APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 9
HCA/2017/000681/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

RALPH GOLDIE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Dean of Faculty, G Brown Sol Adv; John Pryde & Co (for Livingstone Brown, Glasgow)
Respondent: M Meehan, AD; Crown Agent

31 August 2018

[1] The appellant was charged (charge 2) with murder in the following terms:

> "… you …. did assault Jeremy Paradine, … and did push him on the body, cause him to fall down a flight of stairs, throw a vacuum cleaner at him, cause said vacuum cleaner to strike him on the head and body, repeatedly kick, stamp and jump on his head and body, and you did murder him"

[2] After trial he was convicted by the jury in the following terms:

> "…you … did assault Jeremy Paradine, … cause him to fall down a flight of stairs, repeatedly kick, stamp and jump on his body, and you did murder him"

[3] He was also convicted of an assault on Martin McQueenie, by repeatedly punching and kicking him on the head and body, all to his severe injury. That charge (3) had originally contained an averment that he "did push, kick or otherwise strike [the complainer], cause him to fall down a flight of stairs", but the jury deleted these, and other, averments.

[4] After the jury announced their verdict, but before it was recorded, senior counsel addressed the court submitting that the jury's deletion of the word "push" rendered their verdict inconsistent with the directions given, and self-contradictory. He submitted that the trial judge's directions had been to the effect that the jury had to be satisfied that the now appellant propelled, in some way, the deceased down the stairs whereas in terms of their verdict the jury had deleted the only method of propulsion which had been suggested; "cause him to fall down a flight of stairs" did not, in itself, amount to an assault. Senior counsel submitted that the trial judge should decline to accept the verdict, remind the jury of the relevant directions and ask them to retire and reconsider their verdict. This submission formed the basis of the argument on appeal.

The evidence

[5] The evidence showed that the deceased sustained a fatal, and an unsurvivable, head injury caused in a fall down the stairs; the remaining injuries, whilst serious and life threatening, did not cause the death and were inflicted after the fatal head injury caused by the fall, once the deceased was lying at the foot of the stairs. The pathologist could not say whether the head injury was caused by a fall, a push, an accidental nudge or a trip.

[6] The deceased, the appellant and Martin McQueenie, had been drinking in the living room of McQueenie's home, which was on an upper level with the bedrooms and lavatory being downstairs. All three were very drunk. McQueenie stated that the deceased left the room to go to the lavatory, and the appellant followed him out of the room. McQueenie then heard a "rumbling from down the stairs". On investigating, he saw the appellant two or three steps down and the deceased lying on his back at the bottom of the stairs with his legs up on the steps at the bottom. He was not moving. The appellant said "Aw, just fucking leave him there", referring to the deceased. McQueenie then described an assault on himself. Although he said he must have been kicked or pushed by the appellant, he had previously given a statement in which he said that it was possible that he had fallen downstairs.

[7] Evidence was led from the former wife of the deceased, now the girlfriend of the appellant, Maryanne Paradine, who stated that the appellant "told me (the deceased) never fell down the stairs, he pushed him." Asked why, the appellant said that the deceased "never fell down the stairs, I pushed him, because (the deceased) made (the witness) homeless". The witness then stated:

> "He said he jumped and stamped over (the deceased's) body till blood came out his ears. He showed me – jumped with both legs on the stomach and stamped on him. He said he'd already pushed (the deceased) down the stairs. He said that (the deceased) was lying with his legs on the stairs, his back to the wall and was grey looking."

She demonstrated the position as she understood it, using her arms. She said that the appellant kept telling her that he pushed the deceased down the stairs. He said that he went to the toilet, picked up a hoover, threw it and it hit (the deceased) in the face. He told her that "he jumped and stamped on (the deceased's) body till blood came out of the nose and out of the ears".

[8] Although she said he then stated "I killed your husband", she was cross-examined on the basis of a prior inconsistent statement, the result of which, according to the trial judge, was that it became clear that what he had said was to the effect "I think (the deceased) is dead".

