



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 24
HCA/2019/000292/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

WEIR MacKAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie QC; Paterson Bell Solicitors
Respondent: Gillespie, AD; the Crown Agent

24 June 2020

[1] The appellant and his co-accused Allan Doherty each faced a charge of murder. On 3 May 2019, Doherty was convicted as libelled and the appellant was convicted of culpable homicide. In returning their verdict against the appellant the jury deleted most of the conduct specified in the charge. In this appeal the appellant contends that the verdict

returned was in contradiction of the directions given by the trial judge. The appeal is also against the sentence of 14 years imprisonment imposed.

[2] The charge which each accused faced, after amendment, was as follows:

“On 9 June 2017 at Flat 3a Kelburn Terrace, Port Glasgow you ... did assault Karen Young and did seize hold of her by her neck, compress her neck and thereby restrict her breathing, force open her mouth, force your hand and a metal spoon or similar implement into her mouth, slap her on the face, strike her on the head with a piece of table leg or similar implements and did, by means unknown to the Prosecutor meantime, repeatedly inflict blunt force injuries on her head and body and you did murder her;”

[3] The appellant was convicted on the charge in these terms:

“On 9 June 2017 at Flat 3a Kelburn Terrace, Port Glasgow you ... did assault Karen Young and did, by means unknown to the Prosecutor meantime, repeatedly inflict blunt force injuries on her head and body and you did kill her;”

The contention advanced by the appellant was that there was no evidence upon which the jury could have concluded that any injuries to the victim’s head or body made a substantial contribution to her death. The jury deleted all parts of the libel which narrated the acts which had caused the victim’s death and the verdict so returned ought to have been recorded as a verdict of assault.

The circumstances of Ms Young’s death

[4] The victim Karen Young was a woman in her 40s with a long history of drug abuse. She lived in Kilmalcolm in a flat in the same block as her parents. She had a prescription for methadone which she took daily in the presence of a pharmacist. She also abused heroin, cocaine and crack cocaine. According to the evidence given by her mother, Ms Young bought cocaine and crack cocaine from people who lived in Port Glasgow.

[5] Ms Young last collected her methadone prescription on 8 June 2017. Around that time, and for the few days previously, it had been noticed that she was not her usual self.

She was less friendly than she usually was, she had not been taking as much care as she usually did over her appearance and she had a very bad cough. On 9 June 2017 she was seen in a grocery shop in Kilmalcolm where she was known as a regular customer. She was not seen to be suffering from any injuries. Around 13.36 that day ambulance personnel and police officers attended at Doherty's flat at 3a Kelburn Terrace, Port Glasgow and found Ms Young there. She was unconscious and attempts to revive her were unsuccessful. She was pronounced dead. Doherty was the only other person in the flat at that time. There was evidence from a number of sources as to the circumstances in which Ms Young died.

Gillian Howie

[6] Gillian Howie was the appellant's partner. Her evidence was that she had gone to Doherty's flat, by arrangement, on the morning of 9 June to collect the appellant. He had been staying there for few days after they had fallen out. She arrived about 09.30.

Paraphernalia connected with drug abuse could be seen in the flat. There was a package in the living room containing crack cocaine. There was a broken spoon and a piece of metal trim from a table on the floor in the living room and the coffee table had a piece of trim missing. The appellant was in a small bedroom off the living room smoking a pipe of cocaine. Doherty and Ms Young were in the living room. Ms Young's eyes were puffy as though she had been crying but she saw no sign of any injury. The appellant joined the others in the living room.

[7] Ms Howie's evidence was that at some stage she saw Ms Young rummaging about on the table apparently looking for something and putting her hand to her mouth. She explained that matters happened very quickly after that. She heard the appellant say that Ms Young had put something in her mouth and she saw Doherty coming into the room from the bedroom. Ms Young started to choke and Doherty tried to stop her by putting his

hand down the back of her mouth. She thought his hand got stuck and that Ms Young had bit it. The witness said she was panicking and tried to get out of the flat. Doherty said he couldn't get his hand out of Ms Young's mouth and the witness could see the colour draining from her face. Ms Howie explained that she then climbed out of the bedroom window and went away. The appellant came to her house later that day and slept for the rest of that day and all night.

