Neutral Citation Number: [2020] EWCA Crim 951

Case No: 2019/03447/B4 + 03687

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE BIRMINGHAM CROWN COURT

T.20197143

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2020

Before :

LADY JUSTICE MACUR
MR JUSTICE NICKLIN
and
HHJ DICKINSON QC, HONORARY RECORDER OF NOTTINGHAM

- -

Between :

Appellant

OLIVIA LABINJO-HALCROW
- and -
REGINA **Respondent**

- -
- -

Mr A Bajwa QC appeared on behalf of the Offender Appellant
Ms K Bex QC appeared on behalf of the Crown

Hearing date: 14 July 2020

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Approved Judgment

Macur LJ:

1. Gary Cunningham died during the morning of 23 February 2019 as a result of a stab wound above and behind his left knee which severed an artery. The appellant was acquitted of his murder but convicted of manslaughter by reason of diminished responsibility. The issue in this appeal against conviction concerns non – defendant bad character evidence, and specifically, the direction given by the judge to the jury as to how they should regard it in relation to self-defence. The appellant is represented by Mr Bajwa QC. The respondent is represented by Ms Bex QC. Both counsel appeared below.

2. The deceased's body was found in the hallway outside the appellant's flat just before 11 am on 23 February 2019. Police and ambulance services were called to the scene to no avail. The Appellant was in her flat at the time, wearing pyjamas and raised from her bed by the police. A knife believed to be the weapon responsible for causing Gary Cunningham's wounds was found in the sink. Her responses to news of the death of Gary Cunningham were unusual and incongruent to the seriousness of the situation. She was arrested. On arrival at the police station she was medically examined. There were some recent injuries and she complained of discomfort in her neck and shoulders. Alcohol and cocaine were subsequently detected in blood samples taken from both the appellant and deceased. Back calculation indicated that they both would have been under the effect of the same in the early hours of that morning; neither would have been legally able to drive.

3. The appellant made no comment in interview but was subsequently to reveal details of what she said had occurred between her and the deceased in the flat during the night/morning of 22/23 February, first in a telephone call from prison to report an allegation of rape, and then to psychiatrists instructed by both prosecution and defence to prepare reports on the question of diminished responsibility. The appellant upon questioning from the psychiatrists also revealed detailed allegations of past physical and sexual assaults at the hands of the deceased, and others, including when she was a child. However, the appellant could not recall stabbing Gary Cunningham on 23 February 2019. She said she had not knowingly taken cocaine and her drink must therefore have been spiked by Gary Cunningham.

4. The prosecution case at trial was that the appellant had murdered Gary Cunningham. She was not acting in lawful self-defence. At the very least she would have appreciated that some harm would be caused by infliction of the wound and so lead to a conviction for an unlawful act manslaughter. The prosecution relied on the number of wounds inflicted, three of which were likely to be defensive and also the fact that whilst under the influence of cocaine, voluntarily consumed, she was the aggressor as indicated in near contemporaneous text messages to her previous partner.

5. In addition the prosecution successfully applied to adduce evidence of the appellant's bad character, namely her aggressive behaviour in drink towards an ex-partner and Gary Cunningham, and an assertion that she had indicated that she could "murder Gary Cunningham and get away with it by blaming it on her PTSD". The evidence was said to be important explanatory evidence (Criminal Justice Act 2003, s 101(1) (c)) , relevant to an important matter in the case between defendant and prosecution (s101(1)(d)) and that the appellant had made an attack on another person's character (s 101(1)(g)) as had become apparent from the defence statement and what she had said to the psychiatrists.

The prosecution application stated that it did not seek to "constrain" the "substantial amount of background evidence" in what would be an "all in trial". And so it turned out to be.

6. The appellant's case at trial was that she had no memory of stabbing Gary Cunningham, but accepting it was likely she had done so, she would have been acting in self-defence or acting with diminished responsibility or in loss of control.

