IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION)

B E T W E E N :

ALEX JONES

Appellant

- v –

R

Respondent

SKELETON ARGUMENT FOR THE APPELLANT

Introduction

1. The Appellant appeals to the Supreme Court against the decision of the Court of Appeal to reject the appeal against conviction.

2. The Appellant contends that the trial judge erred in law through:

   a. misdirecting the jury as to the law regarding causation; and
   b. misdirecting the jury as to the availability to the Defendant of the defence of self-defence

3. The Appellant has been granted permission to appeal in respect of both of these.

Factual Background

4. The Appellant was one of three individuals who robbed a corner shop. The Appellant was the last to enter the shop, and was unarmed. One of the Appellant's friends was carrying a knife and threatened the shop keeper, causing him to hand over money from the till. As the Appellant and her

friends were leaving, the Appellant was apprehended by the shop's security guard, who dragged her back into the shop and punched her in the face.

5. The Appellant then saw the security guard reach behind the shop counter to pick up a cricket bat. Thinking that she was going to be beaten with the bat, the Appellant lunged at the security guard, knocking him to the ground, and causing him to hit his head and become unconscious. The shop keeper then called an ambulance which arrived 30 minutes later. At hospital the security guard was given medicine to which he had a rare allergy, and subsequently died.

6. On the issue of causation, the learned judge gave the following direction to the jury: 'Ladies and Gentlemen of the jury, if you find so that you are sure, that once the defendant's initial blow to the body of the deceased man started a chain of events which ultimately culminated in his death, then you must find that she killed the deceased.'

7. On the issue of mens rea, the learned judge directed the jury: 'If then you find that the defendant's initial blow was struck with the intention to kill or cause grievous bodily harm to the deceased man, you must find her guilty of murder, as in the circumstances of this case the defendant is not entitled to raise any possibility that her use of force was lawful.'

Authorities

8. The Appellant relies on the following authorities:

- *R v Cheshire* [1991] 1 WLR 844
- *R v Hughes* [2013] 1 UKSC 56
- *DPP v Bailey (Michael)* [1993] 44 WIR 327
- *R v Keane and R v McGrath* [2010] EWCA Crim 2514
- *Palmer v R* [1971] 1 All ER 1077

The First Ground of Appeal

The Judge misdirected the jury by eliding the tests for factual and legal causation

9. The trial judge had a duty to inform the jury of the law relating to causation (*Pagett*, per Goff LJ, confirmed in in *Cheshire* at [p.848B-C]). The trial judge was therefore obliged to address the

question of whether the actions of the medical intervener broke the chain of causation and thereby absolved the Defendant of criminal liability.

10. The trial judge could have addressed the law on causation by directing the jury that the Appellant's act need not be the sole or the main cause of the result, or equally he could have directed the jury that the act must contribute in some more than minimal way to the death (*Cheshire*, per Beldam LJ, at [p.852B] and *Hughes*, per Lords Hughes and Toulson, at [33]).

11. In using the language of 'a chain of events which ultimately culminated in his death', the trial judge misdirected the jury because he elided the tests for legal and factual causation. It is possible for some action *p* to 'culminate' in consequence *q*, without *p* being analysed as 'contributing to *q* in some more than minimal way.'

12. The result of this misdirection is that that there was almost no likelihood of the jury finding that the Defendant did not satisfy the *actus reus* for murder. Following the language of the direction it cannot be said that it was open to the jury to conclude anything other than that the prosecution had established, as a matter of fact, that the Defendant caused the victim's death. Consequently, the direction had the result of stripping the jury of their function as finders of fact. The learned judge's misdirection rendered the conviction unsafe.

The test regarding medical intervention in Cheshire should be expanded

13. The current test set out in *Cheshire* for where medical negligence constitutes a *novus actus interveniens* is effectively a two-stage test. First, unforeseeably bad medical treatment must be established, and second, this treatment should be the sole significant cause of death (*Cheshire*, per Beldam LJ, at [p.851G]). This test renders medical intervention as a *novus actus interveniens* on in the 'most extraordinary and unusual case.'

14. Public policy considerations support amending this test to account for cases where medical intervention was not negligent and where the cause of death is distinct on any common sense view from the initial act by the Defendant. The Appellants therefore propose to include one further question in the current test: either the medical treatment must be unforeseeably bad, *or* the medical circumstances must have been unforeseeable, and then the medical intervention must be the sole significant cause of death. This additional question would be left to the jury as a question of fact.

15. *Cheshire* addresses the question of criminal causation deliberately in the context of the relationship between criminal and civil law (page 849C). However, the criminal law should be capable of analysing cases which fall beyond the realm of clear criminal culpability and civil negligence. The proposed amendment preserves the sentiment from *Cheshire* of the unusualness required to break the chain of causation, but dilutes the requirement to apportion liability. The amendment thereby allows for greater legal flexibility, and provides a mechanism for preventing unjust murder convictions.

