APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 23
HCA/2019/545/XC

Lord Brodie
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by

LORD BRODIE

in

APPEAL AGAINST CONVICTION

by

BRANDON DOUGLAS

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Smith; Faculty Appeals Service (for Hingstons Law Ltd, Aberdeen)
Respondent: Goddard QC AD; the Crown Agent

10 June 2020

Introduction

[1] On 4 September 2019 at the High Court at Aberdeen, the appellant and his co-accused Martin Gemmell were convicted after trial of two charges, namely assault to severe

injury and permanent disfigurement, and robbery (charge (001)); and attempted murder and robbery (charge (005)). Brandon Wilson, another co-accused, was also found guilty of charge (005). On 4 October 2019 the appellant was sentenced to a *cumulo* sentence of 10 years and 3 months detention.

[2] Charges (001) and (005) were in the following terms:

> "(001) on 21November 2018 at 7 Manse Place, Boddam, Aberdeenshire, you BRANDON ROBERT IAN DOUGLAS and MARTIN GEMMELL, did assault Scott Garry David McDonald Thomson, c/o Police Service of Scotland, Peterhead and did enter his home uninvited, brandish a knife at him, repeatedly demand that he give you drugs, money, his mobile telephone and the PIN number for his bank card, utter threats of violence towards him, strike him on the body with said knife and detain him there against his will, all to his severe injury and permanent disfigurement and did rob him of a bank card, a mobile telephone and an air rifle;
> you BRANDON ROBERT IAN DOUGLAS did commit this offence while on bail, having been granted bail on 29 August 2017 at Peterhead Sheriff Court;
>
> (005) on 21 November 2018 at 40 Clinton Drive, Sandhaven, Fraserburgh, Aberdeenshire, you BRANDON ROBERT IAN DOUGLAS, MARTIN GEMMELL and BRANDON WILSON did, while acting along with another, with faces masked, assault Allan Ian Roy, c/o Police Service of Scotland, Peterhead and did enter his home uninvited, brandish an axe and knives or similar implements at him, repeatedly demand that he give you drugs and money, utter threats of violence towards him, repeatedly strike him on the head and body with an axe and knives or similar implements, repeatedly punch him on the head and body, seize and drag him by the body, pursue him ·through the property causing him to lock himself in the bathroom, repeatedly strike the bathroom door with said axe and drag him from the bathroom, all to his severe injury, permanent disfigurement and to the danger of his life and did attempt to murder him and did rob him of a games console and accessories and two mobile telephones;
> you BRANDON ROBERT IAN DOUGLAS did commit this offence while on bail, having been granted bail on 29 August 2017 at Peterhead Sheriff Court;".

[3] At the end of the Crown case the advocate depute had withdrawn all but charges (001) and (005). A submission had been made on behalf of the appellant in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 that the evidence was insufficient in law to justify the appellant being convicted of charge (005). The trial judge rejected the

submission. The co-accused Brandon Wilson gave evidence. The appellant and the co-accused Martin Gemmell did not. Wilson's evidence did not incriminate the appellant or Gemmell.

[4] The appellant has appealed against conviction and sentence. He has abandoned his appeal against sentence. He insists in his appeal against conviction. That appeal relates only to his conviction in respect of charge (005). In the note of appeal the ground of appeal against conviction is framed as the proposition that there was insufficient evidence that the appellant was an active participant in the concerted attack on the complainer. The written argument for the appellant formulates the point as a contention that the trial judge erred in refusing the submission made on his behalf in terms of section 97 of the 1995 Act that the evidence was insufficient in law to justify the appellant being convicted of charge (005), and more particularly that (1) there was insufficient evidence that would entitle a jury to conclude that the appellant was actively involved, as opposed to merely being present, at the time of the attempted murder libelled in charge (005); and (2) given the evidence led by the Crown that one of those present at the time charge (005) was committed was not an active participant, there was insufficient evidence that would entitle a jury to conclude that the appellant was not that person (and therefore, according to the argument, not criminally responsible). We do not suggest that there is anything of significance in the difference between these formulations. The ground of appeal is perhaps better focused as a contention that the trial judge was in error in refusing the submission of no case to answer, but the essential question is always whether there has been a miscarriage of justice. That requires this court to consider for itself whether there was sufficient evidence led to justify the conviction of the appellant on charge (005). In determining that issue this court is not bound by the way the trial judge reports on his evaluation of the evidence. It is open to this court to

attach significance to evidence to which the trial judge did not apparently attach significance. Equally, it is open to this court not to attach significance to evidence to which the trial judge did attach significance. In either event it is then for this court to make its own assessment on the basis of what it regards as relevant and material to conviction.

