



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 42
HCA/2021/87/XC

Lord Justice General
Lord Menzies
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

GARY ORR

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: IM Paterson (sol adv); Paterson Bell (for Tony Currie, Ayr)
Respondent: Gillespie AD; the Crown Agent

10 September 2021

Introduction

[1] On 3 March 2021, at Airdrie Sheriff Court, the appellant was found guilty of a charge which labelled that:

“on 13 January 2018 at Westray Stores ... Cumbernauld, you ... did, while acting with another..., assault Patrick Clarke ... and did repeatedly strike him on the head and body with a knife... to his severe injury and to the danger of his life.”

There was an associated charge of being in possession of an offensive weapon. The appellant had pled guilty to another charge of failing to appear at a diet of court.

[2] The sheriff imposed a 30 month *cumulo* penalty on the principal charge and that of having an offensive weapon, of which 3 months was attributable to bail aggravations. She admonished the appellant on the remaining charge.

[3] The ground of appeal, for which leave had been granted, raised a question of whether the sheriff ought to have directed the jury to disregard evidence of identification by two police officers, on the basis that they had never seen the appellant in person. In the written Case and Argument, the challenge altered to become one founding on what were said to be confusing and conflicting directions by the sheriff on the issue of identification. In oral argument there was a further change in approach, whereby the sheriff ought to have decided that the quality of the CCTV images, which the Crown maintained showed the appellant as the assailant, was such that the sheriff ought to have directed the jury that no identification from the images was possible.

The evidence

[4] Central to the evidence of identification, which was the sole issue of substance at the trial, were CCTV images taken in and around the small convenience store. The images start at about 3.12 pm and last for about 4 minutes. The internal shop images show a person entering, wearing a fur-lined parka jacket with the hood down. This person, who was later identified by police officers as the appellant, had a Mohican haircut. His face is readily identifiable in the images at that point. An outside camera recorded him leaving the shop and moving out of view behind some bins. At that point, the complainer, Patrick Clarke,

who has distinctive blond hair, and Paul McGarr appeared from the direction in which the man in the parka had gone. They had presumably passed each other.

[5] The complainer, having gone into and emerged from the shop, moved in the direction of the bins. A person, again identified by the police as the appellant but not wearing a parka, came back from that area and gestured to the complainer to follow him. He did not do so. The person who was identified as the appellant made slashing motions towards the complainer and chased him back towards the shop. He appeared to have something shiny in his hand; presumably a knife. He was accompanied by a third stockier individual. The internal camera shows the complainer leaving the shop and becoming involved in an altercation with the person identified as the appellant and the stockier individual. They chased the complainer back into the shop and both are seen making slashing motions towards the complainer, who returned to the shop holding his back. Mr McGarr was in the immediate vicinity and went outside to where the two attackers had remained.

[6] The sheriff records that the first witness was Paul McGarr. Almost immediately on commencing his evidence, he volunteered that the accused, who was sitting in court, was not Gary Orr. He also said that the man wearing the parka in the images was not Gary Orr. However, in relation to the CCTV images, one of the men who had attacked the complainer was Gary Orr. Mr McGarr and the complainer had gone into the shop. The complainer had left and he had followed him. He saw Gary Orr and the stockier man outside; Mr Orr shouting, "I've just plugged your mate three times".

[7] The second witness was the complainer who could not remember anything about the incident. He maintained that he could not recognise the persons shown in the CCTV images. He was not asked to identify the appellant.

[8] DC Ian Murray viewed the CCTV images in the days after the incident. He also viewed CCTV images of the cautioning and charge of a person whom he identified as the same person who was shown stabbing the complainer in the images. This was the appellant. The attacker was the same person who had been in the shop wearing a parka jacket. DC Murray had not seen the appellant in person before giving evidence. He had never met the appellant before.

[9] PC Stuart Greenhorn had also viewed the CCTV images. He identified the man wearing the parka as the appellant. He identified the appellant as the person who had approached the complainer and had hit him with something. PC Greenhorn had also never seen the appellant before, but Mr McGarr had named the person who had attacked the complainer and PC Greenhorn had obtained a facial image of that person; ie the appellant. The fifth witness was DC Graham Cuthill, who had cautioned and charged the appellant on 19 September. He had been asked by PC Greenhorn to look at a still which had been taken from the CCTV images, but he had not been able to identify Mr Orr as being in that still because of its quality.

[10] The appellant did not give evidence, nor did he provide any substantive answers on being interviewed by the police.

Charge to the jury

[11] The sheriff directed the jury that they had to consider the testimony from the witnesses about what they had seen in the images. They might find that testimony helpful in interpreting what had been shown, but they were not bound by what these witnesses had said. The jury could take account of what they thought had been shown in the images. The Crown had asked the jury to accept the identifications given by DC Murray and

PC Greenhorn, whereas the defence had asked the jury to reject those identifications as unreliable. People's powers of observation could be fallible and errors could occur in identification. These had to be guarded against. The jury had to judge the soundness of the identifications for themselves. They required "to take special care in assessing the quality of this evidence". The sheriff's directions on identification concluded with a statement that, although the jury did not have to conclude that the witnesses had made 100% cast iron identifications, they had to be satisfied that they could rely on the substance of what the witnesses had said. They would need to be able to accept the evidence of the two police officers where they positively identified the accused.

