APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 29
HCA/2020/335/XC

Lord Justice General
Lord Turnbull
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

NOTE OF APPEAL AGAINST CONVICTION

by

AARON ROBERT DINES KNOWN AS MORRISON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Findlater; Murray Ormiston LLP, Aberdeen
Respondent: G Jessop AD (sol adv); the Crown Agent

13 May 2021

[1] On 5 November 2020, at the High Court of Justiciary sitting in Edinburgh, the appellant was found guilty, after trial, of a charge narrating that he assaulted MDN and repeatedly struck him on the body with a knife to his severe injury, permanent disfigurement and to the danger of his life and that he attempted to murder him. He was sentenced to imprisonment for 8 years, but there is no appeal against sentence.

[2] There is, however, an appeal against conviction and it raises a short point. It is submitted that the trial judge erred in removing the appellant's special defence of self-defence from the jury's consideration. It is said that there was some evidence from which self-defence could have been made out. Even if this is so, the appellant faces two major hurdles. These are that, during his own evidence, he denied that he had used a knife or stabbed the complainer, which is the only narrative of how the assault took place and secondly that when the trial judge raised the question of self-defence after evidence and before speeches, the appellant's counsel agreed that it did not arise. Notwithstanding this, it is submitted that a case for self-defence could have been made out on the basis of a jigsaw, using pieces of evidence from other witnesses in the case and that the judge made an error of law.

The evidence

[3] A number of matters were agreed by joint minute. Amongst these were that, following the incident, at a play park, the complainer had three stab wounds to his abdomen, one to his left thigh and one to his right hand. One of the stab wounds to the abdomen had penetrated the large bowel and was repaired at surgery. The other stab wounds to the body and thigh were closed with stitches and the hand wound was dressed without being stitched. Without treatment, the injury to the bowel would have caused death. There will be permanent disfigurement, with scars at the sites of the wounds.

[4] When the appellant was arrested on suspicion of the attempted murder of the complainer, he struggled with the police and stated: "It was me getting stabbed and it was just self-defence."

[5] A witness DK had been with the complainer and another individual. They were all addicted to crack cocaine, which they had been looking to buy from the appellant when they went to the play park, where they met him. The complainer began grabbing at the appellant with his hands, trying to take drugs from him. A confrontation developed, with the appellant backing away. The complainer appeared to be the aggressor and punched the appellant to the body. With reference to his police statement, the witness said that the complainer had asked the appellant for money he owed him. His first position was that he saw a blue handle in the appellant's hand, but no more than that. The appellant was moving his hands around and backing off. The complainer then ran way and turned out to be badly injured. The evidence of the witness then came to be that, with his right hand, the appellant had pulled out, from somewhere on his person, a breadknife with a blue handle. He saw a fight between the two, with the appellant defending himself. He saw movements by the appellant's arms towards the complainer's torso and the top of his legs, where stab wounds had been found. There was a set-to back and forth. While the appellant was in possession of the knife, he made a lunge for the complainer, but the witness could not say that he ever actually saw him stabbing the complainer. While he watched the struggle, he heard the complainer shout: "I've been stabbed".

[6] Another witness, TR, was unfit to attend court and his statement was read out, using the provisions of section 259 of the 1995 Act. He had been in the park that night looking for drugs from the appellant. He said that the complainer and the appellant started arguing about something. He went on:

> "The argument started getting more heated where Tubz (the complainer's nickname) tried to grab Aaron by the mouth and he punched him to the face. They both then started rolling about the ground fighting. Tubz appeared to be fine before all this happened. During the roll around on the floor I noticed Aaron swing his arm towards the body of Tubz. It just looked like he was punching him. I never noticed

> anything in his hands. I heard Tubz screaming and then him shout: 'I've been fucking stabbed'."

[7] The appellant had lodged a special defence of self-defence, the operative part of that being that "on the occasion libelled he was acting in self-defence, he having been assaulted by the said (complainer)".

