APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 29
HCA/2017/0000365/XC

Lord Justice Clerk
Lady Paton
Lord Brodie

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

MARC HANLEY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Brown, QC, Considine, Sol Adv; Faculty Services Limited
Respondent: M Meehan, AD; Crown Agent

1 June 2018

[1] The appellant was indicted *inter alia* on two charges of attempting to murder Jay Fraser (charges 1 and 3) and one of attempting to pervert the course of justice (charge 2). After trial he was convicted of the latter charge, as amended. The amended libel was that on 20 and 21 June 2016, at Barlinnie prison and elsewhere, he:

> "knowing that Agnes Boyd … or another female witness who had provided a statement to the police, was a witness against you and that she was due to attend an identification parade on 21 June 2016 at which she could identify you as being

> responsible for an alleged assault on Jay Fraser … did contact Robert Duncan and Daniel Baxter … by telephone and did instruct them to induce or coerce said Agnes Boyd or another female witness who had provided a statement to the police, not to identify you or anyone else as being responsible for said crime at said identification parade, and this you did with intent to pervert the course of justice and you did thus attempt to pervert the course of justice."

[2] Included in the original charge, prior to the words "and this", were the words "whereby Agnes Boyd attended said identification parade and did not identify you or anyone else having been induced or coerced to do same". The Crown however successfully moved to amend the charge, and *inter alia* these averments were deleted. Arguments that (a) the amended charge was irrelevant; and (b) that there was insufficient evidence to prove the offence were repelled by the trial judge.

The Facts

[3] On 4 June 2016 the witness Agnes Boyd had given the police a signed statement in which she clearly implicated an individual known to her as Marc Hanley in the offence which became charge 1 on the indictment. To secure identification evidence relating to this individual an "old fashioned" identification parade was arranged for 21 June 2016. On 20 and 21 June 2016, whilst on remand in Barlinnie Prison in respect of charge 1, the appellant repeatedly telephoned two friends and associates instructing them to induce or coerce said Agnes Boyd by giving her drugs and money not to identify him or anyone else as being responsible for the crime at an identification parade. The calls included one made on 20 June at 1852 hrs and one made on 21 June at 0727 hrs. There were other subsequent calls where he remonstrated with an associate for not "sorting" witnesses out for him, the trial judge making specific reference to one made at 2100 hrs on the evening of the 21 June. None of the witnesses, including Agnes Boyd identified the appellant as being responsible, although there was no evidence that this was as a result of his instructions being carried out

and the amendment to the charge reflected this. The appellant gave evidence and admitted responsibility for the calls and the instructions given therein. He explained that he was innocent of the alleged stabbing and did what he did to support his innocence by ensuring that no witness identified him.

The trial judge's decision

[4] The trial judge, relying on *HMA* v *Harris* (No 2) 2011 JC 125 and *Dalton* v *HMA* 1951 JC 76 concluded that the libel was relevant in that it contained "clear specification that the appellant attempted to eliminate evidence which might tend to incriminate him in a future criminal charge". Those words echo the approach taken in *Dalton*. On the question of sufficiency, the trial judge noted that the test for proof of an attempt was whether the accused had "done some positive act towards executing his purpose, that is to say that he has done something which amounts to perpetration rather than mere preparation" (*Docherty* v *Brown* 1996 JC 48, Lord Justice Clerk (Ross) page 60)

[5] In the circumstances of the present case, the trial judge concluded, "the act of instructing, by prison phone, persons to offer money and drugs to a witness (or witnesses) of a serious crime, to fail to identify the caller at an identification parade is … a positive act towards executing his purpose", going beyond mere preparation to an act of perpetration. Once the instructions were issued, the matter was out of the appellant's hands. From subsequent calls, it was clear that he expected his instructions to be carried out.

Submissions for the appellant

[6] The argument rejected by the trial judge, and repeated in the appeal, was that the amended charge did not relevantly aver the crime of attempting to pervert the course of justice. In the absence of an averment that steps were taken in furtherance of the

instructions given by the appellant, which engaged the course of justice in the form of an attempt to influence a witness, the charge was irrelevant. The allegations made would have provided a sufficient basis for a charge of conspiracy or incitement to pervert the course of justice but that was not the libel which the appellant faced. An analogy was drawn with the circumstances arising in *Morton* v *Henderson* 1956 JC 55 (at 58), which involved a charge of attempted fraud. The critical omission in the present case, in distinction from the factually analogous case of *Dalton,* was the lack of any engagement with the witness(es). It was necessary, according to the appellant, that the overt act could "of itself" interfere with or hinder the course of justice, whereas the instruction of associates to perform such an overt act was "one step removed" from such an act, and therefore insufficient to constitute the *actus reus* of an attempt to pervert the course of justice. In the present case, therefore, it was not a "sufficiently proximate" act to constitute an attempt to pervert the course of justice (cf *Docherty* v *Brown* 1996 JC 48).

