APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 72
HCA/2017/74/XC

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

STEVEN JACKSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlay, QC; Faculty Services Edinburgh for T Duncan & Co, Montrose
Respondent: Edwards QC, AD; the Crown Agent

29 August 2017

Introduction

[1] On 22 December 2016, after a trial lasting some 22 days at the High Court in Glasgow, the appellant was convicted of a charge which libelled that:

> "(001) on 27 October 2015 at…, Montrose, you … did assault Kimberley Anne MacKenzie … and did repeatedly strike her on the head and body with a hammer or similar instrument, repeatedly strike her on the head, neck and body with a knife or similar instrument and you did murder her".

He was also convicted, along with his former partner Michelle Higgins, of a second charge which libelled that they attempted to defeat the ends of justice by dismembering the deceased's body, cleaning the locus, and disposing of the body parts and clothing.

[2] On 17 January 2017 the appellant was sentenced to life imprisonment on charge 1 with a punishment part of 26 years. A concurrent sentence of 8 years imprisonment was imposed on charge 2. Ms Higgins was also sentenced to 8 years.

The Evidence

[3] Evidence was led that the appellant was a drug user and dealer who was well known to the police. Ms Higgins was also a drug user and the appellant's girlfriend. The deceased was also a customer and the appellant's former girlfriend. She was murdered on 27 October 2015, although her body parts were not discovered until early November.

[4] On 4 November 2015, the police had called at the appellant's flat at about midnight. The appellant was alone and acting strangely. He was in a trance-like state. He thought that he had recently been in prison for some time. The police explained that he had only been in the cells over the weekend. The appellant said that he had been in prison for the murder of the deceased. The police were not then aware of any suggestion that the deceased was dead. The appellant pointed to a chair and said that the deceased had sat there and offered him sex in return for drugs. Ms Higgins had heard this. She had rushed in and hit the deceased repeatedly on the head with a hammer. The appellant had "finished her off" by cutting her throat. He had chopped up the body before placing the parts in various bins.

[5] In due course Ms Higgins would give evidence that the appellant alone had assaulted the deceased in a frenzied attack.

[6] The evidence of the appellant's ex-wife, BW, was to be significant. It was predicted that she might be a volatile witness. She had mental health problems for which she was prescribed medication. She had the potential to reveal some damning evidence about the appellant; not least that he had admitted murdering BW's daughter's boyfriend by injecting him with heroin between his toes. She had referred to this incident in her police statement. She had also mentioned that he had committed "burglaries", robberies, had blown up a factory and poured petrol through her letterbox. She had been advised by members of the procurator fiscal's staff not to reveal these matters in the course of her evidence, unless specifically asked. BW said during her testimony that she was aware that she was not allowed to speak about certain matters. With these dangers in mind, the trial judge reports that the Advocate Depute trod a very careful path in examination in chief to ensure that no additional information, which might be prejudicial to the appellant, was put before the jury.

[7] BW said that she had been separated from the appellant for some years before the murder. The appellant had asked to meet her. She agreed to do this because of concerns about her daughter. She implied that she was scared of the appellant and only communicated with him because of her concerns. Although unspoken, these concerns related to the appellant's admission that he had killed her daughter's boyfriend. In the course of the meeting, the appellant appeared anxious to tell her something. He told her that he had "cut someone up". The deceased had arrived at his flat and had offered him sex in return for drugs. Ms Higgins had come running in and had struck the deceased on the head with a hammer. He and Ms Higgins had moved the deceased into the bathroom, where he had cut her throat whilst she lay in the bath. The appellant had joked about dismembering the body and had explained how he had disposed of the remains in various bins in Montrose.

[8] BW said that she was terrified because she had not seen the appellant for a long time, but "knew his capabilities". She had agreed to go to bed and breakfast accommodation with him, during which time he had continued to make incriminating remarks. She was not sure whether to believe him. He read books on real life crime and fantasised a lot. The appellant's behaviour became increasingly bizarre at the B & B. He believed that the property was surrounded by police and that there were explosives everywhere. BW explained that she had managed to "escape" from the appellant and contacted the police, having seen news coverage of the incident on television.

