



SHERIFF APPEAL COURT

**[2022] SAC (Crim) 1
SAC/2021/000364/AP**

Sheriff Principal C D Turnbull
Sheriff Principal A Y Anwar
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the Appeal by

PRZEMYSŁAW GAL

Appellant

against

PROCURATOR FISCAL, EDINBURGH

Respondent

**Appellant: McCluskey, advocate; Good & Stewart
Respondent: Prentice QC (sol adv) AD; Crown Agent**

9 February 2022

[1] The appellant was found guilty in the sheriff court at Edinburgh of a charge of forcing open a lockfast secured staff room door and theft of a quantity of cash from restaurant premises in Edinburgh. Against his conviction he has appealed by means of stated case. The single question posed for the opinion of the Court is in the circumstances and on the facts stated, was the summary sheriff entitled to convict the appellant?

Submissions for Appellant

[2] In presenting the appeal, counsel for the appellant submitted that the summary sheriff was not entitled to convict in that there was not a sufficiency of evidence of the commission of the crime of theft. The question posed should be answered in the negative. The sheriff makes plain in the note annexed to the stated case that the evidence upon which the Crown relied came from one witness, LAM, and from CCTV footage. LAM was a general manager in the restaurant. She had been working on the date libelled, from about 3pm until closing time, which was usually about 11.30pm and sometimes later. On that evening, she had £200 to £220 in her purse. The money represented her share of tips for the previous couple of weeks. She kept her purse in her handbag. She and other managers kept their handbags and coats in a small office on the first floor of the premises. The office was secured with a key. It was always kept locked. The ladies' and gents' toilets, which could be used by customers, were just beyond it. There was also on the first floor, a storeroom, which was used for storing napkins, cleaning products and the like. It too was always kept locked, and could be opened by a keypad. When she went home that night LAM noticed that the money was missing from her purse. She was clear that it had gone missing during her shift at the restaurant. She did not notify anyone that night, as it was late.

[3] The CCTV footage in this case is described as being clear and sharp. The sheriff had no difficulty in identifying the individual in the CCTV footage as the appellant. The CCTV showed the appellant entering the first floor area then entering the gents' toilet. It showed the appellant leaving the gents' toilet after a few moments. The appellant then looked cautiously to his left towards the stairs and thereafter opened the door to the storeroom. He appeared to be checking whether anyone was coming up the stairs. He looked furtive. The

appellant spent a few minutes in the storeroom rummaging through the items stored on the shelves there. He then came out of the storeroom, closed the door, and effected entry to the small office. He effected entry to the office quickly and without apparent difficulty. He appeared to use a key of some sort. He entered and remained in the office for a matter of 30--40 seconds before leaving and proceeding down the stairs and therefore off camera.

[4] The appellant submitted that the issue in this appeal is whether the Crown proved by sufficient evidence the fact that the money referred to in the complaint was stolen. The evidence in the case is in narrow compass. There is the evidence of LAM and the CCTV footage. LAM spoke to the money being in her purse in the small office on the day in question and that the money was missing when she returned home that evening. The CCTV evidence confirms that the appellant was on the premises in question; behaving in a furtive manner; and entering the small office where LAM had left her bag.

[5] As pointed out by the Lord Justice Clerk in *McDonald v Herron* 1966 SLT 61, by reference to *Alison* (Volume I, page 324) proof of theft may be complete if one witness speaks to the theft, the second sees the panel in the vicinity, and the third apprehends him *de recenti* with the stolen goods in his possession, the fact that these goods were the stolen goods being spoken to only by the first witness. *Alison* gives examples where the second consideration is absent. It is significant that in every case cited by him in which there was only one witness to the theft of the goods or money, there was evidence of the stolen property or part of it, or property resembling the stolen property, being found *de recenti* (usually in suspicious circumstances) in the possession of the accused. In the present case evidence of this matter is conspicuously absent. The court is left with the evidence of LAM and the CCTV footage; and the absence of any evidence that the accused had at any time the stolen money in his possession.

[6] The appellant also placed reliance upon the decisions in *Stewart v PF Dunfermline* 1996 SCCR 494 and *Harvie v HC* [2014] HCJAC 68; and sought to distinguish *Reid v HM Advocate* 2017 JC 37.

