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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

FRED McCLENAGHAN

Applicant

_____

Before: Gillen LJ, Weatherup LJ and Madam McBride J

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GILLEN LJ (giving the judgment of the court)

[1] The applicant in this case seeks leave to appeal against his conviction on 5 November 2014 on counts of murder and possession of a firearm with intent to endanger life. On 16 December 2014 he was sentenced to life imprisonment and to serve a minimum term of 16 years of his life sentence on the former count and 15 years concurrently on the latter count. He has appealed the conviction of murder and was refused leave to appeal by the Single Judge Mrs Justice Keegan.

[2] Mr McCrudden QC appeared on behalf of the applicant with Mr Duffy. Mr Weir QC appeared on behalf of the prosecution with Mr Connor.

[3] There are essentially three issues in this case. First, whether or not the learned trial judge ought to have left to the jury the alternative verdicts of manslaughter by gross negligence and unlawful act manslaughter. Secondly, whether or not the learned trial judge erred in his direction to the jury in relation to how he dealt with the applicant's failure to give evidence. Thirdly the manner in which the learned trial judge dealt with the applicant's plea to manslaughter at the outset of the trial and which was not accepted by the Crown.

Background

[4] The applicant was originally tried and convicted on 3 July 2012 on both counts (hereinafter called "the original trial"). On 29 January 2014 the Court of Appeal quashed the murder conviction and ordered a retrial on that charge.

[5] At the retrial, which commenced on 16 September 2014 before Treacy J sitting with a jury, the applicant in the presence of the jury at the commencement of the proceedings pleaded not guilty to murder but guilty to manslaughter. Mr McCrudden, despite a request by the learned trial judge to do so, was not prepared to commit the applicant to a revelation of the precise basis on which the plea to manslaughter had been made. The prosecution did not accept the plea to manslaughter and the trial proceeded on the count of murder. That jury was required to be discharged on 29 September 2014 and the trial recommenced on 30 September 2014.

[6] The applicant had been in a relationship with Marion Millican ("the deceased") since December 2009 until the deceased terminated that relationship in December 2010 following incidents of domestic violence by the applicant upon her including the applicant attempting to strangle her. Shortly after the separation the deceased commenced to rekindle her relationship with her estranged husband.

[7] The applicant had a history in relation to mental health issues. On 22 December 2010 he was diagnosed by his GP as suffering from depression. On 24 December 2010 he contacted the suicide helpline "Life Line" indicating he was planning to kill himself and his girlfriend. He repeated these thoughts to the Area Crisis Response Team shortly thereafter. Different agencies appear to have been dealing with the applicant's mental health in the subsequent period and by the beginning of March 2011 it was considered that the applicant was still actively suicidal.

[8] On 11 March 2011 the deceased and her work colleague, Ms Henry, were lunching in the kitchen area of the laundrette where they worked in Portstewart. The transcript of the ABE of her examination by the police officer with the Major Investigation team and her cross-examination in court revealed the following evidence:

- The applicant entered the customer area carrying a gun, progressing to the staff area/kitchen where she and her colleague were and told the deceased that he wished her to go outside and talk. She told him that she would not do that in case he bundled her into a car. At that stage he had grabbed her by the arm.

- It was a small kitchen and thus a confined space.

- The applicant pulled the deceased towards the exit door. He appeared in a violent mood.

- Ms Henry said that the deceased "probably struggled with him" at a time when he was shouting.

- The applicant then discharged a shot into the ground at a time when he had grasped the deceased. He had one hand holding the gun and the other hand holding the deceased.

- At that stage Ms Henry became frightened and went into the toilet. The deceased then broke open the door but Ms Henry managed to escape past him out of the laundrette in order to seek help.

- In cross-examination Ms Henry said that both she and the deceased were terrified and that both were at risk of harm from his actions to the point that she considered he was putting the lives of both of them at risk.

