Neutral Citation Number: [2013] EWCA Crim 322

Case No: (1) 2012/06653 (2) 2012/00838 (3) 2012/4617

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM (1) LEWES CROWN COURT; (2) SHEFFIELD CROWN COURT
(3) CARDIFF CROWN COURT
(1) HHJ Richard Brown; (2) HHJ Goldsack QC; (3) HHJ Curran
(1) T2012/7210 (2) T2011/7337 (3) T2011/7711

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2013

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE RAFFERTY
and
MR JUSTICE SIMON

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Between :

(1) Carlos Dawes **(2) Mark John Hatter** **(3) Barry Francis Bowyer**	**Appellant**
- and -	
R	**Respondent**

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(1) **J M Burton QC** for the **Appellant Dawes**
(2) **B Kelly QC and C Hargan** for the **Appellant Hatter**
(3) **D Aubrey QC** for the **Appellant Bowyer**
(1) **A Edis QC and K Kaul QC**for the **Crown**
(2) **A Edis QC** for the **Crown**
(3) **P Davies** for the **Crown**

Hearing dates: 7th and 8th February 2013

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Approved Judgment

The Lord Chief Justice of England and Wales:

1. These three appeals against conviction were heard sequentially, and as they raised a number of connected questions arising from the loss of control defence in ss.54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act), counsel in each of the cases was present in court while the other cases were argued.

2. (a) On 6 November 2012 in the Crown Court at Lewes, before His Honour Judge Richard Brown and a jury, Mark Dawes was convicted of the murder of Graham Pethard on 5 May 2012. He was sentenced to life imprisonment. The specified minimum term was 15 years.

   (b) On 15 December 2011 in the Crown Court at Sheffield, before His Honour Judge Goldsack QC and a jury, Mark Hatter was convicted of the murder of Dawn Backhouse at or around midnight on 23 June 2011. He was sentenced to life imprisonment. The specified minimum term was 25 years.

   (c) On 3 July 2012 in the Crown Court at Cardiff, before His Honour Judge Curran and a jury, Barry Bowyer was convicted of the murder of Gary Suller on 6 September 2011. He was sentenced to life imprisonment. The specified minimum term was 30 years.

Mark Dawes

3. At about 5.20a.m. on 5 May 2012, following a report that a man had been stabbed in the neck and had stopped breathing, the emergency services were called to an address in Brighton. They there discovered the body of Graham Pethard, a man of 36 years of age, who was visiting the area.

4. Mr Pethard had sustained several injuries. There was a stab wound to the abdominal wall, which had not contributed directly to his death. The fatal wound had tracked down from the neck into the right lung, causing its collapse. Something like two litres of blood were found in the lung. There were numerous other injuries, for example bruises, but these had not contributed to the death. There were no defensive injuries.

5. The case for the prosecution was that Dawes had attacked and killed Mr Pethard with a knife, having discovered him asleep on the sofa with Kayleigh Chessell, Dawes' estranged wife. The Crown's case was that he had done so in a jealous rage which had been building up following arguments over the previous day, and he had come home unexpectedly in the early hours. When he found her and Mr Pethard asleep on the sofa he lost his temper and stabbed him with a kitchen knife. The defence case at trial was that Dawes had acted in self defence. Mr Pethard had attacked him with a

bottle, and he responded by picking up a knife, in effect to defend himself. Mr Pethard was stabbed by the applicant when he, Mr Pethard, refused to back off.

6. There was little dispute about the background. Kayleigh Chessell and Dawes married in 2007. The marriage was volatile, he behaving quite differently when he was drunk than when he was sober. She began a friendship with Mr Pethard. Her accounts about whether there was a sexual relationship between them were inconsistent. In her evidence at trial, she did accept that they had had sexual intercourse. On 3 May she did not return to their flat, staying overnight with a friend. She spent part of the evening with others, including Mr Pethard. While she was out she received some aggressive text messages from Dawes, including a threat to give whoever she was with a "good hiding". When she returned home on the following afternoon, she discovered that Dawes had damaged some of her belongings and broken the wardrobe. Some disturbance then took place between them, but he did not assault her. She fell asleep on the sofa. When she awoke he had left. Although he said he intended returning that night, it was his invariable practice never to do so when he left home in the sort of mood he was then in. So she did not expect him back that night.

7. She started to text Mr Pethard. At her invitation Mr Pethard arrived at the flat at just after 1.03a.m. They drank vodka and fell asleep on the sofa. According to her account, nothing romantic or sexual occurred between them. At about 5.15a.m. Dawes returned home and found the couple on the sofa, dressed, with their legs entwined. Her next memory was of being woken. Her face was wet, and she saw Dawes standing over her, holding a bottle of vodka. He started shouting asking who Mr Pethard was, and she told him, adding that nothing had happened between them.

