



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 38
HCA/2017/000567/XC

Lady Paton
Lady Clark of Calton
Lord Matthews

OPINION OF THE COURT

delivered by LADY CLARK OF CALTON

in

APPEAL AGAINST CONVICTION

by

STEWART DANIEL PETTIGREW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Findlater; John Pryde & Co, Edinburgh (for Messrs Walker & Sharpe, Dumfries)
Respondent: I McSporran QC, Crown Agent

28 June 2018

Procedural history

[1] The appellant, Charlie Joe Walker (Walker), and a third accused (LBH) were tried on an indictment at Dumfries Sheriff Court at a trial which commenced on 13 September 2017.

The only charge relevant to the appellant narrated:

“(003) on 30 April 2014 you LBH, STEWART DANIEL PETTIGREW and CHARLIE JOE WALKER did break into the Dumfries Museum and Observatory owned by

Dumfries and Galloway Council, at Rotchell Road, Dumfries and steal a quantity of sporting medals, a Chain of Office and a casket containing an historical scroll.”

[2] The co-accused LBH did not appear at the trial diet and proceedings against him remain outstanding. The co-accused Walker pled guilty to charge 3 during the course of the trial. At the conclusion of the trial, on 18 September 2017, the appellant was found guilty by the jury in a majority verdict and thereafter he was sentenced to a term of imprisonment. The appeal relates only to conviction.

[3] The original ground of appeal (referred to here as the first ground) raised an alleged miscarriage of justice resulting from the sheriff having repelled the defence submission of no case to answer. Thereafter there were two separate amendments to the note of appeal and two additional grounds were founded upon. For convenience, reference is made to the second and third grounds of appeal on the basis of the order in which we propose to deal with the grounds of appeal. The second ground of appeal was to the effect firstly; that the Crown should not have placed any reliance on certain comments made by the accused Walker outwith the presence of the appellant and secondly; that the sheriff erred in failing to direct the jury not to rely upon the comments made by the co-accused Walker outwith the presence of the appellant and to direct the jury that this was not evidence against the appellant. The third ground of appeal was founded on a failure by the sheriff to direct the jury about concert.

[4] The sheriff provided a very detailed report dealing with the first ground of appeal and also provided a supplementary report in relation to the two additional grounds of appeal. In the supplementary report paragraphs 7 and 9, the sheriff explained that he did not approach this as a concert case and gave no direction regarding concert.

The first ground of appeal: insufficiency of evidence*Evidence at the end of the Crown case*

[5] There was a joint minute, summarised in paragraph 5 of the sheriff's report, which agreed that on 30 April 2014 at around 10.10 pm the Dumfries Museum and Observatory was broken into and various items were stolen. At the material time the appellant had the use of a VW Golf, registration number ND09 VYV which vehicle had four doors, was silver and had tinted glass and alloy wheels; on 6 April 2014 Walker stole an Audi A3, registration number V192 ECF and its registration plates were replaced with false number plates bearing the registration S31 JCR.

[6] In paragraphs 6.1 to 6.26, the sheriff explained in detail the other material evidence led by the Crown. The sheriff considered the submissions on behalf of the defence and the Crown in relation to the no case to answer submission under section 97 of the Criminal Procedure (Scotland) Act 1995. He concluded that there was sufficient circumstantial evidence presented by the Crown, in addition to that agreed in the joint minute, to enable the jury to reach a decision about the appellant's guilt. His detailed reasoning is set out in paragraphs 21 to 35. He explained that the Crown case was based on circumstantial evidence linking the appellant to the commission of a planned break in and theft at the museum on 30 April 2014 involving the two co-accused Walker and LBH. In summary, there was evidence that on 28 April 2014, a VW Golf, which could have been the one used by the appellant, turned onto Rotchell Road, where the museum was located, a few minutes before two men, one of whom was the co-accused Walker, entered the premises and conducted what appeared to be reconnaissance. The vehicle left the road a few minutes after these men exited the museum. In the evening of 30 April the appellant, Walker and another were seen associating in a car park at a Tesco Extra store. The appellant was

