Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **In a decision handed down a few weeks ago, the UK Supreme Court had to consider the compatibility of the covert online activities of 'paedophile hunters' with the Article 8 ECHR right to privacy of those affected.**

- **In a decision handed down a few weeks ago, the Irish Supreme Court was called upon, for the first time, to address the substance and application of the partial defence of provocation in Irish law.**

'Paedophile Hunters' and Right to Privacy

Introduction

In a decision handed down two weeks ago in *Sutherland (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)* [2020] UKSC 32, the UK Supreme Court had to consider whether materials gathered by a private group of 'paedophile hunters' were admissible in evidence in a criminal trial.

Typically, members of these 'paedophile hunter' groups create fake online persona of young teenagers (decoys) with a view to luring, detecting and apprehending adult men who are intent on grooming children for sexual purposes. In any case where the bait is taken, the decoy will engage online (in the guise of a young teenager) with the man and will accept an invitation to meet the man in person. Members of the group turn up at the meeting where they record and film the confrontation and upload it onto the internet so that it can be viewed by others. The group also hand the man over to the police, together with copies of the online communications, recording and film for use as evidence in his subsequent criminal prosecution.

The group's actions do not normally amount to entrapment as they play a passive role in the communications. They do, however, engage proactively in searching out people with paedophile tendencies and, where relevant, they detect and gather evidence against individuals who communicate online with children in a sexual manner. In effect, they are acting as a private police body for these purposes, but they are not subject to the regulatory requirements that apply to the police in this context. The question arises, therefore, whether the evidence they gather in an individual case should be treated as inadmissible because it has not been gathered in accordance with, for example, the requirements of the Regulation of Investigatory Powers Act (RIPA).

Facts

In the *Sutherland* case, a member of the group a created a fake profile of a 13 year old boy as a decoy on the dating application 'Grindr'. When the adult appellant made contact with him, the decoy maintained the pretence of being a 13 year old boy. During subsequent one-

to-one communications online, the appellant, believing that he was engaging privately with a 13 year old boy, sent him a picture of his erect penis. He also made arrangements with the decoy to meet him in person. At the meeting, the appellant was confronted by members of the group who remained with him until the police arrived. The group provided the police with copies of the communications between the appellant and the decoy which were used in the prosecution and conviction of the appellant for a number of sexual offences arising out of those communications.

The appellant challenged the admissibility of the evidence between him and the decoy on the basis that it had been obtained by covert means without the authorisation required under (RIPA). He also argued that it should be excluded because it had been obtained covertly without a prior reasonable suspicion of criminality and, as such, was in violation of his right to privacy under Article 8 of the European Convention on Human Rights (ECHR). These arguments failed at his trial and he was convicted. He appealed unsuccessfully to the High Court of Justiciary (Scotland's High Court) which granted permission for appeal to the Supreme Court.

The specific questions for the Supreme Court were: 1. Whether, given the type of communications used by the group with the appellant, the Article 8 right to privacy would be triggered by their use as evidence in the public prosecution of the appellant? 2. Whether (or to what extent) the use by a public prosecutor of material supplied by private 'paedophile hunter' groups in investigating and prosecuting crime is incompatible with the State's obligation to provide adequate protection for Article 8 rights?

Article 8 ECHR

Article 8(1) stipulates that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Article 8(2) goes on to say that there shall be no interference with this right by a public authority, except such as is in accordance with law and is necessary in a democratic society in the interests of, among other things, the prevention of crime or the protection of the rights and freedoms of others.

In the *Sutherland* case, of course, the activities of the group of paedophile hunters were not those of a "public authority". That, however, did not necessarily mean that Article 8 has no application to the group's intrusion into what the appellant believed were his private communications. The Strasbourg jurisprudence has established that there are circumstances in which the State will be obliged to take positive action to protect the private life and communications of the individual from encroachment by other private parties (see further below).

Nevertheless, in answer to the first question posed, the Court held that Article 8 privacy rights were not engaged on the facts of the case. It gave essentially two reasons for its decision. The first was that the nature of the appellant's communications with the decoy were not such as was capable of making them worthy of respect for the purposes of the application of the ECHR. The second was that the nature of the communications was such that the appellant could have had no reasonable expectation of privacy in relation to them.

