APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 74
HCA/2017/151/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

DAVID CAMERON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: K Johnston, Solicitor Advocate; Martin Johnston & Socha, Alloa
Respondent: E Cameron, AD; the Crown Agent

31 August 2017

Introduction

[1] On 13 December 2016, at Stirling Sheriff Court, the appellant was convicted of a charge (1) which libelled that:

> "on 15 August 2016 at… Alva you … did assault [GP] … and did strike him on the body with a metal pole, utter threats of violence towards him and repeatedly strike

him on the body with a knife or similar instrument to his severe injury, permanent disfigurement and to the danger of his life".

The appellant was acquitted of a further charge (3) of a contravening Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 by shouting, swearing and threatening violence towards two persons on 26 August 2016. Another charge (2) of possession of Diazepam, also on 26 August, had been withdrawn by the Crown.

[2] On 10 January 2017, the appellant was made the subject of an extended sentence of six years, comprising a custodial term of four years and an extension period of two years.

Evidence at trial

[3] The first witness was CG. She lived in a flat on the same landing as the appellant. There was a confrontation between the complainer, GP, and the appellant's partner, DB, on the stairwell. DB had accused the complainer of stealing from the appellant, when they had been in the appellant's flat earlier that day consuming Valium. DB and the appellant had returned to the flat. Sometime later, CG, the complainer, and two other individuals were sitting outside the block of flats when the appellant and DB came downstairs. The appellant was angry and was shouting at the complainer. The complainer had walked away. He was then approached by the appellant who had pulled out a blade and had attempted to strike the complainer on the face. He had missed, but did hit the complainer's neck. The appellant then "went for" the complainer's side and "jabbed it in". The appellant had the knife in his hand, which had blood on it.

[4] The complainer was the second witness. He gave evidence that he had been in the appellant's flat with the appellant and another individual. They had been drinking alcohol and taking Valium. At one point, the appellant had claimed that money and Valium had

gone missing. When DB had arrived, she had been angry at them because of the appellant's "wasted" state. Later on, the complainer was outside with three others, including CG and AG. The appellant had come out of the block of flats with an object, which looked like a shiny pole. He had known that the appellant possessed a walking stick which had a 13" blade. The appellant had gone for his neck. The complainer had put his hand up to protect his head. The appellant had then stuck the blade into his side. He had walked away from the scene before collapsing.

[5] During cross-examination, the appellant's law agent asked the complainer about the pole-like object. He said that he had seen the appellant with the bladed walking stick on many occasions during the 5 years he had known him. It was put to him that it had been he who had had a knife and that he had been injured during the course of a struggle over the knife. The complainer initially responded by saying that he would never carry a knife and would never stab anyone. The sheriff reports that the law agent repeatedly put it to him that he was the one who had the knife. The complainer continued to deny this, becoming increasingly exasperated at what he clearly regarded as a false allegation. At this point he said of the appellant: "this is his third knife crime". The complainer was not asked any questions about this assertion. Cross-examination continued with the law agent putting the appellant's version of events to the complainer, whereby the appellant had swung a pole at the complainer in order to defend himself from a knife attack. It was also put to him that his neck injuries had been caused by the pole; a matter refuted by the ambulance technician who described the injury as a stab wound caused by a sharp implement.

[6] AG gave evidence. She had been present outside the block along with the complainer, CG and one other person. The appellant and DB had come downstairs. The appellant had been very angry and was shouting at the complainer about his having stolen

money and Valium. The complainer had moved away. The appellant had walked up to the complainer and pulled out a knife. The appellant had a walking stick in which, AG said, he kept a knife. The appellant had gone for the complainer's neck. The complainer had raised his arm to defend himself. The appellant had jabbed the complainer's side. AG had gone round the corner and found the complainer collapsed. In cross-examination, AG said that the pole was part of the appellant's walking stick, which came apart to reveal the knife. He had pulled it out of his sleeve.

[7] The complainer had sustained a 0.5cm penetrating wound to the right side of his neck and a 1 cm penetrating wound to his chest wall. The latter had perforated his gallbladder. He had undergone an emergency operation to remove his gallbladder. The appellant had no injuries.

[8] The appellant gave evidence that he had been in his flat during the afternoon, drinking alcohol and taking Valium with the complainer. His partner, DB, had returned and had started shouting about the state that he was in and about things having gone missing. The appellant had confronted the complainer outside the block of flats. He had taken a 1ft length of copper pipe to scare him. He accepted that he had accused the complainer of stealing. He had seen that the complainer was armed with a knife. In order to defend himself, he had swung the pipe at him. The knife had fallen to the ground. He and the complainer had jumped on it, and a scuffle ensued. He had recovered the knife and lashed out at the complainer. The appellant was not sure if he had caused any injuries. He had gone back into the flat with the knife, but he did not know what had happened to it.

The motion to desert

[9] At the conclusion of the complainer's evidence, the appellant invited the sheriff to

desert the proceedings *pro loco et tempore* on the basis that he could no longer receive a fair trial in view of the prejudicial comment made by the complainer (*Platt* v *HM Advocate*, 2000 JC 468 and *Lewry* v *HM Advocate*, 2013 SCL 700). The sheriff asked whether any direction would be appropriate. The appellant took the view that a direction would only serve to draw attention to the prejudicial nature of the remark.

[10] The sheriff refused the defence motion on the basis that it had been an unfortunate, unsolicited remark from a lay witness during the course of cross-examination. The sheriff was not satisfied that the remark so compromised the prospect of a fair trial that desertion became imperative. The brief reference to the appellant's involvement in knife crime had been made by the complainer at a point when he had been accused repeatedly of lying about the incident.

