

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2007

Before:

LORD JUSTICE GAGE
MR JUSTICE TUGENDHAT
and
HIS HONOUR JUDGE SCOTT GALL

Between:

R
v
Danny Johnston
Jonnie Thompstone
Lee Johnston
Anthony Clive Bowyer
Daniel Dudney

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

David Fisher QC and Anthony Orchard on behalf of the Crown
Mark Wall QC and Samuel Stein on behalf of the appellants
Hearing date: Thursday 13 December 2007

Judgment
As Approved by the Court
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Lord Justice Gage :

1. On 31 August 2007 at the Central Criminal Court Danny Johnston, Jonnie Thompstone, Lee Johnston, Anthony Bowyer and Daniel Dudley were all convicted of manslaughter (count 1) and violent disorder, contrary to s 2(1) of the Public Order Act 1986 (count 2). On 19 October 2007 each of these applicants was sentenced to two years detention pursuant to s 91 of the Powers of Criminal Courts (Sentencing) Act 2000 on count 1. The judge adjourned sentence on count 2 pending an appeal to this court. The registrar has referred to this court the applications for leave to appeal against conviction and sentence of all five applicants. We grant leave in respect of the applications for leave to appeal against conviction.
2. In summary the facts are as follows. On Sunday 26 February 2006 at about 15.30 Ernest Norton a 67 year old man was playing cricket with his son James Norton aged 17, on a tennis court by the Erith Leisure Centre, Kent. Both men were approached by a group of approximately twenty youths. An exchange of words took place between members of the group and Mr Norton which led to abuse being directed towards him and his son. The incident escalated into spitting by some in the group at Mr Norton and ultimately stones and pieces of wood being thrown at him. Following the incident eighteen stones were seized from the tennis court by the scenes of crime officer later in the day.
3. Mr Norton was struck on the head by at least one stone. Very shortly after he was hit, as he walked towards the exit of the tennis court, he collapsed and suffered a cardiac arrest. The group of youths ran away. The ambulance service

was called but following unsuccessful attempts to resuscitate him tragically Mr Norton was pronounced dead about one hour later.

4. The prosecution's case was that each of the five appellants was part of the group of youths at the tennis court and that each had thrown something at Mr Norton or in his direction. The prosecution alleged that each was a party to a joint enterprise to assault Mr Norton and each was jointly responsible for his subsequent death.
5. We set out the evidence at trial in a little more detail. Each of the five appellants lived locally in and around the Erith area. Their ages at the date of the trial were as follows:

Danny Johnston, 10 – Jonnie Thompstone, 13 – Lee Johnston, 11 – Anthony Bowyer, 12 – Daniel Dudney, 12.

All belonged to a gang of boys known locally as the TNE "The New Estate". Each had no previous convictions.

