APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 66
HCA/2019/000129/XC

Lord Menzies
Lord Drummond Young
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in

Appeal against Conviction

by

DAVID KINLOCH

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Fyffe, Solicitor Advocate; Paterson Bell
Respondent: A Prentice QC; (Sol Adv), AD; Crown Agent

26 September 2019

[1] On 30 January 2019, the appellant was convicted after trial before a sheriff and jury at Dunfermline Sheriff Court of three charges in the following terms:

> "(1) on 30 December 2017 at Craigmyle Street, Dunfermline, Fife and elsewhere Fife you David Darren Kinloch did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did repeatedly shout and swear, repeatedly utter threats of violence towards Kieran Locke, c/o the Police Service of Scotland whilst in possession of a knife and pursue

him; Contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;

(2) on 30 December 2017 at Craigmyle Street, Dunfermline, Fife being a public place you David Darren Kinloch did without reasonable excuse or lawful authority have with you an offensive weapon, namely a knife; Contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 section 47(1) as amended; and

(4) on 30 December 2017 at Paton Street, Dunfermline, Fife and elsewhere Fife David Darren Kinloch did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did repeatedly shout and swear, challenge police officers to fight, utter threats towards police officers and threaten to set your dog on said officers; Contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

The sheriff adjourned the diet for sentence until 25 February 2019 on which date the appellant was sentenced to 3 years 6 months imprisonment *in cumulo* on charges 1, 2 and 4.

[2] The appellant sought leave to appeal against both conviction and sentence but leave to appeal against sentence was refused. We heard submissions from Mr Fyffe in support of the appeal against conviction. This proceeded on the basis that a miscarriage of justice occurred owing to the sheriff's refusal of a defence motion in the course of the trial that the diet should be deserted because a witness on the Crown list who was called on behalf of the defence (and who was the appellant's partner), mentioned in the course of her cross-examination by the procurator fiscal depute that the appellant had a previous conviction for culpable homicide.

In his report, the sheriff narrated the evidence for the Crown as follows:

> "The complainer in charge 1, Kieran Locke and his partner Toni Young lived opposite the appellant and his partner, Amanda Britt. At some point in the evening, a van stopped in the street and some of the occupants shouted abuse in the direction of the appellant's flat. Mr Locke and his partner later heard screaming coming from the appellant's flat and Mr Locke went over to see if Miss Britt was alright. He knocked on the door which was answered by the appellant who shouted at him, threatened him and chased him back across the street while carrying a knife in his sleeve. Part of the Crown evidence was a recording and transcript of a 999 call made by Mr Locke before he went over. He forgot to close the call and on the recording can be heard knocking on the door screaming and the appellant saying *inter alia* "it's

nothing to dae wi you" in response to Mr Locke asking after the welfare of the witness. Mr Locke's evidence was supported by his partner.

By the time the police arrived in response to the call from Mr Locke the appellant had walked up to a local park with his dog. Police officers saw him but at that stage had not connected him with the earlier disturbance. He had however been told that the person involved in the disturbance had a knife. He called over to the appellant who immediately became very aggressive and threatening. He acted in the manner alleged in charge 4 as amended included threatening to set his dog on them. The dog was on a leash but both the appellant and dog were moving towards the officers with the dog on his hind legs. Both officers were terrified. The female officer retreated to the police vehicle. Both officers thought that they may not survive. The male officer sprayed the appellant however this had no effect. He then drew and 'racked' his baton. This eventually caused the appellant to cease his behaviour."

[3] The sheriff went on to narrate the evidence led for the defence as follows:

"The appellant gave evidence. He said that after the confrontation with the people in the vehicle, he and his girlfriend sat in his flat listening to music. Neither did anything untoward and Miss Britt was not screaming or shouting for help. He did not know who it was who was screaming and shouting on the 999 recording. The complainer in charge 1 came to his door and banged and kicked it. The appellant then said that he chased him across the street. He accepted that he repeatedly shouted and swore and threatened violence. He denied that he had a knife.

