APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 32
HCA/2018/000307/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

JAMES WRIGHT

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Scott QC, Sol Adv; Paterson Bell, Solicitors for Tod Mitchell, Solicitors, Paisley
Respondent: A Edwards QC; Crown Agent

22 May 2019

[1] The appellant and a co-accused were charged with the random murder of an innocent victim, the cause of death being a stab wound to the chest. The case against both accused was a circumstantial one and both accused had lodged notices of incrimination in respect of their co-accused. Based on prior texts between the appellant and his co-accused, the Crown case was that this was a concerted attack. Whilst there was argued to be a sufficiency against either accused as actor, the Crown's primary argument was that the

evidence suggested the co–accused as actor with the appellant art and part. However, the evidence was clearly capable of bearing other inferences, all of which were referred to by the Advocate Depute. The evidence tended to disclose that only one person inflicted the fatal wounds and the jury were obviously satisfied that person was the appellant. The co-accused was acquitted. The appellant did not give evidence but his co-accused, McLellan, gave evidence that the appellant committed the murder, referring to an alleged confession by the appellant to him. He denied he had a knife on him that night, but said that the appellant did.

McLellan's evidence and the speech on his behalf

[2] In the course of McLellan's evidence it was put to the him that at a flat earlier in the evening he had said "I'll stab you" to one of the girls and it was put to him that he had a weapon. He said "It is just words, I don't mean it. If you knew me you would know my mouth gets me in trouble. I had no intention". He said the reason he had sent a prior picture of a knife to the appellant was because he wanted to swap a hat for it. When asked why he wrote prior messages about stabbing people he said that he was arguing with a "lassie" at the time and it was a "daft" thing to say, "My mouth gets me into trouble, that's as far as it goes." He said it was "bravado", that he was trying to look "hard" and that it was not uncommon for people he knew to talk "a lot of shite".

[3] A witness Neil Crawford had sent a message to the father of the co-accused to ask him to destroy the top the co-accused was wearing at the time of the murder, giving no real explanation of why he did so. Crawford had been in the company of the co-accused when the latter was arrested. Both Crawford and McLellan denied that there had been any exchange between them to arrange for this message to be sent. In cross examination of

McLellan counsel for the appellant put to him that there would have been time for him to say something to Crawford, but he continued to maintain that he had not done so.

[4] In the course of his speech, counsel for the co-accused referred to this episode, first by stating that the suggestion that something had been said was made with no basis, and wrongly stating that this suggestion had been made by the Advocate Depute. He continued to attribute this line of questioning to the Advocate Depute, asserting that the Advocate Depute and counsel for the appellant had "hijacked" this episode, from which the only evidence was that nothing had been said, with a view to asking the jury to accept that the reverse was true.

[5] The co-accused had been interviewed initially as a witness, at which point he said nothing about blaming the co-accused. In a subsequent police interview as a suspect he did blame the appellant, but at a relatively late stage of the interview. The interview was not led during the Crown case. The Advocate Depute cross examined the co-accused about the fact that even at the start of his interview he had said he knew nothing about the murder and that it was almost three and a half hours into the interview before he raised the apparent admission by the appellant.

[6] In the course of his speech, counsel for the co-accused repeatedly suggested impropriety on the part of the Crown in relation to the lengthy police interview of the co-accused, suggesting that they had deliberately sought to conceal at least parts of the interview. He referred to the Advocate Depute as "sitting with" a 153 page interview from the start of the trial "and do you think he was gonna let you hear the recording of the interview? Do you think he was gonna actually lead the evidence that in fact Mr McLellan was gonna say the thing was done by Mr Wright…"Why not?" you might think. It's the evidence in the case". Of course, the statement made in the interview was not in fact

admissible evidence against Wright. The point is laboured further when counsel states "what the prosecutor ... has ... deliberately done is not played the interview...". It was maintained that the co-accused had basically said the same thing all along (which was not correct). He made further reference to the interview, saying "And the prosecutor decided he wasn't gonna tell you about it. Why do you think that is?". Later he said "while the prosecutor is adverting to you the fact that in fact Stuart McLellan's the killer, he's sitting with a body of evidence which suggests to him that James Wright is the killer." Again "If you ask me why the prosecutor sat with this 153-page interview and never bothered to lead evidence about it, I've no idea." Towards the end of his speech he said "What I'm suggesting to you is the prosecutor has just decided in his own mind that he's gonna invite you to ignore a huge body of evidence because it points to the man [presumably the appellant] and because the evidence slightly conflicts with one witness…".

