APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 31
HCA/2019/000451/XC

Lord Brodie
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST CONVICTION

by

LAWRENCE NELSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Scullion QC; Robert More & Co, Edinburgh
Respondent: Edwards QC AD; the Crown Agent

5 February 2020

Introduction

[1] The appellant, who was born in February 1991, went to trial at Edinburgh High Court on 1 July 2019 along with his co-accused and brother, Gary Alan Bowman Nelson, on an indictment containing three charges. Both pleaded not guilty

to all three charges and the appellant adhered to his special defences of self-defence on charges (1) and (2). At the conclusion of the Crown case on 5 July 2019 the advocate depute withdrew all three charges against Gary Nelson and charge (3) alone against the appellant; and made certain amendments to the indictment. The trial judge accordingly acquitted Gary Nelson of all three charges. He acquitted the appellant of charge (3). On 8 July 2019 the jury unanimously convicted the appellant of charge (1) as libelled and of charge (2) under deletion of the words "repeatedly strike him on the head with a crowbar and". The terms of the charges of which the appellant was convicted were as follows:

> "(1) on 23 December 2018 at 86 Cawdor Crescent, Kirkcaldy you LAWRENCE SCOTT BOWMAN NELSON did whilst acting with others assault Greig Ramsay, c/o Police Service of Scotland, Brycedale Avenue, Kirkcaldy and did strike him on the head with a crowbar or similar instrument and inflict blunt force trauma to his head and body by means to the Prosecutor unknown, all to his severe injury, permanent disfigurement, permanent impairment and to the danger of his life and you did attempt to murder him;
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> you LAWRENCE SCOTT BOWMAN NELSON did commit this offence while on bail, having been granted bail on 23 November 2018 at Kirkcaldy Sheriff Court;
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> (2) on 23 December 2018 at 86 Cawdor Crescent, Kirkcaldy you LAWRENCE SCOTT BOWMAN NELSON did assault Mark Christie, c/o Police Service of Scotland, Brycedale Avenue, Kirkcaldy and did while acting with others repeatedly punch him on the head, all to his severe injury;
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> you LAWRENCE SCOTT BOWMAN NELSON did commit this offence while on bail, having been granted bail on 23 November 2018 at Kirkcaldy Sheriff Court."

[2] The advocate depute moved for sentence and tendered a schedule of previous convictions applicable to the appellant and a victim statement on behalf of the complainer in charge (1), Greig Ramsay. She advised the court that the appellant

had been remanded in custody since 27 December 2018. As the appellant had not previously received a custodial sentence the trial judge adjourned the case for the purpose of obtaining a criminal justice social work report (CJSWR) to Livingston High Court on 12 August 2019. When the case called on that date, having heard a plea in mitigation and considered the terms of the CJSWR, the trial judge imposed a *cumulo* sentence of 12 years 6 months imprisonment from 27 December 2018 in respect of the two charges, 6 months of that sentence being attributed to the bail aggravation.

[3] The appellant has appealed against the terms on which he was convicted on charge (1). He has also appealed against sentence. The ground of appeal against conviction is that the trial judge misdirected the jury by omitting to give a direction that, if they rejected the special defence of self-defence in relation to the charge of attempted murder, it would be open to them to convict the appellant of assault to severe injury, permanent disfigurement, permanent impairment and to the danger of life, under provocation. The ground of appeal against sentence is that the sentence imposed was excessive, irrespective of whether or not the attempted murder element in the conviction on charge (1) is quashed, but that in the event of ground of appeal 1 being upheld the sentence would be excessive having regard to what the appellant would remain convicted of.

