APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 20
HCA/2019/000454/XC
HCA/2020/000047/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEALS AGAINST CONVICTION

by

(1) MARK MONCRIEFF and (2) PAUL McCANN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: McConnachie QC; Paterson Bell
Second Appellant: Kerrigan QC; Paterson Bell
Respondent: Meehan QC AD; Crown Agent

22 May 2020

Moncrieff

[1] The appellant and his co-appellant, Paul McCann were convicted of the murder of Brian Boyle on 9 July 2018 by repeatedly punching and kicking him on the head and body, repeatedly striking him on the head and body with a hammer and repeatedly stabbing him on the body with a knife or similar implement. The appellant Moncrieff accepted that he

had a knife with which he inflicted the fatal blow, but maintained that he had acted in self-defence. The jury clearly rejected that evidence. It was not in dispute that McCann was armed with a hammer. The issue so far as he was concerned was one of concert. A third accused, Domenica Smith, was acquitted of the murder.

Background

[2] At about 5 pm on the day in question a black Vauxhall Astra driven by Domenica Smith pulled up at an address in Annandale Path, Glasgow. The appellants and a Mark Arnaud, all wearing snoods or balaclavas, exited the car, as did Smith. The boot of the car was opened and at least one weapon was taken from it; one witness described them being "tooled up" with at least one knife and a baseball bat. They went to number 18, kicked the door and behaved aggressively to the distress of local residents. They appeared to be looking for Smith's former partner, Connor Hart.

[3] Having failed to find Hart, they proceeded to Reidvale Street, where the deceased, Brian Boyle, lived in a top floor flat along with his daughter Kayleigh Ann Boyle and his partner Maria Hughes. Smith's sister lived in the same block. On arriving at Reidvale Street, the Astra was stopped in a way which blocked a Vauxhall Adam car belonging to Kayleigh Boyle. All but Arnaud got out of the Astra. Domenica Smith was seen jumping on the bonnet of Kayleigh Boyle's car "like a trampoline", and shouting to Kayleigh "Come down, I'm going to murder you". Another witness said that she was shouting that "they were all grasses". A male, probably Moncrieff was shouting up, "Are you Kayleigh's Dad?" Paul McCann took a hammer from the inside door of the Astra and started smashing the Vauxhall Adam with it. Kayleigh Boyle, her partner Kristopher Hughes, and the deceased ran downstairs where there was an altercation. Brian Boyle, who was described by

witnesses as unarmed, was confronted by the appellants. McCann had a hammer and Moncrieff a knife. It was two on one, fighting and punching at Brian Boyle who fell to the ground. A witness McColgan described a man with a hammer who had been smashing up the car (McCann) swing the hammer towards Boyle. He then said, "They then were gesturing towards each other for about 30 seconds until I seen a guy with a knife (Moncrieff)… This guy lunged towards (Brian Boyle) and stabbed him once I believe just under the rib cage."

[4] Kayleigh Boyle described the "skinny man" (McCann) swinging a hammer at her father's head and body, striking him on the side and back. The "fat man" (Moncrieff) had a lock back knife which he swung towards her father at the same time as the skinny man was hitting him with the hammer.

[5] The trial judge described Hughes as a highly unsatisfactory witness who appeared to have forgotten everything that happened, but who eventually adopted his police statement that two men, one with a hammer and one with a knife had come towards him and Brian Boyle. In his evidence, but not in his statement, he said that Boyle had a knife for self-defence. No-one else spoke to Boyle having been in possession of the knife.

[6] A neighbour, Joan McSween, described by the trial judge as a clear and lucid witness, described seeing Moncrieff with a knife by his waist. He made a move towards the deceased. She was not able to say where the knife went but it was between his waist and chest. She had previously described a man with a hammer, who had tried to hit Brian with the hammer. This was before the she saw the knife.

[7] A further witness, Fiona McVey said that Moncrief stabbed the deceased once in the stomach with a knife.

[8] The post mortem report showed that Mr Boyle had sustained two stab wounds and a further incised injury consistent with a knife attack. One of the stab wounds penetrated the heart and was the fatal wound. He also sustained a number of injuries which were consistent with being struck with a hammer.

