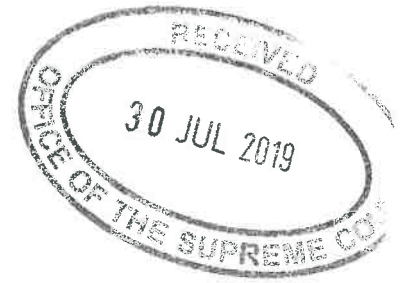


No. 1

O. 58, r. 15



SUPREME COURT

Record No:

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant'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. Date of Filing: 30th July 2019

2. Title of the Proceedings:

The Director of Public Prosecutions

-v-

Alan McNamara

3. Name of Applicant: Alan McNamara

What was the applicant's role in the original case: *[Plaintiff, Defendant, Applicant, respondent etc]*

Defendant

4. Decision of Court of Appeal (where applicable):

Record No: 266/17

Date of Order: 28th May 2019

Perfection Date: 9th July 2019

Date of Judgment: 28th May 2019

Names of Judges: Birmingham P., Edwards J., Kennedy J.

5. Decision of the High Court:

Record No: Bill Number CCDP 2/2016

Date of Order: 27th October 2017 *Perfection Date:* 27 October 2017

Date of Judgment: Date of Conviction 31 July 2017

Date of Sentencing 27th October 2017

Names of Judge(s): Judge McDermott

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes

No

6. Extension of Time:

Yes

No

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

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

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

1. The judgment in DPP V Alan McNamara raises significant matters of general public importance concerning the partial defence of provocation. The decision of the Court touches upon the applicable law and the role of the trial judge concerning the partial defence, the threshold of provocation that must exist and the consideration of “sudden loss of control.”
2. The parameters of the partial defence of provocation have led to a number of public calls for clarification of the defence, particularly following the trial in late 2018 of DPP V Michael Ferris in Tralee. RTE Prime time aired a program relating to the defence following the manslaughter verdict.
3. It has been argued that the Supreme Court or Oireachtas should lay out a comprehensible definition regarding the defence. In 2015, Mr. Justice Donal O’Donnell said that it was “dispiriting” there has been no legislative response to the issue and said the issues were “matters for broader debate and, if thought appropriate, reform”. The late Mr. Justice Carney referred to the defence as “the graveyard for judges.”
4. The law in Ireland has been that a very low threshold is required to allow the partial defence of provocation to go to the jury. Generally, once provocation is established within the evidence, that issue then becomes a matter for the jury to decide.
5. It is submitted that there was clear evidence of significant provocation in the Applicant’s case. However, the Learned Trial Judge, with whom the Court of Appeal agreed, focused on the elements of suddenness and immediacy. The Court of Appeal therefore found that low as the threshold is, it had not been reached, or indeed approached, in the Applicant’s case. It is submitted that this was an error in law having regard to the facts of this case and the law on provocation as currently exists in Irish Jurisprudence.
6. The law in England/Wales is now statutorily based, provocation having been abolished. There, provision has been made for a new defence to murder of “loss of control”, which, if the defence succeeds, the appropriate verdict will be one of manslaughter. The loss of control need not be sudden. Sufficient evidence of loss of control is met if evidence is adduced on which a jury, properly directed, could reasonably conclude that the defence might apply. The statute sets out various triggers including where loss of control is attributable to fear of serious violence or different other matters done or said. It also provides that loss of control need not be sudden in contra-distinction to the old rule in provocation. The statute also clearly opens the door to what has been referred to as “cumulative provocation.” There is no requirement that the things said or done which were said to lead to the loss of control have to be said or done by the deceased.
7. The United States apply the binary murder/manslaughter option with graduated charges, such as first/second-degree to take account of varying levels of intent.

Word count – 496

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

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

1. In its judgment, the Court states:-

“Undoubtedly, what happened in Doon and at Mr. McNamara’s home the previous evening was quite unacceptable, but it cannot provide justification for what occurred the following afternoonWhile Mr. McNamara’s actions were arguably fuelled by emotions running high, it does not follow that he was provoked into doing so in a legal sense and thereby entitled to rely on the defence of provocation in the absence of a sudden response.”