Doherty

[8] An ambulance was called to attend at the property by Doherty. He was given instructions by a call handler to attempt CPR. The first police officer to attend arrived at 13.36 and took over CPR. He noted that Ms Young was cold to touch, that there was blood apparently from her nose and that her face was swollen around the eyes which were closed. He found crack cocaine in a bag on the floor. When police Constable Danielle Park attended Doherty told her that he had known Ms Young for around three months and that she arrived unexpectedly at the flat about half an hour before he had made the call for assistance. He claimed that Ms Young was upset and said that she had had an argument with her ex-partner. He then realised she had a small packet of drugs in her mouth and he tried to get it out. He told the officer that he thought Ms Young had swallowed the bag and that he had tried to retrieve it. In doing so he had put his hand into her mouth and she bit him.

[9] One of the paramedics who attended was asked by a police officer to examine Doherty's hands. Doherty explained that he had been advised by the call handler to put his hands into Ms Young's mouth in order to try to clear the airway. The tape of the telephone call between the handler and Doherty when played revealed Doherty saying that he had his hands in Ms Young's mouth to try and stop her choking and the call handler repeatedly

telling him to remove his hands. The paramedic noted that Doherty's hands were very bruised and swollen.

[10] In conversation with a further officer, Constable Blair, Doherty claimed that Ms Young arrived at his house at around 1pm, was upset and said that she was "sick of life". He told the police officer that he saw her falling to the floor apparently choking. He thought that she had put a wrap of drugs in her mouth and he put one hand in her mouth to try to remove it. He had the other hand over her throat to stop her swallowing it.

[11] Having agreed to attend the police station as a witness, Doherty gave a detailed statement at 15:45 to Detective Constable Gibson. He repeated the account of having known Ms Young for around three months and of her arriving at his flat at around 1pm. He claimed she was upset and crying at the time and wanted to come in to smoke crack cocaine. He claimed that he permitted her in to have a cup of tea. He gave an account of other behaviour by Ms Young, including seeing her holding a metal table leg and trying to eat it and later trying to eat a spoon. He then gave an account of seeing her holding a lump of something in her hand which she put into her mouth and immediately began to choke. He said he went to try and help her and as she was not responding he slapped her a couple of times to try to wake her. He got water from the kitchen which he threw over her, to no effect, and then called an ambulance. He claimed that the call handler told him to put Ms Young onto her back and try to clear her airways which he said that he attempted to do. He could feel the lump in her mouth and she bit hard on his knuckles. He attempted CPR on the instruction of the call handler and could then see blood coming from her nose and noted that she was trying to breathe without succeeding. The police arrived shortly thereafter and he let them in.

Gary Hemphill

[12] Gary Hemphill was a friend of Doherty. He gave evidence that he met him in the street sometime on the night of 9 June 2017. Doherty had told him that Ms Young had tried to steal a package of crack cocaine from him and that he had tried to get it back from her by removing it from her mouth.

Appellant

[13] The appellant was interviewed by Detective Constable Thomson on 21 June 2017 and gave a statement in which he explained that he had been staying with his friend Doherty for two nights, during which they had shared crack cocaine. Sometime in the morning of 9 June Ms Young appeared at the flat and produced a large bag of cocaine. He said he had known Ms Young for around six or seven years through her partner. Both he and Doherty consumed some of the cocaine and when Ms Young asked for some he had told her there was none left. He saw no injuries on her. After Gillian Howie had arrived he explained that he saw Ms Young sitting on one of the couches bending down and placing her hand to her mouth. He shouted "she's just swallowed that parcel" and saw Doherty ran towards her shouting "what ye daein ye stupid bastard". Doherty put his hand into Ms Young's mouth to try and retrieve the parcel and he went over to try to give her the Heimlich manoeuvre as he thought that Ms Young was choking. He was unable to do so and started to pump her chest. By this stage she was lying down with her neck and back against the couch whilst Doherty still had his hand in her mouth and was shouting at her "what ye daein hon, don't be daft, Karen hon don't be daft." Gillian Howie panicked and tried to get out of the flat. The front door was locked and she climbed out of the bedroom window. The appellant explained that he then remembered being in the front bedroom speaking to a woman from the housing department through the window. Doherty told him to tell the woman that he

was not in and that she should come back at 4 o'clock. When he went back into the living room Ms Young was still in the same position and Doherty still had his hand in her mouth, or had put it back in. Sometime after that they both realised that they had to phone an ambulance. He went into a panic, got the house keys from Doherty and went out of the front door. He ended up in the local cemetery.