The trial judge's directions

[9] The trial judge gave the jury directions as to what, in law, constitutes murder and culpable homicide (we return to these in due course). He then reminded the jury of the evidence of the forensic pathologist:

> "She was quite clear, as I understand her evidence, and obviously it is how you understand matters that counts, that the cause of Jeremy Paradine's death injury was the head injury and nothing else. … it was the head injury, occasioned by Mr Paradine coming down the stairs at the flat, which was the only cause of his death. And that head injury was unsurvivable." (transcript of charge pages 20 and 21).

We understand that to be an accurate summary of the pathologist's evidence as to cause of death. Accordingly, evidence that the appellant repeatedly kicked, stamped and jumped on the deceased's body when he was at the bottom of the stairs (as the jury were to find that he had) while very obviously relevant to assault, as libelled in charge 2, was of no relevance to the *actus reus* of murder or, indeed, culpable homicide. We would take the trial judge to have been very much aware of this, hence the emphasis on the fall as the only cause of death, which is reflected in his subsequent directions

[10] The trial judge directed the jury on the definition of murder in general terms, repeating exactly the words suggested in the jury manual, thus:

> "The crime of murder involves the unlawful killing of another person, wickedly intending to kill him, or acting in such a way as to show wicked recklessness as to whether the other person lives or dies. Proof of motive isn't necessary, but it must be shown that the accused either had a wicked intention of killing the other person, or he acted with wicked recklessness as to whether the other person lived or died.

A word about each of these requirements.

Intention is a state of mind, to be inferred or deduced from what's been proved to have been said or done. 'Wicked' in the context of intention has no particular legal significance. It just has its ordinary meaning. Intending to kill someone is obviously wicked.

'Wicked recklessness' is also something to be inferred from what's been proved to have been said and done, and from the nature of the attack and the severity of the injuries inflicted, and the surrounding circumstances. It's acting in such a way as to show total indifference as to whether or not the other person's death results. It involves committing an attack of such severity that it could easily have led to death and being completely indifferent to whether that might result. It's a wicked disregard for the consequences.

For the Crown to prove this charge, you would need to be satisfied:

(1) that the accused killed Jeremy Paradine;

(2) in doing so he acted either:

- with a wicked intention to cause death, or

- in a way which showed wicked recklessness as to Jeremy Paradine's fate."

[11] The trial judge made no reference to the words "push" or "cause to fall down a flight of stairs" as averred in the libel. He did not go on to explain how the general definition given by him might operate on the specific facts of the case, although, as we note below, he returned to the subject towards the end of his directions in law in relation to a possible verdict of assault.

[12] Having discussed the pathologist's evidence and with a reminder that the advocate depute had invited the jury to return a verdict of guilty of murder while counsel for the defence had argued for acquittal, the trial judge then gave directions on what he described as the two other options available to the jury: conviction of culpable homicide "in the event that you find that the accused did indeed push, or somehow propel … Jeremy Paradine down the stairs … obviously, if you consider Jeremy Paradine simply fell or tripped then

you would have to acquit" (page 22); and assault, at the foot of the stairs, in the event that the jury found that "Jeremy Paradine fell or tripped down the stairs, or ended up going down the stairs by way of some form of accident" or that the jury had a reasonable doubt (page 24). Given the context, it is reasonable to infer that the jury would have taken the reference to acquittal at page 22 to mean acquittal of the murder element of charge 2, not of the charge as a whole.

[13] The trial judge then directed the jury on the definition of culpable homicide. Again, he did so in entirely general terms quoting verbatim the possible form of directions given in the jury manual:

> "It's a less serious crime than murder, but it is a crime nonetheless. Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy. It's killing someone where the accused didn't have the wicked intention to kill, and didn't act with such wicked recklessness as to make him guilty of murder. The unlawful act must be intentional or at least reckless or grossly careless. Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against or acting in a way which shows a complete disregard for any potential dangers which might arise. It's immaterial whether death was a foreseeable result or not.
>
> For the Crown to prove this charge, you would need to be satisfied:
>
> (1) that the accused committed an unlawful act;
>
> (2) that act must have been intentional, or reckless or grossly careless in the sense I've defined it;
>
> (3) that death was a direct result of the unlawful act."

