SHERIFF APPEAL COURT

[2019] SAC (Crim) 2
SAC/2018/000722/AP

Sheriff Principal C D Turnbull
Appeal Sheriff P J Braid
Appeal Sheriff A G McCulloch

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in the Crown Appeal by Stated Case

for

PROCURATOR FISCAL PAISLEY

Appellant

Against

DAVID MCLEAN

Respondent

Appellant: M McGuire AD, Crown Agent
Respondent: P Nelson, Antony Mahon, Solicitors, Glasgow

26 March 2019

[1] In this case, the respondent was acquitted at trial of charges of contravention of sections 103 and 143 of the Road Traffic Act 1988. The acquittal followed the sheriff having upheld a defence submission of no case to answer, which in turn followed a successful defence objection to certain evidence being adduced by the Crown, discussed more fully below.

[2] The Crown has appealed by stated case. The questions posed are, first, whether the sheriff was entitled to uphold the defence objection to a police officer, PC Carson, being asked questions about CCTV footage; and, second, whether the sheriff was entitled to refuse the Crown's motion to interrupt the evidence of PC Carson to lead evidence from a witness in order to establish the provenance of the CCTV footage.

[3] PC Carson was the first witness led by the Crown. In the course of his evidence, he was asked to view CCTV footage (Crown Label No 1). The defence objected to his viewing the footage, on the ground that the provenance of it had not been established, in the absence of a certificate under section 283 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). Although a further Crown witness, PC Ford, would give evidence that he had been present at the *locus* and had seen the respondent driving, he would not be able to speak to the matters covered by section 283. The Crown submitted before the sheriff that the section 283 notice had not been served, due to an oversight, but that the Crown did not require to rely on section 283: it could establish the provenance of the CCTV footage by other means. Following an adjournment, the sheriff sustained the defence objection. The Crown then made a further motion, under section 263(2) of the 1995 Act, to allow PC Carson's evidence to be interrupted to enable the evidence of a Mr John Delaney to be given. The purpose of that evidence was to establish the provenance of the CCTV footage. The respondent objected to that motion, arguing prejudice to the respondent if the motion were granted, and further submitting that no cause had been shown by the Crown to allow PC Carson's evidence to be interrupted. The sheriff refused the Crown motion under section 263, which resulted in

the Crown leading no further evidence. That inevitably led to a defence submission of no case to answer, in terms of section 160 of the 1995 Act, which the sheriff sustained.

[4] The sheriff's reason for upholding the defence objection to PC Carson was that she did not consider that PC Ford was capable of establishing the matters specified in section 283. He did not have responsibility for the CCTV system at Braehead Shopping Centre and it was not suggested that he could certify the said matters. Although PC Ford had seen the respondent at the car park entrance, he could not be seen in the CCTV footage. As regards the section 263 submission, the sheriff accepted the defence submission that the respondent would be prejudiced if Mr Delaney gave evidence, given that neither Crown nor defence knew precisely what he would say. The sheriff also referred to the Crown's oversight in failing to serve the section 283 certificate as unexplained. The sheriff therefore concluded that cause had not been shown.

[5] Before us, the advocate depute for the Crown invited us to answer both questions in the negative. He submitted that the sheriff had erred in several respects. In particular, she erred in refusing to allow the CCTV footage to be played to PC Carson. Thereafter, she erred by refusing the section 263 motions. Underpinning both errors was her failure to appreciate that a section 283 certificate was but one means of establishing the provenance of CCTV footage. To a limited extent the advocate depute conceded that the objection was well founded at the time it was made. At that time, the Crown were not in a position to establish the provenance of all the footage on Crown label no 1. That label was a DVD on to which had been burned footage from five cameras. However, a later witness, PC Ford was able to speak to the images which had been captured by one

camera. To that extent only was the Crown able to establish the provenance of the images. Had matters rested there, the submission would have been well founded in respect of the footage from the other cameras. However, by the time the sheriff reached her decision, she was aware that the Crown was then in a position to establish the provenance of all of the footage, by leading evidence from Mr Delaney, a competent and compellable witness whom the Crown was entitled to lead. Further, the Crown was entitled to play the CCTV footage to PC Carson, and question him on its contents, before its provenance had been established, provided it was offering to prove its provenance, as it was: *McLaughlin* v *Skeen* (1979) SCCR Supp 233. That ought to have been an end to the matter, and there ought to have been no need to interpone Mr Delaney. PC Carson's evidence could, if necessary, have been led under reservation of its admissibility. However, if the sheriff thought that the provenance of the CCTV footage ought to be established first, there was no reason for Mr Delaney not to be interponed under section 263. The sheriff had made several errors in considering that motion. She had wrongly thought that a section 283 certificate was the only means of establishing the provenance of the CCTV footage, when it was not: *Gubinas* v *HM Advocate* 2018 JC 45, paras [53] and [54]. She had thought that the defence had not seen a statement of Mr Delaney, when they had. The section 283 certificate, a copy of which had been downloaded by the defence, was properly to be regarded as a statement. It satisfied the criteria of a statement, as set out by Lord Justice Clerk Carloway (as he then was) in *Buerskens* v *HM Advocate* 2015 JC 91, para. 29. The sheriff was therefore wrong when she said that parties did not know what evidence Mr Delaney would give. Finally, she thought she had the