Nature of the communications

In the *Sutherland* case, there was a conflict in the privacy rights seeking positive protection from the State. On the one hand,

the appellant was seeking privacy in respect of his communications with another private person online. On the other hand, respect for the private life of a child demanded that his or her "physical and moral integrity" be protected against the predatory behaviour of paedophiles. The Court had no difficulty in prioritising the latter by finding that the appellant's communications with the child were not capable of respect within the scheme of values inherent in the ECHR.

The Court gave three reasons for its decision on this aspect. The first was that the communications were criminal in nature and capable of being seriously damaging to the child. The second reason was that the State has a special obligation to protect the interests of children under the ECHR as they are recognised as being vulnerable persons. Under the Convention generally, and Article 8 in particular, the interests of children have priority over any interest a paedophile could have in these matters.

The third reason stems from Article 17 ECHR which prevents anyone from relying on the Convention to protect any activity aimed at the destruction or limitation of the Convention rights. The Court considered that the appellants communications had that prohibited effect on the child's Article 8 rights.

The Court concluded, therefore, that the appellant had no legitimate interest in asserting or maintaining privacy in respect of the communications he made to the decoy. The sending of those communications constituted a criminal act which the decoy was entitled to report to the police. Once the police had received that information, constituting evidence of a criminal offence, they were entitled to submit it to the prosecutor. The appellant had no legitimate interest under the ECHR in preventing the prosecutor from using that information in criminal proceedings against him. Indeed, both police and prosecutor had a responsibility under the scheme of values in the ECHR to take effective action to protect children insofar as the information indicated that the appellant presented a risk to them.

No reasonable expectation of privacy

The Strasbourg jurisprudence seems to indicate that if an individual has no reasonable expectation of privacy in relation to his communications, it is unlikely that the Article 8 right to privacy will be engaged in respect of them. In the instant case, the Supreme Court found that the appellant had no reasonable expectation of privacy in respect of his communications with the decoy.

The communications were made directly to the decoy, and there was no prior relationship between the appellant and the decoy from which a right to privacy could be said to arise. Moreover, the contents of the communications were not such that the recipient could be thought to owe the appellant any obligation of confidentiality. Indeed, given the substance of the communications, which the appellant thought he was sharing with a 13 year old boy, it was foreseeable that the latter might report them to someone else. This was very different to a situation where an individual's private communications with another person were subject to surveillance by the police.

Once evidence of the communications had been passed by the decoy to the police, the appellant could have no reasonable expectation that the police would treat them as confidential. As noted above, under the scheme of the ECHR and the need to safeguard children, they would be

bound to act on those communications to investigate whether a crime had been committed. Equally the appellant could have no reasonable expectation that the prosecutor would treat the communications as confidential in the prosecution of the appellant.

Positive duty to protect privacy of communications

The second question put to the Supreme Court concerned whether (or to what extent) Article 8 imposed a positive duty on the State to protect the appellant's private communications from intrusion by private 'paedophile hunters'. If it was the police who were acting as decoys (or using private parties as decoys), they would be subject to the relevant requirements of the RIPA which are designed, in part, to strike a balance between privacy rights and the needs of criminal law enforcement. The question arises, therefore, whether the State is in breach of its obligations under Article 8 through its failure to apply similar privacy protections to the actions of private 'paedophile hunters'.

The Supreme Court, in line with Strasbourg jurisprudence, acknowledged that the State's obligations to protect privacy rights under Article 8 are not confined to the actions of public bodies. There are circumstances in which they can extend to the actions of private bodies by, for example, preventing public bodies (such as the police or the courts) using evidence against a person where it had been gathered by private bodies in breach of that person's right to privacy.

On the facts of the instant case, however, the Supreme Court found, as indicated above, that the manner in which the evidence had been gathered by the group of 'paedophile hunters' did not trigger the appellant's Article 8 privacy rights. Accordingly, there was no obligation on the State to prevent the police, the prosecutor or the trial court from making use of the evidence against him. On the contrary, the overriding positive duty on the part of the State was to ensure that the criminal law was applied effectively so as to deter sexual offences against children.