[14] Forensic examination disclosed that DNA likely to be that of Ms Young was found on a swab of Doherty's right hand and DNA likely to have come from the appellant was found on a swab taken from Ms Young's left hand. Traces of her blood were found in the living room, on the couch and on the carpet. Her blood was also found on a spoon and on a spoon handle.

[15] Ms Young's handbag was found in the cemetery in Port Glasgow on 3 July. There was no purse in it. Evidence was led that the appellant had tried to use a credit card belonging to Ms Young in a shop in Port Glasgow at around 14.00 on 9 June. Neither the appellant nor the co-accused gave evidence or called any witnesses.

Post mortem examination

[16] A post mortem examination was carried out on Ms Young's body by Dr Marjorie Turner and Dr Julie McAdam. In evidence Dr Turner read from the conclusions section of the report where she set out a summary of the findings on examination. She began by describing injuries to Ms Young's head and face. She identified:

- Blunt injury to two areas over the right side of the forehead
- A faint bruise on the left side of the forehead above the left outer eyebrow
- Blunt injury to the left eye, described as a black eye
- Blunt injury down both sides of the nose

- Blunt injury to the mouth
- Bruising to a large area of scalp at the back
- A fracture of the right orbit

[17] The injuries to the two areas over the right forehead were said to be typical of being caused by blows from a blunt object, such as the table leg recovered from Doherty's flat. The fracture of the right orbit was thought to be associated with one of these injuries. The injury to the left eye was consistent with a punch, a hard slap or impact with a hard surface. The injury to the nose was consistent with a blow such as a punch. There was an abrasion present which was consistent with coming into contact with a rough surface, such as a carpet. The bruising to the back of the scalp was consistent with being caused by a blow with a blunt weapon, a punch, a kick, or contact with the ground or a hard surface through falling backwards. There were also two other areas of bruising on the left side of the scalp, and an area of bruising more over the top of the head and towards the right side which were consistent with separate impacts, perhaps from the victim hitting her head off the ground or blows to her head.

[18] Multiple areas of injury to Ms Young's mouth were also described. These included areas of abrasion across the majority of her upper lip and bruising where the left upper and lower lips joined. Inside the mouth, in the inside of her lips and gums, there were other smaller areas of bruising and some linear scratches or abrasions. In Dr Turner's view these findings were consistent with something scratching the outside of the mouth and lips and possibly the inside as well. An implement with a ragged edge to it would have led to such injuries. They were consistent with being caused by part of a spoon which had been recovered from Doherty's flat, if it had been used to poke around in the victim's mouth.

[19] Having described the findings on examination of Ms Young's head and face,

Dr Turner concluded this part of her report with the opinion that:

“Thus whilst there is evidence of injuries to her head and the pattern of these is in keeping with an assault, there is no evidence to implicate these directly in her death.”

[20] The next passage of Dr Turner's evidence concerned injuries over the area of

Ms Young's neck. There was compression of the neck with a broad area of very superficial bruising and confluent abrasion across the front of the neck with underlying fractures of the right side of the larynx. Dr Turner described this as consistent with downward pressure being applied in that area from front to back if the victim was lying flat on her back. There were a few petechial haemorrhages in the eyes that could be associated with this. In Dr Turner's view, this degree of compression of the neck need not necessarily have resulted in death but could have done so. Bleeding in the soft tissues at the back of the throat could perhaps have resulted from a blockage caused by something like a package in her mouth. The presence of a package could result in occlusion of the airways and could have been a significant factor in her death.

