APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 4
HCA/2023/000403/XC

Lord Matthews
Lady Wise
Lord Armstrong

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal Against Conviction

by

JOHN MATTHEW FINDLAYSON BROWN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: I. Smith, John Pryde & Co SSC for Bready & Co, Glasgow
Respondent: Prentice KC, AD; Crown Agent

18 January 2024

[1] The appellant was convicted of assaulting GC by striking him on the head with a bat or similar object and repeatedly striking him on the body with a knife to his severe injury and permanent disfigurement. In due course the trial judge imposed an extended sentence with a custodial term of 5 years and an extension period of 2 years. No appeal is taken against the sentence.

[2] Unusually the complainer gave evidence for the appellant not the Crown. In evidence-in-chief he stated that the appellant was not the person who assaulted him and in cross-examination the Crown challenged his evidence by putting to him parts of a police statement in which he implicated the appellant.

[3] During the course of their deliberations the jury asked to see the complainer's statement but the trial judge, having considered submissions by counsel, refused this request. Amongst other considerations the whole contents had not been led in evidence. Counsel for the appellant invited the judge to give a direction to the jury as to what use they could make of those parts of the statement which they had heard but the judge refused to do so. It is now contended that the jury may have considered that the complainer's statement constituted evidence of fact implicating the appellant. It was not capable of being so used and a miscarriage of justice has therefore resulted. Having heard counsel's submissions, we refused the appeal and indicated that we would give our reasons in writing, which we now do.

The evidence

[4] There was no dispute that the complainer had been assaulted. The appellant and the complainer knew and lived across the road from each other. At about 9.00pm on the evening in question, a neighbour saw the complainer outside, indicating to her that he had lost his house keys. She went out to help him look for them. He had one arm in a sling and was drunk. The search was fruitless and she returned to her flat.

[5] About 11.00pm she saw the complainer going into the appellant's flat. Shortly afterwards, she heard them arguing and shouting. In particular, she heard the appellant shout "I'm just fed up with you". The shouting went on for about 10 minutes. She then

heard banging and scuffling as if they were fighting and the complainer shouted "Don't. Don't. You're my pal". It briefly went quiet and she then heard them arguing in the street. She looked out and saw the appellant holding a "shiny silver stick" over his shoulders behind his head. She saw the complainer running away from him and heard the appellant shouting "Don't come back in this street you ned".

[6] The police attended just after 11.00pm and found the complainer nearly covered in blood from injuries to his head and torso. An ambulance attended and he told the paramedics that a person had hit him with a bat and a knife in his home. He was taken to Queen Elizabeth University Hospital and was found to have puncture wounds to his stomach, each about 3cms long, and an 8cm laceration to the back of his head. The stomach wounds were treated with steri-strips and the head wound with five staples.

[7] The police went to the appellant's flat and before entering they saw him at a kitchen window apparently washing something. On entry they saw blood on the front door, on a banister, on the living room wall and on the kitchen floor. This was agreed to be the complainer's blood. A broken sling similar to the one the complainer had been wearing was found on the living room floor and DNA attributable to the appellant and the complainer were in due course found on the inside surfaces. The forensic scientists concluded that one possible explanation for this was that there had been an altercation between them. The police noticed that the washing machine was on and inside were a pair of tracksuit bottoms, a pair of trainers and various other items. A yellow handled knife was lying in an open kitchen drawer and it had drops of water on it as if it had just been washed.

[8] At interview the appellant claimed that his door had been unlocked and the complainer had come in looking for help. He had been in a fight and was bleeding all over the place. He was only in the house for 2 minutes and, when he left, the appellant might

have walked out with him, carrying a silver crutch. He had only one sharp knife in his house, the one in the drawer.

[9] The complainer's account was that he had been assaulted by a group of boys in the park at the back of his house, that he was drunk, that the appellant was a friend, that he had gone to the appellant's after the assault for help and that he did not remember giving a statement. In both chief and cross he said that it was not the appellant who had assaulted him. In cross he said he would probably have been shouting and did not dispute saying "Don't. Don't. You're my pal". He remembered the appellant trying to put him out of the flat. It was put to him that he told the police that the appellant attacked him and that he said to the appellant "Are you gonna fucking stop? You're gonna fucking kill me." He did not really know what he had told the police but these things were not true.

[10] In addressing the jury, the advocate depute relied upon the various pieces of circumstantial evidence which we have outlined. It was not suggested that the complainer's prior statement was evidence of fact. The position of the defence was, broadly speaking, that the circumstantial evidence was equally consistent with the accounts of the appellant and the complainer.

