APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 73
HCA/2018/38/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

THOMAS TELFORD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: M Anderson; Paterson Bell (for Penmans, Glasgow)
Respondent: Edwards QC AD; the Crown Agent

28 November 2018

Background

[1] On 29 November 2017, at the High Court in Livingston, the appellant was found guilty of three charges. All libelled a date of 12 August 2016 and a flat in Niddrie, Edinburgh. They continued:

> "(1) you ... did assault [CT] residing there and did repeatedly strike him on the body with a knife, to his severe injury, permanent disfigurement and to the danger of his life and you did attempt to murder him; ...
>
> (2) ... you ... did assault [LH] now deceased, ... and did seize her by the throat, hold a knife to her throat and threaten her with violence".

The third charge was one of disposing of the knife used in charge 1. All three charges were aggravated by having been committed whilst on bail from an order of Glasgow Sheriff Court, dated 24 June 2016.

[2] On 12 January 2018, the appellant was sentenced to 9 years and 6 months on charges 1 and 2, of which the 6 months was attributable to the bail aggravations. A consecutive 6 months was imposed on charge 3.

Evidence

[3] The appellant and the complainer were work mates, who were employed as roofers. The appellant lived in Castlemilk, Glasgow and the complainer lived in Niddrie, Edinburgh. They had first met only in August 2016, when both were engaged on a site in Edinburgh city centre. After finishing work on 12 August, they went drinking. They each had five pints of lager and a bottle of Buckfast before travelling by bus to the complainer's home in Niddrie to drink vodka.

[4] According to the complainer, he had gone for a shower. He returned to the livingroom of the flat to find the appellant stabbing the wall with a large kitchen knife. The complainer punched the appellant in the face. The appellant stabbed the complainer twice in the abdomen. The complainer fell to the floor. A female neighbour (the complainer in charge 2), who had heard a commotion, ran into the flat and tried to intervene. She was pinned against a wall by the appellant. The complainer tried to dive over a couch to escape

to the kitchen area but, as he did so, he was stabbed a further four times in the back. He fell to the ground and was stabbed again on the right knee and on the front of the right thigh. The neighbour told the appellant that she had already phoned the police and that he should get out before they came. The appellant made off and disposed of the knife. He phoned an ambulance from a telephone box, but did not say where the ambulance was required. He was recorded as saying "Cos he's going to f...g die, mate".

[5] The appellant succeeded in securing a lift to the station, where he boarded a train and returned home. His father phoned the police. When the police called at his house, the appellant said: "I stabbed him. I left him for dead". As the police removed him from the house, he said to his father: "I'll see you in 15 years". He told the police subsequently that he intended to confess. He said that he should have buried the body: "I could have dug a hole and buried the c...t and been out the now".

[6] On 13 August 2016, the appellant was interviewed by the police. He was asked what had happened in the flat. The appellant said that he had just been talking with the complainer and having a laugh. Then "the boy just f...g flipped and turned round took a flaky man". The complainer had taken a knife from a kitchen block. The appellant had said to him "Please don't make me dae this ...". He grabbed the knife, flipped it around and took it from the complainer. By this time the neighbour had come into the house. After he had stabbed the complainer, the appellant had grabbed the woman by the throat and said "Don't you f...g ... say a word". He had then run out of the house. The appellant admitted stabbing the complainer five times; three times after he had disarmed the complainer and he had turned round; and twice in the back when he tried to climb over a couch and run towards the knife block again. The only reason he had stabbed the complainer was "to save my sell ... it was either me or him ... it wasnae gonna be me ... I could have been lying there deid ...".

On an account of the neighbour being put to him, and being asked if he remembered stabbing the complainer when he was on the floor, the appellant said that the complainer had been leaning over a couch looking at the knives. He had stabbed him then, but would not have done so had he been on the floor.

[7] Meantime, the complainer had been taken to hospital where he had undergone emergency surgery. He had sustained stab wounds to the kidney, ureter, inferior vena cava and the transverse colon. His right kidney was removed. He had two abdominal wounds, one to the right thigh, three to the back and one to the right buttock; all of which were closed with staples. He had a further wound to the knee, which was sutured. He remained in hospital for over a month.

[8] The appellant lodged a special defence of self-defence in respect of charge 1. However, he did not give evidence. The advocate depute submitted that self-defence was bound to fail because the appellant had admitted taking the knife from the complainer, who was then unarmed, and stabbing him three times. When the complainer had gone over the couch, there was a clear means of escape, which the appellant had not taken. The trial judge reached the conclusion that, on the appellant's own account, there was no imminent danger and the appellant had a means of escape when he had used the knife. That use had been, on any view, disproportionate. Both self-defence and provocation failed as a matter of law.

