Judicial Communications Office

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COURT DISMISSES APPEAL BY STEPHEN McKINNEY AGAINST CONVICTION

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal against conviction by Stephen McKinney for the murder of his wife Lu Na McKinney.

Background

At 01:15 on 13 April 2017, Stephen McKinney ("the appellant") made a 999 call stating that his wife had fallen into the water at Devenish Island, Lough Erne. When the police and RNLI arrived they found Lu Na McKinney ("the deceased") in the water immediately beside the boat. The police and RNLI carried out CPR but she was pronounced dead at 02:52. A post-mortem report found that the deceased died as a result of drowning and that she did not have any injuries consistent with a struggle. A blood sample showed that she had Zopiclone, a sedative, in her blood and that this was above the therapeutic level.

The appellant's case was that his wife had fallen into the water and, despite him jumping in, he had been unable to save her. The prosecution relied on a number of strands of circumstantial evidence including differing accounts given by the appellant and his demeanour during the 999 calls as well as in the aftermath of the incident. The appellant was convicted by a jury on 21 July 2021 of the murder of his wife. He appealed against his conviction on seven grounds which it was submitted individually and collectively made the guilty verdict unsafe.

Ground 1: the trial judge erred in failing to accede to the defence application for no case to answer

At the conclusion of the prosecution case, counsel for the defence submitted that there was no case to answer. The judge rejected the application. On appeal, counsel for the appellant challenged the judge's analysis of the evidence as it stood at the end of the prosecution case. At that point there were only three possible explanations for the death of Mrs McKinney – murder, suicide or accident. In her ruling the judge found that there was "really no evidence about suicide". In dealing with the question of accident the judge focused on the deceased's taking of a number of Zopiclone tablets which would have induced sleep making the accidental falling or slipping over the side of the boat significantly less likely. The Court of Appeal was not persuaded that the reasoning was flawed. It considered that the judge's ruling on the application of no case to answer was prepared with care and against a background that the prosecution evidence had been analysed, understood and scrutinised by her. The court was entirely satisfied that the judge's ruling on the application of no case to answer was well-founded and well-reasoned and rejected this ground of appeal.

Ground 2 – The judge erred in failing to discharge the jury following publication in several local newspapers and on the BBC news website

[1] The panel was Keegan LCJ, O'Hara J and McFarland J. O'Hara J delivered the judgment of the court.

On 7 July, in the absence of the jury, the judge delivered her ruling that there was a case to answer. This ruling was, however, reported on 7 July on the BBCNI website and on 8 July in the Strabane Chronicle. Each report revealed that the judge had dismissed an application for no case to answer but it was more prominently reported that Stephen McKinney would not give evidence on his own behalf, a fact which had been made known to the court (and the jury) on 7 July after the ruling that there was a case to answer. There was no information before the judge as to whether any members of the jury had read the pieces in the Strabane Chronicle or on the BBC website. The Court of Appeal said the judge was entirely correct not to explore that question with the jury because she could not have done so without wrongly disclosing to them precisely what should not have been disclosed, ie that having heard submissions, she had concluded that a reasonable jury could convict the defendant of murder.

It is a long-established principle that juries are excluded from court when submissions of no case to answer are made and when the judge gives his/her ruling. It is also firmly established that the jury is not told what the judge's ruling is on such an issue. The reason for this is that if the jury heard the competing submissions and the judge's ruling, it might be inappropriately influenced when it came at a later stage to consider its verdict. The question for the judge to decide alone at this point is whether a jury could convict. The question is not whether a jury should convict. The concern about a jury being present is that a jury which heard the exchanges and then the judge's ruling might be influenced or steered towards a conviction especially if it heard the judge say that a jury could convict. That would encroach on the jury's exclusive role at the final stage which is to decide whether to convict or acquit.

In rejecting the defence application to discharge the jury, the judge made a number of observations including that "in this case the jurors knew that legal matters were being discussed after the Crown case closed. Now, even if there had been no reporting, the jury would know when they came back and the case proceeded that the court must have ruled in respect of that matter to decide that there was a case to answer, and, therefore, I consider no prejudice arises because the press report had given no more information than that."

The Court of Appeal said it would not have dealt with the issue in those terms as the extent of the jury's familiarity with the legal system and trial process is not properly a matter for speculation. Its criticism of the judge's approach, however, was not fatal to the conviction if it was satisfied that the integrity of the trial process has been maintained. The court agreed that in the circumstances of this case it was not necessary to discharge the jury because of the two media reports for the following main reasons:

- In every case in which this issue arises, it will be important to consider the nature and extent of inappropriate media reporting. The greater the degree of inappropriate reporting the more likely it is that the jury will have to be discharged.
- In the present case the two very short reports each made two points. The first, that the defendant would not give evidence, was legitimately and prominently reported. The second, that the learned trial judge had refused a direction of no case to answer, was not legitimately reported and was only a secondary part of each report with no details added of the submissions made or of the reasons given for rejecting the application.
- If the reporting had been more intrusive the risk of discharge of the jury would have been greater.

