APPEAL COURT, HIGH COURT OF JUSTICIARY

[2011] HCJAC 78

Appeal No: XC194/08

Lord Justice Clerk

Lord Osborne

Lord Kingarth

Lord Eassie

Lord Carloway

OPINION OF THE LORD JUSTICE CLERK

In APPEAL AGAINST CONVICTION

by

SAMUEL PETTO

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the appellant: Kerrigan QC, Mason; John Pryde & Co

For the Crown: Prentice QC Sol Adv, AD; Crown Agent

10 August 2011

Introduction

[1] On 4 October 2004 at the High Court in Glasgow, the appellant pled guilty to the following charges:

"(1) On 14 March 2004, at Flat Ground Right, 308 Allison Street, Glasgow you Samuel Petto did assault Arthur Thomas Rawlinson, then residing there, and did repeatedly strike him on the body with a knife or similar instrument and did kill him ...

(3) On 15 March 2004 at 308 Allison Street, Glasgow you Walter Charles Sneddon Thomson ... Steven Patrick Telford and Samuel Petto did, whilst acting along with another, pour petrol or similar accelerant throughout Flat Ground Right there, and set fire to said premises as a result of which an explosion occurred and fire took effect on said premises whereby the block of flats at 308 Allison Street, Glasgow was extensively damaged and flames, smoke and fire gases arising from said explosion and fire entered the common close and stairwell of said block and the other flats within said block as a result of which Myra Donachie, then residing there, received injuries from which she died on 16 March 2004 at Glasgow Royal Infirmary, Glasgow, and you did murder her."

[2] On 22 October 2004 the appellant was sentenced to ten years' imprisonment on charge (1) and to life imprisonment with a punishment part of eighteen years on charge (3). He now seeks to withdraw his plea of guilty to charge (3).

[3] This appeal raises an important question regarding the *mens rea* of murder. It arises as a consequence of the decision of this court in *HM Adv* v *Purcell* (2008 JC 131).

The facts

[4] The appellant lived in the tenement flat specified in the libel. The deceased Rawlinson lived there with him. On the date libelled they had a heated argument. The appellant had been drinking. He killed Rawlinson by stabbing him eight times.

[5] In the course of the day, the appellant and others devised a plan to dispose of Rawlinson's body. The co-accused Thomson and Telford bought petrol canisters. Then they went to a filling station and filled three canisters with petrol. The appellant and Thomson went to the flat. Telford followed them there. The appellant and Thomson poured out most of the petrol throughout the flat and ignited it. Telford arrived at the scene just as the explosion occurred. The explosion caused the dividing wall between the flat and the close to collapse and blew the windows out. The inrush of air caused the fire to spread rapidly. Residents in the building felt it shake and saw a fireball outside the windows. The appellant, Thomson and Telford escaped from the building. Firemen had to crawl through the rubble into the close, where there was intense fire and heavy smoke. The building and neighbouring buildings were evacuated.

[6] Mrs Myra Donachie was found lying unconscious in the hall of her flat on the second floor. She had tried to leave the building but had been overcome by the smoke. She was taken to hospital. She was found to have soot around her airway and a high level of carbon monoxide in her blood. She died on the following morning.

The issue in this appeal

[7] This appeal is founded on the proposition that, since the libel did not allege that the appellant assaulted Mrs Donachie, or had any intention to cause injury to her or any other person, it did not instruct a relevant charge of murder. The plea of guilty to murder having therefore been tendered in error, the appellant should be allowed to withdraw it.

Submissions for the appellant

[8] Counsel for the appellant submitted that the modern definition of murder was that set out in the following definition in Gordon's *Criminal Law*:

"the actual situation is that there is murder wherever death is caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences" (3rd ed, at para 23.33).

