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Decriminalising Murder?

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DECRIMINALISING MURDER?

THE HONOURABLE MR. JUSTICE PAUL CARNEY

The number of murder trials coming before the Central Criminal Court has been increasing at an exponential rate. In 2002 the Court received 55 murder cases as opposed to 25 in 1996. In 2002 the Court disposed of 48 murder cases as compared with 23 in 1996. At the end of 2002, 65 murder cases awaited trial.

One feature of these cases is very striking. In nearly every case it is accepted and not in issue that the accused unlawfully killed the deceased. This is dramatically evidenced by the fact that in the entire of 2002 there was no outright acquittal in any trial for murder. The area of contest in contested trials is therefore between murder and manslaughter. Excluding cases where accused persons changed their plea in the course of the trial there were 28 contested murder trials in 2002. These trials resulted in sixteen murder convictions and a further eleven accused persons were convicted of manslaughter or other offences. In one case there was a disagreement necessitating a retrial and as already noted, in no case was there an outright acquittal.

The fact that the unlawful killing of the deceased by the accused is scarcely ever in issue suggests that if the crimes of murder and manslaughter were merged in a crime to be known as unlawful homicide, or unlawful killing, the contested murder trial might become a rarity and almost a thing of the past. There would be no reason why there should not be a plea of guilty in nearly every case.

In the light of strains which the number of murder trials are imposing on the Central Criminal Court and by knock-on effect on the High Court as a whole, it might be opportune to examine the implications of such a change.

The conviction rate for murder as opposed to manslaughter fluctuates probably according to how concerned the community is in relation to violence at any given time. The conviction rate for murder as opposed to manslaughter appears to be running at present at 57%. Yet, when almost fourteen years ago I made an analysis of a term's cases in the Central Criminal Court, there was a conviction in one case out of seven, namely a percentage of only 14%. This analysis appeared at the time in an Irish Times article.

Charges are preferred by the Director of Public Prosecutions according to the law as stated in the textbooks and in the judgments of the Superior Courts. Offers of pleas of guilty to manslaughter are also assessed by the Director on this basis. Juries in this country do not, in my experience, give blind obedience to the textbook and there are certain categories of cases in which they will not go beyond a manslaughter conviction no matter what the textbook says. A plea offered in such a case may well be rejected on the basis of the textbook and a contested trial will ensue, notwithstanding the inevitability of the outcome. These two latter points lead me to conclude that as matters stand there is an arbitrary element in what the outcome of a murder trial may be.

The Central Criminal Court's other area of jurisdiction is the rape trial. Rape cases have been increasing as exponentially as murders. In 1996, 25 rape cases were received in the Central Criminal Court and 23 were disposed of. In 2002, 55 were received and 48 were disposed of.

The average length of a contested murder trial in 2002 was eleven days and the average length of a contested rape trial was six days.

When I came to the Bar in 1966, the junior Judge of the High Court went to Green Street Courthouse for a few weeks every term and disposed of the list of the Central Criminal Court. With the increasing caseload more than this was obviously required and a backlog of two years developed to get a case on for trial. If a trial suffered any collapse or did not get on for want of a judge, it had to wait a similar period to get back on the rails again. By the permanent assignment of four-judges to the Court (three of them rotating), a very structured discount for pleas and a rigid no-adjudgment policy, the backlog has now come down to twelve months.

If the homicide cases could be reduced to one day or half-day pleas, the backlog could be contained or substantially further reduced with a reduction in the trauma affecting victims, both direct victims in the sex cases and indirect ones in homicides. Delays have been eliminated in the Circuit Court but continue to be a problem in the forum which tries murder and rape. These are the cases in which delay particularly traumatises victims because they are crimes in which the victim and perpetrator predominantly know each other and, due to the liberal bail laws in operation in this State, involuntarily keep coming into contact with one another pending trial.

Due to the increased activity of victim support organisations there seems to me to be a greater attendance of family at murder trials now than ever before. There may, in the row of seats behind junior counsel, be a row of seven pairs of piercing eyes looking into mine because they have nowhere else to look. Whether the trial be days, weeks or months, they remain in situ right through the pathology and right through the evidence attacking their loved one, to set up a provocation defence to which there is no right of reply. In nearly half of these cases the jury will return a verdict of manslaughter, even though the textbook says it should be murder. I have never known the family members concerned to accept this situation. They feel that the case has been lost if the verdict is manslaughter rather than murder and that they have not, as they put it, "got justice". The murder/manslaughter distinction seems to me in this respect to impose a gratuitous suffering on the relatives of victims. This would be avoided if there were a hearing in pleas to unlawful killing in which all the facts of the crime were adduced in evidence.

