APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 4
HCA/2020/12/XC

Lord Justice General
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

DAVID CALLAGHAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh QC, Duling; Faculty Appeals Service (for Houston Law, Glasgow)
Respondent: Edwards QC AD; the Crown Agent

19 January 2021

Introduction

[1] On 4 December 2019, at the High Court in Glasgow, the appellant was convicted, along with a co-accused, of the murder of Owen Hassan on 7 December 2018 by striking him on the head and body with machetes or similar instruments outside the Old Stag Inn,

Greenview Street, Pollockshaws, Glasgow. He was sentenced to life imprisonment with a punishment part of 20 years.

[2] The issue is whether a miscarriage of justice occurred because the trial judge did not direct the jury that a confession by the co-accused to his participation in the attack on the deceased did not constitute evidence against the appellant.

The Evidence

[3] The issue at the trial, in so far as relating to the appellant, was identification. The appellant had incriminated two brothers, KM and SM.

[4] The co-accused was the former boyfriend of SK. That relationship had ended in January 2018. Sometime between March and June 2018, the deceased had formed a relationship with SK. The co-accused was not happy about this. He had sent SK text messages, some of which were of a threatening nature. SK decided to leave for Australia on the weekend of 9/10 November 2018. She had arranged to meet the deceased on Thursday 7 November.

[5] On 6 November, the deceased and AS assaulted SM outside the Old Stag Inn, which was run by the deceased's mother. AS thought that SM had been selling drugs in his (AS's) retail area. The deceased said to SM "if you see [the co-accused] tell him his cards are marked and his time is coming".

[6] During the course of 7 November, the appellant and his co-accused had been in telephone contact on eight occasions; on five for only 2 or 3 seconds. Substantial calls took place at about 6.45pm, 6.50pm and 10.00pm.

[7] At about 6.30pm, four men, including the appellant, got out of a taxi and went into the One O One shop in Boydstone Road; some distance from the Inn. The appellant was

wearing an "Airmax" top with "Max" written on the front. The clothing worn was similar to the smaller of the two attackers who were shown in CCTV images of the murder (*infra*). Ten minutes or so later, a taxi took four males to an address at Hillside Court in Thornliebank, where the co-accused lived.

[8] Much later, at about 10.00pm the co-accused booked a taxi which took two males to Shawbridge Street. At about 10.15pm the same taxi was in Thornliebank Road and later at Ashtree Road, which is near the Old Stag Inn in Pollockshaws. CCTV images showed two men appear from the underpass which links Ashtree to Shawbridge Arcade, which in turn leads onto Greenview Street where the Inn is situated. The smaller man had light coloured writing on his top. The men approached the Inn and made their way to a grass embankment behind and above the Inn.

[9] The deceased left the Inn. On seeing the two men, he ran away but was caught, attacked and murdered. Each assailant used a machete or some other form of large bladed weapon. The deceased died from multiple stab wounds, notably one to the heart. The smaller attacker followed the deceased back towards the Inn, where he struck him again before running away. The taller man walked away. The deceased's mother, Anne Marie Lynch and James Nolan came out of the Inn and attempted to assist the deceased.

[10] Mrs Lynch saw a man at the entrance to the Inn. She took hold of him, but he broke free. She chased him until he turned, swore at her and brandished a 2 foot long knife above his head. She identified this man as the co-accused, as did Mr Nolan. There was another man across the road. He was either climbing over, or hanging from, a fence. He had a large weapon. He had his hood down. She thought that he had been wearing a navy top with white writing on the lower front. She identified this man as the appellant.

[11] At about 1.25am the co-accused took a taxi from an address in Carnwadrick. It dropped him at a junction near Barrhead. At 6.00am a taxi picked up two men from that vicinity and took them to the vicinity of the co-accused's house. At 7.10am the appellant took a taxi from there to his home in East Kilbride.

