APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 74
HCA/2018/000542/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL UNDER SECTION 74

by

HER MAJESTY'S ADVOCATE

Appellant

against

JASON GILMOUR

Respondent

Appellant: Lord Advocate; Crown Agent
Respondent: Graham, QC, Glancy; Allan Kerr

22 January 2019

Summary

[1] This is an appeal against a decision of the Preliminary Hearing judge that the Crown is barred from prosecuting the respondent for murder by virtue of its acceptance of a plea offered by him on 4 September 2012, to a charge of aggravated assault of the then complainer, now deceased.

[2] The charge of murder alleges that on 11 June 2012 the respondent assaulted the deceased by repeatedly punching him on the head causing him to fall to the ground, and then kicking, stamping and jumping on his head, whereby he was so severely injured that he died almost five years later on 17 April 2017.

[3] In 2012 the respondent had appeared on petition charging him with attempted murder of the same victim. By section 76 letter, he offered to plead to an aggravated assault. The offer was accepted. Acceptance of that offer was subsequently reflected in the section 76 indictment, to which the respondent pled guilty, which charged that he assaulted the complainer by repeatedly punching him on the head, causing him to fall to the ground and repeatedly kicking and stamping on his head, all to his severe injury, permanent impairment and to the danger of his life. The respondent was sentenced to a custodial term of 5 years and 4 months, discounted from one of 8 years because of the plea. The sentence reflected the narrative that the crime had occasioned an intracranial bleed from which a long term disability was anticipated.

[4] Following service of the indictment for murder, a preliminary issue minute was lodged contending that the Lord Advocate was "personally barred" from proceeding against the respondent on a charge of murder, although a charge of culpable homicide would remain open. Having heard argument the Preliminary Hearing judge upheld the preliminary issue minute. The Crown submits that in doing so he erred in law.

[5] The central question in the appeal is whether the Crown's acceptance of a plea to aggravated assault amounted, in the circumstances, to an unequivocal and unqualified renunciation of the right to prosecute the respondent for murder, notwithstanding that it would be competent to do so in terms of the Double Jeopardy (Scotland) Act 2011.

Statutory provisions

[6] The Double Jeopardy (Scotland) Act 2011 provides:

"**1 Rule against double jeopardy**

(1) It is not competent to charge a person who, whether on indictment or complaint (the "original indictment or complaint"), has been convicted or acquitted of an offence (the "original offence") with—

(a) the original offence,

(b) any other offence of which it would have been competent to convict the person on the original indictment or complaint, or

(c) an offence which—

(i) arises out of the same, or largely the same, acts or omissions as gave rise to the original indictment or complaint, and

(ii) is an aggravated way of committing the original offence.

...

(3) In this Act, references to a person being "convicted" of an offence are references to—

(a) the person being found guilty of the offence,

(b) the prosecutor accepting the person's plea of guilty to the offence, or

(c) the court making an order under section 246(3) of the 1995 Act discharging the person absolutely in relation to the offence,

and related expressions are to be construed accordingly.

..."

"**11 Eventual death of injured person**

(1) This section applies where—

(a) a person ("A") is, whether on indictment or complaint, convicted or acquitted of an offence (the "original offence") involving the physical injury of another person ("B"),

(b) after the conviction or acquittal, B dies, apparently from the injury, and

(c) in a case where A was acquitted, the condition mentioned in subsection (3) is satisfied.

(2) It is competent to charge A with—

(a) the murder of B,

(b) the culpable homicide of B, or

(c) any other offence of causing B's death.

(3) The condition referred to in subsection (1)(c) is that, on the application of the prosecutor and after hearing parties, the High Court is satisfied that it is in the interests of justice to proceed as mentioned in subsection (2).

(4) Subsection (5) applies where—
(a) A was convicted of the original offence, and

(b) A is subsequently convicted of an offence mentioned in subsection (2).

(5) The court may—

(a) on the motion of A made immediately on A's being convicted, and

(b) after hearing the parties on that motion,

quash A's conviction of the original offence where satisfied that it is appropriate to do so.

(6) A party may appeal to the High Court against the grant or refusal of a motion under subsection (5).

(7) Where A was convicted of the original offence and is subsequently acquitted of an offence mentioned in subsection (2), A may appeal against the conviction under section 106(1)(a) or, as the case may be, section 175(2)(a) of the 1995 Act.

