APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 64
HCA/20018/000116/XC

Lord Menzies
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST CONVICTION

by

GARY McKNIGHT

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Keenan, Sol Adv; Capital Defence Lawyers (for Graham Walker, Solicitors, Glasgow)
Respondent: Prentice, Sol Adv, QC, AD; Crown Agent

4 October 2018

[1] On 29 January 2018 the appellant was convicted at Falkirk Sheriff Court after trial of two charges in the following (amended) terms:

> "(1) On 25 August 2015 at Hazel Avenue, Menstrie you GARY McKNIGHT did assault John Rawding, c/o The Police Service of Scotland and did drive motor vehicle registered number NC54 ESO towards him at speed, mount a pavement and strike said John Rawding with said vehicle to his severe injury and to the danger of his life.
>
> and

(2) On 25 August 2015 at Hazel Avenue and Cedar Grove, Menstrie you GARY McKNIGHT did assault Craig Thomson, c/o The Police Service of Scotland and did punch and kick him on the head and body, to his injury."

The appellant was sentenced to four years imprisonment. He has appealed against his conviction.

The evidential background

[2] The trial lasted five days. The sheriff in his report to this court stated as follows:

"4. The picture presented by the Crown on that evidence was as follows: the complainer in the first charge had stolen a bike belonging to witness Lynne Crawford which had been left unsecured outside a friend's house in Tullibody. Ms Crawford was at that time in a relationship with the appellant who lived with her at another address in Tullibody. She telephoned the appellant, who was driving home in his car, a Nissan X Trail 4 x 4, and who said he'd look out for it. The appellant then came across the complainers at the locus in Menstrie, a short drive from the house in Tullibody. Both complainers were riding bikes. The complainer in charge 1 was riding the bike that had been stolen and the appellant recognised it as such. The complainers were travelling in the opposite direction to the appellant. The appellant decided to take matters into his own hands. He proceeded to turn right at a roundabout shortly ahead, not by turning left and going round the roundabout, but by turning to the right immediately before the roundabout and doing a u turn, then proceeding at speed in the direction from which he had originally come and towards the complainers. They were now aware that they were being pursued and headed for a gap in a wall leading from the pathway at the side of the road to some houses. The appellant intentionally mounted the grass verge and footpath and drove his vehicle towards the gap. In doing so he struck the complainer in charge 1. His vehicle came to a halt. Thereafter, he got out of the vehicle and assaulted the complainer in charge 2. He retrieved the bike, which had been damaged by the collision, put it in his car and drove off. He drove to the house of Ms Crawford's friend and parked the car in the drive next to the house. The police were alerted and were made aware of the registration number of the appellant's vehicle (NG54 ESO) and the registered keeper's address, as well as a description of the vehicle. The registered keeper's address was the address of the appellant. They went to that house but there was no trace of the car. However, they spotted a vehicle of the same description in the drive of the friend's house albeit there were two refuse bins placed directly at the back of it obscuring the rear number plate. They encountered the appellant outside the house and when told that they were there in connection with an incident in Menstrie, the appellant indicated he was aware of the incident and confirmed he was the driver at the relevant time. The vehicle was identified as the vehicle involved in the incident. The appellant was detained.

> 5. In his interview at the police station (Crown Label 1 and Crown Production 13), the appellant, whose solicitor was present, at various stages replied "no comment" to questioning but also went on to give an explanation as to what had occurred, as he put it, his 'version of events'. In short, he stated that he was attempting to cut off the first complainer's escape by driving into the gap in the wall and that he did not intentionally hit the complainer with his car. In relation to the second charge, he admitted striking the second complainer and putting him to the ground after the complainer tried to hit him. In reply to caution and charge, as set forth in the joint minute, the appellant replied:
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> Charge 1: 'That's not true.'
> Charge 2: 'It was eh, it was a 50/50 thing fella, it was self defence as I said to you when I got out the motor to check on that boy, he was trying to attack us.'"

