APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 25
HCA/2022/000454/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

Delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

RYAN PLATT

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: G Brown, Sol Adv; Paterson Bell, Solicitors
Respondent: Prentice KC; the Crown Agent

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30 June 2023

Introduction

[1] The appellant was convicted after trial of assaulting the complainer Gordon Forbes by striking him on the arm with a machete or similar instrument to his severe injury and permanent disfigurement. It was argued that the trial judge misdirected the jury in telling

them that the defence maintained that the complainer was not a credible or a reliable witness. On the contrary, the defence relied on the account given by the complainer in respect of his evidence about sustaining the injury by falling on the machete. The misrepresentation of the defence position gave rise to a miscarriage of justice

Background

[2] The complainer was a reluctant witness. He told the police he had been assaulted but refused to name his assailant. Thereafter, at hospital, he seems to have named the appellant but subsequently denied doing so. In court he professed to have little recollection of the incident. He had been taking drugs. Having been awakened by the sound of someone at his front door, he went to the door taking a machete with him.

[3] He accepted that the male on the other side of the door, whom he did not know, might have thought he was going to be attacked. The male grabbed him and they wrestled over the machete. The complainer fell to the ground, and in doing so injured himself. According to the tape, which we have had checked, he said "I fell on ma knife basically wrestling, trying to get it, my own knife trying to get it back man".

[4] The complainer sustained a laceration approximately 10cm long on his left forearm, injuring a tendon and exposing both muscle and tendon. The injury was consistent with having been inflicted by a large blade. A consultant orthopaedic surgeon described the wound as a defensive one stating that the suggestion of an accident was unlikely, although he could not rule it out.

[5] The appellant was identified by CCTV inside elevators at the locus. He was also identified by the complainer's neighbour, at whose house he had mistakenly called first. In addition, he returned to the scene after the incident and spoke to the police. He told them

that he had been in the flat earlier and had left some personal items which he was returning to collect. He was still clothed as he had been on the CCTV footage. The complainer's blood was on the appellant's t-shirt. A machete was recovered from the veranda of the complainer's flat. The complainer's blood was on the blade and the appellant's DNA on the handle. When the complainer was in the ambulance a voice, identified as that of the appellant, was heard to say "Ya fucking deserve it ya prick".

[6] The appellant did not give evidence. The evidence identifying the appellant as the man at the door was not challenged, and was essentially conceded during the defence speech. (This is not surprising since the appellant advanced a special defence in relation to a libel that during the assault he had bitten the complainer – the jury deleted this part of the libel.) The thrust of the speech was that the jury should conclude that the complainer had fallen on the weapon during a struggle, and the appellant should be acquitted.

[7] The criticism of the charge relates to a sentence where the trial judge stated:

> "… the defence say that [the complainer Gordon Forbes] is not a credible or a reliable witness".

There is no doubt that the judge said this, but that part of the transcript of the charge where this statement occurs is frequently interspersed with the word "inaudible".

[8] In his report the trial judge stated that his note of that part of the charge reads as follows:

> "The defence says that Gordon Forbes is not a credible or reliable witness; that he said that he did not identify the male at his door and that he may have fallen on the blade during a tussle with the male. So you'll have to decide what facts you find proved…"

The transcript reads:

> "The defence says that (inaudible) is not a credible or a reliable witness and (inaudible) and that he did not identify (inaudible) and that he may have followed

> (inaudible). So you will have to decide what facts have been proved and what (inaudible)."

The word "followed" in that extract appeared anomalous, and it seemed possible, if not likely, that what the judge had in fact said, as he had noted, was that the complainer "may have fallen". We therefore had the recording checked, and as far as can be discerned, what the judge said was:

> "The defence say you shouldn't draw such a conclusion, that you're being asked by the Crown to speculate or guess and that's not allowed. The defence says that Gordon Forbes is not a credible or reliable witness in relation to what is alleged to have taken place and that he did not identify the male at his door and that he may have fallen on his blade during a tussle with that male. So you'll have to decide what facts do you find proved…".

[9] It is clear therefore that whilst the trial judge seems to have erred in suggesting that the defence maintained that the complainer was not a credible or reliable witness, the context in which he did so left no room for doubt that the issue for the jury to determine included the possibility that the complainer had injured himself falling on his own blade.

[10] In any event, we would not have considered this single error by the trial judge to have constituted a misdirection (and certainly not a material misdirection), when viewed, as it must be, in the context of the charge as a whole. The judge referred three times during his charge to the proposition that the injury might have been accidental. He reminded the jury that the complainer's evidence had been that the injury had resulted from an accident; and immediately thereafter directed them that accidental or careless injuries did not constitute assault, which was a crime of intent and for conviction to result the Crown required to prove that the contact was deliberate. He repeatedly reminded the jury that "the evidence is always a matter for you". He reminded them that it was only their recollection of the evidence which counted. He directed the jury to consider the submissions made by the advocate depute, and also to "Give equal consideration to the defence case and the

submissions made by [the defence]", before reminding the jury that "It is your decision what conclusions you reach". The appellant's solicitor advocate had addressed the jury on the same day the charge was delivered. The jury must have been well aware what the defence position was and there was no risk of confusion or error arising from the judge having misspoken.

[11] Moreover, the evidence was overwhelming. There was no doubt that the complainer's injury was caused by a machete, which had the appellant's DNA on the handle and the complainer's blood on the blade. The appellant did not give evidence and the only basis on which there might have been said to be an accident was the complainer's evidence to that effect, which was completely implausible, even leaving aside the contradictory evidence of the orthopaedic surgeon. The appellant returned to the scene on what was obviously a false pretext and with the complainer's blood on his t-shirt. Finally the jury no doubt considered that the comment attributed to the appellant ("Ya fucking deserved it ya prick") added colour to what happened. In these circumstances, there cannot be said to have been any miscarriage of justice.

[12] The appeal will therefore be refused.