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Loss of Control: “Sufficient Evidence”

R v Jewell [2014] EWCA Crim 414, Court of Appeal
R v Workman [2014] EWCA Crim 575, Court of Appeal
R v Barnsdale-Quean [2014] EWCA Crim 1418, Court of Appeal

Keywords: Murder; Voluntary Manslaughter; Loss of Control; Sufficient Evidence

In *R v Jewell*, Darren Jewell (J) had driven to the Essex home of his colleague Anthony Prickett (P) in May 2011, ostensibly to pick him up for work. However, when J arrived at P’s house, J shot P at point blank range, twice, with his father’s shotgun, first in the abdomen and then in the head. J then fled the scene but was arrested that afternoon after the police forced his car off the road south of Edinburgh. The car contained a loaded home-made “zip” gun capable of firing .22 ammunition, eight rounds of spare ammunition, and what the Crown described as a “survival kit”: a rucksack holding spare clothes, a tent, several knives, two cans of CS gas, a passport, a driving licence and a chequebook. J was charged with murder and appeared before a judge and jury at Chelmsford Crown Court in January 2012. The Crown case was that it was a premeditated killing. J pleaded not guilty to murder on the basis of lack of mens rea. In police interviews, J claimed that various unknown people (although P may have been one of them) had intimidated him, and that P had insinuated that he (J) only had “two days left” to live. J asserted that the evening before the shooting he had gone to his father’s house and borrowed the shotgun and ammunition. J had stayed up all night with the shotgun and had written to neighbours leaving his keys and asking them to feed his cat, before leaving home that morning in his van. He admitted shooting P, but denied doing so intentionally; he had shot P “as if in a dream” (at [4]). After the shooting, J fled the scene, disposed of the shotgun, ran to his father’s house and took his father’s car, and drove to Scotland where he intended to live before committing suicide. At his trial, J maintained that he had not intentionally shot P. He told that jury that when he got out of his van outside P’s house, “I did it because I lost control. I could not control my actions. I could not think straight. My head was fucked up. It was like an injection in the head, an explosion in my head.” (at [19]). The trial judge considered whether to direct the jury on the Loss of Control defence, but in the end held that there was insufficient evidence of J having lost his self-control to leave the defence to the jury. J was convicted of murder and appealed, contending that the trial judge should have directed the jury on the defence of Loss of Control.

In *R v Workman*, Ian Workman (W), stabbed his estranged wife of 35 years, Sue Workman (S), to death in the kitchen of their farmhouse in Lancashire, in April 2011. He was charged with murder and appeared before Mr Justice Christopher Clarke and a jury at Preston Crown Court in December 2011. The Crown case was that W had deliberately stabbed S to death “because she was defying him” (at [17]). The defence case was that S had “accidentally” stabbed herself to death in the course of a struggle. In police interview, W asserted that he had returned to the farmhouse to collect some belongings. They began quarrelling and W criticised S’s treatment of their eldest son. Shortly afterwards, S had “exploded in anger” (at [9]) and charged at W holding a kitchen knife in her right hand. W had managed to avoid the attack and got behind S, with his left arm around her neck and his right hand holding her right arm or wrist. At some point in the struggle, S had “accidentally” stabbed herself in the

heart with the knife. The jury convicted W of murder. He appealed, contending *inter alia* that the trial judge, Clarke J, should have directed the jury on the defence of Loss of Control.

In *R v Barnsdale-Quean*, Stephen Barnsdale-Quean (B) was charged with the murder of his wife Chantelle Barnsdale-Quean (C) at their flat in South Yorkshire. He appeared before a judge and jury at Sheffield Crown Court. The Crown case was that B had strangled C to death with a chain which had been tightened by using a rolling pin as a tourniquet, after which B had stabbed himself in the stomach and inflicted other injuries on himself in order to make it appear that C had attacked him, and had then called the emergency services. During police interviews, B claimed that C had attacked him before committing suicide by self-strangulation. The jury rejected B's version of events and he was convicted of murder. He appealed, contending that the trial judge, His Honour Judge Goose QC, should have directed the jury on the defence of Loss of Control. (The trial judge had directed the jury on B's alternative defence of suicide pact, but this was rejected by the jury.)

