APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 65
HCA/2017/675/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

NAVEED IQBAL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlay QC, Crowe; Hall Norrie Warden, Dundee
Respondent: Meehan AD; the Crown Agent

3 October 2018

Introduction

[1] On 3 November 2017, at the High Court in Glasgow, the appellant was found guilty of two charges of attempted murder by fire-bombing two houses in Glenrothes at about 11.30pm on 28 March 2017. The first of these, at 5 Adrian Road, involved members of the McLaren family, including Dayle McLaren, then aged 16. The second, at 1 Alexander Road,

involved the house of the Spinks family. This address is situated at the junction of the two roads.

[2] On 1 December 2017, the trial judge imposed a sentence of 16 years imprisonment on the appellant.

[3] The libel was originally against four accused. The Crown's intention, at the start of the trial, was to prove that the appellant had instigated the crimes, even though he was not present at the *loci*. He was at home in Leven. Ryan Easton was said to be the fire-bomber and James Simpson and Jamie McHugh were associates of Mr Easton and involved in facilitating the crimes in some way. During the course of the trial, the Crown withdrew the libel against Messrs Simpson and McHugh. In a somewhat unusual move, the advocate depute told the court, but with the jury absent, that the Crown's revised position was that they were "innocent" of the charges. This was taken, at least by the appellant, to mean that any involvement, which they may have had, was as "dupes".

[4] In another interesting development, the jury found the case against Mr Easton not proven. This resulted in the appellant being convicted on the basis that he had instigated the crimes by engaging someone, whom the Crown maintained was Mr Easton, to commit them whilst the charges against Mr Easton were not proven and the others, whom the Crown had originally said had been involved, had been declared innocent. This set of circumstances has led the appellant to maintain that no reasonable jury could have returned the guilty verdict against the appellant.

[5] The question is thus whether there was a "cogent framework of evidence that the jury were entitled to accept as credible and reliable and which ... entitled them to return the verdict" (*MacKinnon* v *HM Advocate* [2015] HCJAC 6, Lady Dorrian, delivering the Opinion of the Court, at para [6]).

The evidence

[6] At the beginning of March 2017, Dayle McLaren had been involved in an attack on the appellant's younger brother at McDonald's in Glenrothes. This attack was recorded and posted on Facebook by Craig Morgan, who provided the first principal source of evidence. Mr Morgan was a person with a history of enmity towards Mr McLaren. The appellant was a friend of Mr Morgan's father. On the day of posting, the appellant had visited the father's home with a view to speaking to his son. Mr Morgan had showed the appellant the recording, at which point the appellant had become angry and shocked. The appellant had told him that, if he (Mr Morgan) saw Mr McLaren or any of the other people who had attacked his brother, he was to call him.

[7] On 10 March, Mr Morgan had arranged a fight with Mr McLaren. He had invited the appellant to join him at the *locus* for the fight in Glenrothes. Mr Morgan was then driven around Glenrothes by the appellant in an attempt to locate Mr McLaren's house. The appellant had said that they needed to find out "100" (?%) which house was his and to be certain of it. Mr Morgan had pointed out 1 Alexander Road, which he had previously thought might be Mr McLaren's house. Thereafter they had stopped outside 5 Adrian Road. It was established, according to Mr Morgan, that this was where the McLarens lived. On the drive back, the appellant had said to Mr Morgan that at least they knew "100" that it was the McLarens' house. Under reference to a prior statement, Mr Morgan confirmed that the appellant had also said, during this journey, that "he'll be getting it" and "he'll be getting done in".

[8] The next sources of evidence, chronologically, were Messrs Simpson and McHugh, who were called by the Crown following upon their acquittals. They had not previously

provided statements. According to Mr Simpson, he knew the appellant through the motor trade. He also knew Mr McHugh and his friend Mr Easton. On 11 March 2017, Mr Simpson was at the appellant's garage in Buckhaven in the company of Mr McHugh, Mr Easton and Ian Anderson. The appellant had referred to his brother being injured. He was talking about getting back at the people who had done it; saying that he (the appellant) was getting it "sorted". The appellant, Mr Easton and Mr Anderson went away in Mr McHugh's van for 40 minutes.

