



APPEAL COURT, HIGH COURT OF JUSTICIARY

2020 HCJAC 34
HCA/2019/000617/XC

Lord Menzies
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST CONVICTION

by

ALEXANDER BURKE (SENIOR)

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Keenan (sol adv); Paterson Bell Ltd for Carty's Solicitors, Hamilton
Respondent: Edwards QC AD; the Crown Agent

20 August 2020

[1] The appellant appeared at Hamilton Sheriff Court for trial before a sheriff and jury on an indictment containing five charges. Charge 3 related to an individual who is not relevant to this appeal, and this charge was withdrawn by the Crown. Charge 1 was also withdrawn by the Crown. For present purposes, the relevant charges were charges 2 and 4, which were in the following terms:

“(002) On 26th May 2019 at Strathclyde Park, Motherwell or elsewhere you ALEXANDER BURKE SENIOR, ALEXANDER BURKE JUNIOR did whilst acting together with others meantime to the prosecutor unknown assault James Wilson, c/o Police Service of Scotland and did charge at him in possession of spades or similar implements, strike him on the head and body with spades or similar implements and repeatedly punch him on the head and body, all to his severe injury and permanent disfigurement;

You ALEXANDER BURKE SENIOR did commit this offence whilst subject to an undertaking to appear on 30th May 2019 at Aberdeen Sheriff Court;

(004) On 26th May 2019 at Spine Road, the Raith Interchange and elsewhere in Motherwell you ALEXANDER BURKE SENIOR AND ALEXANDER BURKE JUNIOR did whilst acting together with others meantime to the prosecutor unknown assault Theresa and Mary Jean Townsley, both c/o Police Service of Scotland and did whilst they were travelling within motor vehicle registered number DS16 XWX and you were travelling within motor vehicles registered number SO65 FLE and HF17 NKP, pursue the said Theresa and Mary Jean Townsley, repeatedly cause said vehicle SO65 FLE to collide with said vehicle DS16 XWX in an attempt to block the path of the said Theresa and Mary Jean Townsley and whilst they were trapped within said vehicle you did repeatedly strike said vehicle with a scythe or similar implements, all causing extensive damage to said vehicle and placing the said Theresa and Mary Jean Townsley in state of fear or alarm;

You ALEXANDER BURKE SENIOR did commit this offence whilst subject to an undertaking to appear on 30th May 2019 at Aberdeen Sheriff Court.”

[2] The jury acquitted the appellant of charge 2 (and also of charge 5), but convicted him of charge 4. The sheriff sentenced the appellant to 24 months imprisonment, 3 in respect of the aggravation libelled, to run from 31 May 2019. The appellant has not appealed against sentence.

[3] The appeal was advanced on only one ground, in the following terms:

“The jury were directed that they were entitled to consider the application of the doctrine of mutual corroboration as between charges 2 and 4 on the indictment. In returning verdicts against the appellant, they acquitted him in respect of charge 2. It is accordingly submitted that, in the absence of mutual corroboration, there was insufficient evidence to corroborate the evidence of the single complainer in relation to charge 4.”

[4] In his speech to the jury, the procurator fiscal depute relied on the doctrine of mutual corroboration as between charges 2 and 4. He observed (at page 16 line 2 of the transcript of his speech) that

“You may think that the evidence proves that the event definitely took place... it may occur to you that we only have Ms Townsley’s word of who was actually involved in this second attack on her as described in charge 4.”

After explaining to the jury the concept of mutual corroboration and also dealing with concert between Alexander Burke Senior and Alexander Burke Junior, he went on to suggest to the jury that

“Mr Burke Senior and Junior joined together in a purpose to attack Ms Townsley and her sister spontaneously. I also suggest to you that proof that both were involved in charge 4 can be found by applying this mutual corroboration in charges 2 and 4 and indeed vice versa.”

In the course of his earlier explanation of mutual corroboration he stated

“I’m simply illustrating this point to explain to you why I’m inviting you to convict on charge 4 on this particular basis.”

The advocate depute accepted that the procurator fiscal depute relied on mutual corroboration when seeking a conviction on charge 4. She also accepted that the sheriff, quite properly, gave directions in his charge to the jury about mutual corroboration. However, whilst he indicated that the Crown said that the rule could be applied, he did not suggest that mutual corroboration was the only basis on which the jury might find the appellant guilty of charge 4. He gave them full and adequate directions as to concert, and as to circumstantial evidence.

[5] There is no attack in this appeal on the sheriff’s charge, and no suggestion that there was a misdirection. The appeal is founded on the assertion that in the absence of mutual corroboration there was insufficient evidence to corroborate the evidence of the single

complainer in relation to charge 4. We therefore consider the issue of sufficiency of evidence on charge 4.