7. The appellant and Gary Cunningham's relationship had been volatile and tempestuous. Both had accused the other of aggression and physical violence, often recording their own perspectives of the incidents in text messages to each other and others. The appellant had made complaints to the police in the past about Gary Cunningham's assaults upon her but had then retracted the same. The witness statements, police body camera footage, Gary Cunningham's interview records and text messages were available to the jury as agreed facts. In short, the appellant said that they did not contain the full story or were in places inaccurate.

8. The appellant's previous partner gave evidence relating to her aggressive behaviour towards himself, and also related an occasion when he had witnessed an incident between the appellant and Gary Cunningham after which the appellant said that she had stabbed him to break his grip on her arm which he had trapped in a door. The jury were told that Gary Cunningham had previous convictions for violence, including against a former girlfriend, and the questionable comments he made regarding this domestic violence when interviewed for the purpose of a Pre-Sentence Report.

9. There was evidence relating to 22/23 February from neighbours who had seen the appellant and Gary Cunningham outside her flat and which tended to support her subsequent assertion that she was reluctant that he should enter the flat. There was also independent evidence from a neighbour that at about 2 am on 23 February, he heard screams, which sounded as though made by a woman or a child, and banging coming from the appellant's flat with a lower pitched voice shouting at the same time as things were being thrown. He heard someone say "stop" and "get off" or something similar, and it sounded as though someone was "fighting for their life". It then went quiet. Gary Cunningham was seen early the next morning on CCTV in Harborne. He returned to the block of flats and was seen on the landing outside the appellant's flat, apparently uninjured, at approximately 7am.

10. The appellant gave evidence, but became a reluctant witness as time went on, even during examination in chief. Eventually she refused to continue giving evidence after cross examination had barely commenced. However, by then she had given evidence regarding alleged previous incidents of physical and sexual abuse, including about being sexually abused by her childminder's teenage son, when she was aged between 5 and 7, and which she had only reported to her mother in January 2019. She also recounted two incidents that she said had occurred in November 2018, both involving Gary Cunningham. In the first she alleged anal rape, in the second a physical assault that led to her stabbing Gary Cunningham in the arm.

11. There were other incidents that she recounted. Their relationship had started well, but soon deteriorated. She was drinking and Gary Cunningham, started to become increasingly verbally abusive and physically aggressive. When he was not drunk, he would apologise for his behaviour but when he was under the influence of drink or

cocaine then he was a very different person altogether. In May 2018 she alleged he raped her which led to a pregnancy. In June, she had asked him to leave and he physically assaulted her, first at his friend's house and then at his parent's house. Later that month he attended at her property and slapped her, and she had called the police, asking for advice, and claimed a history of domestic violence. She was later to report that after drinking and taking cocaine he had hit her on the right side of her head and punched her in the head. At her trial she said that, in addition he had sexually abused her using a kitchen implement. Gary Cunningham was arrested and interviewed in relation to this physical assault. He alleged that his actions were in reaction to the aggression shown by the appellant. The appellant subsequently retracted her complaint. In August she alleged that Gary Cunningham spiked her drink with an anti- psychotic drug that had 'knocked her out for 36 hours'. In September, when Gary Cunningham was really drunk, he had punched her to the back of the head numerous times and spat on her. In early November she started to take cocaine. In November Gary Cunningham when intoxicated had smashed the back of the head with a stone. Later in November he had raped her and, on another occasion, had put his forearm across her neck, pressing hard. This is when she stabbed him, and he let go. That incident temporarily brought the relationship to an end.

12. The relationship resumed. Gary Cunningham would stay two or three times a week, but incidents of physical assault continued. Screen shots from a mobile phone showed a bruise to her lower back in February 2019.