[9] Cell site analysis had shown that Mr Easton's phone, and thus inferentially Mr Easton, had gone from Airdrie to Glenrothes and back on the night of the fire-bombings. According to Mr Simpson, on that night, Mr Easton had asked him and Mr McHugh to go from Airdrie to Glenrothes in order to pick up Mr Easton at a gym. Mr Easton was supposedly dropping a car off to the appellant. They did not know where they were going. Mr Easton had phoned them en route to see where they were. Mr Simpson had called the appellant for directions at about 11.30pm. According to Mr Simpson, the appellant had been asleep. He had simply mumbled, as if awaking from sleep. Mr Simpson had told Mr McHugh, who had been driving, simply to go home. They did so. There had been no further contact with Mr Easton that night.

[10] DC Davidson gave evidence that, at about 11.22pm, Mr Simpson was recorded as phoning the appellant. The records of two calls, but not those of over 100 others, had been deleted from the appellant's phone. A duplicate record had been recovered from the service provider's database.

[11] One feature of one of the fire-bombings was that a Dunn's Spring Kola bottle was used. Dunn's lemonade is distributed in the Airdrie area, where both Mr McHugh and Mr Easton were living. DNA linked the bottle to Mr McHugh's family.

[12] On 29 March, Mr Simpson said that he and Mr McHugh had gone to the appellant's garage. They had then gone to Cupar. During the course of this journey, the appellant had phoned Mr Morgan's father, and had told him to tell his son that "he got that sorted last night so not to worry any more". The appellant had said to Mr Simpson that the call had been about what Mr Easton and "his pal were up doing" the previous night. They had burned the two houses. The appellant had stated that he had arranged for Mr Easton and his pal to go and burn the two houses, because he did not know "what one was what".

[13] Mr Simpson's testimony, which if believed would have been highly damaging to the appellant, was subjected to extensive cross-examination. This naturally focused on Mr Simpson's sudden liberation after months on remand. Mr Simpson's statement, which he said had been recently recorded by his own legal representatives in prison, had been forwarded to the Crown with a view to the acceptance of a not guilty plea. The cross highlighted the implausibility of the wasted trip to Glenrothes to meet Mr Easton and its coincidence with the fire-bombings; one suggestion being that he and Mr McHugh had gone to Glenrothes as the getaway drivers for Mr Easton.

[14] The evidence and cross of Mr McHugh was in a similar vein to that of Mr Simpson.

[15] DC Davidson gave evidence about website access from the appellant's phone. Between 29 and 30 March, it had repeatedly searched for websites with stories relating to the fire-bombings.

[16] In his interview with the police, the appellant said that he did not know that his younger brother had been involved in a fight. He denied knowing Dayle McLaren. He denied knowing Mr Simpson or having any contact with him at the relevant period. In his evidence, the appellant had admitted that he had told lies to the police in these respects. When he came to testify, the appellant accepted that he had been angry on seeing the attack

on his brother. He denied "swearing vengeance on those responsible". He had been unaware of the fire-bombings until the next day, when it was "all over Facebook".

Judge's charge

[17] The trial judge's directions are not criticised. The standard directions on the onus and standard of proof, corroboration and on issues of credibility and reliability were all given. Part of what the judge said to the jury is relevant in the overall equation of whether a miscarriage of justice occurred. First, he told the jury repeatedly that they required to consider the cases against each of the two remaining accused separately. Secondly, he told the jury to consider the criticisms of the Crown case which had been made in the speeches on behalf of the accused. Thirdly, he drew the jury's attention to the fact that Mr Morgan's father, to whom the appellant had allegedly spoken whilst Messrs Simpson and McHugh were in the car on the day after the fire-bombings, had not been called as a witness. He directed the jury that "if there is a decision by [the] Crown not to cite or to bring a particular witness and that failure gives rise to any reasonable doubt, then you must give the accused the benefit of that doubt" (ie must acquit). Fourthly, he directed the jury that "if there is a mystery in the case of whatever sort and it gives rise to a reasonable doubt then you give the accused the benefit of that doubt".