It is in the interests of justice that the following are addressed:-

2. Should it be the role of the trial judge to decide whether the partial defence of provocation should go to the jury? Should this be a matter solely for the jury to be decided upon on the evidence before them?
3. Where there is some evidence of provocation, guidelines need to be provided to trial judges on how they should decide whether provocation should go to the jury.
4. If deciding not to allow provocation to go to the jury, should a trial judge adopt a subjective or objective test?
5. If sudden loss of control or immediacy is a factor, is the decision on this aspect by a trial judge based on a subjective or objective test having regard to the facts of the case?
6. Should the threshold of provocation be a matter solely for a jury to decide in circumstances where, properly directed, they could reasonably conclude that the defence might apply.
7. Should the issue of suddenness/immediacy be solely a matter for the jury to decide in considering a defence of provocation.
8. It is submitted that there was a misapplication by the Court of Appeal of the law on provocation as it stands in this jurisdiction having regard to the circumstances of the Applicant’s trial.

Word count - 300

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please 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 300 words and the word count should appear at the end of the text.

Word count -

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing:

Yes

No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

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

The Applicant is in custody. He spent time in custody on remand prior to his conviction of murder. The Applicant believes he did not intentionally kill Mr. O'Donoghue. He is anxious that his conviction of this murder is quashed.

Word count - 39

12. 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.

Appendix

Notice of Appeal

1. Title of the Proceedings:

Director of Public Prosecutions

-v-

Alan McNamara

2. Grounds of Appeal:

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

- (i) The Court of Appeal erred in law and in fact in holding that to permit the jury to consider the partial defence of provocation based on the facts of the Applicant's case would have represented a dramatic expansion of the traditional law on provocation. [It is submitted that all the necessary elements relevant to the defence of provocation were present and therefore the consideration of the defence fell within the ambit of a properly charged jury]
- (ii) The Court of Appeal erred in law and in fact in holding that the threshold required to allow a jury to consider the partial defence of provocation had not been reached, or indeed approached, in the Applicant's trial.
- (iii) The Court of Appeal erred in fact and in law in holding that while arguably the Applicant's actions were fuelled by emotions running high, it did not follow that he was provoked into doing so in a legal sense and thereby entitled to rely on the defence of provocation in the absence of a sudden response. [It is submitted that this classically was a matter for the jury to decide upon and that the Court of Appeal therefore misapplied the law on provocation as regards "sudden loss of control" and "immediacy"]
- (iv) The Court of Appeal erred in law and in fact in holding that although acts perpetrated upon the Applicant were quite unacceptable that such did not amount to acts of provocation.
- (v) The Court of Appeal erred in law and in fact in assessing the threshold

for provocation apparently on an objective rather than on a subjective basis.

- (vi) The Court of Appeal erred in law and in fact in failing to hold that the proper test in relation to provocation was whether there was sufficient evidence of provocation that if the jury, properly directed, could reasonably conclude that the defence might apply.
- (vii) The Court of Appeal erred in law and in fact in failing to find a jury, properly charge, could find that the Applicant did indeed suffer a sudden, unforeseen onset of passion, for a moment, which totally deprived him of his self-control.
- (viii) The Court of Appeal erred in law and in fact in holding that the Learned Trial Judge was correct in holding that the sudden, unforeseen loss of possession of self-control was not evidenced at all in the facts of the case.
- (ix) The Court of Appeal erred in law and in fact in holding that the Learned Trial Judge was correct in holding that it was necessary for an act of provocation to be directed towards the accused at the time and that he did not regard the facts of the preceding evening as sufficiently proximate in time to constitute a basis upon which the issue of provocation could go to the jury.
- (x) The Court of Appeal erred in law and in fact in holding that the Learned Trial Judge was correct in not permitting the partial defence of provocation to be considered by the jury having regard to all the facts and circumstances of the case.

3. Order(s) sought

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

1. An Order quashing the decision of the Court of Appeal made on the 28th May 2019 and further an Order quashing the Applicant's conviction in the Central Criminal Court made on the 31st July 2018 and remitting the matter back to the Court of Appeal to decide the issue of whether the Applicant should be re-tried before the Central Criminal Court and allowing the partial defence of provocation to be considered by a jury.