APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 13
HCA/2019/288/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

GURSEL DUZGUN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Murray QC; Faculty Appeals Unit (for MBS Solicitors)
Respondent: Edwards QC AD; the Crown Agent

21 February 2020

Introduction

[1] This appeal is about whether a miscarriage of justice has occurred when the appellant, who was ultimately deemed fit to plead, may have been suffering from a mental disorder at the time of the offence, but did not elect to plead such a defence under section 51A of the Criminal Procedure (Scotland) Act 1995.

Background and procedure

[2] On 29 July 2014, at a first diet in Edinburgh Sheriff Court, the appellant, who was legally represented, pled guilty to a charge which libelled that:

> "on 29 April 2014 at Nicolson Square, Edinburgh you ... did assault [ZA] ... and did repeatedly strike him on the head and body with a pair of scissors, all to his injury; and it will be proved in terms of section 74 of the Criminal Justice (Scotland) Act 2003 that the ... offence was aggravated by religious prejudice".

The plea deleted permanent disfigurement from the libel.

[3] The circumstances of the offence were that, at about 6.30pm on 29 April 2014, the appellant and the complainer, both of whom were of Turkish origin, were outside a food shop. The appellant said to the complainer "If you step in front of me I will kill you". The appellant went into the shop, while the complainer stood outside. When the appellant came out of the shop, the complainer asked him what the problem was. The appellant said "Nothing" before walking up to the complainer and punching him on the left side of his face. He had a small pair of scissors in his fist at the time. The appellant struck the complainer several times, again with the scissors still in his hand.

[4] The complainer sustained puncture wounds to his chest, neck, head, face and left ear. He had bruising to the jaw and chest. When the police arrived, the appellant was in a manic state and ranting wildly. He was taken to the local police office, where he started shouting about being a "God particle" and that he would have to judge everyone. He was deemed medically unfit for interview. He appeared on petition on 30 April 2014. Because of his mental state, the Crown instructed a psychiatric report.

[5] The report was compiled by Dr Craig Morrow on 6 May 2014. It said that the appellant had been born and raised in Turkey. He had moved to the United Kingdom in 2002 and had lived there and in Ireland before moving to Edinburgh in 2006. He had, by the

time of the offence, cut off contact with society and was spending most of his time browsing the internet for videos which might indicate a coming apocalypse. According to the appellant, when the large hadron collider was started up in 2010, an atomic particle flew off and entered his brain through his ear. This opened his mind to the universe and led him to understand that he was a prophet of God, who was descended from Noah. He was ultimately to die at the moment when the world was to end. Thereafter he would assume the role of judging others. There were individuals who were "of fire" or who had come from "the fire temple" which was linked to Solomon. These persons were opposed to the appellant and planned to decapitate him and steal his knowledge.

[6] The psychiatric opinion was that the appellant had a number of active psychotic symptoms which were consistent with a diagnosis of schizophrenia. He was not "presently fit to stand trial", partly because he regarded the court as part of a wider conspiracy. The recommendation, which was followed, was to subject the appellant to an assessment under section 52D of the Criminal Procedure (Scotland) Act 1995.

[7] The report from Dr Morrow, which followed, and was dated 2 June 2014, reassessed the appellant. He had continued to express a number of delusional beliefs, which were "grandiose, persecutory and religious" in theme. Further assessment and treatment was recommended, but it was Dr Morrow's view that:

> "After a period of treatment [the appellant's] mental state would be likely to respond to treatment sufficiently that he could be considered to meet the relevant criteria for fitness for trial over the coming months".

[8] There are no other psychiatric reports in the papers to indicate the appellant's mental state at the time when he pled guilty on 29 July 2014. By that time, according to his then law agent, there had been several meetings between the agent and the appellant in the State

Hospital, Carstairs. One of these had lasted for 90 minutes on 30 May 2014. A second short meeting had occurred on 3 June, presumably at court. There had been another meeting to go over witness statements which took 25 minutes at Carstairs on 16 June. On 14 July there was yet another meeting at Carstairs when the law agent recorded that the appellant was "doing fine under treatment" and "seems to be better". By this time an indictment had been served.

