APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 66
HCA/2017000002/XJ

Lord Justice General
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the STATED CASE

following a REFERENCE from the SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

CAROL KIRK

Appellant

against

PROCURATOR FISCAL, STIRLING

Respondent

Appellant: S Collins (sol adv); Collins and Co (for McCready and Co, Stirling)
Respondent: I McSporran QC (sol adv) AD; the Crown Agent

29 August 2017

Introduction

[1] On 11 May 2015, at the Justice of the Peace court in Stirling, the appellant was convicted of a charge which libelled that:

> "on 29th April 2014 at… Cambusbarron, Stirling you…did assault CM…and did repeatedly strike her on the body with a dog lead to her injury".

She was acquitted of a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 involving threatening and abusive conduct on the same occasions. The justice deferred passing sentence on the appellant for six months before, on 13 November 2015, admonishing her.

[2] On 20 November 2015, the appellant made a late application for a stated case based upon a contention that the verdict was unreasonable because the complainer's evidence was contradicted by an audio recording taken by the appellant. On 30 December 2015, the Sheriff Appeal Court refused the appellant's application for an extension of time to lodge the application on the basis that the appeal was "completely unarguable".

Scottish Criminal Cases Review Commission

[3] The appellant asked the SCCRC to review her conviction on three grounds. The first was that the identification evidence from an eyewitness was compromised by inappropriate discussions which had taken place in the witness room at a calling of the case in November 2014. The Commission rejected this ground, primarily on the basis that identification was not an issue. Secondly, it was said that the police investigation had been "irregular" as, despite the fact that the appellant had telephoned the police herself, the investigating officer had attended at the complainer's house first, had failed to take a formal statement from the appellant or her husband and had refused to listen to the recording of the incident which the appellant had made. The Commission rejected this ground as unstateable. The appellant had failed to identify how the role of the officer had impacted on either the Crown or defence case.

[4] The third ground of review was that the justice had reached a decision that no reasonable justice could have reached in acquitting the appellant of the section 38 charge

("statutory breach of the peace"), whilst convicting her of the assault. The Commission did not accept this contention. However, the Commission went on to consider the explanation which the justice's legal adviser had provided to them setting out the basis for the verdict. This stated:

> "I noted that even if the defendant (*sic*) had meant to hit only the dog initially, the complainer had been holding the dog. On my view the intent was there initially in that it would have been difficult to ensure that only the dog was hit, under the circumstances. The defendant in my view should not have hit out at the dog precisely because she might have hit the other person and in fact the recording distinctly recorded 4 strikes made against the complainer who was holding the dog. You could hear the complainer screaming each time she was hit. Even if the defendant had not intended initially to hit the complainer and only intended to hit the dog the fact that the complainer was holding the dog by the collar and screamed audibly in pain after the first strike connected with her hand meant that the defendant would have known that she had made contact with the complainer and she thereafter had the intent to strike her 3 more times using the excuse that she had only meant to strike the dog. I found this to be a lie given that it would have been obvious to the defendant that she had hit the complainer but she still thereafter decided to continue striking said complainer…
>
> I was therefore satisfied that the deliberate intention to assault was there with evil and wicked intent… I did not regard the injury suffered by the complainer to have been suffered accidentally".

[5] Having analysed this passage, the Commission determined that the justice had misdirected herself in concluding that the applicant had intended to assault the complainer. The Commission interpreted the passage as meaning that the justice had accepted that the appellant had, with both the first and subsequent strikes, intended to strike the dog and not the complainer. That is a misunderstanding of the justice's reasoning. Had it been correct, it is true that the justice would have erred in holding that the necessary intent was present. The Commission identified the justice's finding, that the complainer had screamed in pain after being hit, as a factor in her conclusion that the appellant had the necessary intent. The screaming had been said to be audible on a recording made by the appellant on a Dictaphone, which she had been carrying at the time of the incident. The appellant's law

agent had informed the Commission that "the disc contained within his file was the disc played in court during the cross-examination of the complainer. The file … was … 'played straight from [the agent's] machine rather than lodging a copy with the court'." It is not clear from this whether the file containing the recording was on a DVD (or other similar device) inserted into the computer or stored on the computer's hard drive. From the discussion at the hearing and the minute of the JP court, the court assumes the former. The Commission decided to listen to the recording but were unable to hear the screams to which the justice referred in the explanatory letter. On this basis also, the Commission regarded the justice's reasoning as flawed. It was on these "narrow" bases, as the Commission described them, that the case was referred.

