APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 36
HCA/2019/235/XC
HCA/2019/258/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

(1) JOHN DOCHERTY and (2) DON TEMPLETON

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: J Keenan, Sol Adv; Paterson Bell, (For Bruce Short & Co, Dundee)
Second Appellant: McCluskey; Faculty Services Limited (for Houston Law, Glasgow)
Respondent: M Meehan, QC, AD; Crown Agent

11 February 2020

[1] The two appellants were co-accused on a charge of attempting to murder by shooting which took place at a farm in Bridge of Weir on 31 October 2017. The only issue in the appeal is whether there was a sufficiency of evidence against each appellant, it being maintained that the trial judge erred in repelling no case to answer submissions.

[2] The case was a circumstantial one. There were four sets of cctv footage of importance.

1. Between 14.09.40 and 14.12.12 Mercedes 203 Avant Guard estate motor car WA02 WFW was driven into the Tesco petrol station at Bridge Street, Linwood where fuel was added. The appellant Don Templeton was identified as the driver. The vehicle had been added to his insurance policy on 27 October 2017. The appellant Docherty was in the rear passenger side seat. At that time, he was wearing a burgundy colour top. He exited the vehicle and entered the forecourt shop where he paid for the fuel, and some drinks. He got back into the same seat. The front passenger seat remained unoccupied throughout.

2. CCTV footage from Darluith Road, Linwood between 14.22.36 to 14.23.14 showed a similar Mercedes estate travelling from Linwood towards Houston in the direction of the farm.

3. CCTV at the farmhouse between 14.26.06 and 14.29.56 showed a Mercedes estate motor car being driven into the entrance of the farm 2 minutes and 52 seconds after it had been seen last in the Darluith Road CCTV 1.3 miles away. On entering the farm, the Mercedes turned immediately to the driver's right, in the direction of the motor workshop where the complainer James McGurk and a Crown witness, Josh Kerr, were working. The Mercedes remained out of sight of CCTV directly at the locus. However, the complainer, having been shot, was seen hobbling in the yard. Immediately thereafter the Mercedes was driven off at speed, and was then seen reappearing on CCTV from the direction of the workshop. It was driven at speed and exited the farm.

4. Thereafter at the Darluith Road CCTV from 14.32.18 to 14.32.50 the Mercedes estate WA02 WFW was captured on the Darluith Road CCTV travelling from the direction of the farm back towards Linwood. An eye witness spoke to seeing the vehicle leaving the farm as fast as you could go on that stretch of road. It is not disputed that it is a reasonable inference

from the whole of the CCTV footage that the Mercedes vehicle to which it relates was the same vehicle throughout, namely WA02 WFW.

[3] The complainer gave evidence that on hearing a vehicle run over the gravel outside the workshop he walked outside. He did not see or hear anyone, then heard a bang and was sent flying. He had been shot in the leg (the medical evidence indicated that the weapon used was a shotgun). He knew the appellant Templeton; they had "been pals for years" and had spoken often by phone. He identified Templeton on the petrol station CCTV. The witness Kerr was in the workshop with McGurk when he heard a voice from the bottom part of the workshop shout "alright mate". McGurk then walked towards the voice saying "That's Don's pal, I'll go and deal with it". He walked out of sight at which point Kerr heard a bang which he thought was a gunshot. On hearing a second shot he ran away and did not look back.

[4] The day before the incident, McGurk asked Kerr to drive a van for him. Kerr drove the van to Bridge of Weir. He stayed over at McGurk's house. In his presence McGurk received a telephone call. Kerr heard him say "Hello, Don". He heard the voice on the other end say "They're going to blow up your motors". McGurk replied that his vehicles were all insured. The voice then said, "I'm not bothered about the van, I just want my tools back".

Submissions

[5] The central submission for Docherty was that he had not been identified in the vehicle after the garage; and that the reference to "Don's pal" whilst clearly referring to someone other than Templeton was vague and did not allow an inference that it referred to Docherty.

