Loss of Control: "Sufficient Evidence" (again)

***R v Gurpinar; R v Kojo-Smith* [2015] EWCA Crim 178, Court of Appeal**

Keywords: Jury directions; Murder; Loss of Control; Sufficient Evidence

Mustafa Gurpinar (MG), 14, fatally stabbed Leroy James, also 14, during a pre-arranged fight at Ponders End recreation ground in Enfield, North London, in August 2011. He was charged with murder and appeared before HH Judge John Bevan QC and a jury at the Central Criminal Court in June 2012. His defence at trial was a combination of "accident" and/or lack of *mens rea* and/or self-defence. The trial judge considered leaving the defence of loss of control to the jury but eventually decided not to do so, on the basis that it would be "an added complication". The jury rejected all of MG's defences. He was convicted of murder and appealed, contending that the trial judge should have directed the jury on loss of control.

Nii-Azu Kojo-Smith (NK), 17, fatally stabbed Liam Woodards (LW), 24, during a clash between two groups of young men at Westfield shopping centre in Stratford, East London, in June 2012. He was charged with murder and appeared before HH Judge Richard Marks QC and a jury at the Central Criminal Court in April 2014. His defence at trial was self-defence, on the basis that he feared that LW was about to stab him. NK said that he had swung at LW with a knife which had earlier been given to him (NK) by another member of his (NK's) group. Counsel for NK asked the trial judge to leave loss of control to the jury, on the basis that LW had "goaded and taunted" NK immediately prior to the fatal stabbing, but this request was declined. The trial judge ruled that there was no evidential basis upon which a jury could conclude that NK had lost his self-control. The jury rejected NK's plea of self-defence. He was convicted of murder and appealed, contending that the trial judge should have directed the jury on loss of control.

HELD, DISMISSING THE APPEALS, there was insufficient evidence on which a jury properly directed could reasonably conclude that the defence of loss of control might apply to either appellant (at [55] and [93]).

A trial judge has to consider whether to leave the defence of loss of control to the jury even if it has not been raised by the defendant (at [10]). The fact that the defendant's own evidence did not support a loss of self-control is "only a factor (albeit a significant one), which the judge should take into account in his objective assessment of the evidence" (at [10]).

Under s 54(5) and (6) of the Coroners and Justice Act 2009 (CJA 2009), a trial judge is only obliged to leave the defence to the jury if 'sufficient evidence' has been adduced to 'raise an issue… on which a jury properly directed could reasonably conclude that the defence of loss of control might apply'. In deciding whether such evidence has been adduced, the judge must "proceed on the premise that the jury might take a different view of the evidence to that which the judge may have found" (at [12]).

There are three components to the loss of control defence, set out in s 54(1)(a), (b) and (c), CJA 2009, i.e. loss of control (the first component), a qualifying trigger (the second component), and the normal person test (the third component). The judge's task is to "analyse the evidence closely" and be satisfied that there is 'sufficient evidence' "in respect of each of the three components of the defence" (at [12]). Sufficiency is a matter of "weight and quality" (at [12]).

The trial judge should apply the sufficiency test to the three components "sequentially" (at [13]). Therefore, if there is insufficient evidence of loss of self-control, there will be no need to consider the further two components. Similarly, if there is insufficient evidence of a qualifying trigger there will be no need to address the normal person test (at [13]).

Compared to the old defence of provocation, a "much more rigorous evaluation of the evidence" has to be undertaken before loss of control can be left to the jury (at [14]). This means a "rigorous evaluation of the evidence" against all three components (at [16]).

The trial judge "must be assisted by the advocates" (at [15]). The possibility of the trial judge needing to direct the jury on loss of control notwithstanding the fact that it has not been relied upon by the defence "should generally be notified to the judge as early as possible in the management of the case" (at [15]). The judge "must receive written submissions from the advocates so that he can carefully consider whether the evidence is such that the statutory test is met" (at [15]). The judge must "set out his conclusion in a reasoned ruling" (at [16]). An appellate court will "accord to a reasoned decision of a trial judge the ambit of judgment in the evaluation of the evidence that is open to the judge… [and] will not readily interfere with that judgment" (at [16]).

The judge in MG's case had been right not to leave the defence to the jury; there was "no evidential basis" on which MG could be said to have lost his self-control "to any degree" (at [55]). With regard to the qualifying trigger, there was independent witness evidence that MG might have been in fear of violence. However, there was "no evidence that such fear was anything more than fear before engagement in a fight or that it had in any way resulted in a loss of self-control" (at [55]). There was also "no evidential basis" on which a jury could conclude that a youth of MG's age and sex, with a normal degree of tolerance and self-restraint, would have reacted in the same or in a similar way (at [55]).

In respect of NK, there was "no reason to disagree with the judge's analytical assessment of the first component of the defence… namely his assessment that there was insufficient evidence that the killing had resulted from any loss of self-control" (at [92]). Although there was "evidence that he was angry, that did not… demonstrate a sufficient loss of self-control to fall within the scope of the first component" (at [92]).

COMMENTARY

Much of the appeal court's judgment is uncontroversial and based on existing precedent, in particular *R v Clinton* [2012] EWCA Crim 2; [2013] QB 1; *R v Dawes* [2013] EWCA Crim 322; [2014] 1 WLR 947 and *R v Jewell* [2014] EWCA Crim 414. However, two issues arise for consideration.

"Sufficient Evidence"

Section 54(5) CJA 2009 states that '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'. Section 54(6) adds that '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'.