8. With that Dawes began hitting Mr Pethard with his fists and then with the bottle. Mr Pethard woke up, holding out his hands in self protection, and got up and began looking for his shoes. By now Dawes was very angry and shouted at him to "get the fuck out of my flat". He then went into the kitchen and armed himself with a knife. When he returned Mr Pethard tried to reason with him and asked him not to use the knife. Kayleigh Chessell stepped between them. Dawes moved his arm around her and tried to stab at Mr Pethard. He transferred his knife into his other hand, and then made a stabbing movement with the knife beside her neck. She did not see what happened, but she heard Mr Pethard say that he had been stabbed in the neck. She had never seen Dawes look so angry. He was pacing up and down saying "look what you fucking made me do". He told her he was leaving, insulted her, and threatened to "do" her father. She said that she did not hear Mr Pethard issue any threats or do anything aggressive or violent to Dawes. This account was supported by the evidence of a child who heard the appellant say "I'm going to stab you", and saw him take the knife from a knife rack. He heard another man say "please don't, please don't" some eight or nine times. When the police arrived at the flat, Kayleigh Chessell told them that "Peth had been stabbed by Dawes with a kitchen knife". In the meantime Mr Pethard, holding his neck, tried but failed to make his way to the front door. He slid to the floor, fatally injured, and died shortly afterwards.

9. Dawes was arrested. When interviewed he replied no comment to all questions.

10. In his evidence to the jury he said that throughout the marriage there had been numerous arguments. He had not been working since Christmas, and was somewhat depressed. However he had found a job which was due to start on 4 May. He agreed he sent Miss Chessell threatening text messages but they were empty threats. Because she had lied he damaged her wardrobe when she failed to return home. He decided that he was leaving her and packed his bags. He woke her and told her he was going out. Over the course of the evening he drank about 8 bottles of Stella Artois, not an unusual amount for him, and one leaving him sober but merry. He changed his mind about leaving her, and sent her a text saying he would be coming home and had his key. He set out for home in a good mood.

11. When he reached the flat he saw her lying on the sofa with Mr Pethard their legs entwined and was "gutted". She awoke and said "It ain't what you think". Mr Pethard started to wake so Dawes punched him in the face, told him to get out of the "fucking flat", picked up a vodka bottle from the floor and threw it at him. Seconds later Mr Pethard, holding the bottle by the neck, swung it at Dawes who therefore punched him twice in the face. That appeared to have no effect and Mr Pethard came at him again. Dawes therefore went into the kitchen and picked up a knife to deter him. Mr Pethard backed off. Miss Chessell moved between them so he pushed her to one side and the fire door began to fall onto her. Mr Pethard again came at him with the bottle. Because of a previous occasion when he had been hit by a bottle he was afraid. He moved out of the way and caught Mr Pethard with the knife. He did not know that he had caught him with the first stabbing action and he never intended to kill him or cause him serious harm.

12. It was only when Miss Chessell said "What have you done?" and he saw blood that he realised he had stabbed Mr Pethard. He panicked, left the flat, put the knife down a drain, and "got off his nut" using alcohol and cocaine. He denied that upon seeing her with another man he had 'flipped'. He was more shocked than angry and was trying to work out what was going on. He knew prison telephone calls were recorded, and in a remark to her when she visited him in prison he had used the word 'rage' because she was winding him up. However he had not killed in a rage and did not want seriously to harm Mr Pethard, he simply wanted him out of the flat. His explanation for the downward track of the knife used on a man who was taller than him was that he had been lunging at him in a rugby tackle when Miss Chessell was not standing between them. The child had not seen anything, and was imagining things when he said he heard, "Please don't, please don't".

13. The defence at trial was self defence. Nevertheless, although not advanced by the defendant in his evidence, if self defence was rejected, the judge was invited to leave loss of control as an alternative. Judge Brown accepted that whether or not the defence sought to advance loss of control, he should leave any possible defence to the jury. He decided that the evidence showed that the defendant had incited the violence offered to him by Mr Pethard, and accordingly no qualifying trigger was available. He noted an observation in *Clinton* that:

> "13. The process of objective evaluation in each individual case is hugely complicated by the prohibitions in s.55(6) which

> identifies a number of features which are expressly excluded from consideration as qualifying triggers. Thus the defendant, who, looking for trouble to the extent of inciting or exciting violence loses his control, does not qualify. In effect self-induced loss of control will not run. The most critical problem, however, which lies at the heart of the *Clinton* appeal is sub.s. 6(c), "sexual infidelity"."

14. Mr Burton QC submitted that this conclusion was wrong. The observations in *Clinton* were addressing loss of control in the context of sexual infidelity. *Johnson* [1989] 1 WLR 740 decided on the former law of provocation, remained good law. S.55(6)(a) and (b) only serve to disapply the qualifying trigger if the defendant inciting violence had the specific purpose of providing himself with an excuse to use it. The jury concluded that the violence used by the appellant was excessive. That did not preclude "loss of control". Therefore the defence should have been left to the jury.

Mark Hatter

15. Shortly after midnight on 23 June 2011 Dawn Backhouse was stabbed in the kitchen of her home in Sheffield. She suffered a fatal horizontal stab wound to the left side of her chest and a further penetrating wound through her left wrist.