[14] In this respect the trial judge did add some words relevant to the specific circumstances of the case, by adding:

> "So, as you consider this alternative offence, if you want to proceed to conviction on that matter you would need to be satisfied, first, that the accused committed an unlawful act; and second, that the act must have been intentional or reckless or grossly careless in the sense I've just defined it, and the death was a direct result of the unlawful act. And the unlawful act I'm describing is a pushing or propelling, as Mr. McConnachie described it towards the end of his remarks to you."

[15] After dealing with the alternative of culpable homicide, the trial judge proceeded to deal with the final alternative of assault should the jury find that the deceased had fallen down the stairs by way of accident, or that they simply had a reasonable doubt about the matter. Here, he said:

> "But you may consider that the Crown has proved that the accused nevertheless committed an assault on Jeremy Paradine once he was down the stairs. And I've already defined assault for you when I spoke about charge 3 a moment ago. But put briefly, it's an attack on the person of another with evil intent. And you will see that the word, 'assault' actually features in the charge as it is libelled in line 2. And the Crown invite you to consider that term as it is libelled to be part of the narrative of how the crime of murder was committed by the accused. But if you choose to convict the accused of this alternative on charge 2, that is to say assault, you would simply be required to delete the sections in the charge about pushing Jeremy Paradine on the body causing him to fall down stairs, and, of course you would delete the words at the end, 'and you did murder him'."

[16] Having given instructions on the mechanics of returning possible verdicts, the trial judge then turned to the evidence. He reminded the jury that the Crown relied in particular on the evidence of Maryanne Paradine as an independent source of evidence from which they could accept that the appellant had made a number of admissions in respect of both charges. He directed the jury that they would need to consider what exactly the accused had accepted in conversation with Maryanne Paradine, and if he was admitting to something, what exactly that was (page 42). They had to be clear whether anything the witness spoke to amounted to clear and unambiguous admissions. In relation to Maryanne Paradine, and also Martin McQueenie, the trial judge directed the jury:

> "I formally direct you that you must accept them both as credible and reliable in their accounts to you of the crucial passages of evidence upon which the Crown rely in order even to begin to proceed to a conviction in this case." (page 45)

[17] The jury, after having retired, returned to court with a question about charge 3 in relation to the averment that the appellant did "push, kick or otherwise strike him on the

body, cause him to fa11 down a flight of stairs". The question asked whether these were separate points or if one followed from the other. The trial judge directed that

> "These words are part of the narrative of how the Crown alleged the crime charged was committed and if you are not satisfied that the Crown has proved any part of the charge you can delete that section of the charge, but what's left must define the crime and describe how it was carried out. The words raised in the question, even if all were deleted, would still define the charge and describe how it was carried out. But in order to cause the complainer to fall down the stairs, some form of propulsion would be required, such as a push or a kick or a strike."

[18] There seems to be a non-sequitur in this aspect of the judge's directions. This is not the result of an error in transcription, since what he said was rehearsed with counsel prior to the jury being brought back to court and the exact same words appear. We can only assume that in the second last sentence the trial judge intended to direct the jury that even if the words in the question were deleted there would remain in charge 3 sufficient specification of an assault on Martin McQueenie. This would have been correct. In charge 2, of course, the *nomen iuris* "assault" related both to the allegedly murderous attack, leading to the fall downstairs and the fatal wound, and also to the subsequent attack at the foot of the stairs. In that respect, if equivalent deletions were made to charge 2 a question might arise whether what remained reflected the first as opposed to the second aspect of the charge.

The trial judge's decision

[19] In response to the submission that the jury's verdict did not make sense, and at the judge's invitation to offer a practical solution to the problem, senior counsel suggested that the trial judge might address the jury further and ask them to reconsider. There were no submissions for the Crown. After retiring to consider the matter, the trial judge concluded that the jury had returned a lawful and competent verdict which should be recorded. The

phrase "cause him to fall" was sufficient to provide specification of the necessary criminal act for a verdict of murder.

[20] Notwithstanding the directions given in respect of the question asked in relation to charge 3, which he now considered to be "too generous to the defence position", he considered that the jury's verdict on charge 2 was in accordance with the directions which he gave in respect of charge 2.