[21] Dr Turner then set out the three methods by which compression of the neck could have resulted in death. First, if the pressure had been sufficient to block the airways, or to cause the tongue to be pushed back and block the top of the windpipe, or if the larynx was broken and pressed in causing it to collapse and block the airways. In any of these circumstances oxygen would not be able to get into the blood leading to death. Second, if the blood supply to the brain from the vessels at either side of the neck was impaired then death from lack of oxygen to the brain could result. Third, if pressure was applied to the area of the vagus nerve at the side of the neck then sometimes that can cause cardiac arrhythmia which can result in the heart stopping suddenly and death.

[22] Post mortem examination had also detected the presence of cocaine and methadone.

Dr Turner's opinion was that the levels of these drugs found present in combination may alone have led to a cardiac arrhythmia. Additionally, Ms Young would have been more susceptible to the effects of compression and asphyxia as a result of her intoxication.

[23] Having explained all of these findings Dr Turner explained her opinion as to the cause of death in this way at page 8 of her report:

"Thus, whilst this a complex case these two elements, the compression of the neck and intoxication with cocaine and methadone are considered, in some combination, to have resulted in her death, which perhaps may have been contributed to by the blunt force injuries to her head."

On the last page of the report the cause of death was given as:

1a: Compression of the neck and cocaine and methadone intoxication.

Potential contributing causes:

2. Blunt force injuries to head.

[24] In the course of her evidence in chief Dr Turner was asked whether the injuries found to Ms Young's head and face could have contributed to her death. Her reply was:

"Not directly, they have not resulted in any direct injury or trauma that's caused her death. What it could have done is we've got multiple areas of impact and patterns typical of assault and in sort of situation like that it's stressful, anxiety inducing and you have the potential for your body to go into what's sometimes called the fight and flight situation where adrenaline circulates through the body. An adrenaline surge in some instances could contribute to a cardiac arrhythmia or potentially to the death in that context. So that's primarily why it may have indirectly added into her dying."

[25] When asked to explain what was meant by a cardiac arrhythmia she explained:

"It's an abnormal heart rhythm so it's not the normal steady rhythm that our heart should be beating. If it goes into an abnormal rhythm there are a number of different types, some of which are, you know, lived with quite happily and treated with drugs, others are potentially fatal and you can die very suddenly when your heart goes into that type of arrhythmia."

Submissions

Appellant

[26] Senior counsel for the appellant submitted that the charge was brought against him on the premise that he was acting in concert with Doherty who was directly responsible for the attack upon Ms Young from which she died. It was evident from the trial judge's report that there was no direct evidence of the appellant carrying out any assault personally.

[27] The important directions as to responsibility for death were to be found at page 42 and 43 of the transcript of the trial judge's charge:

"So, for the Crown to prove a charge of murder in this case, you would need to be satisfied that the accused person did something to the victim which inflicted injury on that victim as set out in the indictment, and that in doing so he either acted with a wicked intention to cause death, or acted in such a way which showed wicked recklessness as to the victim's fate. Now, of course, you would also need to be satisfied that whatever actions were taken were one of the causes of death. It doesn't need to be the only cause but as has been correctly said by counsel, it needs to be a substantial contribution to the death."

The verdict returned had to be measured against that direction. The extent of the assault for which the appellant was responsible was repeatedly inflicting blunt force injuries to the victim's head and body. The verdict returned against Doherty included the averment of compressing her neck. Whilst the post-mortem report included in its conclusion the opinion that blunt force injuries were potential contributing causes, this had to be understood in the context of the evidence given. Dr Turner had confirmed in evidence that the blunt force injuries were not the direct cause of death. Counsel submitted that Dr Turner's evidence came to no more than that there was a theoretical possibility that the distress caused by the infliction of the blunt force injuries could in turn have contributed to a cardiac arrhythmia which was capable of having caused death. There was no evidence that Ms Young had suffered a cardiac arrhythmia. Counsel submitted that Dr Turner's evidence

fell far short of demonstrating that the blunt force injuries to the head had been established beyond reasonable doubt as constituting a substantial contributing factor in Ms Young's death

[28] The nature of any possible link between the blunt force injuries to Ms Young's head and body had to be looked at all the more closely in light of the particular deletions which the jury had made from the charge in returning its verdict against the appellant. The jury had rejected the contention that he was responsible for seizing the victim by her neck and compressing it, which was the principal cause of death. They had also deleted the averments of forcing open and inserting implements into her mouth, slapping her on the face and striking her on the head with a table leg or similar. By the verdict returned against Doherty the jury had concluded that he alone was responsible for this conduct.