[9] Given that it was accepted that the appellant had given an account to the police that was not dissimilar to that which BW had spoken to, it was not entirely clear why it was thought necessary to cross examine her in the robust fashion which followed after an opening question about whether she was on medication and for how long she had been a heroin user. It may be said that having to answer such questions in public may have encouraged the witness to anticipate a hostile approach from counsel.

[10] The trial judge reports that it became clear, as the cross-examination continued, that BW was not reacting well to counsel's questions or indeed to counsel. On more than one occasion BW complained that counsel's manner was "abrupt" and "snipey". On being asked about certain Facebook communications with the appellant, she responded "There is a reason why I initiated contact and you very well know it". This was a reference to her daughter's boyfriend's death. Counsel warned her to "be careful" and she said that she would be "very careful".

[11] The following statement and question were then put to her: "The ladies and gentlemen of the jury will have no difficulty in grasping that you're here to do the best you can to cause harm to Mr Jackson, aren't you?" She replied: "That is ridiculous, do you know

that?" BW was becoming upset and irate. She was speaking very fast. The trial judge had asked her to slow down. BW asked the judge if she could ask counsel to stop being abrupt with her. The judge told her that she did not think that counsel was being abrupt with her. It was simply his manner. She instructed the witness not to volunteer any information, but just to answer the questions. BW was told that, if the trial judge considered that counsel was being unfair, the judge would intervene. BW commented that she thought she was being unfairly treated.

[12] The cross-examination continued in the same robust manner in which it was commenced. BW was, according to the trial judge, making strenuous efforts to keep herself under control, and attempting to abide by the instruction to restrict her answers to the questions asked. She became so distressed and upset that the trial judge intervened to speak to her, at which point she asked for a break saying that she could not cope. After the break, during questioning about gaps in her police statements, she again became agitated and accused counsel of being "snipey". This prompted a further intervention from the judge.

[13] Counsel then suggested to BW that she was lying. He put to her that she had a selective short-term memory loss and that she was seeking to "do down" the appellant. BW disputed this. She explained that she had asked her mother to telephone the police because she was terrified. She continued:

> "He's the type of man to come after you. What about the guns under his floorboards and everything? He would shoot you. What about the grenade under his floorboards?... What about all the rest of the stuff that he does?"

As the trial judge tried to intervene, counsel asked, in a sarcastic fashion: "And the Panzer tank in his back garden?" The judge asked the witness to calm down. She offered to adjourn if BW felt unwell or unable to continue. After the judge had ascertained that BW was prepared to continue, the cross-examination resumed.

[14] Despite her outbursts and obvious volatility, counsel began questioning her about her assertion that she was terrified of the appellant. After a number of questions relating to her fear, she said that she was scared of him:

> "because he tried to, set us on fire. He tried to blow us up, All these things in the past, so, yes, I was very scared".

When she was asked why it had taken her two days to go to the police about what the appellant had admitted, BW said that she had not thought that the appellant had been telling the truth because of his schizophrenic episodes, during which he told lies. She had asked her mother for advice, and continued:

> "She thought it was a lie as well, because all he did was to read all these stupid books on criminals and what they want to do, and he fantasised. He used to … cut cats open and let them run away. He would skin them and let them run away and think it was funny. That's the sort of man he is".

The motion to desert

[15] The appellant submitted that BW had made a number of remarks which were so prejudicial that the trial could not be conducted fairly. The trial judge ought to desert the diet *pro loco et tempore*. A number of her comments had been gratuitous and had not constituted answers to the questions asked. No direction to the jury to ignore the comments would be sufficient. What BW had said in the course of her evidence went beyond any competent and relevant evidence *(Platt* v *HM Advocate,* 2000 JC 468).

