APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 3
HCA/2017/00027/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

ADAM LUNDY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Brown, QC, Armstrong; Callahan McKeown & Co
Respondent: I McSporran QC, Sol Adv, AD; Crown Agent

18 January 2018

[1] The appellant was convicted of the murder by stabbing of John Kiltie. Two co-accused, Allison and Goodwin, one of whom was convicted, had also been charged with assaulting Mr Kiltie. The appellant and friends had been drinking and playing music, with the windows open, at a flat at 13 Park Road, Girvan. The deceased live nearby, and there was evidence of prior complaints from him towards the occupants of No 13. The deceased came into the garden at No 13 and an altercation ensued. In his evidence the appellant

admitted striking the deceased with a knife on four occasions, maintaining that he was acting in self-defence against an attack from the deceased, who was wielding a baseball bat. The deceased kept coming at him, swinging a baseball bat. The appellant said that the deceased struck him on the knee, causing him an injury which bled. The appellant stabbed him four times, in a panic. When the deceased desisted and fell, the appellant stopped.

[2] Blood staining matching the appellant's DNA was found on the inside of the left leg of his trousers, consistent with his having bled from the left knee.

[3] A baseball bat was later retrieved from a cupboard at No 13. Contact blood staining on this produced a mixed DNA profile from at least 3 persons. The major and minor components were consistent with the DNA of the appellant and the householder at No 13, and there were other unknown traces. Tests on the handle of the bat revealed a complicated mix of DNA with traces from at least four individuals who could not be identified.

[4] There was evidence of statements to the police made by both co-accused. As the trial judge explained, each claimed to have seen the deceased challenging Allison with a baseball bat and, in contradiction of each other, each claimed to have disarmed the deceased and placed the bat in a cupboard at No 13 prior to any interaction between the deceased and the appellant. These statements were not evidence against the appellant, and the trial judge directed the jury accordingly at the time when the evidence was elicited, and in her charge.

[5] The trial judge explains that there was overwhelming evidence that the appellant had stabbed the deceased, and that the only question was whether in so doing he was acting in self-defence, having been attacked by the deceased with a baseball bat; and if not, whether he had been provoked. The trial judge accepts the defence assertion that the question whether the deceased had a baseball bat was a pivotal issue.

[6] In the appeal it is maintained that there has been a miscarriage of justice resulting from inaccurate, misleading and improper comments made by the advocate depute during his closing speech. The criticisms of the advocate depute were that he:

(i) misled the jury by stating that no DNA of the deceased was on the bat;

(ii) invited the jury to rely on the inadmissible content of statements by co-accused; and

(iii) invited the jury to consider their verdict on sympathy grounds.

It was also suggested that he speculated about the absence of blood on the outside of the appellant's trouser leg, a matter not explored in evidence, but this is a point of little moment, in the context of the speech as a whole.

[7] It is said that the trial judge's directions were not adequate to dispel the prejudicial effect of the advocate depute's approach.

The advocate depute's speech

Sympathy

[8] The advocate depute opened his speech by contrasting a photograph of the appellant, at the time when he was medically examined after arrest, with a photograph of the body of the deceased "lying with four stab wounds dead on the grass" at the locus, describing the photographs as presenting "quite a sharp contrast". He went on to compare the deceased's wounds with the minor injuries (a bruise and a laceration) seen on the appellant.

[9] The advocate depute disavowed showing these photographs to evoke emotion, stating that he referred to them "so that they are an anchor for what I have to say", because in considering self-defence the jury would have to "consider proportionality" and whether

the actions of the appellant constituted a "proportionate response to the violence that was meted out against him".

[10] He went on to say that had he asked the jury three weeks ago, or even two weeks ago, whether they knew a man, John Kiltie, they would have said no. By his calculations the first time they learned that name was at 11.40 on the first day of the trial, but now they knew "considerably more about John Kiltie than just his name".