Accordingly, the jury would have required to consider what injuries the victim had sustained as a consequence of the limited conduct for which the appellant bore responsibility and to determine whether those injuries could have made a substantial contribution to the death of the victim. On the evidence led it was not open to the jury to conclude that they had done so.

[29] Whilst the jury had arrived at a competent verdict, they had fallen into error in failing to follow the trial judge's direction that what they found proved against the appellant required to have made a substantial contribution to Ms Young's death before they could convict him of responsibility for that death. In these circumstances the trial judge ought to have acceded to the motion made on the appellant's behalf at the time to record the verdict as one of guilty of assault.

Crown

[30] The advocate depute invited the court to note that there had been no criticism of the

trial judge's directions. The extent to which there required to be a link between the conduct of the accused person and the death of the victim had been explained in the case of *Johnston v HM Advocate* 2009 JC 227. The court had observed that it is not the case that a death can have only one cause and that it was sufficient that an assault contributes significantly to the death of the deceased. The directions given by the trial judge were therefore correct in law.

[31] The advocate depute accepted that an assessment of the injuries which the appellant had been found responsible for had to take account of the discriminating verdicts returned against each of the two accused. It was clear that the jury had attributed sole responsibility to Doherty for certain of the injuries. In light of that it was conceded that the only injuries to Ms Young which could be associated with the conduct for which the appellant bore responsibility, on an art and part basis, were the areas of bruising to the scalp at the back, the bruise above the left eyebrow, the injury to the left eye described as a black eye and the injury to the victim's nose. These ought not to be thought of as trivial injuries. They involved multiple injuries to the head and left visible injury and bruising. Whilst the jury must have been satisfied that Doherty had assaulted Ms Young in the more extensive manner libelled, the appellant had inflicted injury on a vulnerable woman who had been brutally assaulted by Doherty. Dr Turner had set out in her report, and in her evidence, that any assault upon Ms Young could have precipitated a cardiac arrhythmia.

[32] The advocate depute submitted that Dr Turner had set out a clear mechanism by which the injuries to the victim's head could have contributed to her death. Although Dr Turner had not said that Ms Young had definitely suffered from a cardiac arrhythmia she had explained the link between stress and an arrhythmia. There would be no evidence of a cardiac arrhythmia available at post mortem examination. Her evidence was not speculative. It was opinion evidence which she was well qualified to give. The evidence of

Ms Young's cocaine and methadone use placed her at a heightened risk of cardiac arrhythmia, as did the fact that she was being assaulted, including by being choked. In all of these circumstances the risk of Ms Young suffering a cardiac arrhythmia was not a theoretical risk but a real one. To establish causation the Crown only required to prove that the appellant's conduct made a substantial or material contribution to the death, not that it was the only cause. A material contribution was one which was more than negligible – *R v Cheshire* [1991] 1 WLR 844, as approved of by Lord Reed in giving the opinion of the court in *Johnston v HM Advocate*.

[33] It was also submitted that a parallel could be drawn with the case of *McDade v HM Advocate* [2012] HCJAC 38, where the deceased was assaulted by the appellant and suffered a heart attack. Although the assault by the deceased in that case would not have resulted in death on its own, the court held that it was matter for the jury to determine whether the appellant's acts had made a significant contribution to the heart attack from which death resulted. In the present case it was submitted that the evidence given by Dr Turner entitled the jury to conclude that the blunt force injuries which the appellant was responsible for made a substantial, in other words not a negligible contribution to Ms Young's death. It had not been demonstrated that the jury had failed to follow the directions given and the appeal ought therefore to be refused.

Discussion

[34] It is clear from the trial judge's charge at pp.50-51 that the Crown case against the appellant was presented on the sole basis that he had associated himself with everything that his co-accused had done to the deceased in the course of the whole attack on her. The trial judge summarised the Crown case against the appellant as being that he "associated

himself with whatever was going on". The jury evidently did not accept this approach to the case. They convicted the appellant on the basis of a substantially reduced narrative to the effect that the appellant had acted in concert with Doherty, but only to the extent that they had by means unknown repeatedly inflicted blunt force injuries on the deceased's head and body and that the appellant had killed her (whereas Doherty was guilty of murdering her).

