APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 49
HCA/2022/217/XC

Lord Justice Clerk
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION AND SENTENCE

by

RICHARD GORDON

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Shand; Faculty Services Ltd, Edinburgh for Doonan McCaig & Co, Glasgow
Respondent: Borthwick KC, AD; the Crown Agent

23 December 2022

The trial

[1] The appellant was convicted after trial of the attempted murder of Brian Cleary, including serious injury, permanent disfigurement, and permanent impairment, by repeated use of a knife. He was separately convicted of carrying a knife in a public place, contrary to section 47(1) of the Criminal Law (Consolidation)(Scotland) Act 1995. He had been indicted

along with a co-accused Brian Shields and there were cross-incriminations. Shields was acquitted.

[2] There was direct evidence from Shields that the appellant was the perpetrator. There was also a substantial body of circumstantial evidence which inculpated him.

[3] The victim was a reluctant witness, but there is no doubt that he was assaulted and that he had been severely injured. A joint minute agreed his injuries, which included several wounds, a pneumothorax and damage to the tendons of his left arm, and the treatment required.

[4] The appellant lived in a high rise block in Glasgow. The complainer said he went to the appellant's flat in the afternoon or evening of 3 October 2020. The appellant and Shields were there. The complainer consumed some drink or Valium, left the flat and woke up the next day in hospital. When he left the flat he did not see the appellant or the co-accused.

[5] A witness who lived near the appellant heard screaming from outside and saw someone (who on the evidence was obviously the complainer) leaning against a wall by a bus stop. This was about 1945 hours.

[6] CCTV footage showed the complainer leaving the block of flats and walking towards the area of the bus stop. Within seconds the appellant and Shields came out of the stairwell ground floor door and headed out of the building. CCTV filmed by an outside camera showed the appellant adjusting his tracksuit bottoms at the left pocket area, the inference being that he had something inside his lower clothing. Minutes later the appellant and Shields returned and the appellant appeared to have a long thin object down the back of his tracksuit. He and Shields were seen in animated conversation inside the lift. Footage of the bus stop, which was some distance away, was too indistinct to make out anything other than the presence of some figures.

[7] There was scientific evidence of the complainer's blood on a Ralph Lauren top recovered from the appellant's flat and a red puffer jacket recovered from Shields' flat. Shields could be seen wearing the puffer jacket in the CCTV footage. The opinion of the scientist was that the wearer of each garment could have inflicted wounds that caused the blood to be spattered or was close by when that happened. A machete and the Ralph Lauren top were recovered from the appellant's flat. The top was in the washing machine.

[8] There were also traces of the complainer's blood on the stairs, landing and walls on the 16th, 13th, 10th and 2nd floors of the appellant's high rise building. The appellant lived on the 16th floor and there was significant blood staining on a wall in the stairwell on that floor.

[9] The appellant was interviewed by the police. He told them that the complainer had come to his flat and left to go and see someone downstairs. He said he did not see the complainer again and repeatedly denied that he had gone downstairs in the company of a then unknown male, who must have been Shields. He denied he possessed a Ralph Lauren top. He denied using the stairwell to go from his home because he was wearing a moon boot on his right foot and had mobility issues. He used the lift because of that. He denied being in possession of a knife and denied assaulting the complainer.

[10] There was ample evidence to show that the appellant had lied about numerous elements of this account. It was agreed by joint minute that the appellant, Shields and the complainer were the people shown on the CCTV footage. The appellant was wearing a grey hooded top with dark sleeves and Shields was wearing a red puffer jacket.

[11] The appellant did not give evidence. Shields gave evidence that he was in the flat with the appellant when the complainer came in. The appellant and the complainer were arguing and the latter left the flat, uninjured. The appellant then left and Shields followed. At the bus stop the appellant and the complainer were fighting. Shields admitted joining in

by punching and kicking. The appellant then pulled out a knife and stabbed the complainer. It was a black handled knife about 6 inches long. Shields panicked when he saw the knife and ran off.