The Note of Appeal

[9] The Note of Appeal, which was lodged some four years after the plea of guilty had been tendered, alleged defective representation. Specifically, it stated that the appellant's law agent had not instructed an independent psychiatric report to consider either fitness to plead or "more importantly" whether the appellant had been criminally responsible for his actions at the time of the alleged offence in terms of section 51A of the 1995 Act. It was said that the agent had a professional duty to have the appellant psychiatrically examined prior to tendering the plea. Such an examination should have considered whether the appellant was fit to plead and/or criminally responsible. If a report had been instructed, the appellant would have had evidence available to support a special defence under section 51A. In the absence of that evidence, the appellant had been under a real error of misapprehension which had caused him prejudice. The central allegation was that the appellant's defence had not been properly presented and that he had therefore not received a fair trial. A miscarriage of justice had occurred.

[10] The response of the appellant's then law agent is in the following terms:

> "3 In the time following the preparation of [the psychiatric report of 2 June 2014], it became clear that the appellant was responding well to treatment and that he had undergone considerable improvement in his mental state of health. As a

> consequence, I was able to have a number of meaningful consultations with the appellant between 4 June ... and 29 July 2014. ... [I]n light of my detailed discussions with the appellant I was wholly satisfied that he understood the nature of the allegation and the evidence against him and he was able to provide me with coherent and comprehensive instructions in relation to the evidence. ... [M]y assessment of the appellant's ability to understand the evidence against him and provide meaningful instructions is in keeping with Dr Black's observation that the appellant was 'probably fit to stand trial' at the point at which [he] tendered a plea of guilty. ...
>
> 4 I would also emphasise that in the course of the discussions that I had with the appellant, and in light of his medical history, I discussed with him the possibility of obtaining further medical evidence with a view to exploring whether he had a defence under [section 51A of the 1995 Act]. However the appellant made it very clear that he did not want to submit to further medical assessment or obtain further medical opinion about his state of mind at the time of the incident. To the contrary, the appellant's clear instructions to me were that he wanted his case to be resolved expeditiously and on the basis of the plea that was ultimately tendered on his behalf".

[11] The particular quotation from Dr Black, who was a consultant forensic psychiatrist and acted as Dr Morrow's supervisor, came from a report from him dated 14 August 2014, after the tendering of the plea. In that report it is recorded that neither he nor his trainee were asked for an opinion on the appellant's fitness for trial or his mental responsibility for the assault. Dr Black continued:

> "It may possibly be too late to bring it up, and anyway it will not affect my recommendations, but I do have concerns that some consideration should have been given to the possibility that [the appellant] may have had a defence under section 51A ... although I think that by this time, [the appellant] was probably fit to stand trial, he was very keen to get everything dealt with as quickly as possible and clearly he, himself, is unlikely to have been unaware of this legal provision".

[12] According to Dr Black, the appellant's position had been that his actions at the time of the assault were necessary to save his own life. The appellant had believed that he was a prophet on a mission. The complainer had been a representative of "the fire temple" whose intention had been to kill him. He genuinely perceived himself to be at acute risk. His

violence amounted to necessary and lawful self-defence. Because of his mental disorder, he would have been unable to appreciate the nature or wrongfulness of his conduct.

[13] On 19 August 2014, the court made an interim compulsion order and assigned 6 November as a review hearing. The appellant was detained at the State Hospital meantime. The appellant's case was continued until 9 December. An up-to-date psychiatric report requested. There were further postponements until 16 January and again until 1 April 2015. On 10 April 2015, the court made compulsion and restriction orders in terms of section 57(a) and 59 of the 1995 Act, whereby the appellant was to be detained in the State Hospital without limit of time and subject to the special restrictions set out in Part 10 of the Mental Health (Care and Treatment) (Scotland) Act 2003. This followed a series of further psychiatric reports, which concluded that the appellant had a mental disorder, but that medical treatment was likely to alleviate the symptoms and effects of that disorder. The appellant was on oral antipsychotic medication in addition to nursing occupational therapy and psychological input. Without that treatment there was a significant risk to his own health and to the safety and welfare of others.

