APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 5
HCA/2020/000152/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

Appeal against Conviction

by

KEVIN McGROUTHER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Taylor; Faculty Services Ltd (For Fox McAfee, Solicitors, Coatbridge)
Respondent: Edwards, QC, AD; Crown Agent

29 January 2021

Introduction

[1] On 21 February 2020, in the High Court at Glasgow, the appellant was convicted of a charge in the following terms:

> "On 18 September 2018 at 261 Cedar Road, Cumbernauld, North Lanarkshire you did assault Allan Kemp, care of police service of Scotland, Whittington Street, Coatbridge and did strike him on the chest with a knife or similar instrument to his

> severe injury, permanent disfigurement and to the danger of his life and did attempt to murder him."

An averment that the appellant had previously evinced malice and ill will towards the complainer was deleted by the jury in returning its verdict.

The evidence

[2] The appellant and the complainer were neighbours in flats at the address in the indictment. The appellant lived on the floor immediately below the complainer. There had been a degree of animosity between the two from the time the complainer had moved into the flat.

[3] The complainer gave evidence that at around 5.30 in the morning on 18 September 2018 he heard the appellant shouting up the communal stairway. Because of this he went down and knocked on the appellant's door. The appellant opened it and stabbed him in the chest. The complainer was able to return to his own flat and phoned for an ambulance.

[4] The medical evidence was agreed by joint minute which set out that the complainer had sustained a single 2cm incised wound to the central chest area resulting in a fractured sternum, an injury to the pericardium and a right pneumothorax with significant bleeding. He required treatment which included having his chest opened through the sternum revealing bleeding from a 1cm laceration in the right upper chamber of the heart. The joint minute agreed that the wound to the complainer's chest was consistent with him having been struck once with a knife or similar instrument and that had he not received expeditious medical treatment he would have died as a result of his injuries.

[5] The appellant relied on a special defence of self-defence. Although he did not give evidence on his own behalf, evidence was led by the Crown of what he had said to a friend Mr Thompson and of what he had later said to the police.

[6] The appellant told the police that the complainer had come down to his flat and threatened him with a crossbow with a bolt in it. He said that he felt his life was in danger and that he put his foot inside the front door and told the complainer that he would get a weapon unless he went away. The complainer did not do so and so he went to his kitchen and obtained a small knife. When he came back to the door the complainer was still threatening him with the crossbow. He told police that he elbowed the crossbow out of the way and he accepted that he must have struck a complainer with the knife, although he said that he had not meant to stab him.

[7] Mr Morrison's evidence was that the appellant had told him that he had stabbed someone but that it was in self-defence.

The note of appeal

[8] The ground of appeal on the appellant's behalf argues that the trial judge misdirected the jury by failing to leave open to them the possibility of returning a verdict of guilty without the aggravation of attempted murder. It was accepted that the judge gave appropriate and accurate directions on the definition of the crime charged and in particular on the necessary *mens rea* for the aggravation of attempted murder. It was also accepted that she gave appropriate and accurate directions on the concept of self-defence. The direction complained of occurred in the concluding passages of the judge's charge when she explained the verdicts available to the jury and the entitlement to return a verdict either by a majority or unanimously. In turning to give the familiar direction on the opportunity to delete aspects of the charge the judge said the following:

> "Now, I have to tell you that, if your verdict is to be one of guilty, then you can delete part of the charge that you find is not proved. What is left must define the crime and describe how it was carried out and it may be that in this case there is not much scope for deleting anything because, as has been clearly explained to you by

> Crown and defence, the way in which this case has been presented is that it's either an attempted murder or its self-defence".

The trial judge's report

[9] In her report to this court the trial judge explained that she gave the direction under consideration because it reflected the way in which the case had been approached. She observed that in his speech defence counsel did not submit that the jury could bring back a verdict of guilty of assault but addressed the jury to the effect that if they were left in no reasonable doubt that the Crown had excluded self-defence, then the correct verdict was guilty of attempted murder. The trial judge explained that she assessed the appropriateness of the direction before delivering it and decided to do so because of the very clear stance taken by counsel. She also considered whether fairness demanded that she give a direction on an alternative verdict not sought by either party but decided that it did not. She considered that support for the decision which she arrived at could be found in the case of *Duncan v HM Advocate* 2018 SCCR 319 at paragraphs [27] and [28]. In her opinion, trial counsel had periled the defence on the appellant's conduct being excused by self-defence.