[7] A similar point about impropriety on the part of the Advocate Depute relates to his knowledge that in the interview McLellan refers to the appellant as a smoker (a factor of relevance in relation to the circumstances of the murder).

Submissions for the appellant

[8] These were advanced under reference to two grounds of appeal. The first was that the trial judge erred in refusing the motion to allow the appellant to put the co-accused's previous convictions to him beyond those inferring dishonesty. The second was that the closing speech on behalf of the co-accused was inaccurate, misleading and prejudicial in a manner which was improper.

Ground one

[9] Counsel for the appellant submitted that the answers in the preceding paragraph set

up the co-accused's character in a misleading manner in light of his previous convictions for assault to injury with a bottle and for possession of a knife. The argument was relatively limited, namely that the appellant having set his character up in the way he did, the appellant was entitled to bring out convictions inferring violence, such as possession of a knife because these countered the character evidence given by the co-accused and permitted the convictions to be led under reference to sections 266(4)(b) of the Criminal Procedure (Scotland) Act 1995.

[10] In the passages of evidence the use of phrases such as "if you knew me" went beyond simple denial of having a knife. He suggests that he is someone who talks about knives but never uses them, which implies never carrying them. That it is all bravado and does not relate to actual knives, whereas the convictions show the opposite. The repeated reference to it just being "words" in reference to messages about knives, allows the introduction of convictions showing that it is more than that, and that the "words" have been translated into action. There is a pattern, a message he was trying to put to the jury about who he was if they knew him, and that he had nothing to do with knives.

Ground two

[11] It was submitted that the speech on behalf of the co-accused was inaccurate, misleading and prejudicial in a manner which was improper. Immediately on the conclusion of the speech, the Advocate Depute took exception to imputations of impropriety made against him in relation to a conversation between McLellan and Crawford. Those questions had in fact been asked by counsel for the appellant. The trial judge, having heard counsel, addressed the jury advising them that the remarks had not been made by the Advocate Depute and that any suggestion of impropriety on his part was not correct. The

trial judge did not correct the suggestion that there was any impropriety at all in the questions, although in his report he made it clear that there was no impropriety in the questions at all. There was a perfectly good common sense basis of the questions asked by counsel for the appellant. In addition, counsel for the co-accused appeared to suggest some improper joint approach by the Crown and the appellant's counsel against the co-accused, with a reference to their "hi-jacking" the episode in question to support their respective cases: this meant that the subsequent suggested impropriety on the part of the Crown in relation to a lengthy police interview of the co-accused, suggesting that they had deliberately sought to conceal at least parts of the interview, would also be associated with counsel for the appellant. It was submitted that, taken together, the speech on behalf of the co-accused involved repeated and prejudicial departures from good and proper practice – see *Lundy* v *HM Advocate*, 2018 S.C.C.R. 269. The trial judge was placed in a difficult position when it came to how far he should go in correcting the impression given by the speech without creating a further imbalance. However, the reality was that the words used were so egregious that they could not be corrected.

Submissions for the Crown

Ground one

[12] In general, only previous convictions demonstrating earlier dishonesty or lack of probity can legitimately be used to attack the credibility of the accused. Previous convictions for violence do not, ordinarily, bear on credibility. Particular situations may arise, such as where the witness falsely volunteers that he has never been convicted of an offence, where convictions other than convictions for dishonesty may be relevant (and accordingly admissible) to attack the credibility of the witness. If, in the present case, the co-

accused had stated, falsely, that he had never been convicted of an offence involving violence, or that he had never carried a knife in a public place, he could legitimately have been cross-examined by reference to previous convictions to the opposite effect. However, this was not the nature of his evidence and the trial judge did not err in refusing to allow the convictions to be put to him.

Ground two

[13] The Advocate Depute recognised that there is a responsibility on defence counsel, just as there is on prosecutors, to take care to frame their jury speeches in a manner which is consistent with their professional obligations: *KP* v *HM Advocate* 2018 JC 33, para 17. It was also recognised that counsel for the co-accused "suggested that the Crown had deliberately chosen to conceal at least parts of the interview". The imputation that there was something improper in the decision by the Advocate Depute not to lead evidence of the police interview was misplaced and improper. However, the trial judge in his charge dealt with any imputations of impropriety which had been made.