Conclusion

Since the Supreme Court found that the Article 8 right to privacy was not engaged on the facts of the instant case, the evidence gathered by the group of 'paedophile hunters', could not be excluded on the basis of a breach of the appellant's privacy. Even if the Court found that there had been a breach, it does not follow that the evidence would be ruled inadmissible. Generally, evidence obtained in breach of Article 8 may still be relied on in criminal proceedings, providing that its' use does not amount to a breach of the right to a fair trial as guaranteed by Article 6 ECHR. There was nothing on the facts of the instant case that would bring it within that territory.

By focusing narrowly on the reprehensible behaviour of the appellant, the Court avoided having to deal more broadly with the implications of the 'paedophile hunters' detecting and apprehending suspects and gathering evidence outside of the legal framework that would otherwise be applicable to such actions by the police. This is not simply a matter of them reporting what they have observed to the police, or even acting in response to a reasonable suspicion generated independently of their own activities. Their role is much more significant than that. They are effectively supplanting the police in proactively flushing out suspects and

gathering evidence that will be used against them in subsequent prosecutions.

The private initiative of 'paedophile hunters' can be applauded for every instance in which it succeeds in detecting and bringing to justice the perpetrators of one of the most pernicious and objectionable harms in our society. On the other hand, however, it brings with it the potential to inflict less visible damage on the systemic functioning of the criminal process as a whole. Checks and balances that have been carefully calibrated may be distorted by the injection of unregulated private initiative. That can result in the punitive power of the State being applied arbitrarily, unevenly and sometimes mistakenly under the influence of local unaccountable interests to the detriment of the rule of law.

The Provocation Defence in Ireland

Introduction

Every first year law student will know that provocation (currently termed 'loss of self-control' in England and Wales) can reduce a conviction for murder to one of manslaughter. It originated at common law as a limited concession to offenders who killed under a sudden and complete loss of control triggered by the insulting words or acts of the deceased. Instead of a conviction for murder and the death penalty, they would attract a conviction for manslaughter and a punishment that would take into account the circumstances in which they killed.

Initially, the test for provocation reflected an objective standard associated with the degree of self-restraint that could be expected of a person of reasonable firmness. It did not take account of inherent characteristics of the individual accused person which would render certain forms of provocation more intolerable to him or her than to a person without those characteristics. From about the middle of the twentieth century onwards, the test began to be modified in some common law jurisdictions to allow for certain characteristics of the individual accused to be taken into account when assessing the nature of the provocation, the impact it might have on that individual and his or her reaction to it.

Despite such developments, the application of the provocation defence remains controversial in its interpretation and application in many common law jurisdictions. So, for example, the key element of a sudden and complete loss of self-control in response to a provocative act has proved difficult to establish for women who have killed after having been subjected to many years of violent and degrading abuse at the hands of a partner. By comparison, in some formulations, it can be established where a man reacts violently on being taunted by the sexual indiscretions of a partner.

The test for provocation continues to be tweaked and moulded in different ways in different jurisdictions in an effort to accommodate it to the perceived requirements of contemporary social values, justice and fairness between accused persons and victims. A few weeks ago, in *People (DPP) v McNamara* [2020], the Irish Supreme Court responded to these issues for the first time.

The facts

The accused was a member of a motorcycle club. One evening on leaving a

pub, he and his wife were accosted by members of a rival motorcycle club with whom they were engaged in a 'turf dispute'. The rival club members forcefully stole the accused's jacket bearing his club's insignia and flag. This was perceived by the accused as a gross insult to him and the club, including its president.

The next day, the accused drove to the rival's clubhouse on being told that one of his attackers was there. The accused was armed with a sawn-off shotgun and claimed that he was in a state of fear and distress on account of the events of the previous day. On arriving at the clubhouse, he discharged the gun killing one of the rival club members at close range. The victim was not one of those who had accosted the accused the previous day. At his trial for murder, the accused sought to rely on the provocation defence (among others).

The trial judge ruled that the facts presented did not provide a sufficient basis upon which a reasonable jury, properly instructed, could find for the accused on provocation. Accordingly, the judge refused to allow that partial defence to be put to the jury. The accused was convicted of murder and appealed unsuccessfully to the Court of Appeal and from there to the Supreme Court.

The Supreme Court was asked to consider four questions: 1. Does the defence require the provocative words or actions to come from the ultimate victim? 2. To what extent can background circumstances found or form the defence? 3. Does the defence contain any objective element either as to reaction or as to mode of response or as to time of response? 4. What role, if any, does the trial judge have in excluding the defence from the jury?

