APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 35
HCA/2020/322/XC

Lord Justice General
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

PAUL STUART SMITH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh QC, Taylor; Gilfedder & McInnes
Respondent: R Dunlop QC, AD; the Crown Agent

1 July 2021

Introduction

[1] On 22 October 2020, at the High Court in Edinburgh, the appellant was convicted, by the unanimous verdict of the jury, of murdering Andrew McCarron on 21 July 2019 by stabbing him in the neck. He was sentenced to imprisonment for life, with a punishment part of 18 years.

[2] The appeal is about whether the trial judge erred in withdrawing provocation from the jury. It also raises a question about the displaying of horrific images to jurors and others.

The evidence

[3] The appellant was formerly married to Nicola Johnstone, from whom he had separated in September 2017. She later formed a relationship with Jamie Bell. Between April and July 2019, a number of phone calls and text messages were exchanged between the appellant and Ms Johnstone, in which the appellant threatened to assault and kill Mr Bell.

[4] Mr Bell's mother, Catherine, was in a relationship with Andrew McCarron, the deceased, who was known as "Rugger". The Bell family were frequent attenders at the Edinburgh City Football Club. The appellant lived in Sleigh Drive; a few minutes walk away. On the date in the libel, the Bell family and the deceased were drinking in the Club. The appellant had been drinking with a friend in the city centre. At about 11.15pm, the appellant headed home. As recorded on CCTV, he went into his block of flats at about midnight. He came out some minutes later, made a phone call, went back in and then came out again shortly thereafter.

[5] CCTV images from outside the Club captured the appellant arriving there. Mr Bell was outside, having a smoke. The appellant shouted at him to go back inside, "you shitebag". Mr Bell did so. Shortly thereafter, a number of people ran out of the Club and onto the street. The appellant had his back to the railings which separated the road from the pavement. He was initially surrounded by about seven people. The incident was recorded by one of them on a mobile phone in audio-video format.

[6] The deceased was considerably bigger than the appellant. He ordered everybody away from him and the appellant. It was agreed by joint minute that a particular exchange

of words occurred. The deceased offered to fight the appellant "square now". The appellant said that he did not want to fight with him. The deceased threatened to kill him, but the appellant repeated that he had no interest in fighting him. The deceased then said in an aggressive tone:

> "… did you not turn round to your ex missus and go Rugger thinks he's bigger than what he is". [arms outstretched]. "Well guess what … Rugger's right here now" [arms still outstretched]. "What have you got, what have you got?"

At this, the appellant raised his right arm, placed his left hand around the back of the deceased's neck, and stabbed him to the left side of the neck, saying, "That". The wound was 15.5cms deep and cut through multiple blood vessels. It was fatal. The appellant was arrested. He made various admissions that he had stabbed and killed somebody and that he had murdered somebody.

[7] The appellant did not testify.

[8] The trial judge reports that the jury had been entitled to infer that the appellant had spent some time outside his flat, apparently considering what to do. He had gone up to his flat and collected a large kitchen knife. Since he did not give evidence, there was no explanation about his intentions. When confronted by the deceased, he deliberately stabbed him in the neck with the knife, in response to the question, "What have you got?".

[9] In the note of appeal it is said that the recording of the incident included the deceased accusing the appellant of grooming a child and others referring to the appellant as "a f…g perv" and being a "f…g paedo". None of this was agreed in the joint minute or founded upon at the trial. The trial judge reports that the whole of the recording was played only once, with the later parts being played repeatedly. During the earlier part, shouting could be heard, but the trial judge did not hear the words to which the appellant makes reference. It had been the judge who, because of the difficulties with the audio quality, had

suggested that parties should agree a transcription of the relevant parts. Hence, the terms of the joint minute, which was distributed and read to the jury.

[10] At the conclusion of the evidence, the trial judge raised with parties the question of provocation. The appellant's solicitor advocate submitted that there was evidence which would allow the jury to find that the requirements of provocation were met. He recognised that the appellant had not been physically attacked by the deceased; even if he had been threatened. He submitted that the appellant had reasonably believed that he was about to be assaulted. There had been "mixed" evidence on loss of self-control; the appellant appearing to be calm until he struck the blow. The catalyst was the threat of violence, at which point the appellant "lost it". He had acted immediately in response to threats of violence. The proportionality of that response was for the jury to determine. The advocate depute responded that, as the appellant had not testified, there was no evidence about his state of mind. The use of the knife could not be said to have been proportionate to the threat faced.

