APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 60
HCA/2018/586/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

Note of Appeal against Conviction

by

ASHLEY DUNCAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Crowe; Faculty Services Ltd (for Just Defence Law Practice, Aberdeen)
Respondent: McSporran QC, AD (sol adv); Crown Agent

19 September 2018

Introduction

[1] This appeal raised a question of whether, in a trial for attempted murder, the judge ought to have directed the jury on provocation in circumstances in which the appellant had not given evidence that she had been provoked and the defence advanced on her behalf had been that the evidence was insufficiently credible and reliable to demonstrate that she had been involved in the assault at all. The contention was that provocation could be inferred

from circumstances described by the appellant to the police and that, in terms of *Ferguson* v *HM Advocate* 2009 SCCR 78, a direction required to be given.

Background

[2] On 7 September 2017, at the High Court in Aberdeen, the appellant was convicted of a charge which libelled that:

> "(7) On [Sunday] 22 May 2016 at 28 Auldearn Place, Aberdeen you MATTHEW DONALDSON, LEE HUTCHISON and ASHLEY DUNCAN did, whilst acting together assault Jordan Jones … and did repeatedly punch and kick him on the head and body, brandish a knife at him, seize hold of him, stamp on his head and body, all to his severe injury, permanent disfigurement and to the danger of his life and did attempt to murder said Jordan Jones and did previously evince malice and ill-will towards him".

[3] The co-accused were found guilty of the same charge. On 3 October 2017, the appellant was sentenced to six years imprisonment. Mr Donaldson was sentenced to seven years and Mr Hutchison to eight years; both co-accused having been convicted of other charges for which separate sentences were imposed.

The evidence

[4] The trial judge reports that there was a background of animosity between Mr Hutchison and the complainer. This related to their respective relationships with Amy Spalding, who lived at a flat at Auldearn Place. The main evidence about what had happened at the *locus* came from two witnesses, namely Ms Spalding and Jodie Skinner. The three accused and the complainer had all been in Ms Spalding's flat. The complainer had been "play fighting" with the two male accused in the kitchen. The appellant had been in the livingroom. The fighting had grown more aggressive, but then calmed down. The complainer had gone into the livingroom, where he lay down on a sofa and went to sleep.

[5] Ms Skinner gave evidence that the two male accused had come from the kitchen and began attacking the complainer as he lay on the sofa. They were kicking him. The appellant had then joined in and punched and kicked the complainer. She had punched him four or five times. All three accused had run out of the flat when they had finished.

[6] Ms Spalding said that all three accused had run in from the kitchen and had started punching the complainer who had been asleep on the sofa. The male accused stamped repeatedly on his head. One of them had brandished a knife, although he did not use it. They had all left together. In the hallway, the appellant had said "he deserved it".

[7] A third witness, namely Claire Simpson, had observed Mr Hutchison and the complainer arguing in the kitchen. She had left the flat and then returned to find the complainer lying on the sofa "in a bad way". The three accused were leaving and the appellant had said "he had to learn".

[8] Airborne blood spots and staining, which were consistent with a person being attacked whilst on the sofa and bleeding heavily, were discovered. Bloodstains on the appellant's jeans contained a mixed DNA profile of both the appellant and the complainer.

[9] It was not disputed that the attack on the complainer could have caused his death. When he was examined, he had a Glasgow Coma Scale of 8 out of 15. He had soft tissue injuries to his arms, face and head together with contusions to both sides of his brain. There were right-sided facial fractures. He has been left with a catastrophic brain injury.

[10] On her way to the police station, having been detained on the morning of (Monday) 23 May, the appellant was noted as telling the police that she had bruises to her arm, which had been caused when she had been at Claire Simpson's (*sic*) home on the Saturday (21 May). The complainer had turned up at that address with a knife and had started arguing and fighting with Ms Simpson. The appellant had "jumped in and started fighting

with [the complainer] and this is when it all kicked off". In her police interview at 3.00pm on 23 May, the appellant's statements were, as the trial judge put it, mixed and often contradictory. She initially said that she had not done anything. After several "no comment" replies, she admitted being at the *locus*. The complainer had walked in with a knife. The appellant had been assaulted (presumably by the complainer) being pulled by the hair. The complainer had caused bruising to her arm and other parts of her body. The complainer had referred to Ms Spalding as a slut and she (the appellant) had "kicked off". She denied hitting the complainer. There was a massive fight. The appellant was reluctant to "grass" anyone.