16. The background is a little complicated but can be briefly summarised. Mark Hatter had had a partner for 20 years. They had no children. The deceased had been married and divorced three times. She had two children. A relationship started between her and Hatter about a year before her death. He was older and more prosperous, and generous to her and her children. There was talk that she would have her sterilisation operation reversed so that she could have a child with Hatter, who would pay for the operation.

17. Dawn Backhouse decided to leave Sheffield and return to her home in Maidstone, where she spent substantial periods. During this time she met a man called Dave Brunger. From about May 2011 a sexual relationship developed between them. The appellant was aware of Mr Brunger's existence, and that Mr Brunger had offered the deceased and her children a home. He told various witnesses that he was not clear whether he would live with the deceased in Maidstone, or at all, and he told another witness that he considered his relationship with her to be over. With others he said that he was not sure where he stood.

18. The prosecution case was that the deceased was the victim of a premeditated killing. The appellant's case was that her death was a dreadful accident.

19. The appellant went to her home, carrying a sharp cook's knife, and at about midnight he entered her home through an upstairs window. A neighbour saw him climbing up

to the window, and entering the house, pulling the net curtain back into place. He made it look easy. The neighbour told his mother and they decided to send a text to the deceased, timed at 23.58 asking her to come to the window, to ensure that she was all right. He then watched the house. The back door was open and the light was on in the kitchen. He could hear the appellant and the deceased talking. At first everything appeared in order, but he then heard the appellant say, "You are not going. I'm not letting you go." He heard him on the phone speaking aggressively, telling whoever was there to do himself a favour and, "fuck off". Thereafter he heard the appellant say "look what you've made me do".

20. Another neighbour heard the same argument, which was taking place in the kitchen. She heard the appellant ask, "Have you shagged Dave?" and the deceased replied, "No, I've only kissed him". At this stage the appellant was shouting, but although the voice of the deceased was raised, she was not angry. After a while she heard the deceased's bloodcurdling scream, "No, no, no, no, no". She twice heard the appellant saying, "Look what you've made me do". She ran down the garden, shouting out to the deceased to see if she was all right, and the appellant said, "she's fine, just go away". She again shouted to the deceased who responded, "he stabbed me. He stabbed me. I can't breath. I don't want to die".

21. There was a good deal of evidence to much the same effect, but no further summary of it is needed. As to the appellant, before the police arrived, he positioned himself near to her and stabbed himself in the chest. The prosecution case was that this was done in an attempt to suggest an attempted suicide, whereas the appellant's case was that he did indeed intend to kill himself when he realised that the deceased was dying. The self-inflicted wound required life-saving treatment in hospital. When the police arrived the officer found the appellant hugging a distressed female, who said that she had been stabbed in the chest by him.

22. An examination of the scene showed that all relevant events had taken place in the kitchen, and, apart from blood, there was indeed no evidence of any struggle. It was not possible to establish whether the deceased was standing or sitting when she suffered her wounds. The wound to the wrist was likely to have been a defence injury; so far as the wound to the chest was concerned, the pathologist had never seen such a self-inflicted injury.

23. In his evidence Hatter told the jury that he was in love with the deceased, they had discussed having a child, he idolised her two daughters and lavished presents on them and paid most household bills. The deceased had never told him that their relationship was over or about her new man. He had heard the name Dave, but although he was seeing less of her himself, he never suspected an intimate relationship between them. On 22 June he had taken a knife to her house to take up the carpets. He had been a chef and kept his knives regularly sharpened and he simply picked up a knife that was lying on the kitchen table.

24. That evening she had asked him to pop round. He had a key. They had a cuddle. They raised their voices when discussing finances. When he suggested she contribute to the cost of her sterilization reversal she said, "Do you want blood?" He asked whether she had "shagged Dave", a private joke. When the phone rang she asked him to tell the caller to bugger off and he did. She made a 'violin motion' with the knife. He thought she was messing about. Then he heard something suggesting that she was in pain, so he spun on his heels, turned around and seized hold of her hand. Their combined momentum, with him holding her hand and her holding the knife led to her being stabbed in the chest. "It all happened in a split second". He went on that Mrs Backhouse said, "I think I'm dying", and he replied "Do you want me to come with you. I'll not leave you". She said, "Yeah. I don't want to go on my own". He stabbed himself in the chest. He said, "I wasn't thinking straight what had happened, I was drugged up to the back teeth. I didn't even realise the knife had gone into her chest".

25. He denied being possessive. He had never told Fiona Spencer that the deceased had said the relationship was over. Had she wanted it he would have walked away. He had not heard her cry out and say "No, no, no" or "Please don't hurt me".

