APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 11
HCA/2023/245/XC
HCA/2023/237/XC

Lord Justice Clerk
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

Appeal against Conviction and Sentence

by

LEWIS SPENCE

Appellant

and

Appeal against Conviction

by

CONNOR STEELE

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

First Appellant: S Collins (sol ad); Collins & Co
Second Appellant: Keegan, KC (sol ad); Wilson McLeod
Respondent: Lord Advocate; M McIntosh AD; the Crown Agent

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26 March 2024

[1] The appellants were convicted after trial, along with a co-accused Bradley Logan, of *inter alia,* the attempted murder of Peter Martin by assaulting him, brandishing weapons at him, pursuing him, attempting to strike him on the head and body with a machete and striking him on the hand with the machete, to his severe injury, permanent disfigurement, permanent impairment and to the danger of his life.

[2] Each appellant was sentenced on charge 1 to an extended sentence comprising a custodial term of 7 years and an extension period of 3 years, with concurrent sentences in respect of other charges.

[3] Spence and Steele appeal against conviction. Spence also appeals against sentence. He argues that the imposition of an extension period was excessive.

The circumstances of the offences

[4] The events libelled occurred on 15 September 2020. The evidence of the complainer, now deceased, was led under section 259 of the 1995 Act. On the day in question he was coming out of Anwar Newsagents in Lochend Road South, Edinburgh when he heard tyres screeching and two cars stopped. About 11 men in balaclavas jumped out. One of them pointed a sword at him and he ran back into the shop. He shouted to the shopkeeper to call the police and ran behind the counter. It went quiet and he thought the men had gone but then one of them swung a sword at him. It caught his left hand, which he had raised to protect his head. He thought the man who hit him was called Damien because he was the same height and build as someone he knew of that name.

[5] The events were largely caught on CCTV and dashcam footage. Shortly after leaving the newsagents, the complainer is seen running back towards the entrance and inside. At

least three cars arrive from which around ten young men emerge, each wearing masks and balaclavas to disguise their identities. Five of the men pursued the complainer inside. The police were unable to identify two of the assailants. As to the remaining three, the identification of Bradley Logan is not in dispute; he has not appealed against his conviction. The other two were identified as Spence and Steele. Steele was wearing a dark jacket with goggle eyes on the hood, black gloves, a baseball cap and a face mask and was wielding a black baseball bat. Spence was wearing a camouflage vest, dark t-shirt, dark trousers with a white stripe, short enough to expose the bottom half of his shins, a baseball cap and carrying a machete. Footage from inside the newsagents shows the complainer running behind the counter and hiding. Logan points him out to the man identified as Spence, who thereafter strikes the plastic door separating him from behind the counter, which comes off its hinges. He can then be seen striking in the direction of the complainer with the machete. The assailants left the shop and got into the cars waiting outside which sped off.

The issue at trial

[6] All parties agreed that the critical issue was identification. There was no dispute that the complainer had been attacked in the manner libelled in the indictment. In the Anwar Newsagents footage all of the assailants' faces were well covered. Spence and Steele were identified to varying degrees by various police officers who had viewed the footage. These were DC Andrew Crown, DC Jenna Lawrie, DC Ross Woolley, DC Steven Robertson and PC Rachael McIntyre. The officers' evidence was challenged in cross primarily on the basis that their identifications were the result of discussion amongst themselves and that they were mistaken.

[7] One route to identification of Spence was through comparison between the Anwar Newsagents footage and footage recovered from a store on West Granton Road showing events earlier in the day on 15 September. A man, who is acknowledged to be Spence, is seen being pursued through the store and into the back storeroom by two men with machetes. In identifying Spence, officers made reference to his complexion, that his eyes and nose were clearly showing on both sets of footage, and that the tracksuit bottoms worn in both were similar. Counsel for Spence challenged this, first, on the basis that the complexion of the person shown in the Anwar Newsagents footage was in fact white, and second, that the trousers shown in the Anwar Newsagents footage were three-quarter length, whereas at West Granton Road they were full length.