6. On 26 February 2006 they all met and went to the Bluewater shopping centre. An hour or so later they all returned to the Erith area where they went into a disused factory. A little later they went to the leisure centre for a confrontation with another group of older boys. Anthony Bowyer went home and got a baseball bat. Between 14.45 and 15.00 a confrontation between the two groups was interrupted and dispersed by a man who lived in a flat overlooking the Erith leisure centre. He said in evidence that he thought that the two groups were gathering for a fight. One group was armed with sticks. He left his flat and confronted the first group seizing a baseball bat from one of their number. He shouted at the group; waved the bat at them and both groups ran off.
7. Shortly after 15.00 a large group of boys entered the leisure centre. Tiffany Brown, a receptionist, alerted the leisure centre manager saying that the group was boisterous and that some of the boys were messing about in the changing rooms. They were told to leave and eventually did so. From there the group progressed to the tennis court where Mr Norton and his son James were playing cricket.
8. In evidence, James Norton described how for twenty minutes before the incident he had bowled a ball at stumps behind which his father, the deceased, kept wicket. Their practice proceeded without incident. However, he noticed a group of youths throwing stones at the side of the leisure centre and then saw up to twenty youths approach the tennis court. He said that four or five of the group started abusing him and his father saying that he was a "rubbish" bowler, that he should get a haircut, and that his father should go back to the old people's home. His father told them to "piss off". About five to seven of the group started insulting his father, such conduct lasting several minutes. Some of the group stood back nearer the path. They then started picking up stones and throwing them over the fence. James Norton estimated that ten to twelve stones were thrown. He said that two of the boys climbed the fence, one of whom threw stones overhead in a rapid fashion. One boy tried to throw wood over the fence. James Norton then heard a thud and turned round to see that his father had collapsed. He did not see a stone hit his father or who had thrown it. He estimated that the incident lasted between eight to ten minutes. Later he was able to provide general descriptions of three of the boys present but was unable to identify any of the group involved.
9. Two young girls, Lucy Pearse, at the time aged 13, and Ria Stone, also aged 13, were present at the incident. Each gave video recorded interviews to the police of what they had seen. Their video recorded interviews formed their evidence in chief. Lucy Pearse identified a number of boys present at the incident. She said that one of the group shouted at Mr Norton who replied "just go away". A boy named Danny whom by her description appeared to be Danny Johnston, then swore at Mr Norton and told him he was going to "knock him out". The group then picked up stones and started throwing them at Mr Norton. A boy called Grant picked up a large piece of wood and threw it at the deceased. She saw one piece of wood hit or land near to James Norton and another which missed the deceased. Danny then climbed the fence. She thought that it had been Danny who threw a large stone which hit Mr Norton on the left side of his head. Danny laughed and ran away. The others had been throwing stones but they did not hit the deceased. She thought that Danny had gone inside the tennis court at one point. Mr Norton tried to open the gate but stumbled and fell to the ground. The group all ran away and Ria went to fetch her mother. She gave a description of Danny.
10. In a second interview she said that the group of fifteen had included Jonnie Thompstone, Dan Dudney and she named others as present none of whom were prosecuted. She said in the second interview that she recalled Dudney and Thompstone insulting Mr Norton and laughing at him. Mr Norton told them to go away and Dudney picked up a little stone and threw it at him and his son. The group then all started throwing stones. Thompstone threw a stone that hit Mr Norton on his head. Dudney then found a larger stone, the size of half a brick, and threw it at Mr Norton. It hit him on the head. She identified a number of boys who had been standing slightly away from the tennis court and had not thrown stones.
11. Lucy Pearse attended a number of identification parades. She identified Dudney as the boy who had thrown a stone which hit Mr Norton. She identified Daniel Johnston and said that he did not say or do anything. She attended an identification parade of Thompstone and Lee Johnston but did not make a positive identification of either of them.
12. Ria Stone in her first interview, made on 26 February 2006, described the start of the incident. She said that Mr Norton walked towards the fence to tell the boys to go away. A little boy named Danny then climbed the fence and started throwing stones at Mr Norton. She described others as throwing stones and said that Danny's stone hit Mr Norton on the head and he staggered, falling to the ground. The group then ran away. She said she had only seen

Danny and two other boys, whom she named but were not prosecuted, throwing stones and had only seen Danny's stone hit Mr Norton.

