

SCOTLAND / JUDGMENT

Her Majesty's Advocate v. Ogie & Anor [2010] ScotHC HJC B1 (30 April 1010)

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[2010] ScotHC HJC B1 [New search] [Help] HIGH COURT OF JUSTICIARY NOTE OF DECISION
On DIRECTIONS TO THE JURY by THE HONOURABLE LORD BRACADALE in causa HER
MAJESTY'S ADVOCATE against PAUL IGOE and CAROLINE IGOE

Act: Prentice QC et S McKenna; Crown Agents Alt: G Jackson QC et R Renucci; Beaumont & Co 30
April 2010

- [1] The Crown indicted Paul Igoe and Caroline Igoe for the murder, on 17 January 2009 in Hazelwood Grove, Edinburgh , of Martyn Barclay. The accused are brother and sister; the deceased was the boyfriend of Caroline Igoe. There is no dispute that Martyn Barclay was shot outside the Igoe family home in Hazelwood Grove, where Caroline Igoe and the deceased lived, along with other members of the Igoe family. Paul Igoe lived nearby in Walter Scott Avenue . The deceased, who was shot with his own gun, survived the shooting but died in hospital later that day.
- [2] The undisputed evidence demonstrated that Martyn Barclay was shot once in the right temple. Accordingly, only one person could be guilty of firing the gun; only one person could be actor.
- [3] At the close of the Crown case I repelled a submission of no case to answer advanced on behalf of Caroline Igoe. No such submission was made on behalf of Paul Igoe. After the advocate depute had addressed the jury, Mr Jackson QC on behalf of Paul Igoe made a common law submission seeking a direction that there was insufficient evidence against Paul Igoe on the basis on which the Crown had presented the case to the jury. In order properly to address that issue it is necessary to examine the evidence on which the Crown relied against each of the accused. The evidence against Caroline Igoe

- [4] The Crown case against Caroline Igoe was a circumstantial case. It may be analysed in terms of a number of chapters. There was evidence of Caroline Igoe's relationship with Martyn Barclay. She and the deceased had formed a relationship in November 2008 and he had moved in to 12 Hazelwood Grove shortly thereafter. They occupied one of the bedrooms on the first floor to the front.
- [5] The gun used to shoot the deceased belonged to him. There was evidence that Caroline Igoe knew that he had a gun. There was evidence that some days prior to the shooting she had made a remark indicating that he had shown her how to use it. That evidence was of significance in the light of evidence from one of the ballistics experts that there was a difficulty with the operation of the safety catch which meant that knowledge of how to use this particular gun was necessary. From other remarks which Caroline Igoe had made in the days before the shooting it could be inferred that the gun was stored in the house at Hazelwood Grove. She made reference to her parents' anger if they found out about it.
- [6] There was a chapter of evidence relating to a pillowcase and two socks which were recovered in the street outside the house and in a nearby lane. There was firearms residue on the exterior and interior surfaces of the pillowcase and on one of the socks. There was evidence that the gun had been wrapped in the pillowcase and the socks. DNA from skin cells was found on the pillowcase and one of the socks in amounts which were more consistent with handling rather than secondary contact. This DNA matched the DNA profile of Caroline Igoe. While other items lying in the street were damp as a result of earlier rain, the pillowcase and socks were dry, giving rise to an inference that they had been taken from the house shortly before the shooting.
- [7] There was forensic evidence as to blood spatter on the lower legs of the trousers which Caroline Igoe was wearing on the night of the murder. The pattern of spatter was consistent with her having been present when Martyn Barclay was shot.
- [8] There was evidence of Caroline Igoe's name being used before and after the bang heard by witnesses. There was evidence that shortly after the shooting Paul Igoe attended and removed the gun which was still lying beside Martyn Barclay. He went to the door of the house and had a meeting with Caroline Igoe. In addition, there were certain other adminicles of evidence on which the Crown relied.
- [9] On the basis of the circumstantial evidence the Crown invited the jury to draw the inference that Caroline Igoe had shot Martyn Barclay. The advocate depute presented the case to the jury on the basis that she was the actor. In my opinion the circumstantial evidence was such as to allow that inference to be drawn. An alternative inference was also open to the jury, namely, that she had supplied the gun and was present at the shooting, but that someone else had fired the shot. On that interpretation of the evidence against Caroline Igoe it would be open to the jury to hold that she was guilty art and part in the murder. Where more than one interpretation of circumstantial evidence is open it is for the jury to decide which interpretation to adopt (*Al Megrahi v HM Advocate* 2002 JC 99). Evidence against Paul Igoe