Analysis and decision

Ground one

[14] The court requires to approach the matter on the basis that the use of record under section 266(4) is limited to those convictions which affect the credibility and reliability of an accused who has given evidence. It is clear that convictions which come within that scope may extend beyond convictions for offences of dishonesty, if they reflect directly on the credibility of the accused in relation to a specific aspect of his evidence. In our view the answers in question do not, when examined in their context as they must be, come within the scope of the section. We accept that the answers might be seen as equivocating to a

certain degree, when the questions are examined, but we do not consider that they directly conflict with the knowledge which would be gleaned from the section 49 convictions, namely that on other occasions McLellan carried a knife. As the trial judge pointed out the answers did not deny carrying a knife on any other occasion, but the answer was that he had no intention of stabbing anyone, and he clearly had no record of doing so. In our view, where convictions for offences other than dishonesty are used to challenge the credibility of an accused person as a witness the evidence given must very clearly and unequivocally contravene the nature and terms of the conviction in question. In our view that does not occur in the present case and the first ground of appeal must fail.

Ground two

[15] This ground of appeal initially presented us with more concern, standing the repeated erroneous and incorrect imputations of impropriety on the part of the Advocate Depute in relation to a police interview in which the current appellant was implicated. However, on a closer examination of the circumstances and the charge, we have come to the conclusion that the trial judge's directions, which are not the subject of any criticism, were sufficient to deal with the matter. It is at the very least surprising that senior counsel should have made comments of the kind in question in relation to the police interview standing the well-understood state of the law. As the trial judge pointed out to the jury at pp48-49 of his charge comments made by one accused outwith the presence of that other cannot be evidence against that accused, and can only become so where the individual in question gives evidence and confirms the position taken at interview. It is entirely a matter for the Crown whether there remains anything within the statement of sufficient relevance against the maker of the statement to lead the evidence. They are not bound to do so, and had they

done so the trial judge would have been bound to tell the jury, probably at the very time when the evidence was being elicited, that it was not evidence against the appellant. The trial judge pointed out that it would indeed be a terrible thing if the Crown had relevant evidence and concealed it but that this had not happened. The trial judge explained all this to the jury, and also pointed out to the jury that the documents, productions and witnesses are all available to the defence so that they are not in any way hidden and that the defence may lead evidence thereanent, as indeed happened in the present case. The trial judge made it clear that there had been no impropriety in the conduct of the case. It is true that this was not in fact correct in relation to the speech by senior counsel for the co-accused, but this is of no moment. What the trial judge required to do, and did, was to correct any impression made in senior counsel for the co-accused's speech that there had been any impropriety on the part of the Advocate Depute or counsel for the appellant; it would not advance that correction to suggest that on the contrary there had been some lack of propriety on the part of counsel for McLellan. In fact doing so might have upset the delicate balance which the trial judge was clearly seeking to achieve in making the corrections. It was suggested that the fact that the speech had associated the Advocate Depute and counsel for the appellant together in the references to the episode of evidence regarding Crawford meant that the unfounded criticism of the Advocate Depute would also reflect on counsel for the appellant but we cannot see that this is so. The focus of those aspects of the speech relating to the interview was all on the Advocate Depute – there was no suggestion that counsel for the appellant was equally implicated in the alleged behaviour. It is therefore difficult to identify a complaint which might have reflected adversely with the jury in respect of this appellant, as opposed to the Crown.

[16] As to the complaint about the speech relating to the Crawford episode, there were two issues here: first, the assertion that there was no basis for the cross examination, which was therefore improper; and second that these questions had been asked by the Advocate Depute, when they were asked by counsel for the appellant. Once the speech was concluded, and after hearing parties, the trial judge agreed immediately to correct the suggestion that the questions had been asked by the Advocate Depute, and he told the jury that there had been no impropriety on the part of the Advocate Depute. It might have been preferable if the trial judge had at that stage made it clear that there was in fact no impropriety at all in asking the questions. However, it was very late in the day, about 5 pm, and he probably wanted to consult his notes. The important point is that as soon as he commenced his charge on the Monday the trial judge directed the jury that there had been no impropriety of any kind. Moreover, in dealing with this passage of evidence at pp16-17 of his charge, the trial judge made it clear that it was open to the jury to draw the inferences suggested by the approach taken by the Crown or counsel for the appellant, and thus that there was no impropriety in the way in which the matter was pursued. How a judge chooses to address the impression given by an over-zealous, incorrect or even improper speech is largely a matter for him. He may do so by drawing specific attention to what was said; he may consider that a more subtle approach will suffice to meet the point. The important issue is that after the charge there can be no question of the jury being left with any erroneous impression which the speech might have created. We are satisfied that there was no such question in the present case and that the appeal must therefore fail.