power to prevent Mr Delaney giving evidence at all, which she did not. All of these errors vitiated the sheriff's decision. What ought to have happened was that she ought to have permitted the CCTV footage to be played to PC Carson, and permitted him to give evidence about it, under reservation if necessary. The Crown would then have called Mr Delaney (as they had an absolute right to do) and PC Ford. If it transpired that the provenance of some or all of the footage could not be established, the sheriff could and would have put those parts out of her mind. If, for any reason, the sheriff did not wish to follow that course of action she should have allowed the motion under section 263. If it were argued by the respondent that the Crown ought to have stuck to its guns, so to speak, and called Mr Delaney with a view to then making a motion under section 263(5) to recall PC Carson, it must be borne in mind that even though that provision (unlike section 263(2)) did not require cause to be shown, the sheriff nonetheless had a discretion. The reasons, albeit erroneous, given by the sheriff for refusing the section 263(2) motion would have applied equally to any motion made under section 263(5). Finally, the advocate depute submitted that the sheriff's approach resulted in unfairness to the Crown. While the respondent was entitled to a fair trial, he was not entitled to have the deck so heavily stacked against the Crown that they were at an unfair disadvantage. A balance had to be struck between the interest of the citizen being protected against an illegal or irregular invasion of his rights on the one hand; and, on the other, the interest of the State to lead evidence bearing upon the commission of crime to enable justice to be done: *Lawrie* v *Muir* 1950 JC 19 at 26. The sheriff had failed to strike such a balance.

[6] If we were minded to allow the appeal and answer the questions as proposed by the Crown, the advocate depute further submitted that the appropriate course would be to quash the acquittal and to allow the Crown to bring a fresh prosecution under section 185(1) of the 1995 Act.

[7] Although it seemed otherwise from his opening submission, counsel for the respondent did not ultimately take issue with the fundamental premise of the Crown's submission, namely, that the Crown had been entitled to play the CCTV footage to PC Carson and to ask him questions about it, before its provenance had been established, at least subject to the proviso that the Crown was in a position to offer to prove its provenance later in the trial, which it was conceded it was, at least by the time the sheriff came to decide upon the objection. He accepted that the Crown was entitled to adduce its evidence in any order it chose. It was further conceded (as it had to be) that there was therefore no need for Mr Delaney to be interponed at all. Counsel still further accepted that the Crown had an absolute entitlement to lead Mr Delaney after PC Carson had concluded his evidence, he being a competent and compellable witness. He further accepted that the section 283 certificate was a statement, which the defence had. Despite these various concessions, counsel submitted that the section 263 motion having been made, the sheriff had to exercise her discretion and she had not erred in the manner in which she had done so. The procurator fiscal depute in court had said that he did not know what Mr Delaney would say and the sheriff was entitled to proceed on that basis.

[8] Standing the various concessions referred to above, perhaps the stronger part of counsel's submission was that the Crown had brought its misfortune on itself. It ought not to have thrown in the towel when it did. Instead, it should have called Mr Delaney and if necessary PC Ford. There might have been no need to recall PC Carson at all, because once the provenance of the CCTV footage had been established the sheriff was entitled to view it for herself and form her own views on it. However, there would have been nothing to prevent a motion being made to recall PC Carson under section 263(5). Cause did not need to be shown. There was no reason to think that the sheriff would not have granted such a motion. As it was, the Crown had embarked upon a course of conduct, namely to lead no further evidence, merely on the back of two incidental rulings made by the sheriff. It must bear the consequences of not adducing the evidence which it could have adduced and which may have led to a conviction. Counsel did not accept a suggestion put to him by the Bench either that the defence had led the sheriff down the wrong path, by arguing that Mr Delaney should not be allowed to give evidence at all, or that the sheriff's reasoning indicated that she would not have allowed a motion made under section 263(5), or indeed that the Crown might have had that impression rendering further procedure in the trial pointless.