[9] The deceased was found at 1.35 pm by a lady out walking her dog who noticed the door of the premises ajar and then saw a body on the floor. The deceased died at the scene of the laundrette as a result of a gunshot wound to the centre of her chest merging slightly to the right. Her injuries were outlined to the court by Dr Ingram, the Assistant State Pathologist. It was his evidence that if the suggestion was that the gun was being grappled with the normal protective mechanisms would try to guide the gun to one side, whereas this wound passed directly through the body. The discharge had struck the body at right angles so that the discharge was straight on to the surface of the chest. Counsel had cross-examined him on the basis that the gun could have gone off as someone was pulling it down and whilst Dr Ingram conceded this as a possibility, he still maintained his stance that it was likely not to have been discharged during a struggle. However he did accept that the deceased had bruising on the back of the right thumb with a few abrasions on the tips of both the index and middle fingers with broken nails. He accepted that if one was gripping something those fingers would be the closest to the grip surface e.g. if one was gripping the barrel of a gun with the right hand and there was a struggle going on that could account for the nail breakage.

[10] The applicant left the scene and drove to the place of work of Sheila Donnelly, the older sister of his ex-partner. Sheila Donnelly described to the court that he was shaking when she has asked him what was wrong. He informed her that he had shot a girl over at Portstewart. He informed her that he had wanted to speak to the deceased, that he had the gun in his hand and that she had got hold of the gun. He alleged there was a struggle and the gun went off. The police arrived at the scene and the applicant was arrested.

[11] The applicant informed the police that he put the shotgun in a ditch along a minor road leading to Ms Donnelly's place of work. In a prepared statement to the police he said

> "It was my intention to kill myself on Friday 11 March and that Marion would witness my suicide. I did not intend to harm Marion. Marion's death was accidental. I am truly sorry."

[12] The applicant informed the forensic medical officer Dr Kapur at the police station that he was going to shoot himself in front of his girlfriend, he had an illegal gun with him, his girlfriend grabbed the gun, a struggle occurred and he shot her accidentally.

The impugned ruling of Treacy J

[13] At the close of the evidence the learned trial judge rejected the contention of Mr McCrudden that the defences of unlawful act manslaughter and manslaughter by gross negligence (hereinafter termed "the two alternative verdicts ") should be left to the jury. There was before the jury evidence, both medical and non-medical, on the issue of manslaughter by reason of diminished responsibility and the jury therefore had both this issue and the defence of accident before it.

[14] On the issue of the definition of an unlawful act manslaughter, the learned trial judge cited the words of Lord Lane in R v Dalby [1982] 1 All ER 916 (which he quoted from paragraph B1.60 of the 15th Edition of Blackstone) where he had said:

> "The questions which the jury have to decide on the charge of manslaughter of this nature are:
>
> (1) Was the act intentional?
>
> (2) Was it unlawful?
>
> (3) Was it an act which any reasonable person would realise was bound to subject some other human being to the risk of physical harm, albeit not necessarily serious harm?
>
> (4) …, 'And perhaps most importantly: …"was that act the cause of death"'?"

[15] The learned trial judge in the course of his ruling said:

> "The intimidatory assault which preceded the fatality was not the act which caused the death of the deceased. It was the discharge of the firearm which caused her death not the assault. I do not consider that the Dalby formulation referred to in Blackstone is satisfied. Therefore I do not propose to leave unlawful act manslaughter as an alternative to the jury."

[16] Dealing then with the manslaughter by gross negligence contention the learned trial judge said:

> "Manslaughter by gross negligence is in my view wholly inapposite. It is discussed at paragraph B1.64 and following of the same edition of Blackstone. As Mr Connor very pithily observed 'Is there a non-negligent way to behave as the accused did?' I do not consider that such a verdict could reasonably be suggested by the evidence and accordingly I do not propose to leave that to the jury."

[17] The learned trial judge then added:

> "Prior to giving this ruling, both sets of counsel provided the court with their version of a proposed steps to verdict document in the event that the court were to leave unlawful act manslaughter and gross negligence manslaughter to the jury. I have considered their contents which in my view reinforced the inappropriateness of placing these alternative verdicts before the jury as advocated by the defence but resisted by the prosecution."

