APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 4
HCA/2017/000083/XC

Lady Paton
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL AGAINST CONVICTION

by

SEAN RAYMOND GRAHAM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: CM Mitchell, Advocate; Faculty Services Ltd
Respondent: Farquharson AD; Crown Agent

11 January 2018

Self-defence and provocation

[1] On 18 January 2017, after a trial in Airdrie Sheriff Court, the appellant and his co-accused Charlene Johnson were found guilty by majority of the following charge:

> "(1) on 8 June 2016 at [an address in Cumbernauld], you … did assault Stuart Maxwell Raeburn … and did repeatedly punch, kick … his head and body to his injury."

When returning their verdict, the jury deleted the word "stamp".

[2] The appellant had lodged a special defence of self-defence in the following terms:

> "Brown for the Pannel states that the Pannel pleads not guilty and specially and without prejudice to said plea, states that on the occasion libelled by the Crown the Pannel was acting in self defence of himself and also on behalf of another namely his partner Charlene Johnson, the parties having been attacked by the Complainer."

[3] The appellant gave evidence. No other evidence was led on his behalf. The co-accused did not give or lead any evidence. The appellant and the co-accused were convicted and sentenced to 18 months imprisonment.

[4] The appellant appeals against conviction. He contends that the jury should have been given directions not only in relation to self-defence, but also in relation to provocation. In preparation for the appeal hearing, transcripts were obtained of the evidence of the complainer Stuart Raeburn, his partner Louise Sanderson, and the appellant.

An outline of the circumstances of the offence

[5] The evidence disclosed that on 8 June 2016 the appellant and his partner Charlene Johnson were invited to the home of the complainer and his partner Louise Sanderson. Louise did not drink, but the others were drinking heavily. A fight broke out, during which the appellant and Charlene punched and kicked the complainer. Louise managed to make the appellant and Charlene leave. The police arrived. Statements were taken. An ambulance took the complainer to hospital. The appellant and Charlene were subsequently charged with assault to injury.

Report from the trial judge

[6] In his report, the trial judge (Sheriff Derek O'Carroll) stated that he considered that directions on provocation were unnecessary. At paragraph 25, he explained:

> "It seemed to me however that this was not a case in which the need to direct on provocation arose. Two starkly different and incompatible versions of events were placed before the jury. The Crown's case was that of an unprovoked assault by the two accused on the complainer as he was trying to leave the house and who did not manage to fight back and who did not have wood as a weapon. No question of self-defence or provocation arose on that version. For the defence, the account was of an unprovoked attack by the complainer on the Appellant and the co-accused to which the Appellant responded by wresting the wooden weapon from the accused and then when the complainer began punching the Appellant, he responded in kind, in self-defence, resulting in comparatively minor injuries with no weapon. On that version, importantly, there was no question of excessive or disproportionate force being used by the Appellant on the complainer (unlike other cases where a plea of self-defence has failed because the force used in response to initial violence was excessive or disproportionate). More importantly, there was no evidence that the Appellant 'lost control over himself, when his presence of mind had left him and without thought of what he was doing' (See Jury Manual, Chp 24.1, paragraph 1 and authorities cited therein). That is an essential element of provocation (along with physical attack, instant retaliation and proportionality of response.) The Appellant expressed no such feelings or reaction. On the contrary, the Appellant referred to his superior size and the complainer's alleged high level of intoxication and gave the impression, on his account, that he was able to deal effectively with the complainer's alleged assault on him and saw no need to involve the police. In short therefore, it seemed to me that the jury had before it two competing and incompatible versions of the incident to consider, neither of which included all the elements of provocation and none of the parties involved raised the question of provocation either. In all these circumstances, I did not consider that a reasonable jury could have convicted with a provocation rider and rightly or wrongly, I did not direct on provocation."

Selected excerpts from the transcripts

[7] We acknowledge that this court had the benefit of transcripts, which the sheriff did not. We also note that the excerpts to which our attention was drawn were mainly those parts of the evidence which, if accepted by the jury, might have provided a basis for returning a verdict of guilty of assault with the rider "under provocation".

