

No. 2



O. 58, r. 18(1)



SUPREME COURT

Record No: 2019/150

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Title of the Proceedings: [As in the Court of first instance]

Director of Public Prosecutions

-v-

Alan McNamara

2. Name of Respondent:

Director of Public Prosecutions

3. Application to extend time:

Yes

No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

N/A

4. Do you oppose the applicant's application to extend time:

Yes No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A

5. Do you oppose the applicant's application for leave to appeal:

Yes No

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

- (i) The Applicant has failed to identify any matter of general public importance raised by the judgement of the Court of Appeal such that leave to appeal should be granted;
- (ii) The legal principles concerning the partial defence of provocation are well established as are the separate functions of the trial judge and the jury in deciding, respectively, whether the defence may be considered and, whether the defence applies;
- (iii) In so far as the Applicant contends that the requirement for loss of control to be sudden should no longer form an essential element of the

defence, he is arguing, in the words of the Court of Appeal, for a “dramatic expansion of the traditional law on provocation”; such a change in the law is a matter for the Oireachtas and not the Courts; in this regard, it is noted that the change in the law on provocation in England and Wales referred to by the Applicant was brought about by legislation;

(iv) Similarly, any change with regard to the separate functions of the trial judge and the jury in relation to the defence is a matter for legislation.

Word count - 195

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

- (i) The Applicant has not identified any basis upon which it is in the interests of justice that leave to appeal should be granted;
- (ii) The law relating to the defence of provocation is clear; the test in relation to the application of the defence is a subjective one and there is no necessity for guidelines to be issued to trial judges;
- (iii) The various matters raised by the Applicant under this heading do not relate to the interests of justice but involve advocating for changes to the law on provocation as it currently applies;
- (iv) The interests of justice do not require that leave to appeal should be granted; there was no evidential basis upon which to allow the defence to

go to the jury given the lapse of time from the events said to found the provocation and the absence of any provocation emanating from the deceased himself.

Word Count: 155

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

N/A

Word count -

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes

No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

Word count:

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A

Word count:

Appendix
Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: [As in the Court of first instance]

Director of Public Prosecutions

-v-

Alan McNamara

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. Respondent's Grounds for opposing an appeal if leave to appeal is granted

- (i) The Court of Appeal did not err in holding that to permit the jury to consider the defence of provocation in this case would have represented a dramatic expansion of the traditional law on provocation;
- (ii) The Court of Appeal did not err in holding that the threshold required to allow the jury to consider the defence had not even been approached in this case;
- (iii) The Court of Appeal did not misapply the law on provocation as regards "*sudden loss of control*" and "*immediacy*";
- (iv) The Court of Appeal did not assess the threshold for provocation on an objective basis; even if the Applicant had suffered a complete loss of self- control at the time he shot the deceased, such loss of control could not, on any view, be seen as a sudden response to events which had taken place on the previous evening;
- (v) There was no misapplication of the test for allowing the defence of provocation to be considered; no jury, properly charged, could have reasonably concluded that the defence applied;

- (vi) The trial judge and the Court of Appeal were correct to conclude that the events of the preceding evening were not sufficiently proximate in time to the shooting of the victim by the Applicant;

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

None

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

N/A