[9] Moncrieff gave evidence that there had been no disturbance at Annandale Path. At Reidvale Street, when Smith started jumping on the car he told her to stop. Kayleigh Boyle became involved in an altercation with Smith. Hughes and the deceased came out of the stair, Boyle with a knife and Hughes with a hammer, and came at him. He was not armed. Boyle dropped the knife and was aiming punches at him. Moncrieff picked up the knife. Not being fit he was unable to get away, being confronted by two men. Somehow he and the deceased "came together" and he must have been responsible for the wounds which caused death. He claimed to have dropped the knife at the scene, but no knife was found despite the presence of the police taping the area off as a crime scene, within minutes. Moncrieff did not know what McCann was doing, but he did not have a hammer.

[10] The Crown case was that Moncrieff had inflicted the fatal blows. McCann was guilty art and part, by participating in the assault with a lethal weapon when he knew or must have known that Brian Boyle was being assaulted by Mark Moncrieff with a knife.

Submissions for the appellant Moncrieff

[11] Senior counsel for Moncrieff had submitted to the jury that if they did not acquit they should consider there were two bases for convicting of culpable homicide. These were, first, provocation; and second, that although the appellant had inflicted the fatal blow it was neither intentional nor did it show the element of wicked recklessness required for murder. In dealing with these submissions the trial judge invited the jury to consider whether or not

McCann was involved at this stage in an attack on the deceased with a hammer, stating "..that would mean that two people were acting in concert attacking an unarmed man ...one with a knife and the other armed with a hammer." This was a misdirection since he did not direct the jury that they would need to consider whether or not Moncrieff was aware of McCann having and using a hammer. This was a significant matter since, even rejecting provocation, there was a basis for convicting of culpable homicide. On the trial judge's direction the jury might consider that spontaneous concert could arise simply because McCann was involved, regardless of the state of Moncrieff's knowledge. This can be contrasted with the directions relating to the case against McCann where his knowledge of the knife was highlighted as a critical factor. Moncrieff's position in evidence was that he did not know where his co-accused McCann was at the point when he was involved with the deceased. This was therefore an important point.

[12] It was submitted that the trial judge had misrepresented the position of the appellant Moncrieff as to provocation. In his charge he said that it was accepted that Moncrieff did not say that he had lost his temper or say he had acted in hot blood. In fact counsel submitted that acting in hot blood was only one factor to be considered: it simply meant that reaction had to be immediate. It had not been conceded that Moncrieff did not act in hot blood. The fact that Moncrieff had not said he acted in hot blood did not exclude provocation.

Submissions for the Crown

[13] A charge to the jury should not be considered in isolation but as a whole. The appellant has lifted one part of the charge which does not represent the charge as a whole, in which clear and thorough directions had been given about the law of concert. In the part of

the charge under consideration it was unnecessary for the trial judge to remind the jury of his earlier directions in respect of spontaneous concert and the requirement for knowledge. Those earlier directions, given with examples by way of illustration, provided the jury with a clear understanding of what is meant by spontaneous concert and of the requirement of knowledge on the part of all involved. There was ample evidence that the appellant knew or must have known that McCann was armed with a hammer. There was a body of cogent and compelling evidence that the appellant Moncrieff repeatedly stabbed the unarmed deceased with a knife while McCann repeatedly struck him on the head and body with a hammer. In light of the directions as a whole, the jury must have been satisfied that the appellant knew the hammer was being used or must have known it was being used to repeatedly strike the deceased or they would have deleted that part of the charge in returning a verdict against him.

[14] As to the second ground of appeal, the words used by the trial judge did not misrepresent the highlighted words used by senior counsel and/or appellant's position in evidence. The trial judge did not state that the appellant discounted that he acted in hot blood. He simply stated that the appellant had not said that he had lost his temper or acted in hot blood. That was an accurate summation of the appellant's evidence.

Decision

Ground 2

[15] The full passage in the trial judge's charge is this:

> "[Mr McConnachie] accepted, as I understood it that Mark Moncrieff in his evidence did not say that he had lost his temper and did not say that he had acted in hot blood. But as I understood his position, it was that nevertheless you could infer it from the surrounding facts and circumstances on being confronted with Brian Boyle and Kristopher Hughes, with Kristopher Hughes with the hammer".