Summary of the evidence as reported by the trial judge

[4] The complainer in charge (2), Mark Christie, lived at 86 Cawdor Crescent, Kirkcaldy with his partner, Jade Miller. At the time of the trial he was aged 42 and she was aged 32. In the early hours of the morning of 23 December 2018 an incident

occurred in the kitchen of his house. Greig Ramsay, the complainer in charge (1), was also in the house. At one point all three of them were in an upstairs bedroom watching television. Mark Christie went down to the kitchen to make a cup of tea. Jade Miller was in the living room and Greig Ramsay was in the bedroom. While Mark Christie was in the kitchen he saw the appellant (known to everyone as Scott) chap on the kitchen window. Mark Christie opened the kitchen door to let the appellant in and was hit with something. He could not remember anything after that until he woke up in hospital with his whole face injured. When Jade Miller was in the living room she heard shouting from Mark Christie in the kitchen but could not make out what was being shouted. A woman by the name of Kelly Van Beck ran into the living room and stopped her from leaving. Jade Miller could not do anything and just sat down. Kelly Van Beck punched her and struck her with a hair spray tin. Kelly Van Beck then picked up a crowbar which, according to Jade Miller, had been left in the living room by council workers, "and gave it to the boys in the kitchen". Jade Miller went from the living room into the hall and saw Mark Christie lying on the kitchen floor "getting jumped on". Gary Nelson was holding onto the handle of the outside kitchen door and jumping on Mark Christie. She could not remember the appellant, who was standing in front of Mark Christie, doing anything. (She later changed her evidence when referred to her police statement to say that the appellant was hitting Mark Christie over the face with the crowbar, but, from their verdict, that was not accepted by the jury.) Kelly Van Beck gave the crowbar to the appellant and then pushed Jade Miller back into the living room. Jade Miller heard someone shouting about a £50 bit of coke (cocaine) but she did not know who it was. Kelly Van Beck asked if Greig Ramsay was upstairs and then she,

Gary Nelson and the appellant went upstairs. The appellant had the crowbar and Gary Nelson had an item like a truncheon. While they were upstairs Jade Miller was in the living room. Once the intruders had left she went upstairs and found Greig Ramsay lying against a bedside table with blood pouring out of his head. His eyes were shaking and he failed to answer her. There was also a big hole in the bedroom door. She called an ambulance and both Mark Christie and Greig Ramsay were taken to hospital.

[5] Greig Ramsay was found to have suffered a bruise to the left shoulder, a laceration to the scalp, a severe, open, depressed, comminuted skull fracture under the laceration, cerebral contusions and a subarachnoid haemorrhage underlying the skull fracture and a fracture to the right cheekbone. At hospital he required emergency surgery involving the removal of part of the skull in order to repair the bleeding to his brain, leaving a surgical scar 16 centimetres in length. He has been left with a noticeable depression in his skull and will require further surgery to insert a plate under the skin to improve the appearance of the depression. He will be at risk of seizures for life and has been left with cognitive deficits and problems with speech and memory. His injuries have had a profound effect on his quality of life. He is no longer able to work, has weakness down the left side of his body and experiences great difficulty in speaking. Had it not been for medical intervention he would have died.

[6] Mark Christie was also injured, but not so badly. He sustained swollen eyes, a broken nose, two lacerations next to the right eye, a laceration next to the left eye, a laceration to the right eyelid, a subconjunctival haemorrhage to the left eye and

possibly corneal trauma, fractures to the lower bones of the eye sockets and double vision. He had to undergo surgery to repair the broken bones to his eye sockets.

[7] The appellant was stopped by police officers on the afternoon of 23 December 2018 while driving his car. When he was handcuffed it was noticed that two knuckles on his right hand were swollen. He claimed that the swelling had been caused by his punching a wall.

[8] DNA matching the profile of the appellant was found on blood swabs taken from the hall floor, the stair bannister, the bedroom door and the bedroom door handle on the hall side of the house at 86 Cawdor Crescent.

[9] Greig Ramsay was unfit to give evidence as he had no memory of events as a result of the injuries which he sustained in the attack.

