



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 12

HCA/2019/410/XC and HCA/2019/392/XC

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION

by

(FIRST) ZAK BENNETT and (SECOND) IAN DAVID MOYES

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: Graham QC; Ross and Fox, Glasgow

Second Appellant: Forbes; Paterson Bell

Respondent: Edwards QC AD; the Crown Agent

5 March 2020

General

[1] On 31 May 2019, at the High Court in Glasgow, the appellants, along with their two co-accused, namely, Chloe Walker and Courtney McCreddie, were found guilty of four charges, all relating to events on 7 July 2017 at addresses at Dimsdale Crescent, Wishaw, and Ryehill Road, Lumloch Road and Cortmalaw Gardens, all Glasgow. The first charge was

one of possession of a firearm, with intent to cause EG and JM, who lived in Ryehill Road, to believe that violence was to be used against them; contrary to section 16A of the Firearms Act 1968. The second was a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, by behaving in a threatening or abusive manner at an address in Ryehill Road, pulling a window from its hinges, shouting and swearing at EG, brandishing a shotgun at her and demanding that her son, JM, leave the house. The third was a breach of the peace in Lumloch Road by repeatedly discharging a firearm. The fourth was again possession of a firearm, this with intent to cause AD, who lived at Cortmalaw Gardens, to believe that violence would be used against her; again contrary to section 16A of the 1968 Act. The appellants were sentenced to 8 years imprisonment.

Evidence

[2] Ms Walker had hired a black Mercedes car. From evidence obtained from the tracking device which was fitted to that car, it was not disputed that she had driven it from the appellant Moyes's house at Dimsdale Crescent, Wishaw to the *locus* at Ryehill Road shortly before the events which took place there at about 3.00am. Evidence, obtained from the mobile phones of the appellant Bennett, Ms Walker and Ms McCreddie, placed them in the car, along with a fourth person. When the car arrived at Ryehill Road, two persons got out, one of whom had a firearm. The events libelled then took place. EG, who was the mother of JM, was confronted by the two, who wanted JM to leave the house. The two men then returned to the car, which left and made its way to Lumloch Road. Two men again got out. They entered the back garden of an address at Cortmalaw Gardens, which was the home of AD. The gun was discharged twice. The car then returned to Dimsdale Crescent,

Wishaw. The car's engine had not been switched off from 2.25, when it left Dimsdale Crescent, until it returned there at 3.55.

[3] It was not disputed that there was sufficient evidence to identify the appellant Bennett as being in the appellant Moyes's house, both before and after the incidents and in the car during its journey to and from the *loci*. At 19.33 on 6 July, the car had picked Mr Bennett up at his own house and taken him to Dimsdale Crescent. Later, after the incidents, at 6.03, it dropped him back home. Ms Walker texted Ms McCreaddie to that effect. Mr Bennett's appeal concerned the judge's directions about the import of certain WhatsApp messages in advance of the incidents. One was from Ms McCreaddie to Ms Walker at 19.20 on 6 July and read "Can u pick that Zac up got Moysie? The hot one who was asking for a hot pal !!!? Drop them back here" and later, at 1.54 on 7 July, "If u drive he'll give you a couple of hundred he said x".

[4] The evidence against the appellant Moyes consisted, first, of four particles of firearms residue found on a pair of grey jogging bottoms, which were recovered from his house at Dimsdale Crescent on 27 July 2017. Mr Moyes's DNA was on the trousers, indicating that he had been the wearer of them at some point. Evidence from CCTV images, in relation to Cortmalaw Gardens, showed a person wearing grey clothes. AD had said that one of the men, who had got out of the car, had been wearing a grey tracksuit. There were two other articles found in Mr Moyes's house, notably a mask (on which his DNA was also found) and a hat, on each of which there was a single particle of firearm's residue, which was said not to be scientifically significant.

[5] Secondly, there was a photograph on a phone, attributed to Ms Walker, timed at 15.29 on 6 July, depicting another phone, itself showing an image of a shotgun, similar to the one which was used in the incident, on the floor of a bedroom in the appellant Moyes's

house. Thirdly, there was another photograph on Ms Walker's phone, timed at 4.41am on 7 July, showing the Mr Moyes and Ms McCreddie together. There was another image, dated 14 July, on a different phone, showing Ms Walker and Mr Bennett on a bed with the shotgun. The shotgun shown lying on a floor in Mr Moyes's home was a pump action shotgun of Italian origin which, according to an expert witness who had viewed the CCTV images of the discharges, was capable of producing the flashes recorded.