13. In a second interview given on 8 March 2006 Ria Stone identified a number of boys who were part of the group. On 5 April 2006 she attended identification parades and identified Dudney as the boy who had thrown the stone that hit Mr Norton. She also identified Bowyer and Thompstone as two of the boys who had thrown stones. When she gave evidence, in the course of re-examination, she confirmed that Danny, whose surname she did not know, had thrown the stone that struck Mr Norton. She said that Dudney had been present and was throwing stones but his stone had not hit Mr Norton.
14. A number of other witnesses gave evidence at trial but none was able to identify any of the appellants.
15. The appellant Danny Johnston was arrested on 1 March 2006. When interviewed he said that he had been with Thompstone, Dudney, Lee Johnston (his brother), a boy named Anthony whose surname he did not know, and a number of others at the leisure centre on 26 February 2006. He said that Dudney had gone to the tennis court and was shaking the fence. Mr Norton told him to "fuck off you little runt". Thompstone and another boy and all the other boys present started throwing stones. Some of the stones were thrown through the fence and some of them were thrown over the fence. He said that he had only thrown two stones but later conceded he had thrown about five. He estimated that a total of fifteen stones had been thrown. He said that Dudney had thrown a rock that hit Mr Norton. The group had been about seven feet from the fence surrounding the tennis court. Dudney ran towards the fence and had been three feet away from it when he threw the rock. Later he said that he saw Dudney pick up the rock but Mr Norton started making his way to the gate of the tennis court so he and another boy ran away and he did not see Dudney actually throw the rock. He said others had told him that Dudney threw the rock and Dudney himself had told him that he had thrown the rock.
16. Thompstone was arrested and interviewed on 27 February 2006. He said that a boy named "Casey" had thrown the first stone and then most of the group started throwing stones. He said he tried to throw a stick over the fence but it got stuck in the fence. He identified "little Danny", that is Danny Johnston, as throwing a wooden post over the fence which Mr Norton picked up and walked towards the gate with it. He described Dudney as throwing large stones at Mr Norton. As Mr Norton walked towards the gate he said that he saw Dudney with a large brick like object stop. The group began to run away and later when they re-convened others had said that Dudney had thrown stones at Mr Norton. Dudney then said that he had thrown the stone that had caused Mr Norton to fall to the ground.
17. Bowyer was interviewed on 2 March 2006 and 24 May 2006. He gave no comment answers to all questions put to him.
18. Lee Johnstone was arrested on 1 March 2006. He said at interview that he had been with a group of boys at the relevant time. He said that he had dropped a plank of wood over the fence on the tennis court to try and hit the wickets. The wood did not hit Mr Norton or his son and Mr Norton picked up the piece of wood and made his way to the tennis court. Johnston said he looked round to see if his friends were still present. When he looked back into the tennis court he saw that Mr Norton had collapsed. He did not know what had happened and ran away. He only saw stones being thrown by Dudney.
19. Dudney was arrested on 26 February 2006. He said that a youth named Chapman had thrown the stone. On 27 February 2006 he gave a prepared statement in which he said that he had initially been with Danny and Lee Johnston. They had met a larger group of boys at the leisure centre. He had been walking behind the larger group when they, the larger group, began shouting at the deceased. He kept walking with two other boys and two girls. He said he saw a number of boys throwing stones into the tennis court but kept walking. He later learned that Mr Norton had been hit by a stone and fallen to the ground.
20. Dr Vesna Djurovic, a Home Office pathologist conducted a post mortem on the deceased on 27 February 2006. At the date of the trial Dr Djurovic was too ill to give evidence. The prosecution called Dr Fegan-Earl, a Home Office pathologist, to give evidence of a review which he had carried out of Dr Djurovic's work and findings. The evidence of Dr Fegan-Earl together with the evidence of a consultant cardiologist, Professor Jane Somerville, is very important to the issue of causation. At this stage, we shall refer to it in summary but in greater detail when we deal with the ground of appeal concerning causation.
21. There is no dispute that Mr Norton suffered from a coronary heart disease which resulted in a heart attack in 1977. Following the heart attack he underwent a major heart operation involving a heart bypass which left a scar on his chest and one on his lower left leg. In the course of the operation a vein had been taken from his leg and joined to the non-blocked parts of the heart, bypassing the blockage in an artery. Dr Fegan-Earl explained in evidence that when a person suffers a heart attack, some of the muscle dies and is never replaced. Instead, scar tissue forms. He said that people that have coronary heart disease are at risk of sudden death, either through having a heart attack caused by a clot or as a result of arrhythmia. In instances of arrhythmia (irregular heartbeat) the irregularity of the heartbeat is such as to render it ineffective in generating blood flow and which can lead to the heart stopping so causing the individual to collapse and die.
22. As a result of Dr Djurovic's findings, Dr Fegan-Earl was able to say that Mr Norton bore various marks consistent with the standard treatment administered to someone in cardiac arrest. He sustained a laceration on the left side of the

forehead caused by a blunt object striking the skin and some grazing associated bruising on the right side of the forehead just above the eye brow and towards the top of the head.