[12] Evidence of gait analysis provided moderately strong support for the suggestion that the images of the appellant at the One O One shop showed the same man as one of the attackers in the CCTV images of the murder. The same applied to the co-accused, who had been identified in other images taken at another shop.

[13] Steven Ward, who was a friend of the deceased, spoke to having a conversation with the co-accused at the latter's father's house in Thornliebank. During the course of the conversation, the co-accused said that he had done something bad. He said that he had been involved in the death of the deceased. The incident had taken place near the Inn and the co-accused had been with someone else at the time. The co-accused had chased the deceased down the street and "some other boy" had stabbed him first but he (the co-accused) had stabbed him as well. The co-accused did not say who had been with him.

The Charge to the Jury

[14] Early in his charge the trial judge directed the jury that hearsay was generally not admissible because it was not the best evidence. An exception to this was an admission made by an accused person against his own interest. He explained that the jury required to consider the evidence against each accused separately and to return separate verdicts but that a piece of evidence may be relevant to each accused.

[15] The judge told the jury that the live issue was identification. He gave the jury careful directions on the dangers of eye-witness testimony; notably that of Ms Lynch and Mr Nolan.

He referred to the criticisms which had been levelled at them on that aspect of the case. He continued with a route to verdict in the case of the appellant as follows:

> "…looking at [the appellant], if you don't believe the eye-witness evidence of Ms Lynch regarding the [appellant], or if you have a reasonable doubt about the truth of her evidence, then you couldn't convict … [the appellant]. But if you think Ms Lynch is credible and reliable in this regard, then there must be other evidence supporting what she says.
>
> The advocate depute relies on three possible sources of circumstantial evidence. The comparison of the clothes worn in the [One O One] shop earlier in the evening with the clothing worn by the smaller man who carried out by the attack; the pattern of telephone communications between the two accused and the analysis of the various taxi journeys; the gait analysis. You will recall the criticisms that defence counsel levelled at each of these aspects of the case, it's a matter for you to determine whether these sources provide corroboration."

[16] The judge then dealt with the criticisms of the gait analysis before turning to the evidence against the co-accused. In his case, there were the two eye-witness identifications, which were capable of corroborating each other. If they accepted only one of the witnesses, there were the telephone and gait analyses. In addition, the jury could consider the confession to Mr Ward as corroboration.

Submissions

Appellant

[17] The trial judge had told the jury that they required to return separate verdicts against each accused. He had told them that one piece of evidence could apply to both accused, but he had not gone on to tell them some evidence did not apply to both. The jury could not be expected to know that (*Tobin* v *HM Advocate* 1934 JC 60 at 63). The trial judge had been bound to give the jury what was a standard direction that a statement by a co-accused, outwith the presence of another accused, was not evidence against that other accused (*McGrory* v *HM Advocate* 2013 SCCR 113). It was not necessary that the evidence

complained of directly named the appellant (*Muirhead* v *HM Advocate* 1999 SLT 1231 at 1232); just that it was incriminatory.

[18] The confession of the co-accused that he and someone else had chased the deceased, the other person had stabbed him first, but that he had stabbed him as well, had created a tangible connection between the confession and the appellant. If accepted, the confession confirmed that the co-accused had taken part with another person. This would have indicated that, to some extent, the clothing and gait analysis evidence was correct. It would have supported the credibility and reliability of the eye-witnesses. The detail about the attack was incriminatory of the appellant because of the effect of it on much of the circumstantial evidence relied on by the Crown and because of the general prejudicial effect of having evidence of one co-accused confessing when both were running a similar defence that the identification evidence was unreliable and the circumstantial evidence unconvincing. The trial judge sought to provide a route to a verdict for each accused. Given that the charge was delivered orally, the structure of the directions only served to confuse the jury about whether the confession was relevant to both accused or only the co-accused. The advocate depute's speech had not made the matter clear either.