The sheriff's charge

[3] The sheriff in his report to this court accepted that when charging the jury he did not give a direction on mixed statements. However, he referred to two passages in his charge in which he gave a direction as to the statement given to the police. At pages 13/14 of his charge he gave the following direction:

> "Now in this case you've heard evidence, and you'll see from the transcripts, that the accused answered certain questions put to him by police officers with the phrase, 'No comment', or words to that effect. Now, you cannot read anything adverse against the accused by his acting in this way in the interview. The fact that he did so cannot be held against him. The accused, in so acting, was simply exercising his right but, of course, you will recall that in fact he went on to give an explanation in relation to the incident and that's obviously for you to consider, but the 'no comment' responses within that interview should not, in any circumstances be held against him."

Later in his charge the sheriff gave the following direction (at pages 23/24):-

> "Now, finally, please, I would like you to consider all of the evidence relied on by the Crown and the submissions made by the fiscal. Give equal consideration to the defence case. In reaching your verdict you have to assess the quality, strength and effect of the evidence and decide if the case against the accused had been proved or not. It's your decision what conclusion you reach. If you believe what the accused said to the police in the interview in so far as that pointed to his innocence, if you believe evidence supporting his special defence of self defence, if you believe any other evidence pointing to his innocence, you must acquit him, Even if you don't, but that evidence leaves you with a reasonable doubt about the Crown case, you

> must acquit him. But if you are satisfied beyond reasonable doubt that he's guilty, it is your duty to convict him."

[4] The sheriff concluded his report to this court with the following observations:

> "The critical issues were: in charge 1, whether the appellant deliberately attacked the complainer with his vehicle; and in charge 2, whether he acted in self-defence. In my view, in light of the above directions, the jury were well aware that they could take into account the exculpatory parts of his statements to the police in deciding those issues."

Submissions for the appellant

[5] Mr Keenan for the appellant, emphasised that the appellant did not give evidence at the trial, and the only evidence of his position with regard to these charges was contained in his police interview. The content of that interview was critical evidence for the defence. His position, as explained to the police at interview, was that the collision with the bicycle in charge 1 was accidental, and lacked the necessary intent for assault. His position with regard to charge 2 was that such force as he used against the complainer in charge 2 was in self-defence. There was no dispute that the interview constituted a mixed statement, and there was no dispute that the sheriff did not give a specific direction to the jury as to how they might treat mixed statements, such as was discussed in the Jury Manual at pages 25.1 - 25.5, and in *Morrison* v *HM Advocate* 1990 JC 299 and *McCutcheon* v *HM Advocate* 2002 SCCR 101.

[6] Although the sheriff made reference to the transcript in the passage quoted above (at pages 13/14), he only dealt with the "no comment" responses within the interview. He did not direct the jury as to what use they might make of the exculpatory elements of the interview. Although the second passage quoted above (at pages 23/24) went some way to addressing the issue, it did not go far enough, and did not do so satisfactorily.

[7] Mr Keenan drew attention to three specific deficiencies in the charge – (1) the jury were not directed that the whole statement was available to them as evidence in the case; (2) they were not directed specifically that the statement was available as evidence where the accused had not given evidence at trial; and (3) they were not directed that the mixed statement in this case was an exception to the general rule against hearsay evidence. These were specific directions which should have been given – *McGirr* v *HM Advocate* 2007 SCCR 80 at para 12; *Jones* v *HM Advocate* 2003 SCCR 94 at para 11; *Scaife* v *HM Advocate* 1992 SCCR 845 at 847/848.

[8] Moreover, when the charge was considered as a whole, other directions were apt to confuse the jury as regards the correct approach to the mixed statements. Early in his charge (at pages 1/2) the sheriff stated:

> "What does evidence consist of? Well, first, you must understand what's evidence and what's not…. What's been agreed by each side and recorded in a joint minute, is evidence … What a witness says in the witness box is evidence. Questions – and this is important – or suggestions put to witnesses aren't evidence. They only become evidence if the witness agrees with what's been put, but if all a witness did was to agree with what's put, you need to take care in deciding what weight to give to that. But it's what the witness says in the witness box that's the evidence."

