APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 28
HCA/2019/000513/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

SI

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Moggach; Faculty Services Limited
Respondent: Prentice QC, AD; Crown Agent

23 June 2020

[1] The appellant was convicted of assaulting his baby daughter on various occasions between 30 May 2017 and 17 July 2017 by inflicting blunt force trauma to her head and body by means to the prosecutor unknown causing her severe injury and permanent disfigurement. A critical date was 30 May 2017 when the child was (a) in the sole care of the appellant; and (b) admitted to hospital with serious injuries. These included bruising to her right cheek, forehead and right knee area; a bleed on the left front side of the brain with

contusion of the frontal area; and a sub-conjunctival haemorrhage in right eye. The appellant said the child had fallen from a sofa whilst momentarily unattended. That possibility was not supported by the medical experts, the child being a "non-mobile infant" whose prematurity gave her at the time the development of a 2 day old child.

[2] The child was subsequently admitted to hospital on 12 July when a cranial ultrasound revealed a fluid collection consistent with the changes seen on the original scan, showing a significant bleed with pressure on the underlying brain. The diagnosis was of a chronic subdural haematoma causing a degree of raised intracranial pressure. A non-accidental injury, particularly forcible shaking, is the commonest cause of such an injury. These findings were in the opinion of a consultant paediatric neurosurgeon most likely a natural progression of the acute subdural haematoma identified in May 2017, and the result of a single event occurring on 30 May 2017.

[3] X-ray imaging of the chest on 17 July showed healing rib fractures of the 6th to 8th ribs on the left side. Whilst an earlier X-ray on 31 May had shown no fractures, there was some indication of swelling around the lung in the same area as the subsequently detected healing fractures, consistent with the rib fractures having been present at that earlier date.

[4] Retinal haemorrhages, a common finding in baby shaking cases, were identified on 18 July. Ophthalmic evidence suggested that these were likely to have been caused within two weeks prior to that date.

[5] There was evidence that the precise dating of injuries was difficult, and that the bleed in the brain identified in May, and the rib injuries, could have occurred up to about 10 days prior to the first admission to hospital.

[6] The appellant did not give evidence. In a statement to police and a subsequent recorded interview he maintained his earlier account that the child had rolled off the sofa. It

was submitted that it was the appellant's "position" that the serious injuries could have been caused when the child was looked after by someone else. However, there was no evidence to suggest that this might be the case. In both his police statement and subsequent interview the appellant, asked what might be the two incidents causing the injuries referred to the incident of 30 May saying "that's the only one". He excluded the child's mother or maternal grandparents as having been likely to cause any injuries to the child, and named no other person as having any caring role for the child at that time.

Submissions for the appellant

[7] In the case and argument and subsequent submissions it was stated that it was accepted throughout that the child had sustained non accidental injuries but that these had not been caused by the appellant. What this amounted to was that it seemed to be accepted that the rib injuries, and sub-conjunctival haemorrhage were non accidental, but these could have occurred prior to the 30 May. Insofar as any injuries were deemed to have occurred on 30 May, notwithstanding the preponderance of evidence, it was maintained that these must have been sustained accidentally. It was accepted that the retinal haemorrhages were classic signs of shaking and thus non-accidental.

[8] It was accepted that there was a sufficiency of evidence against the appellant in respect of the charge as a whole. The sole basis of the appeal was that on page 22 of his Charge to the Jury the trial sheriff stated:-

> "the medical evidence does not rule out the possibility of the injuries having been inflicted a few days earlier, but given the evidence of [the child's] s mother and from what the accused told the police, there were no other incidents in the lead up to 30th May that would have explained those injuries."

The sheriff over-stated the position by saying "there were no other incidents": the true position was that there was no evidence of other incidents. However, the denials by the

child's mother and grandmother that any other incident occurred did not exclude the possibility of injury at the hands of another or others. There was no evidence to support such a definitive statement by the sheriff which may have misled the jury into not giving proper, careful and full consideration to the defence submissions.

Submissions for the Crown

[9] If a particular factual proposition is to be advanced for the defence there must be evidence to justify that proposition: *Bakhjam* v *HMA* 2018 JC 127, LJG Carloway at para 35. The only evidence of the respondent's position, led at trial, was a police interview under caution, and a witness statement, led by the respondent during the Crown case. Within these the appellant excluded the possibility of the child receiving an injury prior to 30 May 2017, and excluded the child's mother or maternal grandparents from causing any injuries to the new born child. The appellant names no other person as having any caring role for the child at that time.