[9] If we were minded to allow the appeal, counsel for the respondent did not demur from the advocate depute's suggested means of proceeding.

[10] Section 283 of the 1995 Act is in the following terms:

"**283.— Evidence as to time and place of video surveillance recordings.**

(1) For the purposes of any criminal proceedings, a certificate purporting to be signed by a person responsible for the operation of a video surveillance system and certifying—

(a) the location of the camera;
(b) the nature and extent of the person's responsibility for the system; and
(c) that visual images [(and any sounds) recorded on a particular device are images (and sounds), recorded by the system, of (or relating to)] [1] events which occurred at a place specified in the certificate at a time and date so specified,
shall, subject to subsection (2) below, be sufficient evidence of the matters contained in the certificate.

(2) A party proposing to rely on subsection (1) above ("the first party") shall, not less than 14 days before the [relevant] [2] diet, serve on the other party ("the second party") a copy of the certificate and, if the second party serves on the first party, not more than seven days after the date of service of the copy certificate on him, a notice that he does not accept the evidence contained in the certificate, subsection (1) above shall not apply in relation to that evidence.
[
(2A) In subsection (2) above, *"the relevant diet"* means–
(a) in the case of proceedings in the High Court, the preliminary hearing;
(b) in any other case, the trial diet.
] [3]

(3) A copy certificate or notice served in accordance with subsection (2) above shall be served in such manner as may be prescribed by Act of Adjournal; and a written execution purporting to be signed by the person who served the copy or notice together with, where appropriate, the relevant post office receipt shall be sufficient evidence of such service.

(4) In this section, *"video surveillance system"* means apparatus consisting of a camera mounted in a fixed position and associated equipment for transmitting and recording visual images of events occurring in any place [(and includes associated equipment for transmitting and recording sounds relating to such events)]"

[11] Section 263 of the 1995 Act, insofar as material, is in the following terms:

"**263.— Examination of witnesses.**

(2) The judge may, on the motion of either party, on cause shown order that the examination of a witness for that party ("the first witness") shall be interrupted to permit the examination of another witness for that party.

(3) Where the judge makes an order under subsection (2) above he shall, after the examination of the other witness, permit the recall of the first witness.
…

(5) In any trial, on the motion of either party, the presiding judge may permit a witness who has been examined to be recalled."

[12] Dealing first with section 283, what the sheriff failed to appreciate is that it is simply a means to an end, rather than an end in itself, as is made clear by the closing words in subsection (1), that a certificate which complies with section 283 will be "sufficient" evidence of the matters specified in the certificate. It does not necessarily follow that in every case, evidence of those matters will be necessary. If there was ever any doubt about this, that doubt was removed by the High Court in *Gubinas* v *HM Advocate* 2018 JC 45 at paragraphs [53] and [54], where the Court stated:

"[53] For a video recording to be used as a proof of fact in a criminal trial, it will be necessary to show that the recording is of the relevant event. *How that is done will depend upon the circumstances* (emphasis added). Section 283 of the 1995 Act is an obvious method. The person responsible for the operation of the system can certify that visual images and sounds recorded on a particular device are of, or relate to, events at a particular time or place. That certificate, when formally produced at trial, will be 'sufficient evidence' of what is certified. However, that is not the only mode of proof.

[54] With public area CCTV images, for example, a police officer downloading images may be able to testify to recovering them for a particular location or time. The content of the images, when compared with other evidence of events, may be such that an inference can be drawn that what is shown is a recording of the event. In this regard, the evidence in *Robertson v HM Advocate* may be seen as more than 'barely' sufficient. Private CCTV may involve an employee of the relevant organisation testifying to the same effect. Individuals recording events on cameras or mobile phones, which are matters not covered by sec 283, can speak to doing so. Even without anyone speaking to the recovery of the images, a

> witness to the scene may legitimately be asked if what is shown in images produced is of the relevant event. The fact-finder may infer from that that someone, perhaps unidentified, recorded the images at the time. This may be sufficient evidence of provenance. Once the provenance has been established, the question is what can the fact-finder make of the images."

[13] It follows that, in the present case, the absence of a section 283 certificate should not have been categorised by the sheriff as a failure. Rather, that absence simply closed off one possible means of establishing provenance. The question for the sheriff at the stage when she came to rule on the defence objection to PC Carson being asked to view the CCTV footage, was, or should have been: is the Crown offering to establish the provenance of the footage by some other means? The answer to that question being yes, the sheriff should have permitted the CCTV footage to be put to PC Carson, under reservation if necessary. As counsel for the respondent conceded the Crown is entitled to adduce its evidence in any order and does not need to set up the provenance of CCTV footage before a witness is questioned about it, provided that it is offering to do so: *McLaughlin* v *Skeen* (1979) SCCR Supp 233.