[19] The trial judge gave a brief direction on the admissibility of confessions against interest. The contrast with the recommendations of the jury manual illustrated the weakness of this direction. The text from the jury manual provides clarity about whom the confession is evidence against. The trial judge's direction did not. There was no direction that the confession was only relevant to the co-accused. It would not have been obvious to the jury that the confession was only evidence against the co-accused. This was not a peripheral matter (cf *Telford* v *HM Advocate* [2014] HCJAC 128 at para [18]). Had the matter been made

clear to the jury, a different result may have followed. The misdirection was material and gave rise to a miscarriage of justice.

Crown

[20] The advocate depute contended that there was no merit in the ground of appeal. The circumstances in *McGrory* v *HM Advocate* (*supra*) were different. In *McGrory* there was no dispute that the two individuals, who had been present at the time of the fatal wound, were the appellant and his co-accused. In this case, both accused denied being present at the material time. The co-accused's admission was unspecific in its terms. The appellant was not incriminated by the co-accused. In *Muirhead* v *HM Advocate* (*supra*), there was no dispute on identification. In this case, the defence did not accept that person depicted in the CCTV images with the similar clothing and gait was the appellant. There was therefore nothing to tie him to the statement made by the co-accused.

[21] If the direction ought to have been given, the failure to do so did not result in a miscarriage of justice. The absence of words that would have improved a charge did not mean that there was necessarily a misdirection (*Kerwin* v *HM Advocate*, HCJAC, unreported, 30 March 2016; *Elsherkisi* v *HM Advocate* 2011 SCCR 735 at para 24). The trial judge gave directions to the jury that fitted the particular circumstances of the case. As stated in *Lauder* v *HM Advocate* [2016] HCJAC 30 (at para [13]) a judge's charge should not be an academic exposition, but be tailored to fit the circumstances of the particular case.

Decision

[22] A statement made by one accused outwith the presence of another accused is inadmissible as evidence against that other accused (Dickson: *Evidence* (Grierson ed)

para 363, citing *Milroy* (1839) Bell's Notes 291). This is because, in the case against the other accused, the evidence is hearsay (cf Criminal Procedure (Scotland) Act 1995, s 261 which may now enable a statement of a co-accused in the other accused's favour to be admitted). The rule is often justified, as it is in the *Jury Manual* (p 34/118), as being a matter of fairness; the other accused not having the chance to admit, deny or comment upon was said.

[23] The evidence is, of course, admissible as a generality in a trial which proceeds against both accused as a statement against the interests of its maker; but its incriminatory effect must be restricted to the case against its maker. Where, therefore, it contains material which is incriminatory of another accused, a trial judge ought to direct the jury to disregard that element in so far as it is so incriminatory. If the content of the statement is not incriminatory of the other accused, whether directly or indirectly, no difficulty arises. In that event, there is no need for such a direction.

[24] In this case, the statement by the co-accused was not incriminatory of the appellant. It consisted of an account of the attack on the deceased by two men. That was not in dispute, as the murder was shown in the CCTV images. It may be that the jury considered that the confession by the co-accused lent some credence to the eye-witness identification of the co-accused by both Ms Lynch and Mr Nolan. That may have influenced the jury in regarding Ms Lynch as credible and reliable on identification more generally. Whether that is so or not, the statement contains no material which could have been used to prove the appellant's involvement and that is the critical element.

[25] In these circumstances, no direction to the jury to disregard the statement of the co-accused, when considering the case against the appellant, was required or, given the risk of potential confusion, desirable. The trial judge gave clear directions to the jury on their route to verdict in the appellant's case. They had first to accept Ms Lynch's identification of the

appellant. If they did not accept that, an acquittal had to follow. If they did accept Ms Lynch, they had to find corroboration in the surrounding facts and circumstances as presented to them by the evidence of the 'phone calls, taxi journeys and gait analysis. There is no reason to suppose that the jury left the route upon which they were directed and embarked upon another whereby they took into account off-piste material. The relevance of the co-accused's confession was only mentioned by the trial judge in the case against him.

[26] The trial judge's directions were succinct, clear and accurate, having regard to the live issues at trial. The appeal against conviction is refused.