Summary of the evidence

Charge (001)

[5] The complainer, Scott Thompson, resided alone in a one bedroom bungalow in Boddam, a small village in Aberdeenshire. There is a shop in the village. An ATM is situated inside the shop. The shop has internal CCTV. On 21 November 2018 the complainer was at home at 0900 hours when he heard a loud knock at the door. He answered the door and two males, unknown to the complainer but later identified as the appellant and Martin Gemmell, walked in uninvited. Both were wearing dark clothing, joggers and a jacket. Both had their jacket hoods up. The appellant pulled out a large knife. The complainer stepped back into the living room. He was asked whether he had drugs and money. The knife was held up to him pointing towards his chest. He said that he did not have any drugs or money but the two males did not believe him. He was then told to sit, which he did. Gemmell started to search the house. The appellant stood brandishing the knife. The two males kept asking the complainer where the drugs and money were kept. He repeated that he did not have any drugs and money in the house but they accused him of lying. The appellant then stabbed the complainer above the knee. The complainer handed over his wallet which contained his bank card. The males took his mobile phone (a white Blackberry) from a drawer. They asked him for the PIN number for his bank card and whether he had money in his account. The knife was held at his face and he was told that he

would be stabbed if he did not disclose the PIN number. The complainer gave his PIN number. Both males were in the room when he did so. The appellant still had the knife in his hand. The appellant stayed with the complainer while Gemmell left and withdrew £250 from the ATM in the shop using the appellant's bank card. While Gemmell was away, the appellant continued to search the house. Gemmell returned and told the appellant that he had got money from the ATM. The complainer was told by the males not to phone the police or they would be back. They left, taking an air rifle belonging to the complainer with them. The complainer called the emergency services. He was found to have sustained a large gaping wound to his right leg.

[6] It was not disputed that the two attackers were the appellant and Gemmell. This was acknowledged by counsel for the appellant in the course of his cross-examination of the complainer. Both the appellant and Gemmell had tendered pleas of guilty to charge (001), conditional on pleas of not guilty being accepted to charge (005). The pleas were rejected by the Crown.

[7] In support of the complainer's account the Crown led evidence from Cameron Geraghty, the driver of the car which had been used to transport the appellant and Gemmell to the complainer's house. Geraghty spoke to seeing the appellant with a large knife and an air rifle. Another witness saw the appellant (whom she identified) and Gemmell going from the car to the complainer's house. Gemmell was identified from CCTV footage entering the shop at 0915 hours. The shopkeeper spoke to him using the ATM. A knife which was similar to the knife used in the attack was found in the co-accused (on charge (005)) Brandon Wilson's home. The knife had the appellant's blood on its handle. Gemmell's finger prints were present on the handle of the knife. The air rifle was recovered during a search of Gemmell's house. The white Blackberry mobile phone was found later that night in

Geraghty's car. The phone had the DNA of both the complainer and the appellant on its surface.

[8] There was, in addition, evidence of a telephone call made by the appellant while on remand when he said, while laughing, that he was the one who "hit the boy in the leg".

Charge (005)

[9] The evidence of the complainer in charge (005), Allan Roy, was given by the admission of his statement in terms of section 259 of the 1995 Act. In the statement he explained that he resided in a semi-detached bungalow located slightly off the main street in Sandhaven, which is on the outskirts of Fraserburgh. Entry to the property was through the rear door as the front door was secured shut due to damage. On 21 November 2018 the complainer spent the day drinking with friends. A friend gave him a lift home. He was watching television shortly before 2100 hours when he received a call on his mobile which he did not answer. Shortly afterwards his friend Selina King arrived at the back door to collect some items that she had left previously. As he was handing her the items, the complainer heard her shout "Oh my god". He looked up and saw several males coming from the left-hand side "and straight through my door into my kitchen ". Selina King ran off to her house which was nearby. The males had their faces hidden with their jacket hoods pulled up and scarves across their faces. As soon as the males entered the kitchen, they repeatedly struck the complainer on his head and body. One of the males had an axe with a black plastic coated handle. The second male was armed with a knife. The third male had something in his hand. The first male struck him on the thigh with the butt end of the axe. All three males repeatedly struck him with weapons. The males shouted at him "where's your money, where's your tartan wallet" and "we know you have money". He thought he