(8) An appeal may be brought by virtue of subsection (7) despite the fact that A, before the acquittal mentioned in that subsection—

(a) had appealed, or

(b) had been refused leave to appeal,

against the conviction or against any other matter mentioned in section 106(1) or 175(2) of the 1995 Act in relation to the original offence.

> (9) Sections 121 and 193 of the 1995 Act do not apply in relation to an appeal under subsection (7)."

The First Instance judge's decision and report

[7] The Preliminary Hearing judge considered that section 11 of the 2011 Act, when read with section 1(3), made it competent for the Crown to bring a murder charge where a plea of guilty to the "original offence" had been accepted. The Act did not, however, encroach upon the issue of personal bar. Notwithstanding that under statute it would be competent for the Lord Advocate to bring such a prosecution, he might nevertheless be prevented from doing so where he has formally and publicly renounced the right to do so. A formal announcement of a decision not to proceed with a charge is equivalent to a motion to desert *simpliciter (Thom* v *HM Advocate* 1976 JC 48).

[8] Prior to the 2011 Act a charge of murder could be brought after a conviction for assault which inflicted injuries from which the victim ultimately died. The rationale for this was that the crime of murder was a separate crime and "it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party"- *HM Advocate* v *Stewart* (1866) 5 Irv. 301. In *Tees* v *HMA* 1994 JC 12 the accused had pled guilty to a charge of assault under deletion of attempted murder, and was re-indicted for culpable homicide when the victim died. The Lord Justice Clerk (Ross) giving the opinion of the court said:

> "The Crown appreciated that, having accepted a plea of guilty to the earlier indictment under deletion of the reference to an attempt to murder, they could not now properly charge the appellant with the crime of murder, and accordingly the present indictment charges him with culpable homicide."

[9] The preliminary hearing judge considered that the use of the word "properly" indicated that the rationale behind the statement was that the Crown was barred from

charging the respondent with murder. Having accepted the plea, the Crown acknowledged that the respondent did not perpetrate a murderous assault upon the victim, and thus relinquished the right to prosecute the respondent for murder in the event that the victim died from his injuries. The Lord Advocate was now restricted to a charge of culpable homicide in respect of the death of the complainer.

[10] There was no requirement for the Crown to make an application under section 11(3), this not being a case in which the respondent had been "acquitted" of a relevant offence.

Submissions for the appellant

[11] The nub of the Lord Advocate's submissions was that:

1. The fact that the Crown would have been unable to proceed on a charge of attempted murder in a second indictment (which was accepted) had no effect on the possibility of proceeding on a charge of murder, since murder and attempted murder were different crimes.

2. In any event, the acceptance of the plea could not operate as a clear renunciation of the right to prosecute for murder.

[12] The death of the complainer was a new element creating a new crime. At common law, the previous trial of the accused for assault (whether simple or aggravated) would not found a plea of *res judicata,* whether the accused was convicted or acquitted. Attempted murder was an aggravated assault, distinct from the crime of murder, in respect of which prosecution still lay open to the appellant. Attempted murder was classified as an assault aggravated by a particular *mens rea*.

[13] The underlying rationale for the rule of law which *Tees* articulated was that the death of a victim of assault from injuries suffered as a result of that assault created a new crime:

HM Advocate v *O'Connor* (1882) 5 Coup 206, at 209. The death of the victim created a fundamental change in circumstances. The acceptance of a plea by the Crown to a charge of simple or aggravated assault did not amount to a renunciation of the right to prosecute in the event of death.

[14] The passage in *Tees* relied on by the Preliminary hearing judge was *obiter*. It proceeded on a concession in circumstances where the issue was not raised in submissions or discussed by the court. The concession was in fact inconsistent with the theory upon which the decision of the court in *Tees* proceeded and the authorities upon which it relied.

[15] In any event the acceptance by the Crown of the plea in the present case was not an unequivocal and unqualified renunciation of title to prosecute a charge of murder, of the kind required to establish a bar against proceeding. What was required was "an unequivocal and unqualified announcement on behalf of the Crown" akin to a motion to desert *simpliciter: Thom* v *HMA* 1976 JC 48. The test was "whether the statement or letter founded on was a public unequivocal and unqualified announcement that the Lord Advocate renounced his right to prosecute an individual on specified charges." (*Murphy* v *HM Advocate* 2002 SLT 1416).

[16] It was accepted that *Lockhart* v *Deighan* 1985 SLT 549 and *Hain* v *Ruxton* 1999 JC 166 provided authority for the proposition that the right to prosecute may be renounced before a crime has occurred, but the extent of any renunciation was to be construed strictly.