[18] In relation to the testimony of Messrs Simpson and McHugh, the trial judge said that:

> "as has been made plain by both [counsel for the accused] that's a situation which requires you to take a great deal of care in assessing their evidence, given that they had a motive ... a motive not to tell the truth with a view to securing their release and their departure from the dock".

This was a classic *cum nota* warning. He said later:

> "What about the position of the former co-accused, James Simpson and Jamie McHugh? The defence suggest they duped the Advocate Depute, conned the Crown, into releasing them from the dock and you've heard them give their evidence

> in court. Do you trust their accounts? Do you find their evidence reliable? If not then significant holes are made in the Crown case and you may feel that there is insufficient evidence upon which to convict".

[19] During the course of the trial, the judge had given the jury the standard direction about statements by one accused made outwith the presence of another. He repeated this in his charge to the effect that, if anything was said by the appellant about Mr Easton in his absence, this was not evidence against Mr Easton. The direction would, of course, apply to the appellant's description of the phone call to Mr Morgan's father concerning Mr Easton's involvement in the fire-bombings.

The ground of appeal and submissions

[20] The ground of appeal is that no reasonable jury, properly directed, could have returned verdicts of guilt against the appellant on the evidence presented. The appellant submitted that the Crown had been duped into leading and relying upon the evidence of Messrs Simpson and McHugh. They had been in the general area at the time of the fire-bombings. They had gone to the appellant's garage on the following day. It was the Crown's initial position that they had been involved in the plan, yet they had changed their position mid-trial. The accounts of Messrs Simpson and McHugh were so implausible that no reasonable jury could have accepted them. The appellant had deleted phone calls from Mr Simpson, but that ceased to be significant once Mr Simpson had been declared innocent. No reasonable jury could have taken them into account. There was no telephony evidence to connect the appellant with the perpetrator, whoever that may have been. That being so, and with Messrs Simpson and McHugh out of the picture, the jury would have had to have found that it had been pure chance that they had taken a complete stranger (to the appellant) to the appellant's garage and that the stranger (Mr Easton) had then agreed to

carry out the fire-bombings. The approach of the Crown was illogical at best. The Simpson and McHugh accounts were preposterous and absurd. The Crown had failed to lead evidence from the person (Mr Morgan's father) who had allegedly been the recipient of the phone call from the appellant during the post fire-bombing drive. The totality of the evidence was of such a character that no reasonable jury could have relied upon it. A sense of disquiet must be left when the jury were not satisfied of the case against Mr Easton.

[21] The advocate depute relied upon the standard authorities in relation to the test of "no reasonable jury". It was a high one and could succeed only in exceptional circumstances. The evidence required to be looked at as a whole. The evidence of Messrs Simpson and McHugh had been before the jury and subjected to cross-examination. Their credibility and reliability had been extensively criticised in the speeches to the jury. The jury were given a specific direction that they required to give careful consideration to the evidence of the former co-accused. The jury's acquittal of Mr Easton did not mean that the jury accepted that he had not started the fires. The evidence against the appellant included the admission that he had arranged for Mr Easton "and his pal" to burn down the two houses. This could not of course be evidence against Mr Easton and the jury had been so directed. There was a coherent and compelling body of evidence which supported the conclusion that the appellant had instructed Mr Easton to carry out the fire-bombings and which the jury were entitled to accept. The evidence from Mr Morgan, about the appellant's reaction to the recording of the attack on his brother by Mr McLaren, provided a motive to inflict violence on Mr McLaren. The appellant had made efforts to identify the McLarens' house. Mr Simpson had said that the appellant had referred to getting back at the people who had hurt his brother and that he was "getting it sorted". There was the reconnaissance. Mr Easton had been in the near vicinity of the *loci* shortly before the fire-bombings. The

deleted phone call records led to the inference that the appellant had taken practical steps to remove anything linking him with those people who were in turn linked to Easton. There was the admission and the analysis of the appellant's phone, indicating that he had a very keen interest in the fire-bombings immediately following their commission.