The complainer Stuart Raeburn

[8] Mr Raeburn was a reluctant witness. In examination-in-chief, he stated that he did not want to incriminate the accused. Ultimately he adopted a statement which he had given to a police officer on 8 June 2016 on the basis that he could not now remember what had

happened, but he must have told the police the truth. His police statement was in the following terms:

> "I am 33 years old and stay at home with my partner.
>
> About 2000 hours on Wednesday 8th June 2016, I was out in the back garden of my house drinking with Charlene Johnson and her partner Sean, Sean is mid 30's, 6'2", skinny, brown hair, no top on and dark blue jeans. We were out drinking, my partner Louise Sanderson doesn't drink. Then we fell out for some reason, well I did with Charlene and Sean.
>
> Sean out of nowhere, went for me. He punched me on the face and I fell onto the ground. When I fell onto the ground, Charlene started to stamp on my head, she kept doing it and she was doing it with some force. Then Sean picked me up and punched me again. I fell down again.
>
> Louise managed to get me to into the kitchen. They both followed me into the house and both of them were punching and kicking me when I was on the kitchen floor. Louise managed to get them out and they were shouting when they walked away. My nose is absolutely killing me and the police came. I went to the hospital in an ambulance."

[9] In the initial stages of his cross-examination by the appellant's agent, the complainer confirmed that he had been drinking Buckfast since 11 am on the day of the incident (page 67 line 22 and page 68 line 3). He knew that he should not be drinking as he was taking medication for depression (page 68 line 23 to page 69 line 5). He acknowledged that combining his medication with alcohol could result in blackouts and memory loss (page 69 line 22 *et seq*). He confirmed that, on the day of the incident, he was suffering stress, grief and upset as a result of the issues relating to his children (page 74 line 15). He was then asked about losing his composure as a result of the strain which he was under:

> "[page 75 line 14] Q: … you've no recollection of taking a garden post from your back garden. Do you remember doing that at all? A: No. Q: Is that possible? A: Could've been. Q: Yes. Brandishing that at [the appellant], and tried to strike him with that, can you remember, did that happen? … Could that have happened? A: It could've …
>
> "[page 77 line 3] Q: … will you not agree with me that you did somewhat lose your composure here and started wildly lashing out at people? A: Aye. Q: You said that? A: Mh hmm. I was angry 'cause I'd just had my kids taken off me, two weeks

before. Q: And that must have weighed very heavily with you, I'm sure? A: Mh hmm. Q: … and [the appellant and Charlene] had arrived at your invite with their own young children who I think are not far removed from the ages of your own children, is that right? A: Yes. Q: … Did that upset you? A: Yes. Q: You lost it, didn't you? And you started waving this garden post around? A: … I'm no actually sure what happened."

[10] In re-examination, the complainer retracted or denied much of what he had said in cross-examination.

The complainer's partner Louise Sanderson

[11] Miss Sanderson stated that she did not drink. She had not seen everything that happened during the incident. She had been preoccupied as a result of losing her children. Latterly she had become scared. In examination-in-chief, she said:

> "[page 90 line 5] … when [the complainer] does drinking, I don't let him come near me …
>
> [page 96 line 3] … When [the complainer] drinks, he's not hisself …
>
> [page 102 line 7] There was a bit of wood that we had … we had a bit of wood in the garden that was, got pulled out …"

In cross-examination by the appellant's agent, the following exchanges took place:

> "[page 133 line 19] It [the piece of wood] wasn't a post.
>
> [page 138 line 14] Q: Did you see [the appellant] having to take the bit of wood off [the complainer]? A: I seen that, yeah, but I never seen [the complainer] picking a bit … Q. Right. Hang on. You saw that? You saw [the appellant] take the bit of wood [off the complainer]? Did you agree with that? A: Yes …
>
> [page 139 line 18] Q: So does it come to this, Miss Sanderson: you didn't see all of the incident, and you accept that you see [the complainer] having this piece of wood taken off him by [the appellant]? A: Yeah …
>
> [page 142 line 2] [The complainer] was out of control because he was on his tablets."

In re-examination, questions and answers included the following:

> "[page 149 line 11] Q: … So when Mr Brown [the appellant's solicitor] put the suggestion to you that [the appellant] had taken a piece of wood from [the

complainer], did you see that or not? A: I kind o' seen it. Well, just, I really can't remember that day because my daughter got taken away.