Miss Britt's evidence was as follows. Miss Britt had been allowed to give evidence by CCTV from Glasgow as she had said she was scared of having to come to Dunfermline. In examination in chief she was asked about the earlier incident. She gave evidence along the same lines as the appellant, namely that they had been sitting in the flat listening to music when the appellant came banging and kicking at their door. There was an argument and she had tried to get the appellant to come back into the house. She was 110% sure that the appellant did not have a knife. In cross-examination the procurator fiscal depute did not ask any questions about the vehicle. She did ask about the account of what happened when Mr Locke came to her door and challenged the witness's account. She suggested there may be a recording of that from a 999 call. Unsurprisingly perhaps the witness was surprised as she knew that she had made a 999 call earlier which would not have picked up anything. She became irate at the questioning. However at that point I was able to calm her down by saying that there may have been another call. The procurator fiscal depute thereafter attempted to make clear to the witness that Mr Locke had also called 999 from his house and that had picked up the noise. The procurator fiscal depute was unable to complete her explanation before she was interrupted by the witness who began to shout abuse at the procurator fiscal depute including repeated swearing. ... She also shouted similar abuse at me for allowing the questioning. She then got up from her seat and disappeared from sight."

[4] The sheriff determined that the witness would no longer be given the opportunity to give evidence from Glasgow and would have to attend at Dunfermline court where he would have greater control over the proceedings. He discharged the jury until the following day. He had a message passed to the witness that if she undertook to attend voluntarily he would accept that. He received a message back from Glasgow that she refused to do so. He accordingly issued a warrant for her arrest.

[5] The witness attended at Dunfermline Sheriff Court on 30 January 2019 and her cross-examination continued. Part of the call was played to her and when she was asked to explain how that fitted with her evidence perhaps unsurprisingly she had difficulty in doing so. When pressed on the point she started to become irate and claimed that it all arose because Mr Locke did not want them in the street because the accused had been convicted of culpable homicide having killed his former partner.

[6] For the purpose of the present appeal, the Crown and Mr Fyffe for the appellant have lodged a joint minute agreeing the transcript of an extracted passage of the cross-examination of Amanda Jane Britt by the procurator fiscal depute on 30 January 2019. It is clear from this extract that after the recording of the 999 call made by the complainer Locke was played to the witness, she was unable to reconcile what was heard on the recording with her evidence. She became angry and upset and said she wanted to go home and she did not really care about this. There are two passages in this transcript which are of direct relevance to the submissions in this appeal and which we repeat. (It being agreed in the joint minute that PF means the procurator fiscal depute and AB the witness Amanda Jane Britt).

> "PF: The person we hear shouting there 'it's nothing to do with you' that is David Kinloch isn't it?

AB: Aye I think so.

PF: Right, so that call covers right up from the point that Kieran attends at your door and knocks on your door to the point where David answers the door, doesn't it?

AB: Aye I think so.

PF: Right. And yet we hear no kicking or banging on your door and we hear a female scream.

AB: Right.

PF: That doesn't fit in with what you said happened Amanda does it?

AB: I don't really care. I just want to go home just now. I'm no being rude I just, just want to go home.

Sheriff: Answer the question please.

AB: I, I don't care it is, I don't really care about this.

Sheriff: Well ...

AB: At the end of the day David did not have a knife. It was me that phoned the police. David did not have a knife. They've never chased anybody with a knife but apparently it was a dog (inaudible) that David chased eh. On his Facebook it was a dog (inaudible). David just gave me a metal dog lead. I dinae think so.

Sheriff: Miss Britt, Miss Britt ...

AB: All because of David's background, all because of David's background ...

Sheriff: (Inaudible)

AB: Because David got done with culpable homicide. Are you having a laugh? That's why the neighbours don't like us. It's because of David's background.

Sheriff: Miss Britt you're not helping yourself.

AB: I'm no trying to get arrested again or anything sheriff ...

Sheriff: (Inaudible)

AB: I'm just simply saying David got done for culpable homicide and that is why the neighbours didn't like me or David."

And at a later stage of the transcript of this cross-examination:

"PF: Amanda you're here to do nothing but lie to the ladies and gentlemen (inaudible)

AB: No I'm not. If David, if David had been caught with a knife Kieran had said in that 999 call and (inaudible) that David Kinloch was caught with a knife on him. No he wisnae. David never ... David ran out of our hoose with his mobile phone on him.

PF: Amanda ...

AB: Because he never got caught with a knife on him. So Kieran Locke doesn't like me an David cos of David's criminal history, because David had killed somebody.

PF: Yes you seem quite keen to bring that out Amanda.

AB: Aye I do aye! Cos I've had it up to here with people agantising (*sic)* us coming to the house. Cars and vans sitting outside my property at night trying to intimidate us. We get spat on, we get called names. He gets called a beast, he gets called a bully. I get called scum because I got out with him because he went and killed his ex-girlfriend. Well it's not happening any more hen. I'm absolutely sick to the back teeth of it. David's done his time for the crime. What he done to Sonia Todd it's done with, it's oer wi. Why we're still getting picked on?"