The appeal against conviction

[12] Ground one contends that the trial judge misdirected the jury by failing to tell them that they could not convict the appellant on both charges based on the same *species facti*. It was asserted that a conviction under charge 2 depended on proof that the appellant had the weapon with him with the intent of causing injury since the weapon was neither offensive *per se* nor adapted for causing injury. It was further asserted that, leaving aside the circumstances of charge 1, the evidence that the appellant had the knife with the intention of causing injury was scant to non-existent. The argument advanced was that (i) an accused cannot be convicted of two offences on the same *species facti;* and (ii) that this meant that the same evidence could not be relied upon for conviction on two separate charges, even where one was a common law charge and the other a statutory one, and notwithstanding that the components required for proof of the one offence differed from the components of the other.

[13] It was said that the approach in *Rodger* v *HM Advocate* 2015 JC 215, being inconsistent with what happened in *McLean* v *Higson* 2000 SCCR 764, was wrong and should be departed from. In *Rodger* v *HM Advocate* the appellants were convicted of a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (behaving in a threatening or abusive manner, in a way likely, and intended, to cause a reasonable person to suffer fear and alarm, or reckless thereanent) and of a contravention of section 16A of the Firearms Act 1968 (possession of a firearm with intent to cause a person to believe that

unlawful violence will be used against him or another). In response to an argument that they could not be convicted of both charges on the same evidence, the court said that:

> "[15] … the Latin term *species facti* means simply the facts which must necessarily be established to constitute the offence in question. A body of evidence covering a course of conduct or sequence of activities may well involve the commission of offences with different *species facti*. Where two offences are charged there may be a partial overlap in the set of facts which has to be established for each offence. But in our view a partial overlap does not equiparate with identity in the *species facti*.
>
> [16] In our view, the *species facti* — or factual ingredients — necessary to constitute the two statutory offences with which the appellants were jointly charged are not the same."

The court observed at para [21]:

> "[21] As we understood him, the solicitor-advocate for the first appellant accepted that, where an offensive weapon was used in an assault, and the evidence demonstrated possession of the weapon in a public place in the time leading up to its actual use, there was nothing inept in a charge of assault being accompanied by a charge of possession of the weapon in issue. Again as we understood him, this acceptance was offered because it was recognised that the crime of using the weapon was different in its factual constituents from the possessory offence; and in time it preceded the former. The only basis upon which the solicitor-advocate for the first appellant suggested the present case might be distinguished was that the time involved was 'short'. In our view that is plainly not a relevant distinction."

The foregoing observations in *Rodger* v *HM Advocate* accurately state the law on these issues. It follows that the legal basis of this ground of appeal is not well founded.

[14] In *McLean* v *Higson* the accused had been charged with assault by striking someone with a knife, and a charge under section 47(1). However, the jury did not convict of assault by using the knife, but merely by presenting it. The Crown consented to the conviction on the statutory charge being set aside. It is unnecessary to decide whether the concession ought to have been made, but we entertain some doubt as to whether it should have been. The reason may have lain in a policy decision that where the use of the knife consisted in mere presentation of the knife, the Crown would not seek conviction separately on the statutory charge (see commentary in the SCCR report at p 766).

[15] In any case, it is incorrect to say that it was only the facts showing commission of the first charge which proved the intent required for the second charge. The requisite intention, and that it had been formed prior to the actual assault, could be inferred from the fact that after their argument the appellant followed the complainer from the building, at which point he was seen fiddling with an object which could have been the knife. There was thus evidence apt to prove each offence independently of the other.

[16] The second ground of appeal relates to directions concerning the appellant's police interview. It is not disputed that in respect of matters relating to his movements and clothing there was evidence demonstrating that the appellant had lied. Counsel for the co-accused focused on the evidence of the co-accused incriminating the appellant, and the lies told by the appellant to the police. He suggested that the reason the appellant had lied was that the co-accused account was truthful. In the course of his charge, dealing with these submissions, the trial judge said:

> "It's a matter for you to decide if Richard Gordon was lying and if he was why he was."

It was submitted that the trial judge should have told the jury that if they concluded that the appellant lied in his police interview that would not entitle them to conclude that he was guilty or was likely to be guilty. They should have been directed to put out of their minds any evidence they did not believe.