[18] Turning to the issue of the failure of the applicant to give evidence in this case, the learned trial judge addressed that issue extensively over the course of his charge to the jury.

The applicant's submissions

[19] Notwithstanding 68 pages of skeleton argument with 168 paragraphs submitted by counsel, augmented by oral submissions, the applicant's case can be crystallised into a number of succinct points as follows.

[20] First, there was evidence before the jury justifying the two alternative verdicts being put before it. This evidence included that of Pamela Henry, Sheila Donnelly, the applicant's account to Dr Kapur and his account to the police.

[21] Secondly, manslaughter by gross negligence was in play given the arrival of the applicant at the scene, in close proximity to the deceased in a confined space, with a loaded gun bent on committing suicide. There was thus a duty of care owed to the deceased with an attendant foreseeable struggle which could ensue with the deceased. He breached that duty of care when he grasped her, discharged the weapon into the floor and attempted to force her to come outside the laundrette with him whilst continuing to bear the loaded shotgun. That breach caused her death in the ensuing struggle. It was a matter for the jury to characterise that as

gross negligence and therefore a crime. All the constituent aspects of gross negligence were present leading to her death.

[22] Thirdly, in considering the defence of manslaughter by an unlawful act, it was necessary to view the continuum of his conduct and of unlawful acts on the part of the applicant. Following the principles set out in R v Church 49 Cr. App. R. 206, these were unlawful acts which all sober and reasonable people would inevitably have realised must have subjected the deceased to, at least, the risk of some harm resulting therefrom.

[23] In short Mr McCrudden's argument was that the jury should have been entitled to infer from the fact of the applicant's possession of the shotgun, his violent handling of the deceased against her will, his discharge of the weapon into the floor, and his violent mood an intent to do some harm to the deceased. A reasonable bystander may have concluded from these circumstances, coupled with the evidence of Ms Henry and the accused, that he must have intended to do her harm of some kind and in the midst of this continuum the deceased ultimately died from a shot as she defensively struggled for possession of that gun. The death therefore resulted arguably from a series of unlawful and dangerous acts of common assault, false imprisonment, kidnap, possession of a firearm with intent to cause a person to believe that unlawful violence would be used against her contrary to Article 58(2)(a) of the Firearms Order (Northern Ireland) 2004 and possession of a firearm with intent to commit an indictable offence contrary to Article 60(1)(a) on the same order. The fatal shooting was part of these same transactions.

[24] Mr McCrudden contended that the defence had indicated to the court, in the absence of the jury, that a number of legal bases (inclusive of manslaughter by reason of diminished responsibility) could sustain a finding of manslaughter as opposed to murder. However by dint of the learned trial judge refusing permission for gross negligence manslaughter or unlawful act manslaughter to go before the jury, the plea to manslaughter could only have been taken by the jury to have necessarily contained an admission by the applicant of having deliberately killed the deceased and that this irreparably undermined his credibility not only in relation to the defence of accident but in relation to his defence of diminished responsibility.

[25] Fourthly that the learned trial judge unnecessarily made repeated references about the applicant's silence and "refusal" to go into the witness box thus rendering the trial unfair.

[26] Finally it was his contention that the learned trial judge had effectively removed the defence of accident from the jury's consideration by virtue of drawing their attention to the plea of guilty to manslaughter, now vacated and thus a nullity, made at the outset of the trial.

The prosecution case

[27] Mr Weir contended as follows:

(1) There was no evidence capable of supporting alternative defences of gross negligence manslaughter or unlawful act manslaughter. There was only self-serving evidence based on the applicant's statements during his police interview, to Ms Donnelly and Dr Kapur that the shotgun had discharged accidentally in the course of a struggle with the deceased. On the other hand there was ample evidence of previous assertions by the applicant that he intended to kill the deceased. If the assertions of accident were true, this would have amounted to a complete defence.

(2) Offences involving gross negligence should be limited to those instances where ordinary lawful activity is conducted in a criminally negligent manner. In the instant case the actions of the accused were clearly criminal ab initio.