[11] At a slightly later part of her interview, the appellant said that she was sitting having a drink and a laugh with others, when the complainer came into the flat with a knife, like a raging bull. He had called the appellant a "slut". She had "kicked off" and had then been assaulted by the complainer. This had been when only the appellant, Ms Spalding and Ms Simpson had been present. It was before the other accused had arrived. The appellant said that she could not really remember what had happened after that. She had just left. When asked how the complainer had come by his injuries, the appellant had said that he had stood up from the settee and then sat down. She had not punched him.

[12] At the end of her interview, when the police were attempting to summarise her position, the appellant had said that her sole involvement with the complainer had been putting her hand on his chest because he was in her space. After the interview, when she was cautioned and charged, she said that she had not touched him. There was evidence of a telephone conversation between the appellant and her mother when the appellant had been on remand. In this the appellant had stated that she had "never done nothing". Medical

examination of the appellant revealed two bruises to her left upper arm and multiple small bruises on her knuckles and the back of her hands. These could not be aged.

[13] None of the accused gave evidence.

[14] The trial judge recorded in her charge that the general defence position was that the jury should not believe or rely on the eye witnesses or alternatively that their evidence should leave the jury with a reasonable doubt about whether the accused were involved. Mr Donaldson's approach was to focus on lies told by these witnesses to the police. On behalf of the appellant, it was said that Ms Skinner, after lying in one statement, had not mentioned the appellant in a second statement. This witness had been under the influence of something. Her statement had been redolent of the appellant simply "being an onlooker, or bystander, and not a participant". Mr Hutchison adopted Mr Donaldson's attack on the eye witnesses' evidence. He had incriminated the other accused based on certain statements made by him to others.

[15] The trial judge took the view that the evidence painted a clear picture of the complainer entering the flat, there being play fighting in the kitchen and then a gap during which things had calmed down and the complainer had gone to sleep on the sofa. It was only after that that an attack was launched upon him whilst he was sleeping. In these circumstances the judge did not consider that there was any basis for a plea of provocation. Any interaction solely between the complainer and the appellant had been some time before the attack on the later prone complainer. There had been no hint of provocation being an issue during the course of the trial.

The ground of appeal and submissions

[16] The Note of Appeal complained that there was no direction by the judge on

provocation. It was said that the evidence was to the effect that the two male co-accused had been repeatedly punching, kicking and stamping on the complainer and the appellant had joined in by punching him on the face. The complainer had turned up at the flat with a knife and the appellant had become involved in an altercation with him. En route to the police station after the incident, the appellant had said that, after the complainer had appeared at the *locus* with a knife, she had jumped in and started fighting with him and this was when it had all "kicked off". The jury would have been entitled to find, on the basis of this evidence, that the appellant had been attacked, lost her temper and self-control and retaliated instantly and in hot blood. Her retaliation would have been regarded as broadly equivalent and proportionate to the violence which she had faced. In these circumstances the judge had been obliged to direct the jury on provocation (*Ferguson* v *HM Advocate* (*supra*)). Only if the judge had been able to conclude that no reasonable jury could, on the evidence of what the appellant had said, find provocation established, should directions on provocation have been omitted (see *Duffy* v *HM Advocate* 2015 SCCR 205 at para 21; *Graham* v *HM Advocate* [2018] HCJAC 4).

[17] The advocate depute maintained that, although it could be said that the *dicta* in *Ferguson* v *HM Advocate* (*supra*) was also "fenced", as that word had been used in *Mackay* v *HM Advocate* 2008 SCCR 371, it had left some discretion to the trial judge. *Ferguson* had not laid down a general rule to be applied in all cases. Fairness ought to prevail. A direction on provocation need not always be given. There was no need for such a direction in this case.

Decision

[18] The fundamental principle applicable, when charging a jury in respect of alternative verdicts, is that, as a generality, the trial judge is only required to direct a jury on the issues

which are live at the trial. This central aspect of adversarial procedure is exemplified by *Templeton* v *HM Advocate* 1961 JC 62, in which it was emphasised that, if the parties choose to peril their cases simply on whether the accused is, or is not, guilty of the offence libelled, there is normally no requirement for a judge to introduce an alternative or lesser verdict. Such an introduction may be seen as unfair to one or other, or both, parties, where neither has addressed the jury on the matter. From the defence viewpoint, it may result in the accused being convicted of an offence, albeit a lesser one, when he would otherwise have been acquitted.