26. The defence was accident. The judge was nevertheless invited to leave loss of control to the jury. He declined to do so. In a detailed, carefully structured ruling, Judge Goldsack decided that loss of control should not be left to the jury for three main reasons. First, there was simply no evidence from any witness, including the defendant, that he had or might have lost his self control. Second, there was no evidential basis for a reasonable inference to be drawn that the defendant lost his self control in the brief period between the telephone call from the deceased and her death. There was certainly no indication from the actual nature of the killing that it was done by a man out of control. Alternatively, if he had lost his control as a result of what he heard/realised in the phone call, that related to sexual infidelity and it would have been necessary to direct the jury to disregard it. Third, even if there was evidence of, or from which the jury could infer, loss of control the things said and or done did not come anywhere near constituting "circumstances of an extremely grave character", nor could they cause the defendant to have a "justified sense of being seriously wrong". To suggest that the fact of a break- up of a relationship could amount to circumstances of an extremely grave character or that it would entitle the aggrieved party to feel a justifiable sense of being seriously wronged would be to ignore the normal meaning of these words. It would also result in the defence of loss of control being left to the jury in almost every case where one partner to a relationship kills the other, which was clearly not Parliament's intention.

27. The single ground of appeal arises from the judge's decision that loss of control should not be left to the jury. There was, it is suggested, evidence available which was sufficient to raise this as an issue. This evidence arose from the long term "slow burn" factors coupled with matters which were immediately proximate to the killing. The argument did not permit of any excessive elaboration but granting leave, among other considerations the single judge thought it arguable that there was some evidence of loss of control arising from a combination of factors, including a sense of grievance in the appellant who had invested a great deal both financially and emotionally in the

victim, and was left with a feeling of abandonment and anxiety for the future. The single judge was also unsure whether the judge should have proceeded on the basis that there is any particular category of situations, like "the breakdown of a relationship" that cannot be treated as providing circumstances of an extremely grave character, giving rise to a justified sense of being wronged". These considerations were advanced on behalf of the appellant.

Barry Bowyer

28. At 3.35p.m. on 6 September 2011 Gary Suller's body was discovered at his home in Harold Street, Pontnewydd. He was lying face down on the floor, and his hands and feet had been tied with electric cables. He was badly injured and unconscious, and there was a significant amount of blood around his head area. A paramedic arrived at the home at 4.30p.m. and Mr Suller was pronounced dead at the scene soon afterwards. He had been killed by the appellant.

29. At the time of the killing both men were in a relationship with a woman known as Katie Whitbread or Katie Gilmore, who was working part-time as a prostitute. Each man was aware of her relationship with the other.

30. The prosecution case was that the appellant went to Mr Suller's home to carry out a carefully planned burglary on the morning of 6 September 2011. When Mr Suller returned home, he was subjected to a prolonged beating by the appellant who tied him up and, who after stealing some of his property, made away from the scene in his car. Thereafter he sold Mr Suller's stolen property and used the proceeds to buy heroin. In short he had used violence on Mr Suller as part of a burglary.

31. The defence case was that the appellant had used fatal force due to a loss of control. When Mr Suller returned home he had rushed at the appellant, and a fight had taken place. The appellant's loss of control was brought about by fear of serious violence at Mr Suller's hands, which was accompanied by some provocative comments he made about Katie Gilmore.

32. There was a good deal of background evidence about the relationship between Katie Gilmore and Mr Suller and Katie Gilmore and the appellant, and indeed Mr Suller and the appellant. From this evidence it appeared clear that the appellant was determined to intimidate Mr Suller. For example, during one incident at Mr Suller's home, the appellant had broken the window of Mr Suller's car while he was inside the house with his daughters. On another occasion he had run past the house and slammed a brick against a wall. Mr Suller was obviously very frightened of the appellant. On another occasion Suller had shown a police officer a text message which he believed he had received from the appellant, which read, "I'll kill you".

33. Katie Gilmore's evidence at trial was less favourable to the prosecution case than anticipated on the basis of her written statements. She said that Mr Suller had told her

that the appellant had threatened him during a telephone conversation, but she did not believe him. She was addicted to drugs, yet although Mr Suller wanted her to stop taking them, he would provide her with money to enable her to buy them. She had told lies to both men, and the appellant was being manipulated, so that his head was "totally screwed up". The appellant had treated her "brilliantly" and got her clean of heroin and Mr Suller was trying to split them up. When cross-examined, she agreed that Mr Suller wanted to change her life as a prostitute because he thought she would end up being killed. He had never encouraged her to sell herself as a prostitute. He wanted her to go to college. He was never violent to her.

34. The evidence from the post mortem showed a very widespread pattern of severe injury. Mr Suller had suffered a fracture of the upper eye socket, indentation to the front of the skull, and his cheek bone had broken loose at one end. There were fractures to the upper jaw bone. There were so many injuries to the head that it was impossible to describe them all, but there was widespread bruising and bleeding under the surface of the scalp and a split in the connected tissue which covers the skull and the scalp. There was subdural bleeding and a subarachnoid haemorrhage, with bruising and contusions on both sides of the brain. In addition there was blunt force trauma caused by something hard and firm coming into contact with the skin, with pieces of broken heavy glass in the area where the body was found. The facial injuries could have been caused by heavy impact with a glass-strewn floor. There were numerous abrasions, lacerations, multi-directional scratches and bruises over his body. There were fractures of six of his ribs. There was an area of parchmented skin, appearing to follow from a chemical bleach burn in his hip area. The cause of death was blunt force injury to the head, neck and abdomen, complicated by the inhalation of gastric matter caused by breathing problems, associated with him lying on his side, with his arms and legs bound behind his back. The evidence suggested that he had been tied up while still alive. Evidence from a forensic scientist about blood distribution suggested that the deceased had been beaten in at least six different areas downstairs.