was going to die. They dragged him into the living room. He put his arms up to defend himself but the three males struck him on the arms. His jumper was soaked in blood where he was hit with the axe. He managed to grab the axe handle at one point but then felt himself being repeatedly stabbed in the left shoulder. One of the males found the complainer's tartan wallet which was empty. They continued shouting at him demanding to know where his money was. The three males also found some drugs (crack cocaine and heroin) on the living room table and demanded to know if he had any more drugs. The complainer was struck to the back of his legs. While the complainer was seated on the sofa the male with the axe lifted up his left trouser leg and then hit his leg with the axe. He was told that he would chop his legs off if he did not give them the money. The man with the axe told him he had thousands of pounds and more drugs in the house. The complainer kept repeating that he did not have money or drugs. The three males kept striking him. The three males unsuccessfully attempted to remove his television. They took a new Play Station with a headset and controller. They put it into a bag. At this point the complainer saw an opportunity to get free and ran into the bathroom. He locked the bathroom door. He had hoped to escape through the window but before he could do so the three males began striking the bathroom door. He saw the head of the axe repeatedly coming through the bathroom door as they tried to break it down. The complainer shouted that he was on the phone to the police (although he was not). This seemed to enrage his attackers. The door gave way and the three males came into the bathroom and dragged him back into the living room. They punched him on the head. He thought he heard a fourth male speaking and there was some talk between them all about getting out of there. Then, all of a sudden the three males left by the back door. Shortly after that the complainer heard a car accelerating away

[10] The complainer phoned the police. He was taken to Aberdeen Royal Infirmary where he was admitted and treated for his injuries. He had to be sedated and was in hospital for a number of days. He had six broken ribs, one of which had punctured his lung. He had swelling to his right eye and scratches from his forehead to his ear. He sustained multiple cuts to various parts of his body and multiple stab wounds to his back. In consequence of his experience the complainer has suffered flashbacks, nightmares, anxiety attacks and panic attacks. He is scared and suicidal.

[11] The complainer provided a description of the three men to the police but he was unable to identify any of them.

[12] In support of the complainer's evidence as to a crime having been committed, there was evidence from Selina King of seeing the men entering the house uninvited and hearing one of them shouting "give me the drugs". There was also the evidence of PC Jayne Forman, the first police officer on the scene. She confirmed the obvious injuries to the complainer (the nature and extent of which were agreed by joint minute). She confirmed the damage to the house. There was evidence of the complainer's blood on a number of surfaces.

[13] Selina King's evidence also had a bearing on the number and involvement of the attackers. The trial judge reports her evidence as her speaking to having "fled the locus on seeing the men entering his house uninvited and hearing one of them shouting 'give me the drugs'". The advocate depute when addressing the jury summarised Selina King's evidence as including an "indication that there were a number of men burst in through the door together, possibly four or even five."

[14] At the end of the incident, Selena King looked out of her kitchen window. She heard a car revving, and saw it taking off. The colour of the car was "grey, blue, greenish".

[15] There was evidence of the three co-accused having been in a green Honda Jazz motor car registration number SV04 VWN, which it might be inferred was the vehicle in which the attackers travelled to and from Sandhaven. Evidence was led from Sean Bruce and Caroline Russell that the car they saw in Sandhaven, close to the locus, was the same one they had seen a short time earlier in the Watermill Filling Station in Fraserburgh. CCTV footage showed the Honda at the filling station. Two of the occupants of the car, who left the car to enter the shop there, were identified as the appellant and Wilson. The appellant was dressed in dark clothing. Sean Bruce said that the men he saw running towards the car when he saw it near to the locus in Sandhaven were dressed in dark clothing. The Honda Jazz was later seized and when it was forensically examined Allan Roy's DNA was found on the rear off-side interior door release. This finding was consistent with a bloodstained hand having deposited the complainer's blood.

[16] A balaclava was recovered from the house of the co-accused Gemmell's brother. When it was tested, it was found to have traces of blood and DNA from both the complainer and Gemmell.