The previous test in Ireland

When Ireland was established as an independent State in 1922, it incorporated into its law, by operation of its Constitution, the objective test for provocation applicable in English criminal law at that time. This required, among other things, an actual loss of control on the part of the accused, the provocative act to be such as to send a reasonable person out of control, and proportionality between the accused's reaction and the provocation.

It was not until 1978, that the test was actually considered directly in a decision of the Irish Courts. In *People (DPP) v MacEoin*, the Court of Criminal Appeal responded to the widespread criticisms of the objective test current at the time by adopting what has generally been perceived as a wholly subjective test. This focused on the effects that the provocation would have on the mind of the individual accused and, in particular, on whether it was such as to cause in him or her a sudden and complete loss of self-control and his or her violent reaction. Accordingly, if there was evidence that the individual accused was so provoked, the trial judge should leave it to the jury to determine whether the prosecution had managed to remove any reasonable doubt on that score.

On the face of it, the wholly subjective approach, which does not seem to have been taken up by any other jurisdiction, presents its own problems. Potentially, it opens the door to the partial defence being used in situations where the killing reflects the expression of deeply objectionable or distorted social beliefs or perceptions of honour. Notionally, for example, it might operate to the benefit of those who kill in a furious reaction to: a daughter sullying family 'honour' in matters of marriage or sexual relations, one

partner asserting independence from the other, sexual infidelity, unwanted homosexual advances and, of particular relevance to the instant case, insult to gang honour.

Modifying the subjective approach

Charleton J., in the Supreme Court in *McNamara*, was not persuaded that *MacEoin* laid down the purely subjective test that was attributed to it in some quarters. In his view, it still left a role for the trial judge to determine whether there was sufficient evidence to warrant leaving the provocation issue to the jury. This implied that there must be limitations to the defence, otherwise it might have to be left to the jury where the accused had reacted with lethal force to what, on any objective view, would have been no more than an occasion for the sort of hurt or disappointment that is a common feature of everyday life for most people. In Charleton J.'s view, there is "a minimal degree of self-control which each member of society is entitled to expect from his or her fellow members".

Building on these perspectives, Charleton J. reasoned that the provocation defence has always been limited by objective elements. Not only must the provocation be such that it propels the individual accused into a sudden and complete rage in which he cannot refrain from his violent reaction, but the provocation itself must exceed a common minimum threshold. It cannot be satisfied by a "mere insult". The provocative words or actions must be "outside the bounds of any ordinary interaction acceptable in our society". Accordingly, Charleton J. asserted:

> "The defence does not apply to warped notions of honour and the proper sexual conduct of males or females, or mere hurt to male pride, or to gang vengeance, or to situations where sober people sharing the same fixed characteristics as the accused, where relevant, as to age, or mental infirmity, or sex, or pregnancy, or ethnic origin, would be able to exercise self-restraint in the same background circumstances as apply to that accused."

Moreover, the rage must not be fuelled by intoxication from alcohol or drugs.

In moving away from the purely subjective test associated with *MacEoin*, Charleton J. seemed to be embracing the mixed objective/subjective test that had developed at common law in England and Wales (before it was replaced by a statutory test) and in some other common law jurisdictions. Whether the accused was genuinely provoked, together with the nature of his or her retaliatory response, would be assessed against the degree of self-restraint that could be expected of a sober person of reasonable firmness with certain of the accused's characteristics (eg. age, disability, ethnicity, gender, pregnancy).

Unfortunately, Charleton J. did not go on to engage with some of the difficulties that this peculiar mixed test has given rise to in other jurisdictions. Instead of focusing on what was in the mind of the individual accused, the jury would have to treat him or her on the basis of what could be expected of an artificially constructed person in the same circumstances. Moreover, there is the added complication of determining which of the accused's characteristics should (or should not) be attached to the person of reasonable firmness. What, for example, is the objective justification for excluding the

'short fuse' condition which an accused might have suffered from all of his or her life? By denying it, the test is subjecting the accused to a standard that he or she cannot reach.