An Extra Division had approved that definition in *HM Adv* v *Purcell* (*supra*). This prosecution had proceeded on a doctrine of constructive malice that was not now accepted in Scots law. Statements by Hume, Alison and Macdonald on murder in the course of fire-raising were no longer good law (Gordon, *op cit*, para 23.32). It was not the law that any homicidal conduct displaying wicked recklessness constituted murder. There had to be wicked recklessness in carrying out an intention to cause physical injury. The Crown's approach was that a person who caused death was guilty of murder where his actings demonstrated his willingness to risk causing death or serious injury, or where such a risk was obvious. That approach had been rejected in *HM Adv v Purcell* (*supra*). Wilful fire-raising was an offence against property. Setting fire to a house could not of itself be deemed to be an attack on the person. There would have to be circumstances from which an intention to do physical harm could be inferred. The libel failed to aver that the appellant knew that there were other people living in the building or that the appellant knew of the consequences if the petrol should explode. This was one of the exceptional cases in which a plea of guilty could be withdrawn (*Pickett* v *HM Adv* 2007 SCCR 389).

Submissions for the Crown

[9] The advocate depute submitted that if the *ratio* of *HM Adv v Purcell* (*supra*) was that for murder there had to be an act amounting to an assault, the decision was wrong. Murder could be committed without any distinct intention to inflict harm or injury. Wicked recklessness was a distinct form of *mens rea* for murder. It need not be attributable to an intention to assault or cause injury (*Brennan v HM Adv* 1977 JC 38; *Cawthorne* v *HM Adv* 1968 JC 32). Any criminal act carried out in a wickedly reckless manner and with disregard for the consequences where there was a real and foreseeable risk that death would result, was sufficient to constitute murder. Fire-raising was such an act. The institutional writers envisaged a wider definition of murder than that adopted in *HM Adv v Purcell* (*supra*). If however there was a general rule in murder that required an intention to injure, a case of wilful fire-raising such as this either (1) justified the inference that there was such an intent; or (2) in keeping with the cautious suggestion in Gordon's *Criminal Law* (at para 23.32, *infra*), was an exception to the general rule. The act libelled had a direct and violent effect on the occupants of the building and was likely to cause injury, death or fear and alarm. The conclusive nature of a plea of guilty meant it could be withdrawn only in exceptional circumstances, which were not present in this case (*HM Adv* v *Reedie* 2005 SLT 742).

Conclusions

[10] Charge 3 is a charge of wilful fire-raising and murder. It specifies the locus, the date, the circumstances and the victim. The appellant pled guilty on considered legal advice. The appellant's knowledge that other persons were in the building was conceded. The appellant's knowledge of the likely consequences of his action was a matter of reasonable inference from the facts alleged. In my opinion, there is no substance in the argument that the libel was irrelevant. In any event, the appellant did not object to the relevancy of the charge and it is agreed that the deficiencies in the charge of which counsel for the appellant has complained were made good in the Crown narrative. But even if the drafting of the charge was deficient in any way, it cannot be said that the appellant pled guilty to a charge that did not libel a crime at all. In my opinion, the appellant has not shown a relevant ground on which we could allow the plea to be withdrawn (cf *HM Adv v Reedie* 2005 SLT 742; *Pickett v HM Adv* 2007 SCCR 389). If I am right, that is sufficient to dispose of the appeal.

[11] However, the appeal also raises the important question of *mens rea*. In my opinion, it is misconceived in its reliance on the decision of this court in *HM Adv v Purcell* (*supra*). In that case, the accused had driven a car recklessly and caused the death of a child on a pedestrian crossing. It was accepted by the Crown that he had had no intention to injure anyone.

[12] This case is different. It concerns the *mens rea* of the specific act of setting fire to a ground floor flat in a typical Glasgow tenement. The appellant and his co-accused set fire to the flat deliberately, using a large quantity of petrol as an accelerant. The defence has conceded all along that the appellant knew that people were living in the building. On the facts that concession could not have been withheld.

[13] The appeal proceeds on the assumption that a person who commits such an act cannot have intended to cause injury or death. I do not accept that assumption. A tenement building of the kind with which this case is concerned is densely populated. There are numerous flats on several floors. Those living on the upper floors have access to street level, and therefore a means of escape in an emergency, only by the internal staircase leading from the common close. All of this is within judicial knowledge. Where a person starts a major fire on the ground floor of such a building, the inevitable conclusion is, in my view, that he does so in the certain knowledge that those who are in the building, and especially those in the upper floors, will be at a grave risk of being killed or seriously injured in consequence of the fire. While there may be no desiderative element in the mind of such a person, his appreciation of the virtual certainty that such a risk will eventuate and his deliberate acceptance of it should, in my opinion, be rightly equiparated with an intention that such consequences should occur.

