APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 32
HCA/2020/377/XC
HCA/2020/367/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEALS AGAINST CONVICTION AND SENTENCE

by

(1) ROSS MacDOUGALL and (2) DAWN SMITH

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: McConnachie QC; Faculty Services Limited Edinburgh for Craig Wood & Co, Inverness
Second Appellant: P Nelson, McKenzie, Sol Adv; Martin Johnston & Sorcha, Kirkcaldy
Respondent: S Borthwick, AD; Crown Agent

22 June 2021

Introduction

[1] The appellants were convicted of the murder by stabbing of Tracy Walker at an address in Shetland on 30 July 2019. The first appellant was sentenced, as actor, to life imprisonment with a punishment part of 23 years, with the second appellant being

sentenced, on an art and part basis, to a punishment part of 21 years, reduced to 20 years and 2 months to reflect a prior period spent on remand. Each appellant lodged a notice incriminating the other and neither gave evidence.

[2] They both appeal against conviction and sentence. It is submitted that the trial judge misdirected the jury. In particular, the first appellant contends that the judge erred in directing the jury that they could only convict the second appellant on an art and part basis, rather than as actor. It is submitted for the first appellant that there was sufficient evidential basis to direct the jury that they could convict the second appellant alone as the principal actor. On behalf of the second appellant, it is submitted that the trial judge erred in directing the jury that there was no basis to consider the possibility that the first appellant had carried the knife used in the murder to the locus, on which basis he alone might have been convicted. The sentences imposed are challenged as excessive.

The circumstances

[3] Tracy Walker was killed in a car park close to the flat of a drug dealer, Gary Latham, from whom she was planning to buy drugs. The cause of death was sharp force injuries to the neck and external compression of the neck. During the evening various people, including both appellants, who took heroin and crack cocaine there, had been in Latham's flat for the purposes of obtaining drugs. Witnesses Ross Sutherland and Michael Morrice were amongst them. Later that night, the appellants both wanted more drugs but did not have the means of paying for them, and tried (unsuccessfully) to obtain them on "credit" from Latham. They kept talking about ways which they could get money for drugs. They were seen to be 'giddy' when discussing this together.

[4] Unfortunately for Tracy Walker, the appellants overheard her phone call to Latham asking him to supply her with drugs when she would have cash, after midnight. The appellants spoke irately about Tracy Walker. They continued to talk about getting money, and spoke of a common plan to rob a person or a house in order to do so. When Walker arrived, Latham, who by now thought the appellants were going to rob her, told her to wait at the back of the car park, where it was dark, until he got rid of the appellants. She left in the direction of the car park.

[5] When Latham returned the appellants were getting ready to leave. As the appellants got ready to leave, the second appellant pulled a knife from her handbag. It was black, and the blade was about 8-10 inches long. After the appellants left, Latham and Morrice heard moaning from outside and thought the appellants were having sex. They looked out. Latham described the first appellant as being on top of someone else, in a press up position, directly behind Flat 23. He was roaring with anger and attacking someone. Morrice said the first appellant was on his hands and knees, with his hands at the head of the person beneath him, and his head covering theirs.

[6] Latham went outside and saw both appellants coming down from the top of the car park together. The first appellant had what looked like "a big, evil-looking knife in his hand". Morrice heard Latham arguing with the first appellant, and saying "put the blade down". The first appellant was acting aggressively, and chased Latham back to the flat where he started kicking at the door and saying "I'll stab you".

[7] Shortly after that Latham found the deceased, who was not breathing, with a deep gash on her throat. There was a knife nearby, with a sheath, lying above her head. In its sheath it was similar to the one the second appellant had pulled from her handbag earlier. The knife was later identified as a filleting knife belonging to the second appellant's

stepfather, Ian Pottinger, who had last seen it in his home, about a week before the murder. The second appellant had ready access to that address. Human blood on the knife was consistent with its use to inflict the fatal neck wound. A nearby stone weighing 4.86kg displayed several blood stains matching the DNA profile of the deceased. DNA matching the deceased, found near the opening of the second appellant's handbag, could have been deposited by direct or indirect transfer.

[8] Subsequent to the attack, early on the morning of 30 July, the appellants attended the home of Kyle Swannie. The first appellant asked for a change of clothes as he had been in a fight. Swannie provided clothing, and also gave the second appellant a hoodie to wear. He asked Swannie to give him an alibi "for the fight"'. He was stressed and his behaviour was frantic. When Swannie asked him what he wanted him to say the first appellant said "Just say me and Dawn were here all night".

[9] The same morning another witnesses, Barry Colquhoun, spoke to the second appellant who told him that she knew what had happened to the deceased and that she was there when it had happened. She told him that the first appellant had killed Tracy Walker, struck her with a rock to the side of her head and struck her one more time on the head. She said that the deceased was on the ground and the first appellant cut her with a knife. For about ten minutes she could hear Tracy gargle, and hold her neck. She said that after the attack the first appellant handed her the knife and took some paper out of her bag and put the knife in her bag. They then left the scene, found the first appellant's mother's car and went for a long drive into the hills, where they had disposed of their clothes, phones and the weapon. (This was obviously untrue, on the evidence). Questioned by police at a later stage, the second appellant said that she had been back home that night by 2200 hrs.