(3) None of the acts identified on behalf of the applicant caused the death of the deceased. The various acts referred to by Mr McCrudden and ultimately the death of the deceased was separated by a novus actus interveniens namely the lethal discharge of the shotgun.

(4) The decision for this court is not whether a direction in relation to a lesser alternative verdict was omitted or whether its omission was erroneous, but rather whether the safety of the conviction is undermined citing Sir Igor Judge in R v Foster [2009] EWCA Crim. 2214 at [61].

(5) The learned trial judge was entitled to point out the apparent incompatibility between a plea to manslaughter and the issue of an accidental discharge which would have been a complete defence to murder or manslaughter.

(6) The learned trial judge was entitled to refer on a number of occasions to the applicant's failure to give evidence in circumstances where a defence of accident was being run in conjunction with the partial defence of diminished responsibility.

Manslaughter by Gross negligence

[28] The modern authoritative analysis of the law of gross negligence manslaughter is generally considered to be contained in the unanimous opinion of the House of Lords expressed by Lord Mackay LC in R v Adomako [1995] 1 AC 171 (see also R v Misra and Srivastava [2005] 1 Cr.App.R21, R v Wacker [2003] 1

Cr.App.R CA, and Sellu v The Crown [2016] EWCA Crim. 1716). Lord Mackay said in Adomako:

> "The jury is therefore not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant's negligence was gross and whether, additionally, it was a crime but whether his behaviour was grossly negligent and consequently criminal. This is not a question of law, but one of fact, for decision in the individual case."

[29] From these cases the following additional principles can be distilled:

- The direction to the jury should refer to the fact that it is risk of death, not merely of serious injury, that is relevant.
- A judge is free to use the word "reckless" in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case.
- The existence of a duty of care is a question of law for the judge whereas the question of whether the facts establish the existence of the duty is for the jury once directed on the law.
- For the purposes of the criminal law, the courts will not decline to hold that one person owes a duty of care to another because they are jointly involved in a criminal enterprise.

Unlawful act manslaughter

[30] Once again the law in this matter was clarified by Adomako's case. A perusal of that case coupled with R v Church [1966] 1 QB 59, R v Watson [1989] 2 All ER 865 and R v Dalby [1982] 1 All ER 916 permits the following principles to be distilled.

(1) The killing must be the result of the accused's unlawful act.

(2) The unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

(3) It is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm; the mens rea required is that appropriate to the unlawful act in question.

(4) The harm likely to result from the act must be physical harm. Emotional disturbance will not suffice even though physical harm (and death) does in fact result from the foreseeable emotional disturbance.

> If the accused knows of the victim's susceptibility to physical harm, then that knowledge can be ascribed to the reasonable man and the accused's act can be regarded as "likely to cause bodily harm".

Alternative verdicts

[31] R v Coutts [2006] 1 WLR 2154 is the much cited seminal case on this subject. Taken with R v Foster and Others [2008] 1 Cr. App. R. 38 and R v Barre [2016] 4 Archbold Review 3, CA, the following principles can be distilled on this matter:

(1) The public interest and the administration of justice is best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative which there is evidence to support.

(2) The alternatives must be such as would suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge.

(3) The judge must examine whether the absence of a direction about a lesser alternative verdict would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant.

(4) In each instance it will be fact specific. The trial judge will have "a feel of the case" that the Court of Appeal lacks.

(5) Where an alternative is erroneously not left to the jury, on appeal, the question is whether the safety of the conviction is undermined.

[32] The final principle adumbrated above, namely that the issue is not whether a direction as to an alternative verdict is erroneously omitted but whether the safety of the conviction is undermined, has been the subject of some authoritative criticism. Archbold "Criminal Pleadings Evidence and Practice" 2017 at 7-99 states:

> "This, it is submitted, is circular. The omission will only be erroneous if the jury ought to have been instructed about the available alternative, which they only ought to have been if it was an 'obvious' alternative. Leaving them with an 'all or nothing' choice where the middle course arises on the facts is bound to render a conviction unsafe. That was the essence of the decision of the House of Lords in R v Coutts."