[11] The trial judge did not consider that it was open to the jury to conclude that the requirements of provocation had been met. He recognised that the alternative verdict of culpable homicide should only be taken away from the jury with caution, where there was no basis for it. The threats of violence had been made in the context of a challenge to fight. There was no objective basis for the appellant thinking that he was about to be attacked. There was no subjective account of what the appellant had been thinking. Nevertheless, allowing for the heat of the moment, the trial judge considered that the jury could find that the deceased's actions constituted an assault by threats. There was, on the other hand, no evidence that the appellant had lost self-control. He had acted in a calculated manner. He had been concealing the knife until he struck the blow. He had not tried to ward off the

deceased. His was not an instant retaliation in hot blood. The appellant's reaction was not proportionate. Although the appellant was faced with an aggressive and bigger man, he was being challenged to fight, rather than being directly threatened.

Submissions

Appellant

[12] The ground of appeal is that removing provocation from the jury amounted to a miscarriage of justice. There was sufficient evidence for the jury to conclude that, immediately prior to the fatal blow, the appellant had been subject to an assault by "menaces" or verbal insult or abuse. He had immediately lost his temper and self-control in response to these menaces. He had retaliated instantly and in hot blood. The violence was broadly equivalent to the threatened violence which he faced.

[13] In reaching his decision on provocation the trial judge failed to take into account the value of the images played to the jury. Once the provenance of a recording had been established, it was open to the jury to listen to the audio and come to their own conclusions about what had been said (*Gubinas* v *HM Advocate* 2018 JC 45 at paras [53]-[56]; *Shuttleton* v *Orr* 2019 JC 98 at para [13]). The recording was the "best" evidence.

[14] The definition of provocation was that an accused: "Being agitated and excited, and alarmed by violence, … lost control … and took life, when [his] presence of mind had left [him] and without thought of what [he] was doing" (Macdonald: *Criminal Law* (5th ed) 93-94, under reference to *HM Advocate* v *Kizileviczius* 1938 JC 60 at 63). The provocation had to be substantial, with the accused being put in real danger. There had to be an assault (*Donnelly* v *HM Advocate* 2018 SLT 13 at para [40]; *Drury* v *HM Advocate* 2001 SCCR 583 at para [25]), but an assault could be constituted by threatening gestures, which were sufficient to

produce alarm (*Atkinson* v *HM Advocate* 1987 SCCR 534 and 535). The accused had to act instantly and "in hot blood" (*McIntosh* v *HM Advocate* 2017 JC 143 at para [25]). There had to be a proportionate relationship between the violence offered and the reaction (*Robertson* v *HM Advocate* 1994 JC 245 at 249, approved in *Gillon* v *HM Advocate* 2007 JC 24 at para [39]).

[15] The verdict of culpable homicide should only be withdrawn from the jury where there was no basis for it (*Brown* v *HM Advocate* 1993 SCCR 382 at 391). Only if the court concluded that no reasonable jury could reach the view that there was provocation should directions be omitted (*Duffy* v *HM Advocate* 2015 SCCR 205 at para [22]). The evidence should be taken at its highest for the defence.

[16] The trial judge must have left the accusations of perversity and paedophilia out of account when he decided not to allow provocation to be put before the jury. He had applied his own understanding of the evidence and had thereby missed out elements. The appellant had been threatened with death by a significantly larger man, potentially backed by a hostile crowd, whom the appellant might have reasonably apprehended would assist the deceased. The jury had not been bound to share the trial judge's assessment of whether the appellant faced an assault, which amounted to substantial provocation, or whether his response was proportionate to the threats to kill. The jury could infer that the appellant's exterior demeanour belied his interior state of mind. The sudden actions of the appellant in inflicting the single fatal blow could be viewed as indicating that he had "lost it". The judge had effectively usurped the role of the jury as the finders of fact.

Crown

[17] A trial judge was only obliged to direct a jury about provocation if the jury might reasonably find the necessary elements made out. These were that the appellant had been

physically attacked, had lost his self-control immediately and retaliated instantly and in hot blood with violence which was not grossly disproportionate to the provocation (*Drury* v *HM Advocate* at para [21]; *McIntosh* v *HM Advocate* at para [25] citing Macdonald: *Criminal Law* at 93-94; *Ferguson* v *HM Advocate* [2015] HCJAC 89 at para [10]). The test was well established (*Meikle* v *HM Advocate* 2014 SLT 1062 at para [17]). These elements were not in hermetically sealed compartments.