Submissions

[12] The appeal consisted of three separate tacks. The first was in the grounds of appeal in which the contention was that the identification evidence of the two police officers had been "flawed and unfair". It had consisted of identification of the appellant from the CCTV images and confirmation of that identification from images on the police database. While the officer who had cautioned and charged the appellant, and had thus seen him in person, had been unable to identify the appellant from the images, two other officers, who had not met the appellant, had said that they could identify him. The sheriff therefore ought to have directed the jury that they should disregard the identifications by the two police officers as they had not seen the appellant.

[13] The second tack was in the written Case and Argument in which it was stated, although not a ground of appeal, that the sheriff had given confusing and conflicting directions whereby: first, the jury could make up their own minds about the CCTV images but, secondly, they had to accept the identification evidence of the two police officers in

order to convict. The conflict was that the jury must have accepted the testimony of the two police officers, but that would mean that they could not form their own view on what the images had shown. This amounted to a material misdirection.

[14] The third tack was at the oral hearing. In apparent contradiction of the grounds of appeal, it was accepted that the evidence of the two police officers was admissible.

Nevertheless, the quality of the CCTV images was such that the sheriff ought to have taken the view that no identification could have been made from them.

[15] The Crown complained that the argument now being presented was not that for which leave had been granted. In relation to the ground of appeal, there was no requirement that police witnesses had to have seen an accused in person in order to give evidence of identification. DC Murray and PC Greenhorn had had the opportunity to compare the CCTV images, a photograph from the police database and the images of the police interview, under the less-pressured time constraints of an ongoing trial. There had been no objection to the officers giving evidence of identification and no such objection could be advanced on appeal (Criminal Procedure (Scotland) Act 1995, s 118(8)). Any objection ought to have been taken in a preliminary issue minute (1995 Act, s 71(2)) or at least at the trial. It was now accepted that the evidence was admissible. The sheriff had not been asked to hold otherwise.

[16] The sheriff may have misdirected the jury in telling them that they had to accept the evidence of the two police officers. That misdirection had been in favour of the appellant and no miscarriage of justice arose.

Decision

[17] The ground of appeal relates to the quality of the evidence of identification. It is not

about any misdirection by the sheriff. A more useful starting point in relation to the quality of identification was the testimony of Mr McGarr that the person who had carried out the attack on the complainer was somebody whom he knew to be called Gary Orr. The appellant was identified as being Gary Orr by the police who cautioned and charged him. He would have answered to that name in the sheriff court. The strength of this evidence derives from the unlikely coincidence of Mr McGarr's statement that it was Gary Orr who had carried out the attack and the person in the parka seen in the CCTV images, and later involved in the stabbing, being identified by the police officers as Gary Orr.

[18] In addition to this, two police officers had taken time to compare what they saw on the CCTV images with a database photograph of the appellant and the images of him at the stage of caution and charge a few months after the incident. There is no suggestion of any material change in appearance. No objection was taken to this form of identification and it is too late to raise one now (1995 Act, s 118(8)). In any event, it was perfectly competent to adduce evidence of identification in this way. As was said in *Gubinas v HM Advocate* 2018 JC 45 (LJG (Carloway), delivering the opinion of the court, at para [64]):

“... if a person, such as a police officer, has spent time viewing and analysing the images and thus acquires a knowledge beyond that which the jury might attain in the course of a trial, he or she can give comparison evidence if there is a contemporary photograph available. Such a photograph may not be necessary where it is not disputed, or it is proved, that the accused's appearance in court is not materially different from his appearance at the time of the crime...”

[19] In these circumstances, there was more than sufficient evidence of identification of the requisite quality to merit a conviction. The images, especially those showing the man in the parka entering the shop, were sufficiently clear to permit identification by a jury of the appellant. There was sufficient in the other images for the jury to conclude, on their own viewing, that the attacker was the same person who had been wearing the parka.

[20] The sheriff's directions on identification might have been clearer on the scope for the jurors to form their own view on whether the CCTV images showed the appellant and the place for the image comparison testimony of the two police officers. Technically, the jury did not have to be satisfied that the two police officers had correctly identified the appellant, since the jury could have made up their own minds upon whether the appellant was shown in the CCTV images. On the other hand, if the jury did consider that the appellant was shown in the images, it would almost inevitably follow that they did accept the identical view of the police officers, having carried out their respective comparisons. If they did not accept that the appellant was shown in the images, they could hardly have accepted the identification evidence of the police officers. There was no misdirection. Even if there had been, it was a direction in favour of the appellant. It could not have resulted in any miscarriage of justice.

[21] The appeal is refused.