[17] The acceptance of the plea would have barred the Crown from indicting subsequently for attempted murder (*HM Advocate* v *Nairn* 2000 SLT (Sh Ct) 176). Although the *mens rea* for murder and attempted murder were the same (*Cawthorne* v *HM Advocate* 1968 JC 32; *HM Advocate* v *Kerr* [2011] HCJAC 17) it did not follow that the acceptance of the

plea amounted to an unequivocal and unqualified announcement on behalf of the Crown not to prosecute for murder should the complainer die.

Submissions for the respondent

[18] Senior counsel for the respondent submitted that by taking a considered decision to accept the plea, the Crown must be taken as accepting that the assault fell short of a murderous attack. The Crown was now barred from asserting otherwise and this bar operated notwithstanding a statute under which such a prosecution would otherwise be competent.

[19] Although the relevant sentence in *Tees* v *HM Advocate* was made *obiter dicta*, the use of the word "appreciated" suggests that the Court endorsed the concession made. The result of the acceptance of the plea has been a renunciation of the right to prosecute for any crime involving the *mens rea* of murder or attempted murder.

Analysis and decision

Decision

Res Judicata

[20] The Double Jeopardy (Scotland) Act 2011 created a new regime for the consideration of what had formerly been the common law plea of *res judicata.* The former rule had focused on whether the essence of the crimes in each instance were in a true sense the same, depending on proof of the same facts: the prosecutor could not avoid the plea merely by describing the same facts in a different manner. The statutory prohibition in section 1, however, focuses precisely on the original offence libelled, or any crime of which the accused could have been convicted on the original libel. Otherwise, the issue of whether the circumstances of any subsequent offence may be in substance the same as those involved in

the original offence is only relevant where the new offence is an aggravated way of committing the original offence. Under the common law, even although a prosecution for assault had previously taken place, the subsequent death of the victim changed the circumstances: the facts were now different, and a prosecution for murder could take place. Even if it were the case that at common law the issue of whether a murder trial could follow a prior prosecution for attempted murder was in doubt (as to which, see below), the matter is now put beyond doubt by the terms of section 11 of the Act, which permits a subsequent prosecution for murder following intervening death in any case in which the charge in the original case was one "involving the physical injury of another person", subject to an interests of justice test where there had been an acquittal on that charge. The clear intention of the Act is that even where someone was charged, and acquitted, of attempted murder, a subsequent prosecution for murder should remain possible. It is important to bear this in mind when considering the respondent's argument, which, whilst based on an alleged renunciation of the right to prosecute, nevertheless hinges on questions relevant to the former common law test, namely whether the original and subsequent offences are in essence the same.

[21] In *Kerr* v *HMA* 2015 SCCR 398 the court considered the effect of the introduction of the statutory regime, stating, under reference to section 1 of the Act, that (para 7):

> "This reformulation of the double jeopardy rule is in narrower form than that at common law. It focuses on the *nomen criminis*; the offence as libelled. The reference to 'the same … acts' is only relevant where what is charged in the second offence is an aggravation of the first offence (hence the critical use of 'and'); it would not prohibit, as the common law rule did (see *supra*), prosecuting a person for the same acts under a different nominate offence (eg, an attempted rape as an indecent assault; or rape, unlawful (under age) intercourse or incest, see *infra*)."

It is clear that the current prosecution does not offend against section 1 of the Act: it would not have been possible to convict the respondent of murder on the original indictment; and the crime of murder is not an aggravated way of committing the original offence.

[22] In *Kerr* a plea in bar was argued in terms of section 7 of the Act. The, possibly unintended, consequences of the wording used in section 7 were discussed in that case. What that section does – subject, of course, to other sections of the Act – is prohibit a subsequent prosecution arising "out of the same, or largely the same, acts and omissions as have already given rise to the person being tried for, and convicted or acquitted of, an offence." A charge of murder would indeed arise out of the same, or largely the same, acts and omissions as the attempted murder had done. But for section 11, therefore, the effect would have been that the long-standing rule that there could be a subsequent prosecution for murder, notwithstanding an earlier trial for assault, would not have applied, unless the "interests of justice" test in section 7(4) could be met. However, section 11 replaces that former long-standing common law rule, with a new rule as to the circumstances in which there may be a subsequent prosecution for murder following the eventual death of an injured person. The circumstances in which a prosecution may follow are (i) that the accused was convicted or acquitted of an offence involving physical injury to another person; and (ii) that other person subsequently died, apparently from that injury. Both these tests are met in the present case, so a prosecution for murder under section 11 would be competent.