[11] He then addressed what the jury now knew, including:-

- that he lived with his partner of 22 years and their four children;
- that the eldest child was 20, with learning difficulties, and the youngest a baby;
- that he was a working man, a bus driver, and his partner also worked;
- that he lived in a "bought house" having purchased it from his mother;
- that he had a 63 plate Vauxhall Insignia which was his pride and joy, and which he had worked hard to buy;
- although his parents were separated, they also lived in the same street; and
- the deceased was "a hard working family man, providing for his wife and kids".

At this point the advocate depute again disavowed the intention to evoke sympathy, despite the fact that his next observation was to note that "his youngest son, the baby, will never come to know his father, that would be something that I could say that would be emotional" adding "but you are not here to try the case by sympathy".

[12] The advocate depute then referred to the locus, Park Road, referring to the fact that the houses were a mixture of privately owned and local authority housing. Asking the jury to use their common sense he said (page 12):

> "If you were a man like John Kiltie who gets up at 6am to start their work on the buses five days a week, has a one year old baby in the house, has an older son with learning difficulties, a 20, 25 year old woman moving into the council house across

> the road, 25 metres away who was going to have noisy parties, who was going to have people shouting in the middle of the night and is going to cause a disturbance, is likely to interfere with your quality of life."

[13] Turning to the day in question, he observed that the deceased had been up at the back of 8 so that he and his son could get their hair cut, noting that in the photographs of "Mr Kiltie lying dead in the back garden" it could be seen he had just had his hair cut. He continued:-

> "Mr Kiltie is not a man sitting in his house of a Saturday morning drinking Buckfast and drinking Fosters or taking drugs. He is not a man out of his face of a Saturday morning… He is not a man whose first reaction to a disturbance is I'm going to sort this out…".

[14] There was evidence that the occupants of No 13 had been drinking in the course of that morning. There was no evidence of drug taking.

[15] The advocate depute made reference to the loud music and disturbance coming from No 13, and acknowledged that the deceased had gone across there, and that one of the things the jury would have to address was whether he was in possession of a baseball bat at that time. In that connection, the advocate depute referred back to all he had already said about the deceased, adding (page 21):

> "On the evidence of what happened that morning does John Kiltie, the man who goes to the shop and gets his son Jordan, doesn't go across to the house. Who goes out to get his car ready for the day, there's a noise he phones the police. Is he someone, is he someone who is likely to have gone across to 13 Park Road in possession of a baseball bat. Does he strike you as that person?"

Statements

[16] At this point, addressing the question of the baseball bat, the advocate depute first made mention of statements by the co-accused. He said (page 22-23):-

> "Kern Allison told us, told the police rather, that the deceased had a baseball bat. Nicholas Goodwin told the police the deceased had a baseball bat. So there is evidence that there was a baseball bat but how did the bat get into the garden at Number 13. Who brought the bat into the garden. But it is of note, ladies and

> gentlemen, that as you look at photograph 33 where the tent is erected around the dead Mr Kiltie that there is no baseball bat. How is that so?"

[17] Having addressed the issue of DNA (see below) the advocate depute returned to the issue of the presence of the bat at pages 26-27. He does not in terms refer to the statements of the co-accused but what he does is highlight the accused's evidence and ask how this fitted with either Allison or Goodwin taking the bat into the house. This is elaborated upon at pages 30-31:-

> "But of course we know two things. On Saturday 28 May Nicholas Goodwin in providing a statement to Detective Constable Rae, in the presence of DC Robertson said, 'I ran into the garden… I ran to help my pal. One, the guy with the bat must have thought I was going to hit him, cos he swung it at me. I don't know what I said but I managed to grab the bat which I now seen was wooden. When I grabbed the bat I stepped away with the bat.
>
> And then he went on to describe later in the same statement "pal 2" who we know is Adam Lundy at a later stage stabbing the man.
>
> … and the same applies, of course, on a consideration of what Kern Allison told the police on Sunday 29 May… 'He chased me roon the back garden then the minute I took the baseball aff him, I ran in the hoose and then locked the door.' Now they both can't be right. Nicholas Goodwin can't be right and Kern Allison be correct. And of course, as will be observed, maybe neither of them are right, but they are both consistent in one count. They are not consistent in them taking it. They can't both have taken the bat, but they are both consistent that they took it off John Kiltie, and they took it off John Kiltie before anything happened to Mr Kiltie. So these are issues that you will have to consider."

