APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 8
HCA/2018/152/XC

Lord Justice General
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL CONVICTION

by

ROBERT McPHEE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Forbes; Paterson Bell
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

23 January 2019

Introduction

[1] This is an appeal by the co-accused of John Miller, whose appeal was heard on the same day. The opinion requires to be read in conjunction with that in Mr Miller's case.

[2] On 9 February 2018, at the High Court in Glasgow, the appellant was convicted of 14 charges, spanning a period from 1993 to 2016. The charges related to his treatment of

people who worked for him, on a casual basis, in his business of earth works, tarring and paving. The appellant provided caravans for most of the workers to live in. Some of them had been homeless, when they had met the appellant, and had been happy at first to have the chance of work and somewhere to stay. Some had mental health problems and others had alcohol or drug addiction difficulties. The jury's verdicts, which on many of the charges had involved deletions of parts of the libel, reflected an acceptance that the appellant had used violence against these men if he was displeased with their work or if they tried to stop working for him. He had kept the men in fear. On occasions, if one of the workers had left, he had gone to find him and brought him back. Some were punished by being put into a shed for hours or even days. The appellant succeeded in making people do as he wished because of his reputation for violence and, in some cases, a feeling of helplessness in the complainers.

[3] On 15 March 2018, the trial judge imposed an extended sentence of 12 years imprisonment (the custodial term being 10 years) in respect of the charges (22) of holding a complainer in servitude, contrary to the Criminal Justice and Licensing (Scotland) Act 2010, section 47(1)(a). There were a variety of lesser periods of imprisonment imposed on the remaining charges.

Particular charges

[4] Charge (1) involved various occasions between 1993 and 2003 when the appellant assaulted BM, by repeatedly punching him on the head and body, forcing him to eat a jar of coffee granules, compressing his throat and bending his fingers back, all to his severe injury and permanent disfigurement. The trial judge reports that this complainer was barely fit to

give evidence. However, other witnesses spoke to seeing him being assaulted on many occasions when he had been working for the appellant.

[5] Charge (7) involved JA, who had been working with the appellant's co-accused. When he ran away, he was brought back by that co-accused. It was the appellant who had had ways of locating him. On his return to Scotland, the complainer was badly beaten up by the appellant. The libel, which refers to an occasion between 1999 and 2006, involved the complainer being told to remove his clothing, having his hands and feet bound with rope, being locked in a shed for three days, having petrol poured over him, being told to eat dog food, being forced to crawl on his hands and knees and kiss the feet of the co-accused, and being compelled to fight with other people, all to his severe injury and to the danger of his life.

[6] The complainer on charges (8) and (9), namely JK, had met the appellant when he was a teenager and had left home because of parental violence. He had nowhere to go and was glad at first to get work and accommodation from the appellant. Although he was able to come and go, he had been abducted from a homeless hostel by the appellant on one occasion. He had been assaulted frequently. He had nevertheless continued working. The libels involved punching on the head and body and kicking him on the body, as well as the abduction.

[7] Charge (14) was of various assaults on BM between 2000 and 2006 by punching him on the head and body to his injury. BM had been an alcoholic and had worked with the appellant who had assaulted him if he was unhappy with his work.

[8] The complainer on charge (16), namely WM, (and on other charges of which the appellant was acquitted) spoke to an occasion between 1998 and 2001 when he was punched on the head to his injury by the appellant in Grantown-on-Spey.

[9] Charges (20), (21) and (22) involved GL, who had been homeless and had previously worked for the appellant; an experience described by him as not a positive one. He had returned to work, but spoke to being assaulted frequently. Charge (22), in respect of this complainer, was the contravention of section 47(1)(a) of the 2010 Act, by holding the complainer in a state of servitude at the Curryside Piggery, where he was forced to live, detained against his will and compelled to carry out work for little or no pay.

[10] Charges (24) and (25) involved individual assaults to injury on different complainers, namely DF (a female) and TK, again at the Piggery. Charges (27) to (29) involved the complainer KW, commencing with a variety of assaults during a two month period in November and December 2016 and an abduction from an address in York towards the end of that year. Charge (29) was a contravention of section 4(1)(a) of the Human Trafficking and Exploitation (Scotland) Act 2015, again by holding this complainer, namely KW, in a state of servitude, detaining him and forcing him to live at the Piggery and carry out work for little or no pay.

