

**An Chúirt Uachtarach  
The Supreme Court**



**DETERMINATION**

**THE PEOPLE AT THE SUIT OF THE  
DIRECTOR OF PUBLIC PROSECUTIONS**

**AND**

**ALAN McNAMARA**

**APPLICANT**

**Neutral Citation:** [2019] IESCDET 257

**Supreme Court record no:** S:AP:IE:2019:000150

**Court of Appeal record no:** 2017 No. 266

**High Court record no:** Bill No CCDP 0002/2016

**Date of Determination:** Tuesday, 19<sup>th</sup> November, 2019

**Composition of Court:** O'Donnell J., McKechnie J., Charleton J.

**Status:** Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF THE  
CONSTITUTION APPLIES**

**RESULT:** The Court grants leave to the Applicant to appeal to this Court from the Court of Appeal.

**REASONS GIVEN:**

**ORDER SOUGHT TO BE APPEALED**

COURT: Court of Appeal

DATE OF JUDGMENT OR RULING: 28 <sup>th</sup> May, 2019
DATE OF ORDER: 28 <sup>th</sup> May, 2019
DATE OF PERFECTION OF ORDERS: 9 <sup>th</sup> July, 2019
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 30 <sup>th</sup> July, 2019 AND WAS IN TIME.

1. This determination concerns a decision of the Court of Appeal of 28 May 2019, being an appeal from a decision of McDermott J, sitting with a jury, who ruled during the murder trial of Alan McNamara that the defence of provocation should not be left for the consideration of the jury. On 31 July 2018, Alan McNamara was convicted of murder.
2. In the Court of Appeal, Birmingham P upheld the reasoning of the trial judge. McDermott J had considered the facts. These are set out in the accompanying application and reply. Briefly, in June 2015 it appears that the accused was assaulted on coming out of a public house by members of a rival motorcycle club by being forcibly stripped of his jacket and insignia of membership. There was then a later appearance at or near his residence of some people and a threat. On the next day, he went to the premises of the other motorcycle club armed with a sawn-off shotgun. There he encountered the victim, Andrew O'Donoghue, and discharged a shot at close range, killing him. There does not seem to be evidence that the victim was part of the original incident or what followed. This was thus a case where B insults A but A retaliates by mistakenly killing C. It could be perhaps argued, the Court says nothing for or against this proposition, that the provocation was from a group and the response was to that group.
3. The applicant now seeks leave to appeal to this Court. Alan O'Donoghue claims the defence of provocation should have been left to the jury. About 16 hours had passed since the original incident. Sudden and temporary loss of self control is said to characterise provocation but if the defence is claimed to be wholly subjective; it is claimed that no rules could prevent the jury considering the defence, notwithstanding deliberate arming with a gun and the passage of time. The killing of a victim who apparently did not provoke the accused is said to be part of this. The trial judge should, it is claimed, have left the defence to the jury and had no role in excluding it.

4. By way of response, the Director of Public Prosecutions claims that the correct decision was made and that the law on provocation is settled.
5. The general principles applied by this Court in determining whether to grant or refuse leave to appeal having regard to the criteria incorporated into the Constitution as a result of the 33<sup>rd</sup> Amendment have now been considered in a large number of determinations and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v Director of Public Prosecutions* [2017] IESCDET 134 and in a unanimous judgment of a full Court in *Price Waterhouse Coopers (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. Accordingly it is unnecessary to revisit the new constitutional architecture for the purpose of this determination.
6. The application for leave filed, and the respondent's notice thereto, are both published along with this determination (subject only to any redaction required by law) and it is therefore unnecessary to set out the position of the parties in further detail.
7. The court is not one for the correction of error. No aspect of this ruling has precedential value as a matter of law.
8. This Court considers that the law on provocation is not settled and requires to be considered. As to whether the defence applies where the accused kills someone other than the original provoker is not clear. As to whether a build up of background circumstances, perhaps coupled with an event or perhaps on its own, can found the defence should be considered. As to whether, on a true construction of the original formulation of the defence at common law, and as the law has developed in other jurisdictions by case-decision, the provocation defence contains some objective element should be reviewed in the context of a proper debate on the elements of the defence and the consistency of those elements with other defences in criminal law, needs consideration. The role of a trial judge needs clarification. In addition the burden of adducing evidence on the accused in the context of the role of the trial judge should be addressed as to whether the decision of McDermott J was or was not correct in law.
9. Hence, leave is granted on these points which can be expanded or refined in case management

The Court therefore grants the application for leave to appeal

**AND IT IS HEREBY ORDERED ACCORDINGLY**