APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 49
HCA/2019/605/XC

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION

by

KENNETH THOMSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Adams; John Pryde & Co
Respondent: Prentice QC (sol adv) AD; the Crown Agent

17 September 2020

Introduction

[1] On 25 October 2019, at the Sheriff Court in Edinburgh, the appellant was convicted of three charges arising out of an incident which took place on 13 September 2018 at Boyd's Entry and St Mary's Street Edinburgh. The verdicts of guilty were returned in the following terms:

> "(1) on 13 September 2018 at Boyd's Entry, Edinburgh, you did assault Osman Celik and brandish a broken bottle at him;
>
> (2) on 13 September 2018 at Boyd's Entry, Edinburgh, being a public place, you did, without reasonable excuse or lawful authority, have with you an offensive weapon, namely a glass bottle;
>
> Contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 Section 47(1) as amended;
>
> (3) on 13 September 2018 at Boyd's Entry, Edinburgh you did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did brandish a broken bottle whilst acting in an aggressive manner towards Osman Celik whilst in the company of Agnes Gray, then aged 86 years old, and cause her to suffer fear and alarm;
>
> Contrary to Section 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010;".

[2] Each charge was aggravated by being committed whilst the appellant was subject to bail granted on 1 June 2018. The appellant was also convicted of two other charges which are not the subject of this appeal. After conviction the sheriff imposed a sentence of twelve months imprisonment on charges 1, 2 and 3, with three months of that period attributable to the bail aggravations. In returning the verdict on charge 1 the jury deleted certain averments from the original charge. The words:

> "repeatedly punch and kick him on the head and body, strike him on the head with a bottle or similar item"

were all deleted.

The appeal

[3] Prior to the commencement of the trial the solicitor acting for the appellant had lodged a special defence of self-defence in respect of each of charges 1, 2 and 3. The appellant gave evidence of having acted in self-defence. The first ground of appeal concerns the directions which the sheriff gave in respect of the appellant's evidence. The second

ground of appeal argues that the appellant could not be convicted on both of charges 1 and 3, as they each concerned the same *species facti*.

The incident

[4] The evidence relied upon by the Crown, as given by the complainer Mr Celik, was that he was escorting an elderly lady a short distance along St Mary's Street, from his restaurant to her home in Boyd's Entry, when he encountered a group comprising the appellant, his girlfriend Ms Beacham and another male. All three were behaving aggressively towards another female. When Mr Celik told them to leave the woman alone all three of them came towards him and were pushing and shoving at him, to which he responded by pushing them back. Mr Celik fell to the ground and was kicked and punched by the two men. He was then hit a glancing blow on the head by a bottle thrown at him by the appellant. After Mr Celik was able to get to his feet the appellant produced another bottle from a bag. He broke it on an adjacent wall and held it in his hand in front of Mr Celik. He was swearing and speaking aggressively as he did so. The incident came to an end as other people were saying to "leave it". Shortly thereafter the police arrived.

[5] In evidence in chief Mr Celik volunteered that Ms Beacham had suffered an injury to her nose during the initial pushing and shoving to and fro which caused it to bleed. He accepted that he may have been responsible for this, although, if so, it occurred accidentally. He accepted that during the course of the incident the appellant was saying things to the effect that Mr Celik had broken his girlfriend's nose. He came to accept that he had been charged on summary complaint with assaulting Ms Beacham. Mr Celik also accepted that an item known as a "waiter's friend", a combination bottle opener, corkscrew and knife, was recovered by attending police officers from the ground in the area of the entrance to Boyd's

Entry. He acknowledged that this was his and explained that it must have fallen out of his pocket at some stage during the attack upon him.

[6] Mr Celik's evidence received broad support from a subsequent and unconnected Crown witness, Mr Donald Smith, who observed some of the incident as he was making his way down St Mary's Street.

[7] The appellant gave a different account of events. In his evidence he explained that Ms Beacham had been engaged in a noisy argument with another woman in St Mary's Street during the course of which he shouted and swore at her telling her to hurry up. Mr Celik became involved by asking what was going on, to which the appellant responded that it was nothing to do with him and he should walk away. Mr Celik raised his fists in a pose like a boxer and invited the appellant to fight. When the appellant took a step towards him Mr Celik punched him twice in the mouth. This caused the appellant to let go of the dog's lead which he was holding and the dog ran off. He turned away from Mr Celik to fetch the dog and on turning back he saw his girlfriend on her knees on the ground with Mr Celik standing near to her. He could see that she was bleeding from below her nose and her lips were swollen. He was told that Mr Celik had punched her. Being worried that he might hit her again, he took a half bottle of Buckfast from his pocket and threw it towards Mr Celik's feet in an attempt to draw his attention away from Ms Beacham.

