R v Balmer
COURT OF APPEAL (CRIMINAL DIVISION)

CARSWELL LJ23 FEBRUARY 1996

23 February 1996CARSWELL LJ
In this appeal brought by leave of the single judge the appellant appeals against his conviction on 20 February 1995 at Ballymena Crown Court following a trial before His Honour Judge Hart QC and a jury on one count of manslaughter. He also appeals against the sentence of three years' imprisonment imposed upon him by the learned trial judge on 6 March 1995.

The charge against the appellant arose out of an incident which occurred on 29 March 1994, when Siobhan Dickson was struck in the head and neck by one shot discharged from a firearm then being held by the appellant. The shooting occurred about 4 am, after an evening and night during which the appellant, the deceased and others had been drinking at a public house in Ballymena, then spent some time at the appellant's house at Crosskeys, talking, drinking and listening to music. By that time all the persons concerned appeared to have drunk a good deal, and the quality of their recollection was rather poor.

The weapon in question was a legally held 9mm automatic pistol, which the appellant had the previous morning placed in the drawer of a table in the living room of his house. He had a licence to keep this weapon because he worked for a construction company which carried out work at security bases throughout the Province and was at personal risk at work and at home from terrorist attack. He had fired some practice shots with the gun the previous morning, then placed it in the drawer, containing a loaded magazine, with a round in the breech, with the mechanism fully cocked and the safety catch off. When putting the weapon there he took none of the steps ordinarily regarded as advisable to make it safe. He had not removed the magazine; he had not worked the mechanism so as to eject the round from the breech and ensure that the weapon was not cocked; he had not even put the safety catch on. Nor did he take any of these steps when he removed the weapon from the drawer. In the condition in which the gun was when he took it from the drawer it required only a fairly light pressure on the trigger for it to discharge a round. He acknowledged in the course of cross-examination that when the gun was in that condition he would have to exercise extreme care if it was not to go off. The appellant said in evidence that he had decided to go to bed, and that before doing so he took the gun from the drawer to take with him to his bedroom rather than leave it in the drawer overnight, where other people in the house might interfere with it. He agreed that when he took it from the drawer he must have placed his finger on the trigger and exerted some pressure, at a time when it was pointing towards the deceased, for there was no other way in which the shooting could have occurred.

During his cross-examination Mr Weir for the Crown put these points to the appellant, then asked him (page 64 of the transcript):

"Q 549 Tell me this, Mr Balmer, do you not accept that it was monstrously careless to leave a weapon in that state and even put it into the drawer?"

The appellant replied:

"A Yes, it is, but there would be nobody who would be near it."

Mr Weir went on to ask if it would be grossly negligent, but at that point defence counsel objected to the line of questioning. The judge discouraged counsel from questioning the appellant in a form of words phrased in terms of gross negligence, but at page 66 one finds that counsel again asked the appellant if handling the weapon when he had been drinking was not in itself monstrously careless, with which the appellant agreed. He used the phrase again at page 74 when asking the appellant about putting his hand into the drawer to handle a lethal weapon, and the appellant's counsel objected to the use of the phrase. The judge ruled that in avoiding the use of the words "grossly negligent" and in using the words "monstrously careless" Crown counsel was pursuing a proper line of questioning, and at page 78 counsel put it to the appellant that he killed the deceased through his "very great carelessness", to which the latter again agreed.

The notice of application for leave to appeal submitted on behalf of the appellant contained a multiplicity of grounds of appeal, but at the hearing before us Mr McCrudden QC on his behalf confined himself to three:

(a) The phrase "monstrously careless" was no more than a synonym for gross negligence, and in putting it to the appellant counsel was asking him to express an opinion on the ultimate issue for the decision of the jury. This was unfair, and in permitting it the judge erred in law and this gave rise to an irregularity.

(b) The judge should have permitted the defence to call Dr RJ Davidson to prove that he was suffering from post-traumatic stress disorder and fading recollection.

(c) The judge misdirected the jury when he drew a distinction between a minor degree of carelessness on the one hand and gross negligence on the other, and should have allowed or invited them to consider a range of careless behaviour in between these extremes which might fall short of gross negligence.

We shall consider these grounds in reverse order.

We do not consider that there is any substance in the last ground. The judge correctly directed the jury that the requisite degree of negligence for a finding of guilty under this category of manslaughter was gross negligence, conduct amounting to a crime deserving of punishment, and quite properly contrasted it with a minor degree of carelessness for which the appellant should not be held criminally liable. Mr McCrudden submitted that an implication arose from his charge that if the appellant's conduct went beyond a minor degree of carelessness it would constitute gross negligence. We do not accept that, nor do we think that the

judge was bound to expatiate on all the possible gradations of negligent behaviour, so long as he accurately explained the criterion which the jury was to apply. He gave the jury a sufficient explanation of the standard which they should apply, and his charge did not in our judgment contain any misdirection.