- If the judge herself had raised a question about the adequacy of the evidence, the risk of discharge would have been significantly greater.
- Any risk to the integrity of the trial process in the present case could have been adequately reduced by the jury being reminded, as it inevitably was at the end of the case, that it is the jury and the jury alone who decides on the outcome, guilty or not guilty.

For all these reasons, the court rejected this ground of appeal. It added that it would not expect inappropriate media coverage of issues such as this to be repeated in the future. It said it was a testament to the media's understanding of what can and cannot be reported that this issue had not previously been raised in the Court of Appeal and trusted it would not recur.

Ground 3 – The judge erred in failing to stop the trial and discharge the jury following the death of junior counsel for the appellant

The appellant was represented at trial by Mr M O'Rourke KC with Mr M McCann as junior counsel. The trial ran for some weeks in February/March 2020 before it had to be discontinued with the outbreak of Covid-19. The new trial which culminated in the guilty verdict started in April 2021. Mr McCann became ill on 5 June 2021 and tragically died on 11 June. The appellant contended that the judge should have granted a defence application made on 8 June 2021 to discharge the jury as a direct result of Mr McCann's unavailability claiming that he was denied a fair trial as Mr McCann was an important part of the defence team; his absence weakened the defence team when there were still significant issues to be dealt with before the jury retired to consider its verdict; the prosecution had an unfair advantage because its full team of counsel continued as before; senior counsel for the defence was disadvantaged in not having Mr McCann's input into decisions about how the trial might be conducted for the appellant; and the prospective involvement of a new junior counsel was of very limited value when he had no working knowledge of the background of the case and all of the twists and turns which the trial had taken.

The judge, however, noted that Mr O'Rourke had conducted all the questioning of witnesses in the six weeks during which the trial ran before Mr McCann's tragic illness and death; Mr O'Rourke had also made all of the applications which had been put before the judge on evidential issues; Mr O'Rourke and the defence legal team would continue to be available; and much of the most controversial evidence had already been given.

The Court of Appeal said that in this context, the judge correctly identified the triangulation of interests which is present in all cases. There is the defendant's interest in being fully and professionally represented to ensure he gets a fair trial. In addition, there is the interest of the family of the alleged victim of the murder in concluding the trial process. Thirdly, there is the public interest in a determination of the defendant's guilt or innocence and of finality being achieved in legal proceedings. Weighing up all these issues the judge concluded that the appellant would not be denied a fair trial if the trial continued without Mr McCann.

The court concluded that the judge's decision to continue with the trial was correct. It said that, as a general rule, in each case the trial judge must consider how much evidence has already been given, what remains outstanding and what the extent of any potential disadvantage to the defendant might be. On that approach, one might generally anticipate that if a counsel dies or takes seriously ill at an early stage of a long trial the possibility of discharging the jury might be greater. Even that, however, was not necessarily so: "A case by case approach is required with one

essential and inevitable consideration being that the further advanced the trial is the more difficult it will be to conclude that a fair trial requires the jury to be discharged."

The court rejected this ground of appeal.

Ground 4 – The judge erred in admitting bad character evidence against the appellant

An important part of the prosecution case was its effort to show to the jury that the appellant's marriage to the deceased was an unhappy one, that he was a controlling coercive husband and that he knew that she wanted a divorce. It was argued that this was important because he had falsely painted to the police during interviews a picture of a marriage which was a happy one, give or take the occasional argument. In order to prove this contention, the prosecution applied to introduce evidence, including bad character evidence, in the form of a number of video recordings and a SkypeChat. The introduction of this evidence was strongly resisted by the defence and led to a detailed analysis and ruling by the learned trial judge which the court said it found compelling.

The judge excluded some of the evidence on the basis that it would "trigger moral outrage and may deflect the jury from the main issue which is the question whether the defendant is guilty or not guilty of murder." The judge permitted the inclusion of a video of a domestic argument between the appellant and the deceased on 29 September 2016 and a SkypeChat25 between the appellant and the deceased between 16 and 18 May 2014 which she distinguished from the other video recordings on the basis that it was "relevant to correct the false impression created by the appellant regarding the state of the marriage, his view of the deceased and his controlling and coercive nature towards the deceased and sets out the basis upon which the deceased engaged in" sexual activity shown in the video recording.

Counsel for the appellant submitted that the judge's reasoning was flawed because other evidence before the jury from the deceased's solicitor had already established that the deceased was unhappy in the marriage and that the appellant had hurt and humiliated her. He said the admission of the SkypeChat was unnecessary and that the content was outdated since it was from 2014 and less contemporaneous than the evidence from the deceased's solicitor.

