Unlawful killing and justice after acquittal – what can the law do?

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Published on 19th April 2021

In R v McPherson on 17 March 2021 at the end of the prosecution case Goose J directed an acquittal of Donald McPherson who had been indicted for the murder of his wife, Paula Leeson, in 2017. In giving his reasons he said that although at this stage it seemed *likely* that McPherson was the killer, the evidence was such that a jury properly directed could not be sure that this was so. To most people, and in most cases, that would be surprising reasoning, but it can happen. The judge concluded that even at the end of the prosecution case, when the Crown's case should be at its strongest, the Crown could not disprove the real possibility that Paula had died through other and innocent causes. This note is not a commentary on R v McPherson, which would require a close analysis of the sad facts of that case. Instead it considers the question 'what (if anything) comes next?'.

An acquittal in a criminal trial is usually not evidence of innocence. It is recorded with a verdict of 'not guilty', which means that the prosecution has failed to prove guilt 'beyond reasonable doubt', which is the standard that criminal courts require for guilt to be established. It is a more difficult standard than usually applies in civil trials, where the existence of a fact has to be proved on the 'balance of probabilities', or that the occurrence of that fact is more likely than not. So, logically, someone can be acquitted of a crime in a criminal trial, but be held to have committed that crime in a civil trial.

Of course, in most cases we do assume that people who are acquitted are in fact truly innocent of the offence, and the saying that someone is 'innocent until proven guilty' reflects that attitude. It is a serious thing to consider someone guilty of a crime, so we generally cut people slack until they are convicted to the strict criminal standard.

But there are cases where a criminal acquittal is not the end of matters. There are three possibilities. First, there may be a re-trial. An acquittal is no longer an absolute bar to prosecution for the same offence. The old rule, which still generally applies, is known as 'autrefois acquit', or 'already acquitted'. Under that rule, even if new evidence subsequently came to light, a person could not be tried twice for the same offence. The only remedy might be that the Defendant could be prosecuted for perjury, but even that would only apply if he had given evidence at trial. This rule became particularly unhelpful when DNA evidence started to resolve cold cases, often involving sexual offences, to a high degree of certainty. In the light of this Part 10 of the Criminal Justice Act 2003 gives the Court of Appeal a power to quash an acquittal and order a re-trial in the case of particularly serious offences where compelling new evidence comes to light indicating guilt.The new evidence need not be forensic evidence, but often will be. The consent of the DPP is required before such an application can be made.

The second possibility is to seek a finding of unlawful killing, or a narrative verdict to the same effect, at a coroner's inquest. Where a death has occurred in circumstances where there is concern that criminal liability may arise from it, the inquest is often adjourned pending the determination of the criminal trial. Prior to 2021 it was the case that a coroner would only return an unlawful killing verdict if he (or the jury) were satisfied beyond reasonable doubt that the deceased had been unlawfully killed. The result in the Coroner's Court should therefore have tallied with that in the Crown Court. However, in R v HM Senior Coroner for Oxfordshire (oao Maughan) [2020] UKSC 46 the Supreme Court held that verdicts of suicide or unlawful killing should be returned if the coroner were satisfied of that fact on the civil standard. Lady Arden JSC suggested that most people would appreciate the difference between a verdict in the coroner's court and one in the Crown Court (at 93), and that a failure to find an unlawful killing where that was where the evidence led on a balance of probabilities would be 'as if the system has conspired to prevent the truth from being available to the public'.

There are three further points that need to be born in mind concerning such coroners' inquests. The first is that when considering whether unlawful killing is proven on the basis of deliberate acts, the court will bear in mind the inherent improbability of murder when it weighs up the facts. This is the so-called rule in Hornal v Neuberger Products [1957] 1

QB 247 and it applies whenever a civil court is assessing the existence of a fact that amounts to a crime. The second point is that the coroner's finding is not binding on criminal courts or civil courts, or even admissible in subsequent proceedings – see Daniel v St. George's Healthcare NHS Trust [2016] EWHC 23 (QB). As far as the relatives are concerned it simply makes a public statement. The third point is that a coroner cannot by his verdict identify the guilty party. People may put two and two together, but that is as far as it goes.

It may be that the publicity of a coroner's inquest will be sufficient for the relatives of the deceased, but it may not be. Here we enter the realm of civil litigation. Sometimes, because the facts that constitute the crime also create a civil dispute, a civil court has to decide the claim. The most well-known example of this is not an English case but an American one, concerning O. J. Simpson and the killing of his wife, Nicole Brown Simpson. The difference there is that Nicole's family sued for damages, and the American legal system made substantial punitive damages available, such that Simpson was eventually bankrupted. That type of large damages claim is not available in England. Historically, under the common law no-one could recover damages by reason of the death of another. It made economic sense to kill someone rather than to grievously injure them. That position has been altered by statute, and the following types of claim for loss are now available:

- A claim to recover loss of dependency claim by a child or other dependent under the Fatal Accidents Act 1976 (which is not limited to deaths that were accidental, but extends to any death caused by wrongful act, neglect or default).
- A claim may also be brought by the deceased's spouse, cohabitee or children for a lump sum for bereavement, currently £15,120.
- The deceased's estate can itself claim damages for the deceased's own loss arising from the wrongdoing, under Section 1(1) Law Reform (Miscellaneous Provisions) Act 1934. That would extend to recovering a sum for the deceased's pain, loss and suffering prior to death, but no sum can be recovered where death is instantaneous, and 'instantaneous' would appear to have a wider meaning than one might think – Hicks v Chief Constable of South Yorkshire Police [1992] 1 All ER 690 where damages were sought against South Yorkshire Police for the pain and suffering sustained by the victims of the Hillsborough Stadium disaster, but refused on the grounds that where unconsciousness arose within

> seconds, and death within five minutes, no damages could be claimed. Nor could damages be recovered for the fear arising from the circumstances that led to the death.