The grounds of appeal relating to the exclusion of the evidence proposed to be given by Dr Davidson are those contained in grounds 5 and 6 in the notice of application for leave to appeal:

"5 The learned trial Judge erred in law in refusing to admit the evidence of Dr RJ Davidson, Clinical Psychologist to the effect that the Applicant was, at the time of giving evidence on his trial, continuing to suffer from the psychiatric illness of post traumatic stress disorder, the said evidence being acutely relevant to the jury's understanding and appreciation of the Applicant's ability to understand, appreciate and follow questions and to give evidence and in his presentation of, and demeanour in giving, the said evidence.

6 In refusing to admit the said evidence the learned trial judge failed to give adequate or any consideration to the essential reasons for which the defence sought to have the said evidence received, namely to demonstrate to the jury that the Applicant was, because of his condition, impaired in his ability to concentrate on, follow, and properly respond to questioning."

The appellant's counsel applied to the judge in the absence of the jury to have the evidence of Dr Davidson admitted. At an early stage in the debate the judge heard the content of the evidence which Dr Davidson proposed to give, then after hearing further submissions gave a brief ruling that the evidence was not admissible. Subsequently, after the conclusion of the trial and before passing sentence, he gave his detailed reasons for so holding.

Dr Davidson is a clinical psychologist. Though not a medical practitioner, he said that he could diagnose the appellant as suffering from a neurotic mental illness, the identification and treatment of which was within his regular work and his expertise. He gave it as his opinion that he was suffering at the time of trial from post traumatic stress disorder. The effect of this condition was to make him emotionally blunted and detached, dazed and disoriented and unresponsive to his surroundings and to questioning and to cause him difficulty in concentrating over a period. The appellant himself described his symptoms as a feeling that he was "fading in and out".

Mr McCrudden submitted that the judge should have admitted Dr Davidson's evidence, in order to explain to the jury why the appellant exhibited signs in giving his evidence of poor memory and lack of concentration. It would enable them to understand his demeanour and the manner of presentation of his evidence, from which they might otherwise have taken it that he had been prevaricating and evasive. He submitted that the judge had examined the law relating to the admission of such evidence in detail and stated it correctly, but that he had misapprehended

the purpose for which it was proposed to adduce the evidence. The judge said at the conclusion of his ruling:

"In the light of the concessions made under cross examination the purpose of calling Dr Davidson was clearly to bolster the defendant's case by discrediting those parts of his evidence which were damaging whilst preserving those parts which were thought to be favourable and by unmistakable inference true."

He ended by categorising the object of the evidence as the prohibited one of inviting the jury to regard part of the appellant's evidence as true.

The argument on behalf of the appellant has some foundation, in that the evidence does appear to have been directed towards explaining the appellant's demeanour and apparent lack of recollection in giving evidence, from which the jury might otherwise have drawn adverse inferences about the honesty and reliability of his account of the shooting incident. This class of testimony is in principle admissible, as distinct from that which is directed towards the content of the evidence itself and designed to persuade the jury that it was likely to be true. In classing the proposed testimony as being of the latter category we consider that the judge was mistaken.

There is, however, a different reason why the testimony of Dr Davidson should have been rejected, that of relevance to the issues in dispute between the parties. There was no dispute as to the essential facts of the incident. The appellant admitted that the gun was loaded and ready to fire when he took it out of the drawer and that he must have applied pressure to the trigger when it was pointing in the direction of the deceased. His criminal liability depends on the assessment of these unvarnished facts, and there is nothing which was left in doubt or equivocal or which the jury might have decided more favourably towards the appellant if he had presented his evidence in a better light. There accordingly was nothing in this case to which evidence to explain the demeanour of the defendant was relevant. If this point had been put before the judge he would in our view have been bound to exclude the evidence. We therefore do not consider that the exclusion of the evidence on another ground operated unfairly in any way towards the appellant.

We turn then to the final ground of appeal, the questions directed by Crown counsel to the appellant concerning the standard of his carelessness. We are of opinion that the phrase "monstrously careless" was so close to the standard of gross negligence applicable that its use was virtually a synonym, and that in effect counsel was asking the appellant about a standard which was the ultimate issue for the jury. We propose therefore to examine the effect upon the trial on the basis that the impugned questions should be regarded as having been directed to that ultimate issue.

