Neutral Citation number: **[2021] EWCA Crim 1956**

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/03915/B4

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 17th December 2021

LADY JUSTICE MACUR DBE

MR JUSTICE PICKEN

HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v –

GARY DAVID WALKER

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)
Miss R Brand QC and Miss C Harris on behalf of the Applicant Crown

Mr D Emanuel QC and Mr T Wainwright appeared on behalf of the Respondent

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J U D G M E N T

Friday 17th December 2021

LADY JUSTICE MACUR:

1. This is an application pursuant to section 58 of the Criminal Justice Act 2003, for leave to appeal against a terminating ruling made in the retrial of the respondent, Gary Walker, charged with the murder or manslaughter of Audra Bancroft.. The basis of the application upon which this court is asked to reverse his ruling is that the judge, Holgate J, is said to have made a ruling that it was not reasonable for him to have made ; see section 67(c) of the 2003 Act.

2. The background facts of the case are set out in the previous decision of this court which allowed Gary Walker's appeal against conviction after referral by the Criminal Cases Review Commission : see [2021] EWCA Crim 3. They are reframed in the ruling on the submission of no case to answer in paragraphs 5 to 26 and form the context of this application.

3. The judge indicated that for the purpose of the retrial, which commenced in November 2021, the medical evidence had developed beyond the experts' written 'fresh' evidence before the Court of Appeal in 2021. In paragraph 34 of the ruling, it is said that an analysis of the evidence indicates that the cause of death was hypoxic ischaemic injury to the brain caused by cardiac arrest, caused by hypoxia and increased carbon dioxide due to positional asphyxiation. This was not a case, the judge said, of a "'but for' or 'sine qua non'" cause of death.

4. Mr Emanuel QC, who appeared in the court below as he does before us on behalf of the respondent, positively advanced that analysis. There was no disagreement of that summary by Miss Brand QC, who appeared on behalf of the prosecution.

5. Summarising the defence submission of no case, the judge accepted the analysis that:

> "… the only way in which traumatic brain injury resulting from the assault or manual strangulation could have played any part in [the deceased's] death was if it caused a reduction in unconsciousness, so that she was unable herself to correct the dangerous and life threatening position into which she was placed by [the paramedic]. In the case of the brain injury the mechanism put forward by the prosecution was concussion. In other words, in order to establish causation, the prosecution needs to make the jury sure that the injuries inflicted by the [respondent] on the deceased's brain and/or the manual strangulation made at least a significant contribution to the deceased's impaired consciousness by 2.43 am."

6. Apparently, Miss Brand QC accepted that analysis. The prosecution had opened the case on the basis that if the jury were sure that it was the respondent's unlawful assault upon the deceased which caused her to be unconscious in the first place, then he was not absolved of responsibility by the actions of the paramedic. Either the trauma to the head of the deceased or the strangulation, or both, had rendered her unconscious. As indicated above, the prosecution case therefore depended upon it proving beyond reasonable doubt that strangulation and/or traumatic brain injury resulting from the assault made a significant contribution to the reduced consciousness of the deceased by the time that the paramedic arrived.

7. The defence submission proceeded on the basis that the expert evidence could not discount the realistic possibility that intoxication alone, with or without minimal

contribution from brain injury (however caused) and manual strangulation, caused the decrease in the deceased's consciousness. The ruling refers to the joint statement of experts, upon which they were cross examined by the defence, to the effect:

(1) It was agreed by all experts that unconsciousness or incapacitation could be caused by any of the following: (a) alcohol intoxication; (b) traumatic injury to the brain (whether accidental or by assault); or (c) manual strangulation.

(2) It was agreed by all experts that at the time of the first paramedic's attendance, unconsciousness or incapacitation could have been caused by any of those factors, either in isolation or in combination.

(3) It was agreed by all the experts in this case that any of those factors could not be excluded as a potential cause of unconsciousness or incapacitation.

8. In this regard we note that, although the judge had raised concerns prior to trial as to the adequacy of the joint experts' statement, no significant additions had been made, to any appropriate degree. That is, Holgate J had queried whether all the issues had been identified; there was no indication of reasons explaining disagreement; and there was an absence of explanation by each party of their respective positions. This was said by the parties to be dealt with in the expert's oral evidence.

9. In his ruling, the judge described this as "a highly unusual case indeed", and recorded that the prosecution had to make the jury sure that specific injuries caused by the respondent made at least a significant contribution to a single specific condition, namely, impaired consciousness by a certain time when it was agreed that that condition could have been entirely caused by intoxication, for which the respondent would have no responsibility.