[14] The advocate depute suggested to us that, whatever may be the position in other forms of homicide, the rule in Scots law is that where a person sets fire to a building and the fire causes death to someone inside it, the crime is murder. This submission relies on certain statements of the writers.

[15] Hume discusses the topic in the following way:

"if the circumstances indicate a wicked and malignant spirit, a resolution to do some violent and atrocious mischief; here, though the event prove more disastrous than the pannel was absolutely bent upon, or though it take a course somewhat different from what he intended, it is clear, that in many cases it will be quite the same, in the estimation of law, as if he had foreseen and intended all that happens" (*Commentaries*, I, 23):

He gives the following example:

"Or again, if a man set fire to his neighbour's corn in the barn-yard, meaning to burn the corn, but the fire catches the adjoining dwelling-house, and the house is consumed, and the family perish in it, this is a clear ground, on which to indict the author of this calamity for murder, as well as fire-raising" (I, 24).

He then discusses cases of murder "where a purpose to do a certain unlawful act is accidentally followed by an injury of a quite different degree" (I, 25):

"I allude to the case of a person who sets fire to his own house, being insured, and inhabited by himself, in order to defraud the underwriters; but the flames spread, and the house of his neighbour also is destroyed. It is true, the main purpose here, is a purpose of lucre to himself: yet still he cannot in any proper sense be said to be free of malice to his neighbour, of whose evident danger, from the flames thus kindled, he has shewn his utter disregard. And indeed, if the case be put somewhat more unfavourably for the pannel, as for instance that the two houses are under one roof, or are floors of the same tenement, or are otherwise so intimately connected, that the one cannot be burned but at a great risk to the other, there seems to be little doubt of the decision that ought to be given."

[16] Alison's formulation of the principle is as follows:

"In like manner, if one wilfully set fire to a house with intent merely to destroy a building, but the fire kill an individual, this will be held as murder, though the fire-raiser had no reason to believe that any person was in the house; or if he set fire to a stack-yard, and the flames spread to a dwellinghouse, and kill any of the inmates, this is nothing less than murder... In like manner, if one from the desire of lucre set fire to a house of his own which is insured, and a life is lost in consequence in that house, or in his neighbour's, to which the flames have spread, this appears to be no lesser crime; for here equally, as in the other cases, death has ensued in consequence of the commission or attempt to commit a highly criminal act" (i,18).

Burnett is to similar effect. He says:

"Nay, though injury to the person, either directly or constructively, be not in the contemplation of the killer, it will amount to murder, if death ensues from any highly mischievous or wicked purpose: as, if one wilfully sets fire to a house, with an intention merely to destroy the dwelling, and any person happening to be within is consumed in the flames. This will be murder in the fire-raiser, though he not only intended no corporeal injury to any individual, but had every reason to believe that no person was in the house; and in this respect, Homicide is perhaps different from some other crimes, where an injury, resulting from a different purpose, will not always be held to participate of that purpose" (*Treatise*, pp 5-6).

[17] Macdonald states the principle in the following way:

"When death results from the perpetration of any serious and dangerous crime, murder may have been committed, although the specific intent to kill be absent. This is so where the crime perpetrated involves either wilful intent to do grave personal injury, or the wilful use of dangerous means implying wicked disregard of consequences to life" (*Criminal Law of Scotland*, 5th ed, p 91).

He gives as an example of this:

"if by an act of wilful fire-raising, persons in the house or neighbouring houses are killed."

[18] The current edition of Gordon's *Criminal Law* attempts to synthesise these sources in the following way:

"One of the examples Hume gives of the operation of dole is where A sets fire to a house and kills B in consequence, which he regards as murder. Burnett holds it to be murder where A sets fire to a house and kills someone who happens to be inside, even although he acted without intending any corporal injury to anyone and had every reason to believe the house empty. Macdonald also says it is murder "if by an act of wilful fire-raising, persons in the house or neighbouring houses are killed." There are no reported cases of this kind, and the statements in the textbooks can be disregarded as deriving from a doctrine of constructive malice of a kind no longer accepted in Scots law. It is submitted that death caused by a fire-raiser cannot be murder unless the fire-raising displayed wicked recklessness. It may be that in view of the serious nature of fire-raising this case forms an exception to the suggested rule that murder also requires an intention to cause physical injury, but in the absence of any authority it cannot be asserted that this is so. Fire-raising is certainly a very serious and potentially dangerous crime, but so also is driving a car recklessly and under the influence of drink, and to cause death in the latter way is not murder in modern law" (para 23.32).

