Coercive Control: An offence but not a defence

R v Challen [2019] EWCA Crim 916, Court of Appeal

Murder; Manslaughter; Diminished responsibility; Loss of Control

In August 2010, Sally Challen (C), then aged 56, killed her 61-year-old husband, Richard Challen (R), with at least twenty blows of a hammer at their family home in Surrey. They had been married for 31 years but R had been 'unfaithful on several occasions' which had caused C 'considerable distress'. Eventually, in 2009, C moved out of the family home and began divorce proceedings. However, C found it 'difficult to cope' with the situation and in June 2010 proposed a reconciliation, to which R agreed. Shortly afterwards, she rescinded the decree nisi which had been obtained by this point in time, and the couple agreed to sell the family home and go to Australia for six months.

Nevertheless, C remained suspicious about R's relationships with other women. On the fateful day, C and R had met at the family home to clear out the house and garage in advance of their overseas trip. In the afternoon, C went out to buy food but on her return she noticed that the phone had been moved. She dialed the last-called number and realised that R had rung another woman. C proceeded to prepare lunch but whilst R was eating she produced a hammer that she had brought with her and killed him. C then left the family home and returned to her own property where she spent the night. The next day she called her cousin and said she was at Beachy Head in East Sussex. The cousin called the police and a chaplain, who arrived just as C was walking towards the cliff edge. Over the next four hours she told a police negotiator that she felt like R had treated her 'appallingly badly' over the years and that she was 'very depressed'. Eventually she agreed to leave the cliff edge and was arrested. C was charged with murder and appeared before HHJ Critchlow and a jury at Guildford Crown Court in June 2011.

At trial, C pleaded guilty to manslaughter on grounds of diminished responsibility. This was based on depression (she had first visited a doctor in 2004 after discovering her husband's infidelity and had been prescribed anti-depressant medication in 2008). She did not argue the defence of provocation (subsequently abolished by the entry into force of s.56 of the Coroners and Justice Act 2009 in October 2010, but which was still available at the time of the killing) but HHJ Critchlow left it to the jury alongside diminished responsibility. The jury rejected both defences and C was convicted of murder. She was sentenced to life

imprisonment with a minimum specified period of 22 years. An appeal against sentence was allowed and the minimum term was reduced to 18 years (*Challen* [2011] EWCA Crim 2919).

Several years later, C appealed on the basis of fresh psychiatric evidence which had been unavailable at the time of the trial. Leave to appeal was granted in March 2018 (*Challen* [2018] EWCA Crim 471). At the appeal, it was contended that this fresh evidence suggested that C had a borderline personality disorder and a severe mood disorder (specifically, bipolar affective disorder), at the time of the killing. It was further contended that the fresh evidence revealed that C was the victim of R's controlling behaviour during their marriage. This latter argument was supported by, inter alia, the couple's adult sons, David and James Challen, and C's cousin, who said that during their marriage R 'pulled the strings' and C 'danced'. This evidence was potentially more significant given that 'controlling or coercive behaviour' in the context of two people who are 'personally connected' had become a criminal offence under s.76 of the Serious Crime Act 2015.

There were two, separate but related, grounds of appeal. (1) The fresh evidence showed that C had been suffering an 'abnormality of mind' at the time of the killing; (2) the evidence of R's coercive and controlling behaviour supported the defence of provocation, in that it would have affected the gravity of R's conduct towards C. It was contended that, had this evidence been available at the trial, the jury may have accepted diminished responsibility and/or provocation, rendering C's murder conviction unsafe.

HELD, allowing the appeal, that the conviction was unsafe and should be quashed and a retrial ordered. This was explicitly based on the evidence relating to C's personality and mood disorders, and not the evidence of R's controlling behaviour. Hallett LJ, giving the unanimous judgment of the Court of Appeal, said that the court had 'focused' on evidence that C 'suffers from borderline personality disorder and a severe mood disorder, probably bipolar affective disorder, and suffered from those disorders at the time of the killing'.

On the relevance of coercive and controlling behaviour, Hallett LJ accepted that 'there are sufficient independent and contemporaneous references to the possibility of [C] having been controlled by [R] to support the proposition that she was in an abusive relationship'. However, she added that 'these are not issues for us to determine. We express no view on whether [C] was the victim of coercive control and no view, if she was a victim, on the extent to which it impacted upon her ability to exercise self-control or her responsibility for her actions'. Hallett LJ also emphasised that 'it is important to remember that coercive control as

such is not a defence to murder' and that 'coercive control is only relevant in the context' of other defences, namely diminished responsibility and provocation.

