APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 53
HCA/2017/530/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

LEE McAULAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell (for JC Hughes, Glasgow)
Respondent: Farquharson AD; the Crown Agent

22 August 2018

General

[1] On 27 July 2017, at the High Court in Glasgow, the appellant was unanimously found guilty of a charge which libelled that:

> "(2) on 17 June 2016 at Glasgow Road near to Maxwell Avenue, Baillieston, Glasgow you ... did assault Luke Wallace ... chase after him and strike him on the

> body with a knife and ... Luke Wallace was so severely injured that he died on 25 June 2016 at Glasgow Royal Infirmary and you did kill him".

The original charge had been one of murder, but this had been reduced to culpable homicide by the advocate depute at the conclusion of the Crown case. The appellant was also convicted of two other significant charges. The first was possession of a knife before the event in an area of ground near Mount Vernon Station and between there and the site of the eventual incident on Glasgow Road; contrary to the Criminal Law (Consolidation) (Scotland) Act 1995, section 49(1). The second was attempting to defeat the ends of justice after the event by washing his clothes and instructing a witness, PW, to burn her clothes.

[2] The appellant was sentenced to 9 years detention on the culpable homicide charge and 1 year and 6 months detention on, respectively, the possession and attempt to defeat charges. All sentences were to run concurrently.

The evidence

[3] Both the appellant and the deceased were aged only 16 at the time of the fatal incident. The deceased was associated with a teenage gang known as the Swinton. Swinton is an area between Easterhouse and Baillieston. The Swinton were a rival gang to the Baillieston.

[4] In the early part of the evening of 16 June 2016, the Swinton, including the deceased, met in Garrowhill Park for the purposes of socialising and drinking. Shortly after 10.00pm the deceased and his associate, namely JM, decided to confront members of the Baillieston. According to JM, neither he nor the deceased was in possession of a knife. They walked south to Berriedale Avenue, near to Bannerman High School, in order to ambush the Baillieston.

[5] The appellant had been in an area of Baillieston known as the Scrammie; near Mount Vernon Station. At about 10.00pm he decided to accompany PW, a girl whom he had met for the first time, home. The deceased and JM began to follow the couple as they made their way northwards on Berriedale Avenue, along a path towards Glasgow Road. JM had picked up a bit of wood and the deceased had armed himself with a lump of concrete. They confronted the couple; JM swinging his stick and hitting it off the ground. They asked the appellant where he was from. The appellant said that he had been with people from Baillieston, but was not himself from that area. The deceased and the appellant squared up to each other, near a traffic island on Glasgow Road. PW was standing between them in an attempt to stop anything happening.

[6] According to the trial judge, there was a conflict of evidence about what happened next. On JM's version, the concrete had fallen from the deceased's hand as he had gone to throw it. The appellant had nevertheless feigned injury by crouching down, holding his head and screaming. The appellant then sprang up and chased the deceased. Neither PW nor JM had seen a knife. Shortly afterwards, the appellant came running back towards them. JM threw the stick at him, but it has missed. By this time the deceased had been fatally injured.

[7] PW, according to the Crown's speech, said that the deceased had thrown the concrete past her shoulder towards the appellant. She had heard the appellant scream and assumed that he had been hit. However, no injury was found on the appellant, although it was about a week before he was examined. A blood pattern found at the scene was consistent with the appellant removing the knife from his clothing, the deceased running away from the appellant and being stabbed almost immediately at the start of the chase.

[8] According to the appellant, he had been drunk. When confronted by the deceased and JM, he had told them falsely that he was from Shettleston. He had been terrified. The deceased had thrown a rock, which had flown past PW and hit him on the head. There was a melee and the four moved onto a traffic island in the middle of Glasgow Road. The appellant had heard a knife drop and seen a silver blade. Both he and the deceased had gone for it. The appellant admitted "poking" the deceased. It was, he said, not his knife.

[9] Two witnesses at the Scrammie spoke to the appellant returning to their company in possession of the knife, which had been folded up and put into his pocket. The appellant had said that he had stabbed somebody because they had hit him on the back of the head with a brick. One of his friends had taken the knife and dropped it into a nearby drain, from which it was later recovered. The appellant changed his clothing and asked PW to burn hers. The Adidas top, which the appellant had been wearing, was found laundered during a subsequent search of his house.

[10] The deceased had been taken to the Royal Infirmary. He had a 6cm long stab wound in the right groin, extending from the top front of his thigh up towards his pelvis. He died because of the loss of blood as a result of damage to the femoral vein.

Speeches

[11] It was the Crown's position that, notwithstanding the behaviour of the deceased, the appellant's action in taking out the knife, which he had decided to carry, and plunging it into the groin of the deceased by way of retaliation, was not excusable. On the issue of self-defence, the Crown focused on the need for an immediate threat of violence, a clear and present danger and the absence of excessive force in response. If there had been a means of escape, the appellant had been bound to take it. The appellant had an obvious route of

escape, but had chosen not to take it. The advocate depute founded upon the evidence from members of the Swinton that the deceased had not been carrying a knife. This fact, she said, could be inferred from the deceased and JM picking up weapons *en route*. Although PW had been unable to say who had been chasing whom, JM's evidence was that the deceased had been chased by the appellant. The advocate depute also founded upon the appellant's later possession of the knife back at the Scrammie.