[7] Further, *esto* the amended charge was relevant, whilst it was accepted that the appellant made the calls and issued the instructions set out in the charge, in the absence of evidence of steps being taken to act on those instructions there was insufficient evidence led in support of it to enable the jury to convict. The "overt act" required for the crime of attempt to interfere with or impede the course of justice was missing. In *Dalton* v *HMA*, relied upon by the trial judge, the charge was in similar terms to the unamended charge in this case, but there, contact was made with the witness in an attempt to persuade her to refrain from making an identification of the accused, the very element absent in the present case. In *Baxter* v *HMA* 1998 SLT 414 it was held that it would be sufficient for a charge of incitement to murder that an appellant had encouraged or requested another person to commit that crime. Applying the reasoning of the trial judge in the present case to the facts

in *Baxter*, the result would not be incitement but attempted murder. The present case was similar to *Morton* v *Henderson* where the charge was one of attempting to defraud bookmakers and others by requesting the owner of a greyhound to administer a substance to impair its performance. The request was made but no further steps taken and it was held that the matter had not got to the state of perpetration as opposed to mere preparation. The crime of attempting to pervert the course of justice required that the course of justice has been obstructed, hindered, or interfered with. There had to be some overt act capable of achieving that result.

Crown submissions

[8] The *actus reus* of attempting to pervert the course of justice lay in conduct which constituted an attempt to impede, obstruct or hinder the course of justice. The phone calls constituted deliberate attempts to pervert the conduct of the identification parade, which at the time of issuing the instructions, the appellant knew was about to be held. The parade was a critical part of the police inquiry in respect of which the appellant had been remanded. Commission of the crime was not contingent on the instructed steps being taken by the appellant's associates.

Analysis and decision

[9] The trial judge observed that the crime of attempting to pervert the course of justice can come in many guises. In *Harris* the court narrated the development of the crime known in modern times as attempting to pervert the course of justice. The court noted the observation in *Gordon's Criminal Law of Scotland* paragraph 1.32 that attempting to pervert the course of justice had not been noticed by the institutional writers, and its emergence as a

specific crime under that *nomen juris* was a relatively modern phenomenon. The court observed [para 24]:

> "It is true that 'attempt to pervert the course of justice' is not noticed by the institutional writers as a distinct crime. Although 'conspiring … to defeat or obstruct the administration of justice' (by impersonating an accused) was part of the narrative of a charge in 1845 (*HM Advocate* v *Rae and Little*) the first appearance of it in a reported case as a distinct crime appears to have been in *Scott (AT)* v *HM Advocate* when the indictment libelled, among other crimes, an attempt to persuade certain witnesses to give false evidence in criminal proceedings. It might, no doubt, have been charged as subornation of perjury. The issues arising in the appeal were not concerned with the name under which the charge in question had been framed. Lord Carmont, however, at page 93 observed 'I do not suggest that attempts to pervert the course of justice, as a crime might not be constituted by inducing persons to make false statements outwith the witness box …. '".

[10] In *Harris* the court noted some of the many forms in which an attempt to pervert the course of justice may be committed. For example in *Dalton* attempts to persuade an eye-witness not to identify a particular person could constitute the crime. As in the case of *Scott* already referred to, this could no doubt have been charged as subornation of perjury, but that possibility did not prevent it from being relevantly averred as an attempt to pervert or defeat the ends of justice. In *HMA* v *Martin* 1956 JC 1, the libel of attempting to defeat the ends of justice was apt to apply to the attempt to secure the escape of prisoners from lawful custody. A prisoner escaped from legal custody, and two others were charged with aiding and abetting his escape, the libel containing the narrative of these acts and concluding that all three "did attempt to defeat the ends of justice". No doubt they could have been charged with prison breaking or the statutory offence of escaping from lawful custody, but the libel was held to be relevant, on the basis that "what is libelled here is but one species of a well-recognised and undoubted genus of crime". In *Harris*, the court went on to state (paragraph 28):

> "It is thus clear that by not later than 1961 it had been authoritatively recognised that attempting to pervert (or to defeat) the ends of justice was a crime according to the common law of Scotland and that the commission of that crime might take various forms."

