting to what she has said – and it would be a matter for you to decide or what did happen that day on that evening; now having reached a view as to what did happen you then say to yourselves, if you take the view that the accused lost his self-control as a result of what she said and did what he did, then you would come to look at the ordinary person, the reasonable person that you would have to look at. You give him the characteristics of the accused and one of those characteristics, if you think it to be the case, is that of the love, not just the ordinary love but an obsessional lover or infatuation and you ask yourselves could he have reacted or might he have

reacted in the same sort of way or might he have done what the accused did do."

[27] Mr Lyttle accepted that this part of the charge accurately set out the test to be applied by juries on the issue of provocation in light of the *Smith (Morgan)* decision but he suggested that the earlier sections of the charge may have sown the seeds of confusion in the minds of the jury and that the prior errors could not be redeemed by the correction made by the judge in the passage just quoted. We do not accept this claim. The judge was careful to inform the jury that the earlier parts of his charge on this topic should be ignored and was at pains to ensure that the correct direction was given. There is no reason to suppose that the jury failed to heed his instructions on this matter.

[28] The principal argument for the appellant was that the jury ought to have been provided with evidence as to the appellant's mental condition such as was now available from Mrs Tunstall and Dr Bownes. If such evidence had been given it was at least distinctly possible, Mr Lyttle argued, that the jury would not have dismissed the defence of provocation and that the appellant would have been convicted of manslaughter. He suggested that this court should therefore conclude that the appellant's conviction on the charge of murder was unsafe.

[29] The most recent authoritative statement of the law on the correct approach to the effect of fresh evidence on the safety of a conviction is to be found in *R v Pendleton* [2002] 1 WLR 72. In that case the House of Lords held that where fresh evidence had been received on an appeal against conviction, the correct test to be applied by the Court of Appeal in determining whether to allow the appeal was the effect of the fresh evidence on the minds of the members of the court, not the effect that it would have had on the minds of the jury, so long as the court bore very clearly in mind that the question for its consideration was whether the conviction was safe and not whether the accused was guilty. It is clear from that decision, however, that although speculation as to what effect the evidence might have had on the jury was to be avoided, the jury-impact test did have a virtue in reminding the Court of Appeal that it was not and should never become the primary decision-maker, and that it had an imperfect and incomplete understanding of the full processes which had led the jury to convict.

[30] Applying this approach we have no hesitation in finding that the conviction of the appellant was safe. We do not consider that the evidence of Mrs Tunstall or Dr Bownes creates any doubt, much less any reasonable doubt, that the appellant was provoked (in the legal sense) to kill Mrs Mills. Quite apart from the unreliability of the second set of test results, we do not believe that the avowed vulnerability of the appellant to provocation of the type that Mrs Mills is said to have presented had any part to play in her

murder. One must remember that at all material times he was aware that she had a relationship with Mr Lightbody. The existence of that relationship is not claimed as a basis for his having been provoked. Rather it is suggested that he was provoked by his discovery that Mr Lightbody had resumed cohabitation with Mrs Mills and by the taunts that she had made about his sexual prowess.

[31] As to the first of these, it is impossible to accept that it could have acted as sufficiently provocative to cause a sudden and temporary loss of self-control. All the evidence suggests that it did not. The appellant had known for some time that Mrs Mills was engaged in a sexual relationship with Mr Lightbody. The only new information that came his way shortly before the killing was that Mr Lightbody had moved back into Mrs Mills' home. His reaction to this discovery was to go to her home in order to demand the return of money that he had given her. He repeated this demand when he saw her with Mr Lightbody some short time before the killing. He was not provoked into launching an attack on her when he actually saw her with Mr Lightbody and when, surely, any provocation arising from Mrs Mills' relationship with him must have been at its height. The sight of them together merely prompted a further demand for the return of his money. It is inconceivable that the appellant's discovery that they had started to live together again (as opposed to his knowledge that they were sexually involved) would have provoked him to kill her when she came to his house.

[32] The alleged taunts about lack of sexual prowess are an equally implausible source of provocation, in our view. In the first place, the recovery of recollection of these when trial was imminent casts considerable doubt on their authenticity. Even more important, however, is the consideration that the appellant's claim is that these taunts caused him to experience feelings of shock and shame. It is not suggested that they moved him to anger. As Dr Hanley pointed out, feelings of shame are more likely to inhibit action rather than provoke it. It is unsurprising that the jury rejected this as amounting to provocation.

[33] The fresh evidence in the case, taken at its height, suggested that the appellant was more vulnerable to emotional arousal than most members of the population and that he was likely to recover more slowly than others from having been aroused. It does not establish that the appellant was in fact provoked into killing Mrs Mills. At most it suggests that he might have been more susceptible to provocation. Ultimately, however, the question for this court must be 'does the fresh evidence raise the possibility that the appellant was provoked'. Having carefully examined the evidence we have concluded that it does not. It raises no doubt in our minds as to the safety of the conviction. The appeal must therefore be dismissed.