[8] In his evidence, the appellant denied that he had been selling drugs, maintaining that the complainer was a drug dealer. He said he had been begging in the streets for money to buy drugs and went to the park to buy them there. He had seen the complainer and his two companions, but sought to avoid them as he had had trouble with the complainer before. The complainer attacked him, grabbed him and was demanding money, which the appellant owed him for drugs. Then the complainer punched him three times and he put his hands up to defend himself. He saw that the complainer had a knife in his hand when the third punch was thrown. The complainer held it at the appellant's neck. The appellant tried to run, but the complainer grabbed him and they ended up rolling on the ground. He was struggling to keep the knife, which was still at his neck, away from him. They were rolling around for about 3 minutes before a woman shouted, "Get him", at which he had managed to slither away from the complainer and escape. He ran home and discovered that he had been cut on his right hand, but he had not wanted to go to the police. He did not have a knife with him, he did not attempt to stab the complainer deliberately and he did not attempt to murder him.

[9] In cross-examination, he said he did not know how the complainer had come by his injuries, but he had not caused them and only the complainer had had a knife. He was adamant that he did not stab him.

[10] In his report, the trial judge tells us that he raised with defence counsel whether he maintained that there was any basis for self-defence and/or provocation. We need not concern ourselves with provocation. Counsel agreed that there was no basis for self-defence, as the minute for 5 November records. The judge expected counsel to withdraw the special defence in his speech, but he did not. Rather than causing delay by disconnecting the jury and reminding him about it, he decided simply to direct the jury that self-defence was not an issue for consideration.

[11] The judge was aware that withdrawing a special defence was a strong step. It was his duty to direct the jury that it was not open to them to consider it if there was no evidence from which the requisite conclusion could reasonably be drawn. If, on the other hand, there was some evidence, although it might be slight, or even evidence about which two reasonable views might be held, then the duty of a judge is to leave the special defence to the jury, subject to such directions as the judge may think proper (see *Crawford* v *HM Advocate* 1950 JC 67). This approach has been approved of in a number of cases, such as *Carr* v *HM Advocate* 2013 SCCR 471.

[12] In his report, the judge refers to *Whyte* v *HM Advocate* 1996 JC 187, *Carr*, and *Lawson* v *HM Advocate* 2018 SCCR 76, where this issue was considered. As he points out, there is no suggestion in those cases that the defence representative in the trials conceded that self-defence could not arise.

[13] *Telford* v *HM Advocate* [2018] HCJAC 73 was a recent example where it was correct to withdraw self-defence because the three criteria necessary for the plea could not be met on the evidence. The judge points out that, in this case, while the question of the appellant being the subject of an attack is addressed in the grounds of appeal, the other two are not, namely no reasonable means of escape and no cruel excess, although these were addressed

in submissions. Furthermore, in none of the cases did the accused give evidence to say that he had not performed any part of the action which was the only *modus* of the assault.

[14] Counsel knew that the judge was not going to leave self-defence before the jury and did not attempt to persuade him that he should. His jury speech presented the defence on the basis of the appellant's denial that he had stabbed the complainer deliberately. The judge did not consider that there was evidence capable of meeting all three of the criteria for self-defence, in particular being of the view that it could not be said that the retaliation was not excessive. He also considered that giving directions on self-defence would undermine the speech of defence counsel. In addition, the appellant did not even say that he could not get away. On his own account he had managed to do so. If the hypothesis was that the appellant had disarmed the complainer and then stabbed him five times, such actions would inevitably be cruelly excessive.

Submissions

Appellant

[15] In reliance on the appellant's comment to the police and the evidence of the two civilian witnesses, to the effect that the complainer was the party who first used violence, it was suggested that there was support for the first leg of the test. There was a continuing attack on the appellant by the complainer. The evidence of the appellant backing away from the aggressive complainer and failing to get away from him until the end, when he was able to slither away, could allow a jury to be satisfied that violence was used as a last resort. The means of escape were removed once the complainer began struggling with the appellant, including grabbing him by the neck.

[16] As far as cruel excess was concerned, the appellant spoke to the complainer having a knife. Only one of the five injuries sustained by the complainer was of any particular gravity. Cruel excess was a matter to be left to the jury.

[17] While the appellant had denied stabbing the complainer deliberately and that he had ever had a knife, the jury could nonetheless have held, as they did, that he had a knife and had deliberately stabbed the complainer. Using the other evidence in the case, which was consistent with self-defence, such as the appellant's remark to the police, the jury could have held that the criteria were met.