Submissions

Appellant

[9] The ground of appeal was that the trial judge had erred in directing the jury that self-defence could not apply. The appellant had been entitled to rely upon the "mixed statement" which he had given under caution. If there had been a possibility that the jury

could have been satisfied that the appellant had acted in self-defence, then the issue ought to have been left to them (*Carr* v *HM Advocate* 2013 SCCR 471 and *White* v *HM Advocate* 1996 JC 187, under reference to *Crawford* v *HM Advocate* 1950 JC 67). The judge had erred in concluding that the appellant, on his own evidence, had had a viable means of escape as the complainer made his way back to the knife block. He had failed to take into account the dynamic of the incident and the confined space in which it had occurred. The jury could have concluded that escape had not been a realistic option.

[10] The jury should also have been directed in relation to provocation. On the complainer's own evidence, he had punched the appellant. The jury would have been entitled to conclude that the appellant had lost self-control and retaliated instantly. If the jury had accepted what the appellant had said, they could have concluded that the complainer had been in possession of the knife in the first place, and that he was going to get another weapon when the appellant stabbed him in the back. Even if the jury had rejected the appellant's position that the complainer had a knife, it would still have been open to them to conclude that provocation applied, given that the complainer had punched the appellant (see *Duffy* v *HM Advocate* 2015 SCCR 205; and *Graham* v *HM Advocate* [2018] HCJAC 4). The result of the appeal on charge 3 followed from that on charge 1. If the conviction on charge 1 was quashed, then the same would apply to charge 3.

Crown

[11] The advocate depute submitted that the trial judge had been correct in withdrawing both self-defence and provocation. Self-defence required the three elements of: imminent danger of attack; no reasonable means of escape; and proportionate response (no cruel excess). If one of these was not made out, the defence failed (*Pollock* v *HM Advocate* 1998 SLT

880 at 883). It was accepted that, if there was some evidence which, on a reasonable view, could satisfy the jury of the defence, the judge was bound to leave the matter to them (*Crawford* v *HM Advocate* (*supra*) at 69). In this case there was no imminent danger once the appellant had disarmed the complainer. He had had a means of escape. The sheer number of blows, some of which were to the back, could not be regarded as proportionate. None of the three elements had been made out.

[12] On provocation, on the appellant's own account, he had not suffered a loss of temper and self-control and retaliated instantly in hot blood. Rather, he was attempting to convey an impression of being the reasonable party. The retaliation was not equivalent to the violence faced (*Graham* v *HM Advocate* (*supra*) at para [22]). *Duffy* v *HM Advocate* (*supra*) was distinguishable as it involved an ongoing attack.

Decision

[13] In *Crawford* v *HM Advocate* 1950 SC 67 the Lord Justice General (Cooper), with whom Lords Carmont and Keith agreed, emphasised (at 69) that the:

> "withdrawal of a special defence is always a strong step, but there are circumstances in which it is the duty of the presiding Judge to take that step".

He continued:

> "... [I]t is the duty of the presiding Judge to consider the whole evidence bearing on self-defence and to make up his mind whether any of it is relevant to infer self-defence ... If he considers that there is no evidence from which the requisite conclusion could reasonably be drawn, it is the duty of the presiding Judge to direct the jury that it is not open to them to consider the special defence. If, on the other hand, there is some evidence, although it may be slight, or even evidence about which two reasonable views might be held, then he must leave the special defence to the jury ...".

A similar approach should be taken to the judge's direction to a jury not to consider provocation which, in this case, could have reduced the charge from attempted murder to assault.

[14] In this case, apart from the medical evidence, the accounts of what occurred in the flat came from two sources; the complainer and the appellant's at interview with the police. The complainer's account was of punching the appellant, in order to stop him stabbing the walls of his flat, and then being subject to a vicious attack involving multiple stab wounds, some of them in areas of vital organs, and some to his back when he tried to escape. The appellant's version of events saw him disarm the complainer and then stab him, essentially in the same manner as described by the complainer; albeit that he maintained that he had stabbed the complainer in the back because he had thought that he had been making for the knife block. Neither account contains the requisite immediacy of the appellant being attacked at the point at which the appellant has the knife and the complainer does not. Neither reveals a proportionate response to any threat posed. It may also have been that, as the trial judge concluded, there was also a reasonable means of escape. However, neither party had copies of the photographs of the flat which had been used at the trial. It is not possible to contradict the judge's view on this matter.

[15] On provocation, even the account of the appellant does not reveal that he had reacted, to what he says was an approach by an armed complainer, lost control and acted in "hot blood". Rather, he portrayed an image of being in control throughout and acting in a rational manner, as he saw it. For the jury to have concluded that, or had a reasonable doubt about whether, the appellant had lost control and retaliated instantly, would have involved speculation, given the absence of any evidence to that effect.

[16] It must nevertheless be emphasised that the jury are the primary finders of fact. Issues of fact ought to be left to the jury and not predetermined by the trial judge; whatever his or her views on the evidence might be. However, there are situations in which, on the evidence, it is not open to a jury either to acquit on the basis of self-defence or to reduce a charge on the basis of provocation. The court is unable to fault the trial judge's decision in this particular case. The appeal is refused.