The judge's charge

[6] In the course of his directions to the jury, the trial judge explained the meaning and effect of concert. Specifically in relation to the WhatsApp messages, he gave a standard direction about statements made by one accused outwith the presence of another. He continued:

"But if you're satisfied that persons accused were involved jointly in committing a crime then what's said or written by any one of them in preparing for or carrying out that crime, that's to say in furtherance of the common purpose, is evidence against any of the others. And that's so whether or not the others were present or were part of the group message chat at the time. And that's because in such a situation, what was said can be inferred to be part of their ongoing collaboration in carrying out the crime. So if you're satisfied that a statement about any one of the others was made in the course of planning for or carrying out the crime, its content are evidence against any of the other persons accused who was mentioned. But if you're not satisfied that concert or joint criminal responsibility has been proved then you must disregard what was said about a person co-accused who at the time it was said or messaged or texted was not present or was not part of the group chat, in other words, in that situation, if you're not satisfied that concert or joint responsibility has been proved, the general rule applies."

The jury subsequently asked:

"With regards to Zak Bennett, does reliance on text messages between Chloe Walker and Courtney McCreddie hinge upon whether or not it can be established that some or all of the accused were acting in concert".

The trial judge answered this as follows:

“... as regards Zak Bennett, whether or not you can make reliance on text messages, or WhatsApp messages concerning him between Chloe Walker and Courtney McCreddie depends on two factors. The first is this, before you could rely on anything concerning him messaged between these two you would need to have come to the view that the three of them together were acting in concert in furtherance of a common plan, that’s the first thing. And second thing is that when the messages were sent concerning him or received, that was happening either in preparation of executing the common plan or in furtherance or in the carrying out of the common plan, in other words that communications concerning him were concerned with the furtherance of the common plan. If the messages concerning him were sent or received after the commission of the crimes set out in the charges, then that would be too late and the messages concerning him would not be evidence against him”.

The trial judge dealt with the images caught on CCTV as follows:

“We saw footage which depicted the rear garden of 5 Cortmalaw Gardens and there was other footage taken from public space CCTV cameras ... tracking the progress of the black Mercedes through Wishaw and Glasgow ... and we also had evidence of images taken from the Samsung mobile phone belonging to Chloe Walker and there were photographs and a video. Now, all of that is part ... of the evidence in the case and it’s important that you should realise that you are entitled to form a judgement about what these images show just as you are entitled to form a judgement about eye witnesses’ descriptions about what is said to have happened. Now, we did have witnesses who gave evidence about what they say is happening in these CCTV and phone images and who is shown in them ...

... Now, you are entitled in considering all of that evidence to consider whether these witnesses are credible and reliable. You may find the evidence of a witness helpful in interpreting what is shown in these images but you are not bound by what any of the witnesses said in fact. You are entitled to form your own judgement about what the images show, just as you form a judgement about an eye witness’s description of something that has happened. So you can take into account in determining the facts who you consider to be shown in the images and what you consider the images depict as happening. You can have regard to the CCTV images and the photos when deciding who did what, so you form your own conclusions about the CCTV evidence regardless of what any witness has said.

Now there was some comment made in the defence speeches about the quality of the footage at Lumloch Road, it was suggested it wasn’t that clear or grainy so that the ... witnesses’ evidence about what it shows is happening is possibly not reliable, so you’ll have to consider that ... you’ll have to consider the quality of the footage in assessing the reliability of that evidence”.

Submissions

First appellant (Bennett)

[7] The appellant Bennett submitted that the trial judge misdirected the jury in relation to the text messages. In a case involving concert, comments made, other than by a particular accused, may be admissible in the case against that accused in two situations. The first was where the concerted action was already ongoing and the accused was a party to that activity (eg *Hamill v HM Advocate* 1999 JC 190; *McGaw v HM Advocate* [2019] HCJAC 78). The second was where the comments themselves demonstrated participation in criminality (cf *Johnston v HM Advocate* 2012 JC 49). At the time of the WhatsApp exchanges between Mr Bennett's co-accused, it had not been established that there was any ongoing criminality on the part of Mr Bennett. There was no evidence of concert on his part at the time.

Second appellant (Moyes)

[8] The appellant Moyes maintained that the trial judge erred in repelling a submission of no case to answer. The case had been a wholly circumstantial one; the test to be applied being that set out in *Megrahi v HM Advocate* 2002 JC 99 (at para [31] to [36]). The evidence as a whole did not permit the required inference of guilt. In relation to the jogging bottoms, neither the DNA nor the firearm's discharge residue could be linked in time or place to the incidents, in the absence of identification of the bottoms by those who had either witnessed the incident or viewed the CCTV images of the Cortmalaw Gardens incident. The telecommunications evidence in relation to the three co-accused did not incriminate Mr Moyes. The image of Mr Moyes and Ms McCreddie had been taken three quarters of an hour after the last incident. There was nothing in it to link Mr Moyes to the *loci* or a firearm. The photograph of the shotgun on the floor of a bedroom in Mr Moyes's home was not

capable of giving rise to an inference of guilt. The iPhone on which the photograph of the gun had been taken had not been traced. The image of Ms Walker and Mr Bennett lying on a bed with a shotgun, which was similar to the one shown in the CCTV images, did not give rise to an inference of guilt on the part of Mr Moyes (see *McPherson v HM Advocate* 2019 SCCR 129 at para [8]).