[17] DC Bruce gave evidence that when he arrested Gemmell he saw a black holdall which was later recovered under warrant. When searched, the holdall was found to contain the PlayStation console and accessories taken during the attack on Allan Roy. This evidence was consistent with the evidence of both Caroline Russell and Sean Bruce who said that one of the men they saw running towards the Honda Jazz was carrying a black bag. Gemmell's partner accepted that she had seen Gemmell with the holdall.

[18] A bottle recovered from the Honda Jazz had the co-accused Wilson's DNA on it. CCTV footage from the filling station showed Wilson wearing a black Timberland jacket. This jacket was found in Wilson's house. Allan Roy's blood was found on its lower left

sleeve. Small amounts of drugs were recovered from Wilson's house. Allan Roy's mobile phone was found on the living room table.

[19] There was evidence of the appellant's association with both his co-accused, and evidence of the association of his co-accused with one another. In his police interview the appellant referred to being in their respective houses and leaving his bank card at Gemmell's house and his phone at Wilson's house. A knife with Wilson's blood on the handle was found in Gemmell's house.

[20] The appellant was on remand in respect of the matter which was the subject of charge (001) on the indictment when, on 11December 2018, he was arrested by DC Bruce in respect of the matter which was the subject of charge (005). DC Bruce said that he told the appellant that his arrest was in relation to an assault and robbery on the same day as the assault and robbery for which he had previously been remanded. DC Bruce said that the appellant then said to him that if he had been interviewed at the time of the incident, he would have told him about it. He said that he "was there", but that he did not do it.

The evidence relied on by the trial judge in rejecting the submission of no case to answer

[21] The trial judge reports that he accepted that Scots law did not provide for the admission of similar fact evidence (see *DS* v *HM Advocate* 2007 SC (PC) 1 at paras 41 and 86) but, that said, some of the evidence led in support of charge 001 was also relevant to charge 005, in particular the evidence that the appellant and Gemmell were travelling by car earlier the same day looking for drugs and money from known drug dealers living in the area, whilst armed with weapons. In what DC Bruce took to be a reference to charge (005) the appellant had said that he was there but that he did not do it. There was evidence of the appellant's association with his co-accused. It could be inferred that the attackers had

travelled to and from the locus in the Honda Jazz. Allan Roy's DNA was found in blood on the rear off-side interior door release. This was consistent with a bloodstained hand depositing the blood. When the Honda Jazz was seen and recorded on CCTV at the Watermill Filling Station two of the occupants were identified as the appellant and Wilson. The appellant was dressed in dark clothing. Selena King's description of the colour of the car which drove away from the locus was consistent with that of the Honda Jazz. The appearance of the holdall recovered from Gemmell's partner's house was consistent with that of the black bag seen being carried from the locus by one of the two men who ran towards the Honda Jazz. Gemmell's partner accepted that she had seen Gemmell with the holdall. Putting all this evidence together, it was a reasonable inference therefrom that the appellant was an active participant (as distinct from an innocent bystander) in what was libelled in charge (005).

Submissions

The appellant

[22] It was submitted on behalf of the appellant that the trial judge had erred in concluding that there was sufficient evidence to justify the appellant being convicted of charge (005). It was accepted that active involvement in a concerted attack committed by a group of attackers may arise from any active role, being a lookout for example (see eg *Stillie and Close* v *HM Advocate* 1990 SCCR 719) but there must be some active participation by an accused in order for him to be criminally responsible. Here the evidence was not capable of supporting the necessary inference that the appellant was not only present but was an active participant in the attempted murder. It was accepted that there was evidence from which the jury could conclude that the appellant was present at the locus at the material time, but