[10] The appellant gave evidence. He admitted driving to 86 Cawdor Crescent with his brother Gary and Kelly Van Beck. He said he did so to obtain the repayment of a loan given to Greig Ramsay. He admitted entering the kitchen. He claimed that Mark Christie punched him on the left side of his face and knocked him off balance. He then got his balance back and punched Mark Christie on the face. Both of them had a hold of each other and fell to the floor, where they punched each other. As he put it, "that was it". He then went upstairs and saw a door with a hole in it. He made his way into the bedroom, closed the door quickly and saw Greig Ramsay to his left. Ramsay stabbed him on his right shin with a pair of scissors. The appellant saw a crowbar against the wall to his side, picked it up and swung it to get Ramsay away. It connected with Ramsay and knocked him off his balance. The appellant did not see where the crowbar had hit Ramsay. The appellant, who said he had sustained injuries from the scissors, then ran out to his

car with the crowbar. He admitted lying to the police about the cause of his swollen knuckles.

Trial judge's comments on grounds of appeal

[11] In his report the trial judge observes in relation to the appeal against conviction that, as is acknowledged in the note of appeal, neither defence counsel nor the advocate depute raised the issue of provocation in their submissions to the jury. The trial judge reports that he did not consider it appropriate in the circumstances to mention provocation in his charge. He was extremely doubtful if this could ever have amounted to a case of self-defence, but left that issue to the jury. The Crown case was that the appellant and two others came to the home of Mark Christie for the purpose of perpetrating violence and did so. The hole on the bedroom door and the DNA found on the blood swabs indicated that the appellant was intent on violence before he entered the bedroom. There was no need for him to have gone upstairs and into the bedroom. As stated on page 38, lines 19 to 23 of the transcript of the judge's charge, the Crown case was that this was a case of three people coming to a house to carry out attacks and that they attacked both Mark Christie and Greig Ramsay in the manner set out in the indictment. The trial judge then went on to direct the jury (page 38, line 24 to page 39, line 5 in the transcript) as follows:

> "Ladies and gentlemen, it's only if you accept the Crown case, as I have just briefly summarised it to you, that you would be entitled to convict the accused on the charges which he faces. If you do not accept it, you could not convict him of those charges."

[12] As the jury did accept the Crown case and convicted the appellant of the attempted murder of Greig Ramsay it was the view of the trial judge that no question of provocation could possibly arise.

[13] In relation to the appeal against sentence, the trial judge notes that the appellant had been convicted of two serious offences committed while subject to a bail order. The injuries sustained by Greig Ramsay were horrific. He would have died had it not been for medical intervention. He now suffers significant deficits. He will be at risk of seizures for life and has been left with cognitive deficits and problems with speech and memory. His injuries have had a profound effect on his quality of life. He is no longer able to work, has weakness down the left side of his body and experiences great difficulty in speaking. In his victim impact statement Greig Ramsay described his life as ruined. He described the quality of life he enjoyed prior to the attack as gone for ever. He has lost the freedom to plan his own course in life. He has to rely on others for even the simplest undertaking. Mark Christie was also injured, as previously described. The appellant's criminal record disclosed five previous court appearances, none of which has resulted in a custodial sentence, but one being a conviction in the High Court for assault to injury in January 2008. The appellant had been convicted of breaching bail on three occasions. The trial judge had considered the terms of the CJSWR and everything said on behalf of the appellant in mitigation but, in his opinion, violence of the sort perpetrated by the appellant must result in a lengthy prison sentence.

Submissions

Appellant

[14] On behalf of the appellant Mr Scullion QC confirmed that no issue was taken with the correctness of the trial judge's directions on self-defence but, albeit neither defence counsel nor the advocate depute had raised the issue of provocation, given that, on a reasonable view of the evidence, it was open to the jury to find that the appellant had assaulted the complainer under provocation, the trial judge should have so directed the jury. His failure to do so amounted to a misdirection and there had accordingly been a miscarriage of judge. The conviction of the appellant on charge (1) should therefore be quashed. However, it was accepted, as outlined in the note of appeal, that the jury must have rejected the special defence of self-defence and therefore the issue in the appeal was not the guilt of the appellant on charge (1) but whether to substitute for the existing conviction a conviction for assault to severe injury, permanent disfigurement, permanent impairment and to the danger of life, under provocation.