[18] At page 51, the advocate depute said:-

> "Mr Lundy's evidence of the deceased with the bat is contradicted by the evidence as a whole. Not just by the Crown witnesses but also by what the two co-accused said to the police albeit in Mr Lundy's absence.

DNA

[19] At this point in his speech the advocate depute did point out that if anything said by the appellant raised a reasonable doubt he was entitled to be acquitted. However, in other passages in his speech dealing with DNA he came close to suggesting an inversion of the

onus of proof. The advocate depute first addressed the issue of DNA on the bat at page 24 where he said:-

> "Did we hear in the course of the evidence that there was a DNA profile matching John Kiltie upon the baseball bat or upon the handle? I will be corrected if I am wrong but I don't think we did. No."

Pointing out that if someone was going to come swinging a baseball bat they would touch the handle, he said "but no DNA profile of Mr Kiltie.". He went on to ask "Why is it not contaminated in that way with Mr Kiltie's DNA?" adding the sarcastic comment "how curious". Noting that the householder's DNA might have been transferred to the bat from a mop in the cupboard, the advocate depute said (pages 25-26):-

> "If you can get DNA on to the bat as easily as it touching the mop… presumably it would have easily got Mr Kiltie's DNA on to it and there's no DNA to be found for Mr Kiltie",

again adding a sarcastic comment "what a mystery.".

[20] This is the first point in his speech where the advocate depute seems confused about onus because he said (page 26):-

> "So the DNA results in relation to the bat might just cause you, it's for you, it might cause you to pause, it might cause you to hesitate in being satisfied 100 per cent or at least satisfied by proof beyond a reasonable doubt that Mr Kiltie had a baseball bat but that's a matter for you".

[21] This point recurred at page 48 where he said:-

> "On Mr Lundy's account there really was no opportunity for the baseball bat to get back into Number 13, and we know it did, and that in itself must cause you pause, it must cause you to hesitate in the account given by Mr Lundy."

[22] The advocate depute suggested that the DNA results were consistent with evidence of other witnesses who had not seen Mr Kiltie with a bat (page 28):-

> "Not one of those people saw Mr Kiltie in possession of a baseball bat. So in that respect the absence of Mr Kiltie's DNA on the bat fits with their evidence."

Defence counsel's speech

[23] There are certain aspects of defence counsel's speech which are worth noting. He suggested that the advocate depute had not addressed the jury in accordance with the law, and that the advocate depute had said three things which "should never have been said because he knows the rules as well as I do". The advocate depute was aware (a) that the case could not be decided on the basis of sympathy; (b) that speculation was not allowed; and (c) that statements made by one accused outwith the presence of another were not evidence against that other.

[24] In respect of the first of these counsel took some time to emphasise that the jury could not be swayed by emotional consideration. After the second, he submitted that it was "grossly irresponsible of the public prosecutor" to advance the submission he had regarding DNA in light of the evidence. On the third point he submitted that the comments regarding the statements should never have been said. He invited the jury not to be misled and to listen carefully to the trial judge's directions on these issues, thus effectively inviting appropriate directions from the judge. However, the statements having been relied on by the advocate depute counsel engaged to some extent in an analysis of their contents to counter the inferences which the advocate depute claimed supported the Crown argument.

[25] It is clear that defence counsel only felt it necessary to dwell on these issues as he did because of the approach taken by the advocate depute.