35. The appellant was arrested on 7 September 2011. In his first three interviews he denied that he had been to Mr Suller's house. It was not until the further interviews conducted the following day, after he had been shown CCTV images from the store where he sold Mr Suller's property, that he admitted burgling the house and assaulting him. He told officers that it was his intention to return to the house to release him, but when he drove back, there was activity at the house and for fear that the police had been called he did not go in.

36. The prosecution also drew attention to the contents of the defence case statement. This suggested that the appellant feared serious violence at the hands of Mr Suller, but made no reference to any inflammatory comments about Katie Gilmore.

37. In his evidence the appellant described a history of mental health problems and psychiatric treatment. He had been diagnosed as bipolar and suffered from social phobia, anxiety and depression. He had an extensive criminal record and was addicted to heroin.

38. On 6 September 2011 he went to Gary Suller's house to commit burglary. He knew that Gary had stuff to sell, whereas he and Katie had nothing: no electricity, gas or food. He wore two sets of clothing and a camouflage hat. He also used rubber gloves so as not to leave any evidence. He had no intention of confronting Gary. He knew the house was empty as the car was not there. He gained entry through a window. After entering he bolted the front door and once inside he was looking for anything saleable. He heard a noise; and went downstairs and saw Gary walking through the back door. He panicked and threw a chair at him. The chair missed, and he rushed at him. They started to fight and ended up in the living room. He threw punches and kicks, and Gary did the same.

39. At one point Gary grabbed him round the waist, and the appellant hit him on the head with a glass decanter which broke on the second blow. They began rolling around fighting and the glass got on Gary as they were rolling about. Gary fell down and tried to get up again, so the appellant punched him twice in the face. The appellant then asked Gary why he would not leave them alone. Gary said to him, "Chewy fucked up, leaving you alive". The appellant assumed this was a reference to someone who had recently beaten him up. Gary also said to him "Katie's a prostitute, she's always going to be a prostitute and she's going to be my number one earner". The appellant had no idea Katie was a prostitute and felt sick at hearing this. He also became very angry at the comment about her becoming Gary's number one earner and hit him again repeatedly with his fists. They began rolling around again fighting; and, when Gary was lying on his back, he turned him over, and to avoid him raising the alarm, grabbed some leads and tied him up. He left him trussed. His intention was to finish bagging up the DVDs and sell them to buy heroin before Gary had a chance to report the matter to the police.

40. He had no intention of killing him and at the time just snapped. Gary kept saying, "Don't hurt me"; and he had said, "I won't. I'll be back to set you free". However, he continued to hit him every time he mentioned Katie's name. To avoid any scientific traces, before leaving the house he used bleach on the window sill and on Gary's hands.

41. In cross-examination he accepted that he had lied in the first three interviews. It was because he was afraid and did not realise how badly injured Gary Suller was. He accepted that his own injuries were fairly minimal.

42. The defence was loss of control, the appellant using force on Mr Suller because he was in fear of serious violence at his hands and he also made hurtful remarks about Katie Gilmore which were immensely provocative to the defendant. Judge Curran left the defence to the jury. After the jury had retired they asked the judge if he would clarify "qualifying trigger"? "Is this related to things said and or done by the victim during the attack or should we consider things said and or done during the months leading up to the attack?" The judge directed that they should consider things said and or done both on the day of the incident and in the period before hand.

43. The argument on appeal is that the judge had failed to direct the jury fully as to the "loss of control" defence or to summarise the evidence relating to it adequately, and that the summing up failed to deal with both sides fairly.

44. In a written route to verdict the judge addressed the loss of control defence. Assuming that the use of unlawful force might have resulted from the defendant's loss of control the text continued:

> "Question 6.
>
> Was the loss of control due either to a fear of serious violence from Gary Suller or to things done and or said by Gary Suller which constituted circumstances of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged or to a combination of those two triggers? If answer, no, then he is guilty of murder: if answer, yes, then go to question 7.
>
> Question 7.
>
> Might a person of the defendant's age and sex with a normal degree of tolerance and self-restraint and in the circumstances of the defendant have reacted in the same or a similar way to the defendant. For this purpose the reference to the defendant's circumstances is a reference to all his circumstances other than those whose only relevance to his conduct is that they bear on his general capacity for tolerance or self-restraint. In other words that he may have taken or had taken drugs or was or may have suffered withdrawal symptoms is to be ignored. If answer, yes, he is not guilty of murder: if answer, no, he is guilty of murder."

45. On the day before the hearing of the appeal, we invited Mr David Aubrey QC on behalf of the appellant to be prepared to address the question whether there was any evidence of loss of control sufficient to be left to the jury. At the hearing he advanced detailed submissions in support of the proposition that there was such evidence, and he maintained the criticisms of the summing up in his written submissions.

