APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 30
HCA/2022/000021/XC

Lord Justice Clerk
Lord Matthews
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in

APPEAL AGAINST CONVICTION

by

MARK WISHART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hay, Faculty Services Limited
Respondent: Cameron, Sol Adv, AD; Crown Agent

19 August 2022

Introduction

[1] On 12 November 2021, at the High Court of Justiciary in Dundee, the appellant was convicted of attempted murder for which he was sentenced to imprisonment for a period of 6 years. The charge libelled that the appellant had struck Scott Peletier with the vehicle he was driving, driven repeatedly at him in an effort to strike him again and had also struck

another pedestrian, Kirk Fisken. The focus of the trial was whether the Crown could prove that the appellant had been the driver of the vehicle. After the speeches and charge, the jury asked the following question: "Can we have a pic or close up of the accused for us to see in a clear way?". The trial judge answered that question in the negative. The appellant challenges his conviction on the basis that the trial judge erred in so doing, resulting in a miscarriage of justice. Unsurprisingly, the appellant does not challenge the sentence, which on any view seems low for an attempted murder of this kind.

Facts

[2] Neither of the individual complainers was known to the appellant prior to the incident, which occurred between about midnight and 1am, in the centre of Perth. According to the report of the trial judge, the car in question had to drive round Scott Peletier, who was in the roadway of South Street trying to hail a taxi. The right wing mirror clipped him and he ran after the car, aiming a kick at it. He may have struck it. The driver drove on a little then executed a handbrake turn at the junction of South Street and Scott Street before coming back up the road at speed in an attempt to hit Mr Peletier, who took evasive action. The car then returned for a second attempt, having done another handbrake turn in South Street. When it came back down Scott Street it struck a second innocent passer-by, Kirk Fiskin. He was thrown over the bonnet and roof but luckily only sustained a minor injury. Most of this incident was captured on CCTV. The car could be seen to be missing an alloy wheel cover on the driver's side front wheel.

[3] At about 0135, whilst police officers were speaking to witnesses, a black Vauxhall Astra drove by and a witness, Cameron Doig, shouted "that's the vehicle". PC Callum Reid pursued it in his police car and stopped it. The appellant was driving. He gave his name

but refused to give other details then he drove away. The police gave chase and the car was stopped by other officers. The appellant was still driving. The vehicle was a black Vauxhall Astra. The front driver side wing mirror and the alloy cover of the front driver side wheel were missing. There was a dent on the rear side passenger door, which was consistent with Mr Peletier's having struck it. The police explained to him that a pedestrian had been struck on South Street about 0100. Asked who the driver of the vehicle was at that time, he said "I was driving".

[4] Cameron Doig was deceased at the time of the trial but his evidence, admitted under section 259 of the Criminal Procedure (Scotland) Act 1995, confirmed that the car which drove by and was stopped by the police was the one involved in the incident.

[5] Numerous witnesses gave evidence about their impression of the driver, most suggesting he was of mixed race, or had dark skin. The trial judge in his report stated that the appellant was a white, Scottish male but added "I nevertheless could understand why the witnesses, who only caught a fleeting glimpse as he drove thought he had darker skin." The eye witnesses were all vague about their description of the individual they saw. Joanne Mylchreest said that she did not see the driver very well; Scott Peletier said it was hard to say if the individual was white or mixed race; Littlejohn said he had "darker skin" but it was "really hard to tell". It should be borne in mind that the incident occurred in the early hours of the morning and that the opportunity to view the driver was fleeting.

[6] There was no doubt that the car the appellant was driving when he was stopped was the one involved in the incident. The issue for the jury was whether they were satisfied that he was driving it a short time earlier when the incident occurred.

[7] Shortly after retiring, the jury asked a question of the court in these terms: "Can we have a pic or close up of the accused for us to see in a clear way." The judge sought submissions outwith the presence of the jury. He proposed an answer in these terms:

> "Ladies and gentlemen, your verdict must be based on the evidence that has been led in court. It is not possible once all the evidence has been led to produce further evidence. If new photographs or images of the accused were produced that would involve the introduction of further evidence; it is not possible at this stage to do that. So the answer to your question is no."

Both counsel indicated that they were satisfied with this approach.