Renunciation

[23] The only basis upon which it is maintained that there is nevertheless a bar to prosecuting the respondent for murder is the argument that the plea tendered and accepted

by the Crown had the effect of a renunciation of the right to bring a prosecution for murder in the event that the victim of the assault subsequently died. The effect of the plea was to abandon any proceeding for attempted murder; and since murder and attempted murder have the same *mens rea* and the same *actus reus,* the acceptance of the plea operated as a renunciation, not only of the right to prosecute for attempted murder, but also as a renunciation of the right to prosecute for murder should the victim subsequently die.

[24] The strongest support for this proposition comes from the obiter sentence at p 13 of *Tees* v *HMA* which referred to the Crown's acceptance that "having accepted a plea to guilty to the earlier indictment under deletion of the reference to an attempt to murder, they could not now properly charge the appellant with the crime of murder, and accordingly the present indictment charges him with culpable homicide."

[25] This was obviously a matter of concession by the Crown (a concession which the Lord Advocate in the present case did not support) and it may be fair to say that the wording of the paragraph suggests a degree of approval of the concession. The implication of the comment at p 13 is that a subsequent prosecution for murder could not follow where an averment of attempted murder on the previous indictment had been deleted by acceptance of a plea to assault. This seems to be on the basis that the acceptance of the plea operated as a renunciation not only of the right to proceed with the charge of attempted murder, but of the right to prosecute for murder should the victim die. However, why that should be was not the subject of any argument, and the basis for the concession was not explored.

[26] The court referred to a long line of authority making it clear that a prior trial for assault was no bar to a subsequent prosecution for murder. The reasoning would seem to relate as well to a prior trial for attempted murder as for assault: it was recognised that

"death is a new element and creates a new crime", and that "Homicide is a different crime from assault and no one can be charged with homicide until the victim is actually dead." On the plea of oppression which was also advanced in that case, the court said: (p16)

> "…. we cannot agree with counsel that death did not produce any real change. However seriously injured the victim may have been, we are satisfied that in any case the death of the victim does change the character of the offence. So long as the victim lives, even if he is permanently brain damaged and in a coma, no charge of homicide can be brought. It is only when the victim of violence has actually died that his assailant can be charged with homicide."

These words clearly reflect the approach taken in earlier cases relating to the plea of *res judicata* where, as noted above, it was necessary to consider whether the crimes in each case were essentially the same in substance, relying on the same facts.

[27] In *Isabella Cobb or Fairweather* (1836) 1 Swin 354, at p389, Lord Mackenzie said that it was evident that the panel

> "was not tried for the same crime of which she is now accused. At the time of the first trial death had not taken place. There was therefore no tholing of an assize—no trial, for the crime now charged. It is said that the pannel had done all that she ever did to incur the guilt of murder. But the act of murder is not complete, till the person is actually dead. The act of the pannel may be nothing, unless the consequential fact following on that act has occurred. The whole *res gesta*, therefore, was not in the first charge, and the party cannot be said to have tholed an assize."

At p 390 Lord Moncrieff, referring to assault and murder, commented on "the two denominations of offence being quite different" adding "If I read the authorities in our own law aright, the principle, as laid down by Baron Hume, does not apply to any case, except those in which the facts are the same."

[28] In *James Stewart* (1866) 5 Irv 310 it was made clear that following an earlier trial for assault it would not be possible to proceed subsequently with an aggravated assault, for example adding the words "danger of life", even in the event of such a circumstance intervening,

> "because it is not a new crime, but the same crime with a new aggravation. But when you come to the case of murder, there never can be the crime of murder till the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation; but it creates a new crime." (Lord Ardmillan, p315).

Of course, in these cases the previous charge had been assault not attempted murder, but it will be seen that in both cases the distinguishing factor which allowed prosecution to follow was not that the crimes of assault and murder required a different *mens rea* and were thus different crimes, but that the intervening death created a crime which did not exist until that point. The way it was described in *Patrick O'Connor* (1882) 5 Coup 206, in which both *Cobb* and *Stewart* were noted, was (Lord Young, p209) that:

> "The death of the victim is held to change the character of the offence, so that it is fitting that it should again be inquired into without bar arising from the previous proceedings."

