HIGH COURT OF JUSTICIARY

[2020] HCJ 12
IND/2019-003400

OPINION OF LORD TURNBULL

in causa

HER MAJESTY'S ADVOCATE

against

GRAHAM CAMERON TURNER

Accused;

Crown: Davie QC, AD; Crown Agent
Accused: Duff; Brodies, Glasgow

17 January 2020

Introduction

[1] The accused Graham Turner has been indicted in the High Court. He has challenged the relevancy of the second of the two charges which he faces by preliminary plea. His argument raises the unusual question of whether he can be charged with attempting to pervert the course of justice as a consequence of stating his defence to the principal charge which he faces.

The circumstances as alleged

[2] For the purposes of this summary I shall proceed on the basis of what I understand the Crown expect to establish in evidence. I was provided with copy police statements of the relevant witnesses to assist in understanding this. Sometime around 6.30 in the morning on 17 March 2018, the accused was driving a Toyota Hilux motor vehicle on the M9 motorway near to Plean, Stirling when it left the road and travelled down an embankment, striking trees and flipping onto its roof. His two male passengers both died at the scene.

[3] Various other motorists pulled over and sought to provide assistance. The accused was seen to be out of the vehicle and standing but the two passengers were inside. Ambulance personnel and police officers attended.

[4] Two of the passing motorists who stopped, Ms Sheridan and Mr Stewart, spoke to the accused. They described him as being in complete shock. They asked him if he was injured and what had happened. The ambulance technician and paramedic who attended approached the overturned vehicle and quickly ascertained that both passengers were dead. They then turned their attention to the accused. They described him as looking confused, shocked and hypothermic. They took him to the ambulance and tried to warm him up. They applied a collar and placed him on a board to immobilise him. During the course of these procedures they asked him what had happened.

[5] The accused gave an account in similar form to Ms Sheridan, Mr Stewart, and to the two ambulance personnel. He said words to the effect that a deer had run onto the road and he had swerved to try and avoid it.

[6] Whilst he was in the ambulance at the scene the accused was spoken to by police officers. He was required in terms of section 172 of the Road Traffic Act to identify the driver of the motor vehicle at the time of the collision, to which he replied: "I was". He was

informed that the circumstances of the collision would be investigated which may lead to charges being preferred. He was cautioned that he didn't need to say anything about the collision or the circumstances leading up to it but anything he did say would be noted and may be given in evidence. Again, the accused gave an account of there being a deer in the road and taking action to avoid it.

The charges

[7] The first charge on the indictment alleges that the accused drove the vehicle dangerously and fell asleep, thus causing it to drift onto the hard shoulder, onto a grass verge and down the embankment. He is charged with causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988.

[8] The second charge flows from the information given by the accused to the various individuals mentioned. It is in these terms:

> "On 17 March 2018 at the M9 Edinburgh to Perth motorway near to Plean, Stirling and elsewhere you did, having committed the crime libelled in charge (001) hereof and being conscious of your guilt in respect thereof, state to various persons namely (*names given*) that a deer had run out onto the road causing you to have to swerve or take other evasive action to avoid said deer, the truth being that there was no deer on the road at the time the offence libelled in charge (001) was committed and you were therefore not caused to swerve or take other evasive action to avoid said deer and this you did with intent to avoid arrest and prosecution in respect of charge (001) hereof and this you did with intent to pervert the course of justice and did thus attempt to pervert the course of justice."

[9] Further information provided by the accused, and by observation at the scene, disclosed that he and his two passengers had been deer stalking in Spean Bridge during the night. They had been doing so with firearms (apparently legitimately) and they had shot and killed two deer which had been gutted and were lying close to the motor vehicle.

[10] Two reports from Scottish Natural Heritage on Deer Vehicle Collision data, one dated 2015, the other for 2016 to 2018, were lodged on the accused's behalf as defence productions. I understood his defence to charge 1 to be, as stated at the scene, that a deer suddenly ran across his path on the roadway causing him to swerve and lose control of the vehicle.