[8] Steele relied on a special defence of alibi. He gave evidence in which he said that he had been assisting a friend, TJ McGhee, to move into a new flat at Western Harbour Midway in Newhaven. After this, he went to his father's briefly for dinner before returning to McGhee's previous flat in Royston. Footage from Western Harbour Midway showed that Steele left there at 16:55:11. The Anwar Newsagents footage from which he was identified was timed at 17:09:56. The Crown led evidence to show that it was possible to drive between these two locations in a little under 13 minutes, depending on traffic. Steele's father gave evidence in support of his alibi. A defence witness, James Borwick MSc, spoke to his examination of Steele's phone, the location of which at certain times was used to support his alibi. The phone was at Royston Mains between 10:49 and 14:20, Western Harbour Midway between 15:22 and 16:57 and back at Royston Mains between 17:36 and 20:39. DC Robertson spoke, in cross examination, to his interpretation of this report as indicating that the phone was "offline" for the 38 minutes in respect of which there was no location information. In this respect Mr Borwick said that the location could be identified at the start and end times

but he could not say by what route it had travelled to get from one to the other. A question from the Advocate Depute in cross-examination as to whether Steele's phone might have been in the possession of another was successfully objected to, largely on the basis that it had not been put to the appellant.

The jury's view of the appellants

[9] The trial was conducted remotely, with the jury in a cinema electronically linked to the courtroom so that they could watch the proceedings on a large cinema screen. This is a system which has been successfully used in a large number of trials and no exception to it was taken as a generality. The footage from the newsagents and West Granton Road was played on days 4 and 5 of the trial, the dashcam footage was played on day 2, the Western Harbour Midway footage on days 4 and 6, and Spence's police interview on day 6. On day 6, the jury asked if the accused could be put on full screen briefly as it was difficult to make out faces on the smaller image shown in the quarter screen.

[10] There was no objection and this course was followed; it appears that this may in fact have been done each morning thereafter at the start of the day's business. There appears to have been no further discussion of the matter throughout the remainder of the trial.

The trial judge's report

[11] In her report the trial judge makes numerous, scathing, criticisms of the way in which the Advocate Depute conducted the trial. In her report she states that had she been asked to desert the trial she would have done so, provided she had an assurance that another Advocate Depute would conduct the case. She also notes, without giving detailed reasons for the view, that she could understand why the appellants consider they might not have had a fair trial.

The appeal

[12] The grounds advanced for each appellant were broadly the same. First, the Advocate Depute's conduct of the trial resulted in frequent and repeated objections from defence counsel, such that the jury could have gained the impression that the defence were attempting to conceal evidence damaging to their case (ground 1). In relation to the appellant Steele, a further ground addressed a specific aspect of the Advocate Depute's approach to evidence in relation to the defence of alibi (ground 1(ii)). Second, the trial having been conducted remotely, the jury were unable to see the appellants while the evidence relating to their identification as the perpetrators was being led, such that they were unable to carry out a proper assessment of that evidence under reference to the CCTV footage (ground 2).

[13] The first ground of appeal relating to the prosecutor's conduct of the trial was not insisted in, save for the discrete point advanced for Steele in relation to evidence led in support of the alibi. The second ground was advanced under reference to *Gubinas* v *HM Advocate* 2018 JC 45, and *Wishart* v *HM Advocate* 2022 JC 259, para 9 and the observation that "the jury have a right to see the accused as evidence is given". If the jury could not see the appellants whilst the CCTV from the locus and dashcam footage were being led, they would be unable to carry out any exercise of comparison. A verdict of guilt returned in such circumstances meant that the appellants had not received a fair trial and the result had to be considered a miscarriage of justice.

[14] The Lord Advocate submitted that it could not be inferred from the jury's request to view the dock on full screen that they were unable properly to assess identification, particularly since detailed directions on the issue were given by the trial judge. The Lord

Advocate also made submissions about the tenor of some of the trial judge's comments concerning the Advocate Depute's conduct of the trial, submitting that the tone and content of these were inappropriate. Whilst there was some criticisms which may be legitimate, others were on matters of judgement over which competent practitioners might differ. Of most concern were those which appeared personal in nature, even petty (such as a comment about the Advocate Depute's wig falling off, or dropping her papers), and reflected a hostile and hyper-critical approach towards the Advocate Depute, suggesting a lack of courtesy, respect for the dignity of the court, and patience.

Analysis and decision

Ground 1

[15] The way in which the first ground, now not insisted in, was framed for each appellant was in terms which asserted:

- that the appellant was deprived of his right to a fair trial due to the conduct of the Advocate Depute throughout the trial;
- that she repeatedly misrepresented the evidence given by witnesses at the trial;
- that she sought to lead evidence that was plainly objectionable;
- and that she repeatedly pursued irrelevant and objectionable lines of evidence notwithstanding warnings from the trial Judge.