Submissions

Appellant

[10] On the appellant's behalf it was accepted that his trial counsel had not canvassed the possibility of a reduced verdict of guilty in his speech to the jury. However, it was submitted that the trial judge had misunderstood matters if she had inferred any form of concession from what counsel had said to the effect that if the jury rejected self-defence then the only verdict would have to be that of guilty of attempted murder. A transcript of trial counsel's speech was available and it could be seen that no such explicit concession was made. Attention was drawn to various passages in that transcript in which reference was

made to the nature of the weapon involved, the single blow inflicted and the absence of fury or rage. Although these observations were made in the context of arguing in support of self-defence, it was submitted that the tenor of the speech suggested a rejection of either a murderous intent or wicked recklessness. It was therefore wrong of the trial judge to conclude that, absent self defence, counsel had made any concession on the quality of the conduct involved.

[11] The central component to the argument advanced was that the advocate depute had made it plain in her speech to the jury that one of the issues for the jury to determine was whether the appellant should be convicted of attempted murder or of a lesser offence. This having been put in issue by the Crown, and there being no explicit concession by defence counsel that attempted murder was the only appropriate guilty verdict, it became obvious that a direction on the possibility of a verdict of guilty under deletion of this aggravation ought to have been given.

[12] It had been conceded at trial that the appellant was responsible for the injury inflicted on the complainer. In the appeal it was accepted that the violence offered could amount to an attempt to murder but it was submitted that such a conclusion was not inevitable. A contrast was drawn between the single injury inflicted in the present case and cases involving multiple stab wounds towards vital areas of the body, or prolonged attacks involving stamping and kicking of the head and shootings. It could therefore be seen that absence of the direction argued for constituted a material misdirection.

[13] It was submitted that given the nature of the blow inflicted in the present case, the jury ought to have been clearly directed that they required to undertake a critical assessment of the quality of the appellant's conduct and that they could reflect that, if appropriate, by a

verdict of guilty of assault to severe injury, permanent disfigurement and to the danger of life but under deletion of the aggravation of attempted murder.

[14] Under reference to what had been said in the case of *Duncan*, counsel submitted that where the legal quality of the accused's conduct was the focus for the jury, and the violence involved was limited to a single blow, then the prospect of a verdict under deletion of attempted murder was an obvious one and the jury required to be equipped by direction to assess whether or not such a deletion ought to be made.

Crown

[15] On behalf of the Crown it was submitted that there had been no misdirection by the trial judge. A verdict of assault to severe injury, permanent disfigurement and danger of life was not one which was reasonably available on the evidence when considered in the context of the way in which the evidence was approached by both parties. The appellant inflicted a stab wound directed to the centre of the complainer's chest. The knife was inserted with sufficient force to fracture bone and penetrate one of the chambers of the heart. At the very least the action was wickedly reckless.

[16] The focus of dispute at the trial had been the potential involvement of a crossbow and whether the appellant was acting in self-defence. The trial judge concluded that a direction on an alternative verdict was not required. Her assessment was appropriate and was supported by what had been said by the court in *Duncan* v *HM Advocate* and in the case of *Anderson* v *HM Advocate* 2010 SCCR 270.

Discussion

[17] The transcript of trial counsel's speech to the jury makes it clear that his essential purpose was to support the contention that the complainer had arrived at the appellant's

door armed with a crossbow and to undermine the complainer's evidence to the effect that he had not. He advanced the proposition that if the jury had a reasonable doubt about the testimony of the complainer, then a verdict of acquittal had to be the result. In conjunction with these submissions he identified the adminicles of evidence which were said to support the credibility of the account which the appellant had given to the police and to Mr Morrison.