Proponents of the murder/manslaughter distinction want it retained, firstly because the word murder has become synonymous with the word heinous in our language and culture. Secondly, they would want it retained for the mandatory penalty attaching to murder. This is a diplomatic way of saying that judges are not to be trusted. The Central Criminal Court, through the efforts of its registrar, Mr. Liam Convey, publishes a very substantial annual report which gives details of all sentences imposed. I believe they are consistent with each other, reflecting the gravity of the crime, its effect on the victim and the circumstances of the accused, including prospects of rehabilitation. It is also to be borne in mind that a life sentence or a substantial sentence is now in effect to be what the Parole Board says it is to be.

The cost of a murder trial is rarely looked at but it is obviously a legitimate area of inquiry if it diverts resources from other areas of the justice system. The two longest running cases of modern times were those of Catherine Nevin and one involving the Chinese community. What I am considering here would have made no difference to

the Nevin trial as there was no admission in relation to the killing and I am not sufficiently familiar with the facts of the Chinese case to express a view on it. These two cases lasted months.

The murder trial rarely lasts less than a week, can run to months and averages eleven days. Fees payable to prosecution and defence counsel and defence solicitors are readily quantifiable and could be ascertained from the Department of Justice unit in Killarney. The same would apply to fees for interpreters and defence expert witnesses. The fees and expenses of prosecution witnesses fall to be discharged by An Garda Siochana. A murder trial will typically involve over 100 witnesses and if it originates outside Dublin, the Guards will have the expense of transporting these witnesses to and accommodating them in Dublin. This expense would of course only arise in the contested trial and not in the plea of guilty. The least quantifiable expense would be the provision of the court infrastructure, including court staff and judge.

It seems to me legitimate to inquire whether this order of expenditure continues to be justified because our culture has bestowed a particular mystique, gravity and aura of heinousness on the word “murder” over and above the word “killing”.

The assumptions underlying this culture have been judicially questioned. In the case of *Hyam v. D.P.P.* 1975 A.C. 55 at p. 98, Lord Kilbrandon in his speech said:

“There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment. It is no longer true; if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide.”

In our own jurisdiction in *The People v. Conroy (No.2)* [1989] I.R. 160 at p. 163, Finlay C.J. noted that manslaughter in many instances may be as serious as or even more serious than murder. It has also been contended by the English Advisory Council on the Penal System in 1978 that:

“Although murder has been traditionally and distinctively considered the most serious crime, it is not a homogenous offence but a crime of considerable variety. It ranges from deliberate, cold-blooded killing in pursuit of purely selfish ends, to what is commonly referred to as mercy killing.”

The position of the Law Reform Commission has been that many of the difficulties associated with the distinction between murder and manslaughter can better be met by means other than abolition, including the removal of the mandatory life sentence for murder.

If the crimes of murder and manslaughter were merged with the trial Judge having a discretion as to sentence I believe the consequences would be as follows:

1. Significantly fewer cases would proceed to trial and cases would be disposed of in half a day as opposed to a week, weeks or months.

2. A decisive impact would be made on the backlog problem affecting the Central Criminal Court.

3. Very significant savings would be made in prosecution and defence costs and in the peripheral costs and expenses associated with transporting witnesses to and accommodating them in Dublin.

4. Victims would be saved the disappointment and trauma occasioned to them by a manslaughter only verdict. They might well not appreciate this benefit by reason of the aura and mystique surrounding the word murder as opposed to the word killing.

A halfway house would be to leave matters as they stand but give the trial Judge discretion in relation to sentence. This would increase the number of pleas of guilty but it is not possible to estimate by how many.

Even if matters are left as they are, a small number of pleas to murder are now forthcoming. Thus is by reason of the parole board having power to open the file on a long-term prisoner after four years. This contrasts with the position in the days of capital punishment when a Judge might refuse to permit a plea of guilty to murder on the basis that it would be regarded as an act of suicide.