Decision

[22] The test which applies in relation to a contention that no reasonable jury could have returned a verdict of guilty on the evidence presented to them, has been described as a high one, which can succeed only in exceptional circumstances once, as here, it is accepted that there is a legal sufficiency of evidence. The appellant requires to satisfy the court that there was no cogent framework of evidence entitling the jury to return a verdict of guilt, having accepted that evidence as credible and reliable.

[23] The legal sufficiency is derived initially from the evidence of Mr Morgan. If accepted, this demonstrated, first, that the appellant had a motive for doing violence to Mr McLaren stemming from the attack on his brother less than a month before the fire-bombings. Secondly, it showed that, less than three weeks beforehand, the appellant had carried out reconnaissance on the very two houses which were attacked. Although Mr Morgan had said that the McLarens' house had been identified during this exercise, and it was therefore uncertain why the Spinks' address was also targeted, it is apparent that both houses had been pointed out for whatever reason. The jury would have been entitled to reject that part of Mr Morgan's testimony to the effect that he had made the McLarens' address clear to the appellant and determine that, at least in the mind of the appellant, the two houses were both candidates. Thirdly, Mr Morgan's evidence was to the effect that the appellant had threatened violence to Mr McLaren at the end of the reconnaissance mission.

[24] Leaving aside, for the moment, the testimony of Messrs Simpson and McHugh, there were a number of facts and circumstances to be taken into account in order to supply the necessary corroboration. The most obvious one was that the fire-bombings did occur. Having regard to the threats and reconnaissance, the jury would have been entitled to the view that this was not coincidental. In addition, there was the link between the fire-bombings and both Airdrie (from the Dunn's bottle) and, more particularly, Mr McHugh's family (from the DNA). There were the deleted calls from Mr Simpson's phone to the appellant at or about the time of the fire-bombings. The fact of deletion was a criminative circumstance, no matter how weak. Finally, there was the appellant's keen interest in the fire-bombings in the days immediately following. Although this too may not be the strongest factor, the jury would have been entitled to regard it as criminative when combined with the earlier threats and reconnaissance. The contention that the appellant was just interested in a local incident is not a convincing one, when he had no obvious connection with the addresses in Glenrothes other than in the context of the attack on his brother.

[25] This would all have been sufficient upon which to base a guilty verdict. It is a cogent framework of evidence, which the jury would have entitled to accept, irrespective of their view of the testimony of Messrs Simpson and McHugh. The trial judge's tentative direction that, if the jury rejected their testimony, they "may feel that there is insufficient evidence" was correct in so far as it left open the possibility that such a rejection would not, as a matter of law, require the jury to acquit.

[26] It is important to observe that it was a matter for the jury to make of the evidence what they wanted. Once it had been put before them, they were not bound to interpret it in the manner submitted by the Crown. They would have been entitled to take the view, as the

defence had submitted, that Messrs Simpson and McHugh had indeed "conned the Crown" and that the evidence established that they were involved in the fire-bombings, albeit that their precise roles may not have been capable of determination. The jury may have accepted their evidence, which was consistent with that of Mr Morgan, that, when they visited the appellant at his garage at Buckhaven, he had been threatening to "get it sorted". This would have brought Mr Easton into the equation and, thereby, such evidence as there was about Mr Easton's involvement in the context of the case against the appellant. That context included the evidence of the subsequent admission by the appellant, in his call to Mr Morgan's father on the day after the fire-bombings, that he had arranged for Mr Easton and "his pal" to burn both houses. Perhaps critically in the acquittal of Mr Easton, that was not evidence against him.