The trial judge's directions

[26] The trial judge emphasised:

> "it's your recollection of the evidence and what you consider is important in the evidence that counts. If you have a different view of the evidence as suggested to you, or even as referred to by me, you must prefer your own recollection because it's your view that matters." (pages 1-2)

She explained what constituted evidence, adding:

> "Evidence is where the witness speaks to her or his direct personal knowledge of the matter, and what's said to you in speeches, ladies and gentlemen, is not evidence." (page 6)

[27] The trial judge directed the jury that they could not be swayed by emotional considerations:

> "What you cannot do, is guess or speculate. You must decide the facts only on the evidence you have had had led before you and in making an assessment of the evidence, you must not be swayed by emotion or sympathy or prejudice.
>
> Crimes such as murder, or those involving serious violence, can give rise to strong feelings and great sympathy for the deceased's family, but you must put aside any personal reactions or views.
>
> So too, you're not here to make moral judgments as to antisocial behaviour or drinking and, at this point, I'd point out there was no evidence of drugs being taken by anyone here.
>
> You are acting as judges of the facts here and you must approach your task in the way of a judge, that is, coolly and impartially. Nor should you have any regard to the consequences, one way or another, of any verdict that you reach. The consequences of any verdict are for me and others to deal with." (pages 10-11)

[28] The trial judge addressed the issue of prior statements by witnesses. In respect of statements by accused persons, she said:

> "Now there's also evidence you've heard of statements made by the accused. Now statements made to the police by the accused are evidence in this case for you to consider. Now you've heard here evidence of a witness statement made by Mr Goodwin, and you've heard and seen statements made by Allison at police interview.
>
> Now each accused, in their statements, said some things which could point to his guilt, for example, admitting they were at the scene, and some things which could point to innocence, such as Mr Allison when he said that he acted in self-defence and Mr Goodwin that he didn't hit anyone.
>
> Now in respect of each statement, you look at the whole of it, and you have to decide if what was said was true in whole or in part. You can prefer one part of a statement to another. You could disbelieve the part pointing to innocence, if, for example, there's other evidence in the case you think points to guilt, or if you thought it was simply inherently unconvincing.

> But if you believe any part pointing to innocence, or if anything said by the accused in his statement raises a reasonable doubt in your mind as to the accused's guilt, you must acquit the accused, whether or not he's given evidence.
>
> So you decide what you make of these statements and what weight you give them. Please remember you are only concerned with what the accused said to the police in conducting the interview, not what the policeman raised in questions to the accused and, very importantly, can I remind you of the warning I gave you earlier during the trial: anything an accused says to the police outwith the presence of another accused, is not evidence either for or against the co-accused, and you must disregard what Mr Goodwin or Mr Allison said about the actings of either his co-accused, including Mr Lundy." (pages 15-17)

[29] The trial judge explained the role of expert witness in relation to the evidence of the biologist, saying:

> "But please note, the limited terms of the opinions given by the forensic witnesses here, that is, the forensic biologist, and the medical forensic examiners.
>
> Various scenarios were put to these witnesses about the implications of their findings and the forensic biologist or examiner agreed that the scenario put was a possible explanation for their findings, but that evidence goes no further than that." (page 18)

[30] On the DNA point, she said:

> "Or, for example, the biologist's evidence that whilst there were various and different traces of DNA on the handle of the baseball bat, he could not identify them. This does not mean, as was suggested, there was no DNA from the deceased on the bat, it just means we don't know the answer to that. Nor does the presence of the first accused's DNA on the bat necessarily mean it must've come from direct transfer from the first accused being struck with the bat, although that is one possible explanation." (pages 19-20)

[31] After dealing with self-defence, and how it arose on the evidence in the case, she returned to the matter of DNA on the bat, specifically mentioning the Crown speech:

> "Now I have noted here that the Crown also suggested that there was no DNA on the handle of the baseball bat from the deceased, but that, ladies and gentlemen, is not accurate. My notes are that there are DNA, there were DNA traces found on the bat from a number of people but those traces were insufficient to allow for comparison. So we don't know whether there was or was not DNA from the deceased on the bat."

[32] In her report, the trial judge states that she noted that the advocate depute in his speech queried the suggestion that the deceased had been in possession of a baseball bat, and submitted that even if they did think the deceased had a baseball bat this would not necessarily lead to the conclusion that murder had not been proved. In that context, she said, the advocate depute referred to the remarks in the police statements of the co-accused, noting that they could not both be right, but were both consistent with the bat having been removed from the deceased. The trial judge notes that "if this is viewed as placing reliance on the co-accused's statements, then this should not have been said". She conceded that "it may have been better to spell this out again with specific reference to the crown speech", but did not think that the jury would be in any doubt about the matter.