Submissions for the appellant

[11] The jury's request to see the complainer's statement suggested that they may have considered that the parts of the statement referred to could be used as evidence of truth. The trial judge should have directed the jury specifically that the complainer had not accepted that the statement was true and that they could not use it as evidence of truth. Reference was made to the Jury Manual page 36.4-131 at paragraph 11. It was necessary and in accordance with normal practice to have given such a direction (*Khan* v *HM Advocate* 2010

SCCR 514) and the failure to do so kept open the possibility that the jury might have failed to give the prior statement "proper consideration" (*Lumsden* v *HM Advocate* 2011 SCCR 648). Reference was also made to the High Court of Justiciary Practice Note No 2 of 2017 in relation to prior statements.

[12] The judge's refusal to give a further direction had left the jury in a position where they could have accepted the content of the statement as having been true (*Masocha* v *HM Advocate* [2016] HCJAC 15). The fact that the trial judge had given general directions at the outset of the trial about the use to which prior statements could be put was not sufficient. A specific direction tailored to the evidence of the complainer was required. Under questioning by the court, however, counsel accepted that the fact that the complainer had not adopted his statement was obvious and that if the jury had followed the introductory direction they could not have found that the statement was evidence of fact.

Submissions for the Crown

[13] The judge's directions were sufficient and there was no miscarriage of justice. The jury must be assumed to have followed the directions which they were given (*Clow* v *HM Advocate* 2007 SCCR 201, *SS* v *HM Advocate* [2023] HCJAC 48). Whether a specific direction was required was fact-sensitive (*Moynihan* v *HM Advocate* 2017 JC 71). A direction on the use of prior statements was intended to clarify for the jury the use to which a statement might be put, not to advise them simply that a prior inconsistent statement could be used to undermine a witness's evidence. That was obvious (*JM* v *HM Advocate* [2019] HCJAC 9). It was misconceived to look at isolated passages of a judge's charge. The correct approach was to look at the charge as a whole (*Withers* v *HM Advocate* 1947 JC 109). The Crown in this case had relied solely upon circumstantial evidence and had never invited the jury to accept the

complainer's police statement as evidence of fact. The judge's directions were sufficient in the circumstances of this case. There had been no question of adoption of the complainer's statement and neither speech had suggested the statement was evidence of fact. Furthermore, the judge noted in his report that it would not have been helpful for the appellant had he reminded the jury that shortly after the assault the complainer had implicated him in it. It was mere speculation to assume that the jury had approached the statement in the way which was now suggested.

Analysis and decision

[14] We agree with the advocate depute that it is important to consider the judge's directions as a whole. The directions include the introductory directions, of which the jury have a copy. In those directions the judge told the jury the following:

> "Witnesses may also be asked about earlier statements made by them to other people. There are three main reasons for this. (First) to jog the memory of the witness, who may then be able to give evidence from recollection. (Second) to enable the witness to adopt an earlier statement, which then becomes evidence. Statements are adopted in this sense if they are proved to have been made by a witness and the witness accepts that they were telling the truth at that time. And (third) an earlier statement may be used to undermine a witness's evidence. It may be used to contradict what the witness has said in court by demonstrating that the witness had said something different on an earlier occasion. The earlier statement, unless adopted, is not evidence of the truth of what is in it, but it is available to help you in your assessment of the witness's evidence."

[15] In his charge to the jury, the trial judge reminded them of the need to comply with the initial directions. At a later point in his charge he reminded the jury that there were various purposes for which a witness might be referred to a prior statement. One of those was to enable the witness to adopt as part of their evidence something they said shortly after the incident. He explained this as follows:

> "Something is adopted in this sense if the witness confirms saying it and that they were telling the truth at the time, in which case it becomes part of their evidence of the facts of the case and this is to be assessed in the same way as you assess the rest of their evidence."

[16] He also reminded the jury that the complainer gave evidence that contrary to the allegation in the charge he was assaulted not by the appellant but by other unidentified persons. The appellant had given a similar account.

[17] As we have indicated, counsel conceded that the fact that the complainer had not adopted his statement was obvious. He also conceded that had the jury followed the introductory direction they could not have proceeded upon the basis that the prior statement was evidence as to fact. Those concessions could hardly have been withheld and are clearly correct. The complainer plainly did not adopt his statement and the jury could not have thought otherwise. They were bound to follow the direction which they had been given and are presumed to have done (*Clow* v *HM Advocate)*. It was not necessary for the trial judge to repeat the direction. The jury in any event had a copy of it.

[18] Unlike the cases relied on by counsel for the appellant, there was in fact a direction given as to the use to which prior statements could be put. The appeal rests on speculation and an assumption that the jury did not follow the directions they were given. It has no merit.

[19] In these circumstances we refused it.