Submissions for the appellant

[21] By their verdict, the jury had deleted the only specification by which a murderous assault was said to have been committed. The trial judge's direction in answer to the question relating to charge 3 applied with equal force in relation to the murder charge. In these circumstances the jury's verdict was not competent: *McGeary* v *HMA* 1991 JC 54. In accordance with *Took* v *HMA* 1989 SLT 425 and *White* v *HMA* 1990 JC 33 the trial judge ought to have declined to accept the verdict, reminded the jury of the relevant directions and asked them to retire and reconsider their verdict, all as submitted to him by senior counsel for the appellant. It was not submitted that the verdict had not been capable of correction, had the trial judge adopted the suggestion of senior counsel for the appellant. However, that course not having been taken, the basis upon which the appellant was convicted of murder is not made clear.

Submissions for the Crown

[22] By its verdict the jury must have been satisfied that the appellant deliberately caused the deceased to fall down a flight of stairs. The deletion of the word push is consistent with the jury being satisfied that the appellant deliberately caused the deceased to fall down the

stairs by "some form of propulsion" constituting the [deliberate] act of causing the deceased to fall downstairs. The word "assault" was not deleted.

[23] In some cases, very little specification may be contained in the charge: for example, in *Gilroy* v *HMA* 2013 JC 163, the indictment libelled that the accused murdered the deceased "by means unknown."

Analysis and decision

[24] We accept that of course the Crown may seek to prove a charge of murder when the means thereof remained unknown. In those circumstances however, the crime is established by building a circumstantial case seeking to show that it was a necessary inference from all the known circumstances that the accused murdered the deceased. This was not such a case. The only basis upon which a verdict of murder might reasonably follow was acceptance by the jury of the evidence of the appellant's alleged admission to Maryanne Paradine of deliberately pushing the deceased down stairs. Without that evidence there was no evidence from which death could be attributed to a deliberate act of the deceased. We reject entirely the advocate depute's submission that either the evidence of the pathologist or the evidence of the appellant having followed the deceased from the room, followed by a "rumbling" could form the basis of a finding of a deliberate act independent of the push spoken to by Maryanne Paradine and adopted by the Crown in the framing of the indictment. The evidence of the pathologist was basically neutral, and while, when taken together with the evidence about the appellant following the deceased, it could have corroborated a clear and specific admission by the appellant, neither piece of evidence on its own is sufficient to point to death resulting from a deliberate act of the deceased. It was not suggested that without the evidence of Maryanne Paradine there would have been a

sufficiency of evidence for murder; and at trial the Crown clearly relied on her evidence as the basic foundation of the case.

[25] In other circumstances, where there has been a conviction of murder or culpable homicide it might be possible to infer that the jury has reasonably concluded that the appellant was responsible for the death by an act of the appropriate culpability, albeit that the act is unspecified in those parts of the charge as survive the jury's deletions. However, on the evidence in this case, given the fact that, as the trial judge directed the jury, acceptance of Maryanne Paradine was a fundamental requirement for conviction of murder, we do not consider that such an approach may properly be taken in this case. Unless the jury accepted her evidence that the appellant admitted deliberately pushing the deceased downstairs there was no basis upon which a verdict of murder might result. The fact that the word "assault" remained in the charge is of no assistance, since there was a non-murderous assault averred, of which the jury could, and did, convict. The word "cause" does not itself carry with it any murderous implication. The deletion of the word "push" however suggests that the jury were not satisfied on the evidence of Maryanne Paradine as to the nature and extent of any admission by the appellant. The matter is compounded by the directions of the trial judge in respect of the very similar wording on charge 3, where the jury were given a clear direction that they could not delete all methods of propulsion while leaving the words "cause him to fall down a flight of stairs" in their verdict, yet this is exactly what they did in relation to charge 2. The verdict thus appears inconsistent with either the direction as to the necessary approach to the evidence of Maryanne Paradine or the supplementary directions given admittedly in respect of a different charge but in respect of substantially the same wording. This apparent inconsistency is one which should have

led to the trial judge taking the further action suggested by senior counsel in an effort to resolve matters and make it clear what was the basis upon which the verdict was returned. As is noted in Renton & Brown's Criminal Procedure, 6th edition, para 18-89:

> "If the verdict is self-contradictory, or contrary to the judge's direction the judge should refuse to accept it, and may require the jury to reconsider it."