[33] The trial judge considered that it would be going too far to treat the advocate depute's comments about the appellant's background as an invitation to the jury to base their verdict on sympathy for the deceased or his family. In her report she said:-

> "I considered that the Crown were entitled to suggest, based on the evidence, that the jury could consider whether the deceased was likely to have charged into this incident armed with a baseball bat, but beyond that I did not approve of the submissions made. "

However, she felt that dwelling further on them ran the risk of emphasising them.

Submissions for the appellant

[34] Counsel pointed out that all grounds of appeal against conviction had passed the sift, the comment from the sifting judges being:

> "The issue of whether the trial judge's directions on the co-accused's statements were adequate, when set against the advocate depute's use of them in his speech, is arguable. That brings into play the possible cumulative effects of the other remarks made by the advocate depute, especially those apparently invoking sympathy and those said to be misleading regarding the DNA, or lack of it, on the bat. Leave to appeal against conviction is therefore given on all grounds."

[35] The criticisms specifically contained within the grounds of appeal may be summarised as follows:

1. The advocate depute misled the jury by stating that there was no DNA from the deceased on the baseball bat. Although this was corrected by the trial judge, her direction did not mention that it was the advocate depute who had made the incorrect suggestion.

2. In his speech the advocate depute speculated about the absence of blood on the outside of the appellant's left trouser leg, a matter about which the scientific expert had not been asked. This was said to undermine the appellant's account of having been struck on the knee with the bat. The trial judge gave no direction to correct this inaccuracy.

3. The advocate depute invited the jury to rely on the inadmissible content of the statements taken from both co-accused as suggesting that the bat had been removed from the deceased before the appellant stabbed him. The trial judge's directions about these statements was not sufficient to deal with the potential effect these remarks might have on the jury.

4. Finally, the advocate depute invited the jury to consider their verdict on "sympathy grounds", referring to the deceased's family, and background on repeated occasions. He implied that the appellant and others had been taking drugs, a matter for which there was neither libel nor evidence. The trial judge did clarify this latter point, but gave only the standard directions on the issue of sympathy.

[36] It was submitted that these remarks by the advocate depute, in isolation and in respect of their cumulative effect have resulted in a miscarriage of justice.

Under reference to *P (K)* v *HMA* 2017 HCJAC 57, para 24, it was submitted that the questions for the court were:

Does the court consider that there was a prejudicial departure from good and proper practice on the part of the Crown?

Were the directions given at the trial sufficient to prevent unfairness or a miscarriage of justice?

Can the court be confident that, overall, the substance of the trial was fair?

Can the court be confident that any unfairness did not create a miscarriage of justice since it could not have affected the outcome?

[37] Examples of departures from good conduct were given in *P (K)* and included "an improper intrusion into what was the exclusive role of the Sheriff". In *Randall* v *The Queen* 2002 1 WLR 2237 the Privy Council observed that:

> "Reference should never be made to matters which may be prejudicial to a defendant but which are not before the jury"

[38] It was submitted that the remarks by the advocate depute, in isolation and in respect of their cumulative effect have resulted in a miscarriage of justice. It was accepted that isolated incidents do not necessarily render a trial unfair, but there comes a point where the departure is so gross or persistent or prejudicial or irremediable that it can be said that the accused has been denied the substance of a fair trial.

[39] In relation to the specific grounds, it was submitted that the first of these, relating to DNA constituted a prejudicial departure from good practice on the part of the Crown. Proper directions were given by the trial judge and in isolation this ground could not succeed. However, it served to emphasise the cumulative effect of the Crown's misdemeanours, bearing in mind that not all of them were the subject of corrective directions.

[40] To encourage the jury to consider the evidence of the police statements after the withdrawal of the charge of murder against the co-accused was highly improper and could only be prejudicial to the appellant's claim of self-defence – *Beacom* v *HMA* 2002 SCCR 33, para 9. The general directions given by the trial judge were not adequate to address this issue.