Discussion

[33] We recognise that the learned trial judge heard this case over a lengthy period and therefore had a much better feel for the evidence and the drift of the case than this court can have. It is important not to erode that distinction more than logic compels. As Lord Mackay said in Adomako at page 72 et seq, the task of trial judges in setting out for the jury the issues of fact and the relevant law is a difficult and demanding one. To make it obligatory on trial judges, especially highly experienced judges such as in this instance, to give directions in law which are so elaborate and all-embracing that the ordinary members of the jury, doubtless listening in fascinated bewilderment, will have great difficulty following and even greater difficulty in retaining in their memory for the purpose of application in a jury room, is no service to the cause of justice. We must therefore caution against a reach that goes beyond this.

[34] Normally the question to be considered is whether the alternative verdicts would have suggested themselves to the mind of any ordinarily knowledgeable and alert criminal judge. The instant case is somewhat different in that Mr McCrudden had specifically drawn these two additional aspects of manslaughter to the attention of the judge and indeed submitted to us that part of his cross examination of Ms Henry had been specifically directed to setting up those very defences.

[35] We have come to the conclusion that in rejecting Mr McCrudden's submissions on this issue, the learned trial judge fell into error. Based on the evidence adduced before the jury from the various statements made by the applicant and the evidence of Ms Henry and Ms Donnelly gross negligence manslaughter was at least plausibly arguable in that:

- The presence of the appellant with a loaded shotgun in a laundrette in close proximity to the deceased in a confined space at a time when he had contemplated suicide with the shotgun raised a duty of care towards her.

- There was some evidence from other witnesses that it had been his intention to commit suicide and, if so, there was a duty of care on his part towards the deceased to ensure that she was not injured or killed in effecting that intention.

- With a loaded shotgun in his possession, the applicant, on the evidence of Ms Henry, had grasped hold of an unwilling victim, discharged the weapon and had tried to take her outside to his car. It is arguable that in these circumstances it was foreseeable that a violent struggle could and did ensue between him and the victim which would therefore expose her to serious injury or death due to the presence of a loaded weapon.

- Given that he had already discharged the weapon into the ground, it was likely that the chances of a struggle on the part of the victim to escape him whilst he was holding the firearm would and did occur.

- Grasping hold of an unwilling victim and attempting to force her out of the laundrette whilst he was in possession of a loaded weapon was a breach of his duty to take care. Allowing such a circumstance to arise constituted a breach of that duty of care which might be characterised as gross negligence and therefore a crime.

- The potential violence attendant on the breach of his duty of care, and, if it was accepted by the jury notwithstanding his failure to give evidence to this effect, the real possibility that an ensuing struggle had actually occurred, may have been the substantial cause of the gun discharging and the fatal wound occurring to the victim.

- The behaviour of the applicant was such as to amount to a criminal act.

[36] Similarly, we consider that it would have been plausibly arguable before a jury that this conduct leading to the death of the victim amounted to unlawful act manslaughter in that:

- The killing arising out of a struggle to escape his attentions was the result of his unlawful acts namely assault, forcibly coercing her to leave the launderette, possessing a firearm with intent to cause her to believe that unlawful violence would be used against her and with intent to commit an indictable offence.

- The unlawful acts were such as all sober people would inevitably realise must have subjected her to at least the risk of some harm resulting if she was injured through struggling to escape him.

[37] In separating the shot which killed her from the contextual surroundings of the unlawful acts and ignoring the continuum or transactional nature of his unlawful behaviour the learned trial judge has fallen into error.