The "loss of control" defence - Discussion

46. Section 54 of the Coroners and Justice Act 2009 (the 2009 Act) provides:

> "(1) where a person (D) kills or is a party to a killing of another (V), D is not to be convicted of murder if –
>
> > (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self restraint and in the circumstances of D, might have reacted in the same or a similar way to D.

(2) for the purposes of sub-section (1)(a), it does not matter whether or not the loss of control was sudden.

(3) in sub-section (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) sub-section (1) does not apply if, in doing or being a part of the killing, D acted in a considered desire for revenge.

(5) on a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under sub-section (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) for the purposes of sub-section (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. …"

47. Section 55 provides:

"(1) this section applies for the purposes of s.54.

(2) a loss of self-control had a qualifying trigger if sub-section (3), (4) or (5) applies.

(3) this sub-section applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) this sub-section applies of D's loss of self-control was attributable to a thing or things done or said (or both) which –

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) this sub-section applies if D's loss of self-control was attributable to a combination of the matters mentioned in sub-sections (3) and (4).

(6) in determining whether a loss of self-control had a qualifying trigger –

> (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purposes of providing an excuse to use violence;
>
> (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
>
> (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded. … ".

48. This legislation replaced the former provocation defence. As suggested in *Clinton* [2012] 1 Cr. App R 26, where its application in the context of sexual infidelity was addressed, the circumstances in which it applies do not exactly leap from the legislative page. We must now consider its application to the issues raised in these appeals, and in particular in the context of violence offered to or feared by the defendant. The considerations bearing on this problem are found in different sub-sections, and it may be convenient to their proper examination if we reassemble ss.54 and 55 of the 2009 Act, so that all the relevant considerations found in the sub-sections can be seen in their context within the statutory framework.

49. When a person kills or is party to the killing of another person, unless he has acted in a considered desire for revenge, he is not to be convicted of murder, but of manslaughter, if each of three distinct ingredients which comprise the defence may be present. If evidence sufficient to raise an issue in relation to all three ingredients is adduced, the prosecution must disprove the defence. But the evidence is not sufficient for this purpose unless, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. If so the defence must be left to the jury and the prosecution must disprove it. This judgment proceeds on the basis that the fundamental principles relating to the burden of proof are unchanged.

50. Whether the issue of loss of control arises because the defendant has positively advanced it for consideration, or because the judge is contemplating whether to leave the defence to the jury when for forensic reasons it has not been advanced, the approach to the decision must be identical. In *Clinton*, at paras 45 and 46, the court summarised the task of the judge:

> "This requires a commonsense judgment based on an analysis of all the evidence. To the extent that the evidence may be in dispute, the judge has to recognise that the jury may accept evidence which is most favourable to the defendant, and reject that which is most favourable to the prosecution, and so tailor the ruling accordingly. That is merely another way of saying

> that in discharging this responsibility the judge should not reject disputed evidence which the jury might choose to believe."

51. The evidence may of course come from the defendant himself, and it is trite law that the credibility of the defendant is a matter for the jury. There was debate whether the assessment of the gravity of the circumstances and whether the defendant was caused a justifiable sense of being seriously wronged are subjective, that is, whether it is enough for the defendant to assert that he himself believed that the circumstances were sufficiently grave and that his sense of being seriously wronged was justified. As we shall see, irrespective of any credibility issue, the bare assertion of these matters will not always be sufficient for these purposes.

52. "Opinion", as used in s.54(6), is commonly used to mean the judgment of the court. This is exemplified in the procedures for the Case Stated, and indeed in relation to the use of video recordings, in s.103 of the 2009 Act itself. In short, "opinion" for these purposes is not used in the sense that different judges may reasonably form different opinions about the way in which discretion should be exercised: what is required is a judgment, which may be right or wrong. As in any appeal to this court, the challenge will not succeed unless we decide, bearing in mind the advantages that the judge will have had from having heard the evidence, that the defence should have been left to the jury. If so, and it was not, the judgment was wrong, and the defence should have been left to the jury, the defendant was deprived of his entitlement to the jury's verdict. The conviction would be quashed and in most cases of this kind, a new trial would almost certainly be ordered.

53. Provided the evidence is sufficient for the purposes of s.54(6) it must be left to the jury, whatever forensic tactical decisions may have been made by or on behalf of the defendant. In this respect, long standing principles are unchanged, and no wearisome recital of the many decided cases which confirm them is needed. Similarly, however, whether the prosecution has raised the question or not, at the end of the evidence the judge should examine and decide whether, indeed, sufficient evidence relating to all the ingredients of the defence has been raised.

54. We can now turn to the first requirement, that is that the defendant's acts or omissions in doing, or in being a part of, the killing resulted from his loss of self control. Provided there was a loss of control, it does not matter whether the loss was sudden or not. A reaction to circumstances of extreme gravity may be delayed. Different individuals in different situations do not react identically, nor respond immediately. Thus for the purposes of the new defence, the loss of control may follow from the cumulative impact of earlier events. For the purposes of this first ingredient, the response to what used to be described as "cumulative provocation" requires consideration in the same way as it does in relation to cases in which the loss of control is said to have arisen suddenly. Given the changed description of this defence, perhaps "cumulative impact" is the better phrase to describe this particular feature of the first requirement.