[18] Reference was made to a number of cases, such as *McGrouther* v *HM Advocate* 2021 SCCR 46, *Graham* v *HM Advocate* 1987 SCCR 20, and particularly *Surman* v *HM Advocate* 1988 SCCR 93. In that case the appellant had given evidence that he was defending himself in a struggle with the deceased, but that he was unaware of stabbing him. He agreed with the suggestion that the stab wounds must have been inflicted accidentally. There was no question of the deceased being armed but, according to the appellant, he was trying to throttle him with his hands. In the opinion of the court, it was for the jury to determine whether the appellant was acting in self-defence or whether his evidence was sufficient to raise in their minds a reasonable doubt as to whether the Crown had established its case. The trial judge was wrong in taking the defence of self-defence away from the jury. For other reasons, there was no miscarriage of justice in that case. It is noteworthy that in that case the stabbing was not the only *modus* of assault charged.

[19] Counsel also referred to the cases of *Whyte* and of *Graham* v *HM Advocate* [2018] HCJAC 4, although the relevance of that latter case is not immediately apparent.

[20] If the court were not with him, counsel recognised that the appeal could not succeed. However, assuming his submissions found favour, the court would require to consider

whether a miscarriage of justice had resulted, given the appellant's evidence and the fact that counsel had agreed that self-defence was no longer an issue.

[21] Counsel's agreement was an error. However, this was not a case where it was appropriate to base an appeal on defective representation. The error arose because the lack of a basis for self-defence had been raised, in error, by the trial judge and that had infected what happened thereafter. Therefore the judge had raised the point because he obviously had a preliminary view that self-defence should not go to the jury. It was speculative to try to work out what might have happened had counsel insisted on the special defence. The judge's intervention was the point at which the case went off the rails.

[22] The case could be distinguished from *SB* v *HM Advocate* 2015 JC 289. In that case, and in cases such as *Duncan* v *HM Advocate* [2019] JC 9 and *Nelson* v *HM Advocate* [2020] HCJAC 31, the ground of appeal being advanced was one of misdirection in circumstances where parties had not advanced a particular line, or specifically disavowed a particular line, and on appeal it was contended that such an omission represented a miscarriage of justice. That was not the position here. The special defence had been removed by the trial judge. Where a defence appeared to be available on the evidence, generally the trial judge should provide directions on it. Self-defence could have been made out on the evidence led in this case. The defence had proceeded on the basis of this throughout the trial. It was only when the judge raised the issue that counsel agreed there was no basis for it. At paragraph [28] of his report, the judge said that:

> "[Trial counsel] knew that I was not going to leave self-defence before the jury and made no attempt to persuade me that I should."

That was where the error of law and the miscarriage of justice arose. The trial counsel's acquiescence was not a cure for the judge's error. In any event, even if *SB* did apply, this was one of those exceptional cases where the judge should not have withdrawn the defence.

Crown

[23] Under reference to *Pollock* v *HM Advocate* 1998 SLT 880, the advocate depute submitted that it could not be argued that all three criteria were made out. *Pollock* was a case where there was obviously cruel excess. So was the instant case. There had been no suggestion that the appellant could not get away. He had slithered free and run off.

[24] While it was clear from *Crawford* and such cases that the court had to be cautious in withdrawing a special defence, this was a case where it was appropriate.

[25] Leaving all that aside, counsel had agreed that there was no basis for it. The only conduct libelled was the act of stabbing the complainer repeatedly with a knife and the appellant had said that he did not do that. That being so, there was no basis for a special defence of self-defence and the judge was correct in raising the issue. Counsel could not advance the special defence given that evidence. *SB* was in point. Reference was also made to *McGrouther* v *HM Advocate* and *Duncan*. The obligation on the court was to charge in accordance with the way parties conducted the case, unless it was obvious that a particular direction had to be given. The question was one of fairness. As was pointed out at paragraph [28] in *Duncan*, situations where the court charged a jury otherwise than in accordance with the way the parties conducted the case ought to be rare.