[16] It was maintained that this was incorrect: whilst it was accepted that he did not say he lost control; it was not conceded that he had not acted in hot blood, no questions on that subject having been addressed to him. Counsel submitted to the jury that the requirement for acting in hot blood meant that the reaction had to be immediate, not delayed. This is a matter about which the trial judge gave proper and clear directions. The trial judge left the issue of culpable homicide open, notwithstanding the fact that as far as provocation is concerned Moncrieff's evidence was that when he used the weapon the deceased had been disarmed. In his charge he proceeded to direct the jury that

> "..before you could accept that Mark Moncrieff was acting under provocation, you need to be satisfied that he was attacked physically, or where he believed he was about to be attacked and reacted to that; he has lost his temper and self-control immediately; he has retaliated instantly and in hot blood; and the violence of his retaliation was broadly equivalent to the violence that he faced. If you accept that Mark Moncrieff was provoked you would convict him of culpable homicide and not of murder."

[17] Clearly the trial judge's observations did not rule out the possibility that the jury might find the appellant acted in hot blood: had he done so he would have been bound to withdraw provocation from the jury. He left it open to them to find that there was provocation, notwithstanding the evidence of the appellant that he picked up the weapon and used it on an unarmed man.

[18] On the appellant's own evidence at the point when he repeatedly stabbed Brian Boyle, Boyle was unarmed. It is difficult to see this as a proper basis for the plea of provocation, and the trial judge acted favourably towards the appellant by leaving the issue of provocation to the jury. We do not consider that the trial judge misrepresented the position of the appellant and this ground of appeal must fail.

Ground 1

[19] It is not disputed that the appellant Moncrieff inflicted the blow which caused death.

He was therefore, as actor, guilty either of murder or culpable homicide. Leaving aside the question of provocation, which we have already dealt with, the only basis upon which a verdict of culpable homicide rather than murder could have followed would be if the jury considered that Moncrieff's actions were not so wickedly reckless as to constitute the necessary *mens rea* for murder. It was in this context that the question of what McCann might have been doing at the time arose. Moncrieff could have been convicted of murder on the basis of his own actings alone; the relevance of what McCann might have been doing at the time was that it might assist the jury in assessing the quality of Moncrieff's actions to know whether he used the knife at the time when McCann was also attacking the deceased with a hammer. Unlike a knife which may be concealed up a sleeve, or which in the speed of events may not be seen, a hammer is a more difficult weapon to conceal. It is nigh on inconceivable that Moncrieff would not have been aware of it, if McCann were attacking the deceased with a hammer at the time Moncrieff used the knife.

[20] In any event, by focusing on the one short passage in the trial judge's charge this ground of appeal removes the passage from its fuller context. That context includes full and detailed directions on concert as a concept, both planned and spontaneous. The need for any individual to be aware of the use by a co-accused of the use of a lethal weapon was highlighted at pages 36 and 37 of the charge on 13/8, and was repeated in clear terms at page 37, line 22 to page 38, line 4 where the trial judge plainly stated that acts outwith the knowledge of other participants are the responsibility only of those who committed them. On 14/8, in the passage highlighted in the appeal, the trial judge made it clear that he was telling the jury that apart from considering the effect of his actions in isolation, they could assess his state of mind by reference to whether at the time of the stabbing he was involved

in a concerted attack with McCann who was using a hammer. The trial judge, in the very sentence criticised referred to a "concerted attack", and he went on to say that "if there is concert" then that is the evidential basis upon which state of mind must be assessed. The repeated reference to concert is clearly an indication to the jury that that legal principle, which he had already explained in detail, was what required to be considered in assessing Moncrieff's state of mind. In our view there is no likelihood that the jury would have misunderstood the position, or might have considered that the quality of Moncrieff's actions could be assessed by reference to something of which he was unaware. As is repeatedly observed, a judge's charge must be looked at as a whole. Doing so provides no basis for concluding that there was any misdirection and the appeal must be rejected.

McCann

[21] A Note of Appeal has also been presented by the appellant McCann, which hinges entirely on Moncrieff's appeal being successful. That appeal having failed no consideration need be given to the position of McCann whose appeal must also fail.