I am not convinced that wilful fire raising that causes death is truly an exception to the general rule that the *mens rea* of murder requires an intention to cause injury; nor am I persuaded that the case of causing death by wilful fire raising is analogous with that of causing death by driving a car recklessly and under the influence of drink. In a typical case of the latter kind, the driver loses control of his car, which mounts the pavement, and kills a pedestrian. In such a case the driver cannot be said to have intended to drive onto the pavement or to injure the victim. Fire raising is however a wilful act and, for the reasons that I have given, I consider that the requirement of intent in this case is satisfied.

[19] Looking at the matter more generally, however, I think that in a case of the former kind the statements of the writers that I have quoted create a difficulty in circumstances where there can have been no deliberate intent to kill or to cause injury. The statements of Alison and Burnett, and perhaps also Hume and Macdonald, on the case where death results from wilful fire raising are based, in my opinion, on a doctrine of constructive malice that is insupportable in modern law. There could be a case where one who deliberately set fire to a building had no reason to know that there was someone inside: for example, where a tramp was sleeping inside a ruined barn. I do not accept that in such a case Scots law should recognise an exception to the general principles of *mens rea* on which *HM Adv* v *Purcell* (*supra*) was decided.

[20] Since this appeal can be decided on the narrow basis as to the meaning of intent in the clear-cut circumstances of the case, it is unnecessary for us to explore the greater profundities of the mental element in murder and culpable homicide in contemporary Scots law. The discussion of that subject in Gordon's *Criminal Law* (3rd ed, paras 23.10-23.22) should suffice to persuade any reader that the subject is in need of a thorough re-examination. The submissions that we have heard in this case and in the appeal in *Telford* v *HM Adv*, with which it was conjoined, have given us a glimpse of at least one of the major problems. It is regrettable that in this appeal, heard by five judges, in which the Crown sought to establish an important principle, the advocate depute relied almost exclusively on Scottish sources, referred briefly to some English case law and failed to refer us to any decisions on this familiar fact-situation in other English speaking jurisdictions.

[21] From my own researches on the point, pursued in response to the Crown submission, I have the impression that other English-speaking jurisdictions may have attained greater maturity in their jurisprudence on this topic than Scotland has. In Scotland we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy. In recent years, the authors of the draft Criminal Code for Scotland (2003) have greatly assisted our thinking on the matter; but we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice.

[22] My own view is that a comprehensive re-examination of the mental element in homicide is long overdue. That is not the sort of exercise that should be done by *ad hoc* decisions of this court in fact-specific appeals. It is pre-eminently an exercise to be carried out by the normal processes of law reform.

Disposal

[23] I propose to your Lordships that we should refuse to allow the plea to be withdrawn and refuse the appeal.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Osborne

Lord Kingarth

Lord Eassie

Lord Carloway

[2011] HCJAC 78

Appeal No: XC194/08

OPINION OF LORD OSBORNE

In APPEAL AGAINST CONVICTION

by

SAMUEL PETTO

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the appellant: Kerrigan QC, Mason; John Pryde & Co

For the Crown: Prentice QC Sol Adv, AD; Crown Agent

10 August 2011

[24] I agree with your Lordship in the chair that the appeal should be refused.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice Clerk

Lord Osborne

Lord Kingarth

[2011] HCJAC 78

Appeal No: XC194/08

OPINION OF LORD KINGARTH

In APPEAL AGAINST CONVICTION

Lord Eassie

Lord Carloway

by

SAMUEL PETTO

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the appellant: Kerrigan QC, Mason; John Pryde & Co

For the Crown: Prentice QC Sol Adv, AD; Crown Agent

10 August 2011

[25] I have had the advantage of reading in draft the opinion of your Lordship in the chair, and for the same narrow reasons expressed therein, I too would be in favour of refusing the appeal.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2011] HCJAC 78