The traditional rule of the common law is that while evidence of fact is admissible, evidence of opinion is not (subject always to an exception for expert opinion evidence). The two most commonly stated reasons for this rule are, first, that the opinion of the witness is irrelevant and, secondly, that if it were to be admitted the function of the jury would be usurped: see May on Criminal Evidence, 3rd ed, paras

8-03 and 8-04. The former reason would appear to be of questionable validity, for the probative value of the opinions of some witnesses may be considerable. The latter is another example (the best known being the rule against hearsay) of the traditional practice of the common law to keep away from the jury evidence which the judges felt they could not be trusted to handle with sufficient discrimination.

In common with other traditional rules of evidence, this rule against admission of evidence on the ultimate issue has been substantially eroded in recent years. In Director of Public Prosecutions v A and BC Chewing Gum Ltd [1968] 1 QB 159 the decision of the Divisional Court was that the evidence in question was not directed towards the ultimate issue. Lord Parker CJ said, however, in the course of his judgment at page 164:
"I myself would go a little further in that I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any objection. No doubt when dealing with the effect of certain things on the mind science may still be less exact than evidence as to what effect some particular thing will have on the body, but that, as it seems to me, is purely a question of weight."

In R v Stockwell (1993) 97 Cr App R 260 the issue was debated in the context of a witness described as a facial mapping expert giving his opinion whether a man depicted in a video film of a robbery taken by a security camera was the appellant. The court held that it was properly admitted. Lord Taylor of Gosforth CJ said at page 265, referring to DPP v A and BC Chewing Gum Ltd, [1968] 1 QB 158 that the prohibition against an expert giving his opinion on the ultimate issue, if it exists, has long been more honoured in the breach than the observance. He cited with approval Cross on Evidence, 7th, pp 500, in which it was stated:

"It is submitted that the better and simpler solution, largely implemented by English case law, and in civil cases recognised in explicit statutory provision, is to abandon any pretence of applying any such rule, and merely to accept opinion whenever it is helpful to the court to do so, irrespective of the status or nature of the issue to which it relates."

Lord Taylor also referred to Hodgkinson, Expert Evidence: Law and Practice, pages 152-3. In that passage the author discusses whether an expert witness can express an opinion whether the particular facts before the court constituted insanity, or whether he is restricted to stating what types of behaviour demonstrated insanity in persons generally, leaving it to the jury to draw inferences in the particular case. The author states:

"There is little doubt however that such a distinction is not now rigorously observed, and given that expert evidence of this kind is to be put before a jury, it may be suspected that the often casuistic distinction between the general and the particular

is either ignored by juries, or seen as a distinction of form rather than substance. It has been suggested too that some defences in criminal proceedings can in effect only be raised by adducing expert evidence, and that: 'it would put an insuperable difficulty in the way of the defence whenever they were trying to establish insanity' if such evidence were to be excluded by an ultimate issue or other analogous rule.

After examining these sources in Stockwell Lord Taylor concluded at pages 265-6:

"The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work referred to say, a matter of form rather than substance.

In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."

The authority of the traditional rule is accordingly weak, if not non-existent, in the modern law governing opinion evidence given by expert witnesses. One should not overlook, however, that in Sherrard v Jacob [1965] NI 151 this court by a majority held that opinion evidence of police officers as to the capacity to drive of a motorist who is under the influence of alcohol was not admissible, accepting pro tanto the continuing validity of the rule. It is relevant to mention, moreover, that some American and Commonwealth authority would maintain the existence of the rule in relation to the application of an essentially legal standard, such as that of negligence (see Cross on Evidence, 8th ed, pp 552-3 and the cases cited there), and it may have to be decided in due course whether it should be regarded as continuing to exist in that sphere. Certainly it would seem undesirable in general that an expert witness should be asked to give his opinion on the essential question whether the acts or omissions of a defendant in a criminal case should be regarded as negligent or grossly negligent: see the dissenting judgment of Lord MacDermott LCJ in Sherrard v Jacob at page 156. It may be that the trial judge should retain the power in appropriate cases to "stop the expert short of doing the jury's work for them": Murphy on Evidence, 5th ed, p 507, citing the American Federal Rules of Evidence. The immediate question is whether the defendant himself can properly be asked a direct question on the ultimate issue of gross negligence (as in effect he was), or whether it may be unfair to him to allow such a question. In our opinion the issues are rather different from the admission of expert opinion evidence on the issue. The defendant is not being asked to usurp the jury's function by "doing their work for them". He is being confronted with the facts which lead towards the conclusion of his guilt and being asked whether that conclusion is not correct. Such a process occurs constantly in cross-examination, for example, where apparently damning facts are put to a defendant accused of shoplifting, who is then asked trenchantly a question such as "Is it not perfectly clear that you intended to steal this article?" It could not be suggested that such a question was unfair. We should be reluctant to attempt to lay down a comprehensive rule, for it is possible that cases may occur

where unfairness could result from directing questions to the defendant on the ultimate issue, more particularly where it concerns some matter involving technical or expert knowledge. We consider, however, that the discretion of the trial judge to ensure the fairness of the trial is sufficient to cover any such cases and that a general rule against asking a defendant questions of this nature does not exist and is not required.