Submissions

Defence

[11] Counsel for the accused submitted that there was a two part test to be taken account of in considering the relevance of a charge of attempting to pervert the course of justice. First, there had to be a criminal investigation, in other words the course of justice needed to have begun. Secondly, the accused required to have done something to interfere with the course of that investigation. Counsel submitted that when the accused spoke to the passing motorists and to the ambulance personnel no investigation of any sort had commenced. He was simply asked what had happened by concerned individuals who were trying to provide him with assistance. In support of the submission that the course of justice had not begun by this stage counsel referred to *Dean* v *Stewart* 1980 SLT (notes) 85.

[12] The accused was not informed of any enquiry until the point at which he was spoken to by police officers and cautioned that there may be an investigation. That was the point at which he knew there was a course of justice which had commenced.

[13] Counsel submitted that nothing which the accused said was done with the intention of interfering with the course of justice. He had responded to the concerned enquiry made by the passing motorists and had simply repeated that to the police officers who thereafter spoke to him. The essence of a charge of attempting to pervert the course of justice was that

there was an interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case – *Hanley* v *HM Advocate* 2018 JC 169, Lord Justice Clerk (Dorrian) at paragraph [12].

[14] Counsel argued that the charge did not contain any averment as to how the words used by the accused constituted any form of interference with the course of justice. The police enquiry was not conducted any differently from the way it would have been. All that the accused had done was to give his account of what had happened. An accused person could not competently face a charge of attempting to pervert the course of justice by stating his defence. Even a false denial of guilt did not alter the course of justice and did nothing to impede it.

Crown

[15] The Crown's contention was that the accused knew that he was responsible for causing the death of his two passengers and deliberately set about informing those present of a different and false set of circumstances.

[16] The advocate depute submitted that the course of justice commences at the point at which it is suspected that a crime has taken place and investigations are underway. In the circumstances of the present case, the course of justice commenced at the point when the vehicle crashed, resulting in fatalities. That was the point at which it became clear that there would have to be an investigation.

[17] The advocate depute rejected the proposition that the accused had done nothing to interfere with the course of justice. The accused had engaged in an active effort to build up a picture of what happened. He put an alternative version of events in play which had to be

enquired into, by for example questioning of witnesses and which had to be considered by the Crown's road traffic experts.

[18] In the Crown's submission it would be a matter of degree whether or not an accused person opened himself up to a charge of attempting to pervert the course of justice by stating his defence. No authorities were referred to in relation to this part of the crown's submission. The decision to bring such a charge against the present accused was made because, by contrast with many other cases, his conduct: "seemed so stark".

Discussion

Commencement of the course of justice

[19] In *Dean* v *Stewart* the court explained that the question of what is the course of justice and when it begins are both questions which depend upon the circumstances of the particular case. The court noted that it will certainly have begun where it is obvious that a crime has been committed and when investigations are taking place to establish the identity of the culprit. It seems plain then that the determination of the point at which a course of justice commences will be a fact sensitive matter.

[20] In the present case, the two motorists to whom the accused is said to have made comments were attracted by signals from a foreign motorist who had already stopped. He asked Ms Sheridan to phone the police and to phone an ambulance. She dialled 999 and was put through to the ambulance service before leaving her car to see if she could provide assistance. Although it is not plain from the statements to which I have had access, it may be that the police were contacted by the ambulance service.

[21] Whilst it is therefore clear that the authorities were alerted to the need for assistance before the accused spoke to anyone specified in charge 2, there is no suggestion that anyone

involved at that stage thought that they were reporting a crime. They were responding to the realisation that there was a need for emergency help. I can see no basis upon which it could be said that the course of justice had commenced by the point at which the accused is said to have spoken to Ms Sheridan and Mr Stewart. The same applies to the point at which he was spoken to by the ambulance personnel.

[22] On the other hand, it is plain that the course of justice had commenced by the point at which the attending police officers advised the accused, under caution, that they were investigating the circumstances of the incident. As was explained in *Watson* v *HM Advocate* 1993 SCCR 875, although it might not be clear to the police at the outset what the crime was or who was the culprit, these are matters which a police investigation is set up to establish. If an incident was of such a nature that it was plainly open to the inference that the police investigation might result in criminal proceedings against someone, then it was an investigation which can properly be said to have been in the course of justice since it had already begun and was in the hands of the police. That is the situation which applied when the attending police officers spoke to the present accused. Accordingly, on an application of the first leg of the test I would uphold the plea to the relevancy of the second charge by deleting reference to all but the named police officers.