[26] Various cases are cited where that course of action has been either suggested or taken. The circumstances in which this might be necessary are not confined to those where the jury have deleted all specification, as occurred in *Took* v *HMA*. *White* v *HMA* was a case in which the jury returned verdicts on two charges on the same evidence, contrary to the directions of the trial judge. In *Whyte* v *HMA* 2000 SLT 544 the court observed that this approach should be followed should a jury return inconsistent verdicts on two charges dependant on each other for mutual corroboration. In *Glover* v *HMA* 2014 SCCR 68 the jury had included in its verdict an averment for which no evidence had been led. That, and other inconsistencies, should have caused the sheriff to raise the matter with the jury at the time to clarify their verdict. In *Cameron* v*HMA* 1999 SCCR 476, the court stated:

> "It would, of course, be quite wrong, as the Crown acknowledged, for the trial judge to seek to influence the jury in any way. It is, however, part of his function to assist the jury to deliver an unambiguous and clear verdict to which they can all assent as the verdict of the jury. It may happen, as in the case of *Took* v *HM Advocate*, that it is clear that the verdict delivered orally in respect of a single charge is not one which it is open to the jury to return. In such circumstances the trial judge may invite the jury to retire if they wish to reconsider their verdict and he will usually consider it appropriate to give them some assistance so that they may understand what the difficulty is, so that they can reconsider the matter and ensure that, through the foreman, the jury's intended verdict is correctly delivered. It may be, as in the present case and in *White*, that when the verdict of the jury on the libel as a whole is delivered through the mouth of the foreman, a confusion, incompetency or inconsistency emerges. We see no reason why a different practice should be adopted when that happens."

[27] The verdict of a jury is, of course, not given in isolation, but as part of a framework which includes the speeches of counsel and the directions of the trial judge (*Beggs* v *HMA*

2010 SCCR 681, para 207). From this framework, including the evidence and the libel, the basis of any conviction should be discernible (*ibi*d*).* This may not follow if the trial judge's directions are incomplete, fail to identify all the matters which the Crown required to establish for conviction, or are in any way confusing. In the present case, the charge is not well structured, and the directions on murder and culpable homicide are given in the most general terms without reference to the specifics of the case. This was a case where a verdict of either murder or culpable homicide required to rest on exactly the same, single, deliberate and unlawful act of the appellant, namely an assault, and in particular a push on the body resulting in a fall downstairs. In these circumstances it was very important for the jury to have clear directions on this matter, and to the circumstances in which they might choose to return one verdict rather than another; it should have been straightforward for the trial judge to provide the jury with an elementary "route to verdict", the existence of which would have helped render any verdict understandable.

[28] It is not entirely clear that the trial judge truly appreciated this. Having introduced the subject of alternative verdicts (page 22) the trial judge went on to say:

> "Let me be specific, you may consider that there was conduct, such as a push, by the accused at the top of the stairs which bears criminal responsibility but that this conduct falls short of the crime of murder as I have just described that to you. In such circumstances, you would require to consider the alternative offence of culpable homicide."

It is difficult to see what the jury would have made of this. The wording of this part of the charge is entirely divorced from the terms of the libel in the case. The latter, and the evidence, was wholly predicated on there having been an assault by the appellant, in the form of a push: there was no question of any other "conduct" on his part which might have resulted in either murder or culpable homicide. There is no recognition that the basis of the case – whether murder or culpable homicide – is a deliberate assault in the form of a push

which caused the deceased to fall down the stairs. The matter was compounded by the fact that the directions on culpable homicide contained references to recklessness or gross carelessness, which relate to a form of culpable homicide which was never in issue in the case.