Events since 2015

[14] The appellant was in due course transferred to conditions of medium security at the Orchard Clinic, Edinburgh. A report from Prof John Crichton, dated 19 February 2020, records that the appellant's mental health has improved considerably over time as a result of appropriate antipsychotic medication complimented by careful nursing, occupational therapy and skilled social work intervention. The appellant had progressed to spending several "overnights" a week outwith the hospital environment. He was ready for consideration of a conditional discharge into the community. A difficulty for him, as

reported by Prof Crichton, is that, although he had been granted indefinite leave to remain in the United Kingdom, having been granted asylum in 2006, the conviction could result in the Home Office revoking his leave to remain and his refugee status. So far as the merits of a plea under section 51A of the 1995 Act are concerned, it is Prof Crichton's view that, at the time of the offence, the appellant had active psychotic symptoms, secondary to a schizophrenic illness, characterised by bizarre delusional beliefs and disordered conduct. He was at the time unable by reason of mental disorder to appreciate the nature and wrongfulness of his conduct.

[15] A report from Dr Fionnbar Lenihan, also at the Orchard Clinic, supports the view that the appellant has displayed symptoms, such as bizarre delusions of a religious and persecutory content, as well as prominent thought disorder, for many years. He continued to meet the criterion of posing a significant risk of serious harm to others without the appropriate treatment which was being provided by the clinic. The appellant needed to remain subject to a compulsion and restriction order. Rehabilitation had to be cautious and measured in order to manage the appellant in the community.

Submissions

[16] The appellant and the Crown entered into a joint minute in advance of the appeal hearing agreeing that, on the date and place libelled, the appellant had repeatedly struck the complainer on the head and body with a pair of scissors to his injury.

[17] The appellant submitted, first, that, in terms of section 51A of the 1995 Act, the evidence demonstrated that he was not criminally responsible for his conduct by reason of mental disorder. He had been unable to appreciate the nature or wrongfulness of his conduct. For the purposes of the appeal, the appellant needed only to show that this had

been a live issue which required investigation. Such an investigation had been necessary for the proper preparation of the defence. Secondly, the appellant's law agents had had a duty to investigate the defence in terms of section 51A of the 1995 Act. There had been a failure to instruct an independent psychiatrist to consider whether the appellant was fit to stand trial and/or whether the appellant had been criminally responsible for the acts alleged. Exceptional circumstances existed, which entitled the court to allow the appellant to "withdraw" his plea of guilty (*Kalyanjee* v *HM Advocate* 2014 JC 233). Thirdly, the test was whether the plea had been tendered under some real error or misconception or in circumstances which were clearly prejudicial to the appellant (*Pickett* v *HM Advocate* 2008 SLT 319 at para [58]). The appellant had been under such a misconception and error as to the potential defence available to him. He had been deemed unfit to stand trial between 30 April and a date shortly before the plea of guilty had been tendered. No investigation had been carried out on his mental state, either in relation to his ability to stand trial or, more importantly, whether he was criminally responsible. In the absence of such investigation, and the likelihood that the defence would have been made out, the appellant was under a real error or misconception. Even if he had not been, fourthly, the court could arrive at a more general view that, in any event, a miscarriage of justice had occurred.

[18] By letter dated 10 December 2019, the Crown intimated that they did not support the conviction. It was accepted that the appellant had had a defence open to him in terms of section 51A of the 1995 Act, which had neither been explored nor advanced on his behalf by his legal representatives. It was accepted also that it was likely that that defence would have been established on the balance of probabilities, if it had been pursued. On that basis there had been a miscarriage of justice. This letter had been sent without any consideration of the response of the appellant's agent to the allegation of defective representation. The advocate

depute invited the court to allow the appeal on the basis that the tendering of the plea had been prejudicial to the appellant and a miscarriage of justice had occurred. If that were done, the court could use section 118(5) of the 1995 Act to set aside the verdict and to re-impose the compulsion and restriction orders on the basis of a finding that the appellant's defence under section 51A had been made out.

Decision

[19] An accused person is entitled to plead guilty to the charge libelled against him. He is not required to plead a defence which may be open to him on the evidence. For a variety of sound reasons, an accused may elect not to advance such a defence. If he elects to plead guilty then, as it was put in *Reedie* v *HM Advocate* 2005 SCCR 407 (LJC (Gill) at para [11]), that plea:

> "constitutes a full admission of the libel in all its particulars (*Healy* v *HM Advocate* [1990 SCCR 110]) ... [I]n view of the conclusive nature of such a plea, it can be withdrawn only in exceptional circumstances (*Dirom* v *Howdle* [1995 SCCR 368]): for example, where it is tendered by mistake (*McGregor* v *McNeill* [1975 JC 57]) or without the authority of the accused (*Crossan* v *HM Advocate* [1996 SCCR 279]). There is little scope, if any, for the withdrawal of a plea that has been tendered on legal advice and with the admitted authority of the accused (*Rimmer, Petitioner* [2002 SCCR 1])."