[11] The appellant did not give evidence. However, an interview with the police, in a redacted form, was played to the jury. In this the appellant denied knowledge of the complainers in charges (7) to (9), (14) and (25). He said that he did know the complainers in charges (1), (16), (20)-(22), (24) and (27)-(29). He denied the allegations of criminality. Specifically, on charge (1), he said he used to drink with BM in Kilmarnock. BM worked for him on occasions. He had known BM's father. He had never assaulted BM. On charge (16), he knew WM as a person who had worked with his son for a couple of years. WM had never worked for the appellant and the appellant had never assaulted him. On charges (20) to (22), he knew GL as a person who had worked with him for about 4 months. GL had

lived with him. On charge (24) he knew DF as the girlfriend and then wife of GL. He had not abducted GL or DF nor had he assaulted either of them.

[12] On charges (27) to (29) the appellant said that he did know KW as a relative of his co-accused, Mr Miller. KW had been working for Mr Miller but had gone to York at Christmas to see his girlfriend. Mr Miller had been asked by KW to pick him up. The appellant and Mr Miller had gone to York to pick him up. He had phoned him but had neither assaulted nor abducted him.

[13] In the course of the defence speech, counsel had drawn the jury's attention to the police interview. He had explained (p 18/110) that the appellant had the right not to give evidence. He had spoken to the police. The jury had retained transcripts of what the appellant had said. The jury could see what his reaction "to all of this was back then". He said that he did not know several of the complainers (see *supra*). Counsel said that, in relation to the people whom the appellant knew, "That's evidence that you can use in the case". The question for the jury was how it fitted with the rest of the evidence. The speech then analysed the evidence on each charge, attacking the credibility and reliability of the witnesses on a wide variety of bases. Counsel returned (73/110) to the interview in relation to charges (8) and (9), but only to say that the appellant had said that he did not know the complainer, JK, and had been in Aberdeen during the relevant period. Almost all of the defence speech was focused on the deficiencies in the Crown case caused by inconsistencies and implausibilities of one type or another and the lapse of time since the relevant events.

Charge to the jury

[14] In her charge to the jury, the trial judge described counsel as trying to assist the jury and that the jury should give due consideration to all that counsel had said about what was

important, what inferences to draw and what facts should be found proved. Much later, the judge repeated the need to "pay heed" to all that counsel had said to them. The judge gave the standard directions on the presumption of innocence and proof beyond reasonable doubt. Specifically in relation to the appellant, she told the jury that they should not draw any adverse inferences from the fact that the appellant had not given evidence. The judge gave the jury directions on the prohibition on hearsay and the exceptions to it. In particular, she told the jury that:

> "Hearsay is allowed in court if it is something said by an accused person outwith the court, so that is why counsel are able to ask witnesses what one of the accused men said, in this case [the appellant], and to play a recording of him being interviewed by the police. You'll remember listening to that.
>
> In that interview [the appellant] admitted that he knows [GL and DF] but he denied committing any crime and that is evidence that's before you and you have to consider that along with all the other evidence."

The trial judge gave the directions on the charges involving servitude (22) and (29) as set out in the opinion in the appeal by Mr Miller.

Submissions

Appellant

[15] The ground of appeal as amended at the hearing was that, in relation to the charges in which the appellant said that he knew the complainers, the trial judge erred in failing to direct the jury on the exculpatory evidence, as contained in his police interview. The interview constituted a mixed statement within the meaning of *McCutcheon* v *HM Advocate* 2002 SCCR 101. No specific direction had been given about the status of the statement or how the jury should deal with it. The judge ought to have said that what the appellant had said in his interview was available as evidence; it being clear from the speech that the

defence were asking the jury to take account of it. Reference was made to *Scaife* v *HM Advocate* 1992 SCCR 845 and *McKnight* v *HM Advocate* [2018] HCJAC 64 at para [20]. There had been a material misdirection and a miscarriage of justice.

[16] The appellant adopted the submissions of the co-appellant, Mr Miller, in respect of the definition of servitude and related matters.

Crown

[17] The advocate depute submitted that, other than in relation to charges (27) to (29), the appellant's interview was wholly exculpatory. The trial judge had not been asked to direct the jury on the law applicable to mixed statements. Admitting knowing certain complainers and stating that some of them may have worked for him from time to time did not make the interview a mixed statement.