Nowhere did the sheriff indicate that the contents of a mixed statement to the police might amount to evidence.

[9] Indeed, some other directions given by the sheriff might have suggested that the statement by the accused in police interviews did not amount to evidence. At page 8 of the charge the sheriff directed the jury: "In this case the accused has neither given evidence nor led evidence from any other source… Don't assume the Crown case is … proved just because there's been no defence evidence." At page 10/11 the sheriff directed the jury as follows:

> "Now, another aspect of this evidence was the use of prior statements. You'll remember I have already explained that normally speaking it is only what a witness says in the witness box which constitutes evidence. The consequence of that is that usually evidence of what a witness said to someone else is called hearsay and is not admissible. However, there are exceptions to that rule…".

The sheriff then went on to direct the jury about the use they could make of prior inconsistent statements, and prior statements adopted by the witness as their evidence. He made no reference at any point in his charge to the statement made by the accused to the police as being an exception to the hearsay rule.

[10] It was submitted that it was a material misdirection for the sheriff not to give a specific direction to the jury that, in the absence of oral evidence from the accused in the witness box, the contents of his interview with the police were available as evidence to be considered. Reference was made to *Irvine* v *HM Advocate* 2000 JC 321 at 324B/E, and *Lennox and Boyle* v *HM Advocate* 2002 SCCR 954 at paras [6] to [9].

[11] The sheriff's charge was liable to confuse the jury as to whether they could have regard to the appellant's statement to the police. This statement was of critical importance to the defence, because it was the only place at which the appellant set out his position regarding accident in relation to charge 1, and self-defence in relation to charge 2. Nowhere in his charge did the sheriff touch on the appellant's position regarding accident.

[12] If the jury followed that part of the charge which directed them as to what amounted to evidence, they may have excluded that appellant's police interview as evidence. If they followed the direction as to what constitutes an exception to the hearsay rule, they were told that the general rule is that the contents of a prior statement are hearsay, and they were told about one exception to this general rule. The sheriff did not go on to explain, for example, that the appellant's police interview was another exception to the general rule on hearsay, nor did he indicate that it had any evidential value.

[13] As in the case of *Lennox and Boyle* v *HM Advocate*, there were contradictions between different parts of the sheriff's charge, and it cannot be assumed that the jury were able to resolve these, or that they applied the directions at pages 23/24 of the charge rather than the earlier, and contradictory, directions.

[14] The contents of the appellant's interview with the police were so central to his defence that a miscarriage of justice had occurred and the convictions should be quashed.

Submissions for the Crown

[15] The advocate depute reminded us that a charge to the jury should not be regarded as an academic exposition of the law of evidence, but should be tailored to the issues arising in the trial. The issues which the jury required to resolve were clear and in sharp focus – was the collision in charge 1 an assault or was it accidental, and was the force used by the appellant in charge 2 an assault or in self-defence.

[16] The advocate depute accepted that the sheriff's charge did not give the standard *Morrison* and *McCutcheon* direction. However, in this case the issues were narrow and clear, and what the sheriff did was adequate.

[17] If the court took the view that there was a misdirection, the advocate depute submitted that in any event there was no miscarriage of justice. At page 17/18 the sheriff referred to the appellant's position regarding self-defence in relation to charge 2. He went on to give them standard directions about self-defence, with which no issue had been taken. This could only have been relevant if the contents of the appellant's statement to the police amounted to evidence to which the jury could have regard. The jury must be taken to have understood this. In a trial in which the issues were so narrow and focussed, it was

stretching credulity to suggest that the jury would not have understood that they could consider the contents of the police interview, and the appellant's position stated therein.

[18] There was therefore no misdirection, and even if there was, there was no miscarriage of justice, and the appeal should be refused.