10. The judge referred to the legal principles which were to be derived from *R v Galbraith* [1981] 1 WLR 1039 at page 1042, and which are further explained in *G and F v R* [2012] EWCA Crim 1756 at [33] to [36]; in *Gian v The Crown Prosecution Service* [2009] EWCA Crim 2553 at [21], [22] and [25]; and in *R v Broughton* [2021] 1 WLR 543. We need to say very little in this respect. There has been no attempt to persuade us that this application should be decided upon the basis that the judge made an error of law; see 67(a) of the 2003 Act.

12. The judge identified four issues in this case, namely:

Was there evidence that the respondent unlawfully assaulted the deceased?

If he did so, was there evidence that he intended to kill her or to cause her really serious bodily harm; or (in the case of manslaughter) to suffer some harm which was less than really serious bodily harm?

Were the injuries inflicted in that assault on the deceased at least a significant, or more than minimal, cause of her death?

Was the chain of causation broken by a *novus actus interveniens*, that is, the action of the paramedic who, when he attended the deceased at around 2.43 am on 8th December 2003, took her out of the recovery position, laid her on her back, and placed her head on a pillow?

13. As to these, the first and second issues were conceded by the defence as being sufficiently evidenced for the matter to be left to the jury. It was common ground that if the defendant succeeded in showing that there was no sufficient evidence on the third issue then the application must succeed and the case should be withdrawn from the jury. It was only if the respondent failed to make good his submissions on issue (iii) that issue (iv) needed to be considered. As it transpired, the judge would have found that there was evidence in relation to this final issue that he would have been left to the jury, but for his ruling in relation to the evidence regarding the third issue.

14. So it is that the submission before this court have focused upon that question.

15. Mr Emanuel QC submits the possibility that alcohol intoxication was the sole reason for impaired unconsciousness at 2.43am was not merely a theoretical or hypothetical prospect to explain causation, as identified in the authority of *Gian*. The experts had not, when giving evidence, discounted intoxication on the basis anything 'was possible', scientifically speaking. Therefore, the experts accepted that they could not exclude a realistic alternative explanation of intoxication causative of decreased consciousness.

16. The prosecution had been unable to refute either of these contentions or the respondent's analysis of the expert evidence in responding to the submission of no case to answer. Indeed, rather than attempting to do so by reference to the expert evidence, Miss Brand QC had submitted that a reasonable jury would be entitled to draw conclusions on issue (iii) by having regard to the evidence from other non-expert witnesses and including the lies that the defendant had admitted to telling when first asked about events leading to Audra Bancroft's death .

17. These submissions are repeated in the skeleton arguments before us and have been amplified by Miss Brand QC.

18. Holgate J reviewed the expert evidence of Professor Rutty, Professor Milroy and also Dr Daniel de Plessis. These medical experts had been party to a court directed joint meeting and had agreed a joint statement (see above).

19. Upon review and analysis of the evidence which the judge articulated in some detail; and with obvious care at paragraphs 60 to 62 (as regards strangulation); at paragraphs 64 to 70 (as regards brain injuries); and at paragraphs 73 to 75 (the evidence of other experts), Holgate J concluded that the evidence did not enable a reasonable jury properly directed to reject alcohol intoxication as a major cause of Audra Bancroft's reduced consciousness by the material time (2.43 am). That is, the pathological and expert evidence did not establish that manual strangulation or concussion resulting from brain injuries countered the realistic prospect that intoxication was a substantial or significant cause of reduced consciousness, .

20. Miss Brand QC has taken us to several parts of the transcripts of the expert evidence which she maintains demonstrate that the experts' evidence of the was not adequately reflected in the analysis conducted by the judge. Having regard to those parts of the transcript, taken in isolation, we would agree with her. However, the judge was required, as Miss Brand accepts a reasonable jury would be so obliged to have regard to the whole of the expert evidence. Cherry-picking from evidence in chief, regardless that it was not maintained during cross-examination and that it ran counter to the joint expert statement, does not assist the prosecution case. In short form, at the conclusion

of Miss Brand's submissions, we were satisfied that she had not, and could not have, demonstrated that the judge failed to have regard to any of the relevant expert evidence. We find the judge's analysis of the expert evidence is unassailable to the prosecution challenge. His conclusions were neither irrational nor perverse.

21. We turn to the second part of Miss Brand's submission, that is, that the judge was wrong to find that there was no other available evidence of events prior to the collapse of Audra Bancroft which would assist the jury in excluding the fact of her intoxication, (with minimal contribution from brain injury and/or manual strangulation) as a cause of her decreased consciousness.