55. For present purposes, we can deal briefly with the third ingredient of the defence, that a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, that is all of his circumstances other than those bearing on his general capacity for tolerance or self-restraint, might have reacted or behaved in the same or a similar way. In this judgment, no further elaboration is appropriate.

56. The crucial questions in the present appeals involve an examination of the qualifying triggers defined in s.54(1)(b) as elaborated in s.55, that is the second ingredient of the defence. To the extent explained in *Clinton*, sexual infidelity is to be disregarded. By contrast, if the loss of self control is attributable to D's fear of serious violence from the victim against him or some other identified person, the qualifying trigger may be present. A further qualifying trigger applies if the loss of self control is attributed to a thing or things done or said, or both, which constituted circumstances of an extremely grave character, and causes the defendant to have a justifiable sense of being seriously wronged. As the legislation recognises in s.55(5) there are unlikely to be many cases where the only feature of the evidence relating to the qualifying trigger in the context of fear of violence will arise in total isolation from things done or said within s.55(4). In most cases the qualifying trigger based on a fear of violence will almost inevitably to include consideration of things said and done, in short, a combination of the features identified in s.55(3) and (4).

57. Neither qualifying trigger in s.55(6)(a) and (b) is available to the defendant who has deliberately sought to provide himself with an excuse to use violence by inciting, or encouraging or manufacturing a situation for this purpose.

58. There was some debate about the continuing authority, if any, of *Johnson* [1989] 89 Cr. App. R 148, decided in the context of the former provocation defence. In that case the court rejected the submission "that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being outside a jury's consideration". In our judgment, for the purposes of the loss of control defence, the impact of *Johnson* is now diminished, but not wholly extinguished by the new statutory provisions. One may wonder (and the judge would have to consider) how often a defendant who is out to incite violence could be said to "fear" serious violence; often he may be welcoming it. Similarly, one may wonder how such a defendant may have a justifiable sense of being seriously wronged if he successfully incites someone else to use violence towards him. Those are legitimate issues for consideration, but as a matter of statutory construction, the mere fact that in some general way the defendant was behaving badly and looking for and provoking trouble does not of itself lead to the disapplication of the qualifying triggers based on s.55(3)(4) and (5) unless his actions were intended to provide him with the excuse or opportunity to use violence. As *Johnson* no longer fully reflects the appropriate principle, further reference to it is inappropriate. The relevant principle is identified in the present judgment.

59. The loss of control defence is not self-defence, but there will often be a factual overlap between them. It will be argued on the defendant's behalf that the violence which resulted in the death of the deceased was, on grounds of self-defence, not

unlawful. This defence is now governed by s.76 of the Criminal Justice and Immigration Act 2008. In the context of violence used by the defendant there are obvious differences between the two defences and they should not be elided. These are summarised in *Smith and Hogan, 13th Edition,* at p 135. The circumstances in which the defendant, who has lost control of himself, will nevertheless be able to argue that he used reasonable force in response to the violence he feared, or to which he was subjected, are likely to be limited. But even if the defendant may have lost his self-control, provided his violent response in self-defence was not unreasonable in the circumstances, he would be entitled to rely on self defence as a complete defence. S.55(3) is focussed on the defendant's fear of *serious* violence. We underline the distinction between the terms of the qualifying trigger in the context of loss of control with self-defence, which is concerned with the threat of violence in any form. Obviously, if the defendant genuinely fears serious violence then, in the context of self-defence, his own response may legitimately be more extreme. Weighing these considerations, it is likely that in the forensic process those acting for the defendant will advance self-defence as a complete answer to the murder charge, and on occasions, make little or nothing of the defendant's response in the context of the loss of control defence. As we have already indicated, the decision taken on forensic grounds (whether the judge believes it to be wise or not) is not binding on the judge and, provided the statutory conditions obtain, loss of control should be left to the jury. Almost always, we suggest, the practical course, if the defence is to be left, is to leave it for the consideration of the jury after it has rejected self-defence.

60. As noted in *Clinton*, viewed overall, the eventual legislation which found its way into ss.54 and 55 of the 2009 Act did not closely follow the overall recommendations of the Murder, Manslaughter and Infanticide (Law Commission No. 309). Nevertheless, as the Law Commission noted, in the context of the former defence of provocation, the judge was bound to leave the defence if there was evidence that the defendant was provoked to lose self-control, however improbable the defence may have appeared. In the view of the Law Commission 5.15:

> "The current position does not serve the interests of justice because the need to put the defence to the jury in these circumstances increases the likelihood that an unmeritorious claim may succeed".

At 5.16 it was proposed that the trial judge should have the task of "filtering out purely speculative and wholly unmeritorious claims". We see a direct link between this recommendation and the legislative provisions in s.55(3),(4) and (5). Their effect is that the circumstances in which the qualifying triggers will arise is much more limited than the equivalent provisions in the former provocation defence. The result is that some of the more absurd trivia which nevertheless required the judge to leave the provocation defence to the jury will no longer fall within the ambit of the qualifying triggers defined in the new defence. This is unsurprising. For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control.