[23] The more important question, in my opinion, is whether the accused's comments, even to the police officers, could constitute the crime of attempting to pervert the course of justice.

Can stating a defence constitute the crime libelled?

[24] By way of commencement, I do not accept the proposition that there was something "so stark" about the accused's conduct at the scene of the crash so as to distinguish it from

so many other examples of cases in which the accused person has given an account to the police (or to others) which is said to be false. For example, the court has ample experience of cases involving allegations of sexual assault in which the accused person, when interviewed under caution, denies criminality and gives a detailed account of consensual activity on the part of the individual making the complaint. I have never encountered a case of that sort in which the accused finds himself facing a charge of sexual assault and an associated charge of attempting to pervert the course of justice by falsely giving the account of consensual activity. Nevertheless, come trial, the jury is invited by the Crown to believe the complainer's account and to treat the accused's version as a lie designed to avoid the consequences of his conduct. The same observations apply in relation to prosecutions, generally for other sorts of criminal conduct, in which an accused person has given an account of alibi to the police.

[25] The decision to charge the present accused with the offence of attempting to pervert the course of justice, alongside the principle charge to which his account pertains, therefore seems to me to reflect a change in practice on the part of the Crown from that which it has hitherto operated. For my part, I cannot identify a previous example of an indictment of this sort and none was offered up in the debate. One would assume that an analysis of the legal basis for proceeding in this way would have been undertaken at the time when the indicting decision was made. The challenge by way of preliminary plea was timeously intimated to the Crown. Since I was provided with no legal analysis of the basis upon which the specified conduct could constitute the crime libelled, I was left with the impression that the decision to include charge 2 may not, in fact, have been the product of mature consideration. Nevertheless, I require to adjudicate upon the challenge in light of the Crown's insistence on the relevance of the charge libelled.

[26] It is correct that attempting to pervert the course of justice can foreseeably take a number of forms (*HM Advocate* v *Harris* No 2 2011 JC 125). An examination of previous cases shows that the hallmark of the crime comprises conduct which is in the nature of a positive effort to disrupt or frustrate an enquiry. So taking steps to destroy evidence in advance would constitute the crime (*Dalton* v *HM Advocate* 1951 JC 76). As would taking steps to prevent evidence being available (*HM Advocate* v *Mannion* 1961 JC 79).

[27] However, it is also undoubtedly the case that saying things which are untrue to the police in the course of an enquiry can constitute the crime of attempting to pervert the course of justice. Giving a false name to the police has in many cases resulted in a conviction (see for example the cases listed in Ross, JM, "Offences against the Administration of Justice" in *Stair Memorial Encyclopaedia: Laws of Scotland* vol 7 para 496 listed at footnote 5).

[28] The essential difference, of course, between cases of that type and the present is that they are cases in which the accused person gave a false name in an effort to prevent a prosecution against him. In none was he giving a false name by way of stating his defence.

[29] The same sort of underlying purpose can be seen in the case of *Waddell and Currie* v *MacPhail* 1986 SCCR 593 where the two accused were charged with attempting to pervert the course of justice by each giving false information about which of them had been the driver of a particular motor vehicle. The police were investigating a charge of driving whilst disqualified against the accused Currie who, when required to identify who had been the driver of a vehicle, said that Waddell had had charge of it at the relevant time. When Waddell was required to give the same information he responded that he had been driving.

[30] Accordingly, it can be seen that the essence of the crime which was charged and established against each of these two accused was an effort to frustrate a prosecution for driving whilst disqualified against Currie. It is also relevant to note that the charge of

attempting to pervert the course of justice was prosecuted on its own. It is not plain whether Currie was separately prosecuted for driving whilst disqualified. If he was, either on indictment or summary complaint, then the charge of attempting to pervert the course of justice was not prosecuted at the same time.

[31] The Scottish case which comes closest to the circumstances found in the present indictment may perhaps be *Davidson* v *HM Advocate* 1990 SCCR 699. In that case, the accused faced an indictment charging him with a number of offences under the Misuse of Drugs Act 1971. The evidence was that when police officers searched a property in Aberdeen on 7 June 1989 the accused escaped out of a bedroom window. This conduct was reflected in a charge of obstruction under section 23 (1) of the 1971 Act. He also faced a charge which libelled that between the date of the search and three days later he and a co-accused formed a purpose to hinder, frustrate and pervert the course of justice and concocted a false alibi, as a consequence of which both stated to police officers that the accused was in the company of the co-accused at a different house at the relevant time. Importantly, perhaps, this account was only persisted in for a period of one day and did not constitute the accused's defence at trial. Accordingly, the charge of attempting to pervert the course of justice reflected circumstances which were not in dispute and to which the accused pled guilty. Again then, the essence of the charge was in the conduct which sought to frustrate the prosecution, which conduct was distinct from the accused's defence to the main charges brought.