[18] It is correct that at no stage did counsel expressly concede that a verdict of guilty to attempted murder would follow if the jury were to reject his submissions. What is important though is to consider what he did say. At an early point in his address counsel stated:

> "And so I turn to the evidence, and my starting point is this: for you to convict Kevin McGrouther you need to find Allan Kemp to have been honest with you about the important circumstances of the event. My focus, you will know without me mentioning it, is this question of the crossbow."

This made it clear to both the judge and the jury that the issue from the defence perspective was the honesty of the complainer's account. It was not suggested that there was any other issue for the jury to assess. Nothing which was said by defence counsel at any stage in his speech could have been construed as an invitation to consider any alternative verdict. We therefore consider that the trial judge was correct to understand that the case was presented as either an attempted murder or self-defence.

[19] In any event, we entirely reject the starting point of the appellant's argument that the Crown had placed before the jury the issue of whether the verdict ought to be guilty of attempted murder or of a lesser assault. The passage which was founded on for this purpose was at pages two to four of the transcript of the advocate depute's speech, where she set out what she said was the basis upon which the Crown invited the jury to convict the

appellant of attempted murder. The advocate depute identified the various relevant aspects of the evidence, submitting that the attack was unprovoked. She drew attention to the nature of the weapon, along with the nature of the injuries inflicted, and reminded the jury of the agreed evidence that the complainer would have died but for expeditious medical treatment. In light of these aspects of the evidence the advocate depute invited the jury to conclude that the appellant either intended to kill the complainer, or he was acting with a wicked recklessness as to whether he lived or died, which, she accurately stated, would constitute attempted murder.

[20] In this passage of her speech the advocate depute was setting out the basis for the charge libelled. This was an integral part of her function, which was undertaken in an appropriate and conventional manner. It is entirely artificial to attempt to construe these passages of her speech as setting out a distinction between attempted murder and a lesser verdict. Accordingly, in our opinion, the basis upon which the appellant argues that the direction argued for was necessary and obvious is not made out.

[21] However, it is also important to understand that the trial judge was alert to the question of whether a direction was necessary, even although the issue of a lesser verdict had not been canvassed. In her report she informs us that before giving the direction complained of she assessed whether or not she ought to give the jury directions on the opportunity of returning an alternative verdict not sought by either party.

[22] In delivering the opinion of the court in the case of *Duncan* at paragraph [27] the Lord Justice General (Carloway) said:

> "The general principle is that the obligation on the trial judge is to charge on verdicts in accordance with the manner in which the case has been presented to the jury by the parties (the "live issues"). The judge should not speculate or embark upon areas of possible alternative verdicts which have neither been canvassed in the evidence nor formed part of the speeches to the jury. The judge ought not to present an

> alternative verdict, which has not been canvassed by the parties, unless the prospect of that verdict is an obvious one. … The principle is based upon that of fairness. It follows that there is an exception where, on the contrary, a direction on an alternative is required as a matter of fairness."

[23] At paragraph [28] he said:

> The need to direct on a matter not raised by parties ought to be a rare event, given the functions of parties representatives, but it remains possible that the trial judge will regard an alternative, such as culpable homicide in a murder trial or reset in a theft case, as obviously open to the jury on the evidence, even if it is not been addressed in the speeches. … If the judge does take the view, that he or she ought to give a direction on an alternative verdict not addressed by the parties, he or she should do so …"

[24] The *dicta* in Duncan were applicable to the circumstances of the present case. It was accepted that the appellant stabbed the complainer in the centre of his chest with a knife using sufficient force to fracture bone and penetrate one of the chambers of the heart. The trial judge gave full and careful directions on what was required to establish the aggravation of attempted murder. The only live issue in the case was whether the appellant was acting in self-defence. Once self-defence had been rejected beyond reasonable doubt the only reasonable conclusion to draw from the appellant's conduct was that he acted with wicked recklessness. There is no sense in which the prospect of a verdict under deletion of attempted murder was an obvious one. The assessment which the trial judge came to was reasonable and appropriate in the circumstances. Her decision was based upon the manner in which the case had been presented by the parties and a direction on an alternative was not required as a matter of fairness. This was not one of the rare occasions on which there was a need to direct the jury on a matter not raised by the parties.

[25] In the opinion of the court there was no misdirection and the appeal must be refused.