61. The presence, or otherwise, of a qualifying trigger is not defined or decided by the defendant and any assertions he may make in evidence, or any account given in the investigative process. S.55(3) directly engages the defendant's fear of serious violence. As we have explained, in this type of case s.55(4) will almost inevitably arise for consideration. Unless the defendant has a sense of being *seriously* wronged s.55(4) has no application. Even if it does, there are two distinctive further requirements. The circumstances must be *extremely* grave and the defendant's sense of being seriously wronged by them must be *justifiable*. In our judgment these matters require objective assessment by the judge at the end of the evidence and, if the defence is left, by the jury considering their verdict. If it were otherwise it would mean that a qualifying trigger would be present if the defendant were to give an account to the effect that, "the circumstances were extremely grave to me and caused me to have what I believed was a justifiable sense that I had been seriously wronged". If so, when it is clear that the availability of a defence based on the loss of control has been significantly narrowed, one would have to question the purpose of s.55(3)(4) and (5).

Conclusion

62. With these broad considerations in mind, we can now address the individual appeals.

R v Dawes

63. Judge Brown's approach to the question whether the loss of control defence should be left to the jury when only self defence was advanced for it to consider by the defence was correct. He would have left the loss of control defence to the jury if in his judgment there was any evidence relating to the qualifying trigger which did not fall within the ambit of s.54(6) of the Act. For the reasons already given, *Johnson* should not have been treated as overruled by the prohibition against reliance by the defendant on the manufacture of a violent situation incited by the defendant to which he had responded. There was no sufficient evidence that this was the defendant's purpose.

64. In our judgment, however, the decision that the loss of control should not be left to the jury was fully justified. There was no sufficient evidence that the appellant ever lost his self-control. His own evidence was that he had not killed Mr Pethard in a rage. He was shocked rather than angry. He simply wanted him out of the flat. He had acted in self-defence. For what we may describe as obvious reasons the jury rejected this defence. However although for the purposes of self-defence the extent of his violence was wholly unreasonable, it did not follow that his actions were consequent on any loss of self control. In our judgment there was no evidence sufficient to leave the first ingredient of this defence to the jury. Accordingly, although the judge understandably misread the impact of the new legislative provisions of *Johnson*, his decision that the defence should not be left to the jury was correct.

R v Hatter

65. We agree with Judge Goldsack's decision. The defence was accident. Once again, for entirely understandable reasons, the jury rejected the defence. It did not follow from the rejection of the defence that the loss of control defence might then arise. Dealing with it generally, we agree that the fact of the break up of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged. However we also appreciate that circumstances vary, and just as issues relating to sexual infidelity have to be examined in their overall circumstances, so the events surrounding the circumstances in the breakdown of a relationship will often but not always fall to be disqualified by s.55(6). In the present case, however, we agree with Judge Goldsack that the reality of this case was that the death of the deceased was a direct consequence of the appellant's response to the breakdown of the relationship, and that there was no particular feature of the evidence to suggest any justifiable sense in the appellant of being seriously wronged. If the jury was sure about the main thrust of the Crown's case, this was premeditated murder. If the jury concluded that the defendant's account of events may have been correct, but nevertheless rejected accident, there was no evidence that the fatal injuries were inflicted by him in consequence of loss of control.

R v Bowyer

66. If we have any criticism of one of the outstanding judges of his generation on the former Wales and Chester circuit, now the Wales circuit, it is that the loss of control defence was left to the jury at all. The appellant was a self -confessed burglar. He deliberately entered the home of the deceased in order to steal property, to sell it to feed his drug habit. He deliberately targeted the house, taking every precaution to avoid detection. At the very best, he suggests that he just snapped when, following the householder's return, he, the householder, reacted violently to the presence of the burglar in his home and used deliberately insulting remarks about the appellant's girlfriend. To that the somewhat colloquial answer is, "So what"? If either of these men was justified in losing his self control, it was the deceased. The deceased was entitled to say and do anything reasonable, including the use of force, to eject the burglar from his home. Even taking the appellant's evidence at face value (and we bear in mind that the jury must have rejected it) it is absurd to suggest that the entirely understandable response of the deceased to finding a burglar in his home provided the appellant with the remotest beginnings of a basis for suggesting that he had any justifiable sense of being wronged, let alone seriously wronged. On that basis alone, one essential ingredient of this defence was entirely absent. Furthermore, we can detect no evidence of loss of control. The tragic events which occurred in the home of the deceased bore all the hallmarks of appalling violence administered in cold blood.

67. The remaining criticisms of the judge are not sustained. The loss of control defence was accurately summarised. Given the facts of this case a fair summing up would inevitably present a very powerful case against the appellant. It is perhaps salutary to

remember that a fair summing up should reflect the evidence presented to the jury. If the evidence for the prosecution is very powerful, the summing up should not, as a matter of general fairness, seek to diminish its impact, anymore than a strong case for the defendant should, in the interests of fairness to the prosecution be similarly diminished. A fair summing up means no more and no less than that it should fairly reflect the evidence available for the consideration of the jury. This summing up had that proper effect.