[6] For Templeton the submission adopted the argument that the terms "It's Don's pal" were not sufficient to be taken as referring to Docherty. It was conceded that it was a reasonable inference that the appellant was driving the vehicle throughout, including at the

farm. However, there was insufficient evidence to convict him on an art and part basis with the shooter. There was no evidence of any agreement involving a weapon. The only basis upon which an inference could be drawn as to his involvement in any plan was the evidence the car sped away from the locus, but this does not demonstrate either prior or spontaneous agreement, but only an awareness that there was an urgent need to depart the locus.

[7] A further ground of appeal for Templeton based on a material misdirection relating to concert as applicable to him was conceded by the Crown.

[8] The advocate depute submitted that there were three compelling features which supported the inference of a plan between the accused, against the background of the evidence as a whole. These were: the relatively remote location of the workshop, which was up a track on farm premises off a country road; the departure of the car at high speed immediately after the shooting; and, coupled with that, the very short time it was at location, which was not suggestive of a visit for a legitimate purpose.

Analysis and decision

[9] It is in the nature of circumstantial evidence that it may be capable of bearing more than one interpretation. As was noted in *McPherson* v *HMA* 2019 SCCR 129, the critical question is whether an inference of guilt is a reasonable one to draw from the evidence. If so, the matter should go to the jury who will then determine whether in the circumstances they consider that they should draw that inference, having regard to the weight they think should be attributed to the various pieces of evidence taken together. The point is not to look at individual circumstances but to ask whether these individual circumstances, taken together, are capable of supporting an inference of guilt beyond reasonable doubt.

Docherty

[10] In our view the evidence would enable the jury to draw the inference that Doherty was still in the car when it pulled off the road to the workshop; that he was the person identified as "Don's Pal"; and that he was the shooter. The evidence against him was that he was seen in the rear seat of the vehicle when it left the garage, in the company of the appellant who was driving the car. The evidence suggests he was not a mere passenger since he paid for the fuel, using cash and presenting his keyring card, associated with his mother in law's Tesco account. This aids the inference that he remained in the car thereafter, and strengthens the evidence of his association with the driver, whose fuel he had paid for. It seems unlikely that he would have done this if he did not intend to remain in the vehicle, or was not party to whatever was intended. The words described as part of the *res gestae* were capable of an inference that the individual who spoke from the end of the workshop was a friend of the appellant Templeton, who was both known to the complainer, and was driving the very car in which the person had arrived. It is an almost irresistible inference that this person was the shooter, and that this was Docherty; and that he made his getaway in the vehicle. It may, of course be that other inferences could be drawn. The appellant gave evidence that he had exited the vehicle before it got to the farm. Reference during the appeal was also made to a joint minute agreed during the defence case that a police officer had viewed the footage 14.22.36 to 14.23.14 "as showing" the vehicle with a front seat passenger wearing a white or light top. What exactly was made of this at trial is not clear – it seems that it could not be seen when the footage was shown at normal speed. However, this evidence would not in our view affect the sufficiency of the case, and was material going only to weight, and for the jury to ask whether it meant that they should not draw the inference which the Crown asked them to draw.

Templeton

[11] As to Templeton, he was the driver of the vehicle throughout. It was a reasonable inference that the "Don" with whom the complainer appeared to have an issue the previous night, and the "Don" whose friend was identified at the locus, was one and the same person as the appellant. Of course, the jury could be asked to conclude that this was all a coincidence, but the inference would be a reasonable one. The vehicle was driven to the workshop, and was on the farm premises as a whole for a very short period of time. At best for the defence this was a period of 3 mins 50 secs, if the footage (3) is to be taken as recording that time. The vehicle could have been stationary for only a very brief moment. This would accord with the trial judge's note that the evidence showed that the vehicle drove off "immediately" after the shooting. It is a reasonable inference that the engine had not been turned off during the short period when the vehicle must have been stationary; in other words, it was being kept ready for a swift departure. The fact that Templeton remained in the vehicle lends support for that inference. The weapon used was a shotgun – it is a reasonable inference that the driver of the vehicle must have seen the passenger with such an item, in the car and on exiting it at the workshop. From all of this evidence it is a reasonable inference that there was a prior plan to shoot the complainer, of which the appellant Templeton was a knowing participant.

[12] In these circumstances both appeals so far as based on sufficiency must fail. We accept, however, that the Crown was correct to concede the appeal against Templeton so far as based on misdirection. We will accordingly appoint the case to a hearing on the effect of this.