[29] This reference to "conduct" is repeated in the trial judge's report. When counsel made his submission as to the jury's verdict, he referred in particular to the direction which the trial judge gave in respect of charge 3, and the need for some form of propulsion to remain specified in the verdict if the jury intended to convict the appellant of that part of the charge which averred "cause him to fall down a flight of stairs". He submitted that in the absence of a mode of propulsion the verdict did not make sense. The trial judge at first appears to have been sympathetic to this submission, since he said:

> "Yes. I think there's substance in your point and it ties up with the directions I gave in my charge and also, albeit in a different charge, the supplementary direction I gave…. although [on] the same issue, in respect of charge 3".

[30] In the first part of this remark the trial judge was presumably thinking of the directions he gave in relation to the evidence of Maryanne Paradine and the need to be clear as to the terms of any admission and the requirement for the jury to accept her evidence on critical matters before they could consider convicting of murder.

[31] In his report, the trial judge states :

> "I made it clear to the jury that in the event they concluded that … the deceased simply fell or tripped, they must acquit or consider the alternative verdict of an assault at the bottom of the stairs. I also gave a direction on culpable homicide which referred to a finding on the part of the jury of the appellant "pushing or propelling" the deceased down the stairs (page 24) and to "conduct, such as a push" by the appellant at the top of the stairs (page 22). In these circumstances therefore the phrase in the libel of charge 2 "cause him to fall" was sufficient to cover the necessary criminal actus for the crime the jury had duly by their verdict found to have been established."

[32] The fact that these directions relate only to culpable homicide or assault perhaps highlights the fact that the trial judge failed to give any directions about how his directions on murder could operate on the facts of the case, and suggests that he had not fully appreciated the extent to which either verdict depended on proof of an assault, as opposed to mere "conduct".

[33] We appreciate that the directions given by the trial judge were lifted entirely from the Jury Manual. However, as the court observed in *DM* v *HMA* [2017] SCCR 235 (para 16) a slavish and unthinking repetition of what is suggested in the Jury Manual as merely a possible form of directions will not necessarily

> "…be sufficient to alert the jury as to how they should go about their decision-making in every case. Effective jury directions must engage with the specifics of the particular trial and the particular issues that arise for decision."

The trial judge has a duty

> "…to tailor the charge to the specific circumstances of the case, all with a view to giving proper and clear directions to the jury. Simply to repeat the terms of the manual is no guarantee against a misdirection appeal. In his foreword to the earlier edition of the manual, the then Lord President , Lord Hamilton, emphasised that every charge is unique. … The manual is no more than a first port of call, providing a useful, but non-authoritative, checklist of points to bear in mind. Juries are entitled to a bespoke charge adapted to the evidence and to the particular issues arising in the trial." (*McGartland* v *HMA* 2015 SCCR *per* Lord Malcolm, para 31)

[34] Given the evidence of the forensic pathologist, what was required from the trial judge was a clear direction to the jury that in order for them to convict of either murder or culpable homicide they had to be satisfied that the appellant had committed an assault on the deceased which had caused him to fall down the stairs. Because the only form of assault which had been suggested in the evidence was a deliberate push, as spoken to by Maryanne Paradine as having been admitted by the appellant, to convict of either murder or culpable homicide the jury therefore had to be satisfied that the appellant had deliberately pushed the

deceased and that deliberate push had caused the deceased to fall down the stairs. Only if the jury were so satisfied did the further question arise, whether it had been established that the appellant had the necessary *mens rea* for murder in the form of a wicked intention to kill or wicked recklessness. For all his quotations from the jury manual, the trial judge did not give such a direction. It may well be that this failure to emphasise the critical importance of the allegation of a push contributed to confusion on the part of the jury as to precisely what required to be proved. At all events, they returned a verdict which we consider is both self-contradictory and inconsistent with the directions that the judge did give. That was apparent at the time the verdict was returned and called for clarification. The trial judge should have taken the course of action urged upon him by senior counsel for the appellant. His failure to do so leaves a verdict from which, taking into account both the evidence and the judge's charge, the basis of the appellant's conviction for murder cannot reasonably be discerned. We are satisfied that the result is a miscarriage of justice and the appeal must succeed.