[page 151 line 13]: Q: The ladies and gentlemen might infer from you saying [the complainer] was out of control that he was somehow behaving aggressively or violently. Is that the truth? A: On these tablets, when he mixes medication wi' drink, yes he can be. Q: He can be what? A: Aggressive. Q: Aggressive. On that night, did you see him behaving aggressively. A: No."

The appellant

[12] The appellant described how he and his partner Charlene and her two children had intended to go to Mr Ali's shop and then to the swing park. At the shop, they met the complainer, whom they knew. He asked them to go into the shop and buy drink for him. He did not want the shopkeeper to be able to tell his partner Louise that he had bought drink. He was already showing signs of having been drinking. The appellant went into the shop and bought the complainer a bottle of Buckfast. The complainer then invited them all to his house. The appellant knew that the children of the complainer and his partner had just been taken into care. However he thought that Charlene's two young children would be welcome, and accordingly accepted the invitation. Drink was consumed by the complainer, the appellant, and the co-accused (but not by Louise Sanderson). The complainer was becoming more upset. In examination-in-chief, the appellant explained:

"[Page 12 line 24] … as the night or the day was going on, he was gradually getting more upset. I think he was starting tae, you know, I know a lot o' people that have been drinking start getting a wee bit more emotional especially, obviously, what's, you know, whatever's happened wi' his kids. You know, he's started getting a bit more emotional, and he's started crying at one point … He was trying tae talk to me about it … I've not got any kids of my own. I said, probably the best person tae talk to would be Charlene [the co-accused] … about this, which he did …

[Page 15 line 17] … a kind o' an argument started. He [the complainer] was starting to get quite loud. Quite aggressive towards Charlene … Charlene and [the complainer] ended up going out in tae the garden … then ah've got up and ah've come out to make sure Charlene was okay …

> [Page 16 line3] Q: Why did you do that? A: Because I could see [the complainer] kind o', he was kind o' pushing at Charlene, he was pushing at her and Charlene was … Charlene was trying … to console him … Q: And what was his response? A. By pushing her. Pushing her away … He was quite … aggressive lookin' …
>
> [Page 16 line 21] I've actually said tae Charlene, let's just get … obviously there was a lot o' swear words involved, and I've tried to get Charlene tae get out the back gate, just tae leave …
>
> [Page 17 line 24] … as we went out, there's been a bit o' a ruckus, really, pushing and shoving …
>
> [Page 18 line 6] … we'd been trying to get out the back … ah had ma back turned tae [the complainer], Charlene was facing me and all ah can remember was Charlene shouting 'Sean'. I've automatically came and jumped forward towards Charlene but turned at the same time. Just then, I felt something hit ma back. I then looked, to see in his hands was a, which I could only describe as, like a two by four, a block o' wood … it was like a fencepost … Q: … who had that? A: [The complainer].
>
> [Page 19 line 2] I felt something hit ma back … I had turned round and just then, he was gonnae strike me with it again and I've tried to grab it and by this point, we're kind o', a tussle to say the least … he was, really, really angry. He was shouting … he was just, he was really intoxicated. Really, really drunk. I couldn't make out what he was actually saying.
>
> [Page 20 line 11] I couldn't get the stick off him … Charlene was, I believe she was obviously trying tae protect me as well, at the same time … He's took it back tae hit, and get another swing wi' the stick and he's actually got Charlene full force in the face …
>
> [Page 21 line 4] … as far as I could tell, Charlene was knocked out … because she was lying in a, like jaggy nettles … and she wasnae moving … Then I turned round to try and get the stick back off him … I managed to get it off him and threw it away …"

The appellant went on to describe the complainer holding a garden hoe, which Charlene managed to remove (page 22 line 20). The appellant said that the complainer was punching them, and he was punching the complainer. He said that he was clear that it was the complainer who attacked him (page 23 line 11). He said that he would not need a weapon to deal with the complainer as he (the appellant) was 6½ feet tall and the complainer was more than a foot smaller than him (page 25 line 11) and also under the influence of alcohol (page 25 line 23). He had some sympathy for the complainer (page 28 line 4).