- [10] The advocate depute invited the jury to find Paul Igoe guilty on an art and part basis as acting in concert with Caroline Igoe. The evidence against him was as follows. There was undisputed evidence that some time after the shooting Paul Igoe came round to Hazelwood Grove where Martyn Barclay was lying, lifted him by the shoulders and moved him, before laying him down again. Paul Igoe then took the gun, which was lying beside Martyn Barclay, and, after speaking to Caroline Igoe at the door of the house, removed the gun from the scene.
- [11] There was evidence that on the following day he took a blue top, which he had been wearing when he removed the gun, to the house of Linda Johnston, where he left it, before retrieving it some weeks later. Linda Johnston gave him another top to wear. She stated that at a later stage, in the house of a man called Frankie Campbell, Paul Igoe had said, under reference to the top, that he had to get rid of the evidence. He had said that it did not matter how many times it was washed, it would not get rid of evidence.
- [12] The remaining evidence against Paul Igoe is to be found in a number of admissions made by him in the days after the shooting. In the course of these admissions, which were made to a number of people, Paul Igoe admitted that he had shot Martyn Barclay. The clear tenor of his admissions was that he was the actor. As I understood the position of the Crown, the advocate depute invited the jury to disregard these admissions to the extent that they were admissions to having been the actor. However, he sought to make some use of them. He submitted that they demonstrated intimate knowledge that Martyn Barclay had been shot and that Paul Igoe was an active participant in the murder. He submitted that, taken along with the behaviour of Paul Igoe after the event, the jury could infer that he was art and part in the murder.

Submissions

- [13] Mr Jackson submitted that there was insufficient evidence to allow the jury to hold that Paul Igoe was art and part in the murder. There was no basis in the evidence to hold that when Caroline Igoe fired the gun Paul Igoe was acting in concert with her. There required to be evidence that would allow a jury to conclude that the person who did not pull the trigger was acting in a common criminal purpose with the actor. He recognised that there could be such situations and cited examples, including the supplying of the gun to the actor, or giving encouragement to the actor. No doubt other examples could be figured. Knowledge that Martyn Barclay had been shot could not provide a basis for saying that he was acting in concert with the person who fired the shot. There was no basis for saying that he was present at the shooting or that he did anything by way of active participation. Nor was this a case of the type in which the jury could rely on evidence not prayed in aid by the Crown.
- Discussion

- [14] In my opinion, once the admissions by Paul Igoe to being the actor are put out of account, as they must be on the Crown's approach, all that may be taken from what was said by Paul Igoe, at the highest, is knowledge, after the event, that Martyn Barclay was shot in the

temple by a handgun. Such knowledge after the event would not in itself be sufficient to bring home guilt. While the evidence as to what Paul Igoe did after the shooting is significant evidence, it would not in itself be sufficient to allow an inference to be drawn, in the circumstances of this case, that he was involved in the shooting. Nor, in my opinion, would the combination of knowledge after the event and the behaviour of Paul Igoe after the event be sufficient. The matter is dealt with by Hume, Commentaries on the Law of Scotland Respecting Crimes vol i, p 281: "The only other sort of accession is by things done after, and in pursuance of the homicide; such as concealing the dead body, approving the deed, harbouring the actors, or enabling them to escape. It is clear, that, taken along with previous knowledge of the mortal purpose, or an instigation to commit the murder, or any aid lent in the contrivance or execution, this of assistance afterwards is a powerful circumstance in support of the charge of art and part; as it strengthens a train of facts, which go on the whole to prove a participation of the enterprise, and indeed to presume a promise of that assistance which is afterwards given,- a promise which must have encouraged to make the attempt." Hume goes on to cite the Appin murder as an example: "Of this description was the noted case also of James Stewart in Aucharn, for the murder of Campbell of Glenure; where the assistance given the murderer to escape after the deed, was connected with sundry particulars of previous aid and comfort towards the commission of it." Hume then deals with the situation where things done after the event are not so connected: "But, how sufficient soever the grounds of conviction in these and the like instances; it is a very different sort of guilt, and does not amount to art and part of homicide where the after assistance is libelled per se, unconnected with any earlier knowledge of, or concern in the deed. To assist in concealing the dead body; to harbour the actors; to help them to escape; to rescue them from the officers of justice... All these are, doubtless, immoral and criminal acts, and may naturally give rise to a suspicion, against those who so far forget their duty, of a deeper concern in the deed. But they are no part of the history of the murder: Nay, they do not even necessarily infer an approbation of it; since they may be done out of affection only or compassion for the actors, to relieve them of the consequences of that which cannot now be remedied or undone." The evidence against Paul Igoe seems to me to fit into the second category identified by Hume. There is no evidence of previous knowledge of the mortal purpose, or an instigation to commit the murder, or any aid lent in the contrivance or execution of the murder, which would invest the behaviour of Paul Igoe after the event with significance in relation to participation in the murder. There is an absence of any evidence which would allow an inference to be drawn as to what role Paul Igoe played in acting in concert with the actor.