wearing a distinctive jumper. A silver VW Golf and a silver Audi A3 were close together in the car park and the appellant and Walker stood talking close to the Audi. A silver VW Golf left the car park at 2123 and a silver Audi A3 left three minutes later. At 2135 hours, vehicles of the same description travelled in convoy on New Abbey Road and turned into Rotchell Road. What appeared to be the same vehicles were seen together again at 2143 hours driving along New Abbey Road and at 2205 a silver Audi A3 travelled back along that road and turned into Rotchell Road. The break-in occurred between 2209 and 2211 and a silver Audi A3 was seen coming from the direction of the locus at 2212 travelling at high speed. At 2301 a silver VW Golf entered the caravan park where the appellant was living. CCTV footage from inside the museum showed that one of the thieves was wearing a jumper which was similar to that worn by the appellant in the Tesco car park. There was evidence also that the appellant travelled to Aylesbury on 2 May and tried to sell something to a business which traded in second hand jewellery. He was with two other males, the description of one of whom fitted Walker. There were other adminicles of evidence which we need not narrate. The sheriff accepted that the Crown did not have evidence against the appellant in the form of any admission by the appellant, any eye witness evidence as to the appellant's involvement in the offence or its planning, recent possession of stolen items, or identification of the appellant's vehicle by its number plates at the time of the reconnaissance visit to the museum on 28 April or the offence on 30 April 2014. We note that the sheriff in his analysis accepted that the admissions by Walker to his former girlfriend, Lauren Davis, was evidence against Walker but not the appellant. On the sheriff's analysis of the evidence relating to the period around 28 April 2014, the afternoon and evening of 30 April 2014 which was the day of the offence, and the period from 1 May

2014 onwards, he was satisfied that there was sufficient circumstantial evidence to allow the case to proceed to the jury.

Submissions by counsel and the advocate depute

[7] Counsel for the appellant submitted that there was insufficient evidence of identification of the appellant as one of the persons responsible for the commission of the crime. There was no evidence of identification of the Golf by reference to its licence plate or direct identification of the appellant before or at the time of the offence. The height of the Crown case was the identification of a jumper, worn by a figure on the CCTV recording in the museum premises at the time of the offence, as similar to a jumper worn by the appellant sometime earlier at a different locus. The evidence about the appellant's interaction with a jeweller at a later date in Aylesbury did not identify any link with the items stolen from the museum and did not assist the Crown case.

[8] The advocate depute submitted that this was a very strong circumstantial case and prayed in aid the detailed evidence referred to by the sheriff. He submitted that the sheriff was entitled to conclude that the circumstantial evidence, when taken at its highest, was sufficient to implicate the appellant in the commission of the offence together with the two other males. The sheriff was correct to leave to the jury the question whether such inference should be drawn.

Decision

[9] Having considered the evidence reported by the sheriff in detail, we are not persuaded that this was a strong circumstantial case against the appellant. There was no evidence that the appellant was involved in the planning of the offence, no identification of

the appellant at the museum at any time and no links other than possible inference with the stolen goods. Nevertheless we consider that it was open to the sheriff to reach the conclusion that the Crown case, taken at its height, was sufficient to permit an inference of guilt to be drawn by the jury. We are persuaded that the sheriff was entitled to repel the no case to answer submission which was made at the end of the Crown case under section 97 of the Criminal Procedure (Scotland) Act 1995.

The second ground of appeal: inadmissibility of comments made by the co-accused Walker

[10] The second ground of appeal stated:

“... the comments made by the co-accused outwith the presence of the appellant were not available as evidence against the appellant... It is respectfully submitted that it was an error in law resulting in a miscarriage of justice for the Crown to rely on the comments of the co-accused when addressing the jury. It is further respectfully submitted that it was an error in law resulting in a miscarriage of justice for the jury not to be directed in due course that the comments were not available as evidence against the appellant.”