[32] The way in which it was put by the Lord Justice Clerk (Dorrian) in giving the opinion of the court in *Hanley* v *HM Advocate* at para [12] was that:

> "In all cases, the essence of the charge is the interference with what would otherwise be expected to come to pass in the ordinary and uninterrupted course of justice in the particular case."

[33] What one is therefore looking for is an averment of some form of "interference" in the sense described in *Hanley*. With this in mind I have taken note of what is said in the commentary to the case of *Waddell and Currie* in the Scottish Criminal Case Reports. The learned and respected commentator there observes that *Dean* v *Stewart* is authority for holding that a suspect who tells lies to the police is guilty of an attempt to pervert the course of justice. In *Gordon's Criminal Law*, 4th edition at page 704, at footnote 120, the authors also refer to *Dean* v *Stewart* and state that:

> ".. it seems, therefore, that to tell lies to the police when interviewed by them in the course of criminal investigations is a crime."

[34] Whilst the cases referred to above demonstrate that this is true in some circumstances, the unqualified statement may be a little too broad. There is a difference between giving a false name to prevent a prosecution and giving an account of innocence, albeit an account which the crown may argue is false. In the case of *Dean* the accused falsely represented that he had been the driver of a car at a particular time. The court characterised this conduct as an attempt to conceal evidence which might tend to incriminate the true driver. That can be seen to be an example of the sort of "interference" described in *Hanley*. I do not read *Dean*, or any of the other cases I have mentioned, as providing authority for the proposition that anything said by a suspect to the police will render him susceptible to a charge of further criminal conduct if what is said is inconsistent with his guilt on the charge being investigated. Indeed, in the body of the text at page 704 in Gordon, the authors argue that:

> "A fortiori it is not an offence for an accused falsely to deny his guilt, even if the result is to throw suspicion on others."

[35] To return to the circumstances of the present case there is, it seems to me, something profoundly uncomfortable in explaining to a jury that the accused person is to be presumed innocent of the first charge brought by the Crown but at the same time permitting the Crown to present a public accusation that his account of innocence in relation to that charge is to be characterised as an attempt to pervert the course of justice.

[36] The key, it seems to me, is to understand what the course of justice is in this case. The Crown have arrived at a decision as to the conclusions which they will ask the jury to reach in relation to charge 1. However, arriving at that decision simply triggers the process of assessment. It may be or it may not be that the Crown's analysis of the events will come to be accepted. The Crown's analysis may be right or it may not be. The accused's account may be true or it may not be. The eventual decision arrived at after trial, whether it is one of guilt or innocence, will be the point at which justice is reached and delivered. That process of reaching justice will require full weight and consideration to be given to the accused's account of events. The fact that an accused person gives an account which is inconsistent with the case brought against him by the Crown does not constitute an "interference" with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case. The fallacy, it seems to me, in the Crown's approach lies in the inherent implication of a claim to be the proprietor of justice. The Crown's theory is that the account given by the accused must be an attempt to pervert the course of justice because, if accepted, it defeats the basis upon which the principal charge is brought. In my view, the uninterrupted flow of the course of justice includes an assessment of the accused's defence. The course of justice is not "interfered" with by having to take account of a claim to be innocent, whether that claim is in the end rejected or not. On the contrary, the uninterrupted course of justice requires that such a claim is fully weighed. In reaching this

decision I am fortified by the obvious contrast with previous charging practice which is disclosed in the present indictment.

Decision

[37] For the reasons which I have outlined above, I hold the second charge against the accused to be irrelevant. I would have held that the statements made to Ms Cowie, Mr Stewart and the ambulance personnel were not made in the course of justice. I hold in any event that none of the statements alleged in the charge can constitute an interference with the course of justice of the sort necessary for a relevant charge of this sort in the circumstances set out in the present indictment.