[13] In cross-examination by the procurator fiscal depute, the following exchanges took place:

> "[Page 46 line 9] Q: What was it that made you lose control of your temper? A: I didn't lose control of my temper … Far from it.
>
> [Page 53 line 1] Q: … you lost control of your temper … What was actually happening when you were tussling? A: I was trying to get the stick off him.
>
> [Page 55 line 4] Q: [The complainer] called the police because he was the one under attack, and you can't get away from that fact, can you? A: You can't get away fae the fact that [the complainer] started it, picked up a stick and started hitting us with it …"

Submissions for the appellant

[14] Counsel for the appellant submitted that, notwithstanding the jury's rejection of the appellant's special defence of self-defence, there was an evidential basis upon which the jury could, if they so chose, return a verdict of guilt subject to the qualification that the appellant had been provoked. The transcripts demonstrated that. Questions of credibility and reliability were for the jury. The jury were entitled to accept parts of a witness's evidence, and to reject other parts. There had been evidence which, if accepted, satisfied the four requirements for provocation. A direction relating to provocation was therefore necessary. The lack of such a direction resulted in a miscarriage of justice (either on the basis of *McInnes* v *HM Advocate* 2010 SC (UKSC) 28 or *Brodie* v *HM Advocate* 2013 JC 142). The conviction should be quashed, and a conviction in identical terms but with the rider "under provocation" substituted. The sentence of 18 months should be quashed, and a lesser sentence substituted.

Submissions for the Crown

[15] The advocate depute submitted that, on a proper understanding of the evidence, the

four-stage test for provocation was not satisfied. The sheriff had heard the evidence. He had seen the witnesses and had an opportunity to assess their demeanour. The appeal court should be slow to interfere.

[16] The court's attention was drawn to features of the appellant's evidence which were at odds with other witnesses' evidence (for example, his denial of his own intoxication, and the fact that he claimed to have been hit on the back with the piece of wood when there was no record of any injuries to the appellant). His kicking and punching of the complainer could not be regarded as "instantaneous". The only evidence of kicking was in the kitchen, once the complainer had been pursued from the garden into the kitchen. There was no evidence of loss of control on the appellant's part. The appellant himself denied any loss of control. The kicking and punching of the complainer was disproportionate.

[17] There had been two competing accounts. The sheriff was in the best position to assess those accounts and to decide whether or not a direction relating to provocation was required. There had been no miscarriage of justice. The appeal should be refused.

Discussion

[18] The question at issue is whether the sheriff should have given the jury directions about provocation.

[19] It is not in dispute that it is the jury's task to decide questions of credibility and reliability, to determine what evidence to accept and what evidence to reject, and to conclude what inferences could be drawn from evidence which they accepted. Similarly it is not in dispute that the jury are entitled to accept parts of what a witness said, and to reject other parts.

[20] In the present case, we consider that it was open to the jury, on the evidence, to conclude that the following circumstances had been sufficiently established (bearing in mind that the appellant did not have to prove anything, and in particular did not have to satisfy the rules of corroboration or meet the standard of proof of "beyond reasonable doubt").

- On 8 June 2016 the complainer and his partner were suffering considerable grief and upset because their children had been taken into care.
- The complainer had consumed drink and medication, which could make him aggressive.
- The complainer's drinking also made him more emotional.
- When the appellant and his co-accused Charlene, who had arrived accompanied by her children, tried to offer advice and consolation, the complainer became angry, upset and distressed, started crying, and ultimately became aggressive.

It was also open to the jury to accept the evidence of three witnesses (Louise Sanderson, the appellant, and indeed the complainer himself) to the effect that the complainer, when angry and upset, had possession of a piece of wood which resembled a fence post, which he brandished and (if the jury accepted the appellant's evidence on this matter) used to strike both the appellant and Charlene.

[21] As the jury convicted the appellant of assault, they clearly rejected his special defence of self-defence. They may have taken several factors into consideration, including the height and build of the appellant compared with that of the complainer, and the fact that the complainer was drunk and was outnumbered by two to one. But it does not necessarily follow that the jury would have rejected the concept of an assault committed "under provocation".