[16] It was said that this might have had a prejudicial effect against the appellants, leading the jury to think that the defence were repeatedly interrupting the running of the trial in an effort to prevent them from hearing the evidence. This ground of appeal was rightly not insisted in, but the question remains as to why it was advanced in the grounds of appeal in the first place. We recognise that this ground passed the sift (despite a complete lack of specification), but it seems likely that this was largely due to the hyperbolic nature of

the trial judge's comments (a matter to which we will return). In reality, when the matter is examined dispassionately and objectively, the ground is unstateable, as was clearly recognised by both solicitor advocates in their decision not to insist on it.

[17] The allegations made in this ground are very serious. They call into question not only the prosecutor's competence, but arguably, in asserting that she insisted on continuing with irrelevant and objectionable lines of evidence, despite the warnings by the trial judge, also her integrity. It is notable that this ground of appeal is stated in the most general of terms and no specification is given. There is specification given in the case and argument, but when examined the points can generally be seen to be without merit or trivial. Certainly the issues raised come nowhere near the standard of default required to constitute an unfair trial. An unacceptable degree of speculation is reflected in the approach taken. It is true that the Advocate Depute had some initial difficulty in working out how to lay the foundation for leading the identification evidence, which led to numerous objections to the way in which she developed this line. It also seems that she became somewhat unnerved as she tried to correct herself, but the matter was eventually resolved in a satisfactory way. In particular, an eventual defence objection to proceeding further with identification from the witness during whose evidence this difficulty had occurred was repelled. The trial judge ruled on various objections, sometimes in favour of the defence, sometimes in favour of the Crown. Itis not suggested that the directions she gave on any issue arising in the trial were wrong or confusing. As the Lord Advocate submitted:

> "In this case there has not been identified any particular error or failure on the part of the Advocate Depute which can be properly categorised as either a substantial and prejudicial departure from good and proper practice, or a serious contravention of accepted rules of practice. Where errors on the part of the Advocate Depute have been identified, it is not suggested by the Appellants that the trial judge erred in her rulings on objections made, nor that the directions of the trial judge were deficient or inadequate to address any errors identified."

[18] The test for showing that conduct of the prosecutor has been so egregious as to prevent a fair trial, creating problems so grave that they could not be cured by direction is a high one (*KP* v *HM Advocate* 2018 J.C. 33). This is entirely understandable, since many of the observations about the presentation of appeals on the basis of inadequate representation apply *mutatis mutandis.* There are many issues of practice upon which competent professionals may legitimately disagree, including on issues of strategy, presentation of evidence and the like. Differing views may be taken on the admissibility of evidence without implying that one party is incompetent or lacks integrity. Errors are not uncommonly made during the conduct of a trial, in the heat of the contest, without leading to an inference of unprofessional conduct. A ground of appeal which seeks to attack the professional competence and integrity of the prosecutor should not be lightly advanced. A ground of appeal of this kind could have serious professional and personal repercussions for the individual who is subject to criticism, especially where that criticism is unfounded. Legal representatives must have a care to satisfy themselves fully that such grounds have a proper foundation and may responsibly be advanced before including them in a note of appeal.

Ground 1(ii)

[19] Notwithstanding the abandonment of ground 1, it was maintained for the appellant Steele that the Advocate Depute's treatment of the evidence relating to his alibi resulted in an unfair trial and a miscarriage of justice. In cross examination, the reporting officer referred to his understanding of the defence expert report as indicating that the appellant's phone was "offline" for the period of 38 minutes. In the relevant ground of appeal it is stated that there was no evidential basis for this, and that rather than seek to correct the

evidence of the witness, the Advocate Depute wrongly sought to suggest to the defence expert that the phone was "off" at this time, which was not what his report had stated. Whilst this evidence of the reporting officer is referred to repeatedly in the speech of Mr Keegan, we can find no mention of it in the speech of the Advocate Depute. Nor can we find any reference to her having made this suggestion to any witness, although the possibility of the phone being off was raised by Mr. Keegan in examination in chief of the expert. In any event, it would have been of no moment had she done so, since the critical point was not whether the phone was off or on but that during a 38 minute gap, during which the offence occurred, it was not recording location information.

[20] The criticisms advanced under this ground of appeal were expanded to maintain that the Advocate Depute had misrepresented to the jury that the evidence of the expert witness led for the defence was that he did not know where the phone was during those 38 minutes. It is quite plain from the transcript that this was indeed the evidence of the witness. He knew where the phone was at the start of that period, and where it was at the end, but the route taken between the two locations, or where the phone was at any point in the period, he did not know. This is an example of an alleged misrepresentation by the Advocate Depute being no such thing.