The retention of an objective element in the test has important implications for the role of the trial judge. If the test is wholly subjective, there is a very low threshold for leaving the provocation issue to the jury. Essentially, if there is any evidence that the accused might have been provoked into reacting in the manner that he or she did, the judge should leave it to the jury to determine if the accused was genuinely provoked and if his or her reaction was proportionate to the provocation suffered. With the mixed objective/subjective test, however, the threshold is higher. Here the judge could withdraw the matter from the jury where, for example, the alleged provocation consists of nothing more than the sort of hurt or disappointment that is a common feature of everyday life.

Passage of time

A distinctive feature of the provocation defence is that the reaction to the provocation should be sudden and explosive. A cooling off period, or evidence of planning or revenge, will usually prove fatal as they suggest that the effects of the provocation had subsided and that the accused had regained self-control by the time of the killing. An entirely subjective test, however, would open up the possibility that an individual, such as the accused in *McNamara*, could even seek to rely on it in respect of his or her violent actions the next day. While Charleton J. acknowledged that circumstances could vary from case to case, he considered that there was a certain unreality about relying on provocation the day after it was allegedly suffered. That would afford no basis upon which a jury could fairly find for an accused on the issue. Accordingly, the judge should not allow the defence to go to the jury in that instance.

Retaliation against the provoker

An unusual feature of the facts in the *McNamara* case is that the deceased victim was not a member of the group that robbed the accused and insulted the honour of his motorcycle club. He was merely a member of the rival club in question. Charleton J. acknowledged that there could be exceptional circumstances in which the provocation defence could be relied upon even though the person killed was not the immediate author of the provocative behaviour. Possible examples might include group provocation, or the equivalent of transferred malice (where the accused misses his target and kills another). None of those situations applied in *McNamara*, so the provocation defence could not be made out in that case.

Summary of the test

Charleton J. very helpfully provided a summary of the elements of what is now required in Irish law to reduce a conviction for murder to one of manslaughter on the basis of provocation. It reads, almost verbatim, as follows. There must be a sudden, and not a considered or planned, loss of self-control. It must be a total loss of all control, as distinct from losing one's temper. There must be a complete overwhelming loss of ordinary self-restraint, in the face of what was done or said, that the accused cannot help intending to inflict death or serious injury, and could not stop himself or herself from doing so. The total loss of self-control cannot be attributable to intoxication on drink or drugs. The accused's actions are to

be considered as if he or she was not acting under the influence of drink or drugs when he or she killed the victim.

Loss of self-control also must be in response to a genuinely serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour or to any unacceptable ideas as to the proper romantic or sexual conduct of males or females; nor hurt to male pride; nor to gang vengeance. Nor does it apply in situations where ordinary people, sharing, if relevant, the same fixed characteristics as the accused (eg. age, sex, pregnancy, mental infirmity, ethnic origin, or state of health), would be able to exercise self-restraint in the same background circumstances. People can be provoked, but juries should always remember that there are degrees of provocation and there are also degrees of reaction to being provoked. What the accused did, and the accused's claimed mental state, must be judged against that background.

Decision in *McNamara*

Applying this test to the facts in *McNamara*, Charleton J. had no difficulty in upholding the trial judge's decision not to leave the provocation issue to the jury. He explained that the judge's role was to decide whether, on the version of events most favourable to the accused, the jury might fail to be satisfied beyond a reasonable doubt that the killing was unprovoked. The learned judge was satisfied that there was no foundation of fact on which a jury could reasonably find provocation in this case.

Interestingly, Charleton J. considered that the position might be different if the accused had reacted the day before at the point at which he (and his wife) was robbed and insulted. Depending on the nature of his reaction, that could possibly have provided a basis for the judge to leave the matter to the jury. In the event, it was lost due to the passage of time and the fact that the victim was not part of, and had not even been present at, the provocation. Equally fatal was the disproportion between the nature of the provocation and the response of shooting the victim in the face at close range with a sawn-off shotgun.

Conclusion

The decision in *McNamara* marks a significant change in the Irish approach to the interpretation and application of provocation as a partial defence to murder. Among other things, it replaces what was considered to be a purely subjective test with a mixed objective/subjective test. In doing so, however, it introduces some of the difficulties that other jurisdictions have experienced with that approach. While Charleton J. offers a compelling argument for some practical limits on what should qualify as provocation, he is less successful in charting a principled basis for the parameters of the objective/subjective test.