13. The appellant's evidence of what happened on the 22/23 February was described by the judge as "fairly truncated". She said that she drank alcohol during the afternoon of Friday the 22nd. At 8.30 pm she agreed that she and Gary Cunningham had been sitting outside the block of flats waiting for him to pick up some cocaine. She said that she did not want to go back into the flat with Gary Cunningham, but they appear to have ended up there. They drank more alcohol in the flat. A fight took place in the early hours of the morning and she screamed during the course of it. Hair scrunchies subsequently recovered from the kitchen floor and the dented kettle related to the fight. She confirmed that she had called the police from prison on 14 March to complain that she had been sexually assaulted at the flat on the night of the 23rd.. She confirmed the truth of the allegation recorded in the transcribed report. In summary, in the early hours of the morning she was pinned to the bed by Gary Cunningham with his right arm, she had been raped vaginally and her anus digitally penetrated. She could not recall when this incident had happened in relation to the fight at 2 am. Finally, she recalled Gary Cunningham coming up behind her, twisting her left arm, and smashing her chin on the sink. She said she did not knowingly take any cocaine that night.

14. Cross examination was short lived. The appellant refused to continue to give evidence. The prosecution was unable to challenge the reliability of her evidence in respect of the past incidents or immediate circumstances surrounding the stabbing. In due course the judge directed the jury as to the manner in which they may take into account her failure to answer questions, specifically in relation to the history of her relationship with Gary Cunningham, her allegations against him and others, her drug use, the text messages, her aggression towards others, the manner in which she came to make the allegation of rape three weeks after the event, her failure to answer questions in interview. There is, and could be, no complaint about his direction in accordance with s 35 Criminal Justice and Public Order Act 1994.

15. Psychiatric evidence was called as to the appellant's likely state of mind at the relevant time. Professor Furtado and Dr Kennedy, instructed by defence and prosecution respectively gave evidence, which included a history of the abusive relationship with Gary Cunningham as reported by the appellant, and to a significant extent repeated in her evidence before the jury, and also as to what she said had occurred over 22/23 February. She also told them about the sexual abuse she said she had experienced as a child. Both psychiatrists were clear that it was for the jury to determine whether her account was to be believed, but with that proviso, if the 'factual matrix' was established it supported their respective opinion that the defence of diminished responsibility was made out.

16. So far as Professor Furtado was concerned: "If her story is to be believed, which is for the jury to decide, then when faced with a threat of further sexual violence she would have experienced flashbacks of the trauma she previously experienced and, coupled with her difficulty and problem-solving, would have led to an abnormality of mental functioning. She could have been in a heightened emotional state wherein she could have genuinely believed she'd be raped again. This would have impacted on her problem-solving skills and impulsivity."

17. Dr Kennedy confirmed the information that was provided to Dr Furtado, and additionally that Gary Cunningham digitally penetrating her anus reminded her of what had happened to her as a child, and then he raped her. He said that "If her account of the final assault is accurate, at least in general terms, and particularly that her anus being penetrated brought back intrusive recollections of childhood sexual assault, then this could have had particularly potent effects on her mental functioning.

18. The judge withdrew the issue of loss of control from the jury at the end of the evidence. We consider he was right to do so. There was no sufficient evidence to go before the jury that the appellant had lost control. There is no issue relating to this ruling in so far as the appeal against conviction is concerned and we need say no more.

19. The judge delivered a split summing up. The first section covered many of the necessary legal directions, including self-defence, but not as to non-defendant bad character. He started the remainder of his summing up six days later. In the meantime, discussions took place on two separate occasions regarding the direction that the judge should give the jury concerning the appellant's allegations against Gary Cunningham in relation to self-defence.

20. The judge's direction to the jury on self-defence in the first section of his summing up was unimpeachable and we need not repeat it here. His direction to the jury on the question of non-defendant bad character followed his rehearsal of the appellant's account of her relationship with Gary Cunningham, in the following terms:

> "The next topic is Gary Cunningham's history of violence. Obviously, you have heard about that really as part of the defendant's case because she says, "He has used violence in the

> past towards me" and that is part of the important background to this case in explaining why she used violence on this occasion.
>
> …
>
> You must decide whether you are sure that the evidence demonstrates the defendant has been physically and sexually assaulted in the past by Gary Cunningham. …
>
> If you are not satisfied so you are sure that Gary Cunningham behaved in any or all of the ways alleged, then you should ignore those parts of that evidence that you are not satisfied of. If you are sure that he did behave in that way, then you are entitled to consider that evidence along with agreed facts 12 to 21 and the evidence of Sinead Masters when you consider the defendant's claim in evidence that it was Gary Cunningham who started the incident on 23 February, in particular, whether it supports the fact that she was acting in self-defence. The fact that Gary Cunningham has acted in this way in the past does not mean that he must have used unlawful force on this occasion but it is something you may take into account when you are deciding whether or not the prosecution have made you sure it was the defendant and not Gary Cunningham who started the violence, and that the defendant's use of force was unlawful." (Underlining provided.)