[9] The trial judge had erred in inadvertently misdirecting the jury about what they were entitled to find proved from their viewing of the CCTV images at Cortmalaw Gardens. It was not open to the jury to form their own conclusions from the CCTV images in so far as the identification of Mr Moyes was concerned. The quality was so poor that no identification was possible. The directions may have confused the jury (*Afzal v HM Advocate* 2013 SCL 954 at paras [12-13]). *Gubinas v HM Advocate* 2018 JC 45 was distinguishable given the quality of the images.

Crown

[10] In relation to Mr Bennett, the advocate depute submitted that, at the time of the WhatsApp messages, there was evidence that Mr Bennett was involved in concert with the others. Matters had moved from preparation to perpetration. Whether the incriminatory messages were sent or received in furtherance of that common criminal purpose, and therefore admissible against the appellant, was a question of fact. The message to Ms Walker, to pick up Mr Bennett and bring him to where the others were, had been in a context in which she had not met him before. At the time of the message about the money, both women had been in Mr Moyes's house. The shotgun was shown in the house in the photograph timed at 15.29 on 6 July, by which time perpetration was underway. The interrelationship of the activities and the exchange of messages painted a clear and logical

picture of all accused working together in furtherance of the common criminal purpose. The jury were entitled to take the messages into account. In any event, given the totality of the circumstantial evidence against Mr Bennett, there was no prospect of the jury coming to a different verdict.

[11] In relation to the appellant Moyes, the several circumstances, when taken together, were capable of supporting the inference that he had been acting with the others in furtherance of the common criminal purpose. There was no need for the jogging bottoms to have been spoken to by witnesses who were either at the scene or who had viewed the CCTV. The CCTV images had been of poor quality and it was not possible to identify anyone from them. The images were not relied upon by the trial advocate depute as evidence of identification. It was open to the jury to assess whether Mr Moyes was one of the persons shown in the images on the basis of the other circumstantial evidence. There was no misdirection. The trial judge had cautioned the jury about the quality of the footage. In any event, given the totality of the evidence, there had been no miscarriage of justice.

Decision

[12] Evidence, of Ms McCreddie contacting Ms Walker prior to the incidents with a view to picking up the appellants and telling her that, if she were to drive then, she would be paid for it, is not hearsay. It is a fact which is relevant to the commission of the crime by all participants not long afterwards. It is part of the proof relative to the preparation and perpetration of the crime. As such it is admissible against all of the accused in so far as it sheds light on their participation in concert in what occurred.

[13] The prohibition against hearsay finds its true focus in relation to reports of what a person had said outwith the courtroom after the event, with which the prosecution or

litigation is concerned, has occurred. It does not apply to testimony concerning what was said by persons, especially ultimate alleged participants, prior to, or at the time of, the event where that is relevant to proof of the commission of the crime and its perpetrators. Evidence of “the whole thing that happened”, that is the *res gestae*, is admissible (see generally Davidson: *Evidence* para 12, 13 *et seq*; Walker & Walker : *Evidence* (4th ed) para 8.5.1 *et seq*; and the dissenting opinion of Lord Philip in *Hamill v HM Advocate* 199 JC 190 at 202-204, citing Dickson: *Evidence* (Grierson Ed) paras 254 and 256). As Dickson put it (at 363, (cited in *Johnston v HM Advocate* 2012 JC 49, Lord Reed at para [42])):

“... all words uttered or documents issued by one conspirator in furtherance of the common design, and those which accompany acts of that description, and so form part of the *res gestae* may be used against all the other prisoners, provided there be *prima facie* proof that they engaged in the plot” (see also § 257).

[14] The trial judge’s directions were overly favourable to the appellant. There was no need for concert to have been proved in advance. It may be that it is the content of the WhatsApp messages themselves which ultimately proves the concert. On this basis the appeal in Mr Bennett’s case must be refused.

[15] The trial judge’s directions on what the jury might make of the CCTV images of events at Cortmalaw Gardens were unexceptional. It was not suggested by the Crown that the appellant Moyes could be identified from the images and the judge did not say so either. The significance of the images was, as the judge said, in relation to gauging the testimony given and, following *Gubinas v HM Advocate* 2018 JC 45, in determining the facts as shown in the images. The judge’s passing reference to the jury taking into account the images in determining who was shown in them cannot reasonably be interpreted as meaning that the jury could identify the appellant solely from the images themselves.

[16] The circumstantial case against the appellant Moyes was a compelling one. The car which took the perpetrators to and from the *loci* left from, and returned to, his address. Firearms residue was found on clothing in his house. The clothing was linked to him by the DNA findings and, in relation to the tracksuit bottoms, linked also to the CCTV images and AD's description of what one of the assailants had been wearing. Asking AD, or the police officer who viewed the images, to comment on the similarity of the bottoms in court was neither necessary nor likely to have been productive. The photograph of a shotgun, which was present in Mr Moyes's house during the day prior to the incidents, completes the compelling narrative. In these circumstances, there was undoubtedly a case to answer. His appeal against conviction is also refused.