APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 44
HCA/2022/133/XC

Lord Justice General
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

DARREN JAMES HUGHES

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: S Collins (sol adv); George More & Co, Solicitors
Respondent: G J Anderson KC; the Crown Agent

9 November 2022

Introduction

[1] On 3 February 2022, at the High Court in Glasgow, the appellant was convicted of two charges relating to an incident at an address in Pilton, Edinburgh on Saturday, 7 December 2019. The first was an assault on his sister, Ashley Hughes, by entering her flat uninvited, punching her on the head and kicking her on the body, all to her injury. The

second was of assaulting Ryan Farrer by punching and kicking him on the head and body and stabbing him repeatedly, all to his severe injury, permanent disfigurement, to the danger of his life and attempting to murder him. A co-accused, Mark Mitchell was also convicted of both charges, but, significantly, under deletion of the aggravations and the attempted murder.

[2] On 7 April 2022, the appellant was sentenced to 9 years imprisonment and his co-accused to 18 months.

[3] The appeal concerns the trial judge's decsion not to allow the appellant to lead evidence under section 267(2) of the Criminal Procedure (Scotland) Act 1995 from Danielle Farrer, who was Mr Farrer's sister. She had not been on the defence list of witnesses and had been present in the courtroom during the first two days of the trial.

The evidence

[4] Given the nature of the complainer's injuries, it was not disputed that what had happened to him amounted to an attempted murder. The two accused had lodged special defences of incrimination; each blaming the other for the stabbings. In due course, each would testify against each other.

[5] Mr Farrer had died in advance of the trial of a cause unrelated to the events of 7 December 2019. On the morning after the incident, he had given a statement to the police. He had been staying in Miss Hughes' flat. He had fallen asleep on a bedroom floor. He woke up to someone assaulting him. He identified his attacker as Mr Mitchell, who had kicked him on the face, said "I f…..g warned you", and kicked him on the face again. His sister and the appellant were in the room. The appellant punched him on the face once or

twice. Mr Farrer did not know that he had been stabbed until the assault had ended. He blamed Mr Mitchell for the stabbing, although he had not seen him with a knife.

[6] Miss Hughes testified that her brother (ie the appellant) and Mr Mitchell had entered her flat uninvited at about 8.00pm on the Saturday. As soon as she answered the door, the appellant punched her. Then Mr Mitchell attacked her. She heard a bang from the bedroom. Mr Mitchell came out of the bedroom and kicked her in the stomach, saying "You'll get what he just got". Her brother had left the flat by then. She went into the bedroom and found Mr Farrer covered in blood. In conversation with the emergency services, in relation to the attacker, she said "They'll be well gone".

[7] Ultimately it was held that there was sufficient evidence for the jury to hold that Miss Hughes had adopted a statement given to the police. In this she had said that, when she was on her knees, the appellant had kicked her on the ribs another couple of times. Despite her initial denials, she had said in her statement that the appellant had gone into the bedroom with Mr Mitchell. They were both with Mr Farrer for 2 or 3 minutes.

[8] Lisa Mitchell, who is Mr Mitchell's sister, testified that both accused had been at her address before the incident and had returned by the following morning. Under reference to statements which she too ultimately adopted, she said that she had heard the appellant on the phone to his mother. He had told her that "Ashley had stuck us in". During a conversation between the two accused, the appellant had said "You don't have to worry Mitchell it was me". The appellant had later said to her that "he cut him up good and was making slashing motions towards my face".

[9] Debbie Farrer, who was Mr Farrer's mother, also adopted a statement to the effect that Miss Hughes had phoned her that night in an emotional state. She had said that the appellant and Mr Mitchell had battered both Miss Hughes and Mr Farrer.

[10] The police spoke to interviewing Mr Farrer. He had told them that Mr Mitchell had "grassed" him and that he (Mr Farrer) would grass Mr Mitchell in return. He said that Mr Mitchell had stabbed him. The appellant had not stabbed him, but had punched and kicked him.