21. We have no hesitation in saying that this direction was fundamentally wrong in law. This direction transfers the evidential burden to the defence and to the criminal standard. This is unwarranted and offends against the basic principles of criminal law. Ms Bex QC informs us that the trial judge was aware that the appellant would give evidence of Gary Cunningham's alleged reprehensible behaviour towards her, and says that since he had not been required to rule upon its admissibility, 'agreement' could have been "the only mechanism". Further, Ms Bex QC says that the judge had drafted directions prior to his first discussions with Counsel; the prosecution agreed with his suggestion and encouraged his direction that it was for the appellant to prove to the criminal standard that the allegations were credible in so far as the issue of self-defence was concerned. We disagree with the assertion that 'agreement was the only mechanism' to admit this evidence and refer in this judgment to the possibility of admitting this evidence pursuant to s 98 of the Criminal Justice Act 2003 which requires no agreement, albeit it may have called for a ruling in this case. However, what is clear from the available transcripts of part of those two discussions on this point, is the disagreement between prosecution and defence, and the judge's professed uncertainty and anxiety in relation to his directions. This prompts us to say that in whatever manner this evidence was said to be admissible, we consider that, not least as a matter of professional courtesy, the judge would have been better served in his overview of the trial and preparation of what would be a complex factual and legal summing up, by being alerted to the situation by Counsel via annotation of the DCS file.

22. Expressing some anxiety, the judge accepted the prosecution submission that, following *R v Miller [2010] 2 Cr.App.R 19* and *R v Braithwate [2010] 2 Cr. App. R 18* the appellant could only rely on the bad character evidence if she had satisfied the jury so they were sure that the relevant incident had occurred. We regret that in doing so he dismissed his initial, and we think correct, view that this evidence was in fact admissible by virtue of s 98 (a) of the Act as evidence which "has to do with the alleged facts of the offence with which the defendant is charged" in light of the live issues of self-defence and diminished responsibility. . Mr Bajwa QC did not seek to support this point. He argued that the evidence agreed to be admissible pursuant to s 100 should receive the same treatment as if admitted as of right, namely the jury need only conclude that it might be true to rely upon it.

23. The prosecution seek to defend the conviction. They maintain as they did below that (i) the evidence was not admissible pursuant to s 98 since they were "temporally distanced from the night of the killing by between 11 days and 9 months" and (ii) it was necessary and right that the judge should direct the jury that the appellant must make them sure that the allegations of previous events of physical and sexual assault occurred before they could rely upon them in relation to self-defence. That is, "the evidence could not have substantial probative value of the deceased's propensity to be violent unless the jury is sure that it is true and that the same test applies whether the evidence is adduced by the prosecution or defence."

24. The prosecution rely on *Miller* and *Braithwaite* as before, but additionally cite *R v Mitchell (Northern Ireland) [2017] AC 571* as support for the proposition that, if the appellant's argument as to the correct burden and standard of proof is endorsed, it would "allow the jury to rely on evidence of reprehensible conduct which it has concluded is probably untrue". The argument proceeds that this cannot have been Parliament's intention because: the 2003 Act intended to restrict the use of bad character evidence; it would contravene the rule in *Miller* and would allow mere 'kite flying and inuendo'; it is inconsistent with the obligation pursuant to s 109 on the judge to assess admissibility on the basis that the facts are true; it defies logic to direct the jury that if they concluded that an episode of violence probably did not occur it was nevertheless substantially probative of a violent propensity directed against the defendant; and , would allow a defendant to make wide ranging unproven allegations against another without fear of contradiction by refusing to give evidence.