22. The judge dealt with these submissions in paragraph 77 of his ruling.

23. Holgate J referred to the scientific evidence to the effect that the level of intoxication may not have peaked until after the last of the lay witnesses had seen Audra Bancroft and that a back calculation of the measurement of blood alcohol level showed what would be a high level of intoxication, even for a regular drinker, at 2.43 am. The medical experts rightly took account of what one described as a "substantial level of intoxication" when they formed their opinions. Technically, Audra Bancroft was not unconscious at 2.43 am; she had reduced consciousness, assessed as being 11-12 on the Glasgow Coma Scale and appeared to the paramedic to be intoxicated.

24. In the judge's analysis, none of the evidence of the defendant's lies upon which Miss Brand QC sought to rely went directly, or at all, to the issue of causation. Holgate J noted that, rightly, there was no suggestion by the Prosecution that propensity, could be relevant to issue (iii). The defendant's lies relating to telephone calls he made to Audra Bancroft, to Barclaycard and the blood in Regent's Park went to issues (i) and (ii) that is assault and intent. (See [12] above) . The judge went on to say:

> "Some of this material relates to the period when [the deceased] was still alive. All of it is consistent with the [respondent] seeking to conceal the attack he had carried out. The nature of the force involved has been taken into account by the experts. I do not consider that these lies could conceivably be relevant to the causal link the prosecution need to establish under issue (iii), so that a jury could be sure that alcohol intoxication should be rejected as the sole cause of the deceased's reduced consciousness."

23. Today, Miss Brand QC has focused particularly upon the defendant's undoubted lies and suspicious behaviour before calling an ambulance and prior to making a clean breast of his assault upon the deceased. She submits that, having regard to those lies, the jury could be sure of which of the possible alternative causes of reduced consciousness posseted by the experts was responsible for the mechanism of death. What is more, the defendant had accepted in interview that as a result him defending himself, he had "knocked out" the deceased.

24. However, we do not see how this latter point assists the prosecution. The prosecution case was that the observable injuries to the brain indicative of trauma had been caused in the street. It does not accord with the evidenced medical 'observations' recorded by the paramedic at 2.43. It does not in any way detract the expert evidence that loss of consciousness could have been induced mainly by intoxication.

25. Mr Emanuel QC concedes that, in the appropriate case, provable 'lies' could assist in the interpretation of expert evidence in a way to exclude what may otherwise be a realistic possibility. However, he submits that this is not such a case. The case presented a difficult medical scenario in terms of the mechanics of Audra Bancroft's death, and meant that there was an extremely narrow basis upon which the prosecution could prove the case against the defendant, as was rightly conceded and as the judge rightly found. In those circumstances, the defendant's lies made not the slightest bit of difference. The three distinct and realistic possibilities as to the reason for the reduced consciousness remained intact, regardless of any jury points that may have been scored by the prosecution in due course.

26. We agree.

27. This is an extremely unusual case from a medical perspective. When allowing the appeal against conviction, this court said (at [55]) :

> "The context against which the medical evidence was and is to be judged is inherently complicated by several factors. There is little doubt that whether she had previously fallen in the street, the deceased had received injuries at the hands of the appellant and had been gripped by the throat, she was extremely drunk and at some stage she became unconscious, whether initially through drink, and at what stage from injury or the effect of positional asphyxiation, is unclear. In these circumstances, the necessity for a detailed and careful exposition of the medical issues was unavoidable. …"

28. In our view, a careful exposition was and is unavoidable and is not assisted by general assertion or a broad brush approach. The judge's analysis of the expert evidence was a meticulous and careful exposition of the expert evidence.

29. We are firmly of the view that a reasonable jury would not be able to disregard the unanimous expert evidence on the live issue, and consequently could not be sure that intoxication had not caused the reduced level of consciousness which preceded the hypoxic ischaemic brain damage which led to death, despite evidence of causation of the head injury or the impact of manual strangulation.

30. We endorse Holgate J's ruling but, in any event, remind ourselves that the test which we must apply is that of reasonableness. We are singularly unpersuaded that the prosecution is able to demonstrate any part of the evidence which the judge failed to take into account, or otherwise did take into account without necessary qualification. We are not satisfied that the analysis he made was flawed in any respect.

31. In those circumstances, we refuse the prosecution's application. We confirm the ruling which terminated these proceedings. We order that the respondent is to be acquitted of both counts 1 and 2 of the indictment, namely murder and, in the alternative, manslaughter.

34. The reporting restrictions will be lifted from Tuesday 21st December 2021, after Holgate J has informed the jury as appropriate.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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