[41] It is improper for a prosecutor to seek to invoke sympathy from the jury, as was clearly noted in *Morrison* v *HMA* 2014 JC 74

> "these remarks were plainly irrelevant to a consideration of whether the appellant had been at fault and insofar as sought to recruit the jury's sympathy for the deceased's husband in his loss and bereavement as an element in the Crown case the procurator fiscal-depute was acting in a grossly improper manner which required emphatic action by the sheriff."

[42] The advocate depute took an emotive approach throughout his speech, which constituted impropriety and a departure from good practice. It is clear from the content and context of his remarks that he was seeking to evoke sympathy, despite denying the fact. The trial judge ought to have directed the jury specifically on this matter, and general directions were not sufficient. Emphatic action was required.

[43] The advocate depute's reference to inadmissible evidence, in isolation, and when considered in *cumulo* with the remaining grounds denied the appellant a fair trial. The jury's assessment of the appellant's evidence and challenge to the crown case was undermined unfairly by the prosecutor, and not properly corrected by the trial judge.

Submissions for the Crown

[44] It was submitted that whilst there were errors on the part of the advocate depute which constituted a departure from good and proper practice, and related to matters of relevance to the issues at the trial, such errors were capable of correction, and were

addressed and corrected by the learned trial judge as required. The prosecution speech to the jury is only one part of the trial process and the whole circumstances must be looked at to ascertain whether the trial was compromised

[45] The advocate depute's summary of the evidence regarding DNA on the baseball bat lacked the necessary care and accuracy. However, it was robustly contested in the defence speech and corrected by the trial judge. The error was not so extreme that it could not be corrected in this way, and it was not productive of a miscarriage of justice.

[46] It was accepted that the evidence of the statements were not and could not be evidence against the appellant. Being relevant evidence against the co-accused, they had been competently led. However, it was conceded that the advocate depute's remarks constituted a serious error which was not corrected by his own acknowledgement that the appellant was not present when they were made. He referred to the statements as if it were open to the jury to have regard to them in considering the case against the appellant. The materiality of the issue was such that had the error not been corrected by the trial judge, having been robustly addressed by defence counsel, it would have been productive of a miscarriage of justice. However, the trial judge had properly directed the jury at the time the statements were first referred to, and in her charge made it clear that they did not constitute evidence against the appellant. The jury would have been in no doubt that they could not have used them for this purpose.

[47] It was accepted that the jury must deliberate upon the evidence and not on speculation, sympathy or emotion, and that they should be directed not to take such matters into account. In the crown's written submissions it was suggested that with the exception of his reference to the deceased's baby son, the remarks by the advocate depute were not used to evoke sympathy but to highlight factors relevant to the issues of self-defence and

provocation, but during the hearing of the appeal this point was not addressed with any force, the appeal depute recognising the weakness of that argument. In the whole circumstances the trial judge's general directions on the issue (page 10**)** were adequate.

Analysis and decision

[48] In *KP* the court endorsed the observations made in *Boucher* v *The Queen* (1954) 110 Can CC 263, 270, para 10, that:

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction,- it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly ..."

[49] In *Randall*, where *Boucher* was also relied upon, the Privy Council noted (para 10):

> "To safeguard the fairness of the trial a number of rules have been developed to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. These rules are well understood and are not in any way controversial. But it is pertinent to state some of them."

It went on to stress (para 11):

> "It cannot be too strongly emphasised that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse."

[50] As the court observed in *KP* (para 19), "Our system depends upon all involved understanding and respecting these rules." The advocate depute did not respect these rules. In all three respects advanced in this appeal, the conduct of the advocate depute was unsatisfactory. If taken in isolation, it might be possible, on a generous interpretation, to take the discussion of the DNA as a careless error, notwithstanding the repeated references to it, and the sarcastic comments, but the point does not occur in isolation, and it is much

harder to attach a similar interpretation to the other two transgressions, which constitute clear breaches of well-known and well understood principles. The first of these is that a jury require to set aside all emotional considerations, and should not be invited to do otherwise. The second is the clear rule that evidence of statements made by one accused is not evidence against another accused, if made outwith that other's presence. The advocate depute can be taken, as defence counsel observed, to be well aware of these rules.