what was missing, in the absence of speculation, was any evidence from which it could be inferred that he was actively involved. The complainer's evidence was that he was attacked by three men; a fourth man was there but that fourth man was not involved. The trial judge had been wrong to find that evidence led in support of charge (001) was relevant to the proof of charge (005). It might be different had these been charges relating to the same complainer (cf *Fraser* v *HM Advocate* 2013 SCCR 674 at para 49 and Hume, *Commentaries* ii, 413). The evidence led in support of charge (001) did not make it more probable that the appellant committed the offences libelled in charge (005) (cf *CJM* v *HM Advocate* 2013 SCCR 216 at para [28]). As the trial judge pointed out in his report [para 22], what has been called "similar fact evidence" has no place in Scots criminal law (see *HM Advocate* v *DS* at paras [41] and [86]). Evidence of propensity to commit a crime does not provide corroboration. The supposed relevance to charge (005) of the evidence led in support of charge (001) is presumably because of the similarity of the two offences. However, neither the *Howden* principle (see *Howden* v *HM Advocate* 1994 SCCR 19) nor the rule in *Moorov* v *HM Advocate* 1930 JC 68 assists. Charges (001) and (005) were not sufficiently peculiar to allow an inference that the appellant must have been actively involved in each (cf *R* v *Straffen* (1952) 36 Cr App R 132*). McHale* v *HM Advocate* [2017] HCJAC 35, which was relied on by the Crown, was a very different case. There, a number of ATM machines had been blown up using a very distinct technique. Here the trial judge had pointed to the similarity that the appellant and his co-accused were travelling by car looking for drugs and money from known drug dealers living in the area "whilst armed with weapons". However, once the evidence relating to charge (001) is disregarded, there was no evidence that the appellant was armed with a weapon. There were significant dissimilarities as between the ways in which the respective offences were carried out. Charge (001) was committed with a knife

whereas in charge (005) a range of weapons was used, including knives and an axe. In charge (001) the complainer was struck once with a knife whereas in charge (005) the complainer was set upon and very seriously injured, he was pursued into a locked bathroom which was broken into using an axe. The nature of the attacks were different, whereas in charge (001) two men calmly carried out different roles, in charge (005) three perpetrators committed an almost instantaneous and frenzied group assault. Given these differences it was submitted that the offences in charge (001) and charge (005) were not similar in the way they were carried out.

[23] The remaining evidence in the case was incapable of supporting an inference of active participation. At its most incriminative, the appellant's admission to being "there" did not imply taking an active part. Whether the appellant associated in the homes of the co-accused was neutral. The appellant was not identified as either of the two males seen running towards the Honda Jazz car parked near the locus. The Crown evidence was that four people had been in the car when it was seen at a petrol station some time before the events libelled in charge (005) happened. The appellant was one of the four occupants. One of the males seen running towards the car near the locus was carrying a black bag similar to that found in the home of the co-accused Gemmell, not in the home of the appellant. That the complainer's blood was deposited inside the Honda Jazz was not evidence referable to the appellant. A jury could reasonably infer from the sightings at the filling station that the appellant was an occupant of the car used to go to the locus, but it could not be reasonably concluded from that evidence that the appellant was one of the three males who were actively involved in the attack.

[24] According to the complainer he was attacked by three unidentified males using weapons. At the end of the attack the complainer heard a fourth male speaking. It follows

that there was a fourth male person who was present towards the end of the assault who was not an active participant in the attack on the complainer. Given the jury's verdict, it can be assumed that they accepted the complainer's account of there being a fourth male present. There was insufficient evidence to entitle a jury to exclude the possibility of the appellant being that fourth male. There was no evidence from which it could be inferred that the fourth male was there as a look out or to assist in the assault. As only three males were said by the complainer to have attacked him it follows that the fourth male person must have been someone who was not actively involved at all in the assault and robbery. The appellant's conviction on charge (005) should accordingly be quashed.

The respondent

[25] It was the Crown's submission that when the evidence was looked at as a whole there was sufficient evidence to allow the jury to conclude that the appellant was one of the three persons who entered the house of the complainer in charge (005) and took part in a concerted attack upon him in the manner libelled. In any event, the jury were entitled to conclude that all four occupants of the vehicle that parked close to the locus in charge (005) were participants in a concerted attack. They included the appellant. This was a circumstantial case and the evidence of the appellant's participation in the crime libelled in charge (001) was relevant and available for consideration by the jury in relation to charge (005) (see *McHale* v *HM Advocate* at para [26], and *McGaw and Reid* v *HM Advocate* [2019] HCJAC 78). The fact that an accused is not seen to strike a blow in the course of a concerted attack does not exclude that accused from being part of the attack (see *Vogan* v *HM Advocate* 2003 SCCR 564).