[38] Invoking the concept of the relevance of a continuum of unlawful conduct we have derived assistance from the authorities cited by Mr McCrudden on what are colloquially known as the manslaughter "escape " cases including R v Watson [1989] 2 All E R 865 (elderly victim dies of a heart attack in the course of a burglarious intrusion), R v Lewis (2010) EWCA Crim 151 (victim hit by car when escaping from attackers), R v Mackie (1973) 57 Cr. App.R. 453 (boy falls downstairs escaping from violent father), R v Pagett (1983) 76 Cr. App. 109 (girl victim killed by exchange of gunfire with police when used as human shield) and R v Le Brun [1991] 4 All ER 673 (victim wife killed when falls from grasp of accused who had originally knocked her to the ground).

[39] We have therefore concluded that there is merit in Mr McCrudden's submissions on these issues. Ultimately the question for this court is whether the conviction of the applicant was unsafe in light of these conclusions following the principles set out in R v Pollock [2004] NICA 34. Having considered the evidence and the conduct of the trial in this regard we have a sense of unease about the correctness of the verdict in the absence of these arguments being put before the jury. Consequently we do not believe that the verdict is safe and on these grounds we grant leave to appeal and proceed to allow the appeal.

[40] Whilst it is unnecessary for us to deal with the further grounds of appeal, some further observations may assist. First, we find no foundation in the submission by counsel that the learned trial judge erred in observing on more than one occasion the applicant's silence and refusal to go into the witness box. In the context each reference was justified and necessary to ensure that the jury properly considered that aspect of the case.

[41] In this case at the outset of the trial the applicant had pleaded guilty to manslaughter on an unspecified basis. A defendant may of course plead not guilty to a count as charged but guilty to a lesser alternative offence of which the jury might convict him on the count charged. The prosecution, as occurred in this case, were entitled to elect to proceed on the count as charged namely murder.

[42] In R –v- Hazeltine [1967] 2 QB 857 the accused H, on being arraigned for wounding with intent contrary to Section 18 of the Offences Against the Person Act 1861, pleaded not guilty to that offence but guilty to unlawful wounding. The prosecution refused to accept the plea and a trial ensued during which the accused offered a defence of acting in reasonable self-defence. Although this defence was inconsistent with his original plea, no mention was made of it during the trial. When the jury acquitted him, the judge proceeded to sentence him in accordance with the plea. That sentence was quashed on appeal as H had not been convicted of any offence. His original plea to unlawful wounding was impliedly withdrawn on the prosecution saying that it was not acceptable.

[43] Salmon LJ observed at p. 862F et seq:

> "The conclusion, however, is inescapable, that there cannot be more than one effective plea to any count in respect of which an accused has been put in charge of the jury. The only effective plea here was a plea of not guilty. The court desires to make this plain should a case of this kind arise in the future: it is open to the prosecution to call evidence before the jury to the effect that the accused has pleaded guilty to unlawful wounding and to make the point that it is inherent in such a plea that he admits that what he did was unlawful and malicious. Such an admission

> is wholly inconsistent with a defence that what he did was done by accident or in self-defence. If the accused gives evidence and sets up a defence which is wholly inconsistent with the admission which he has already made, then he should be cross-examined by the prosecution on that admission."

[44] This case is authority for the proposition that at the trial in such circumstances the prosecution may put in as evidence the plea as a partial confession. We are satisfied that had the applicant in the instant case chosen to give evidence he could have been cross-examined on his reasons for pleading guilty to manslaughter in circumstances where he was mounting the defence of accident. Hence we are satisfied the learned trial judge was entitled to draw to the attention of the jury his original plea of guilty to manslaughter.

[45] However it is important to appreciate that in circumstances where the plea to the lesser offence is not accepted by the prosecution, it does not rank as a formal admission. It is deemed to be withdrawn or a nullity in light of its non-acceptance.

[46] In the instant case, the learned trial judge did draw to the attention of the jury the fact that notwithstanding his defence of accident, he had pleaded guilty to manslaughter. However it is equally clear, that at no stage during this trial was it explained to the jury that, in light of the prosecution refusal to accept the plea, that plea was to be regarded as withdrawn. Failure to apprise the jury of this fact may well have caused confusion and disadvantage to the applicant. It is at least conceivable that jurors may have been bewildered as to how the applicant was raising a defence of accident when he had already pleaded guilty to manslaughter. Had it been brought to their attention specifically that the plea was now deemed to be withdrawn, room for such confusion would have been diminished. We consider that judges should take the precaution of explaining to a jury in such circumstances precisely what has happened and what the consequences are.