[51] All three elements of the speech were advanced by the advocate depute in support of an argument on a central issue of the case – whether the deceased had possession of a baseball bat. Part of the advocate depute's purpose in dwelling on the character of the deceased was to suggest that he was not the sort of person to approach the scene carrying a bat. The misstatement regarding the DNA results was intended to counter the suggestion that the deceased had been in possession of the bat. As to the statements, the references set out in para [17] above were in the part of the advocate depute's speech in which he invited the jury to consider whether, if the deceased did have a bat, he was attacking the appellant at the point of the stabbing. They constituted an invitation to resolve that issue against the appellant by considering what each of the co-accused had said in their statements about what was done with the bat. The reference set out at para [18] above was made in the part of his speech where the advocate depute was rehearsing the evidence given by the appellant and setting out the reasons why he invited the jury to disbelieve that account. It constituted an invitation to disbelieve the appellant's account by relying on, amongst other matters, the accounts of events as given in their statements by the two co-accused. Furthermore, two of the references to DNA on the bat are associated with comments which are at the very least confusing in respect of the onus of proof.

[52] In our view the conduct of the advocate depute constituted serious contraventions of accepted rules of practice and they required detailed and emphatic action on the part of the trial judge. The law in this area was recently examined by this court in *KP* v *HMA* [2017] HCJAC 57. At para 18 the court quoted from *Morrison* v *HMA* 2014 JC 74, para 31, where the charge:

> "…failed completely to engage with the specific problems presented by the procurator fiscal-depute's address. It is a conventional charge in the most general of terms without a hint from the sheriff that he appreciated and was attempting to address those problems. In so far as these remarks tilted the balance as between Crown and defence that is required for a fair trial, the sheriff did nothing to attempt to restore that balance."

[53] In the present case, the remarks of the advocate depute came into the same category, and it was incumbent upon the trial judge to take decisive action to restore the balance between the parties. The trial judge did not take such action. She gave general directions that the jury could not allow feelings of sympathy to enter into their deliberations but did not link these directions with correcting anything said in the advocate depute's speech. In respect of this aspect of the complaint, the advocate depute's speech did three things. First, it implicitly invited the jury to allow sympathy to enter their deliberations. The only possible context of some of the advocate depute's comments, for example the baby growing up without a father, would be to elicit sympathy. Notwithstanding the advocate depute's protestations to the contrary, in our view these parts of the speech require to be seen as evoking sympathy. Second, it placed significant emphasis on the character of the complainer as a factor which the jury could take into account, by considering whether the deceased was the kind of person who was likely to have gone across the road in possession of a baseball bat. The extent to which the character of a witness, even a complainer, is relevant, is very limited. There could be no doubt that the deceased had gone across the

road on the day in question, and the only issue was whether he had been in possession of a bat when doing so. It would have been a relevant rhetorical question to ask whether, in light of what was known about him, and what he had been doing that day, the jury thought that the deceased did go across armed with a bat; it is a subtly different matter to suggest that he is not the kind of person to do so. Finally, the speech invited a contrast between what the deceased had been doing that morning and what the appellant and others at No 13 had been doing. That too might have been a legitimate observation to make, but in this case the gratuitous reference to "taking drugs", a conclusion for which there was no basis in evidence, again took the matter beyond what was legitimate.

[54] Although the Crown's written submissions had suggested that, apart from the remark about the baby son, the advocate depute's comments might be seen as relevant to the questions of self-defence and provocation, that point was not pressed during the appeal, the advocate depute in the appeal recognising the weakness of the argument. In any event, it was an unwarranted gloss on the doctrine of cruel excess in self-defence for the Advocate Depute to seek to reduce that issue to one of mere proportionality. That is another way in which the Crown speech was unsatisfactory.