So, claims against the wrongdoer for damages may be available, but they may be limited, are hedged about by restrictions and they in general require the claimant to prove that he has suffered financial loss as a result of the death.

Where the unlawful killing is alleged to be a mercenary one, then any civil claim may well concern an attempt to prevent the wrongdoer from profiting from his wrongdoing. So, for example, a husband is alleged to have forged his wife's will, and then to have killed her for the benefits he would receive under the will. If he is acquitted both of her murder and forgery, there will still be a dispute as to whether the will should be admitted to probate, and that may depend upon whether the probate court considers the will to be a forgery on the balance of probabilities.

Equally, there may be an argument that the husband's rights to his wife's estate (whether by her will or on intestacy) should be lost under the doctrine of forfeiture. The court would have to decide whether the husband unlawfully killed his wife, on the balance of probability. In Maughan (above) Lady Arden suggested that a forfeiture case had to be proven to the criminal standard (para. 69). If her ladyship was suggesting that the criminal standard applied to this type of forfeiture, I would respectfully doubt that (see Ungoed-Thomas J in Re Dellow's Will Trusts [1964] 1 WLR 452).

A court may be required to consider whether a contingency under a contract has come about. Typically in present circumstances this will be a contract of life insurance that will benefit either the deceased's estate (and if the wrongdoer stands to benefit from that, then the doctrine of forfeiture will come into play, as above) or he will benefit directly as the beneficiary of the policy. In this case the argument will be between the insurance company and the deceased. Either the insurance company will argue (if appropriate) that the policy only covers accidental death and not unlawful killing; or more usually that public policy prevents the wrongdoer from recovering. A person in general cannot

benefit from his own wrongful act[1]. A murderer cannot benefit directly from the payment of life assurance on the life of the victim.

Indeed, the wrongdoer will not be able to benefit from his wrong even indirectly. That is demonstrated by Davitt v Titcumb [1990] Ch 110. There a couple, J and G had bought a house as tenants in common in equal shares, with the benefit of a mortgage and an associated life assurance policy payable on the death of the first of them to die. G murdered J. The court held that the life assurance company was bound to pay out so as to discharge the mortgage (the mortgagee had done nothing wrong). The court then held that that payment should be treated as Js money so that G received no benefit from its payment.

In all of these cases a civil court may be more willing to consider a wider range of evidence than a criminal trial would. Typically, a criminal court will not hear evidence of what is called 'bad character' – convictions and background facts pertinent to the character of the deceased – unless it is probative of the particular charge the defendant faces, in which case it may be admissible on application under section 101 Criminal Justice Act 2003. These rules do not apply to civil trials, where evidence is admissible where it is tends to prove the allegation, unless the Court decides to exclude it in the exercise of its case management powers.

Can the defendant rely on his acquittal to establish that he did not commit the offence in a civil trial? He cannot. Not only is an acquittal not conclusive proof of innocence, it is not any evidence of innocence at all. It is regarded in the subsequent trial as opinion

[1] The policy has been often stated – see the notorious historic cases of Cleaver v Mutual Reserve Fund Life [1892] 1 QB 147 (Florence Maybrick poisoning her husband) and In the Estate of Crippen [1911] P. 108 (administration of the estate of the murdered wife of Dr. Crippen). There is a detailed analysis of the consequences of killing related to insurance policies as it applies to the law of the United States in Christoe – Murder for Life Insurance Money: Protecting the Children 58 S. Texas L. Rev. 173. See also Kingree and Tanner - Life Insurance as Motive for Murder (1994) 29 Tort & Ins LJ 761.

evidence – what someone else thought about the facts on a different occasion – and even when the opinion is that of a High Court Judge, rather than a jury, it is inadmissible. In Mr. McPherson's case that would assist rather than hinder him, as Goose J did express an opinion that was adverse to Mr. McPherson's liability, by commenting that it was likely that Paula had been killed by him. In practice, a civil judge may well be aware of Goose J's comments. If he is, then he will have to put them from his mind and come to a decision based on the admissible evidence, however difficult that may be.

Lastly, bear in mind that there is no guarantee of a trial. A defendant can choose not to participate in a civil trial, and to lose by default. Even if he defends the claim he is not bound to give evidence (but may find it hard to defend the claim in practice if he does not). If the purpose of a civil claim is to have the defendant 'hauled over the coals', then he has to be a willing participant for that to happen.

Will such a trial achieve 'justice'? That depends on what is meant by justice here. A determination in a civil trial will be a badge that shows the world what probably happened. It unravels the monetary consequences of the wrongdoing, and that may be significant if the wrongdoing was carried out for financial gain. But it does not in any other sense punish the wrongdoer. There is also the other side of the coin. The relatives believe the defendant is guilty. If he is not, and that is the conclusion of the civil court, then much money will have been spent and an innocent person further pursued. That needs to be weighed carefully before deciding whether to go down that route.

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