[21] A further criticism advanced under this head, although not presaged in the ground of appeal, was the assertion that the Advocate Depute had put to the expert an objectionable proposition, namely that the phone might have been in the possession of someone else. The question was objected to on the basis that there was no basis in evidence for asking it, and the objection was upheld. It was somewhat surprisingly contended that this one instance was sufficient to render the whole trial unfair, and the result a miscarriage of justice, on the basis that the jury might have concluded from the objection that the defence were seeking to

suppress evidence. There is no basis for such an assertion. This is another example of incorrect criticism of the Advocate Depute. The expert witness had been asked to report on the location of the phone: this was all he could competently do. Nevertheless in his report he offered the opinion that since the appellant was seen, with a friend, on CCTV at Western Harbour Midway at a time which reflected the location of the phone, "it is fair to state that the handset was in his possession when he left that location". The inference that this was so is one which would have been open to the jury to draw, although there were other possible inferences, including that it was in possession of the other individual seen in the footage. However it was beyond the role of the witness to offer this as his opinion. The matter should have been dealt with at a preliminary hearing and in any event should have been objected to at trial. The possibility of the phone being in someone else's possession was first raised by the expert himself. The Advocate Depute followed the matter up with a question whether it was possible someone else had the handset, and it was this which led to the objection that this lacked an evidential basis. The trial judge agreed with the objection, in the presence of the jury, before asking them to retire whilst she heard detailed submissions. She upheld the objection.

[22] What the Advocate Depute was legitimately seeking to do was to show that there were other inferences which might be open to the jury, and to explore the limitations of the expert evidence. The possibility that the phone was in the possession of the other individual seen at Western Harbour Midway was an obvious one, and the fact that this had not been put to the appellant was a matter for comment only; it did not make the question objectionable and the objection should have been repelled. This is another example of incorrect criticism of the Advocate Depute. In this instance both the solicitor advocate for the defence and the judge were wrong, and the Advocate Depute was right. A similar point

arises in respect of the Depute's reference in her speech to the appellant and his friend seeming to draw attention to themselves by the CCTV camera at Western Harbour Midway. We agree with the Lord Advocate that the Depute was entitled to invite the jury to question whether the movements and demeanour of the appellant, and in particular his looking directly at the camera, may be indicative of his acting with a conscious awareness of the presence of the camera in order to set up the alibi. She was entitled to raise that issue and criticism of her by the trial judge and for the appellant is misplaced.

Ground 2

[23] The evidence of police officers identifying Spence was reasonably strong, and there was evidence from at least one officer of knowing him personally. In relation to Steele, officers made a comparison with his physical build, and with those parts of his face which could be seen, in particular the eyes. On day 6 of the trial the jury asked if they could see a close up of the appellants in the dock since it was difficult to make out the faces on the quarter screen. There was no objection and this was shown to them on full screen for about 2 minutes. According to the solicitor advocate for the second appellant this was thereafter done each day at the commencement of business. It was maintained for each appellant that the jury's request means that when the evidence of identification was led, and in particular when the CCTV evidence was shown, the jury could not have been in a position to see the appellants clearly and make a proper comparison of images. They had to be able to do so at the time the CCTV was being shown, and their decision to convict in these circumstances must be viewed as a miscarriage of justice.

[24] The suggestion that the jury did not have an adequate opportunity to view the appellants in the dock is not made out. The appellants were always visible on the quarter screen during the trial, including when all the CCTV footage was shown. They had several

opportunities to see close ups of the appellants. They also had the opportunity to view the police interview video of Spence and the CCTV which was admittedly that of Steele at Western Harbour Midway. Steele also gave evidence on his own behalf. There is in our view no reason to think that the jury would have been hampered in their task.

[25] The jury made a request which was accommodated by the trial judge; it appears to have satisfied them because they did not repeat the request; and no one else raised the matter again. It has to be noted that there is no suggestion that there was an insufficiency of evidence or that it would have been impossible to identify from the footage; nor is it suggested that no reasonable jury properly directed could have convicted.