[26] The evidence incriminating the accused in relation to charge (001) was not presented to the jury as demonstrating a general propensity on the part of the appellant to commit a certain type of crime. Rather, the jury were invited to conclude from the evidence adduced in relation to charge (001) that on 21 November 2018: the appellant was travelling by car with his co accused Gemmell in the Aberdeenshire area; he was armed with a knife; he had an intention to assault and rob and was willing to use the knife to stab his victim in the furtherance of that intention; that he had an intention to obtain drugs and money from the robberies; the robberies were to take place in private houses; and the victims were to be persons who themselves had a previous involvement in supplying drugs. This was all relevant to proof of charge (005), but in addition there was a significant amount of other evidence on which the jury were entitled to rely in relation to that charge.

[27] The complainer had described "several males" running to his house and thereafter an attack by three men in the house, all of whom were armed. The weapons included a knife and an axe. The men demanded drugs and money and each had their face masked. A fourth male was heard speaking to the other three and there was talk between them all about getting out of there. All the males left together by car. Selena King spoke to a number of men arriving together, possibly 4 or 5 in number, and running towards the complainer's house. One had shouted "give me the drugs". They all left together in a car. The appellant had admitted to DC Bruce that he "was there" but didn't do it. The appellant was associated with the car used in the attack. The appellant was seen on CCTV dressed in dark clothing at a petrol filling station getting out the car and getting back in again with another male in dark clothing at 1938 hours. There was evidence that the car had four occupants. The car seen at the filling station and recorded on CCTV fitted the description of the car seen by Selina King. The Honda Jazz was later found to have the DNA of the complainer on an

interior rear door release, consistent with a secondary transfer of the blood by an attacker. Police officers were directed to the complainers address at 2055 hours, just over an hour after the sighting at the filling station.

[28] There was, it was submitted for the Crown, an abundance of evidence against the co-accused Gemmell and Wilson in relation to charge (005). In Gemmell's case that included a balaclava recovered at his brother's house with DNA matching that of Gemmell and the complainer on it. Gemmell was arrested in a friend's house. Some of the property stolen in the course of the robbery was recovered there. A jacket that Wilson was seen to be wearing on the CCTV footage was found to have blood on it with DNA matching that of the complainer Roy. A phone stolen from Roy was recovered in Wilson's flat. There was evidence of the appellant's association with each of the two co accused, both on CCTV at the petrol station and by the finding of the appellant's bank card at Gemmell's house and his phone at Wilson's house.

[29] When these various pieces of evidence are taken together, it was submitted that a jury would reasonably be entitled to hold that on 21 November 2018 the appellant had armed himself and travelled in a car along with his co-accused with the intention of committing robberies of persons involved in the drug trade and in particular that he was looking for drugs and money. A jury would be entitled to hold that he was one of the three men involved in attacking the complainer in charge (005). A jury would equally be entitled to take the view that all the males who approached the house were part of a concerted attack, whether they had entered the house or not. All arrived together by car. Selina King stated that the males all ran together to the house of the complainer, and there was a shout of "give me the drugs". The complainer described the males as having their faces hidden

with jacket hoods and scarves. The "fourth" male spoke to the others in the course of the attack, there was talk about "getting out of there" and all the males then left together.

Decision

[30] In its essentials the submission for the appellant is as follows. There was evidence to place the appellant at or about the locus but nothing further to incriminate him in relation to charge (005). The complainer gave evidence of having been attacked by three male persons but there was also a fourth male present. As there was no evidence of that fourth person having participated in any way in the attack on the complainer or in the taking of his property, and as the Crown had not excluded the possibility of the appellant being that fourth person, there was insufficient to convict the appellant of charge (005) and accordingly his conviction should be quashed. The evidence referable to charge (001) was not admissible in relation to charge (005).

[31] The starting point in evaluating that submission is to recognise, as counsel for the appellant did recognise, that the Crown case was circumstantial and based on an allegation of antecedent concert. The Crown's primary position is that the evidence points to the appellant being one of the three males who the complainer described as having attacked him. However, the appellant and his co-accused were indicted, and they were convicted by the jury, "while acting along with another". Accordingly, the Crown case, and the jury verdict, accommodated criminal responsibility on the part of a fourth person as well as the three males. The question therefore comes to be: did the Crown lead sufficient evidence to entitle the jury to convict the appellant, irrespective of whether he was one of the three active assailants or he was the fourth person. In our opinion, the Crown did lead sufficient evidence.