23. An internal examination of the body revealed no bruising to the skull, no fracture of the skull and no bleeding round the brain. There was deep bruising beneath the surface of the injuries to the left and right side of the forehead and the left cheek bone was depressed. The lungs contained an oedema, indicative of heart failure. Dr Djurovic found evidence of the heart attack that had preceded bypass surgery in 1977 but the bypassed veins were fully open and there was no blood clot present. There was no evidence of a recent or ongoing heart attack. Dr Fegan-Earl agreed with a number of conclusions made by Dr Djurovic. They were, firstly that the deceased died as a result of coronary heart disease. Secondly there was evidence of the deceased receiving surgical treatment for his heart disease. The venous bypass grafts from the leg were open and unblocked with no evidence of narrowing. Thirdly there was no evidence of an active death of the heart muscle at the time of the deceased's death and there was thrombosis but no clot completely blocking the veins or coronary artery. There was no active progression of the coronary disease which could account for his death. Fourthly and fifthly there were two areas of blunt impact injury, abrasions, lacerations, some bruising and a depressed fracture of the cheek bone, to the face consistent with a minimum of two impacts by or against objects with a relatively rough surface which could have been caused by irregularly shaped stones being thrown at the deceased's head. The impact to the head did not result in any significant cerebral trauma or brain injury that could have been a direct causative factor in the death. There was no way of specifying that any one stone had caused an individual injury. It was possible that one, but not both, of those injuries was caused by the collapse of Mr Norton to the ground. Sixthly it was most likely that death resulted from the development of an abnormal rhythm in a previously diseased heart, precipitated by the emotional and physical trauma sustained by the incident. Seventhly it is well recognised that the stress-related release of catecholamines, better known as adrenaline, into the circulation can precipitate the development of a fatal arrhythmia in individuals with pre-existing heart disease.
24. As a result of these conclusions Dr Djurovic gave the cause of death as ischaemic heart disease due to coronary heart disease which had been operated on in the past.
25. A toxicological examination carried out by another witness found no alcohol or drugs in the blood or stomach contents. A neuro pathologist found no injury to the brain and another expert witness who had examined the heart tissue under a microscope found extensive scarring associated with a previous heart attack but no evidence of recent infarction scarring. The latter indicated that there had been no ongoing death of the heart muscle before the incident.
26. Professor Somerville in evidence expressed the opinion that arrhythmia is common in the type of heart disease found in the deceased's heart. In her view the bypass surgery was functioning well and there was no new death of heart muscle. Professor Somerville agreed that death resulted from the development of an abnormal rhythm in a diseased heart precipitated by being suddenly or unexpectedly attacked. She explained the mechanism of arrhythmia and the effects of adrenaline. In her view the deceased's heart had stopped probably through a lethal arrhythmia and that there was no new blockage of any of his heart's vessels. She thought it unlikely that gentle exercise would have produced adrenaline. There was nothing to indicate the deceased suffered from an arrhythmia as a result of playing cricket.
27. Save for Thompstone none of the appellants gave evidence. Thompstone said in evidence that he was part of a group of about twelve boys who had been present at the leisure centre. He said that they had been waiting around in order to fight another group of boys but were prevented from doing so by the intervention of an onlooker who had chased them away with their own baseball bat. The group then went into the leisure centre but were asked to leave by the manager. The group, then fifteen or sixteen in number including two girls, walked back to the Frobisher Estate when they noticed two people in the tennis courts playing cricket. Mr Norton walked towards the fence and told them to "piss off" and shouted at them to leave. Nobody responded but two boys spat at Mr Norton as he walked away. Thompstone accepted that he also had spat at Mr Norton and he agreed that his spittle landed on the back of Mr Norton's jacket.
28. Thompstone said that two boys, not prosecuted, shouted abuse and then another threw a stone at the wicket. Following that the majority of the group picked up stones and sticks and threw them. Thompstone said that he saw stones being thrown but did not see them landing. He recalled a large piece of wood that seemed to be a part of a "for sale" sign going over the fence but he could not remember who had thrown it. He said that he had thrown a part of a branch which hit the fence and fell to the ground. He then picked up a stone which he intended to throw at the cricket stumps. He threw it but it hit the fence and bounced back. He said he threw another stone over the fence which landed near to the cricket stumps. He did not see any of the objects hit Mr Norton. Two or three minutes after the last stone landed he and another youth ran away. Later, having met up with other members of the group, Dudney told them that he had "got" the man with a stone. Thompstone said that he had lied in his police interview by denying that he himself had thrown stones. He did so because he was afraid and did not want to admit to doing anything in front of his parents. In cross-examination he said that Lucy Pears was wrong when she said that she had seen one of the stones thrown by him hit Mr Norton.
29. Two character witnesses gave evidence in support of Thompstone's case.
30. None of the appellants challenge their convictions on count 2. The grounds of appeal are common to each of the appellants and the main focus of the appeal is on the issue of causation. It is submitted on behalf of all of the appellants that the judge at the close of the prosecution case should have ruled that there was insufficient evidence to leave count 1 to the jury. The basis for this application was a submission that the prosecution could not prove that the

incident in which the five appellants were involved was causative of Mr Norton's death. The judge ruled that there was sufficient evidence of causation and the case continued.