The application to allow Danielle Farrer to testify

[11] Section 78(4) of the Criminal Procedure (Scotland) Act 1995 provides that an accused cannot examine any witness unless advanced written notice of the name and address of the person has been given "unless the court, on cause shown, otherwise directs". Section 267 of the Act states that a court can allow a person to be in court before he has given evidence if that is not contrary to the interests of justice. The section continues:

> "where a witness has, without the permission of the court and without the consent of the parties… been present in court during the proceedings, the court may, in its discretion, admit the witness, where it appears… that the presence of the witness was not the result of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his presence, or that injustice will not be done by his examination".

[12] Danielle Farrer is the daughter of Debbie Farrer and was the sister of Mr Farrer. She had been observing the proceedings throughout the trial. At the conclusion of Mrs Farrer's evidence, she asked if she could ask a question. She was told that she could not. She later told the Crown that her daughter had information about the case. The police then took a statement from Miss Farrer. She told them that, shortly after her brother's funeral in May 2020, she had encountered Mr Mitchell in a supermarket. In relation to the funeral he had said "well it's no ma fault. I'm no gonnae get caught for it anyway as there's no evidence".

[13] The appellant moved to lodge a supplementary list of witnesses containing Miss Farrer's name and to admit her evidence. It was reported that, although no mention of

it had been made in her police statements, she was also going to testify that her brother had repeatedly told her that it had been Mr Mitchell who had stabbed him. There was no record of Miss Farrer having given any information of this nature to either the Crown or the police in advance of trial. The application was not opposed by the Crown. The application was opposed by Mr Mitchell on the basis that the witness had sat through all the evidence for the Crown, including the evidence of Mr Farrer's statement to the police, the testimony of Miss Hughes and that of her own mother.

[14] The trial judge allowed the late witness list to be lodged "on cause shown". He refused to allow the witness to give evidence under section 267(2). He reasoned that Miss Farrer had been present in court for two days, during the fundamental and important testimony. It was highly likely that she would be influenced by what had taken place in court. The onus lay on the person seeking to adduce the testimony (*Macdonald* v *Mackenzie* 1947 JC 169). He might have decided that matter differently, had the witness provided the same information to the authorities in advance of trial. The onus had not been discharged and the application was therefore refused.

The Defence

[15] Mr Mitchell testified to going to the flat. The appellant had punched his sister twice as she opened the door. The appellant went into the bedroom and punched Mr Farrer two or three times on the face whilst straddling him on the floor. Mr Mitchell went towards Mr Farrer. He was told by the appellant to leave him, which he did. The following day, the appellant told him that he had nothing to worry about as he had not done anything. Mr Mitchell denied any form of assault on the complainers.

[16] The appellant denied assaulting his sister. She had been pulling at him and he had hit her accidentally on the face. Mr Mitchell had gone into the bedroom alone. Mr Mitchell had been in the bedroom screaming and shouting. He said "I'm going to f…..g kill you". The two accused left together. He did not know that Mr Farrer had been stabbed. He denied making any admissions.

Submissions

Appellant

[17] The appellant submitted that, having correctly identified the test, the trial judge had placed inappropriate weight on considerations that were of no relevance or significance. The section involved a two part test. First, was the presence of the witness as a result of culpable negligence or criminal intent? Secondly, had the witness been unduly instructed or influenced by what had taken place that injustice would result? The question, of whether Miss Farrer had identified herself as a potential witness, was irrelevant. Given that no-one knew that she was a potential witness until she was excluded from the courtroom, proof of a previous report was nothing to do with the onus being on the appellant. The relevant issue, applying *Affleck* v *HM Advocate* 2005 SCCR 503 (at para [16]), was whether the parties had been aware of a potential witness being in court. The conversations between the witness and Mr Farrer were peculiarly within her knowledge. It was difficult to see that what she had heard or seen in court could have unduly instructed or influenced her. The judge erred in focusing on unfairness as distinct from injustice. Ultimately the jury preferred the testimony of Mr Mitchell to the statement of Mr Farrer. Adducing the evidence of the complainer's sister, who was neutral as between the two accused, would have significantly

supported the evidence of what Mr Farrer had told the police. Material evidence had thus been withheld from the trial and a miscarriage of justice had occurred.

