APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 55
HCA/2019/000262/XC

Lord Malcolm
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in

APPEAL AGAINST CONVICTION

by

DAVID DITCHBURN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Fyfe (sol adv); Bruce & Co (Arbroath)
Respondent: A Edwards QC, AD; Crown Agent

29 January 2020

[1] At the High Court sitting at Edinburgh on 15 May 2019, the appellant was found guilty on four charges, including charge 5, which was in the following terms:

> "On 9 or 10 August 2018 at Flat 2, 12 Brunswick Road, Edinburgh you DAVID CAMERON DITCHBURN did assault John Ashwood and did strike him on the head to his severe injury and you did kill him; you DAVID CAMERON DITCHBURN did commit this offence while on bail, having been granted bail on 16 July 2018 at Edinburgh Sheriff Court."

The grounds of appeal

[2] The appellant appealed against that conviction on the basis that the trial judge misdirected the jury in relation to the definition of culpable homicide as it applied to that charge. The trial judge wrongly introduced to the jury the possibility of a guilty verdict based upon the appellant's "reckless or grossly careless" conduct; the Crown case having been one confined to a deliberate assault upon the deceased, and the defence having been conducted upon that basis. Both the trial judge and the respondent concede that the directions complained of were misdirections in law. The issue in the appeal was whether they were material in the sense of having caused a miscarriage of justice.

The circumstances of the case

[3] At the trial a third party spoke to a small argument between the appellant and the deceased, and to the appellant punching the deceased on the side of his head. Elsewhere in his evidence this was described as "a wee slap". The appellant gave evidence to the effect that the deceased had started picking on the said man, to whom he became aggressive. The appellant intervened and the deceased landed a punch on the side of his jaw. In return he slapped the deceased with his left hand to the right side of the deceased's jaw. All three men sat down. Subsequently the deceased slumped off his seat and fell to the floor. There was no apparent injury but blood was coming from his mouth. Another person arrived and phoned for an ambulance. The following day the appellant told this person "I think I've killed him", referring to the deceased. In her report the trial judge states:

> "In essence, the appellant accepted that he caused the injury to John Ashwood's mouth but stated that he was acting in self-defence in the sense of defence of his

> friend ... and that he did not intend to cause any serious injury far less death to Mr Ashwood."

The jury heard expert medical evidence to the effect that complications of blunt force mouth injury were just one element in a multi-factorial death. The circumstances were somewhat unusual in that the assault was not, in itself, likely to cause a fatality.

The trial judge's report

[4] In her report the trial judge states that she directed the jury on the issue of self-defence, and on the requirements for the crimes of assault and of culpable homicide. If self-defence was rejected, in order to convict the appellant of culpable homicide the jury would have to be satisfied that an assault committed by the appellant was a material or significant contributory factor in the death. In the event the jury must have proceeded upon that basis. She advises that physical contact between the appellant and the deceased was not in dispute, but the nature of the intention, the *mens rea*, was contentious. She gave the jury the standard directions on culpable homicide from the jury manual. The options for the jury were:

1. accept the defence of self-defence and acquit the appellant;
2. reject the defence of self-defence but find that any assault had not materially contributed to the deceased's death; or
3. reject the defence of self-defence and find that the appellant assaulted the deceased and that the assault was a material cause of the deceased's death.

The charge to the jury

[5] There is no criticism of the charge to the jury in respect of self-defence, nor as to the crime of assault, which was correctly described as consisting of "a deliberate attack on another person." The appellant's complaint can be illustrated by reference to the following passage at page 32 in the transcript of the charge.

> "Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy. It is killing someone where the accused did not have the wicked intention to kill and did not act with such wicked recklessness as to make him guilty of murder. The unlawful act must be intentional or at least reckless or grossly careless. Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against, or acting in such a way which shows a complete disregard for any potential dangers which might arise. ... To convict of culpable homicide, you would need to be satisfied of the following: one, that David Ditchburn committed an unlawful act – in this case the act alleged is assault; secondly, that act must have been intentional or reckless or grossly careless in the sense I have defined; and thirdly, that John Ashwood's death was a direct result of the unlawful act."