Analysis

[26] The proposition, derived from cases such as *Crawford*, that special defences ought not

to be withdrawn if there is any reasonable basis in the evidence for them, is non-controversial. By navigating a tortuous path within the evidence in this case, there might have been a basis for the jury to hold that the complainer had a knife (the appellant's own evidence) and that the appellant was acting, as he put it to the police, in self-defence in a general sense. There was a basis in the evidence of the two civilian witnesses that the complainer attacked the appellant. There was no suggestion in the evidence that there were ever two knives on the scene. The only knife which was seen was that which the witnesses said they saw in the possession of the appellant. If the hypothesis is that he used the complainer's knife to inflict the five wounds then, inevitably, that would have amounted to cruel excess, leaving aside the question whether or not he might have been able, reasonably, to make his escape. The various cases referred to in argument turned on their own facts and on the terms of the charges.

[27] The more fundamental problems for the appellant are the nature of his own evidence and the agreement by his counsel that the issue of self-defence could not arise on the evidence. There is no foundation for any suggestion, nor indeed was it suggested, that counsel was put under any pressure to make this concession. In any event, in our opinion, standing the state of the evidence, not only was counsel's approach reasonable in the circumstances, it was the only approach which he could realistically and responsibly take. The only criminality alleged against the appellant was his use of the knife. In his evidence he denied using a knife. There was no basis on which counsel could have effectively discarded that evidence and proceeded on the basis that the jury should consider self-defence, even on an *esto* basis. Had there been sufficient other evidence supporting self-defence, counsel might have had a difficult practical choice to make. If the position of the accused in such a case were that he denied the use of the weapon and denied committing the

assault at all, reference to a provisional defence might well have been seen to be undermining the accused's position and could easily lead to a jury thinking the defence wanted to have its cake and eat it. There being no evidence capable of fulfilling the three criteria for self-defence in the instant case, however, there was no tactical decision for counsel to make. The decision to agree that there was no issue of self-defence was one which he was bound to make in the circumstances.

[28] We observe that if there had been sufficient evidence of self-defence it would have been open to counsel nonetheless, standing the appellant's evidence, to decide not to rely on the special defence, because of the tactical considerations outlined above.

[29] Even in such a case, it would not generally be for the court to intervene and impose a special defence of self-defence or any other special defence on the accused. However, that is not this case. The trial judge quite properly raised the issue and counsel quite properly indicated that he would not be relying on the special defence. There was no need for him to use any particular form of words in withdrawing the special defence. An indication to the trial judge that that was his position was quite sufficient. The judge made no error. He did not in fact make any operative decision at all, although we know what his views on the matter were. All he did was give effect to the concession made by counsel. Had he carried on regardless of this and addressed the jury on self-defence he would have risked undermining the position adopted by counsel. *Cf Duncan* at para [30].

[30] Whether or not to lodge a notice of special defence in the first place and thereafter whether or not to continue to rely on it, are matters entirely within the province of defence counsel. If they choose no longer to rely on such a defence, as happened here, then the circumstances envisaged in *SB* arise. The Lord Justice Clerk, as he then was, delivering the Opinion of the Court said the following at paras [34] and [35]:

> "[34] The responsibility for giving correct directions on the law to a jury rests firmly with the trial judge. Where a defence appears to be available on the evidence, it will generally be incumbent upon the judge to provide the jury with adequate directions on the nature of the defence. A failure to do so may result in an accused person being found guilty of a greater offence, or even simply an offence, of which he should not have been convicted. This was part of the rationale in *Ferguson* v *HM Advocate* 2009 SCCR 78 (following *R* v *Coutts* [2006] 1 WLR 2154, Lord Bingham at para 12). The issue there was determined on the basis that it had been unfair to the appellant, who had been charged with murder, to omit directing the jury on the alternative verdict of culpable homicide, even although neither the Crown nor the appellant had raised the possibility of such a verdict.
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> [35] It is important not to extend the *ratio* in *Ferguson* beyond its parameters. It is one thing for an accused not to refer specifically to an available defence in a jury speech. It is quite another for the accused to state specifically to the court that a particular defence is not being advanced. In the latter situation, there may still be occasions in which the court may nevertheless decide to leave such a defence for the jury's consideration. The normal position, however, will be that the court should accept the concession and direct the jury accordingly. It will only be in quite exceptional circumstances that such a course could be regarded as resulting in an unfair trial."

[31] There are no such exceptional circumstances in this case. It follows that the appeal must be refused.