[15] In developing his submission, Mr Scullion explained that it was incumbent on the trial judge to consider the whole of the evidence in order to determine whether on any reasonable view of that evidence a finding of guilty of assault under provocation was open and, if it was, direct the jury as to the circumstances in which provocation might be found to apply with a view to them returning the appropriate verdict (*Duffy* v *HM Advocate* 2015 SCCR 205 at para [21]). This was such a case.

[16] The jury's ultimate acceptance of the Crown case, as referred to by the trial judge in his report, was irrelevant to the issue as to whether it was necessary to provide directions on provocation. As was recognised by the trial judge there was a

complete divergence between the Crown and the defence regarding the circumstances in which the complainer in charge (1) came to sustain his injuries. The appellant had given evidence that he had been attacked by the complainer armed with a pair of scissors and stabbed repeatedly to the legs and that he had reacted by lifting the crowbar and swinging it at the complainer, striking him once to the head. It was submitted that it was open to a reasonable jury to reject self-defence on the view that a means of escape was open to the appellant while also concluding that there was a physical attack by the complainer; a loss of self-control by the appellant; and immediate retaliation by him which, in the circumstances, was not grossly disproportionate. Mr Scullion accepted the applicability of a test derived from *Duncan* v *HM Advocate* 2019 JC 9 at para [27].

[17] In reply to questions from the bench Mr Scullion accepted that the appellant had not given evidence of having lost self-control and indeed on one interpretation of his evidence he stated that he did not lose self-control but, nevertheless, the jury had been directed that they could accept part of a witness's evidence and reject another part. Regularly in the High Court an accused will give evidence in support of a special defence of self-defence and as part of that evidence he will say that he did not act in anger and did not simply retaliate, but nevertheless the jury will be directed that on all the evidence they might conclude that the accused did in fact act under provocation and that therefore they should consider whether to reflect that in their verdict.

[18] On sentence Mr Scullion did not press the appeal in the event of the court rejecting the appeal against conviction but submitted that were the conviction of

attempted murder to be quashed the sentence imposed by the trial judge would be excessive for what would remain.

Respondent

[19] The advocate depute submitted that the question whether a direction is required on provocation depends upon whether, on a reasonable view of the evidence, such a finding would be open to the jury (*Ferguson* v *HM Advocate* 2009 SCCR 78 at 79). Where no reasonable jury could, on the evidence, conclude that there had been provocation, a direction is not required (*Duffy* v *HMA* at para [22]).

[20] Provocation in law requires there to have been a physical attack on the accused or a reasonable belief that he was about to be attacked; a loss of self-control; an immediate retaliation; and a response that was not disproportionate. In the instant case there was evidence from the appellant that the complainer had "attacked him" with a pair of scissors. There were injuries to the appellant's right leg and right hand which were consistent with them having been caused by scissors and a police officer had spoken to seeing scissors in the bedroom, albeit they had not been recovered. The complainer had no memory of the circumstances and did not give evidence. The only direct evidence of what had happened in the room had come from the appellant. That evidence could be considered to support some of the elements required for a successful plea of provocation. There had been a physical assault, immediate retaliation and, on one view, a response which was not grossly disproportionate. There was however no evidence of loss of self-control. The situation could be said to be similar to that in *Telford* v *HM Advocate* [2018] HCJAC 73 at para [15] where for the jury to have concluded that, or had a reasonable doubt

about whether, the appellant had lost control and retaliated instantly, would require speculation on their part.

[21] Even if the court considered that there had been an evidential basis for provocation and therefore the trial judge misdirected the jury, there had been no miscarriage of justice, whether the issue was addressed in terms of the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28 or that in *Brodie* v *HM Advocate* 2013 JC 142.

