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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**18/02/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

R

v

KEVIN MAYBIN

Before: Treacy LJ, Maguire LJ & McFarland J

Stephen Toal (instructed by KRW Solicitors) for the Appellant
Mark Farrell (instructed by the PPS) for the Respondent

TREACY LJ (delivering the judgment of the court)

Introduction

[1] On 23 January 2020, following a contested trial, the appellant was convicted by majority verdict of a single offence of wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 ("the 1861 Act"). The Single Judge, Scoffield J, granted leave on two out of three grounds and the appeal is proceeding on those two grounds only, namely the failure to leave an alternative verdict of section 20 assault and the way in which the law on self-defence was dealt with.

Background

[2] On 14th May 2017 the appellant was attending an under-16 GAA match. The appellant, as is not uncommon at such events, was lawfully in possession of a hurling stick. The prosecution case is that he struck the injured party with a hurling stick two or three times to the head causing serious injury to his head and an injury to the hand. The injury to the hand appeared to be a defensive injury. The injured party required hospital treatment for lacerations to both his head and hand. The reason for the attack it was alleged had been a loss of temper as a result of the appellant being told off by the injured party for using foul language in front of children. The appellant made a self-defence case at trial stating that the injured party had been confrontational to him and had gone to punch him. The appellant's

case was that he instinctively struck out to defend himself. The issue of self-defence had not been raised during interview as the appellant had made a no comment interview.

[3] The appellant complains about the failure of the judge to direct the jury that they could find the defendant guilty of section 20 assault, which is an option that is open to a jury if they are made aware of it. As this did not occur, the jury was left with the alternatives of the assault contrary to section 18 of the Offences Against the Person Act 1861, which required specific intent, or an acquittal.

[4] In order to understand why this had occurred, the appellant's new legal team contacted prosecuting counsel, and he replied by email to say:

> "The alternative Sec 20 was discussed with the Judge/Defence but due to the nature of the defence raised (self-defence) defence Counsel did not seek this and I didn't feel that I needed to add it to the indictment."

[5] In turn, trial defence counsel was also invited to comment and he replied to say, inter alia, that:

> "…PPS counsel, prior to trial, offered a section 20 Offences Against the Person Act 1861 charge (s20). Mr Maybin rejected a plea to this charge, as was his right. The offer was subsequently made again prior to trial, and on the morning of his trial. Again, Mr Maybin rejected this approach, indicating that as he had done nothing wrong, he would not enter a plea to or accept any lesser charge. With regard to any alternative jury verdict, same was broached by PPS counsel in the course of the trial. Mr Maybin indicated that he did not wish same to be a consideration for the jury as he maintained that he had done nothing wrong. Mr Maybin was advised as to the strengths and weaknesses of his case at all times, and advised that on conviction for a s18, a substantial prison sentence was virtually inevitable…"

[6] It is clear from these exchanges, and is not in dispute, that a plea to section 20 was acceptable to the Crown at all times leading up to the trial. In his skeleton argument, prosecution counsel informed the court that at arraignment on 5th November 2019 he had discussed with the Officer in Charge whether a Section 20 (wounding) would be an acceptable resolution for the injured party. The Officer advised him that he believed the injured party would be agreeable to such a

disposal. Prior to the trial, defence counsel was asked by prosecuting counsel whether he wanted the lesser alternative count of Section 20 added to the indictment but he advised that it was an "all or nothing" defence that he had to run. At the conclusion of the evidence, the trial judge raised the issue of whether she should leave the alternative section 20 offence. The trial judge was informed that the "agreed position" was that she should not. She was not, however, reminded of the passages from Blackstone and the most relevant authorities referred to later in this judgment.

[7] Prosecuting counsel with his characteristic fairness acknowledged in his skeleton argument that it was his own view that a section 20 would have met the justice of the case on the basis there was a loss of temper on the appellant's part during a hurling match when he and the injured party were supporting rival teams. It would not be unusual for a spectator at such a match to have a hurling stick with them to practice and it was not a case of the appellant arming himself in advance to commit an assault. Prosecuting counsel candidly and correctly, in our view, acknowledged that intent would have been a core issue in this case and that "… a jury could have come to the view that the appellant did not intend to inflict really serious harm in the heat of the moment but nonetheless had committed the unlawful assault." Before us prosecuting counsel pointed out that this was his view before the trial had unfolded. Although not accepting section 20 was an "obvious" alternative verdict (calling it a "longshot") he nonetheless acknowledged that it was open to the jury to conclude on the evidence that the blows with the hurley stick were deliberate (and not in self-defence) but that the appellant did not have the necessary intent for section 18 (i.e. intent to inflict grievous bodily harm). This reflects the fact that a jury is entitled to conclude that self-defence has been disproved by the Crown but equally find that the defendant didn't intend to cause the injury that was sustained or find that it was a deliberate blow from the outset but not necessarily with the specific intention to cause a wound.