[14] We must stress, having regard to the passage from *Gubinas*, *supra*, that even had Mr Delaney not been proposed as a witness, PC Carson would still have been entitled to comment on the CCTV footage (or at least, the parts of it which showed events observed first hand by PC Ford) and the Crown would still have been entitled to establish the provenance of it on the basis of PC Ford's evidence that the events which he had seen were those shown on the CCTV footage. The sheriff further misdirected herself by asking whether PC Ford could speak to the matters covered by section 283. That was, for the reasons already given, nothing to the point. The real question was whether the

evidence of PC Ford, in combination with that of PC Carson, would be sufficient to establish whether the appellant was driving a motor vehicle at the material time. If, even following *Gubinas*, there is a misconception that a section 283 certificate is always required to establish the provenance of CCTV footage (and it appears from the stated case that, leaving aside the errors in the sheriff's approach, the defence laboured under such a misapprehension) the sooner that misconception is banished, the better.

[15] The first question in the stated case therefore falls to be answered in the negative.

[16] Turning to the second question, strictly speaking it should be unnecessary for us to answer it. There was no need for the evidence of PC Carson to be interrupted, standing *McLaughlin, supra.* It seems to us that the real purpose of section 263 is to allow a witness to be interponed to enable the witness who is interrupted then to be asked questions about what the interponed witness has said. The most obvious example of that is where the first witness is to be asked about a statement which he perhaps denies having made, and in those circumstances it is easy to see why the Crown (or, as the case may be, the defence) may wish to establish what was said before asking further questions. However, in the present case there was no need to ask PC Carson questions arising from anything that Mr Delaney did or did not say. It may be that PC Carson's evidence would have been of no value, until such time as Mr Delaney did speak to the provenance of the CCTV but that is a different point. The Crown therefore did not require to rely upon section 263 at all. However, the motion having been made, the sheriff again fell into error in the various respects submitted by the advocate depute. Her entire approach continued to be vitiated by the erroneous approach to section 283.

Beyond that, she erred both in her assertion that neither party had any idea what he would say, when, having regard to the terms of the un-served section 283 certificate, plainly they did; and in her apparent belief (although we do consider, having regard to paragraph 10 of the stated case which records the submissions made for the respondent, that she was misdirected in this respect by the appellant) that the issue was whether Mr Delaney should be allowed to give evidence at all. As it was, given that the Crown had an inalienable right to call him, her conclusion that the defence would be prejudiced by PC Carson's evidence being interrupted was misconceived. We can discern no prejudice whatsoever to the defence in Mr Delaney giving his evidence during, instead of after, PC Carson's evidence.

[17] Although the sheriff was only faced with the section 263 motion because of her previous mistaken approach to the objection to PC Carson's evidence, and the section 263 motion ought not to have been required, nonetheless the sheriff made the further errors we have identified in considering that motion. Accordingly we will also answer the second question in the negative.

[18] The question then arises as to how we should dispose of the appeal. There was merit in the respondent's submission only to the extent that following the sheriff's two rulings, she was thereafter correct to acquit the respondent on the evidence she had heard, in light of the procurator fiscal depute's decision to lead no further evidence. However, we consider that the respondent's criticisms of that decision are made with the benefit of hindsight, and that the desiderated action was no more than a counsel of perfection. Given the sheriff's reasoning in refusing the section 263 motion, we can

readily understand why the depute in Court elected not to go through the exercise of immediately moving to call Mr Delaney, with a view to then recalling PC Carson.

[19] As the advocate depute submitted a balance requires to be struck between fairness to an accused and fairness to the Crown. Regard must be had to the interests of the state in prosecuting crime, and being allowed to adduce such admissible evidence as they wish to adduce in order to secure a conviction. It may be that the evidence of PC Ford and of the CCTV footage would have sufficed, as counsel for the respondent submitted; but it may not have been sufficient to persuade the sheriff beyond reasonable doubt. The procurator fiscal depute understandably concluded that PC Carson's evidence was no longer to be available to the Crown and took a reasonable decision (in the circumstances) to lead no evidence and to move for desertion *pro loco et tempore* (which motion was also refused). The sheriff in our view has tilted the scales of justice too far in favour of the respondent. Justice requires that the Crown should be given a further opportunity to prosecute the respondent.

[20] Accordingly, having answered the questions in the stated case as indicated above, we shall allow the appeal, quash the acquittal and permit the Crown to bring a fresh prosecution in terms of, and in accordance with, sections 183(1)(d) and 185 of the 1995 Act.