In *Clinton*, Lord Judge CJ (as he then was) stated that 'sufficient evidence' in the context of s 54 CJA 2009 meant that there "must be sufficient evidence to establish *each* of the ingredients defined in section 54(1)(a)(b)(c)" (*Clinton* at [45], emphasis added). Similar pronouncements were made by his Lordship in *Dawes* (at [49] and [53]). Lord Thomas CJ in the present case not only accepts that this is the law but emphasises it: according to the Lord Chief Justice, it is "clearly" the judge's task to be satisfied that there is 'sufficient evidence' in respect of all three components of the defence (at [12]; see also [22]). Lord Judge's proposition has been criticised by the present author (see Loss of Control: "Sufficient Evidence" (2015) 79 J. Crim. L. 6), and that criticism is repeated here. Certainly, this approach is not mandated by the legislation itself, which simply requires that the evidence 'raise an issue' with respect to the defence *as a whole*, not *each element of it*.

Nevertheless, it is accepted that it is correct to say that, if the defendant relies on loss of control, s/he should be required to show that there is 'sufficient' evidence of a loss of self-control (the first component) and that this was caused by one or both of the qualifying triggers (the second component). The defendant should be required to identify at least *some* evidence as to these issues, otherwise s 54(5) and (6) would be meaningless. However, it is, surely, wrong to require the accused to adduce evidence as to the response of the normal person (the third component).

Section 54(1)(c) CJA 2009 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'. The third component is simply a matter for the jury and it is wrong to impose an obligation on the accused to adduce 'evidence' to support it. Indeed it is difficult to see what form this 'evidence' could take.

When discussing MG's appeal in the present case, Lord Thomas CJ states that "there was no evidential basis on which a jury could conclude that a youth of [MG's] age and sex, with a normal degree of tolerance and self-restraint would have reacted in the same or in a similar way" (at [55]); the clear implication being that the defendant should have presented some evidence to this effect but neglected to do so. It is unclear how the defendant could possibly adduce evidence as to the likely reaction of a 'normal person'. Neither Lord Judge CJ in *Clinton* and *Dawes* nor Lord Thomas CJ in the present case offer any meaningful guidance on this point.

Later, when discussing NK's appeal, Lord Thomas CJ states that "we consider that [NK] would have had great difficulty in showing there was sufficient evidence to satisfy the third component" (at [94]). This is a contender for the judicial understatement of the year. It would be *practically impossible* for NK's counsel to have adduced *any* 'evidence' on this point, let alone 'sufficient' evidence. It is, therefore, submitted that the Court of Appeal has fallen into error on this point (originally in *Clinton*, again in *Dawes* and now in the present case) and has significantly restricted the availability of the loss of control defence by permitting trial judges to withdraw it from the jury's consideration on the basis that defence counsel has failed to adduce 'sufficient evidence' as to how the normal person might have reacted to the qualifying trigger in any given case, even if 'sufficient evidence' had been adduced in support of the first two components of the defence.

"Loss of self-control"

Lord Thomas CJ considered the viability of a number of suggestions that have been put forward as to the correct meaning of the phrase 'loss of self-control'. The phrase appears in the CJA 2009 on *seven* occasions (in s 54(1)(a) and (b), s 55(2), (3), (4), (5) and (6)), and the phrase 'loss of control' also appears (in s 54(2)). Neither 'loss of self-control' nor 'loss of control' are defined anywhere in the legislation. The first definition that was suggested in the present case was one proffered by counsel for MG, to the effect that "a defendant could be considered to have lost his self-control when acting in fear or in anger or swayed by both, so as to do an act that he would normally avoid by reason of morality or fear of the consequences; a jury might therefore find that a defendant may have lost his self-control when he did an atypical act" (at [18]).

The second suggestion, proposed by Professor David Ormerod in the latest edition of *Smith and Hogan's Criminal Law* (OUP) at paragraph 15.1.2.5, and adopted by Rafferty LJ in *Jewell* at [24], was that loss of self-control means, "a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning". Finally, counsel for the Crown in the present case contended that the Ormerod / *Jewell* formulation was potentially too wide and asserted that a mere "loss of temper" would be insufficient.

In the end, Lord Thomas CJ decided that it was "undesirable" for the appeal court to address the meaning of 'loss of self-control' because the issue had not actually been raised in the present appeals:

> It is the better course to decide any such issue, if the issue ever arises, on the particular facts of a case. It may well be that the issue is generally fact-sensitive. It may therefore be unnecessary for this court to elaborate on the terms of the Act, but such a decision must await a case where the issue arises (at [20]).

His Lordship also declined to speculate on whether "the loss of self-control had to be a total loss or whether some loss of self-control was sufficient" (at [20]).

It is submitted that the Crown was correct to assert that a mere "loss of temper" would be insufficient, and so too would a test based on doing "an atypical act": both set the bar too low. In *Richens* (1994) 98 Cr. App. R. 43, a provocation case, Lord Taylor CJ said:

> It would have been perfectly proper to emphasise that the test was not loss of temper but a sudden and temporary loss of self-control which resulted in the defendant being unable to restrain himself from doing what he did (at p 49).

Apart from the reference to the loss of self-control having to be "sudden", which is emphatically *not* a requirement under the loss of control defence by virtue of s 54(2) CJA 2009, the above-quoted passage seems to provide a perfectly acceptable template for juries to use today. Lord Taylor CJ in *Richens* also observed that it would be a judicial misdirection (in the context of the provocation defence) to require a "complete" loss of self-control. It is submitted that this principle should also be regarded as good law under the CJA 2009.