[11] The procedural and evidential background to the case is explained in the supplementary report by the sheriff in paragraphs 10 to 19. As part of the evidence, the procurator fiscal depute led witness Lauren Davis, a former partner of co-accused Walker. In oral evidence, Lauren Davis did not identify the appellant and denied giving a description referred to in the transcript which resembled the appellant. Her oral evidence was summarised by the sheriff in paragraphs 6.5 to 6.9 and 18 of his report. Read short, Lauren Davis stated that at the end of April 2014, Walker travelled to Scotland with someone called Stewart, who was from the travelling community. During 27 April 2014 to 30 April 2014, she exchanged messages, texts, and phone calls with Walker. One of his messages indicated that he intended to buy a trailer to put next to Stewart’s trailer. Another message was to the effect that there was no need to worry about money now, because he

had “got a nice bit”. On 23 May 2014, after falling out with Walker, Lauren Davis phoned Surrey police to report admissions made by him. He had told her that he had broken into a museum in Scotland with two others. They had stolen items, including an Olympic medal. They had obtained £34,000. Lauren Davis said in evidence that she had given a statement to detectives from Dumfries. Her telephone call to the police was the subject of paragraph 17 of the joint minute as follows:

“That Crown label 21 disc contains a 999 call made by witness Lauren Davis to Surrey Police Call Centre on 23 May 2014 at 23.51.41 hours. That Crown production 56 transcript is a transcript of said call.”

The sheriff noted, in paragraph 10 of his supplementary report, that Lauren Davis made reference to “Stewart” during the call. She did not identify the appellant in court, and she denied having given the police a description of Stewart. The co-accused Walker pled guilty on the third day of the trial and the case continued against the appellant only.

[12] It is not clear from the report by the sheriff or from other information before this court what the witness Lauren Davis said about the telephone call and transcript but it was not suggested that in her oral testimony she disputed that she had made said call or that the transcript was inaccurate except to the limited extent reported by the sheriff.

[13] During the speech to the jury, the procurator fiscal depute submitted that “all the evidence you have heard in the case is available for you to consider...” and referred to the evidence of Lauren Davis. Reference was made to the facts agreed in the joint minute and specifically paragraph 17 thereof. She invited the jury to approach the case as a circumstantial case and to look at the association between the accused; in particular the reconnaissance on 28 April; the actual break in on 30 April and what happened in the few days after the break in. This appears to be a reference to the evidence about the appellant

visiting a jeweller. She referred to the evidence of Lauren Davis on a number of occasions but in particular the depute fiscal submitted in her speech to the jury that:

“... Now we heard evidence from police officers that they really weren't getting on too well with the enquiry into the museum break in until they became aware of the phone call that Lauren Davis made to Surrey Police on 23 May after she fell out with the accused Walker and you heard the detail of the call and you have a copy of the transcript and she told them that accused Walker had been involved in a break in to a museum in Scotland with Stewart who was a traveller and another male, they had stolen gold olympic medals and as a result of this phone call she provided CP24 a statement and Facebook messages between her and the accused Walker and as a result of that call, that statement, the police were then able to make some progress with the enquiry which they did and the Tesco receipt for men's clothing recovered in the silver Audi led them to view the CCTV from Tesco at the time on the receipt when they started to see the association at Tesco between the three accused...”

[14] It was not disputed that the sheriff gave no direction to the jury to the effect that this evidence about what Walker told Lauren Davis, insofar as it was based on what Walker said outwith the presence of the appellant, was not evidence which the jury were entitled to take into account in respect of the appellant.

[15] In paragraph 19 of the supplementary report, the sheriff very fairly accepted that, the issue having been raised in the appeal process and he having had time to reflect further on the case, “it may have been appropriate” for him to have given the jury a more specific direction about the evidence of Lauren Davis.