[18] If the interview was mixed, then the omission to give specific directions in terms of *McCutcheon* v *HM Advocate* (*supra* at para 11) and summarised in *McGirr* v *HM Advocate* 2007 SCCR 80 (at para 12), did not result in a miscarriage of justice (see also *Harley* v *HM Advocate* 1995 SCCR 595 at 600 and *Macleod* v *HM Advocate* 1994 JC 210). Although the judge did not follow the standard directions in the Jury Manual, because she did not treat the interview as mixed, looking at the charge as a whole, the jury would have been left with a clear understanding that they could accept the explanation given by the appellant at interview and that, if they did, or it left them with a reasonable doubt, they should acquit. If the trial judge had given the standard direction in the Manual, then it would have been less favourable to the appellant, as she would have had to have directed them that they should be cautious about what the appellant had said to the police, as it would have not been given under oath or subject to cross-examination.

[19] The advocate depute adopted the submissions made in the appeal by Mr Miller on the question of the state of servitude.

Decision

[20] Section 261ZA of the Criminal Procedure (Scotland) Act 1995, which was introduced by section 109 of the Criminal Justice (Scotland) Act 2016, will to a substantial extent bring to an end the saga of exculpatory, incriminatory and mixed statements which had been the subject of judicial scrutiny and analysis in a series of cases, most notably *Hendry* v *HM Advocate* 1985 JC 105; *Meechan* v *HM Advocate* 1970 JC 11; *Morrison* v *HM Advocate* 1991 SLT 57; and *McCutcheon* v *HM Advocate* 2002 SLT 27. In relation to statements by accused persons to the police in the course of investigations prior to 25 January 2018, the old rules continue to apply (Criminal Justice (Scotland) Act 2016 (Commencement No. 5, Transitional and Saving Provisions) Order 2017 (SSI No. 345) para 9). These were that exculpatory statements are inadmissible as proof of fact, whereas incriminatory or mixed statements are admissible for that purpose. In *Morrison*, it was said (LJC (Ross) at 307) that a mixed statement is one which was "capable of being both incriminatory and exculpatory" and thus a "qualified admission". In *McCutcheon* a mixed statement was said (LJG (Cullen) at 36) to be one in which a part of it was "capable of incriminating the accused".

[21] The distinction can be a fine one. Thus, in *Jamieson* v *HM Advocate* [2011] HCJAC 58 a statement by an accused that he was alone in a flat with his partner's infant when the infant became comatose, was regarded as incriminatory, or at least partly so. A statement was mixed where it "contains an 'admission against interest' in relation to a matter which is relevant to the proof of an offence, even though the statement may contain exculpatory material" (*ibid* Lord Osborne, delivering the opinion of the court, at para [19]).

[22] It is accepted that the interview, in so far as it recorded that the appellant did not know certain complainers, was not mixed. The first question is whether an admission that the appellant knew some of the complainers was incriminatory. It may be that there are cases in which knowledge of the existence of a complainer may be incriminatory. This is not one of them. In so far as the appellant accepted acquaintanceship with a complainer, that is not incriminatory. On charge (28), however, where there is an admission of going to York and bringing the complainer back to Scotland, the statement at interview is undoubtedly mixed, since it involves accepting participation in the facts libelled, albeit not criminality.

[23] The second question is whether, in relation to charge (28), there was a misdirection. This has to be considered in the context of the trial, including the issues which were raised in the speeches. As was said in *Sim* v *HM Advocate* 2016 JC 174 (LJG (Carloway) at para [32]), it is primarily the function of parties, and not the judge, to address the jury on what parts of the evidence were important and what were not. There is no suggestion that the Crown founded on the contents of the interview. The defence hardly touched upon them, presumably because they were little more than a denial of guilt. They set out little by way of a positive case. Against that background, it was sufficient for the trial judge to direct the jury, as she did, to give due consideration to what defence counsel had said, to remind them that the appellant denied committing any crime and that the content of the interview was evidence that was before them and which they should consider along with the other evidence. Accordingly, this ground of appeal falls to be rejected.

[24] In relation to the directions on the meaning of servitude, for the reasons given in the opinion in Mr Miller's appeal, this ground also fails.

[25] The appeal against conviction is accordingly refused.