[6] The evidence of the complainer Theresa Townsley is set out at length in paragraph 10 of the sheriff's report. We do not consider it necessary to repeat this in full here. After giving evidence about the events libelled in charge 2, the sheriff records that

"Ms Townsley said she then panicked and left at that point with her sister driving off in her vehicle... as they left the appellant rammed the side of her sister's vehicle as they were setting off and the driver's mirror of the vehicle came off. The appellant then pulled in front of her sister's vehicle. Alexander Burke Junior's vehicle then pulled in behind them boxing them in. As they drove towards the Raith Interchange the appellant's vehicle was in front of them and the vehicle containing Alexander Burke Junior was behind them... The road led to the Raith Interchange. The larger vehicle was hitting them from behind and the smaller, that driven by the appellant, kept coming up on their bonnet. At the Raith Interchange their vehicle was stopped and Alexander Burke Junior jumped out of the vehicle which had been behind them with an item she thought to be a scythe, initially she thought it was a machete but it had a blade to cut straw. He ran towards their vehicle coming out of the vehicle with the crew cab. She advised that the appellant was still ramming their vehicle with his. The blade of the scythe was put through the window of her sister's vehicle trying to strike her. The window was smashed. Alexander Burke Junior was shouting "you're dead". All the windows of that vehicle were smashed... She was shown various photographs of damage to the Jeep Grand Cherokee and to her sister's vehicle."

[7] Theresa Townsley was the primary source of evidence against the appellant on charge 4. Leaving out of account any question of mutual corroboration with charge 2, was there sufficient evidence from another source, or sources, which supported or confirmed the direct evidence of Ms Townsley and so might provide corroborative evidence? (see *Fox v HMA* 1988 JC 94 at 100 and 107).

[8] In the submissions before this court, attention was focused on four aspects of the evidence:

- a) The evidence of James Wilson, the complainer in charge 2.
- b) CCTV evidence

- c) A book of photographs (Crown Production 17) showing damage to the vehicle DS16 XWX.
- d) The transcript of the 999 call to the police which was agreed by joint minute.

[9] We deal with these aspects of the evidence as follows:

- a) The evidence of James Wilson. This is summarised in some detail by the Sheriff at paragraph 7 of his report. Mr Wilson gave evidence about the vehicle which the appellant was driving and the vehicle which Theresa Townsley and her sister were in. Mr Wilson gave evidence that Alexander Burke Junior approached him and punched him to the face at which point the appellant went back into the vehicle in which he had arrived and drove off.

“As the appellant drove off, Mr Wilson described a vehicle being ‘rammed’. He heard a noise of plastic or metal being struck and a revving of engines but was not sure which vehicles were involved. The appellant had moved off immediately before the vehicle containing his partner, Theresa Townsley, also drove off from the car park in her sister’s vehicle. Shortly after the appellant drove off Alexander Burke Junior got back into a white Ford Transit tipper truck and drove off. This was shortly after the appellant and Theresa Townsley had left the car park. They all drove off in the same direction.”

- b) The CCTV evidence was summarised by the Sheriff at paragraph 9 of his report. It is consistent with the evidence of the complainer Townsley that there was a white tipper truck in front of her vehicle and another immediately behind her vehicle as the vehicles were headed towards the Raith Interchange.
- c) The photographs show considerable damage to the vehicle in which the complainer Townsley was seated. It was conceded on behalf of the appellant that there was damage to the front of the vehicle in which Ms Townsley was seated.
- d) It was apparent from the transcript of the 999 call that the complainer Townsley was upset and distressed. However, the advocate depute did not rely on this as

an adminicle or piece of circumstantial evidence which might be capable of providing corroboration; she accepted that the sheriff directed the jury that they could only use this to test the credibility and reliability of the complainer. We need give this no further consideration.

[10] Leaving aside the 999 call, and also leaving aside mutual corroboration as between charges 2 and 4, we are satisfied that there was indeed a sufficiency of evidence to enable the jury to find the appellant guilty of charge 4 of this indictment. The evidence of the complainer Townsley was clear and compelling. The evidence of James Wilson as to the appellant's aggressive demeanour and the appellant leaving the car park in his white tipper truck immediately before the vehicle containing Theresa Townsley and her sister also left the car park, and the sounds of a vehicle being "rammed" and the noise of plastic or metal being struck and a revving of engines was all consistent with Ms Townsley's evidence. The CCTV evidence was also consistent with Ms Townsley's evidence to the effect that as she was driving from the car park to the Raith Interchange there was a white tipper truck in front of her and another immediately behind her. The photographs show damage to the vehicle in which Ms Townsley was situated which was also consistent with her evidence, and in particular that the smaller vehicle driven by the appellant kept coming up on their bonnet.

[11] We also note that when the jury returned their verdict, neither the sheriff nor those acting for the appellant expressed surprise or concern that the jury returned a verdict of guilty in relation to the appellant on charge 4 but acquitted him on charge 2. As the sheriff indicated in his report to us:

"Had I considered that the conviction of the appellant in charge 2 was essential for a conviction in charge 4 I would have given a directed verdict once the jury had returned their not proven in respect of charge 2. However, I consider there was still

a basis for conviction having regard to the evidence of Mr Wilson and Theresa Townsley in respect of the incidents starting at the car park and leading down to the Raith Interchange sufficient for the jury to reach verdicts delivered by them.”

We consider that the Sheriff was correct in this view.

[12] Having concluded that there was indeed a sufficiency of evidence to enable the jury to convict the appellant on charge 4 notwithstanding his acquittal on charge 2, this disposes of the only ground of appeal. Accordingly this appeal must be refused.