[29] It is not obvious to us that the considerations which enabled a murder prosecution to proceed following an earlier assault prosecution should not apply in relation to a previous prosecution for attempted murder. The rationale was not based on any difference in concept between assault and murder as such, but on the simple fact that the intervening death entirely changed the factual situation. The critical consideration, that until death intervenes there can be no prosecution for murder, applies as much to attempted murder as to assault. As was the case in *Cobb*, the "*res gesta*" was not in the first charge; the facts were manifestly not the same. We do not consider it to be the case that, merely because the *mens rea* of attempted murder and murder are the same, the two crimes must be considered so equivalent that an inability to prosecute the former must imply an inability to prosecute the latter in the event of death intervening. It may indeed be said that the only difference between murder and attempted murder is that in the latter the death has not been brought

off, but that is no small matter. We are satisfied that the effect of death is to create an offence different from the one which featured in the original charge and to that extent we accept the Lord Advocate's submissions.

[30] We are persuaded, however, on the basis that the difference lies in the way in which we have just outlined, and that the intervening fact of death creates a new situation. We found the Lord Advocate's assertion that attempted murder should be seen simply as an assault aggravated by a particular *mens rea*, and thus distinct from murder on that basis, less persuasive, and difficult to reconcile with *Drury* v *HMA* 2001 SLT 1013, to which we were not referred.

[31] It is clear from both Macdonald and Alison that an assault could be considered to be aggravated by the intent to commit a more serious offence, and that this was so in respect of an intent to murder. Alison (I, 179) refers to the use of firearms as a particularly bad aggravated species of assault, "necessarily involving the intent to murder, or such recklessness as is equivalent to it". Otherwise, Alison does not include attempted murder as a subset of assault. Both Macdonald (p 108 *et seq*) and Alison (i, 163 *et seq)* treat attempted murder as a distinct crime deserving of treatment separate from assault, although the former does introduce the subject with the words:

> "In judging of the intention of an accused who has committed an aggravated assault, the same rules are to be followed as in judging of the intent in actual murder, viz. that a ruthless intent, and an obvious indifference as to the sufferer, whether he live or die, is to be held as equivalent to an actual attempt to inflict death."

[32] This, however, is a clear reference to the issue of wicked recklessness, which is the distinctive feature of murder and attempted murder, but obviously not of assault. That the element of wickedness is required for both murder and attempted murder, but not for assault, strains the submission that the latter is simply a form of aggravated assault.

[33] Assault is a crime of intent and cannot be committed recklessly: whereas murder does not require intent, and may be established by actings which imply wicked and gross recklessness. Murder may also, albeit rarely, be a crime of omission, or at least a passive failure to act – see Gordon, Criminal Law, third edition, vol I, para 3.34 and cases there cited. Attempted murder, like murder, does not require any intent to kill, but can equally be established by the requisite degree of recklessness – *Cawthorne* v *HMA* 1968 JC 32. The *mens rea* for assault is that of evil intent, an intention to cause harm: this is not sufficient for murder, where the quality of wickedness is an essential element (*Drury* v *HMA* 2001 SLT 1013, Lord MacKay of Drumadoon, para 10; Lord Rodger of Earlsferry, para 10.) Without argument based on these considerations, we are disinclined to proceed on the basis of the Lord Advocate's assertion that attempted murder is simply an aggravated assault.

[34] Nevertheless, for the reasons we have given we are satisfied that the crimes of murder and attempted murder are sufficiently distinct, so that an act which may operate as a renunciation of the right to prosecute the latter does not necessarily have the same consequence in respect of the former, should death subsequently intervene and change the facts of the case. In our opinion a renunciation of the right to prosecute a charge of murder can be established only on the clearest possible, unequivocal terms, and cannot readily be created by inference or implication, which is the essential basis upon which the respondent's argument proceeds.

[35] Furthermore, the issue of whether the Lord Advocate has renounced the right to prosecute any particular case must be seen in the context of the law which would otherwise apply. Whatever may have been the position prior to the introduction of the 2011 Act – *pace Kerr* – that Act makes it abundantly clear that it should now be possible to prosecute for murder even where there has been a prior prosecution for attempted murder. It is against

that background that the Lord Advocate's acceptance of the plea must be analysed. For this reason also we consider that the acceptance of the plea cannot be construed as the renunciation of a right to prosecute should the victim die.

[36] In all the circumstances the appeal will be allowed.