[7] After the witness had completed her evidence, a motion was made on behalf of the appellant to desert the diet. In his report to this court, the sheriff narrates the competing submissions for and against this motion and his reasons for refusing the motion as follows:

> "During the course of submissions the Crown explained to me that in 2018 the appellant had been prosecuted for other offences on indictment in Kirkcaldy Sheriff Court. The witness gave evidence. During the course of two trials, she said in front of the jury that the accused had been convicted of culpable homicide. On the second occasion she had been warned prior to giving evidence that she should not do so. As a result of her actings the first two trial diets had to be deserted *pro loco et tempore*. Prior to the start of the trial in this court, the procurator fiscal depute advised the appellant's solicitor that she would not be leading the evidence of the witness. If the defence wished to do so they should take steps to warn the witness not to mention the conviction. She was advised were the witness to mention the conviction there would be no motion to desert. The appellant's solicitor, who I understood also acted

for him the Kirkcaldy case, informed me that he had advised the appellant not to mention the conviction for culpable homicide although the appellant's initial instinct was to do so in order to explain the abuse from the occupants in the van.

The defence was accordingly careful not to mention it during his evidence or the evidence in chief of Miss Britt. In light of the prior history, the Crown was on notice that questioning of Miss Britt had to be carried out with great care. It was accepted that the question asked did not invite the answer given. The Crown urged me to find that the witness had said what she had in a deliberate attempt to derail the proceedings. She had done so twice before.

I refused the motion for a variety of reasons but I did not consider it necessary to reach a concluded view on the issue of whether the witness deliberately gave the evidence relating to the conviction with the intention of engineering desertion of the indictment. I considered that could only be determined in the context of contempt of court proceedings in which Miss Britt would have the opportunity to respond. I was not however persuaded that the case should be deserted. It seemed clear to me that the witness was always likely to behave in an erratic matter if pressed with questions she found difficult to answer. This was known by the appellant's solicitor. The witness must have known perfectly well that she was not to make mention of the conviction. The appellant's solicitor took a decision not to remind her of that prior to her giving evidence. The solicitor had said that if she spoke about it he would not seek a desertion. That I considered was a minor consideration. Had the question asked been such that the evidence was invited, I did not consider that the defence was somehow personally barred from seeking a desertion. My primary reason for refusing the motion was the issue that the jury would have to determine.

The only factual issue in dispute was whether the appellant was in possession of a knife. The appellant had admitted acting in an extremely threatening and aggressive manner. I did not see that a conviction, no matter how serious, would sway the jury in relation to the limited issue they had to determine. I considered that any prejudice could be cured by clear directions in relation to the conviction. Those I gave between pages 8 and 10 in my charge. I had also dealt with Miss Britt's other outburst at pages 4 and 5 of the charge. This direction was largely a repeat of what I had said to the jury when I had sent them home when the witness had left the room the previous day. Had I deserted the trial, it seemed to me that, unless the Crown did not challenge the witness at all, it would be highly likely that there would have been a repeat of the outburst at a future trial if the witness felt under pressure. So the witness refused the motion to desert and decided to deal with the matter in his charge to the jury."

[8] There are two passages in the charge which have some relevance to this appeal. At page 4 of his charge the sheriff gave the following directions:

"And in particular at this point, I think it's only fair, well it is fair for me to make a few remarks about the outbursts which you have heard from both the accused and

> Miss Britt during the course of their evidence. Whatever you may think about their behaviour in court, you may not think that necessarily impacts upon the principal issues in this case which are fairly narrow. You must not think that just because they behaved very badly or what you may perceive to have been very badly, that that necessarily means that they must be telling lies about the central issue of the case. As I say, you do not know how they normally react to stress."

[9] And then at page 8 he gave the following directions. He began with the opening remark "now I want to deal with briefly what you may not take into account" and he went on:

> "Now in this context you've heard evidence from Ms Britt that they were all against them because of a conviction for a serious crime by the accused. Assume for a moment that that's right. It is irrelevant for the purposes that you're dealing with whether he was convicted of that, you may think, has really nothing to do with whether he was carrying a knife and the other issues which you'll have to determine on that evening. You have no idea what it was about apart from very briefly as to the nature of the possible victim. But you don't know any detail and it cannot impact on the issues which you have to deal with because he's admitted that he effectively has a very short temper and he behaved in the manner which was spoken to apart from having a knife. And as I say what he may or may not have done at some time in the past doesn't really impact on that question. Even if there was evidence, which there isn't, that something, that there was a knife involved in the last one, we don't go in for rounding up the usual suspects in this country. Merely because somebody has done something once, that does not mean that he will have necessarily done it a second time. So you have to determine on the evidence which is before the court, on this evening, whether or not he committed these offences. Alright?"