25. We are unable to accept the interpretation placed upon the authorities cited with regard to non-defendant bad character adduced by the respondent or any of the arguments as to why the direction given to the jury in this case was justified. The cases of *Miller* and *Mitchell* concern evidence going to the propensity of a defendant, as support for the prosecution case that s/he committed the offence for which s/he stand trial. Whilst catering for the factual circumstances in each case, and not requiring a separate assessment of each and every individual allegation in order to establish propensity, which must be viewed in the round, the requirement that propensity is established to the criminal standard is not applicable to the evidence adduced by a defendant, nor can the same be inferred. The case of *Braithwaite* concerned a defendant's failed application to admit 'bad character' "evidence" of a type which the trial judge

adjudicated had insufficient probative value, namely CRIS reports. This court agreed, saying at [17] that the report: *"was no more than evidence that a complaint or allegation had been made. It was not evidence that the witness had done what was alleged."*. The issue in that appeal was admissibility of the "evidence" so called, and its sufficiency in probative value, and not the subsequent assessment by the jury. The case certainly does not support any proposition that the defendant must prove the facts beyond reasonable doubt. The prosecution has accepted in terms, not least in the agreement reached with the defence at trial, that the evidence adduced by the appellant in this case was of substantive probative value.

26. The prosecution arguments are simply misconceived, rely upon a misinterpretation of the authorities and are without any grounding in the context of the accusatorial trial process. There is a restriction upon the admissibility of bad character evidence, by both prosecution and defence. This is explained and illustrated in the authorities above. S 109 directs the judge as to admissibility, not to determine credibility, and does not provide nor imply the standard of proof applicable to the party seeking to rely upon it once admitted. If admissible, the evidence of the defendant as to allegations against a complainant or deceased, will be assessed in accordance with the applicable burden and standard of proof for the issue under consideration. Challenges to the defendant's evidence through cross examination or rebuttal evidence are commonplace, and the legal direction as to possible adverse inference of a defendant refusing to give evidence, caters for opportunistic scandalmongering.

27. Ms Bex QC argues, in the alternative that the conviction is nevertheless safe. She submits that there was "a wealth" of established and agreed evidence of Gary Cunningham's bad character, particularly in relation to a previous partner, and also suggests that the hearsay evidence of what occurred on the 22/23 February as related by the appellant to the psychiatrists would have "attracted the balance of probabilities direction in any event". We consider these to be flawed, and inherently self-contradictory arguments.

28. In directing the jury on the partial defence of diminished responsibility the judge necessarily referred to the appellant's evidence regarding Gary Cunningham past behaviour, since she had provided it to the psychiatrists who examined her in significantly similar terms. He directed them that:

> "What the defendant said to the psychiatrists is not to be treated by you as additional evidence of what took place between the defendant and Gary Cunningham. All they have done is simply repeat what the defendant told them. You have heard about what the defendant told the psychiatrists because it was those accounts which formed the basis for their expert evidence about the defendant's state of mind; that is its only relevance in this case. You must decide if the defendant's account to them is more likely than not to be true. …

> the burden is on her to establish that all of the following four things are more likely than not. So, this is different from the prosecution. They have to make you sure of the defendant's guilt so far as their assertions are concerned but here, when the partial defence is raised, there is a reversal of the burden. It now is on the defendant and she only has to satisfy you that it is more likely than not."

29. The jury were correctly directed upon the defence of diminished responsibility, and the 'value' of the information she provided to the psychiatrists. They were specifically told that it was not to be treated as 'additional evidence' of what took place to that which she had related in evidence to them. However, in following the legal direction regarding the appellant's need to prove the factual matrix upon which the psychiatrists relied on the balance of probabilities to find diminished responsibility , as we assume they did, they were obliged to consider whether her account of past events was or may be correct. They obviously did so to return the verdict of guilty they did. This raises an obvious question as to whether, if correctly directed in relation to the appellant's evidence relating to past misconduct, the jury would have been made sure by the prosecution that she was not acting in self-defence.

30. We have no hesitation in quashing the conviction as unsafe. We allow the appeal.