HELD, DISMISSING THE APPEALS, there was insufficient evidence of Loss of Control in all three cases. In *Jewell*, Rafferty LJ said:

This bore every hallmark of a pre-planned, cold-blooded execution... The evidence that this was a planned execution is best described as overwhelming... As to the first component, whether there is evidence of loss of control, sufficiency of evidence is bound to suggest more than minimum evidence to establish the facts... The judge balanced the undisputed evidence against what was accurately described as no more than a bare assertion by [J] "I lost control". His finding was plainly open to him and is unimpeachable. (at [43], [45], [48] and [49])

In *Workman*, Davis LJ said:

At no stage did [J] advance a defence of loss of control... [A] judge is required to leave such a defence to the jury, whether or not it is positively part of the defence case, if sufficient evidence is adduced to raise the issue. It is not a matter for the trial judge's "discretion". The question is what is nowadays modishly called a binary question: either the defence should be left or it should not be left, yes or no... In our view, the judge was correct not to leave the issue of loss of control to the jury... There was nothing at all in the defence case to give rise to such a defence. (at [85] – [88])

In *Barnsdale-Quean*, McCombe LJ said:

In the present case, as we see it, there was no such evidence [of a loss of control]. There was none provided by [B] in either his interviews or with the police or his own evidence. His case was that he was attacked by [C] and had no recollection of what happened thereafter. He was not saying that he had lost control at any stage. There was no objective evidence of loss of control in any other evidence either. There was in fact just no evidence upon which a jury, properly directed, could have concluded there had been a loss of self-control on the part of [B] at all. To have concluded that there had been would have been mere speculation without evidential foundation. (at [27])

COMMENTARY

The statutory defence of Loss of Control was introduced with effect from 4 October 2010 by the Coroners and Justice Act 2009 (the 2009 Act), s. 54(1), replacing the common law defence of provocation, which was simultaneously abolished by s. 56(1) of the 2009 Act. The new defence is a special and partial defence in that it is only available to those charged with murder and, if successful, leads to a conviction for manslaughter rather than an acquittal (s. 54(7) of the 2009 Act). There are three elements to the defence: a loss of control (s.54(1)(a)), a qualifying trigger (s. 54(1)(b)) and a normal person test (s. 54(1)(c)). In cases where the defence is raised, it is the task of the prosecution to disprove one or more of the elements in order to secure a murder conviction – but only once the accused has adduced “sufficient evidence”. For present purposes, the key provisions are s. 54(5) and (6) of the 2009 Act, which provide as follows:

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (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 subsection (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.

The leading case on the subject of “sufficient evidence” is *R v Clinton; Parker; Evans* [2012] EWCA Crim 2, [2013] QB 1; [2012] 3 WLR 515 (see Wake, N, *Loss of control beyond sexual infidelity*, (2013) 76(3) J Crim L 193). In that case, Lord Judge CJ said (emphasis added):

Unless there is evidence sufficient to raise the issue of loss of control ***it should be withdrawn from consideration by the jury***... This requires a common sense judgment based on an analysis of all the evidence... The statutory provision is clear. If there is evidence on which the jury could reasonably conclude that the loss of control defence might apply, it must be left to the jury: if there is no such evidence, then ***it must be withdrawn***. (at [45] – [47])

In all three cases under discussion in this note, there was “insufficient” evidence that any of the three appellants had lost their self-control, and that was enough to dispose of all three appeals. Indeed, in both *Workman* and *Barnsdale-Quean* there was no evidence at all. The decision in *Jewell* that the accused’s “bare assertion” is insufficient evidence to support a defence of Loss of Control echoes the Court of Appeal’s decision in *R v Ciccarelli* [2011] EWCA Crim 2665, [2012] 1 Cr. App. R. 15, a case on s. 75(1) of the Sexual Offences Act 2003 (the 2003 Act). Section 75 provides that a rebuttable presumption of non-consent on the part of the complainant in a sex offence case will be created in certain circumstances, for example where the complainant is “asleep or otherwise unconscious”, unless “sufficient evidence is adduced to raise an issue as to whether he consented”. On the meaning of “sufficient evidence” in the context of the 2003 Act, Lord Judge CJ explained that this meant “some evidence beyond the fanciful or speculative had to be adduced” (at [18]).

Finally, in *R v Clinton; Parker; Evans*, Lord Judge CJ said that “There must be sufficient evidence to establish **each** of the ingredients defined in section 54(1)(a)(b)(c)” (at [45], emphasis added). It is submitted that that is going too far in favour of the Crown. It is accepted that the defence should be required to adduce “sufficient” evidence that the accused lost his self-control (the first element) and that this was caused by one of the qualifying triggers (the second element), but not that there should be a requirement for the accused to adduce evidence as to the response of the normal person (the third element). It is right that the accused in seeking to be excused from murder liability under the 2009 Act should provide some (more than fanciful or speculative) evidence that he actually lost his self-control and that there was a valid qualifying trigger. However, to require the accused to provide “evidence” in order to establish the third element is surely going too far. Section 54(1)(c) of the 2009 Act requires the jury to consider whether “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 in a similar way to D”. Although it is likely that D will seek to adduce evidence relating to the circumstances in which the loss of control is alleged to have occurred, it is difficult to see how an evidential burden can be imposed on the accused in relation to the third element. The test imposed by s. 54(1)(c) is simply a matter for the jury and it is unnecessary to expect the accused to adduce “evidence” to support it.