[10] Margaret Haughian was a prison escort officer responsible for transporting the appellants from Shetland to Grampian Prison in Peterhead after their appearance in the sheriff court. They took a flight from Sumburgh Airport to Aberdeen Airport. During the flight she was handcuffed to the second appellant who said, while nodding towards the first appellant: "We are going to spend the next 10 to 15 years together for something I've done".

[11] In a conversation when remanded in HMP Grampian, the first appellant asked another inmate, Hildtich, what people in Shetland were saying about the case. Hilditch said people were saying that the first appellant had pretty much decapitated the victim with a machete. The first appellant replied to the effect that it was not a machete, it was a knife Dawn had given him.

The trial and directions to the jury

[12] The Crown's case at trial focussed on the first appellant being the principal actor, with the second appellant providing him with the knife used in the murder.

In his directions to the jury, the trial judge stated as follows:

> "The only basis upon which you could convict Dawn Smith is that she was acting in concert with Ross MacDougall as I have explained concert to you. You could not convict her of murder if you are not satisfied that she was acting in concert with him".

He also reminded the jury of the defence case for the first appellant, which raised the possibility of the second appellant being the actor in the murder.

[13] In relation to the submissions made by counsel for the second appellant, the trial judge directed the jury that a suggestion that the first appellant could have taken the knife from Pottinger's house was unsupported by evidence; that Colquhoun's evidence that the second accused herself told him that she had taken the knife from her father's house had not been challenged in cross-examination; and that to consider the suggestion would involve

pure speculation which was not permitted. There was no evidence upon which they could have concluded that the first appellant had taken the knife.

Analysis and decision

Conviction

First appellant

[14] The Crown had originally maintained that the issue raised for the first appellant had not been a live issue at trial. It became apparent that this argument was not tenable. In advance of the trial, the first appellant had lodged an incrimination of the second appellant. The only lines pursued by his senior counsel were (i) that the main Crown witnesses were not reliable or credible and (ii) that there was evidence which, if the jury rejected certain central elements of the Crown case, and accepted an alternative analysis offered by counsel, might justify the conclusion that the second appellant alone was guilty as actor. The Crown accepted that the comment made by the second appellant to Margaret Haughian was capable of being considered an unequivocal admission, which would require little by way of corroboration. It was also accepted that there was evidence which could corroborate that, and that there was thus at least a "possible" sufficiency against the second appellant as actor. This, however, was extremely weak compared with the case against the first appellant as actor. It is interesting to note that in his report the trial judge does not suggest that there was not a sufficiency of evidence against the second appellant as actor. Instead he states that:

> "The only basis upon which the jury were invited to convict the appellant was that set out by the Advocate Depute in his address to the jury and narrated at para [17] above. What is stated in these grounds is in essence what Mr McConnachie submitted to the jury, which they rejected."

[15] Like the written submission for the Crown, this misses the point. Live issues at trial are not dictated purely by what is the Crown theory of the case. Against the relevant background it is, in our view, impossible to assert that the matter was not a live issue at the trial. The fact that the evidence was weak compared with the evidence that first appellant was actor did not mean that it was not a live issue; it merely meant that the persuasive force of the evidence might be very fragile when considered in light of the evidence overall. Ultimately, when considering the effect of the Crown acceptance that there was a sufficiency against the second appellant as actor, the advocate depute conceded that the matter was a live issue at trial. We consider that a sensible concession in light of the relevant authorities (see: *Gardener v HMA* 2010 SCCR 116 at para [17]).

[16] After reminding the jury of the speech by counsel for the first appellant, the trial judge directed the jury:

> "It's for you to decide whether there is or is not merit in the criticisms which he made. He asked you to find that on the evidence that Dawn Smith, the second accused, was alone responsible for the murder of Tracy Walker for the reasons which he gave."

[17] The difficulty with this direction was that the trial judge had already directed the jury, clearly and repeatedly, that the only basis upon which they could convict the second appellant was that she was acting in concert with the first appellant who was actor in the murder. He had effectively excluded from the jury's consideration the possibility that the second appellant might be guilty other than on an art and part basis. The directions which were given did not put into proper focus the issues, and were to an extent contradictory. To that extent there was a misdirection.

[18] The question which then follows is whether that misdirection amounted to a miscarriage of justice in terms of section 106(3) of the Criminal Procedure (Scotland) Act

1995. Whether a misdirection amounts to a miscarriage of justice will depend on the whole circumstances of the case. The court will not examine parts of the charge to the jury in isolation but will view the summing-up as a whole, and importantly, against the background of the whole evidence in the case, as well as the arguments at trial (*Muir* v *HM Advocate* 1933 JC 46 at page 49, per Lord Sands). It is important to note that not every misdirection will amount to a miscarriage of justice (*AM* v *HMA* [2006] HCJAC 46 at para [7]; *McGougan* v *HMA* 1991 SLT 908 at page 910). That is the case even where the misdirection can be said to be material (*Docherty* v *HMA* [2014] HCJAC 94 at para [33]). Relevant factors include the seriousness, importance and materiality of the error which arises, assessed in the context of the evidence at trial.