[19] In *Templeton*, the proposition for the appellant was that, on an indictment which libelled an alternative of culpable homicide or a statutory offence of causing death by reckless driving, the judge ought to have directed the jury that they could convict of reckless driving only. That option, which may have been open if the jury had not been satisfied that the driving had caused the death, had not been mooted by either the prosecution or the defence in their addresses to the jury. As the Lord Justice General (Clyde) put it (at 67):

> "…[I]f it is not proper in all cases for a Judge to give the jury… a direction [on an alternative verdict], then the circumstances in which he does so must necessarily be a matter for him. He would require to deal with the matter if it is raised either by the prosecution or by the defence at the trial. But I am unable to envisage a case in which it was his duty to raise the matter *ex proprio motu* where both sides have, no doubt for good reasons, chosen to present the issue to the jury as one of conviction [of causing death by driving recklessly] or complete acquittal."

Lord Guthrie did qualify this. He said (at 69) that:

> "…the duty of a presiding Judge is to give the jury the necessary directions on the live issues at the trial. … No doubt, if a direction in law is necessary in fairness to the accused, the Judge ought to give it although the defence has not raised the matter. A question which must be considered by the jury if the verdict is to be a just one must always be a live issue."

[20] The approach in *Templeton* was adopted in *Johnston* v *HM Advocate* 1997 SCCR 568, in which the Lord Justice General (Rodger), delivering the opinion of the court, said (at 576):

> "… the mere fact that counsel does not raise an issue does not necessarily mean that a judge will not require to cover it in his directions to the jury where it can be seen to be critical to a proper consideration of the evidence. That appears… to be the basis of… *Hobbins* [v *HM Advocate* 1996 SCCR 637]. But equally there will be issues which have not been addressed by the Crown or the defence and which the trial judge may well consider that he should not raise with the jury since they have not heard submissions on them. He may well take the view that, were he to address such an issue, he would risk disturbing the balance of the trial by giving the jury his views on a point on which they had not had the benefit of submissions from counsel. Sometimes a trial judge may see a possible conclusion on the evidence which has not been mentioned by either side. He cannot know why it has not been mentioned. In that situation he cannot be criticised for deciding that he should not draw the jury's attention to that particular view of the facts or for omitting to include a direction which would fall to be applied if the jury adopted that view of the facts. As is recognised in *McPhelim* [v *HM Advocate* 1960 JC 17] this court requires to leave a margin of appreciation to the trial judge in deciding what matters he should cover and in what detail he should cover them."

[21] Lord Sutherland's dissenting opinion in *Hobbins* v *HM Advocate* (*supra*) had contained the following (at 645):

> "The purpose of charging a jury is to give the jury necessary directions in law to provide a proper framework for their consideration of the facts and, in particular, to give them proper directions on matters which are in issue in the trial. It is not a function of the trial judge to speculate about possible lines of defence which have not been advanced in any way by the accused."

This was endorsed in *Mackay* v *HM Advocate* 2008 SCCR 371, in which the trial judge had not left culpable homicide to the jury in a trial involving an allegation of murder by smothering. In delivering the opinion of the court, which included Lords Wheatley and Reed, Lord Johnston said:

> "… the obligation on the trial judge to charge the jury is fenced by the way the case is presented to the jury by both or all parties. It is not for the trial judge to speculate or embark upon areas of possible verdict which have not been canvassed in the evidence or form part of a submission to the jury… (see the dissenting opinion of Lord Sutherland in *Hobbins* v *HM Advocate* [(*supra*)] and *Johnston* v *HM Advocate* [(*supra*]), following *McPhelim* v *HM Advocate* [(*supra*)]."

[22] This passage, at least in so far as it used the word "fenced" was "disapproved" in *Ferguson* v *HM Advocate* 2009 SCCR 78, in which Lord Osborne, delivering the opinion of the court, said (at 89):

> "While, of course, it is not for the trial judge to place before the jury the option of a verdict which would not be justified upon a reasonable view of the evidence before them, it was erroneous to suggest that the way in which the case was presented by parties was in some undefined way necessarily determinative of the options available to the jury".

The court derived support for that proposition from *Steele* v *HM Advocate* 1992 JC 1, *Brown* v *HM Advocate* 1993 SCCR 382 and *R* v *Coutts* [2006] 1 WLR 2154.

[23] The *dicta* in *Ferguson* is expressly said to be in contrast to that in *Mackay*. However, there is little real conflict. It is not obvious why the judges in *Ferguson* thought it either necessary or appropriate to "disapprove" of the opinion of a bench of equal status, especially given the authority of the cases upon which the bench had relied. The court in *Mackay* was setting out the general position, which is amply vouched by the authorities cited.

[24] In *Brown* v *HM Advocate* (*supra*) the issue was whether the trial judge had been correct to withdraw culpable homicide from the jury's consideration in circumstances where the possibility of that verdict had been raised in the defence speeches. In *Steele* v *HM Advocate* (*supra*), the issue of reset, as distinct from theft, had been also been raised by the defence in their speeches (see LJG (Hope), delivering the opinion of the court, at 4). Neither case is in point.