Submissions for the Respondent

[7] The advocate depute invited the court to answer the question posed in the stated case in the affirmative and to refuse the appeal. In the present case, findings in fact (xiii) and (ix) were significant. They are in the following terms:

“(xiii) In the course of viewing the CCTV footage for that evening, [LAM and her assistant manager] saw an individual who was not a member of staff come up the stairs, enter and then leave the gents' toilet, effect entry to the storeroom, and then effect entry to the small office where LAM's purse was to be found, within her handbag, that evening. This happened during the course of her shift.

(ix) The CCTV footage shown to the court was of the first floor of [the restaurant] for the evening of 27 March 2019. It was clear and sharp. It showed an individual coming up the stairs, and then entering the gents' toilet, where he remained for a few minutes. On emerging from the gents' toilet the individual had paused. He had looked cautiously to his left. He appeared to be checking whether anyone was coming. His manner was furtive. He then effected access to the storeroom. He did so quickly and without apparent difficulty. How he did so was not clear. He spent some time rummaging around what was stored on the shelves, before leaving the room and closing the door.”

[8] Findings-in-fact (xiii) and (ix) were of significance when viewed in light of what was said in *Reid v HM Advocate* at paragraphs [12]-[14]. It was not of assistance to attempt to compare the particular facts of earlier cases. The principle was helpfully set out in *Reid* at paragraph [12], which explained that for a sufficiency of evidence for theft, the search for corroboration falls to be carried out in terms of the Lord Justice-General (Rodger)'s *dictum* in *Fox v HM Advocate* 1998 JC 94. In *Reid* there was clear and unchallenged evidence from the householder; in the present case there was clear and unchallenged evidence from LAM.

The most obvious conclusion to draw from the CCTV footage was that the appellant - who had no legitimate purpose to be in storeroom or the office - was looking for something to steal. It is not necessary for proof of theft that there be evidence from two separate sources, each describing the precise nature of the missing item and its disappearance (see *Reid* at paragraph [14]). Taken as a whole, there was a sufficiency of evidence.

Decision

[9] There are many similarities between the facts of the present case and those of *McDonald v Herron*, but each case is fact sensitive. In *McDonald*, a prosecution for theft, one witness deponed that he left a bag containing money in his office and that it was missing on his return after a two hour absence. That witness and another spoke to the accused being on the premises at the relevant time and behaving in a suspicious manner. There was no evidence that the stolen property was found in the accused's possession. The sheriff-substitute convicted. On appeal, the High Court held, that in these circumstances the failure to corroborate the essential fact that the bag and money had been stolen was fatal; and the conviction was quashed. In *Reid*, the High Court distinguished *McDonald*, on the basis that there was no evidence to corroborate the witness's account of a possession having been removed.

[10] *McDonald* was referred to with apparent approval in both *Stewart* and in *Harvie*. In *Reid*, the High Court was not clear why, in *Harvie*, evidence that money had been removed from a drawer was not corroborated by video footage of the respondent removing "items" from the drawer, which she had no reason to be accessing, and putting them in her pocket. In *Harvie* it is worthy of note that the High Court expressly stated that it is not necessary to have two "direct" sources of evidence to the commission of a crime. As in *Reid*, the terms of

the Lord Justice-General (Rodger)'s *dictum* in *Fox v HM Advocate* (at page 100) merit repetition:

“While evidence can provide corroboration only if it is independent of the direct evidence which it is to corroborate, the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.”

[11] The starting point in the present case is the evidence of LAM. It was clear and unequivocal. The sheriff found her to be a wholly credible and reliable witness. The CCTV footage is independent of the evidence of LAM. The footage is real evidence which constitutes sufficient proof of what it shows happening (see *Shuttleton v PF Glasgow* 2019 JC 98). The sheriff was satisfied, from the footage, that the appellant's actions were suspicious. The appellant might, if he was a customer of the restaurant, have had a right to use the gents' toilet, but he had no right to enter either of the locked rooms. His demeanour and his behaviour were highly suspicious. That carried with it a clear inference of dishonest intent. The sheriff gave detailed, cogent reasons for reaching the conclusion he did on the footage. As set out in *Reid*, it is not necessary for proof of theft that there be evidence from two separate sources, each describing the precise nature of the missing item and its disappearance. In the present case, the sheriff was entitled to reach the decision he did.

[12] We shall, accordingly, answer the question posed in the stated case in the affirmative and refuse the appeal.