The stated case and the DVD

[6] Following upon the reference, the appellant lodged a "Note of Appeal" against conviction. By interlocutor dated 11 April 2017, the court directed that the Note of Appeal be treated as an application for a stated case, since this was a summary prosecution. This Note addressed only the question of whether the justice had erred in law in holding that the appellant had the requisite intent even if she had only been trying to hit the dog. The issue concerning whether the justice could have heard the screams on the recording was not raised at all.

[7] In the stated case, the justice reports that the complainer's dog had confronted that of the appellant. In relation to what happened next, she found the following facts proved:

> "17. While holding [her dog] by the collar the complainer was struck on the left hand by the appellant several times using the metal part of the dog lead.
>
> 18. After each strike by the Appellant on the Complainer, the Complainer was heard immediately screaming loudly on the Dictaphone recording.

19. These screams by the Complainer were screams of pain, due to the injury inflicted on her.

20. [The dog] was not struck by the Appellant …, only the Complainer was struck.

21. The initial strike by the Appellant … was not intended to strike the Complainer, but to strike the dog…

22. The second and subsequent strikes by the Appellant … were intentional by the Appellant to assault the Complainer.

23. The complainer suffered bruising to her left hand…

24. On 29 April 2014 at… Cambusbarron… the Appellant did assault the Complainer by repeatedly striking her on the body with a dog lead to her injury."

[8] The questions in the stated case are:

"1. Standing finding in fact 23 (*sic*) did I err in law in determining that the Appellant had the necessary mens rea for assault when she inflicted the first blow upon the complainer's hand?

2. On the facts stated was I entitled to convict the Appellant ?"

The reference to finding in fact 23 may have been intended as one to finding in fact 21 in the final case. It was explained that an adjustment had been proposed by the appellant adding a question: "On the evidence, was I entitled to make Findings in Fact 18 to 22 and 24 to 26?" This again may be a reference to slightly different findings in the final case. The adjustment was rejected by the justice because this issue was not something which was raised in the application for the stated case ("the Note of Appeal"). The questions stated, which do not seek to challenge any of the facts found, would normally not prompt any examination of the evidence; the findings in fact found by the justice would be decisive. In summary prosecutions, subject to there being supporting evidence, the trial judge is final on questions of fact (*Anderson* v *HM Advocate* 1974 SLT 239, LJG (Emslie) at 240).

[9] Nevertheless, the justice provided a narrative of the evidence. The complainer spoke to the appellant striking her on the back of the hand with the metal clip that was attached to her dog lead some 8 to 9 times before pulling herself together. This had caused extensive bruising and swelling to her hand. In cross-examination, the appellant's agent said that he had a copy of a Dictaphone recording of the incident which he wished to play to the court. This is referred to as Defence Production 1, but that is a transcript of the recording. It would appear that the recording itself, in whatever physical form it was stored, was never formally lodged as a label (cf the JP court minute). Its status appears to be simply as a recording used to test the complainer in cross-examination. Had it been formally lodged, it would have to have been appropriately marked by the justice or her legal adviser/clerk. The recording was played to the complainer. The transcript refers to a female shouting in the background and a dog snarling and barking. Otherwise it contains only words said to have been recorded.

[10] It was put to the complainer that there was nothing on the recording to demonstrate that she had been assaulted by the appellant. However, the complainer said that:

> "you can hear her on the tape hitting me 5 or 6 times, she was not hitting the dog, she was hitting her (*sic*) with the lead."

The justice, combining either what she or the complainer had heard on the recording and the transcript, narrates the totality of the recording as including:

> "The noise of something metal hitting another person's skin several times … and the victim immediately screaming out in pain each time she is hit."

The justice describes the recording as quite harrowing in that the complainer could be heard screaming each time that she was hit. The sound of the lead hitting the complainer could be heard before each scream.

[11] A passer-by, and thus an apparently independent witness, said that she saw the appellant hitting the complainer repeatedly, more than 3 to 4 times, with the lead. There

were about 10 strikes. A police officer spoke to the bruising and swelling on the complainer's hand.

[12] The appellant denied hitting the complainer. She maintained that she had been hitting the dog.

[13] The justice's reasoning in the stated case is broadly as set out above (and largely "cut and pasted") as follows:

> "Even if the Appellant had not intended initially to hit the Complainer and only intended to hit the dog …the fact that the Complainer was holding … [the dog] by the collar and screamed audibly in pain after the first strike connected with her hand meant that the Appellant would have known that she had made contact with the Complainer and she thereafter had the intent to strike her 3 more times using the excuse that she had only meant to strike the dog. I found this to be a lie given that it would have been obvious to the Appellant that she had hit the complainer but she still thereafter decided to continue striking said Complainer, using the quite unbelievable excuse that she thought she was only striking the dog… and not striking the Complainer. As I say I found this evidence to be incredible and a lie."