The sheriff's charge

[11] The sheriff sought the views of parties again at the conclusion of the trial on whether he should direct the jury specifically to disregard the complainer's offending remark. He was not asked to do so by either party. He decided that it was better not to remind the jury of the particular evidence. The sheriff then gave the following general direction:

> "…, ladies and gentlemen, you are not judging anyone's lifestyle and you must put out of your mind anything that may have been said about matters that do not relate directly to what witnesses say happened on 15th ... August. Your job is to assess the evidence about what happened on those dates. Anything else is irrelevant".

[12] In fact, the appellant's record, which is extensive but mainly one of dishonesty, did not reveal that this was "his third knife crime". Only one conviction for carrying a bladed weapon was shown and that had been in 2001. According to the law agent, who appeared at the appeal hearing as a solicitor advocate, she had attempted to reach an agreed position

with the procurator fiscal depute whereby the jury could have been told that the complainer's statement was not true, but the procurator fiscal depute had been reluctant to agree to this for fear that the jury might thereby be under the false impression that the appellant had no record at all. The solicitor advocate was unable to recall whether the sheriff had been asked to correct the error simply by telling the jury that what the complainer had said had been checked and was not true (a relatively simple expedient). Consideration was not given to calling a witness to confirm, again in simple terms, that this was the position.

[13] In his report on the Note of Appeal, the sheriff observes that he did not consider that the offending remark had led to a miscarriage of justice. The complainer had given a convincing account. His injuries were consistent with this account, which was corroborated by two witnesses. The only contradictory evidence had come from the appellant, whose account was inherently implausible. He had admitted leaving his flat with some kind of weapon with a view to confronting a group of several persons, two of whom were both younger and bigger than him. His version, that he had taken only a small section of copper pipe with him, was not probable.

Submissions

Appellant

[14] It was submitted that the sheriff had erred in refusing to desert the trial. The complainer's remark, that this was the appellant's "third knife crime", had been highly prejudicial. Although it was accepted that whether to desert was a matter for the sheriff's discretion, his reasoning had been flawed. In particular, the brief nature of the comment and its inevitability were not legitimate reasons to have refused the motion. The situation

was similar to that in *Platt* v *HM Advocate (supra)*, and the sheriff had erred in distinguishing it. The directions given by the sheriff had been insufficient to rectify the prejudice caused by the complainer's remark.

[15] Whilst it was speculative to state that the jury convicted the appellant of charge (1) because of the prejudicial remark, the jury had acquitted the appellant unanimously of charge (3), in which the witnesses were also AG and CG. The complainer's remark may have affected the jury's assessment of the evidence on charge (1). There had thereby been a miscarriage of justice.

[16] In relation to the sheriff stating that there had been no miscarriage of justice, it was not the role of the sheriff to assess the credibility of the witnesses but rather to ensure that the accused received a fair trial. The decision of the jury to convict the appellant was a majority verdict, which did not reflect the sheriff's assessment of the evidence.

Decision

[17] As was recently reiterated in *Jackson* v *HM Advocate* [2017] [HCJAC 72 the test for determining whether a trial should be deserted is set out in *Fraser* v *HM Advocate*, 2014 JC 115. It is primarily for the court of first instance to determine whether remarks made by a witness have so compromised the prospects of a fair trial that desertion has become the imperative, if a potential miscarriage of justice is to be avoided. The court places considerable weight on the views of the trial judge or sheriff making the decision. He or she has a considerable advantage over an appellate court in understanding the realities of the situation and is best placed to assess the likely, and possible, impact of the answers on the jury in light of all that has happened during the trial. For these reasons, the judge or sheriff is afforded a wide discretion in deciding what to do in the interests of justice.

[18] It is of some significance that the cases in which the court has quashed a conviction on this ground have involved answers either given in examination-in-chief by the prosecutor (eg *Sivero* v *HM Advocate* [2013] HCJAC 1, *Platt* v *HM Advocate* 2000 JC 468, *Graham* v *HM Advocate* 1984 SLT 67) and/or volunteered by experienced police officers who ought to have known better (*Sivero; Lewry* v *HM Advocate* 2013 SCCR 396). Although the ultimate question, of whether the appellant has demonstrated that a miscarriage of justice has occurred, may arise in a variety of different situations and each case will turn on its own facts and circumstances, it is significant that in this case, as it was in *Jackson* v *HM Advocate* (*supra*), the offending remark was made in the course of what might loosely be described as robust cross-examination. If a complainer, who knows an accused's antecedents, is being repeatedly accused of himself being to blame for being stabbed, it cannot be regarded as surprising that he will say something which he thinks supports his account that he was stabbed by the accused, such as that the accused has previously committed a similar offence.

[19] Acknowledging at once that cross-examination of prosecution witnesses is a skill involving delicate decisions which may have to be instantly taken, a defence representative may have to accept the consequences of his or her line of questioning and the tone in which it is delivered when accusing a witness of a criminal act.

[20] The remark of the complainer has also to be put into context in determining the level of prejudice potentially sustained. The court encourages trial judges to set out that context in their reports and to express their own views on whether a miscarriage of justice may have occurred. The sheriff has helpfully explained that context as being that the complainer was a convincing witness whose account was borne out by the injuries he sustained. It was corroborated by two witnesses. The appellant's account of going to confront a group with a small piece of copper piping was inherently implausible. Given that context, and having

regard to the general direction given, any part which the remark played in the jury's determination must have been very minimal indeed. No miscarriage of justice can be seen to have followed.

[21] The appeal is accordingly refused.