[8] The appellant explained that he then entrusted the dog to his friend who was nearby and as he turned back to Mr Celik he saw him pulling something out of his pocket with a flash of silver and presumed that he had a knife. In response he picked up a glass bottle which he smashed on a wall in order to try and defend himself in case Mr Celik came towards him with the knife. He said to Mr Celik to put the knife down and he would put the bottle down. Mr Celik did not do so and Ms Beacham then ran at him causing him to

stumble and drop the knife to the ground. Someone else then intervened to stand between the two, the appellant threw the broken bottle away and shortly thereafter the police arrived.

The sheriff's charge

[9] At an early stage in his charge, the sheriff explained that he would give the jury specific directions on self-defence, which he said was an important aspect of the case. When he came to define the crime of assault he said that he would leave self-defence aside and deal with that later. In turning to provide the legal definitions for charges 2 and 3 the sheriff began by directing the jury that, as a matter of law, self-defence was not a competent defence to either of these charges. He directed that self-defence only related to charge 1. He explained that this was because the law provided a different defence for charges 2 and 3.

[10] In relation to charge 2, he explained that the defence provided by the law was that of reasonable excuse. In this context he gave the following direction:

> "As a matter of law I have to tell you that fear or apprehension of an attack is not a reasonable excuse for arming yourself. That's what the law says and it may seem rough, but it's to prevent people tooling up because they think there might be trouble and the law is very firm that fear of an attack is not a reasonable excuse for having an offensive weapon."

[11] In directing the jury in relation to charge 3, the sheriff explained that to establish this crime the Crown needed to prove that the accused behaved in a threatening or abusive manner and that the behaviour would be likely to cause a reasonable person to suffer fear and alarm and that the accused intended to do so or was reckless as to whether he did or did not. He repeated his direction that special defence was not available for their consideration in relation to this charge. He explained that the law provided a different defence, namely

whether or not any proven conduct was reasonable in the circumstances. The sheriff directed that the jury should consider matters in this way:

> "You decide what you think he did in relation to (this charge) and then having decided what you think he did you ask yourself whether that conduct was reasonable in all the circumstances, and if it is you acquit him, if it's not then he does not have the defence available to him and you are entitled to proceed to consider conviction."

[12] Having completed this exercise by giving directions on the definitions of the remaining two charges the sheriff returned to the matter of self-defence. He directed that self-defence could be available to protect oneself or another. He made it plain that this issue only arose in relation to charge 1 and, whilst not linking his comments to the facts of the case, gave directions which were in conventional and familiar terms.

Submissions

Appellant

[13] In developing the appellant's first ground of appeal, counsel drew attention to the fact that both Mr Celik and the appellant referred to two different glass bottles in their evidence. Charge 2 referred to "*an* offensive weapon, namely *a* glass bottle". In his speech to the jury the procurator fiscal had not explained whether he saw the charge as referring to both bottles or, if not, to which one. However the sheriff's directions had made it clear to the jury that this charge related only to possession of the broken bottle. This could be seen from what he said in introducing this offence at page 33 of the transcript of the charge:

> "… If you're wondering why it's not called a 'broken bottle' as it is everywhere else, it's because it starts as a bottle and becomes a broken bottle …"

Similar observations were made elsewhere and at page 35 the sheriff explained that possession of a broken bottle alone would be sufficient to establish the offence, the Crown did not need to establish what the appellant intended to do with it. These were important

directions making it plain that the jury required to focus on the appellant's conduct in relation to the broken bottle.

[14] The sheriff was wrong in directing the jury that fear of an attack cannot provide a reasonable excuse for having an offensive weapon. Reliance was placed on what had been said by Lady Paton in delivering the opinion of the court in the case of *Lunn* v *HM Advocate* 2016 SLT 98 at paragraph [9]:

> "[9] Before us today the advocate depute, in a helpful submission, advised that the Crown had given careful consideration to the appeal, and had come to the view that the appeal was well founded and ought to be conceded. Partly as a result of the oral submissions today and partly in view of a letter sent in advance of today's hearing, we understand the Crown's position to be that taking possession of an offensive weapon in anticipation of or fear of future violence would not constitute a reasonable excuse (cf. the Lord Justice Clerk in *Grieve* v *McLeod* at 1967 J.C., p.36; 1967 S.L.T., pp.71–72). However matters would be different where a person took possession of a weapon during an incident where he or she was under attack, for the purpose of preventing or discouraging further violence. It was pointed out to us that the jury manual was based more on the circumstances in *Grieve* v *McLeod* , whereas in the circumstances of the present case a more flexible approach was necessary as it was for the jury to decide whom to believe and whom to disbelieve, and at least one of the versions of events which was put before the jury in the course of the trial suggested that the appellant, when under attack and in extremis , had come into possession of the bottle and used it solely to attempt to prevent further attack (cf. dicta of Lord Carloway at 2009 S.C.C.R., pp.515–516, para.7 of *Donnelly* v *HM Advocate*)".

[15] It was submitted that the appellant's position was indistinguishable from that of the appellant in the case of *Lunn*. The appellant's evidence was that he had picked up and smashed the bottle only on seeing the complainer taking out what he thought to be a knife and he did so only to prevent the complainer attacking him with it. The conflict in the evidence as to the circumstances in which the bottle had been smashed and brandished could only be resolved by the jury but the direction given deprived the appellant of his reasonable excuse defence, namely that he was acting to defend himself in fear of an imminent attack. The direction given amounted to an instruction to convict on charge 2.

This was a material misdirection resulting in a miscarriage of justice and the conviction on charge 2 should be quashed.

[16] However, it was also argued that this misdirection was of such materiality as to poison the jury's consideration of the issues which arose in respect of charges 1 and 3 as well. For the sheriff to have explained, as such an absolute proposition, that fear of an attack could not constitute a reasonable excuse for the appellant arming himself with an offensive weapon, was to misdirect, or at least to confuse the jury, in relation to the principal live issue at the trial, namely whether or not the appellant was acting generally in self-defence. It therefore followed that the misdirection complained of was substantial and went to the whole purport of the charge, in the sense described by the Lord Justice General (Carloway) in giving the opinion of the court in the case of *Sim* v *HM Advocate* 2016 JC 174 at paragraph [32]. In these circumstances the effect of the misdirection filtered into charges 1 and 3 as well and the conviction on each of those charges ought to be quashed.

[17] In support of the second ground of appeal counsel submitted that the *actus reus* of charge 3 was the assault in charge 1. Although Ms Gray was mentioned in this charge, there was no suggestion that the appellant had directed his behaviour towards her. She was an unfortunate witness to the event. The behaviour which was libelled in charge 3 was the assault by threats on Mr Celik as specified in the first charge. The accused was therefore open to being convicted of the same conduct on two occasions. The facts of the present case were distinguishable from those in *Rodger* v *HM Advocate* 2015 JC 215. The convictions nevertheless ran counter to the principle referred to in paragraph [15] of the opinion of the court in that case, given by Lord Eassie, to the effect that the court will not convict a person of more than one offence arising out of the same facts which must necessarily be established to constitute the offence in question.

Crown

[18] On behalf of the Crown the advocate depute conceded, as he had in the written submissions tendered in advance of the hearing, that the sheriff misdirected the jury in relation to charge 2. The advocate depute recognised that, on one view of matters, the misdirection could be said to have introduced a fatal flaw into the jury's assessment of the admitted use of the broken bottle. However, the jury had heard all the evidence and had received proper directions on self-defence in relation to charge 1. The verdict returned demonstrated that the jury had decided that in brandishing the bottle at Mr Celik the appellant had not been acting in a way which amounted to self-defence. On this analysis there would be no illogicality in the respective verdicts returned.

[19] In relation to the second ground of appeal the advocate depute submitted that the offences specified in charges 1 and 3 are quite different in character and the facts necessary to constitute each were different. A conviction on both charges was competent.

Discussion

[20] It is plain from the decision of the court in the case of *Lunn* v *HM Advocate* that the direction given in relation to reasonable excuse for possession of an offensive weapon in the present case was incorrect. A more nuanced explanation was necessary. The conviction on charge 2 cannot stand for this reason. The remaining question is whether the direction given did introduce a "fatal flaw into the jury's assessment of the admitted use of the broken bottle".