[14] As noted above, according to the appellant's agent, the recording was played in court on a computer provided by the appellant's law agent. In whatever form it existed, it was removed from court by the agent at the end of the trial. As also already noted, the content of the recording was not made an issue in the application for a stated case. It was therefore not dealt with by the justice, who signed the stated case in July 2017 when the conviction was already 2 years distant. Meantime the SCCRC had provided copies of the recording to the court and the Crown. By letter dated 25 July 2017 the Crown requested the court to seek the justice's comments on the state of the recording. The court forwarded a DVD containing what was said to be a copy of the recording to the justice. She responded that it was not in the same format, as her recollection was that the one used at the trial had been played using the court's equipment and not that of the agent. Having listened to the DVD on a computer, she was unable to confirm that it was the same recoding as had been played at the trial. It

did not have the requisite clarity whereby the strikes and screams referred to in the stated case could be heard.

Decision

[15] This was a straightforward case in which the complainer said that the appellant had struck her repeatedly with a dog lead. Under cross-examination, the complainer said that the blows and screams could be heard on the recording. The content of the recording thus became evidence in the case notwithstanding that the recording does not appear to have been formally produced. The complainer's evidence was corroborated by an independent by-stander who said the same. According to the justice, the audio recording supported their evidence. The justice found the appellant's evidence, that she had only struck the dog, to be incredible, for the reasons given above regarding multiple strikes causing the complainer to scream. The justice accepted that the first blow may have been an accident, but rejected the idea that the subsequent ones were other than deliberate.

[16] There is no substance in the contention that the justice had accepted that throughout the incident the appellant had been trying to hit only the dog. That is not what is said either in the letter from her legal adviser to the Commission or in the stated case. There is no merit in an argument that, just because the justice accepted that the first blow may not have been intended to strike the complainer, there was somehow an absence of the requisite intent when the appellant had continued with the remaining strikes. The justice's finding (22) is clear that the second and subsequent strikes were intended for the complainer. Her reasoning is consistent with the explanation proffered to the SCCRC that she had concluded that the appellant was lying about hitting the dog since it would have been obvious to her that she was striking the complainer and not the dog.

[17] The unusual feature of the case is the contention, put bluntly, that the justice's findings in fact, and her narrative of the evidence, are simply wrong because the blows and the screaming are not detectable on the recording. There are several problems with this. The first is that the procedure in an appeal in summary procedure is by stated case. The appellant is confined, *inter alia*, to matters which he desires to be reviewed in his application (Criminal Procedure (Scotland) Act 1995 s 182(3). The court stating the case does so in a manner which deals with those specific matters (s 178(2)) as set out in the application (s 176(1)(b)). Sometimes, matters can emerge after the stated case is drafted, in which case the appellant can seek to amend his application (s 176(3)). However, the reasoning of the justice in this case concerning the content of the recording was set out by the legal adviser in her letter to the SCCRC and the concerns about this formed part of the reasons for the reference. These were not included in the Note of Appeal which became translated into the application; hence the matter is not properly focused in the stated case. On this basis alone, the court would not have found in the appellant's favour.

[18] Secondly, even if the matter had been properly focused, in the absence of an agreement by the parties to the contrary, or some deficiency obvious from the court's own observations of a piece of real evidence formally produced in the case, this court cannot go behind the findings in fact stated, or (were an appropriate question to have been posed) the justice's narrative of the evidence, and conclude that finding in fact 18 concerning the recording is wrong. That would negate the purpose of the stated case procedure with its dependence on the account given by the court of first instance. The justice's narrative of what the complainer said could be heard on the recording, with which the justice agreed, is decisive, at least in the absence of an agreement that the DVD made available to the SCCRC and copied to the court is a true copy of that on the Dictaphone and that it does not record

the screams and blows. There was, of course, no obligation upon the appellant to lodge the recording in a summary trial. She would have been able to use it to test the evidence of the complainer in cross in any event. However, where, as is now the case, an accused maintains that a piece of real evidence either demonstrates his innocence or provides a reasonable doubt as to his guilt, then it would be, at the very least, prudent to lodge the item formally with the court, to have it marked as such by the clerk and to refrain from removing it until such times as any appeal or intended review process is completed.

[19] The first question must be answered in the negative, the second in the affirmative and the appeal refused.