Appeal No: XC194/08

Lord Justice Clerk

Lord Osborne

Lord Kingarth

Lord Eassie

Lord Carloway

OPINION OF LORD EASSIE

In APPEAL AGAINST CONVICTION

by

SAMUEL PETTO

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the appellant: Kerrigan QC, Mason; John Pryde & Co

For the Crown: Prentice QC Sol Adv, AD; Crown Agent

10 July 2011

[26] I agree with your Lordship in the Chair that, for the reasons given by your Lordship in paragraph [10] of your Lordship's Opinion, the appellant has not demonstrated any relevant grounds upon which he may be permitted to withdraw the plea of guilty which he tendered, on legal advice, to charge (3) on the indictment and that, on that account, this appeal against conviction falls to be refused.

[27] I am also in agreement with the view which your Lordship expresses on the wider question canvassed in the immediately succeeding paragraphs of that Opinion. I consider that the deliberate setting of fire to a building in which it is known that persons are present can constitute a sufficient act to found a charge of murder. Plainly, setting fire to the building is a method which an assailant may select as a means of inflicting personal harm or death. If the setting of the fire results in the death of occupants additional to those whom the fire-setter actively intended to harm, the fire-setter would nonetheless also be guilty of their murder. He is taken to have intended, as respects them, the natural and foreseeable consequences of the wilful act of setting fire to the building in which he knows that people are present, namely that they may suffer death or serious injury, and it would matter not that those who perish were not his intended target. Even in the absence of a specific or any target for the infliction of injury, the causing of personal injury or death to the occupants known to the fire-setter to be in the building, will usually be foreseeable with reasonable certainty. In the context of the typical Scottish urban tenement, such as that with which the present case is concerned, there is, to my mind, no good reason for treating a ground floor flat as a building distinct from the tenement as a whole.

[28] In the present case, it is conceded that the appellant and his co-accused knew that some, if not all, of the other flats in the tenement were occupied at the time at which they set the fire. As your Lordship in the Chair has narrated, the operation of wilfully setting fire to the ground floor flat involved dousing the interior of that flat with large quantities of petrol - sufficiently large to cause, in effect, an explosion destructive of the structures of the tenement and a very rapidly developing fire. Given the nature of those fire-setting activities, I consider that the appellant must be held to have had foresight of the virtual certainty, or obviousness, of the adverse consequences of that wilful fire-setting activity for the safety of those known by him to be in the tenement building.

[29] I would further observe that one is here concerned with a wilful criminal act, intended, on any view, to destroy property (and evidence) but also carrying the obvious consequence of death or injury to the other people in the tenement. That is, as your Lordship in the Chair acknowledges, a different situation from the activity with which the Court was concerned in *HM Advocate* v *Purcell.* The activity in issue in that case was driving a motor car in a reckless manner, but without an intention to cause harm to anyone or, indeed, any property.

APPEAL COURT, HIGH COURT OF JUSTICIARY

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[2011] HCJAC 78

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OPINION OF LORD CARLOWAY

In APPEAL AGAINST CONVICTION

by

SAMUEL PETTO

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

_____

For the appellant: Kerrigan QC, Mason; John Pryde & Co

For the Crown: Prentice QC Sol Adv, AD; Crown Agent

10 August 2011

[30] I agree that, for the reasons given in paragraph [10] of the Opinion of your Lordship in the chair, this appeal must be refused.

[31] I also agree with your Lordship that wilful fire raising of the type under consideration in an urban tenement provides sufficient intent for the crime of murder. It is not an exception to the principle that murder requires a deliberate attack intended to cause injury. Rather, in the circumstances here, the nature of the fire raising would have merited a charge of assault on the inhabitants, even if the fire raiser had not known the specific locations or identities of those inhabitants. It would, however, be different if the presence of inhabitants could not have been anticipated.

[32] Nevertheless, again following the analysis and research of your Lordship in the chair, a comprehensive re-examination of the classic definition of murder, which (subject to *Drury* v *HM Advocate* 2001 SCCR 583) remains that set out in *Macdonald: Criminal Law (*5th ed, at p 89), to be carried out in the normal course of law reform, may be desirable.