The trial judge's criticisms of the Advocate Depute

[26] Given the terms of ground 1 and the trenchant criticism of the Advocate Depute made by the trial judge in her report, it is perhaps unsurprising that the Lord Advocate's written submissions addressed this issue, submitting that the tone and content lack the requisite dignity, indicative of a lack of patience and hostility. It was submitted that it is one thing to engage in legitimate criticism, quite another to criticise on matters of judgement on which competent practitioners may differ. We do not now require to deal at length with the detailed submissions on this aspect of matters by the Lord Advocate. It is sufficient for us to address three matters. First, as we have noted some of the criticisms by the trial judge were not well made; or related to matters of little significance. At one point in her report she makes a grave allegation that the Advocate Depute made observations prejudicial to the appellants and which should not have been said. The allegation of prejudicial conduct is repeated elsewhere in her report. However we can find no indication of this anywhere in the Advocate Depute's speech. The criticism by the judge of the Advocate Depute's comments regarding the appellant Steele's running away from the police at the time of

apprehension was inappropriate, and seems to have been based on the trial judge having accepted the appellant's explanation for doing so; but the jury need not have accepted that explanation and the Advocate Depute was perfectly entitled to make the remark. Second, at one point in her report the trial judge states that had there been a motion to desert she would have acceded to it, as long as she could be assured that someone else would conduct the resulting trial. The selection of prosecutor for a trial is entirely a matter for the Lord Advocate. Further in making that remark it is clear that the trial judge had not given any consideration to the very high test which would require to be met to justify such a step. We have been able to identify nothing in the Depute's approach which would have justified such an approach. Third, the trial judge makes an extraordinary remark that she can understand why each appellant "feels he has not had a fair trial". Coming from the person in court whose overarching obligation was to secure such a trial the remark is to say the least unusual. Nowhere in her report does the trial judge explain the basis for that remark. It is impossible to understand the rationale for the comment so far as Spence is concerned; and so far as Steele is concerned, as with certain other observations within her report, the trial judge seems to have been influenced by her own personal assessment of the evidence in the case, which of course was a matter for the jury. Suffice it to say that we are satisfied that a miscarriage of justice has not been established.

[27] In each case the appeal against conviction must be refused.

Sentence

[28] The appellant Spence argued that the imposition of an extended sentence of 10 years, consisting of a 7 year custodial term and an extension period of 3 years was excessive. The appeal challenges only the imposition of the extension, it being submitted that this was not

justified. Spence had no prior convictions but since the offence was convicted of bail offences and breach of section 90(1)(a) of the Police and Fire Reform (Scotland) Act 2012. The possibility of an extended sentence was not suggested in the CJSWR and the trial judge had not asked to be addressed on the matter. The trial judge notes that a recommendation is not a prerequisite for imposition of an extended sentence and states that notwithstanding the lack of record she considered that the test had been met. She saw no reason to distinguish between the offenders as they had all been actively involved in the attack.

[29] The appellant Steele has several non-analagous convictions, but several for bail offences. Logan has a relatively lengthy record for a wide range of offences including public order offences, assault, and breaches of court orders. In speaking to the social worker Spence maintained that he was innocent of the charges, thus making assessment difficult. Apart from the subsequent convictions, he was on several occasions the subject of diversion in respect of offences which included assault. Peer association, behavioural issues and lack of consequential thinking were all identified as problems. The CJSWR suggested that "Engaging with offence focused work in the custodial setting would be the best way for [him] to begin to address the outstanding risk factors which would impact on the potential for further offending." The report did not refer to the possibility of extended post-release supervision. It did, however, (i) identify the risk of causing serious harm which he presented as high; (ii) suggest that his offending behaviour has been increasing in terms of frequency, diversity and seriousness; and (iii) note that the degree of denial made assessment overall to be difficult.

[30] CJSWRs for Steele and Logan both made reference to the possibility of post-release supervision. In Steele's case the basis for this was the diversification of offending and the significant level of denial which suggested that significant intervention would be required to

reduce the likelihood of serious harm in the future. In relation to Logan the CJSWR suggested that an extended period of supervision was required *inter alia* to manage risk.

[31] The test for the imposition of an extended sentence is that the period for which the offender would otherwise be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender (1995 Act, s210A(1)(b)). It is true that the CJSWR for Spence did not specifically address the question of whether the statutory criterion for an extended sentence was satisfied, but in the particular circumstances of the case we do not consider that to be the end of the matter. The report observed that Spence had been involved in offending since 2009 and that this had clearly escalated in frequency and seriousness. The risk that he would cause serious further harm was high. Numerous risk factors were identified, including substance misuse and attitudes supportive of crime, whereas no protective factors were identified. The report stated that

> "There are clearly identifiable public protection issues … linked to (Spence's) risk of violent recidivism and related harm. There is a high level of uncertainty as to whether any intervention in the community will be appropriate and manageable given the level of his denial."

We consider that the concerns expressed in the report about the high risk of this appellant causing further serious harm, the uncertainty about managing the risk he presented and the consequential risk to public safety provided a sufficient basis for the imposition of an extended sentence, particularly given the level of violence involved in the murderous attack on the complainer.

[32] The appeal against sentence in Spence's case is refused.