Decision

Ground 1

[22] A finding of provocation may be of considerable significance in determining the degree of culpability associated with a conviction. It is, as Gordon explains, a plea in respect of which an intentional killer is convicted of culpable homicide and not murder because someone who kills under provocation does not kill out of wickedness, but "from sudden passion involving loss of self-control by reason of provocation" (*The Criminal Law of Scotland* (3rd edit) at para 25.09, quoting *Att-Gen for Ceylon* v *Perera* [1953] AC 200, Lord Goddard CJ at 206). By parity of reasoning, an assault which in other circumstances would fall to be regarded as attempted murder will, if committed under provocation, amount only to the lesser crime of assault, subject to such aggravations as may be appropriate on the facts of the case. Hence the disposal which Mr Scullion argued for here: because the trial judge did not give the jury the option of finding that the assault which constituted charge (1) had been committed under provocation and thereby deprived the appellant of the opportunity of being so convicted, the resulting miscarriage of justice should be remedied by

substituting a disposal of the case as if a finding of provocation had in fact been made.

[23] Whether a given assault or killing was committed under provocation is a matter for the jury but provocation, as a matter of law, must meet certain quite precise criteria. Parties were agreed that these can be found satisfactorily set out in the Jury Manual (and see *Graham* v *HM Advocate* [2018] HCJAC 4 at para [22]). Where what is relied on is an act of violence, there are four requisites. The accused must have been attacked physically or believed that he was about to be attacked and reacted to that. He must have lost his temper and self-control immediately. He must have retaliated instantly and in hot blood, without time to think. Finally, the violence used by the accused must be broadly equivalent to that with which he was faced. Where any of these criteria are not present then a jury is not entitled to make a finding of provocation and where a judge does give a direction on provocation he or she requires to make that clear. Conceivably, where the issue has been raised, a judge might properly direct the jury that on the evidence before them a finding of provocation is not open.

[24] That is not the situation here. Neither the defence nor the Crown made any mention of provocation and the trial judge said nothing about it either. For that he is criticised. The first ground of appeal is that the trial judge misdirected the jury by failing to advise them of the requisites of provocation and explain that, in the event they rejected the special defence of self-defence, they could consider whether the accused was guilty of assault, but under provocation, and, if they so decided, that they would not convict of attempted murder. Appeals on similar grounds succeeded in *Duffy* v *HM Advocate* and *Graham* v *HM Advocate* (in *Duffy* and *Graham* the

convictions had been of assault, the Appeal Court quashed the convictions and substituted convictions for assault with the rider "under provocation" and adjusted the sentences downwards).

[25] Whether, and if so when, a judge should direct on an alternative verdict, such as guilty of assault under provocation, where the possibility has not been raised by either party, is discussed in *Duncan* v *HMA* 2019 JC 9. There the Lord Justice General, giving the opinion of the court, said this:

> "[1] The fundamental principle applicable, when charging a jury in respect of alternative verdicts, is that, as a generality, the trial judge is only required to direct a jury on the issues which are live at the trial. This central aspect of adversarial procedure is exemplified by *Templeton* v *HM Advocate* [1961 JC 62] in which it was emphasised that, if the parties choose to peril their cases simply on whether the accused is, or is not, guilty of the offence libelled, there is normally no requirement for a judge to introduce an alternative or lesser verdict. Such an introduction may be seen as unfair to one or other, or both, parties, where neither has addressed the jury on the matter. From the defence viewpoint, it may result in the accused being convicted of an offence, albeit a lesser one, when he would otherwise have been acquitted.
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> …
>
> [27] The general principle is that the obligation on the trial judge is to charge on verdicts in accordance with the manner in which the case has been presented to the jury by the parties (the 'live issues'). The judge should not speculate or embark upon areas of possible alternative verdicts which have neither been canvassed in the evidence nor formed part of the speeches to the jury. The judge ought not to present an alternative verdict, which has not been canvassed by the parties, unless the prospect of that verdict is an obvious one. That is what Lord Bingham said in [*R* v *Coutts* [2006] 1 WLR 2154]. The principle is based upon that of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness. That is what Lord Guthrie said in *Templeton* v *HM Advocate*. It is not inconsistent with what Lord Osborne said in [*Ferguson* v *HM Advocate* 2009 SCCR 78] Lord Osborne did not say that the option of an alternative was required if that alternative was 'justified on a reasonable view of the evidence'. He merely said that a judge should not direct on the alternative when it was not so justified. The exception is also not inconsistent with what Lord Johnston said in *Mackay* v *HM Advocate* [2008 SCCR 371], once it is recognised that he was setting out a general principle and not an absolute.