Alternative verdicts – Duty on Trial Judge Irrespective of wishes of Counsel

[8] The decision as to whether to leave an alternative verdict to the jury is not a matter for counsel to decide, as stated by Lord Bingham at para 23 in R v Coutts [2006] 1 WLR 2154, which is outlined at D19.63 in Blackstone's Criminal Practice (2020) in the following way:

> "D was charged with murder. His defence was that the death had been a tragic accident. The parties agreed that it would be unfair to direct the jury on manslaughter, and the trial judge did not direct the jury on manslaughter. D was convicted, and appealed on the basis that the judge should have directed the jury on manslaughter. The House of Lords allowed the appeal.

> Lord Bingham, with whom the other Law Lords agreed, stated that, while the murder count against the appellant was clearly a strong one, no appellate court could be sure that a jury to whom the alternative count had been left, would not have convicted of manslaughter. He stated the principle in this way:
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> > "*The public interest in the administration of justice is,* in my opinion, *best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support.* I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency."

[9] At para [40] in his concurring opinion in Coutts, Lord Hutton referred with approval to the passage in Lord Clyde's speech in Von Starck v Queen [2000] 1 WLR 1270, which set out the nature of the obligation on the court:

> "*The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial.* In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a

> fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which *may* be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them."

[10] In his speech Lord Hutton also said at para [61]:

> "Therefore, I consider that the House should follow the reasoning in the second line of cases and hold that, *save in exceptional circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence."*

[11] In respect of alternative verdicts, judges are not always obliged to leave all alternative verdicts. When, however, there is an allegation of an offence involving specific intent Blackstone's Criminal Practice (2021) at D19.58 observes:

> "It is important for the court to leave an alternative which does not require proof of specific intent where such intent was required for the charge on the indictment.' (Hobson [2009] EWCA Crim 1590; Foster [20"9] EWCA Crim 2214; Johnson [2013] EWCA Crim 2001)

[12] The appeals were allowed on the issue of intent in all three of the cases cited in the above passage from Blackstone. In Hobson, D smashed a glass into the face of another lady in a bar but later claimed that she acted instinctively and in self-defence during the scuffle. The Crown case was that an independent witness had testified to say that the complainant had done nothing wrong, whereas the defence case was that she had grabbed D by the throat. At the trial, the alternative verdict of section 20 was not left to the jury and they convicted of the section 18 offence. Allowing the appeal, the Court of Appeal said the following at paras 11 - 12:

> "It is, in our view, particularly important that this is done [leaving the alternative verdict] where the offence charged requires proof of a specific intent and the

alternative offence does not. Even then there may be circumstances where the issue of specific intent does not truly arise. For example, if a man is shot at point-blank range in the head and the defence is simply that the defendant was not present, there is no requirement on the judge then to leave the alternative of manslaughter by way of killing without the necessary intent for murder. However, there will be cases, as Coutts recognised, where it is necessary to leave the lesser offence as an alternative to avoid the dangerous situation where the jury is faced with the stark choice of convicting for the serious offence or acquitting altogether. That may give rise to a miscarriage of justice.

In the present case it seems to this court that it was properly open to the jury to have found on the evidence that the appellant had not acted in self-defence and had intended to hit the victim with the glass, unbroken as it was, but had not intended to cause her serious bodily harm (or at least may not have had that specific intent). As we have pointed out, the prosecution on this appeal accept that that would have been a proper interpretation available to the jury on the evidence they heard."

[13] The Court of Appeal concluded the appeal by stating at paras 14 – 16:

"In the present case the Recorder's course of action seems to us to have presented the jury with that stark choice of either convicting the appellant of section 18 wounding — a very serious offence — or of acquitting her completely. We can well understand why they decided against the latter, once they had decided that self-defence and accident were not feasible. But there must be a concern that they may have convicted of section 18 wounding rather than permitting the appellant to go scot-free when, had they had a section 20 verdict available to them, they would not have decided to convict on the more serious charge.

That being so, we can only regard the conviction in this case as being unsafe. The appeal is therefore allowed and the conviction is quashed. The appeal against sentence falls with it."

Conclusion

[14] We are satisfied that it was open to the jury to conclude on the evidence that the blows with the hurley stick struck by the appellant were deliberate (and not in self-defence) but that the appellant did not (or may not) have the necessary specific intent for section 18 (intention to cause grievous bodily harm). This was a realistically and clearly available verdict on the evidence. It is unfortunate that the indictment was not amended before or during trial to include the section 20 count. It is also unfortunate that when the trial judge raised the issue of section 20 as an alternative count at the close of the evidence that her attention was not drawn to the authorities referred to above. Even if both counsel are agreed on the issue of whether an alternative count should be left to the jury, they are still required to remind the judge of her/his "greater and more onerous" independent function and responsibility in relation to alternative verdicts. This is especially so because, as Lord Hutton reminds us in Coutts, save in exceptional circumstances an appellate court should quash a conviction where *the judge* has erred in failing to leave a lesser alternative obviously raised by the evidence. Accordingly, we conclude in this case that the conviction is unsafe by reason of the failure of the trial judge to leave the section 20 offence as a lesser alternative obviously raised by the evidence. If that count without specific intent had been left to the jury, which was deemed acceptable as a resolution of the case by the PPS before the trial and which was raised with counsel by the trial judge at the conclusion of the evidence, the jury would not have been left with the 'stark' alternatives of section 18 or an acquittal.

[15] In the light of our conclusion on the first ground, we do not propose to address the second ground.