[10] It is important to note three matters which are dealt with in the written submissions for the appellant. First, it is accepted that the witness' initial "outburst" was spontaneous and was neither the fault of the prosecutor nor the sheriff. It is clear that the witness was determined to continue to speak notwithstanding the sheriff's repeated attempts to stop her. Secondly, the second outburst might be viewed slightly differently in that it occurred in response to robust and confrontational questioning. However, it is not suggested that the questioning was unfair or inappropriate. Even if it could be said that the prosecutor was unwise to have approached the continuation of cross-examination in such a robust way

standing the earlier outburst, nothing in this appeal founds upon any suggestion of wrongdoing by the Crown. By the time of this second outburst the appellant's criminal conviction had already been revealed to the jury. (For the avoidance of doubt the averment of carelessness on the part of the Crown giving rise to the appellant's conviction being revealed which is contained in the note of appeal, was not insisted upon). Third, the learned sheriff's directions in relation to the previous conviction are found at page 8, line 19 to page 10, line 2 of the charge. In short, the jury was directed that the previous conviction was not relevant to and should have no bearing upon their consideration of whether the appellant possessed a knife at the material time. No criticism is made of these directions.

[11] Mr Fyffe accepted under reference to *Fraser* v *HM Advocate* 2013 SCCR 674 that the fact that a witness has referred in evidence to an accused's previous convictions is not necessarily determinative of the question of whether the accused will receive a fair trial and that the sheriff is afforded a wide discretion in deciding how to deal with this. However, he submitted that the sheriff erred in the exercise of that discretion and that the appellant's previous conviction was so prejudicial that a fair trial could not be achieved by means of the jury being directed to ignore it. He submitted that the sheriff erred by failing to give sufficient weight to the prejudicial effect that the appellant's previous conviction might have. Amanda Britt referred to it more than once. On the second occasion she made an explicit reference to the appellant having killed someone. There was a significant risk that this would discredit him and materially impact upon the assessment of whether he or the Crown witnesses were telling the truth about his possession of a potentially deadly weapon.

[12] Furthermore, whilst it may not have been the principal consideration of the sheriff, the terms of his report suggest that he considered the potential future conduct of the witness as relevant to the question of whether the appellant will receive a fair trial. He submitted

that this was an error. No weight should have been attached to the likelihood of a repeat of the witness' outburst. The question for the learned sheriff was whether the circumstances rendered the trial irretrievably unfair. The witness' potential future behaviour was not relevant to the question of whether the appellant suffered material prejudice in the current trial.

[13] The advocate depute submitted that the consequences of disclosure of a previous conviction are dependent on the facts and circumstances of each case and it was a matter for the trial sheriff to determine whether the disclosure had so compromised the prospects of a fair trial that desertion became imperative if a potential miscarriage of justice were to be avoided. A wide range of factors fell to be taken into account.

[14] The trial sheriff was best able to assess the possible impact of the disclosure on the jury in light of all that had happened during the trial, and a wide discretion was afforded to the sheriff. He referred to *Fraser* v *HM Advocate* at paragraph 58, *Cameron* v *HM Advocate* 2017 SCL 923 at paragraphs 17-20. He also submitted that fault or lack of fault by the questioner was a relevant factor under reference to *Binks* v *HM Advocate* 1984 JC 108 and *Duncan* v *HM Advocate* 2013 HCJAC 153. Desertion is an act of last resort to be taken only where the actual or perceived unfairness is so material that no step short of abandoning the trial can address it (under reference to the Opinion of the Court delivered by Lord Justice General Carloway in *HM Advocate* v *RV* 2017 SCCR 7 at paragraph 12).

[15] The advocate depute submitted that in the present case the trial sheriff took into account all the relevant factors and exercised the wide discretion conferred on him in a balanced and reasonable way. His decision to refuse the motion to desert was sound and showed no error of law and his subsequent charge to the jury was clear and sufficient to meet any potential prejudice to the appellant. There had been no miscarriage of justice.