[17] It seemed to us that counsel's development of his argument was effectively an attempt to argue that the effect of the trial judge's charge was to invite the jury to consider corroboration, or at least proof, by false denial. We are not willing to entertain that argument. It was not foreshadowed in the grounds of appeal. In any case, we are satisfied that it is not a good argument. It would in fact have been a misdirection for the judge to tell

the jury that the lies by the appellant had no relevance. It would probably have been more accurate for the trial judge to tell the jury that if they concluded that the appellant lied about these matters it may have a bearing on their overall assessment of his police statement. That would have accorded with the thrust of the speech for counsel for the co-accused which was to ask the jury to prefer the account given by the co-accused in evidence over the contents of the appellant's statement. As the advocate depute pointed out, the judge told the jury that if they rejected a piece of evidence they should simply put it to one side and not jump to the opposite conclusion; that there was no onus of proof on the defence, and they could draw no adverse inference from the fact that the appellant did not give evidence; and that it was for them to evaluate the appellant's interview, giving them directions on how to do this. The single sentence focused on by counsel for the appellant needs understood in that context. A central issue in the case was whether the evidence of the co-accused should be believed, or whether the appellant's police statement should be given credit. Taking the charge as a whole we do not consider there to have been any material misdirection, let alone a miscarriage of justice.

The appeal against sentence

[18] The judge imposed a sentence of 7 years on charge 1 and a consecutive sentence of 3 years on charge 2. In his report he said:

> "The appellant has a very bad record for violence with convictions at High Court and Sheriff and Jury level. He has 16 previous convictions for offences including rape, assault and robbery and assault to severe injury. He was convicted in 2009 for a s.49 offence (knife) and sentenced to 11 months custody. Again, in 2016 he got 18 months for a s.49 offence. He clearly has not learned his lesson. Against his record, these were separate offences, that merited separate sentences, which I imposed to run consecutively given the appellant's record for having a knife/weapon in a public place."

[19] The submission for the appellant was that the sentences should have been concurrent. Reference was made to *Allan* v *HM Advocate* 1997 SCCR 23 where concurrent sentences were imposed, although it was recognised that a different approach had been adopted in other cases, eg *Campbell* v *HM Advocate* 1986 SCCR 516.

[20] The question whether sentences should be concurrent or consecutive is a matter for the court to decide having regard to all the factors in the case, including the extent to which the offences are separate, the circumstances and places in which they took place, and the record of the accused (*Nicholson* v *Lees* 1996 JC 173). This is recognised in the Scottish Sentencing Council's Guideline on the Sentencing Process, para 31:

> "When the offender appears for sentence on more than one offence and the court decides to impose separate custodial sentences for two or more of the offences, it is up to the court to decide whether the sentences are to be served concurrently (at the same time) or consecutively (one after the other). This applies whether the offences are on the same complaint or indictment or on separate ones."

[21] It is essential to have regard to the cumulative effect of consecutive sentences. It is important to consider whether that effect is excessive having regard to the actions of the accused and his prior convictions. The cumulative sentence should be fair and proportionate (Scottish Sentencing Council, Guideline on the Principles and Purposes of Sentencing, para 1). This is reflected in the Sentencing Process Guideline, in respect of consecutive sentences specifically, at para 34:

> "When sentencing for multiple offences the total headline sentence must be fair and proportionate."

[22] The question for us is whether an overall sentence of 10 years for the offences of which the appellant was convicted can be said to be excessive. Counsel for the appellant frankly stated that had the judge imposed a *cumulo* 10 year sentence he would have had difficulty in suggesting that it would have been excessive. As the trial judge pointed out the

appellant has a bad record. He has been convicted twice before in the High Court (rape and assault and robbery), and on five separate occasions at Sheriff and Jury level (assault, assault to severe injury; assault and robbery, and possession of a knife (repeatedly)). He is now 41 years of age, and the present very serious charges suggest that neither time nor age has remediated him. The jury was satisfied that the actions of the appellant had the quality of attempted murder. It was fortunate for the complainer that prompt surgical repair of his tendons prevented serious lasting damage to the arm. The appellant armed himself with a knife, took it with him into a public place with the intention of using it to cause harm, and attempted to murder the victim with it. In these circumstances, against his very bad record, we cannot say that an overall sentence of 10 years is excessive.

Disposal

[23] For the foregoing reasons the appeal against conviction and sentence is refused.