The Second Ground of Appeal

16. Additionally or in the alternative, the learned judge erred when he said in the second limb of the direction: '*If then you find that the defendant's initial blow was struck with the intention to kill or cause grievous bodily harm to the deceased man, you must find her guilty of murder, as in the circumstances of this case the defendant is not entitled to raise any possibility that her use of force was lawful*.'

17. The judge correctly directed the jury on the *mens rea* for murder: intention to kill or cause grievous bodily harm.

18. However, the judge misdirected himself and the jury when he said that D was not entitled to raise the possibility that she had used lawful force (self-defence).

The issue of self-defence was one for the jury

19. Neither common law nor statute exclude the offence of murder from the defence of self-defence.

20. The issue of self-defence should be left to the jury where there is evidence 'which if accepted could raise a prima facie case of self-defence' (*Bailey* p.1).

21. The question therefore is whether, on the extant facts, there was evidence sufficient to raise a prima facie case of self-defence. The case of *Bailey* provides guidance on determining this issue:
    a. the question is one for the trial judge to answer by applying **common sense** to the evidence in the particular case (*Bailey* pp.4-5)
    b. Whether self-defence can fairly be said to arise depends in any case on an **analysis of the facts** relied upon by the accused (*Bailey* p.5). In other words, the court must consider "all

the circumstances" of the case to determine whether D acted in self-defence (*Keane* at [5(3)]).

22. Applying a common-sense analysis to the facts relied upon by the accused:
    a. D's act was one single push, not a prolonged or frenzied attack;
    b. D did not use a weapon, nor had she brought a weapon to the shop with her;
    c. The act was not premeditated;
    d. The act was not predicated on revenge;
    e. D was reeling from a punch to the face;
    f. She had been punched in the face by V, an adult, male, security guard;
    g. She could see that V was reaching for a cricket bat;
    h. She knew that he was willing to use violence, and had every reason to believe that he would use the cricket bat to beat her, especially given that he had dragged her back into the shop;
    i. Moreover, the prosecution accepted that the appellant struck her initial blow against the deceased in order to defend herself.

23. Therefore, on a common-sense analysis, there was evidence sufficient to raise a prima facie case of self-defence. Where the threshold is passed, 'the jury's attention *must* be directed to these factors if they arise' (emphasis added); it is 'a test solely for the jury' (*Keane* at [5(3)]). The learned judge was wrong not to leave the issue to the jury.

The correct direction

24. Given that the jury must make a finding of fact on whether D acted in self-defence, the jury must be told the relevant law about the defence: 'the fundamental rule of summing-up remains the same. The jury must be told the law which applies to the facts which it might find' (*Keane* at [6]).

25. The defence of self-defence requires two tests to be met (*Keane* at [5]). The jury should have been asked to consider both:
    i) What was D's genuine, subjective belief at the time of the act (the subjective test); and
    ii) Given this belief, were D's actions 'reasonable, or proportionate (which means the same thing' in all the circumstances (the objective test) (*Keane* at [5(3)]).

26. Applying the facts of this case to the subjective test, it was open to a jury to find that D genuinely believed herself to be in serious physical danger, for the reasons outlined at paragraph 22 (e)-(h) of this skeleton argument.

27. The second limb – the objective test – requires the jury to consider whether the force used by D was 'more than a reasonable man would consider necessary' (*Palmer*, p.1). In answering this question, the jury 'must be reminded' that 'there is in a confrontation no opportunity for the kind of hindsight or debate which can take place months afterwards in court', also known as 'agony of the moment' factors. Where 'the defendant must act on the instant … and does no more than seems honestly and instinctively to be necessary, that is itself strong evidence that it was reasonable'. (*Keane* at [5]).

28. Applying the facts of this case to the objective test: D, a woman, in fear of being beaten with a cricket bat and reeling from a punch to the face pushed V, a male security guard, once in the chest. In the case of Keane, it was held that 'a single blow was proportionate. The unforeseen serious injury from falling on the back of the head does not affect the proportionality of the single blow' (*Keane* at [15]).

29. Thirdly and finally, the jury should have been directed that it is for the *crown* to disprove the defence of self-defence such that the jury is sure (*Keane* at [21]). (An appropriate direction as to this point was provided in the case of *Palmer* at p7).

30. With respect, the learned judge has erred in conflating the *mens rea* for murder with the defence of self-defence. The correct approach, which distinguishes the two analyses, was articulated in Palmer: 'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable ground he believes is necessary to prevent and resist the attack. And if in using such force he kills his assailant he is not guilty of any crime *even if the killing was intentional*' (*Palmer*, p.6). Even where the *actus reus* and *mens rea* for murder are established, self-defence can be found, and it operates as a complete defence. It should have been left to the jury as the tribunal of fact.

Conclusion

The learned judge misdirected the jury by a) conflating legal and factual causation and b) refusing to leave the question of self-defence to the members of the jury. As a result, the conviction of D is unsafe. We respectfully request that your lordships allow this appeal and quash the conviction.

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11 October 2019