[16] Counsel for Ms Higgins opposed the motion to desert. He emphasised that she had waited some considerable time for the trial to be dealt with. She had been in custody for over a year. It would be unfair to discontinue the case at this stage. It had been counsel's intention to introduce the appellant's record in any event although, ultimately, there was no attempt to do so. Any prejudice could not be judged at this particular stage. *Platt (supra*)

was distinguishable (see also *Cordiner* v *HM Advocate,* 1978 JC 64; *Deighan* v *MacLeod,* 1959 JC 25; *Sivero* v *HM Advocate,* 2013 SCL 415; and *Fraser* v *HM Advocate,* 2014 JC 115).

[17] The Crown submitted that in terms of the test in *Fraser (supra* at para [48]), that it was for the trial judge to determine whether any breach had so compromised the prospects of a fair trial that desertion had become imperative. Counsel for the appellant knew the risks of cross-examination. Almost all of the matters referred to by BW, which might be seen to be objectionable, had been contained in her police statements. It was in the public interest to ensure that trials were brought to a timeous conclusion. The judge had to balance the public interest against any prejudice. The matter could be dealt with by way of a direction (*Duncan* v *HM Advocate,* [2013] HCJAC 153 and *Platt* v *HM Advocate (supra*)).

[18] The trial judge observed that BW had reminded counsel on several occasions that there were matters that she ought not to mention. In the course of what the judge describes as a lengthy and very robust and, at times, provocative cross-examination, BW had become agitated and upset. In the course of discussions between the judge and counsel, counsel appeared to have acknowledged the difficult dynamics between himself and the witness. Although the witness's remarks could be seen to be prejudicial, they were not so prejudicial as to prevent a fair trial. Despite the witness's repeated statements, counsel persisted in his cross-examination with, at times, repetitive questions challenging her credibility and particularly, her assertion that she was afraid of the appellant.

[19] The judge had regard to the fact that elements of the appellant's character were already before the jury. Both the appellant and his co-accused had been in custody for some 13 months. Looking at the overall position – including the manner in which the offending comments were made – the trial judge was of the view that the matter ought to be dealt with by way of an appropriate direction to the jury.

[20] When the trial resumed, the trial judge warned BW that there were to be no more outbursts. She directed the jury that they ought to ignore any outbursts "which referred to alleged conduct by the first accused and which does not form part of the charges on the indictment … Just ignore them". After the judge gave that direction, counsel chose not to ask any further questions.

[21] In her charge, the trial judge repeated her direction that the jury had to reach their verdicts solely on the evidence that they had heard in court. She continued:

> "I would remind you to concentrate on the evidence in support of the charges on the indictment and not on any evidence that might have been given in relation to allegations which do not and never featured within the terms of the indictment and I refer in particular to some of the wholly unsubstantiated allegations made by [BW] in her outbursts during cross-examination".

Submissions

[22] The appellant submitted that the trial judge had erred in refusing the motion to desert. It was accepted that it was known that BW was likely to be "difficult" from the appellant's perspective. She had displayed *animus* toward the appellant. It was also accepted that the cross-examination had been robust, but BW had not been unfairly treated. She had neither been bullied nor hectored. The outbursts from the witness BW had been unprovoked and had been calculated and deliberate attempts to damage the appellant in the eyes of the jury. The remarks about the appellant's character were so prejudicial that no direction from the judge could cure them. BW's remarks presented the appellant as a man of violence, who possessed weapons, and was capable of gratuitous cruelty. There could have been no prejudice to anyone by deserting the trial at the early stage at which the remarks had been made (day six). Although each case turned on its own facts, in this case a miscarriage of justice had occurred (*Platt* v *HM Advocate (supra*)).

[23] The advocate depute reminded the court that BW had been warned not to reveal certain things. BW had been being very careful in that regard. She had, however, been volatile from the start. The trial judge had applied the correct test (*Fraser* v *HM Advocate* (*supra*) at para [58]) and taken into account all the relevant factors including the fact that there had been considerable difficulties in assembling the witnesses, who had given evidence before BW, many of whom had drug addiction and other social problems.