[25] In *R* v *Coutts* (*supra*) there was particular emphasis put upon the public interest in seeing that an accused was, on the one hand, not convicted of an offence which was not proved or, on the other, acquitted, when he was guilty of a lesser offence not put before the

jury. A particular passage in *Coutts,* which the court found attractive, was where Lord Bingham said (at para 23):

> "The public interest in the administration of justice is ... best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any *obvious* alternative offence which there is evidence to support ... I would also confine the rule to alternative verdicts *obviously* raised by the evidence; by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge ..." (emphasis added).

As the court also noticed, Lord Bingham was alert (at para 24) to the possibility of unfairness, if speeches had been concluded before the alternative was first mooted.

[26] The court in *Ferguson* v *HM Advocate* (*supra*) referred to Lord Rodger's observations in *R* v *Coutts* (*supra* at para 81) which, since he was then dealing with procedure in England and Wales, may be perceived as differing from what he had said ten years earlier in *Johnston* v *HM Advocate* (*supra*). He expressed the view that the duty on the trial judge was to direct the jury on manslaughter if the jury "might reasonably return such a verdict on the whole of the evidence". This was not exactly in accord with Lord Bingham's *dictum*. In both *Coutts* and *Ferguson,* the court suggested that, in order to avoid unfairness, if a trial judge took the view that it was appropriate to give a jury directions on alternative verdicts, this ought to be communicated to counsel before they addressed the jury. This expedient, whilst theoretically available, would involve judges and sheriffs requiring to do so in the many cases in which alternative verdicts arise and parties have every intention of addressing the options. A judge may have little, and often no, means of knowing, what line parties will take on verdicts prior to the commencement of speeches.

[27] The general principle is that the obligation on the trial judge is to charge on verdicts in accordance with the manner in which the case has been presented to the jury by the parties (the "live issues"). The judge should not speculate or embark upon areas of possible

alternative verdicts which have neither been canvassed in the evidence nor formed part of the speeches to the jury. The judge ought not to present an alternative verdict, which has not been canvassed by the parties, unless the prospect of that verdict is an obvious one. That is what Lord Bingham said in *R* v *Coutts* (*supra*). The principle is based upon that of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness. That is what Lord Guthrie said in *Templeton* v *HM Advocate* (*supra*). It is not inconsistent with what Lord Osborne said in *Ferguson* v *HM Advocate* (*supra*). Lord Osborne did not say that the option of an alternative was required if that alternative was "justified on a reasonable view of the evidence". He merely said that a judge should *not* direct on the alternative when it was *not* so justified. The exception is also not inconsistent with what Lord Johnston said in *MacKay* v *HM Advocate* (*supra*), once it is recognised that he was setting out a general principle and not an absolute.

[28] The need to direct on a matter not raised by parties ought to be a rare event, given the functions of parties' representatives, but it remains possible that the trial judge will regard an alternative, such a culpable homicide in a murder trial or reset in a theft case, as *obviously* open to the jury on the evidence, even if it has not been addressed in the speeches. That appears to have been the position in *Duffy* v *HM Advocate* 2015 SCCR 205, in which the complainer had admittedly assaulted the appellant, and *Graham* v *HM Advocate* [2018] HCJAC 4. If the judge does take the view, that he or she ought to give a direction on an alternative verdict not addressed by the parties, he or she should do so, even if, by that time, it may be too late to seek the views of the parties on the appropriateness of giving the direction. That procedure is in the nature of the adversarial jury system.

[29] Applying this principle to the present case, the parties did not, in their addresses to the jury, raise the prospect of a verdict of assault only, based upon provocation. There was

no need for the trial judge to do so unless that alternative verdict was an obvious one on the evidence, such that the public interest necessitated that the direction be given, notwithstanding any unfairness which might thereby ensue. The evidence founded upon by the appellant in the appeal was the content of her statements to the police. Had this obviously raised provocation as a trigger for the appellant participating in an attack on the complainer as he lay on the sofa, it may be that the judge ought to have given the direction. It did not. Rather, if anything, any element of provocation related to an earlier episode, after which matters had calmed down. Any earlier violence had no immediate relationship to the attack on the sofa.

[30] In presenting the defence case, the appellant's position was to the effect that the evidence was so incredible or unreliable that the jury ought not to be satisfied that the appellant had participated in the assault; not that she had done so under provocation. In that situation, had the judge given the direction, it would have had to have proceeded on a hypothesis that the appellant had participated in the attack. Such a direction would have had the potential to undermine the defence position as put to the jury. It certainly did not require to be given as a matter of fairness.

[31] The appeal is accordingly refused.