[32] Counsel for the appellant accepted that there had been sufficient evidence to establish that the appellant was one of the persons present "at or about" the locus during the commission of the acts which constituted charge (005); in other words that he was either one of the three active assailants or the fourth person. This concession could not have been withheld. DC Bruce had spoken to the appellant's admission that he "was there". This was corroborated by the evidence which established that the appellant was one of the occupants of the Honda Jazz which had brought the attackers to the locus. Counsel explained however that by accepting that the evidence was sufficient to establish that the appellant was "at or about" the locus, he did not mean that he accepted that the evidence was properly open to the interpretation that the appellant had entered the complainer's house. Moreover, counsel did not accept that it could be inferred from the direct evidence that there had been a pre-agreement among the three active attackers and the fourth person to assault and rob the complainer.

[33] For reasons that we will come to, we disagree with counsel on both of these points but on one matter we are agreed. Counsel accepted that on the hypothesis that it was established that there was a pre-agreement to assault and rob the complainer to which the appellant was party, the appellant's "mere presence" at the locus during the assault and robbery would be enough to entitle the jury to convict him of charge (005). We see that as a concession properly made.

[34] As counsel accepted, where a victim is attacked as part of a common plan among a number of persons, it is not necessary for it to be proved that someone who was party to that common plan actually struck the victim, for him to be guilty of assault (see eg *Stillie and Close* v *HM Advocate*). However, where a person is present when another person does something criminal, but that person does nothing to assist the other person, there will

usually be no basis upon which it can be alleged that the first person has incurred criminal responsibility (see eg *Lawler* v *Neizer* 1993 SCCR 299). *Ex hypothesi* he has done nothing to attract personal responsibility and there is nothing from which it can be inferred that he was art and part in the criminality of the other person. For all that is disclosed by the evidence, the first person is the archetypal innocent bystander. It is different where there is evidence of a prior agreement to commit the offence and that the accused was party to that prior agreement. Then, any degree of participation is sufficient to make the accused responsible for what the other party or parties do, provided that it does not go beyond the extent of what was agreed. Where what has been planned is an act of violence, simple presence while others actually inflict the violence can readily be inferred to be participation in the assault, whether by providing moral support to the actual assailants, by being available to provide more active support should it be required, and by intimidating the victim.

[35] Hume puts the matter this way in the course of a discussion of art and part in murder (*Commentaries* i 264):

> "One thing is plainly reasonable, and is allowed by all the authorities: That if a number conspire and lie in wait, to kill a certain person …it signifies nothing who gives the mortal blow, or how few blows are given. Though but one of the party strike, and dispatch with one blow of the lethal weapon, he is not therefore the one actor on the occasion, but executioner, for all of them, of their common resolution: Properly speaking, he is their instrument with which they strike, and they by their presence are consenting, aiding and abetting to him in all he does; having all come hither on purpose to have it done, and being ready to lend their aid, if need shall be. Their presence on the occasion is substantially an assistance. It adds to the terror and the danger of the person attacked, who, in case of an assault by one only, not supported by the attendance of others, might happen successfully to defend himself; as on the other the side the invader is heartened in the enterprise, by his knowledge of the force which is at hand to sustain him."

[36] In *Vogan* v *HM Advocate* 2003 SCCR 564, the appellant and two co-accused were charged with attempted murder. The evidence against the appellant was that he had been

present when a number of men burst into the complainer's flat and attacked him, *inter alia*, by cutting him with a Stanley knife and by trying to put pieces of tape from a roll of tape on him. The appellant was convicted and appealed on the ground of insufficiency of evidence. His appeal was refused. Giving the opinion of the court Lord Kirkwood said this at (at p567):

> "On the issue of sufficiency of evidence, we are satisfied that the submissions made by the advocate depute are well founded. The complainer gave evidence that the appellant was in the flat at some stage while the attack in the living-room was taking place, and that he left with Cruickshank just before the last blow with the machete was administered. The complainer described the appellant as 'just raking about the house' and standing speaking, in the course of the assault, although the appellant had not hit him. There was evidence of the appellant and Cruickshank being seen running together carrying plastic bags and, of course, there was evidence that the police found in the appellant's flat the roll of tape that had been used by Cruickshank in the course of the attack as well as a Stanley knife and the bloodstained shoes. In our opinion, the evidence led before the jury, looked at as a whole, was sufficient to entitle them to hold that, even though the appellant had not inflicted any blows on the complainer, he was nevertheless part of a group who had acted together in pursuance of the common criminal purpose of assaulting the complainer"