Submissions by counsel and the advocate depute

[16] Counsel for the appellant criticised the failure of the sheriff to give relevant directions about this important issue, particularly in circumstances where the procurator fiscal depute relied on the evidence in her speech. He submitted that the misdirection was a material misdirection in a case where the circumstantial evidence was not as strong as the sheriff indicated and that the misdirection represented a miscarriage of justice in the particular circumstances of the case.

[17] The advocate depute submitted that the evidence in relation to Walker's comments was competently led and was evidence implicating Walker. He did not dispute the general principle that a statement made by one accused which incriminates a co-accused, and which was made outwith the presence of that co-accused, is generally not admissible evidence against the co-accused unless it was said in furtherance of a common criminal purpose. Although the evidence was competently led, the advocate depute accepted that the evidence to the extent that it implicated the appellant was not evidence against the appellant under reference to well-known principles and *Johnston v HM Advocate* 2012 JC 49. He submitted that the procurator fiscal depute was entitled to make reference to the evidence as it was relevant to prove that Walker was one of the three men committing the offence. The procurator fiscal depute did not suggest that Walker's statements that the appellant had planned or committed the crime with him was evidence available to the jury to consider as against the appellant, but merely set out a narration of the evidential background to the police investigation. The issue was not raised at the time of the trial nor when the grounds of appeal were first drafted. The advocate depute endeavoured to support the approach of the procurator fiscal depute and the approach taken by the sheriff. Eventually, however, the advocate depute conceded that there was a misdirection by omission. But he submitted in the context of the totality of the circumstantial evidence which was "overwhelming" against the appellant, there was no miscarriage of justice.

Decision

[18] The evidence from the witness Lauren Davis about statements made to her by Walker both before and after the offence was committed on 30 April 2014, would have required some analysis and direction even if the sheriff had treated this as a concert case. It

was not disputed by parties that the general principle which applies is that statements by accused outwith the presence of a co-accused are not evidence against the co-accused. In certain circumstances, where the Crown is relying on the doctrine of concert, a statement by a co-accused in connection with a common purpose may be admissible but not in all circumstances (*Johnston v HM Advocate (supra)* (paragraph 42)). Lord Reed in delivering the opinion of the court stated:

“... It is however clear in Scotland, as elsewhere, that this exception to the hearsay rule is confined to evidence of things said in furtherance of the common purpose, and cannot therefore apply to statements, claims or allegations made after the common purpose has been achieved or has failed...”

[19] According to the report by the sheriff, at paragraph 6.8, some of the main admissions by Walker reported by the witness Lauren Davis were made in a telephone call to her after the break in had taken place. It is important to understand, in any event, that the approach adopted in this case was not to put the evidence into the context of a concert case. The jury were left with agreed evidence in the joint minute and the oral evidence of Lauren Davis which was certainly relevant to the guilt of Walker but was not relevant or admissible in relation to the appellant. We have no difficulty in concluding that the failure to give a direction was a misdirection by omission by the sheriff.

[20] In considering whether the misdirection resulted in a miscarriage of justice, we note that the evidence of Lauren Davis was given prominence and the jury had a transcript of her call to the police as well as her oral evidence. It was an important breakthrough in the police investigation and was relied on in the speech to the jury by the procurator fiscal depute. The circumstantial evidence which was capable of incriminating the appellant was diffuse and capable of a number of different interpretations. We consider that in the context of the circumstantial evidence in this case, the evidence of Lauren Davis about admissions by Walker would have been likely to have played an important part of the deliberations by the

jury. Clear directions were required about what the jury required to do with her evidence in relation to the appellant. We do not accept that the evidence in this case was overwhelming or totally compelling in relation to the appellant and we note that the jury verdict was by a majority.

[21] For these reasons, we cannot be satisfied that, if the jury had been properly directed, there was no real possibility that the verdict against the appellant would have been different. We are of the opinion therefore that the appeal should be allowed in respect of this ground of appeal. Standing our decision, we do not consider it necessary to consider the third ground of appeal.

[22] We therefore allow the appeal and quash the conviction.