> [28] The need to direct on a matter not raised by parties ought to be a rare event, given the functions of parties' representatives, but it remains possible that the trial judge will regard an alternative, such as culpable homicide in a murder trial or reset in a theft case, as obviously open to the jury on the evidence, even if it has not been addressed in the speeches. That appears to have been the position in *Duffy* v *HM Advocate*, in which the complainer had admittedly assaulted the appellant, and *Graham* v *HM Advocate*. If the judge does take the view, that he or she ought to give a direction on an alternative verdict not addressed by the parties, he or she should do so, even if, by that time, it may be too late to seek the views of the parties on the appropriateness of giving the direction. That procedure is in the nature of the adversarial jury system."

[26] Mr Scullion accepted the applicability of the principle stated in *Duncan*. Was then a verdict, subject to provocation, an obvious one on the evidence in the present case, such that the public interest necessitated that the direction be given, notwithstanding any unfairness which might thereby ensue? In our opinion the answer to that question is no.

[27] The only direct evidence of the immediate circumstances of the appellant's assault on the complainer in charge (1) came from the appellant himself. The advocate depute accepted that, on that account, three of the four requisites of provocation might be said to be present: a physical assault on the appellant by the complainer; immediate retaliation by the appellant; and a response by inflicting one blow, albeit with a crowbar, which was not grossly disproportionate. However there was no evidence of loss of self-control and in the absence of such evidence there was an insufficient basis for the desiderated verdict.

[28] We have been provided with a transcript of the appellant's evidence. We agree with the advocate depute's assessment of that evidence.

[29] In his examination-in-chief, having given his account of the events which were the subject of charge (2), the appellant explained that Jade Miller told him that

the complainer in charge (1), Greig Ramsay, was responsible for the theft of the money which the appellant said he had come to recover, and that Ramsay was in an upstairs bedroom. The salient points in his evidence were as follows:

> "[Extract of evidence page 21, line 10] Jade had said that it was, it was all Greig and he was upstairs in the bedroom …so because they were trying to put Greig in it I thought that I would go up because me and Greig were still on good terms, the fact that I've just took their …and said it was him that done it. So when I walked up the stairs, …maybe about the third step from the top …I looked to my left-hand side and I see there was a door with a hole in the bottom of it"
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> [Extract of evidence page 25, line 21] "I had made my way into the bedroom and then the door closed quickly over …the light was on …
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> [Extract of evidence page 26, line 23] "… the door like just closed over, I turned to the side and that's when I was met with Greig and a pair of scissors and he stabbed him (*sic*) the right of the leg in the shin, and then I turned I away from the door …he just stabbed me in the shin, the right shin. And then I turned to face the door and backed off because it was like in a frenzied attack. And then, like, I started backing away."
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> [Extract of evidence page 28, line 3] "He just started swiping with these scissors, I was trying to back away, it was bad, like so bad …because I couldn't get any further back I turned to the side and there was a crowbar lying near the wall. …then when I turned to side to get it and I just went 'get lost' and he stabbed, he was stabbing me in the left thigh. I just said 'get lost' and then it was enough to take him off his balance I didn't know he hit the door …"
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> [Extract of evidence page 29, line 10] "I swung to get him away and when it connected with him, it knocked him, like, off his balance …I didn't know if it connected …I knew that it had hit him but I didn't know where it had hit him and it knocked him off his balance, just as soon as I seen I could get to the door I was out the door"

[30] The appellant did not depart from or elaborate on this account in cross-examination beyond confirming that he only used the crowbar in order to facilitate his escape from the bedroom and that he only struck one blow:

> [Extract of evidence page 57, line 9] "Q. And the explanation for picking up the crowbar which you happened to see in the bedroom in the course this

> frenzied attack was that you couldn't get out of the door? A. I couldn't get out the door."
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> [Extract of evidence page 59, line 7] "Q. And you're quite clear that in relation to Mr Ramsey that you only hit him once? A. I did hit him once. Once to get him away from me… Q. So you couldn't account for a fracture to his cheekbone because you only hit him once? A. I did hit him once that was the hit. …I did hit him once that was it."