[37] Returning to the facts in the present case, counsel for the appellant accepted that there was evidence to establish that the appellant had been "at or about" the locus. In our opinion the evidence went somewhat further than that, allowing the inference to be drawn that the appellant had entered the complainer's house with the other three males. The most natural interpretation of the appellant's admission to DC Bruce that "he was there but he did not do it" is that he was present where "it", the assault on the complainer, was carried out, albeit, according to the appellant, he was not one of the assailants. The trial judge's summary of the evidence in his report has "several males" coming towards the back door of the house and running into the kitchen. Admittedly, he then describes how three males were armed. However, when the advocate depute addressed the jury he spoke of the evidence of possibly four or even five men who burst through the door together. We have

not noticed the advocate depute's account of the evidence being corrected or challenged but, in addition, there was the evidence of the complainer having heard the fourth male speaking to the others at a point. The complainer was then in the house, an indication that the fourth male was also in the house.

[38] As far as the question of pre-agreement among the three males and the fourth male is concerned, we accept the Crown submission that the jury would be entitled to take the view that all the males who approached the house were part of a concerted attack. The assault and robbery were clearly planned by the four males. They drove together to the complainer's house. They all immediately got out of the car and ran together to the house. They were all in dark clothing and were wearing balaclavas. At least some of them had weapons. Selina King heard a shout of "give me the drugs" and the complainer's evidence was of being immediately assaulted and subjected to demands for drugs and money. We would see the inference that the four males had formed an agreement to assault and rob the complainer and that, as one of the four males, the appellant was party to that agreement, as well-nigh irresistible.

[39] Thus, in our opinion, the evidence led by the Crown of the events of the evening of 21 November 2018 was sufficient to justify the conviction of the appellant on charge (005) and that is so, as was submitted on behalf of the Crown, irrespective of whether the inference is drawn that the appellant entered the house together with his three companions. However, the Crown, both at trial and before this court, also relied on the evidence which had been led bearing more particularly on charge (001). The trial judge accepted the Crown's submission on this. So do we.

[40] We do not propose to discuss what precisely was meant by Lord Hope and Lord Rodger when, at paras 41 and 86 of *DS* v *HMA*, they stated that evidence of similar facts was

inadmissible as a matter of Scots law. For present purposes it is enough to confirm that we accept that it is generally inadmissible for the Crown to adduce evidence of bad character or of propensity to commit a particular sort of crime. That is rather different from saying that evidence of the occurrence and circumstances of one event will always be irrelevant to proof of a separate event (see *McHale* v *HM Advocate* [2017] HCJAC 35 at para [26]) but, as was explained in the Crown submission, this is not what the prosecution was seeking to do here. The evidence relating to charge (001) was about what the appellant had been doing earlier on the same day as the incident which was the subject of charge (005). The facts in issue in relation to charge (005) included the identity of the perpetrators of an assault with weapons in an attempt to obtain money and drugs; their individual involvement in that assault and robbery; and whether some or all of them were acting together as part of a pre-arranged plan. We would see it as self-evident that it was relevant to the determination of all these issues that earlier that day the appellant was travelling by car in the Aberdeenshire area with Gemmell; that he was armed with a knife; and that he had an intention to assault and rob drug suppliers. Apart from anything else, it would be to strain the jury's credulity to suggest that, given his activities in the morning which were the subject of charge (001), the appellant's admitted presence at the locus of charge (005) in the evening was as an innocent bystander. It is artificial to compartmentalise, as it appeared counsel for the appellant was seeking to do, the evidence of what the appellant was alleged to have done earlier in the day of 21 November 2018 as relating exclusively to charge (001), and the evidence of what the appellant was alleged to have done later in the day as relating exclusively to charge (005).

[41] As we have already indicated, we do not consider that the evidence led in support of charge (001) was necessary for a sufficiency of evidence for conviction on charge (005). However, in our opinion, that evidence strengthened the inferences which were already

available. The trial judge did not err in rejecting the submission of no case to answer. There has been no miscarriage of justice. The appeal is accordingly refused.