[12] The defence speech focused on the fact that the appellant and PW had been walking down the road, not looking for any trouble. This was in sharp contrast with the deceased and JM. It had been the deceased and JM who had confronted the couple; using the stick and throwing the stone. The appellant had "undoubtedly" been hit by the stone. The appellant had fought back at that point. The only question was where the knife had come from. It was the defence position that, if the knife had been in the appellant's possession prior to the incident, then he was guilty. That was on the basis, as the appellant's counsel put it to the jury, that even if a person had been hit by a rock, he was not entitled to take a lock knife from his pocket, open it, chase after someone and then stab him in retaliation.

Charge to the jury

[13] In charging the jury, the trial judge gave the standard direction that if they believed the accused, or any other evidence which pointed to his innocence, then they would be bound to acquit. On self-defence, the judge stated that a person was entitled deliberately to use such force as was needed to ward off an attack. The person was entitled to be acquitted, but that could only occur if each of three circumstances existed. First, the accused had to have been attacked, or had a reasonable belief that he was in imminent danger of death or serious injury, and had acted in that belief. Secondly, the accused could only use violence as

a last resort. If there were other ways by which he could reasonably have avoided the attack, then he should have taken them. Thirdly, the accused was entitled to use no more than reasonable force to stop the attack. Self-defence was not a licence to use force which was grossly in excess of that needed for the defence.

[14] The trial judge continued:

> "Lawyers sometimes say there must be no cruel excess. You cannot for example use fatal force in response to an attack that's obviously not life threatening. ...
>
> Normally punching someone wouldn't justify retaliating with a knife because there's no real proportion between the two. A blow with a fist is different from being struck by a knife or may be. The retaliation ... has to be proportionate to the attack. But it may be that there are some very exceptional circumstances where a blunt force attack, actual or anticipated, may be met by the use of a knife.
>
> ... it will be for you to decide whether these circumstances exist in this case and whether that's a reasonable response. So, these are matters not to be decided by law but by your view of the facts. You should consider these matters with care. In doing so ... you should allow for fear and the heat of the moment. Do not judge the accused's actions too finely. Take a broad and reasonable approach to the type and degree of violence he faced and the type and scale of force in his response."

Submissions

Appellant

[15] The first ground of appeal, for which leave had been given, concerns the absence of a direction about provocation. According to the appellant, there ought to have been such a direction, although it was accepted that its effect could only have been in relation to sentence. Even if the matter had not been raised in the speeches to the jury, it was only if there could have been no finding of provocation that the direction should be omitted (*Duffy* v *HM Advocate* 2015 SCCR 205 at paras [21-22]; *Copolo* v *HM Advocate* 2017 SCCR 45 at para [38]; *Ferguson* v *HM Advocate* 2009 SCCR 78 at para [36]; and *Kirkwood* v *HM Advocate*,

unreported, HCJAC (sentence), 3 November 2017). The jury could have returned a verdict of culpable homicide with a rider of provocation.

[16] The second ground of appeal was that the trial judge had erred in directing the jury that fatal force could not be used to repel an attack that was obviously not life threatening. The direction had not defined what fatal force was. The judge had erred in stating that only in very exceptional circumstances could a blunt force attack, actual or anticipated, be met with the use of a knife. There was no requirement of exceptionality. There was an evidential basis from the appellant's own testimony that he had been under an immediate threat of attack. The stabbing had taken place after the rock had been thrown, It had been done in the heat of the moment. It had taken place on or adjacent to the traffic island where bloodstaining had been found. The appellant's position in relation to escape was that, at the material time, both he and the deceased had gone for the knife. In light of the defence position on ownership of the knife, the judge ought to have focused that issue for the jury's attention.

Respondent

[17] The Crown accepted that there had been provocation and had accordingly reduced the charge in the course of the trial to one of culpable homicide. This had been explained to the jury and there was therefore no need for the trial judge to direct them on the issue.

[18] The trial judge had correctly directed the jury that the benefit of the defence was lost when the force used to repel the attempt was excessive (*Fenning* v *HM Advocate* 1985 JC 76 at 81). The jury were not directed that self-defence could not apply; rather that allowance had to be made for the heat of the moment. The violence used by the appellant had to be measured against that used or threatened by the deceased (*Brady* v *HM Advocate* 1986 JC 68

at 75). The judge's reference to a punch was illustrative; that a blow with a fist cannot justify retaliation with a knife (*HM Advocate* v *Doherty* 1954 JC 1 at 5). The judge's directions were in line with the Jury Manual. They should not be scrutinised as if the jury had not heard the evidence and the speeches.

[19] The appellant had said that it had not been his knife. The jury had been directed to acquit if they believed him. It was accepted that if, on the other hand, the knife had been that of the appellant, he was bound to be convicted. Given the finding of guilt on charge 1, it was accepted by the jury that the appellant had the knife before the event. The jury had thereby rejected the basis for the self-defence.