31. The ground of appeal relating to this issue is put in two ways. Firstly it is submitted that the judge was wrong to reject the submission of no case to answer. Secondly, it is contended that the expert medical evidence was such that no reasonable jury, properly directed, could be sure that the conduct of the appellants had caused the death of Mr Norton. It is obvious from the above that the issue of causation turns to a very great extent on the evidence of Dr Fegan-Earl and Professor Somerville. We now turn in more detail to the relevant parts of the expert medical evidence and the submissions of counsel.
32. In their skeleton arguments counsel for the appellants seek to make much of the judge's change of mind over the issue of causation between views expressed by him in his ruling rejecting the application to stop the case at the close of the prosecution evidence and a second draft direction on causation shown to counsel before defence speeches. In short, when ruling at the close of the prosecution case the judge concluded that causation could be proved by the prosecution on the basis that the insults and spittle aimed at Mr Norton together with the throwing of stones at him all constituted an unlawful and dangerous act. This reflected the way the case had been opened to the jury by the prosecution. Before defence speeches the judge told counsel that he proposed to direct the jury that the potentially unlawful and dangerous acts were restricted to the throwing of stones at Mr Norton.
33. In our judgment, the judge was right to narrow the ambit of the alleged unlawful and dangerous acts in this way. Insults and spittle can hardly be described as dangerous acts; and, in any event, it would be difficult for them to give rise to a foreseeable injury in an apparently active and healthy man.
34. When the judge informed counsel of this change of mind, counsel for the appellants renewed their applications for the case to be stopped on the basis that causation could not be proved by the prosecution. The judge rejected these submissions. At the hearing of the appeal Mr Wall QC counsel for all the appellants, did not seek to attach any significance to this change of mind by the judge. The only relevance which it has now is that it would appear from a reading of the evidence of Dr Fegan-Earl and Professor Somerville that the difference as causative factors represented by these two events was not highlighted in their evidence.
35. In the summing-up the judge directed the jury on the issue of causation in the following terms:

"So I come to deal with the question of causation. What the Crown must prove is that the throwing of stones or missiles at, or in the direction of Mr Norton was an unlawful and dangerous act and which was a substantial cause of his death. It is enough that such act contributed significantly to the death, but it need not be the sole or even the principal cause of death but it must be more than merely minimal. It follows that if it may have been something other than the assault, that is to say, the intentional or reckless throwing of stones or missiles, such as verbal abuse and/or spitting or the game of cricket, for instance, which caused the arrhythmia and that the throwing of the stone and missiles made no significant contribution to causation of death at all, then the verdict must be not guilty because causation of death from unlawful and dangerous act would not have been established."

36. No criticism was made of this direction. So the issue before this court is whether there was sufficient evidence for the jury safely to conclude that the throwing of stones by the group of boys was a significant contributory cause of Mr Norton's death. This has involved a close analysis of the medical evidence and in particular the evidence of Dr Fegan-Earl and Professor Somerville.
37. It is submitted by Mr Wall on behalf of all of the appellants that the evidence of Dr Fegan-Earl and Professor Somerville left open the possibility that any one of five events could have caused the heart attack sustained by Mr Norton and so his death. These five events are firstly, the game of cricket being played by Mr Norton with his son; secondly, the verbal exchange between Mr Norton and the group of youths in the course of which spittle was aimed at Mr Norton; thirdly, the stone throwing; fourthly, the stone which hit Mr Norton; and fifthly, Mr Norton's decision to remonstrate with the group of youths involving him walking towards the gate of the tennis court. In addition, Mr Wall emphasises the evidence of Dr Fegan-Earl and Professor Somerville that due to his condition Mr Norton could have died at any stage.
38. In answer to questions about these five events in cross-examination by Mr Valios QC, on behalf of Danny Johnston, Dr Fegan-Earl agreed that any one of them could potentially have caused Mr Norton to collapse. The cross-examination continued in the following way:

"Q. Or a combination?"

A. Yes, there is likely to be a cumulative effect. Clearly the longer a diseased heart is having to pump at a higher rate and the more adrenaline that is secreted, then clearly that will have a more deleterious effect, yes.

Q. And, as you said, almost at the conclusion of your evidence in chief in answer to my learned friend Mr Fisher, even a verbal exchange can – or there is a well recognised relationship even with a verbal exchange.