[27] As was submitted by the appellant, the denial of involvement by Messrs Simpson and McHugh may have been inherently implausible, given their seemingly abortive trip from Airdrie to Glenrothes at or about the time of the fire-bombings, when looked at in light of their connections with both the appellant and Mr Easton. However, that implausibility is of little assistance to the appellant. The jury would have been entitled to reject their denial and consider, on the basis of the rest of their evidence and the surrounding circumstances, that they had been involved in some way, despite the acceptance of their not guilty pleas by the advocate depute. That acceptance did not provide them with a certificate of innocence which was binding on the jury. If the jury rejected their denials, they would not thereby be precluded from accepting their testimony about the appellant's threats and his post event admission. Their acceptance of that testimony would have been entirely legitimate in terms of the general direction that they would be entitled to accept parts of a witness's evidence and reject others.

[28] The testimony of Messrs Simpson and McHugh was attacked by the defence. They clearly had something to gain by blaming the appellant and Mr Easton (ie their own liberty). In these circumstances, it was incumbent upon the trial judge to advise the jury at least that "they should take into consideration the criticisms which have been made of the witnesses in the course of the presentation of the defence case" (*Docherty* v *HM Advocate* 1987 JC 81, LJG (Emslie), delivering the Opinion of the Full Bench, at 95). The judge went further than this by giving his *cum nota* warning that the jury should "take a great deal of care in assessing their evidence". This is an important factor in the assessment of whether a miscarriage of justice occurred. The short point is that it remained for the jury to decide what parts, if any, of the testimony of the *socii criminis* to accept and what to reject. Whatever flaws there may have been, the jury were not bound to reject the entirety of their evidence. On the contrary, they could accept that the appellant had threatened violence towards Mr McLaren in advance of the fire-bombings and, perhaps more significant, had admitted instructing the fire-bombings on the day after they had occurred.

[29] There was accordingly a cogent framework of evidence that the jury were entitled to accept as credible and reliable and which entitled them to return the verdicts of guilty. The appeal against conviction must therefore be refused.

Sentence

[30] The appellant contended that, although the charges were serious, the sentence was excessive. Reference was made to the minimum recommendation in *Campbell* v *HM Advocate* 1998 JC 130, 2004 SCCR 220. The appellant was aged 34 at the time of the crimes. He was married with a young family. He had no significant record other than convictions for a breathalyser offence in 2000 and an assault in 2004, both of which had

resulted in non-custodial disposals. He operated his own car repair and maintenance business, which he had built up through his own efforts. The offence was, therefore, totally out of character. However, the appellant continued to deny his guilt. There was therefore, it was candidly accepted, no element of remorse.

[31] The trial judge reported that the *modus* was essentially throwing Molotov cocktails through the ground floor windows of the two addresses. Both houses were occupied. Most of the occupants were asleep. Most of them were children. In the McLaren house, not only was Dayle present, but also children aged 9, 7, 3, 2 and 13 months. In the second house, there were children aged 18, 13, 4 and 3. This is apart from several adults present in both houses. Mr McLaren sustained burns to his chest and torso. He was the most seriously injured. He was in hospital for 4 or 5 days.

[32] From his sentencing statement, which the trial judge reproduced in its entirety in his report, it appears that he took into account all of the relevant circumstances. Notwithstanding the appellant's largely crime free and both stable and productive background, having regard to the potential catastrophic effects of these crimes, it cannot be said that the sentence imposed for multiple attempted murders was excessive. The minimum recommendation attached to the life sentence in *Campbell* for the murder of six persons, including a baby, by fire-raising, in 1984 was 20 years. It is not comparable to the present sentence given the possibility of parole in the appellant's case after a much shorter period of imprisonment. The appeal against sentence must also be refused.