Decision

[24] The test for determining whether a trial should have been deserted is set out in *Fraser* v *HM Advocate*, 2014 JC 115 (LJC (Carloway) at para [58]). It was for the trial judge to determine whether the remarks by BW had so compromised the prospects of a fair trial that desertion became imperative, if a potential miscarriage of justice were to be avoided. An appeal court places considerable weight on the views of the trial judge in this area. The judge had the benefit of presiding over the trial and assessing the context of the answers within what, in the present case, had been a lengthy trial process. The trial judge has a considerable advantage over an appellate court in understanding the realities of the situation. She was best able to assess the likely, and possible, impact of the answers in light of all that had happened during the trial. The judge is afforded a wide discretion in deciding whether: (i) to ignore the offending evidence and do nothing, lest the matter be emphasised; (ii) to direct the jury to ignore that evidence and to advise them that they should do so because it has no bearing on the matter before them; or (iii) to desert the diet because of the inevitability of an unfair trial as a result (*ibid*).

[25] Although it is by no means determinative, it is an important feature in this case that the offensive material emerged during cross-examination and not evidence-in-chief (cf *Platt*

v *HM Advocate* 2000 JC 468). There is, of course, a statutory prohibition upon the prosecutor revealing previous convictions, but there is also a duty to take care to frame questions properly and competently in order to avoid undesirable answers. In *Deighan* v *MacLeod* 1959 JC 25 the Lord Justice Clerk (Thomson at 29) cautioned that

> "… it may safely be said that prosecutors must be very careful, and if by carelessness in framing a question or by *pressing a witness too far* despite the sort of warning signs one sometimes sees, the prohibited information is allowed to come out, then the prosecutor must pay the price, and rightly so, because as a rule the prosecutor knows quite a bit about the witnesses and their means of knowledge and ought to be on their guard" (emphasis added).

[26] That was in an era when cross-examination by the defence was far more limited in scope and time and far less robust and repetitive than sometimes now occurs. In modern times, especially given that some witnesses may be less cowed in the face of authority than hitherto, there is an equal onus on defence representatives to take care both when framing questions which may be seen, particularly by the witness, as pressing a point too far. This is especially so when they are aware of the witness's propensities and ability to cause harm. As was by analogy frankly acknowledged by the appellant's counsel, if a person elects to prod a wasp's bike, he is likely to get stung. That is a risk which defence counsel may face in many cases. He or she may not be open to criticism if he or she elects to adopt one mode of attack, but equally he or she cannot cry foul if the witness reacts in a predictable and damaging fashion.

[27] In this case, the offending remarks were made in the course of robust and, as the trial judge describes it, provocative cross-examination. Although the cross-examination was not calculated to insult or intimidate, the questioning was potentially upsetting. It had become clear that BW was reacting badly both to the manner of the questioning and to counsel. The judge made a number of interventions in an attempt to calm the proceedings.

BW had previously been taken through examination-in-chief very carefully by the Advocate Depute, who managed to prevent the witness straying into fields about which she ought not to speak. Several times during cross-examination, BW reminded counsel that there were matters which she had been told not to refer to. The offending comments were foreshadowed in police statements which were known to all parties. In spite of the obvious dangers, counsel maintained his line. The court does not criticise counsel for that, it being a tactical decision for him to take, but the consequences in such circumstances can rarely be a desertion of the diet.

[28] In reaching her decision, the trial judge took into account all of the relevant factors, including the nature of the remarks, the manner in which they were elicited, the time that the appellant and Ms Higgins had been in custody, the point in the trial at which the motion was made, the level of potential prejudice to the appellant and the public interest in seeing the trial concluded. She reached a balanced and reasoned decision based upon these factors. The subsequent directions following the outbursts, which were repeated in the charge, were adequate to meet any potential prejudice to the appellant.

[29] No miscarriage of justice can be seen to have occurred and the appeal is refused.