The submissions

[6] It was common ground that during the trial there had been no reference to recklessness or gross carelessness, nor in the defence and Crown speeches. The topic was introduced for the first time in the judge's charge. For the appellant it was submitted that, in the whole context of the case, the jury could only convict on the basis of an assault causing death, something which would necessarily involve deliberate conduct on the part of the appellant. The concepts of recklessness and gross carelessness introduced by the judge were not relevant to the crime libelled. Page 33 of the charge records that the jury was directed as follows:

> "Now, I want to look at these elements in turn, but taking the first two together – that's assault and intention, recklessness or gross carelessness. I've already given you the definition of assault. So, first, on charge 5 you must decide whether it's been proved to your satisfaction that David Ditchburn struck John Ashwood deliberately and with the necessary intention or recklessness."

The earlier correct definition of assault as a crime of intent was contradicted in a manner which, whatever else, was confusing. In addition to the passage already quoted in paragraph [5] above, there was a similar misdirection at page 36 of the charge. It is a realistic possibility that the appellant was convicted upon an erroneous basis as to the necessary *mens rea*. It follows that the misdirection was material and productive of a miscarriage of justice.

[7] The Crown urged that the charge be viewed as a whole. The passages complained of should be read in the context of the evidence, speeches and the issues at the trial. Whether a misdirection amounts to a miscarriage of justice is a matter of fact and degree; *McPhelim* v *HMA* 1960 JC 17. Minor deviations from standard formulae would not normally be regarded as productive of a miscarriage of justice, if the directions on a particular topic are, when the charge is read as whole, clear and correct: *Sim* v *HMA* 2016 JC 174 Lord Justice General (Carloway) at paragraph 32.

[8] It was accepted by the Crown that the reference to recklessness was inappropriate, and potentially apt to confuse. However the issue for the jury was clearly one of deliberate assault as a result of which Mr Ashwood died. This was reflected in the charge on the indictment. The appellant stated that he intentionally struck the deceased, albeit in defence of another man. The jury would have understood what was required for an assault for the purpose of charge 5. In the whole circumstances the misdirection did not result in a miscarriage of justice.

Decision

[9] The court has no difficulty in preferring the submissions in support of the appeal. Causing death by reckless conduct, as opposed to an assault, is a separate crime, with a distinct *mens rea*. That crime was not charged. As noted above, the judge repeatedly linked the crime of assault with recklessness and gross carelessness. Those directions could have caused the jury to convict even though satisfied that the appellant did not assault the deceased; or that he acted in defence of the other man, but nonetheless behaved recklessly or with gross carelessness. The judge introduced and by repetition emphasised a new route to conviction which was outwith the terms of the libel, was not in issue at the trial, and was not mentioned during either the Crown or defence speeches to the jury. The Crown's invitation to conclude that the jury could not have been misled or confused on the key issues in the trial is rejected. The appeal is upheld, and a new sentence imposed limited to the convictions on the other charges. (After that was done, the court granted a Crown motion seeking authority for a fresh prosecution in respect of charge 5.)

Postscript

[10] The court has previously commented upon the importance of bespoke charges tailored to the particular circumstances of the trial and to the issues which the jury requires to determine. By way of example reference can be made to *McGartland* v *HMA* [2015] HCJAC 23 at paragraph 31, where it was stated that the manual is no more than a first port of call providing a useful checklist of points for judges to bear in mind. In the present case the trial judge lifted the directions complained of more or less verbatim from the manual at chapter 43, where, in the then current version, the focus was upon distinguishing murder and culpable homicide. However the crime of culpable homicide can occur in a wide variety

of circumstances, including, as in this case, when a relatively minor assault contributes to a death. In *Green and Others* v *HMA* [2019] HCJAC 76 (again in the context of the manual as then drafted), it was observed that, while the manual directions may be correct as a generality, they are not apt for a death brought about by an assault – see the judgment of the court delivered by the Lord Justice General (Carloway) at paragraph 66. It is noted that the manual has been revised to reflect the remarks in *Green*.