[35] There was an obvious link between the conduct which Doherty was responsible for and the victim's death. It was compression of the neck resulting in asphyxiation. Since, as the advocate depute explained, the verdict returned against the appellant was unexpected, there had been no focus in either the speeches or in the charge on the issue of causation in the context of the limited responsibility which was decided upon.

[36] We accept the advocate depute's submission that the injuries for which the appellant was held responsible cannot be described as trivial. We also accept that Dr Turner's evidence included the statement that the stress from an assault could have resulted in a cardiac arrhythmia. The question though is whether there was a basis in the evidence upon which the jury could have concluded that the victim died because of a cardiac arrhythmia. If there was not, there could be no link between the injuries to the face and head for which the appellant was responsible and the death.

[37] In giving evidence Dr Turner explained that although the head and face injuries sustained by the victim did not in themselves cause death, there was a method by which they could have made an indirect contribution. The anxiety associated with the assault resulting in these injuries had the potential to cause adrenaline to circulate through Ms Young's body. In some circumstances an adrenaline surge of this sort could contribute to a cardiac arrhythmia. Some types of arrhythmia can lead to death very suddenly, others do

not lead to death at all. It seems clear then that what Dr Turner was describing was an outcome based upon a chain of potential occurrences.

[38] There was of course no evidence that the victim in fact suffered a cardiac arrhythmia and we are satisfied that what Dr Turner was describing was no more than a theoretical possibility. Dr Turner was of course giving expert opinion evidence and was entitled to explain the range of mechanisms which could have brought about death in this case. That is not the same as giving opinion evidence as to the actual cause of death. The fact that a pathologist cannot rule out a particular mechanism does not constitute evidence that this was in fact the actual mechanism of death. It could be different in a case in which there were no injuries capable of causing death on their own. In such a situation, in the absence of any other explanation, it may be that a forensic pathologist would be prepared to express the opinion that the stress of an attack had caused the deceased to suffer a cardiac arrhythmia which could not be detected at post-mortem examination. Such opinion evidence could then provide a legitimate basis for a jury to hold that death was in fact caused by a cardiac arrhythmia. In the present case there is a competing and far more obvious cause of death, namely the compression of the neck resulting in asphyxia.

[39] The distinction between the present case and the cases of *Johnston* and *McDade* is that in both of those cases the actual mechanism of death was established in evidence. Once that is known the jury can come to consider whether the conduct established against the accused person made a material contribution to bringing about death through the mechanism as established. In the case of *Johnston* the direction which was approved of by Lord Reed, in giving the opinion of the court at paragraph [54], was whether (the assault) had caused or contributed to the death of the deceased. In the present case the assault for which the appellant was held responsible may have contributed to the victim's death, but only on the

basis of a mechanism of death which could in the circumstances be no more than hypothetical.

[40] The extent to which there could have been any link between the totality of the blunt force injuries to the victim's head and face and her death is best set out at the end of page 8 of the post mortem report where Dr Turner brought together her conclusions. She explained that the compression of the neck and the intoxication with cocaine and methadone are considered in some combination to have resulted in death:

“... which *perhaps may* have been contributed to by the blunt force injuries to the head.” (emphasis added).

[41] When the exercise of stripping out the blunt force injuries for which Doherty alone was responsible is contemplated it becomes even clearer, in our opinion, that any link between the injuries for which the appellant was held responsible and the death of the victim becomes entirely speculative. In these circumstances we are persuaded that the submissions for the appellant should be given effect to. We shall therefore quash the verdict of guilty to culpable homicide which was returned against him and in its place we shall substitute a verdict of guilty to the crime of assaulting the victim by means unknown to the prosecutor meantime, (and) repeatedly inflicting blunt force injuries on her head and body.

[42] We shall order that the case should call on a subsequent date in order to hear submissions on the appellant's behalf as to the sentence to be imposed in respect of the amended verdict.