Decision

[19] It is not disputed that the appellant's police interview was a mixed statement. This is clearly correct. With regard to charge 1, the appellant accepted that he caused his car to collide with the bicycle being ridden by the complainer, but his position was that he was attempting to shut off a gap through which the complainer was seeking to escape, and that the collision was not intentional. With regard to charge 2, he accepted that he hit the complainer, but only after the complainer had hit him first, and that he was acting in self-defence. There were plainly elements of the interview which were exculpatory, and other elements which were incriminatory. The interview was led in evidence by the Crown. The appellant did not give evidence on his own behalf. This might be described as a paradigm of a mixed statement requiring a direction to the jury.

[20] What is required by way of direction will vary from case to case, but there are certain essential elements. The general principles were set out by the Lord Justice General (Cullen) giving the opinion of a court of nine judges, in *McCutcheon* v *HM Advocate* 2002 SCCR 101 (particularly at paragraph 11). The requirements were conveniently summarised by the Lord Justice Clerk (Gill) delivering the opinion of the court in *McGirr* v *HM Advocate* 2007 SCCR 80 at paragraph [12]:

> "[12] We repeat once more that it is for the trial judge and not the jury to decide objectively whether a statement made by the accused is a mixed statement, that is to say one that is partly incriminatory and partly exculpatory in its effect (cf *McCutcheon* v *HM Advocate*; *McIntosh* v *HM Advocate*, Lord Justice Clerk Gill at

> para 18). Where the Crown lead evidence of such a statement, the trial judge must direct the jury that its contents are available as evidence for or against the accused, whether or not the accused gives evidence (*Jones* v *HM Advocate*); and that they must determine whether the whole or any part of the statement is to be accepted by them as the truth. He should also specifically direct them that if they believe the exculpatory part or parts of the statement, or if the statement creates in their minds a reasonable doubt as to the guilt of the accused, they must acquit (cf, *Scaife* v *HM Advocate* at p 848E)."

[21] In his report to this court the sheriff accepted that he did not give a direction on mixed statements, but expressed the view that in light of the directions which he gave at pages 13/14 and 23/24 (quoted above) the jury were well aware that they could take into account the exculpatory parts of his statement to the police in deciding the critical issues.

[22] We do not agree. We emphasise that we are not suggesting that a trial judge must take a purely formulaic approach and repeat word for word the possible directions on mixed statements given in the jury manual. However, we consider that it is essential that the trial judge should cover (in his own words) those aspects to which the court referred at paragraph [12] of *McGirr*, quoted above.

[23] The sheriff's failure to give a direction specifically about how the jury should treat the police interview was exacerbated by the way in which he directed the jury in other passages of his charge. At pages 1/2 he told them that they must understand what's evidence and what's not, and directed them that the terms of the joint minute was evidence, and what a witness says in the witness box was evidence, but he did not at any point in his charge go on to explain that the contents of the police interview were evidence. He told the jury that the accused had neither given evidence not led evidence from any other source, and he directed them that they should not assume the Crown case is proved just because there had been no defence evidence. He went on (at pages 10/11 of his charge) to deal with the use of prior statements, and reminded the jury that normally speaking it is only what a

witness says in the witness box which constituted evidence, and that the consequence of this was that usually evidence of what a witness said to someone else is called hearsay and is not admissible. He went on to explain that there were exceptions to this rule, and dealt with the situation in which a witness adopted parts of their prior police statements. He then went on to mention the accused's police interview, but did not direct them that this was another exception to the general rule about hearsay. He explained to the jury (correctly) that the appellant's "no comment" responses within the interview should not, in any circumstances, be held against him, but he did not go on to direct the jury as to what they should make of any exculpatory or incriminatory parts of the interview. We consider that this omission amounted to a misdirection.

[24] Moreover, despite the submissions for the Crown to the contrary, we consider that this misdirection has resulted in a miscarriage of justice. The exculpatory parts of the appellant's police interview were the crux of his defence. They were the only place in the evidence in which the appellant's position on each charge was to be found. The absence of a clear direction as to mixed statements, and how the jury should consider the police interview, in the context of the charge as a whole, gave rise to a real risk of confusion.

[25] For these reasons we are satisfied that a miscarriage of justice has occurred, and we shall quash the convictions.