We are satisfied that in the appeal before us no unfairness of any kind was caused. The facts pointed inexorably towards a finding that the acts and omissions of the appellant were careless to an extreme degree. We do not consider that any unfairness resulted from his being asked whether those acts and omissions constituted monstrous carelessness, which amounted to putting it to the appellant that he was guilty of its synonym gross negligence. It was quite open to him to deny the conclusion and attempt to justify himself. In fact he accepted the charge of monstrous carelessness, but it was a virtually inescapable inference. One could not say that it was unfair to ask him to draw it. We are accordingly of the opinion that this ground of appeal is not well founded. None of the grounds of appeal against the appellant's conviction has been made out, and the appeal against conviction will be dismissed.

Mr MCrudden submitted that the sentence of three years' imprisonment was on the facts of the case manifestly excessive. There is a dearth of decisions directly in point on sentence in cases of manslaughter resulting from gross negligence. On one side of the line is the case of R v Lappin (1993, Omagh Crown Court), in which the late Higgins J imposed a sentence of four years' detention in the Young Offenders' Centre on a plea to manslaughter in a case where the defendant discharged a shotgun negligently and fatally injured a friend. The defendant lodged an appeal in respect of the sentence, but abandoned it before the hearing. We have perused the statements of evidence in that case, which was a serious one and very clearly distinguishable from the soldiers' cases to which we shall refer in a moment. The defendant, a youth of 17 years, had himself loaded the gun and taken part in an extended session of horseplay involving the gun, which was obviously extremely dangerous. In the course of this the gun went off while the victim was holding it and the defendant was grappling with him. The defendant accepted that he must have had his finger on the trigger. He then attempted to conceal his part in the affair and dispose of the gun. We do not have any details of the extent to which the soldiers' cases were brought to the judge's attention, but he had himself imposed the sentence in one of them, so he certainly would have known at least of that case.

On the other side of the line is a series of cases in which serving soldiers pleaded guilty to manslaughter where the deaths were caused by negligent discharge of firearms. In several of these the discharge occurred in a sanger and was brought about by the defendant's failure to clear his weapon properly or follow standard procedure for handling firearms. The trial judges sentenced the defendants to terms of imprisonment varying from twelve to eighteen months, but suspended the sentence in each case.

In one case, that of Michael Anthony Kane (1995, Belfast Crown Court) the defendant, a soldier serving in the Royal Irish Regiment, shot his girlfriend at their home with a negligent discharge from his personal protection weapon, a Walther pistol. He made the case that he had removed the magazine from the pistol when he returned home after being out drinking, but forgot that he had left a round in the breech, and when he foolishly pointed it at his girlfriend and pulled the trigger it went off and shot her. MacDermott LJ imposed a sentence of three years, suspended for three years.

One English authority was cited to us, R v Wesson (1989) 11 Cr App R (S) 161, where the appellant waved his shotgun about and pointed it while cleaning it, saying that it was unloaded, and shot his son. He was charged with murder, but found guilty of manslaughter, and sentenced to seven years' imprisonment. The Court of Appeal reduced it to two years. Staughton LJ said that the public would rightly demand a significant sentence of imprisonment, but that seven years was too long.

We have taken all these cases into account. We do not regard any class of defendant, soldier or civilian, as being in a special category, and the law must maintain evenhandedness towards all. We regard all the cases cited to us as depending on their own facts, and the sentence in each reflects the view taken by the individual judge of the culpability of the defendant in the circumstances in which the death occurred. On the facts of the present case we are of opinion that the acts of the appellant were inexcusably dangerous. In our judgment a custodial sentence was required and a suspended sentence would not suffice to mark the seriousness of the appellants acts and omissions. We consider that the judge was right in his approach, but taking into account the greater range of information about other cases which we have had made available to us we think that an appropriate sentence would be one of 18 months. We shall allow the appeal against sentence, which will be varied accordingly.

Appeal Against Sentence Allowed