Decision

[20] There was no need for the trial judge to direct the jury on provocation. Although a judge has a general obligation to direct a jury on obvious alternative verdicts reasonably available on the evidence, a finding of provocation could not have had any material bearing on the form of the jury's verdict in this case. Provocation had already been demonstrated and accepted by the Crown. It had led to a reduction in the charge to culpable homicide. Thereafter, its only relevance was in relation to sentence. A judge may in certain circumstances, if he or she chooses to do so, put the matter of provocation to the jury and advise them that a rider could be added to any verdict of guilty. This may be useful where there are several reasons for a verdict of culpable homicide, as distinct from murder, being returned, but the judge wishes the jury to adjudicate on the issue of provocation. In this case, it was not disputed that the deceased had confronted the appellant and had at least threatened to attack him with a lump of concrete or a stone, and perhaps thrown it at him. The defence would ultimately be able to raise the issue of provocation at the sentencing diet

and the judge would be able to apply his own assessment of the evidence in determining the appropriate sentence. There was no need for a rider on provocation to feature in the jury's verdict to enable it to be considered in the sentencing equation.

[21] The trial judge's directions on self-defence were appropriate. The question of self-defence had been covered in the speeches to the jury and the trial judge had given the conventional directions in the context of conflicting evidence, especially in relation to who had prior possession of the knife. It is correct to say that, as a generality, an obviously non-life threatening attack, such as a punch, cannot be met with the use of fatal force by stabbing with a knife (*HM Advocate* v *Doherty* 1954 JC 1, Lord Keith at 5). It is correct also that only in exceptional circumstances should it be assessed as being self-defence (see Gordon: *Criminal Law* (3rd ed) II para 24.13).

[22] It had been put to the jury that the critical issue was: who had the knife before the stabbing? It had been conceded on the part of the defence that, if it had been the appellant, then he was guilty. The jury resolved this issue in favour of the Crown's position. A verdict of guilt of culpable homicide was thereafter inevitable. The appeal against conviction is accordingly refused.

Sentence

[23] In assessing sentence, the trial judge reports that he had regard to the terms of the Criminal Justice Social Work Report and everything said in mitigation. In particular he took into account that: (1) it had been the deceased and JM who had initiated the incident; (2) the appellant had only inflicted one stab wound; (3) he was now only 17 and came from a troubled background; and (4) he appeared as a first offender. The judge also took account, however, of three other factors: (1) the fact that the appellant did not take full responsibility

for the offence and presented as at moderate risk of re-offending; (2) the gravity of the crime and the intense grief and sadness which it had caused to the deceased's family; and (3) the need to deter the carrying of knives (*Spence* v *HM Advocate* 2008 JC 174).

[24] It was maintained that the trial judge had placed insufficient weight on the roles played by the deceased and JM. The deceased and JM had done more than simply initiate the incident. They had stalked the appellant and PW. There had been a significant level of provocation on the part of the deceased and JM, who had both been armed with weapons. A rock had been thrown by the deceased. There was only one stab wound and it had been in the groin area. There was no suggestion of an intent to kill or to cause significant harm. The stabbing had been a spur of the moment act. Insufficient weight had been placed on the spontaneous nature of the assault.

[25] The appellant had only been 16 at the time of the offence and had no history of carrying or using weapons. He had had a highly traumatic childhood, having previously been the subject of domestic violence and bullying at school. He was a vulnerable person. Despite his difficulties, he had successfully completed a vocational training programme and had obtained a work placement. Since his conviction, he had attended, and completed, various courses in prison. He had a supportive relationship with his mother and siblings. He had expressed remorse and regret for the death of the deceased. In *Spence* v *HM Advocate* (*supra*) the appellant had been older. There was no suggestion that the deceased had engaged in the type of conduct towards the appellant as had occurred in that case. The blow in *Spence* was to the chest. The depth was greater and the degree of force had been more than moderate. *Kane* v *HM Advocate* 2003 SCCR 749, regarding the sentencing of children, was of greater assistance.

[26] For an adult offender, it could not be said that a sentence of 9 years detention was excessive in the circumstances of this case. The significant feature, and one to which the trial judge had been entitled to pay particular attention, was that the appellant had gone out into the public streets carrying a knife. In due course, as might have been anticipated, he used it to cause a fatal injury. As was made clear in *Spence* v *HM Advocate* (*supra* LJG Hamilton), delivering the Opinion of the Court, at para [19]), "the carrying and the use of knives are matters of grave concern to all right-thinking people in our community."

[27] Nevertheless, the court is persuaded that having regard to the youth of the appellant at the time of the offence, the sentence which was selected by the trial judge was excessive (see *E (V)* v *HM Advocate* 2018 SLT 246, citing *McCormick* v *HM Advocate* 2016 SCCR 308, *Greig* v *HM Advocate* 2013 JC 115 and *Hibbard* v *HM Advocate* 2011 JC 149). The court will quash the sentence of 9 years and substitute one of 7 years detention.