Respondent

[18] Section 267(2) contained two cumulative tests. Both tests must be fulfilled before a judge could exercise his discretion to admit the witness. The trial judge approached the application in the correct way. He identified the correct tests and applied each correctly. He had no discretion to admit the witness. The first test had been met, so *Affleck* v *HM Advocate* was not in point. On the second, the judge was entitled to conclude that the appellant had failed to demonstrate that Miss Farrer had not been unduly instructed or influenced by what had taken place in the courtroom. She had heard the statement of her brother in which he had not initially said that he had been stabbed by Mr Mitchell. Rather, he had not noticed that he had been stabbed until after the incident. She had heard the police, who said that her brother had later told them that Mr Mitchell had stabbed him and the appellant had not. The statement which Miss Farrer had given to the police had not referred to any comments made to her by her late brother. If the judge retained a discretion on whether to admit the testimony, he would have been entitled to refuse to do so. The jury already had the statement from Mr Farrer that it had been Mr Mitchell who had stabbed him. No miscarriage of justice could have occurred.

Decision

[19] At common law, an objection to the competency of a witness could be taken on the basis that he had heard the testimony of another during the trial. The purpose of this rule was said by Hume (*Crimes* ii, 379) to be:

> "not only to obviate the risk of a false or concocted story among the witnesses, whether for or against the panel, but to prevent even that impression, which one witness is apt to receive from another".

Allison (*Practice* 542) describes the rule as:

> "founded on the importance of having the story of each witness fresh from his own recollection, unmingled with the impression received from hearing the deposition of others in the same case".

The rule was, to some degree, anomalous as it did not apply where a witness had been present during the precognition of others or had heard evidence in a previous trial. There was also an exception in the case of medical or scientific experts (see generally, Dickson: *Evidence* (Grierson ed) para 1599 *et seq*.; Macdonald: *Criminal Law* (5th ed) 294).

[20] It was recognised that the rule did not prevent witnesses speaking to each other, and discussing their evidence, prior to the trial. The anomalies were put to rest by section 3 of the Evidence (Scotland) Act 1840, whose words are repeated in section 267(2) of the Criminal Procedure (Scotland) Act 1995 and were also contained in its predecessor, the 1975 Act (s 140). It is now competent to permit a witness who has, without permission, been present in the courtroom during proceedings, to give evidence if that presence was not due to culpable negligence or criminal intent and the witness has not been unduly instructed or influenced by what took place during her presence, or that injustice will not be done by his examination. The section does not place an "onus" on anyone, but no doubt it is for the person seeking to adduce the witness to satisfy the court that these pre-conditions (they are not tests) have been met (*Macdonald* v *Mackenzie* 1947 JC 169 Lord Jamieson at 176, cf Lord Mackay at 174 but ccf at 179). It was not suggested that there was any criminality or negligence involved in this case.

[21] The trial judge took the view that, having sat through the most fundamental and important passages of evidence, it was highly likely that the witness would have been influenced by what she had seen and heard during the trial. That was an entirely reasonable conclusion in the circumstances. In reaching it, the judge was entitled to take into account that, in relation to the references to what her brother had told her, Miss Farrer had made no previous mention of that, even when interviewed by the police during the currency of the trial. Having reached a view that Miss Farrer would have been influenced by what she had heard, the trial judge was bound, in terms of the section, to disallow this evidence as one of the conditions for its admissions had not been met. The appeal must be refused on that basis.

[22] In any event, no miscarriage of justice could have arisen from disallowing Miss Farrer's testimony. In relation to what Mr Mitchell had said to her in the supermarket, that did not amount to any form of admission by him. A statement from Mr Farrer, to the effect that it had been Mr Mitchell who had stabbed him, was already before the jury in the form of that given by Mr Farrer to the police on the morning after the incident. Any evidence of a later statement to the same effect would have been of little evidential value.