[22] The Jury Manual sets out a possible direction on provocation where self-defence is pleaded, as follows:

> "Provocation is quite distinct from self-defence, and shouldn't be considered along with it. I've already told you about self-defence, so first you decide if the accused acted in self-defence. Only if you thought he hadn't, would you again look at the evidence, and decide if he had acted under provocation.
>
> Provocation by violence
>
> Provocation may arise for consideration when each one of these four circumstances exists:
>
> 1) where the accused has been attacked physically, or where he believed he was about to be attacked, and reacted to that. The danger of attack must be immediate, not in the future. The belief must have been held on reasonable grounds, even though they might turn out to have been mistaken. A mistaken belief must have had an objective background. It can't be purely subjective or of the nature of a hallucination.
>
> 2) where he has lost his temper and self control immediately,
>
> 3) where he has retaliated instantly and in hot blood. If he had time to think, and then acted, that would be revenge, not acting under provocation,
>
> 4) where the violence of his retaliation was broadly equivalent to the violence he faced. There must be no gross disproportion between the accused's violence and the violence which prompted it. It's the degrees of violence you compare. The fact that the effect of the retaliating violence was more serious than that of the provoking violence doesn't necessarily mean that it was grossly disproportionate."

[23] In the present case we consider that there was an evidential basis for provocation which the jury could accept if they were so minded, namely a physical attack on both the appellant and his co-accused with a piece of wood which was like a fence post; a resultant loss of control on the part of the appellant (despite his assertion to the contrary); a retaliation which might be regarded as "instantaneous"; and a level of violence (punching and kicking, without a weapon) which a jury might consider broadly equivalent to the attack on the appellant. We accept that there might be differences of view about each one of

those matters: but they were relevant matters in the context of provocation which, in our opinion, were for the jury's assessment and decision.

[24] It may well be that, for reasons of tactics or effective presentation, neither the prosecution nor the defence mentioned "provocation". However as was explained in *Ferguson v HM Advocate* 2009 SCCR 78, it is for the trial judge to give such directions as are necessary in an endeavour to ensure that the accused is neither over- nor under-convicted. In that case Lord Osborne, delivering the opinion of the court, quoted with approval certain guidance given by Lord Bingham of Cornhill in *R v Coutts* [2006] 1 WLR 2154, at paragraph 23:

> "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support… I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

[25] Lord Bingham went on to advise that any question of unfairness in the trial arising from such an approach on the part of the trial judge could be avoided if notice were given at an appropriate time of the trial judge's intention to give directions in relation to an alternative verdict:

> "There may be unfairness if the jury first learn of the alternative from the judge's summing up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct."

[26] While the plea of provocation would not exculpate the appellant (in contrast with the special defence of self-defence), if a rider of "under provocation" were to be added by the jury, the crime would be less serious and any sentence should reflect that.

[27] In this case, we are unable to conclude that no reasonable jury could, on the evidence, reach the view that there was provocation (cf *Duffy* v *HM Advocate* 2015 SCL 544 at paragraph [22]). We consider that the option of provocation should have been made available to the jury by means of the necessary directions. Further, following the guidance given in *Ferguson* v *HM Advocate* 2009 SCCR 78 and *R* v *Coutts* [2006] 1 WLR 2154, the safest course for the trial judge to adopt would be to:

> " … communicate that view in court, but outwith the presence of jurors, to counsel, before they address the jury, indicating that it is proposed to give a direction upon such an alternative verdict or verdicts. In this way, any possible unfairness may be avoided" (*Ferguson* at paragraph [36])".

[28] We are also satisfied that the lack of directions relating to provocation resulted in a miscarriage of justice, whether that issue is assessed in terms of the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28, 2010 SCCR 296 ("a real possibility that the jury might reasonably have come to a different verdict") or *Brodie* v *HM Advocate* 2013 JC 142, 2013 SCCR 23 (a more flexible test, as set out in paragraphs 40 to 43). However we accept that what is in issue in this appeal is not the question of guilt, as the jury rejected self-defence, but the degree of culpability. Accordingly we accept counsel's submission that the appropriate disposal would be to allow the appeal and to substitute for the existing conviction a conviction in identical terms, but with the rider "under provocation".

Decision

[29] We grant the appeal against conviction. We quash the conviction, and substitute therefor a conviction in identical terms but with the rider "under provocation". To reflect

the element of provocation, we quash the sentence of 18 months and substitute therefor a sentence of 16 months.