- [15] In these circumstances, I am driven to the conclusion that, on the basis on which the Crown have presented the case to the jury, there is insufficient evidence to allow the jury to hold that Paul Igoe was art and part in the murder of Martyn Barclay. The alternative approach [16] The question then arises as to whether I should direct the jury that it is open to them to return a verdict of guilty against Paul Igoe on the basis that he was actor. It is clear from a number of recent cases that the verdicts open to a jury, within the scope of the indictment

and available on the evidence, are not circumscribed by the prosecutor's address to the jury. These cases indicate that if there is evidence on which the jury could reasonably come to particular conclusion, the trial judge should direct them that it is open to them to reach that conclusion, whether or not the Crown has invited them to do so. While most of the cases have been decided in the context of directions in relation to alternative charges, that is not the only situation in which the issue may arise. Delivering the opinion of the court in *Johnston and Woolard v HM Advocate* 2009 SCCR 518 Lord Reed said this at paragraph [39]: "Since the alternative charge is implicit in the indictment, it is not apparent why a conviction of that charge should be regarded as impinging upon the prosecutor's responsibility for the charges brought against the accused, even if the prosecutor has not expressly sought a conviction of the alternative charge in his address to the jury. On the contrary, authorities to the effect that it is in certain circumstances the duty of the court to draw an alternative verdict to the attention of the jury, even if it has not been mentioned by the prosecutor, are predicated on the view that the verdicts open to the jury, within the scope of the indictment and the evidence, are not circumscribed by the prosecutor's address to the jury. The point is illustrated by such authorities as *Quinn v HM Advocate* ; *Steele v HM Advocate* ; *Robertson v HM Advocate* ; *Meyl v HM Advocate* ; and *Touati v HM Advocate* . In the recent cases of *Ferguson v HM Advocate* and *Hopkinson v HM Advocate* the court expressed its agreement with the judgments in *R v Coutts* , where it was held that the trial judge should have directed the jury about an alternative verdict notwithstanding united submissions on behalf of both the prosecution and the defence to the contrary. So far as the stance of the prosecutor was concerned, Lord Bingham of Cornhill said (at para 12) that alerting the jury to the options open to it, 'is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is.... It is the ultimate responsibility of the trial judge'. Lord Rodger of Earlsferry similarly observed (at para 81): 'The stance of prosecuting counsel cannot be determinative of the range of verdicts fairly open to the jury on the evidence.'"

- [17] It seems to me that it would be open to the jury to find that the admissions made by Paul Igoe were genuine. They could find corroboration for these admissions in the evidence of his behaviour after the event. There is therefore a basis on which the jury could convict Paul Igoe as actor. In that event, since the circumstantial case against Caroline Igoe is capable of giving rise to the inference that she was acting in concert with the person who fired the gun, it would be open to the jury to convict her art and part in the murder.
- [18] Accordingly, I shall direct the jury that if they are satisfied that Caroline Igoe fired the shot, it would be open to them to convict her as actor and they must return a verdict of not guilty by my direction in relation to Paul Igoe. Alternatively, if, contrary to the approach of the Crown, they are satisfied that Paul Igoe fired the shot, they could convict him as actor and it would be open to them to convict Caroline Igoe art and part in the murder. HIGH COURT OF JUSTICIARY NOTE OF DECISION by THE HONOURABLE LORD BRACADALE in causa HER MAJESTY'S ADVOCATE against PAUL IGOE and CAROLINE IGOE

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