[20] None of the examples referred to in *Reedie* apply to this case. The plea of guilty was not tendered by mistake, nor was it tendered without the authority of the appellant. On the contrary, the appellant's law agent reports, first, that he was, as a result of several meaningful consultations with the appellant in the lead up to the plea, "wholly satisfied that [the appellant] understood the nature of the allegation and the evidence against him and he was able to provide ... coherent and comprehensive instructions in relation to the evidence". There is no material before the court to contradict that statement. As the agent added, his

assessment was supported by the subsequent report from Dr Black that, at the time of the plea, the appellant was "probably fit to stand trial".

[21] The agent explains that the possibility of obtaining further medical evidence, with a view to exploring whether he had a defence under section 51A of the Criminal Procedure (Scotland) Act 1995, was discussed with the appellant. The appellant made it:

> "very clear that he did not want to submit to further medical assessment or obtain further medical opinion about his state of mind at the time of the incident. To the contrary, the appellant's clear instructions ... were that he wanted his case to be resolved expeditiously and on the basis of the plea that was ultimately tendered on his behalf".

There is no material produced which contradicts that version of events. In short, therefore, at a time when he was deemed fit to plead, the appellant had given clear instructions to his agent not to pursue the issue of his mental responsibility at the material time. It would have been a breach of his obligations to the appellant if the agent had nevertheless decided to pursue a line which he had been specifically instructed not to pursue.

[22] In *Grant* v *HM Advocate* 2006 JC 205, it was made clear (LJC (Gill) at para [21]) that, in order to succeed in a defective representation case, an appellant must establish that the conduct of the defence resulted in a miscarriage of justice. That can be said to have occurred only:

> "if the appellant's defence was not presented to the court, and he was therefore deprived of his right to a fair trial, because counsel either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it ...".

In this case, the opposite is being suggested whereby the law agent ought to have disregarded his instructions and conducted the defence on an alternative basis. It was also emphasised in *Grant* (at para [24]) that the problems, which can occur in defective representation cases, are exacerbated where, as in this case, the allegations are made long

after the proceedings against the appellant have concluded. For that reason, it was stated that any allegations of fault on the part of an accused's representatives should be supported by some objective material. This is normally in the form of an affidavit. There is no such material in this case. In particular, there is no affidavit from the appellant which contradicts the version of events presented to the court by his former agent. For these reasons the appeal, which is presented solely on the basis of defective representation, must fail.

[23] It was suggested that, had the court determined that a miscarriage of justice had occurred, then it was open to it simply to substitute a verdict of acquittal under section 118(5) of the 1995 Act. That would not have been an appropriate disposal in the circumstances of this case. That section provides that:

> "... the High Court shall, where it appears to it that the appellant committed the act charged against him but that he was not, because of section 51A of this Act, criminally responsible for it, dispose of the appeal by –
>
> > (a) setting aside the verdict of the trial court and substituting therefor a verdict of acquittal by reason of the special defence set out in section 51A of this Act ...".

The provision is designed to operate in a situation in which a special defence under section 51A of the Act had been lodged in the trial court, but the jury nevertheless convicted the appellant. In that situation, if the court determined, for whatever reason, that the jury's verdict could not stand, it has the power to substitute a verdict of acquittal. It is not an appropriate disposal where there has been no special defence lodged in the first place. Had the court been inclined to allow the appeal, it would simply have quashed the conviction. The Crown could then have sought authority to bring a new prosecution under section 118(1)(c) of the 1995 Act. In the event of such a prosecution, it would be open to the Crown to accept a plea of not guilty by reason of the special defence under section 51A (1995 Act, s 53E). If the Crown do not accept such a plea, then the case must proceed for a

determination by the jury. It is not appropriate for an appeal court simply to accept the validity of such a plea of not guilty, or to hear evidence in support of it, where the matter has not been canvassed at first instance.