A. Yes.”

39. Professor Somerville was asked similar questions by both Mr Fisher QC, for the prosecution and, Mr Valios. The following exchange took place between Mr Valios and Professor Somerville:

“Q. And so far as the question that my learned friend asked you a moment ago, is it realistic to break down the stages of event to see what happened? You say no. And in relation to was it one or a combination, you said it was impossible to say, any could on their own, or as a combination?”

A. Yes”

40. Professor Somerville was asked about the effect on Mr Norton of these events by Mr Valios. Effectively she ruled out the game of cricket as having any causative effect. She said that she could not say it could not have caused Mr Norton’s death but added “I can’t say it could not do it, but I would find it totally unexpected.” Mr Valios pressed the witness on the four other events:

“Q. Yes, there were verbal exchanges going both ways, with what appeared to be swearing.

A. Well, I think that potentially could have been the start. But I would have thought on its own - - in this case it was not so, because if he started to suffer from a high heart rate, or extra beats, I think he would have shown unable to get to the gate, because – so there were two or three events after, so it might be the latter events, or the combination; I cannot say.”

41. And a little further on:

“Q. And if at the end of it, suppose, just for example, suppose at the end of it having had the verbal exchange and stone throwing, can a decision by somebody, “I am going out a remonstrate with those little wretches”, for example, could that produce the sort of adrenaline rush?”

A. Well, I think – of course, this is a whole package of things that was sandwiched fairly together and sometime during that, the adrenaline, effective - - if that is what it is, and that is what we think it is, because he ended up with an arrhythmia; at least we know that, we know he had ventricular fibrillation, not asystoly, which is a complete stopping of the heart. Sometime during that he must have - - his heart went into an arrhythmia, but I cannot say more, or when or how.”

42. Mr Fisher candidly commented that this answer highlighted some of the difficulties in the case. However, he submits that the thrust of the evidence given by Dr Fegan-Earl and Professor Somerville is that the most likely cause of Mr Norton’s heart attack was a combination of the insults, spitting and stone throwing by the group of youths. Of these two events, he submits, common sense dictates that the most shocking would be the stone hitting Mr Norton’s head. This event must be, he submits, judged in the context of Mr Norton’s previous good health since his bypass operation in 1997 and the fact that he had played table tennis with his son the previous evening. Further, Mr Norton displayed no signs of distress until he collapsed when walking towards the gate.
43. In the circumstances, Mr Fisher submits, the jury could safely infer as part of the cumulative effect of these things, the throwing of stones was a significant contributory cause of Mr Norton’s death. He emphasises the evidence of both experts that the temporal relationship between the events and Mr Norton’s collapse was very significant. He further stresses the fact that the jury only had to be satisfied that the stone throwing was one of the causes of his death and more than just a minimal cause.
44. In our judgment the jury could properly have ruled out as significant causes of death the game of cricket and the everyday chance that Mr Norton might suffer a heart attack. Although the experts could categorically not rule out either of these events as the cause of death, in the context of Mr Norton’s history, their evidence shows that it would be very surprising if one or other had been a cause of death. Mr Norton’s wife (in a statement read to the jury) described him at the time of the incident as a fit and healthy man who had regular medical check ups.
45. In our view, the real question which the jury had to answer was whether it could safely exclude the possibility that the preliminary event to the stone throwing, namely the verbal exchange and the spitting by the group of youths at Mr Norton was the sole cause of the rush of adrenaline which in turn caused a lethal arrhythmia and so death.
46. Both experts agreed in evidence that this earlier part of the incident could have caused the lethal arrhythmia. Mr Fisher concedes that neither expert could say with any precision when or what it was that started Mr Norton’s decline. Further, in the course of argument he conceded that it was unrealistic to suppose that the earlier incident, which appears to have lasted for some minutes (not exceeding five minutes) did not cause any increased release of adrenaline. Mr Fisher also accepted that the experts were unable to say how long it would take for Mr Norton to reach an irreversible decline. The closest the experts got to giving evidence on this question appears in Dr Fegan-Earl’s evidence in the following passage:

“A. Well, the adrenaline, when it is secreted, very rapidly enters the circulation, and gives rise to its effects, which is increase in blood pressure, increase in heart rate among them. If that heart is then having to pump harder, much more forcefully, increase the blood pressure, then that is putting a stress upon the heart. Will he necessarily have felt pain? Not necessarily, he may just

have immediately collapsed when an arrhythmia was the result of that adrenaline on the heart. It could be just seconds.”