Decision

[16] The starting point is the reasoning of the court in *Fraser* v *HM Advocate* at paragraph 58:

> "Finally, even if there had an implied breach of the prohibition, it would have remained for the trial judge to determine in the first instance whether the breach had so compromised the prospects of a fair trial, in the domestic sense, that desertion became the imperative if a potential miscarriage of justice were to be avoided. In this area, the court places considerable weight on the views of a trial judge making the decision at first instance. He has the benefit of presiding over the trial and judging the context of the answers within what, in this case, was a lengthy trial process. He has a considerable advantage over an appellate court in understanding the realities of the situation. The trial judge is best able to assess the likely, and possible, impact of the answers on the jury in light of all that has happened during the trial. Thus he is afforded a wide discretion in deciding whether: (1) to ignore the offending evidence and do nothing lest the matter be emphasised; (2) to direct the jury to ignore that evidence and, as here, to advise the jury that they should do so because it has "no bearing on the matter before them"; and (3) to desert the diet because of the inevitability of an unfair trial as a result. In this case, the trial judge took into account all of the relevant factors before deciding upon the appropriate course of action. He reached a balanced and reasonable decision based upon these factors. In such circumstances the court is unable to find fault in his decision."

[17] Desertion is indeed a last resort. As it was put by the Lord Justice General, Lord Carloway, in giving the Opinion of the Court in *HM Advocate* v *RV* at paragraph 12:

> "An ongoing High Court trial for serious offences, such as those libelled in the indictment in this case, should be deserted at the instance of the court only when it has become abundantly clear that the circumstances warrant such drastic action. It may be merited where for example irreparable unfairness is perceived to have occurred already or whether is a material risk that the proceedings will inevitably become unfair (*HM Advocate* v *Fleming* at paragraph 33, *Fraser* at paragraph 51). That can only arise if the problem cannot be cured by an adjournment, an adequate direction to the jury or by introducing some other reasonable procedural or evidential step. Desertion is in this sense an act of last resort, to be taken only where the actual or perceived unfairness is so material that no step short of abandoning the trial can address it."

[18] It is important in the present case to remember that it is accepted on behalf of the appellant that no fault attaches to the procurator fiscal depute or to the sheriff and that the

disclosures of the previous conviction by this witness were not as a result of unreasonable or risky questioning. It is also worth noting that it was accepted before us that there was a discussion between the procurator fiscal depute and the agent for the appellant before the witness gave evidence, in the course of which the procurator fiscal depute suggested that if the defence wished to call the witness, they should take steps to warn her not to mention this conviction. The defence agent chose not to do this, but told the procurator fiscal depute that were the witness to mention the conviction there would be no motion to desert.

[19] It is clear from his report to this court that the sheriff addressed the central question, namely whether in light of the disclosure of this previous conviction, a fair trial was possible. We consider that he applied the correct test to that question. He was clearly alert to the fact that this was a previous conviction for a serious offence. He carried out a careful assessment of the prejudice which might result to the appellant if the motion to desert were refused and in the course of that assessment, carried out a balancing exercise.

[20] We do not consider that he fell into error in this assessment and he was in the best position to carry it out. In light of that assessment, he decided that the best way of dealing with the witness' disclosure of the previous conviction was to deal with it in his charge to the jury. He gave full, clear and careful directions to the jury on this matter and no criticism is made of these.

[21] There is nothing to support the submission for the appellant that the sheriff did not attach adequate weight to the seriousness of the previous conviction. It is clear from his report that he did so.

[22] It was accepted on behalf of the appellant that the past behaviour of the witness in disclosing this same previous conviction in earlier trials was a factor which the sheriff would properly take into account when reaching his decision, but it was submitted that the sheriff

was not entitled to take into account the possibility that she would do the same thing in a future trial if he deserted this trial. We do not agree. First, although the sheriff made reference to the likelihood of the witness doing the same thing in the future, this did not form part of his reasoning for refusing the motion to desert. And in any event this is an inference which the sheriff was entitled to draw from the information before him about the witness' previous conduct and her conduct in the trial before him.

[23] Moreover, it appears to us that having been given careful directions in the judge's charge, the jury reached a discerning verdict (as was accepted by Mr Fyffe before us). Despite the disclosure of the previous conviction, the jury deleted the words "brandish said knife" from charge 1.

[24] In all the circumstances of this case, we are not satisfied that the sheriff erred in his decision to refuse the motion for desertion. There has been no miscarriage of justice, and this appeal will be refused.