[10] The medical evidence that one could not exclude the possibility that the injuries apparent on 30 May 2017 had been caused a few days prior cannot be viewed in isolation but against the background of a witnessed injury and hospital admission on 30 May, and evidence that such injuries (significant head injury and rib fractures), would be apparent to those caring for the child if they had pre-existed. The directions were an accurate reflection of the evidence before the jury. There was no need for sheriff to give a specific direction to eliminate the possibility of another event which had not arisen in evidence. Reference was made to *Begum* v *HMA* [2020] HCJAC 16 at para 53 in similar circumstances:

> "There was no requirement for the judge to give the jury a specific direction on the need to eliminate the possibility that someone else had shaken the baby some time before she had been handed over at 3.30pm, more than 5 hours before her collapse. Quite apart from the absence of any evidence that either the parents or the baby's

> eight year old sister had done anything to cause the child substantial injury, the essence of the case as advanced by the experts was that the injuries had been caused at the same time as the collapse. If the jury did not accept that hypothesis, which was explained in detail to them, they would have been bound to acquit. That was the only basis upon which the Crown case proceeded. In these circumstances, there was no misdirection of the jury and the first three grounds of appeal fall to be rejected."

Analysis and decision

[11] There was evidence before the jury that the bruising, sub-conjunctival haemorrhage, bleeding leading to chronic subdural haematoma causing a degree of raised intracranial pressure, and the fractured ribs all arose or could have arisen from one incident on 30 May. There was evidence of a mechanism (forceful shaking) by which all the injuries could have been inflicted. The child was admitted with fresh injuries sustained whilst in the sole care of the appellant. The appellant's assertion in interviews and at hospital that the child rolled off the sofa was essentially excluded as a possibility by all the medical experts. On the evidence there was no alternative reasonable explanation for these injuries, nor was there any evidence pointing to an incident prior to 30 May which might have resulted in trauma. There was evidence suggestive of a subsequent episode of shaking resulting in the retinal haemorrhages identified in July 2017.

[12] There was therefore ample evidence before the jury from which they would have been entitled to conclude that the appellant had assaulted the child on "various" occasions during the period of the libel, causing the injuries libelled.

[13] It would no doubt have been preferable had the sheriff been more precise in relation to the direction which is criticised, saying that there was no evidence of other incidents in the lead up to 30 May that would have explained the injuries being referred to, but the notion that the jury might thereby have been misled or somehow failed to give due weight

to the defence submissions must be rejected. In the first place, the sheriff gave the jury the standard directions that the assessment of evidence was a matter for them, not for him, and that if anything he said did not accord with their recollections they should proceed on their own recollections. The jury would not have understood the sheriff to have been stating the evidential position to be other than it actually was. The sheriff proceeded to give the jury full and detailed directions about the appellant's police statement and subsequent interview, correctly directing them that if any part of these gave rise to a reasonable doubt they required to acquit, a direction which was repeated later in the charge.

[14] As to the medical findings following admission on 30 May, the sheriff directed the jury that they had to consider three issues: whether the injuries found following that admission were caused by trauma sustained on that day; whether that trauma was accidental or non-accidental; and, if the latter, whether the injuries occurred as a result of an assault by the appellant, as he had already defined it. He made it clear that the injuries to which he was referring were the bruising, the brain bleed including the subdural haemorrhage, the sub-conjunctival haemorrhage and the rib fractures. He pointed out to the jury that whilst there was a sufficiency of evidence for an assault on 30 May, sufficiency was not the same as quality, and unless they were satisfied that at least the brain bleed was caused in an incident on 30 May at the hands of the appellant they could not convict of a libel which included an assault on 30 May.

[15] He went on separately to deal with the evidence indicative of a subsequent event, and in particular the ophthalmic evidence. He made it clear that the jury had to decide on the evidence whether there was a second incident; whether it was an abusive, non-accidental one; and whether the appellant was responsible for it. They could convict of the charge as

libelled only if satisfied that there were two separate events in each of which the appellant assaulted the child causing injury.

[16] The directions which are singled out for criticism require to be seen in the context of the whole charge, and of the evidence which was before the jury. Having regard to both we do not think there is any merit in the criticisms advanced. In this respect we note that the sheriff also directed the jury that they had:

> "to exclude any realistic possibility for there being an unknown cause for the injuries, and to exclude the explanation the accused offered to the child's mother and to the police, before they could conclude that the injuries were non-accidental and resulted from an assault."

In light of *Begum* it is questionable whether the first part of this direction was required, but it was clearly favourable to the appellant. The sheriff's directions overall were quite clear, balanced, and not in any way liable to confuse the jury, or cause them not to give due consideration to any relevant points advanced for the defence.

[17] In these circumstances the appeal must be refused.