[8] The appellant submitted that the trial judge erred in refusing the request. He erred in considering that the jury were effectively seeking to access additional evidence. If the jury had been within the court room, the fact that they could view the appellant closely would not have constituted evidence not led during the trial. The speech of defence counsel had emphasised the difference between the descriptions given by the eyewitnesses and the appearance of the accused. It was said that this illustrated the importance of the matter and that the failure to accede to the request, having impeded the ability to present the defence, resulted in a miscarriage of justice.

Decision and analysis

[9] We do not think the trial judge was correct to conclude that the jury were asking for further evidence. Although they asked for "a pic" they also referred to a "close up". An accused person is a participant in the trial and his presence is a matter of fact; it is not subject to the rules of evidence. The accused has a right to be present at his trial and the jury have a right to see the accused as evidence is given. If description evidence is given they are entitled to compare the description of the perpetrator with the accused in the dock. The

request of the jury did not involve the introduction of additional evidence, nor did it require the appellant to do anything. No action on his part would have been required.

[10] As when a request is made to view a production, this request was a matter for the discretion of the trial judge, to be exercised in the interests of justice and in the particular circumstances of the case. The trial judge did not appreciate this. He did not purport to exercise a discretion and treated the issue as one of law. To that extent, and that extent alone, he erred. However, even if the trial judge had correctly viewed the matter as one for his discretion it is unlikely that such a request ought to have been granted in the circumstances of the case including his own assessment of the adequacy of the image on screen, and the nature of the evidence which had been led, and especially, the attitude of defence counsel. In this case, of course, the witnesses did not purport to identify the appellant, and the descriptions they gave were circumscribed by numerous qualifications. Critically important to the decision would be the submissions made by counsel, and most especially the submissions made by counsel for the defence, who may be expected to be fully aware of any risk to the defence which may adhere to any such request.

[11] The trial judge canvassed the matter with counsel and both counsel were in agreement that the request should be refused. As the advocate depute submitted, where both parties agree to a particular course of action, based upon reasonable grounds, it will only be in a quite exceptional case that an appeal against a decision acceding to both parties' request will succeed (*HDJS* v *HM Advocate* 2018 SCCR 98, Lord Justice General (Carloway) at paragraph 16). We have no way of knowing the basis upon which defence counsel was content that the jury should not be allowed to see a close-up of the appellant, but he was well aware of the submissions which he had already made to the jury. He would have been aware also of the limitations of the case he was presenting. This is not a case where a

positive identification was being challenged: the point was simply to seek to undermine vague descriptions given by eye witnesses who in reality had added little if anything to the Crown case. Counsel would also have been aware of the impact of the strengths of other parts of the Crown case, including the appellant having been found driving the vehicle identified as involved in the incident very shortly after it, and the subsequent admission. Had he thought it would be in the interests of the defence, or facilitate acceptance of those submissions for the request to be granted one might have expected him to say so. Although the trial judge commenced by suggesting that the request should be refused he made it abundantly clear that he was willing to consider any submissions to the contrary. No such submissions were made. The circumstances are somewhat different from those in *HDJS* but the acquiescence of counsel remains a relevant issue. Had it been thought to be in the best interests of the appellant for the request to be granted one might have expected defence counsel to take a different stance. In these circumstances it cannot be said that there was any manifest unfairness in the course which was adopted

[12] Notwithstanding that the civilian eyewitnesses could only provide a general description of the driver, and had not identified the accused (either by VIPER or in the dock), there was ample evidence that the appellant was the driver at the time, including his own admission, and the fact that it was agreed that he was the registered keeper of the vehicle (see *Elphinstone* v *Richardson* 2012 SCCR 418). The vehicle was specifically identified by Cameron Doig as being the same as that used in the attack. The physical damage to the vehicle the appellant was driving was consistent with the nature of the incident, the passenger side wing mirror having struck the first complainer and the dent in the same side rear door was consistent with that complainer having succeeded in kicking the vehicle as it drove away. The missing alloy wheel trim was consistent with CCTV footage of the vehicle

involved in the attack. The appellant's actions in driving off when confronted by the police were also relevant. A close up of the appellant would have added little to the preponderance of circumstantial evidence identifying the appellant as the perpetrator.

[13] The trial judge adequately addressed the dangers of identification in a case such as this in his charge to the jury. He clearly recognised the importance of the issue, and addressed the matter in detail, reminding the jury that powers of observation were fallible; that errors occurred in identification; that there was no dock identification of the appellant and that no VIPER had taken place. Thus, even if we considered that there was an inherent unfairness arising from the judge's error, it would be impossible to conclude that there had been a miscarriage of justice.