[11] That there may be more than one way relevantly to aver a crime contrary to the course of justice thus appears from the examples cited. This appears consistent with Hume's treatment of the subject. Hume conceives of a broad class of "offences against the course of justice" (Commentaries on Crimes, vol I, chaps. XI – XV), including those where, "if there may be some doubt of the propriety of a charge of subornation, there seems, however, to be none of competently and severely punishing the offence, as a species of the *crimen falsi*, or as a conspiracy and machination, or under some other more detailed description, such as may suit the circumstances of the case" (p 383). In the particular context of attempted subornation, Hume adverts to "other the like proceedings, tending to corrupt the sources of evidence" (p 382, n 2,) and, in treating of punishments more generally (p 384), "any evil practice, tending to mislead, constrain, or corrupt the witnesses, or to destroy, suppress, or alter evidence of any kind" in the course of any criminal trial, as examples of "an interference with the course of justice".

[12] In all cases, the essence of the charge is the interference with what would otherwise be expected to have come to pass in the ordinary and uninterrupted course of justice in the particular case. To that extent, the *nomen juris* adopted at the discretion of the Crown in any particular case may be of limited significance (cf Gordon, *supra,* paras 1.32 – 1.36). The fact that a different charge might have been libelled does not mean that a charge of attempting to pervert the course of justice is for that reason irrelevant. It is thus not surprising in *Harris* (para 26) to see attempting to effect an escape from lawful custody recognised simply as "a species of the more general class of crime of taking steps to frustrate the ends of criminal

justice." In *Harris* it was argued that the scope of the crime was limited to cases in which there was an attempt to destroy evidence. However, the court took the view (para 30), that "the cases on analysis are not restricted to such a narrow scope. Attempting to pervert the course of justice can foreseeably take a number of forms." In holding the charge to be relevant, the court noted the salient points of the offence as being that a course of justice was in train, in that case in the form of police investigations, and that the appellant took various steps in an attempt to stop them.

[13] The same description may be applied to the circumstances and actions of the present appellant. There is no doubt that a course of justice was in train, and that the appellant took steps designed to frustrate it. The offence libelled lies in the instruction to induce or coerce one or more witnesses not to identify the appellant "or anyone else" as being responsible for an alleged crime, in the knowledge that the witness(es) had previously provided a statement(s) to the police against the appellant. To that extent, whatever his motive for doing so, and whether or not the desiderated failure to identify him as the perpetrator was intended to represent the truth of the matter, or a false account, nonetheless the appellant sought to dictate or influence the nature of the witnesses' evidence, in blatant disregard of the existence, content or veracity of their earlier statements to the police. The appellant's instruction, in the knowledge of the earlier statement(s) having been given, and of the anticipated attendance of the witnesses at an identification parade thereafter, is amply sufficient evidence from which to infer the necessary intent to pervert the course of justice. In addition, a jury would be entitled to infer from the inducements apparently to be offered that the appellant so intended.

[14] There being no doubt (and no dispute) that the appellant had displayed the relevant intent, the issue was whether the necessary *actus reus* had been established. The discrete

question arising was whether the appellant had so tendered the inducement or otherwise manifested his intention, notwithstanding that the intermediary engaged for the purpose failed to communicate it to the witness. The extent to which one can draw an analogy between the crime of attempting to pervert the course of justice, the elements of which can take many forms, and the concept of attempted crimes generally, for example fraud, where the constituent elements of the offence are in more limited scope, is open to question. The point is touched on in *Dalton,* p81, in the opinion of Lord Mackay (although in the context of what is required for corroboration rather than for primary evidence of the *actus reus*). Macdonald suggests (Criminal Law of Scotland (5th edn), p 186) that:

> "Subornation of perjury may perhaps be regarded as being a special instance of criminal conspiracy, perjury being the object agreed upon. Such an agreement is indictable at common law (as attempted subornation) where the false deposition has not been emitted."

To that extent, it may be unhelpful to look beyond offences against the course of justice in seeking to identify the character of the primary offence or attempts thereanent. In the circumstances of the present case, the primary offence may itself be characterised as a form of conspiracy, and there is nothing objectionable in the Crown's decision to frame the libel as it did.