[18] The first requirement was a physical attack (eg *Copolo* v *HM Advocate* 2017 JC 143 at para [25]). It had been accepted by the Crown that the appellant had been attacked but it was doubtful whether that concession had been properly made. No blow had been struck. Neither the second requirement of provocation (loss of self-control), nor the fourth requirement (no grossly disproportionate violence) had been made out. There was no evidence that the appellant had lost self-control. Such evidence as there was suggested that he appeared to be calm. He had kept the knife concealed. The contention that he had "lost it" ignored the background to the incident; that is to say, hostility towards Mr Bell. The violent conduct offered by the victim had to be reasonably proportionate to the threat perceived (*Gillon* v *HM Advocate* at para [19], referring to *HM Advocate* v *Smith*, unreported, Glasgow High Court, February 1952). In *Smith*, the trial judge had directed the jury that it takes a tremendous amount of provocation to palliate stabbing a man to death. Words, however abusive or insulting, are of no avail. A blow with a fist is no justification for the use of a lethal weapon. Provocation, in short, "must bear a reasonable relation to the resentment which it excites". On any view the violence used by the appellant had been grossly disproportionate (*Gillon* v *HM Advocate* at para [19] *et seq* citing *Thomson* v *HM Advocate* at 284; *Parr* v *HM Advocate* 1991 JC 39 at 47; *Lennon* v *HM Advocate* 1991 SCCR 611 at 614; *Low* v *HM Advocate* 1993 SCCR 493 at 507; and *Robertson* v *HM Advocate* at 249). The

closest analogy was *Anderson* v *HM Advocate* 2010 SCCR 270 where provocation was excluded. The suggestion in *Anderson* (at para [18]), that provocation could be constituted by verbal abuse, was an aberration (*Donnelly* v *HM Advocate* at para [36]).

Decision

[19] It is correct to say that, once images of an incident have been displayed in court, it is for the jury to make of them what they will. The same applies to an appellate court when entertaining an appeal of the nature advanced here. The appellate court must nevertheless bear in mind that it has not heard or seen the other evidence which was presented at trial. It should, in that context, pay due deference to the views of a trial judge who has had the advantage of hearing and seeing the evidence and who, like the jury, is better placed to determine what inferences can be drawn from what is seen and heard on the recording. The appellant has made reference to what may have been heard by the jury, apart from the exchange agreed by joint minute. This material was not founded upon to support the plea of provocation during the trial. It is of insufficient moment, for the reasons which follow, to ground a plea of provocation.

[20] The requirements for provocation are well established. They have been extensively analysed by the Full Bench in *Drury* v *HM Advocate* 2001 SLT 1013 and *Gillon* v *HM Advocate* 2007 JC 24. Macdonald: *Criminal Law* (5th ed at 93) deals first with behaviour which does not palliate the offence so as to reduce it to culpable homicide. This includes "words of insult, however strong, or any mere insulting or disgusting conduct, such as jostling or tossing filth in the face" (Hume: *Crimes* i 247-8). The provocation must be substantial, albeit that this should not be weighed in too fine a scale. In the situation in which there is a fist fight and "the party provoked secretly draw a knife and stab with it from behind … he will scarcely be

heard to maintain that the offence is mitigated by the provocation" (at 94). Macdonald continues:

> "The defence of provocation is of this sort –
>
> > 'Being agitated and excited and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing.'
>
> But this can never apply … where the resolution, although sudden, is deliberate and malignant in character".

[21] Enumerated, the requirements are as follows: first, the accused must have been attacked physically; secondly, he must have lost his self-control immediately; thirdly, he must have retaliated instantly and in hot blood, without time to think; and fourthly, the violence used by the accused must not be grossly disproportionate to that which he faced. *Ferguson* v *HM Advocate* [2015] HCJAC 89, Lord Brodie, delivering the opinion of the court, at para [10]. These elements have a tendency to overlap and should not be looked at in isolation. If there is evidence which is capable of supporting each of these elements, the issue, that is an alternative verdict of culpable homicide based upon provocation, should be left to the jury. The trial judge did leave open a verdict of culpable homicide (cf *Brown* v *HM Advocate* 1993 SCCR 382), but not on this basis. It is nevertheless instructive to note that all of the members of the jury must have regarded the stabbing as either intended to kill or displaying the requisite wicked recklessness.