Postscript: C was due to face a retrial at the Old Bailey in July 2019. However, in June 2019, the Crown accepted a plea of guilty to manslaughter on grounds of diminished responsibility. C, now aged 65, was sentenced to nine years and four months – the time she had already served – and was 'therefore entitled by law to be released at once'.

Commentary

The present case is more important for what it *doesn't* decide than what it actually does decide. The Court of Appeal ultimately allowed C's appeal by reference to the fresh evidence of her suffering from borderline personality disorder and bipolar affective disorder. The Court was at pains to point out that coercive control was *not* a defence to murder and could only have relevance in the context of other defences. This was despite the fact that much of the media coverage of the appeal focused on R's behaviour towards C during their marriage ("Fear led our mother to kill our father. It wasn't murder", The Observer, 17th February 2019; "New coercive control laws under spotlight in hammer killing appeal", The Guardian, 27th February 2019; "The Sally Challen appeal will give hope to abused women", The New Statesman, 1st March 2019).

Rather than establishing an important new precedent, the present case is instead evocative – both factually and legally – of a case from more than twenty years' ago, *Hobson* [1998] 1 Cr. App. R. 31. At Liverpool Crown Court in October 1992, Kathleen Hobson (H) had been charged with murdering her abusive and alcoholic partner, James McDonald, by stabbing him to death. Her defence at trial, self-defence, was rejected by the jury, as was provocation, which had been left to the jury by the trial judge. H was convicted of murder and sentenced to life imprisonment. Several years later, H appealed, contending that fresh evidence had emerged subsequent to her trial showing that she had been suffering from Battered Woman Syndrome (BWS), a 'variant of post-traumatic stress disorder', at the time of the killing. Moreover, BWS had been recognised as a 'disease' in 1994, which meant that it satisfied the requirement for diminished responsibility at the time (under s. 2(1) of the Homicide Act 1957, prior to its amendment by s. 52 of the Coroners and Justice Act 2009) that an 'abnormality of mind' be 'induced by disease or injury'. H contended that her conviction was therefore unsafe. Her appeal was allowed, her murder conviction was quashed and a retrial ordered.

Thus, both Hobson and Challen involved women killing their abusive male partners. Both women were convicted of murder after their chosen defence (and provocation) was rejected. Both spent several years in prison before having their convictions quashed and retrials ordered on the basis that fresh psychiatric evidence, unavailable at the time of the trial, supported a defence of diminished responsibility.

Plus ça change. Or do they? One potentially significant development since the killings of James McDonald and Richard Challen is the abolition of provocation in October 2010. Would its replacement, loss of control under s.54 of the Coroners and Justice Act 2009, have made any difference had it been available to Kathleen Hobson and Sally Challen? That defence poses three hurdles for the defence to overcome (or, more accurately, three opportunities for the Crown to disprove it). The first is the requirement in s.54(1)(a) that the accused suffer a loss of self-control, albeit not necessarily suddenly (s.54(2)). The second is the need for a qualifying trigger (s.54(1)(b)). In cases like Hobson, where physical violence from the deceased was frequent, the trigger could be that contained in s.55(3), where D's loss of self-control 'was attributable to D's fear of serious violence from V against D'. In cases like Challen, where the abuse was psychological rather than physical, the trigger in s.55(4) would be more apposite, i.e. where there were 'things done or said (or both) which constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged'.

The third and final requirement is that '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' (s.54(1)(c)). In the present case, that would presumably entail asking whether a 'normal' 57-year old woman in Sally Challen's circumstances might have taken a hammer (or another weapon) to the head of her unfaithful, controlling husband. That begs at least one question: would the 'circumstances' include C's borderline personality disorder and bipolar affective disorder? The answer is probably 'no', on the basis of s. 54(3), which stipulates that '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'. The evidence would therefore have to suggest that one or both disorders had a significance beyond the 'general'. In *Rejmanski; Gassman* [2017] EWCA Crim 2061; [2018] 1 WLR 2721, post-traumatic stress disorder and emotionally unstable personality disorder, respectively, were deemed to have no such significance.