[21] The charge of assault which the appellant faced included a number of different allegations. The allegations of repeatedly punching and kicking the complainer were spoken to by both Mr Celik and Mr Smith. The appellant denied any such conduct. The

allegation of striking the complainer on the head with a bottle was spoken to by Mr Celik and was admitted by the appellant, at least to the extent of throwing the bottle at him. The appellant's explanation for doing so was that he was acting in defence of Ms Beacham. The jury deleted all of these allegations from the verdict of guilty which was returned. It is reasonable to infer that they must have done so by preferring the evidence of the appellant, or by being left in a reasonable doubt as to the Crown's case of assault. This is the context in which the effect of the plain misdirection requires to be considered.

[22] The sole allegation within the charge of assault which the appellant was convicted of was that of brandishing a broken bottle at Mr Celik. The appellant admitted to this conduct, again under the explanation that he was acting in self-defence. In his charge the sheriff made it clear that this was the bottle to which charge 2 was directed. Charge 3 specified the use of the broken bottle. Accordingly, it is correct to understand that this conduct fell to be considered by the jury in the context of three separate criminal offences.

[23] In the present case the statutory defence provided for in section 47(1A) of the Criminal Law (Consolidation) (Scotland) Act 1995 was engaged by the appellant's account of why he brandished the broken bottle at Mr Celik, as was the defence of self-defence which he pled in relation to the assault charge. As the sheriff explained in his directions on self-defence, there was no onus of proof on the appellant to establish that he was acting in self-defence in relation to the assault charge, although the jury did require to be satisfied that the relevant conditions for the application of the defence were present. The crown required to meet that defence and satisfy the jury beyond reasonable doubt that it should be rejected. Although the sheriff did not say so in his charge, an accused person who relies on the statutory defence is in a different position. The defence provided for by section 47(1A) of the

1995 Act places a legal burden on the accused person to establish the defence. The standard of proof required is on the balance of probabilities.

[24] The breadth of the statutory defence provided for by section 38(2) of the 2010 Act is also wide enough to include the conduct of an accused person who claims that he was acting in self-defence. Although it was not referred to in submissions before us, this is clear from the decision in *Urquhart v HM Advocate* 2016 JC 93, the opinion of the court given by Lady Smith at paragraph [15]. The court also expressed the view that in relying on the statutory defence it would not be necessary for an accused person to meet all the requirements of self-defence that apply when pled as a special defence. This statutory defence was also engaged by the appellant's evidence of why he was brandishing the broken bottle. As with section 47(1A) of the 1995 Act, section 38(2) of the 2010 Act imposes the burden on the accused person wishing to present such a defence. The section provides that it is a defence for the person charged "to show that the behaviour was, in the particular circumstances reasonable". However, this statutory defence only imposes an evidential burden on the accused person – *Urquhart* paragraphs [21] and [24].

[25] It would no doubt have been feasible to craft directions focussing on the admitted brandishing of the broken bottle in relation to each of the three charges in this case which were not only legally correct but also informative and of assistance to the jury. However, we recognise that the need to explain where the conditions necessary for self-defence applied and where they did not, along with the need to communicate the import of the differing onuses and standards of proof, would have made this a challenging task. The importance of separating out the different considerations which applied in respect of each charge, in our opinion, serves to underline the impact of the direction which the sheriff did give in relation

to the possession of an offensive weapon. We agree with counsel for the appellant that in telling the jury that:

> ".. the law is very firm that fear of an attack is not a reasonable excuse for having an offensive weapon."

the sheriff delivered what can properly be described as an absolute proposition.

[26] In these circumstances we agree that it was asking too much of the jury to appreciate that, despite what they had been told, an accused person could still be judged to have acted reasonably and appropriately by brandishing an offensive weapon in fear of an attack in the context of a charge of assault.

[27] The same applies in relation to charge 3. Acting in self-defence for the purposes of preventing an assault is almost bound to include aggressive behaviour. It is difficult to see how the jury could have determined whether the appellant's conduct constituted reasonable behaviour, for the purposes of charge 3, if they were proceeding upon the understanding that as a matter of law it was not reasonable to arm oneself with an offensive weapon, even if under attack.

[28] Bearing in mind the deletions from the charge of assault which were returned by the jury as discussed in paragraph [21] above, it is difficult to understand the basis of the convictions returned on charges 1 and 3 without concluding that the misdirection in relation to charge 2 did in fact introduce a fatal flaw into the jury's overall consideration of the appellant's conduct.

[29] In these circumstances we are satisfied that there is force in the submissions presented on the appellant's behalf in support of the first ground of appeal and we shall give effect to those submissions by quashing the convictions in relation to charges 1, 2 and 3.

In light of this decision it is not necessary to determine the issue raised under the second ground of appeal.