[22] On the first of the elements, the trial judge reasoned that the jury would have been entitled to infer that the appellant had been attacked physically. As is made clear in *Donnelly* v *HM Advocate* 2018 SLT 13 (LJC (Dorrian), delivering the opinion of the court, at para [36]), the suggestion in *Anderson* v *HM Advocate* at para [18], that verbal abuse alone can constitute provocation, is an aberration and is not the law. It is true that an assault may be

committed without an actual blow being struck. The example given, however, (*Atkinson* v *HM Advocate* 1987 SCCR 534) is of a masked man jumping across a counter toward the cashier in the context of a robbery. That is far removed from a shouting match between two people, who knew each other, outside a social club at closing time. As Macdonald said, words of insult and jostling are not enough. The actings said to amount to provocation must be substantial. In this case they were not.

[23] There was no evidence to justify the judge concluding that there was any basis upon which the jury could determine that any of the other three elements might have been present. The appellant did not give evidence, so there was nothing to suggest that he lost his self-control immediately, retaliated instantly and in hot blood. His solicitor advocate's assertions, that the appellant had thought that he was about to be attacked, had "lost it" and acted in response to threats, had no foundation in the evidence. Although the appellant in *Duffy* v *HM Advocate* 2015 SCCR 205 had, similarly, not testified and his agent had not even addressed the jury on provocation, that was a case in which the complainer had accepted that he had knocked the appellant to the ground and repeatedly punched and kicked him. *Duffy* may be seen as restricted to that type of situation. It may be out of kilter with the principle that a trial judge ought not normally to canvass alternative verdicts which have not been raised or addressed by the parties (*Duncan* v *HM Advocate* 2019 JC 9, LJG (Carloway), delivering the opinion of the court, at para [28] *et seq*.)

[24] Even if there had been evidence of loss of self-control and instant retaliation in hot blood, the violence used was on any view grossly disproportionate to the threat offered. In *Thomson* v *HM Advocate* 1985 SCCR 448 the appellant and the deceased had been business associates who had fallen out. The appellant had, as agreed, gone to their business premises to remove certain materials which were essential to his trade. The deceased changed the

locks. The appellant went to the premises to see the deceased, armed with a kitchen knife. The deceased had refused to allow him to remove the items, laughed at him and, when the appellant was about to leave, pulled him back into the office where a scuffle ensued which culminated in the appellant stabbing the deceased. The Lord Justice Clerk (Ross, at 458) said:

> "A minor assault of that kind … is clearly insufficient to found a plea of provocation which would palliate the taking of the deceased's life by stabbing. Where the victim has used force, there must be some relation between the force and the violence of the retaliation. In *Smith* v *HM Advocate*, unreported, High Court at Glasgow, February 1952 (see 1952 JC 66), referred to in Gordon: *Criminal Law* (3rd ed) 25.19 and cited in *Drury* v *HM Advocate* 2001 SLT 1013, LJG (Rodger) at para [33] and *Gillon* v *HM Advocate* 2007 JC 24, Lord Osborne, delivering the opinion of the court, at 34), the Lord Justice General (Cooper) told the jury:
>
> > 'It takes a tremendous amount of provocation to palliate stabbing a man to death. Words, however abusive or insulting are of no avail. A blow with a first is no justification for the use of a lethal weapon. Provocation, in short, must bear a reasonable [relationship] to the resentment which it excites'."

The appellant had gone out armed with a large knife to the Club, which he knew would be frequented by the Bells, including Mr Bell, whom he had previously threatened to kill. On being confronted by the deceased, the appellant deliberately used the knife, which he had concealed, to stab the deceased in a highly vulnerable part of his body simply in answer to a question, albeit aggressively put: "What have you got". No jury could have regarded such a reaction as other than grossly disproportionate.

[25] The appeal is refused.

Postscript

[26] The images of the murder of the deceased as recorded on the mobile phone were horrific; showing in graphic terms the stabbing of the deceased and its fatal aftermath. Great care must be taken by both prosecution and defence when deciding whether it is

necessary to show such images to members of the jury, and to others in the court room. It may be that some may be familiar with this type of image, but many more will not. The lasting effects of viewing such images may be significant. Those effects must be considered and guarded against. If such images are deemed a necessary element of the proof, their use ought to be discussed by the parties and should be raised with the court at the Preliminary Hearing. There is no record of that happening in this case. The impression left by the trial judge's report is that the salient parts of the recording were shown repeatedly to the jury. Whether that was necessary and whether it was necessary to show the aftermath at all is doubtful. It is understandable that, faced with a plea of provocation, the Crown will reasonably deem it necessary to show the images to the jurors. The manner in which that should be done ought, in the future, to be the subject of a considered case management decision.