[15] Whilst it may be that any analogy with attempted crimes in general should not be pressed too far, it may be relevant to notice the words of the Lord Justice General (Hope) in *Docherty* (p50, underlining added) where, suggesting that the difference between a completed crime and an attempt had not adequately been explored in the authorities, he said:

> "[Hume] puts the matter correctly when he says that, even when no harm ensues on the attempt, still the law rightly takes cognisance of it: "if there has been an inchoate act of *execution* of the meditated deed; if the man hath done that act, <u>or a part of that</u>

> act, by which he *meant and expected* to perpetrate his crime, and which, if not providentially interrupted or defeated, would have done so."

[16] Thus we consider that the trial judge was correct to conclude that in the present case the charge was relevant. To draw an analogy with attempted subornation of perjury (Hume, I, p 382):

> "The conspiracy has had its course so far as depended on the suborner; and it would be a great encouragement of those dangerous and pernicious practices, if they were to pass unpunished in every instance where they happened not to succeed. One thing, however, seems to be material to the relevancy of a charge of this sort; that the alleged solicitation, which in these circumstances is not vouched or confirmed by any actual perjury, or engagement for perjury, must have been used in an ouvert and palpable shape, such as testifies an earnest and serious determination to seduce."

That the appellant, of necessity, interposed third parties and communicated his instructions to them rather than directly to the witness(es) does not justify the conclusion that the charge was not relevant. The drawing of such a formal distinction, on account of a lack of direct engagement with the witness, would be to defeat the practical utility and deterrent effect of such charges. The repeated phone calls made in anticipation of the identification parade constitute a sufficiently overt act for the purpose of the offence. The libel was that the appellant did "instruct" Robert Duncan and Daniel Baxter to induce or coerce the witnesses in other words that such were the circumstances and perhaps his relationship with Duncan and Baxter that the appellant reasonably expected that what he wished to be done by them would be done by them.

[17] The second part of the appeal maintained that even if the charge could be said to be relevant, there was insufficient evidence of an overt act. We cannot agree. The evidence showed the following:

(i) that the appellant knew that the witness Agnes Brown had named him in a statement to the police, implicating him in the commission of what became the primary offence on the indictment;

(ii) that the appellant knew that an identification parade was to be held for the purpose of securing identification evidence from that witness;

(iii) with that knowledge the appellant repeatedly instructed associates of his to offer inducement to the witness, and other witnesses, not to identify him, or anyone else;

(iv) that at no stage prior to the identification parade did the appellant recall or change those instructions; indeed on the very morning of the parade he repeated them;

(v) that in subsequent calls he berated his associates for failing to "sort" the witnesses, suggesting that when the initial instructions were given he had reason to think they would be followed;

(vi) that, being incarcerated, the appellant could not directly contact the witnesses himself, but had done what he could to make his involvement in the matter complete.

[18] In the result we consider that there was sufficient evidence supporting a relevant charge. We therefore refuse the appeal against conviction.

Sentence

[19] The appeal was also against sentence, the argument being that the four years imprisonment imposed by the trial judge was excessive. The deletion of the averment that the witness had in fact attended the parade and failed to identify anyone having been

induced not to do so removed the most serious part of the original libel. The appellant was 26 years of age and whilst he has previous convictions, had never previously served a sentence of imprisonment. The sentence was back-dated only to the date of conviction, 19 May 2017. The appellant had appeared on petition on charge 1 on 15 June 2016 when he had been remanded in custody. Charge 2 was committed on 20 and 21 June of that year. The appellant was admitted to bail on charge 1 on 23 June 2016. On 10 August 2016 he appeared on petition in relation to the second charge of attempting to murder Jay Fraser and was remanded in custody. At that stage the circumstances of charge 2 were already known to the authorities, and the allegations which came to form the basis of that charge were amongst reasons advanced by the Crown in successfully resisting the appellant's application for bail.

[20] The trial judge took into account the appellant's previous convictions, his age, the serious nature of the charge faced by him, the vulnerability of the witness who was the object of the offence and the blatant disregard for the justice process which he deliberately and calculatedly sought to interfere with. It was on that basis that he selected a sentence of four years imprisonment. In the circumstances we do not think that sentence can be said to be excessive.

[21] The trial judge was not made aware of the fact that the circumstances of charge 2 had been relied upon to resist bail on 10 August 2016, hence his decision to backdate only to 19 May 2017. The Crown having explained that these circumstances did indeed form part of their objection to bail, we are satisfied that the sentence should be backdated to 10 August 2016. We allow the appeal against sentence to that extent.