[19] We are unable to reach the conclusion that the misdirection in this case amounted to a miscarriage of justice. Whilst it is possible to say that one view of the evidence might have allowed a conclusion that the second appellant was actor, and such a conclusion might have been open to the jury had they rejected the central propositions upon which the Crown case was based, the evidence that the first appellant had in fact been the actor – which included a very clear and unequivocal admission to using the knife - was extremely strong. The first appellant did not give evidence, and the issue arose only by means of an alternative analysis of the evidence, which involved the need to reject significant evidence which the jury would have little reason to discard.

[20] Moreover, whilst the evidence and the defence case might have raised the possibility of the second appellant as actor, a conclusion that she had acted alone is not one which might reasonably have been reached by the jury on the evidence as a whole. There was overwhelming evidence that the two appellants had acted together in the course of a common purpose in the pursuit of which they murdered the deceased, which included:

- The two appellants had been heard, in Latham's flat, talking about how they could obtain money in order to purchase drugs. They talked about trying to get money robbing someone or a house. They were giddy, whispering to each other and said they had to get money somehow. There was evidence that the second appellant jumped up onto the first appellant, wriggled herself on him and said, "We will get money from someone or we will rob someone."
- The appellants had overheard the phone call made by the deceased to Latham and spoke between themselves about her. There was also evidence that both appellants felt some anger towards the deceased, which arose from prior, unrelated events.
- The second appellant was seen to be in possession of a knife in Latham's flat. The evidence strongly suggested that she provided that knife to the first appellant, who then used it in the murder.
- The second appellant admitted to Colquhoun that she was present when the attack had happened and that she had stood and watched for ten minutes while the deceased gargled and held her throat.
- Neither of the appellants assisted the deceased or called an ambulance.
- The evidence suggested that at some stage subsequent to the attack the bloody knife came into contact with the second appellant's handbag, or she handled her bag after coming into contact with the deceased's blood.
- Eyewitnesses saw the appellants leaving the car park together; they had remained in each other's company from the time of planning to rob someone to a point subsequent to the death.
- Both appellants left the locus in the car belonging to the first appellant's mother and later attended the home of Swannie, who gave them a change of clothes.

[21] Standing the evidence, the likelihood that the jury would have convicted the second appellant as actor yet acquitted the first appellant, is, on the evidence virtually non-existent. In these circumstances the appeal against conviction for the first appellant must fail.

Second appellant

[22] The submissions for the second appellant that the trial judge erred in the direction which is challenged are not tenable. The simple fact of the matter is that there was no evidence to support the contention made in counsel's speech. The only evidence placing any time frame on the removal of the knife was that it must have been within the week or so prior to the events giving rise to the murder. There was no evidence of the first appellant being in Pottinger's house. In contrast, there was evidence that the second appellant admitted taking the knife herself, and that it had been seen in her possession prior to the murder. The first appellant was only seen with the knife subsequent to the murder. There was simply no factual basis upon which the trial judge should or could have directed the jury to the possibility that the knife had been taken by the first appellant. As such, he was entitled to remove that hypothesis from the jury's consideration on the basis that it was speculation. There was no misdirection and so the appeal against conviction for the second appellant must be refused.

Appeals against sentence

[23] In his report the trial judge stated:

> "Having regard to the serious aggravations mentioned and following the guidance given in *HM Advocate* v *Boyle and Others* 2010 SCCR 103 at para [16] I considered that a punishment part significantly longer than 16 years was appropriate in the case of the appellant and selected a punishment part of 23 years (*Leathem* v *HM Advocate* [2017] HCJAC 10 and the cases cited therein; and *Davidson* v *HM Advocate* [2019] HCJAC 10)). I considered that the appropriate punishment part for Dawn Smith, having regard to the aggravations mentioned, was 21 years."

[24] The reason for the different lengths of the sentences lay in the first appellant's criminal record. We agree with senior counsel for the first appellant that only limited assistance can be gained from comparison with other cases but that those cases referred to by the trial judge were both of a more serious or sinister nature than the present one. We accept this was a case of extreme violence, and that it was aggravated by the purpose of robbery. Nevertheless we are persuaded that a sentence of more than 20 years for the first appellant was not merited, even having regard to his record. He has a conviction for assault to severe injury and danger of life by the use of a knife, for which a 16 month sentence was imposed, and another for possession of a knife which attracted 14 months. That record is a basis for differentiating the case of the second appellant. Although she too has prior convictions, those were not of the violent nature of those of the first appellant (although she does have convictions for possession of weapons). She has served a sentence of six months imprisonment for theft and bail charges. We will therefore quash the sentences and impose a sentence of life imprisonment with a punishment part of 20 years for the first appellant and a sentence of life imprisonment with a punishment part of 18 years for the second appellant. In the latter case the period will be reduced to 17 years and 2 months to reflect the period on remand.