47. When asked to say what if any event was the cause of the lethal arrhythmia both experts were careful to say that it was not possible to conclude that any one cause was more or less likely. Again Mr Fisher concedes that the effect of the medical expert evidence is that it is not possible to say whether there would or not be signs of arrhythmia before Mr Norton collapsed. The onset of lethal arrhythmia may or may not be instantaneous; it also may or may not be irreversible.

48. In our judgment, at its highest, the evidence of each doctor was that the cumulative effect of the insults and spitting together with the stone throwing was the most likely cause of the lethal arrhythmia. Dr Fegan-Earl said in answer to the following question in re-examination:

Q. And the throwing of stones, and a stone or stones that hit him on the head, and him remonstrating, is it realistic, from your point of view to seek to subdivide those, and suggest: ah, well, it may be just one of those that caused his death, as distinct from the combination?

A. No, I do not think you can. We are presented with what we are presented, and that is a sequence of events culminating in this man's collapse and death. I think it is academic to try and separate them out, and I do not think one can realistically. I think it is reasonable to suggest that there is a cumulative effect as stress continues, because the heart is continuing to beat, it is a diseased heart, the longer it is in that situation the more likely an arrhythmia is to occur.”

49. We have already cited a passage in Professor Somerville's evidence in which she makes it clear that the onset of arrhythmia must have occurred at some time during the “whole package of things” and that she could not say when or how.

50. In our view these passages neatly encapsulate the prosecution's difficulties. We can well understand the expert's inability to identify the precise event which caused the lethal arrhythmia. To them it was an academic and, no doubt, seemingly impossible task. From the legal standpoint, where as here, the jury had to be satisfied that the act which caused arrhythmia was an unlawful and dangerous act it was crucial for this issue to be resolved if the jury were to be satisfied that the prosecution had proved causation. Provided it remained, on the evidence, impossible to exclude the earlier insults and spitting as the sole cause of the arrhythmia, in our judgment, the jury could not properly conclude that the prosecution had proved causation.

51. Dr Fegan-Earl when describing stress as a potential trigger for arrhythmia said:

“Q. What things, if I may use that word, cause stress on the heart?

A. What things cause stress on the heart?

Q. Yes.

A. Well we are really thinking of is any situation that leads to changes in the rate of the rhythm of the heart. Now, if we think about adrenaline, as we have been discussing, as I have indicated I am sure the jury will be well familiar with adrenaline flowing in their own bodies when they are nervous or frightened, and they will be familiar with the heart banging against their chest. That is the result of stress. So fear, anticipation of something unpleasant, produces adrenaline. That starts the heart contracting harder. Why is it doing that? It is to prepare the body to get ready to flee from a situation, or stand and fight. So that is what is causing stress upon the heart itself.

Q. So getting up to cross-examine you, if my heart starts beating faster, because you are the expert and I am not, that is adrenaline being released into my blood?

A. And surprise.

Q. And surprise. Quite innocuous things can cause stress on the heart?

A. Yes.

Q. And consequently, in a diseased heart bring about an event such as this?

A. Yes”

52. In the course of her evidence Professor Somerville gave evidence to like effect (see para 41 above).

53. In his submissions, Mr Fisher stressed that common sense logic must have led the jury to convict these appellants. Whilst accepting the attraction of this argument we have nevertheless concluded that it cannot succeed. In our judgment it follows from the passages in the evidence, to which we have referred, that although the combination of events was likely to have caused the lethal arrhythmia, perhaps most likely, it was impossible on the evidence for the

jury properly to exclude the insults and spitting as the sole cause of Mr Norton's death. In the circumstances the convictions on count 1 cannot stand and must be quashed.

54. There is a second ground of appeal which challenges the judge's direction on the issue of foreseeability. In view of our conclusion on count 1 it is unnecessary for us to deal with this ground. We content ourselves with observing that the submission made on behalf of the appellants by Mr Wall on this ground is not supported by authority. Indeed, the authorities support the proposition contended for by Mr Fisher. Without expressly deciding the point our inclination is to prefer the prosecution's submissions on this ground.
55. Having reached the above conclusions we announced our decision following oral argument and admitted the appellants to bail on certain conditions. The appellants have now to be sentenced by the trial judge in respect of count 2. We make clear that the grant of bail is not to be taken as any indication of the likely sentence which the judge may pass. All sentencing options will be open to him.

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