The Court of Appeal did not accept that submission. It said the evidence of the SkypeChat was clearly relevant to the issues in the trial about the state of the marriage and about the controlling and coercive conduct of the appellant. It noted that the judge had a difficult path to carve out in admitting relevant evidence which was probative without it being so prejudicial as to outrage the sensibilities of some members of the jury and turn them against the appellant on moral grounds alone but that in its view, she achieved this difficult balance and found no defect in her analysis or her decision to admit this evidence. The court dismissed this ground of appeal.

Ground 5 – The judge erred in refusing to exclude video evidence of a domestic argument on the grounds that it was not bad character evidence when the submission was clearly for that purpose

This ground related to the admissibility of video evidence of an "unpleasant argument" between the appellant and the deceased on 29 September 2016, just over six months before she died. The judge decided that this evidence did not amount to bad character evidence as while the appellant came across as "dismissive and rude", it could not safely be said that he was behaving in a way which was "reprehensible" as required by Article 17(1) of the Criminal Justice (Evidence) Northern

Ireland Order 2004. Since it was not admissible as bad character evidence, the question was whether it should be admitted under common law rules.

The appellant had made the case in police interviews that he and his wife were an "extremely happy" couple who were "always equal." He also said that he did not know anything about a divorce. The video, however, showed him to have lied on the potentially critical issue of divorce which he had contended he knew nothing about. All of this was considered by the judge who concluded that there was "no prejudice in showing this video and none which outweigh its probative weight." The Court of Appeal concluded that the ruling was unimpeachable and dismissed this ground of appeal.

Ground 6 – The judge erred in permitting the prosecution to adduce evidence tending to suggest that the appellant had not entered the water in Lough Erne when the investigative police had failed to secure relevant evidence which could have proven that the appellant had done so

At trial, the judge conducted a hearing in the absence of the jury about the admissibility of evidence from Mr DeGiovanni, Professor Tipton, and a reconstruction of events by way of a police officer entering Lough Erne and then trying to get back out on to the boat. The context for this evidence was that the police suspected that the appellant had not in fact entered the water to find and save his wife but that he had stayed on the boat and poured water over himself to create the false impression that he had entered the Lough.

The evidence given by Mr DeGiovanni was in respect of two photographs: one taken on a smartphone hours before the incident showing part of the seating area at the back of the boat and a second taken after the incident showing a bottle of water in that seating area. The prosecution sought to introduce this evidence on the basis that it was capable of supporting the contention that the reason why the bottle was now in the seating area was that the appellant had put it there after he had emptied the contents over himself. At trial Mr O'Rourke objected to that as pure speculation and pointed out that a number of people had been on the boat after the emergency services arrived. The judge held that Mr DeGiovanni's evidence in conjunction with other evidence was capable of bearing an inference which was probative of guilt and therefore admissible.

The trial judge also held that Professor Tipton's evidence was relevant to the question of whether the appellant entered the lake or whether that story was implausible as the prosecution contended. She said that it was for the jury to determine whether in fact the appellant did or did not re-board the boat having regard to all the available evidence. Professor Tipton therefore gave evidence about the effect of cold water on the body and the difficulties in reboarding the boat. The judge excluded the police reconstruction evidence of efforts to get out of the water on to the boat in the following terms as "it is of no assistance given the number of variables relating to the clothing worn, the fitness and ability to swim of the participant."

There was no challenge by the defence to the judge's ruling at trial, or on appeal, but it was submitted that the evidence of Professor Tipton and Mr DeGiovanni should not have been admitted because it was speculative in the extreme and extremely prejudicial. The Court of Appeal, however, agreed with the judge's ruling particularly given her familiarity with, and understanding of, the complexities and nuances of the trial. It dismissed this ground of appeal.

Ground 7 - The appellant's trial was unfair in that the jury plainly did not give any consideration to the evidence or multiplicity of issues which they ought to have considered and upon which they were directed by the learned trial judge in her charge

The basis for this proposition was that, after a particularly long trial which lasted for more than ten weeks, the jury returned a guilty verdict approximately one hour after being invited to retire. Counsel for the appellant submitted that the jurors could not possibly have considered properly the evidence and issues raised within that short timescale. The Court of Appeal found no substance in this ground of appeal. It said it would be remarkable if an appellate court intervened to quash a conviction on the basis that the jury had not deliberated for long enough: "That would beg the unanswerable question – what timescale would be long enough?" The court dismissed this ground of appeal.

Conclusion

The Court of Appeal said it had found almost nothing in the case which caused any concern about the rulings given by the judge or her analysis of the evidence. It said there was nothing in this appeal which made it doubt the safety of the jury's verdict and dismissed the appeal against conviction.

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://www.judiciaryni.uk/).

ENDS

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