[55] In relation to the use of statements, the trial judge had given a general direction when the evidence was first elicited, and gave a similar general direction in her charge. It may be, having regard to the terms of her report, that the trial judge had not entirely appreciated the extent to which the advocate depute's speech had sought to rely on inadmissible evidence on a central issue in the case. The judge clearly considered it necessary to correct the advocate depute on the DNA point, and it may be that in focusing on that matter she did not recognise the extent of the advocate depute 's other transgressions, although the content of the defence speech might have alerted her to that.

We are in no doubt that the Crown was correct to concede, in its written submissions, that the trial advocate depute had indeed sought to rely on inadmissible evidence. He did so repeatedly, and under repeated reference to the contents of the statements on a central issue in the case, and in terms unfavourable to the appellant. The worst of these, perhaps, was the gratuitous reference to that part of Allison's statement suggesting that the appellant had been responsible for stabbing the deceased. The advocate depute knew full well that this was not evidence against the appellant, and must have known that its introduction in his speech was highly prejudicial.

[56] The general directions given by the trial judge were not in our view sufficient. What was necessary was a clear and robust correction of the position adopted by the advocate depute. His submissions had been made in the face of exactly that same general direction having been given. Merely to repeat it was not sufficient to address the erroneous content of the speech. The limited direction which the trial judge gave was one which she would have been required to give even if the advocate depute had made no reference to it in his speech. Furthermore, having listened to the defence speech, the jury were left with a "spat" between counsel which the trial judge's directions did little to resolve, save in the most general of terms.

[57] The trial judge commenced her directions on statements by saying that "statements made to the police by the accused are evidence in this case for you to consider". Only at the very end of her directions on statements did she remind the jury of the warning given earlier about statements made outwith the presence of another. In light of the approach taken by the advocate depute this warning should have been given in clear and specific terms at the outset of the treatment of the issue, and should have been accompanied by an equally clear correction of the advocate depute's speech, and possibly even a rebuke. Instead, elaborating

upon the warning she had just given, what the trial judge said was that "you must disregard what Mr Allison or Mr Goodwin said about the actings of his co-accused, including Mr Lundy." This specifically does not address the major use of the statements by the advocate depute, which was less about the actions of the appellant than those of the deceased. A direction such as that given by the trial judge was entirely insufficient to address the potentially prejudicial effect of the Crown's repeated incorrect and improper reliance on these statements.

[58] The third element of the speech which gave cause for complaint was in relation to DNA on the bat. As with both other elements of the speech to which the appeal relates, this too arose in the context of the same crucial issue in the case. The trial judge did seek to correct this, stating first that the position was not "as suggested" and secondly specifically identifying the advocate depute's comments in this regard as not accurate." Had this transgression by the advocate depute stood alone, this direction might have been adequate, even allowing for the fact that they were on two occasions associated with remarks which appeared to offer a confusing, but uncorrected, view of onus. But as we have observed, it did not stand alone: it was one of three distinct and serious contraventions of accepted rules of practice, all of which related to a central plank of the defence case.

[59] The Crown speech thus contained repeated and prejudicial departures from good and proper practice, and when one considers the cumulative effect of them, bearing in mind the extent of the violation of the rules, and the centrality of the issues to which they related, it is in our view impossible to say that there has not been a miscarriage of justice.

[60] The fact that defence counsel sought, in his speech, robustly to counter the remarks of the advocate depute is of no moment. It is not the role of defence counsel to correct the deficiencies of the crown speech. Given the breadth of the conduct, defence counsel must

have felt that he had no option but to try to address the points made by the advocate depute. The effect of the Crown speech was thus to cause defence counsel to tailor his speech in a particular way, and to focus on matters which he would not otherwise have dwelt on in the same way. He should never have been put in the position of having to address these matters, and this tends to highlight the extent to which the balance between Crown and defence, necessary for a fair trial, was tilted. Unfortunately, as in *Morrison*, the directions of the trial judge did not sufficiently restore that balance. In the circumstances the appeal must succeed and the conviction must be quashed.