[31] The appellant's account, if accepted by the jury, might have supported his case of self-defence but there is nothing in it to suggest that the appellant lost self-control and retaliated in hot blood. Mr Scullion accepted that that was so, but submitted that the jury were not bound to accept or reject the appellant's account in its totality. As with the evidence of any witness, it was open to the jury to accept parts of the evidence and reject other parts. That is undoubtedly true, but it is equally axiomatic that rejection of evidence to one effect does not provide evidence to the opposite effect. It is the case that in *Duffy*, where the court found that the sheriff should have given a direction on provocation, the appellant did not give evidence and therefore there was nothing before the jury which provided a direct insight into any loss of self-control on his part; and that in *Graham*, where again the court held that a direction on provocation should have been given, the appellant, who did give evidence, went the distance of denying that he had lost his temper. However, both in *Duffy* and in *Graham*, the court was able to conclude from all of the relevant evidence, that it could not be said that no reasonable jury could have found that the accused had acted under provocation. That is not the position here. For the jury to find that the appellant lost self-control and immediately retaliated in hot blood would have been simply speculation on their part.

[32] That is sufficient for our decision. Far from being an obvious possible verdict, we consider that a verdict of assault under provocation was not one which a reasonable jury could have reached. There was therefore no misdirection and no miscarriage of justice. We are however reinforced in our conclusion that there was no miscarriage of justice by our consideration of how the respective cases were put to the jury by the trial judge and what the jury determined.

[33] The trial judge summarised the Crown case for the jury at page 36 of the transcript of his charge. It was of three people arriving at the house of Mark Christie at about 5am and carrying out an attack first of all on Mark Christie in the kitchen and then on Greig Ramsay upstairs in the bedroom. There was no question whatsoever of self-defence. The defence position, on the other hand, was that the appellant was on each occasion acting in self-defence with the limited amount of force that he said he used. The question for the jury was whether they had found the Crown's case proved. As he reports, the trial judge directed the jury:

> "Ladies and gentlemen, it's only if you accept the Crown case, as I have just briefly summarised it to you, that you would be entitled to convict the accused on the charges which he faces. If you do not accept it, you could not convict him of those charges."

[34] The jury clearly did accept the Crown case. There was no room in that case for provocation. Mr Scullion suggested that the reason that the jury rejected the plea of self-defence might have been that they took the view that the appellant had failed to avail himself of a means of escape, but otherwise accepted his account. We do not accept that suggestion. As can be seen from the brief extracts from the appellant's evidence quoted above, he was at pains to stress his attempts to get out of the bedroom, but more critically, it is very clear that failure to take the opportunity to

escape was simply not an issue in the case. There was no cross-examination on the point. In the absence of such cross-examination it is not a matter which the trial advocate depute could have put to the jury and there is nothing in the judge's charge to suggest that he did put it to the jury.

[35] We refuse this ground of appeal

Ground 2

[36] As the note of appeal is framed, ground 2 includes the proposition that imprisonment for 12 years and 6 months was an excessive sentence for what the appellant had been convicted by the jury. As we have noted above, Mr Scullion did not press that proposition but confined his submission to what would be the position if ground of appeal 1 was upheld and the conviction for attempted murder was quashed. We consider that Mr Scullion's assessment of the sentence imposed by the trial judge to be a proper one. The appellant was convicted of two very serious offences, one of which was very serious indeed. They involved violent attacks in the early hours of the morning in the home of the complainer in charge (2). Both complainers sustained fractures to the face or skull. The consequences for the complainer in charge (1) have been particularly grave. He has been left with cognitive defects and problems with speech and memory. The trial judge reports that the complainer described his life as having been ruined by cruel and vindictive actions. That is understandable. These were offences which called for a significant custodial sentence. There is no question of the sentence selected by the trial judge being excessive.

[37] We also refuse this ground of appeal.