[47] Finally we observe with some measure of concern that counsel on behalf of the applicant had apparently declined to explain to the learned trial judge and therefore to the jury the basis upon which the plea of manslaughter had been entered in the first place. In our view it is unsatisfactory that counsel should not identify in such circumstances the basis upon which a plea is being entered. A judge charging a jury must be alive to the need in many instances to provide a route to a verdict for the jury. In manslaughter cases, such as the instant appeal, a number of possibilities open up. Thus this applicant could conceivably have been convicted of murder, manslaughter as a result of diminished responsibility, manslaughter as a result of gross negligence and manslaughter as a result of an unlawful act. The issue of the admissibility of certain lines of cross examination or indeed evidence might be influenced by the judge's awareness of what constituted the foundation of the plea. It might have helped the judge to see more clearly the true significance of the cross examination of some witnesses in this case. If these alternative defences had been

admitted, it would have been necessary for the learned trial judge to have explained in some detail each possibility to the jury in addition to accident. He could not have left a vague concept of an all-embracing manslaughter count to them to make what they could of it. To leave revelation of the true expanse of the defences until the evidence was over is potentially a recipe for trial chaos.

[48] A further consideration and observation arising from this case is as follows. In R v McCandless [2001] NI 86, Carswell LCJ, with whom Coghlin LJ agreed (Nicholson LJ dissenting) concluded that the jury had to agree on the basis upon which they brought in their verdict of manslaughter. A jury was not agreed upon its verdict if only some of their number did not regard provocation as negatived while some others found that a case of diminished responsibility was made out. It was not sufficient to say that because the consequences of the finding of each group of jurors was that the charge of murder was reduced to manslaughter they were agreed on the essential constituents of the offence of which the defendant was guilty.

[49] This approach is echoed in Blackstone's Criminal Practice 2017 at B1.35 where the authors, in the context of the separate grounds of manslaughter bearing on an unlawful act and gross negligence, state:

> "It should not be sufficient that six jurors thought that the accused's act causing death was unlawful but not grossly negligent and the other six thought it was grossly negligent but not unlawful. Here the prosecution have not proved either of the two forms of manslaughter beyond reasonable doubt; it is quite different from a case where what would otherwise be murder has been proved and the jurors merely differ as to the reason for reducing the offence to manslaughter."

We consider that this is the approach that ought to be adopted during the course of a retrial.

[50] The question then arises as to whether this court should order a retrial. This court may on quashing a conviction order the applicant to be retried if it appears that the interests of justice so require pursuant to s. 6(1) of the Criminal Appeal (NI) Act 1980. The decision whether to order a retrial requires a judgment of the public interest and the interest of the appellant. The court must consider the public interest in pursuing persons reasonably suspected of serious crime, avoiding oppression and unfairness to the appellant and the interests of the applicant including the lapse of time and the punishment he has already suffered under the first conviction. (See R v McCormack [2000] NI 189 and Valentine on "Criminal Procedure in Northern Ireland" 2nd Edition paragraph 18.74).

[51] Each case turns on its own facts. A retrial may be ordered where an appeal succeeds on grounds of misdirection (see Au Puy-Kuen v AG for Hong Kong [1980] AC 351) or irregularity (see People v Moran [1977] 111 ILTR 137).

[52] We have taken into account the gravity of the charge namely murder, the sufficiency of evidence which exists to be put before a new trial court and the fact that we consider that a fair trial is still possible. We have borne in mind Mr McCrudden's contention that there have been two trials of this man, the state of his health and the fact that in any event he will be serving a sentence of 15 years imprisonment on foot of his conviction for possession of the shotgun with intent to endanger life. We consider however that the public interest in pursuing this applicant, who has been charged with the most serious of offences, must carry the most weight in this instance. Accordingly we order a retrial of the applicant.