



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 58
HCA/2016/426/XC

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

ANTHONY GANNON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Graham, Hay; Faculty Appeals Service (for Westcourts Litigation, Greenock)

Respondent: W McVicar (sol adv) AD; the Crown Agent

8 August 2017

[1] This Opinion requires to be read in conjunction with *Gubinas v HM Advocate* [2017] HCJAC 59, which was heard at the same time. The case raised a similar point relative to directions upon the interpretation of CCTV or other video images.

[2] On 25 July 2016, at the sheriff court in Paisley, the appellant was convicted of two charges. The first was that he assaulted an employee of Farmfoods, Port Glasgow on 30 March 2016, with intent to rob. The second was of having a knife with him at the time; contrary to section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995. He was sentenced to 4 years on the first charge, and 2 years concurrent on the second, backdated to 31 March 2016.

[3] The evidence came first from MG, the assistant manager at Farmfoods. He had seen the appellant in the shop on some 5 or 6 previous occasions. On the relevant date, he had been looking towards the till area when he saw the appellant, whom he identified in court, with a scarf over his face standing close to the till. He went into the toilet and the alarm bell went off. He went on to the shop floor where the manager, SC, told him that someone had pulled a knife on him. SC pointed towards the door. MG saw the appellant running out of the door. On 6 April, MG identified the appellant at a VIPER parade. He was shown CCTV images of the events. He recognised the appellant as shown in the images, although the appellant's name had only been given to him later by others.

[4] SC gave evidence that he had been at the till, when a man approached and shouted "open the f...ing till". He showed him a knife. SC pressed the alarm bell and told the assailant that he was phoning the police. The assailant had a scarf around his mouth. Nevertheless, SC knew him and he was able to identify him in court. He had seen him in the shop around 10 times previously. He had pointed him out to MG as he was leaving the store. He had identified him to the police later that day from an emulator board containing some 12 images. This witness was also shown the CCTV images. On 6 April he too had identified the appellant at a VIPER parade.

[5] PC MR spoke to arriving at Farmfoods and being given the name of the appellant. The appellant lived less than half a mile away. The police went to his home. A knife was recovered from the kitchen area, sitting on a draining board at the sink. The officer was not able to identify the appellant from the CCTV images. He was able to do so from the clothing of the person shown and that recovered at the appellant's house, together with the appellant's direction of travel. The knife had the same kind of blue coloured handle as shown in the images. PC SM gave evidence about attending at the appellant's flat after the incident and recovering the knife.

[6] In his charge to the jury, the sheriff referred to the CCTV images. He described them as part of the evidence in the case. He continued:

"The thing to remember is this: you're here as judges not witnesses. You form a judgement about what the disc shows just as you form a judgement about the eye-witnesses' descriptions of what happened in Farmfoods.

Just because you've seen a record of the events made on disc ... doesn't mean that you become a witness to these events yourselves. You have to stand apart from these events and form your own conclusions about the disc, the CCTV evidence we've seen played on disc.

Witnesses have told you about the disc showing what it shows concerning the commission of the crime. You have to decide if the witnesses' interpretation of what the disc shows is correct. You have to decide what the CCTV shows and if it supports proof of the crime charged. You can take account of what it has been said it shows but you are not bound by the views you have heard. So at the end of the day you judge the CCTV evidence just as you judge all the other witnesses you heard in this case".

[7] After the jury had retired, they returned to ask whether they could see the CCTV images of the assailant "showing the knife in close up". The sheriff, having consulted parties, told the jury that there was no closer image than the size of that shown to them previously. The jury wanted to see, in particular, "the blue bit"; presumably the knife. The video was then played and stopped at an appropriate point. The jury were permitted to

leave the jury box and to approach the screen for the purposes of obtaining a closer view.

They then retired again before returning a unanimous guilty verdict.

[8] The ground of appeal was that the sheriff had erred in not giving the jury an additional direction about how to treat the video images. He had failed to direct them that the evidential weight to be attached to them could only be to support or undermine the testimony of the witnesses and not as “stand alone evidence”. In submissions, however, there was no criticism of the sheriff’s directions as a generality. Rather, the complaint came to be that he ought to have re-directed the jury, following upon their question, to ensure that their purpose was only one of testing the account given “by the footage, and not to attempt to reconcile themselves as to what is demonstrated”. The actions of the jury suggested that they had adopted an investigatory role, despite having been told not to do this.

[9] The Crown’s Case and Argument had been that the jury had to be guided by evidence from witnesses (*Steele, Donnelly*). Identification of the appellant, by reference to the video images, had not been a live issue in this case. The jury were properly allowed to make up their own minds about what the video images showed. The images had been played again in the presence of the appellant and under control of the court. There was no objection to this. No additional directions were sought or required.

[10] The court is satisfied that there was no need for the sheriff to repeat what he had already said to the jury about the video images. The jury did not ask for further directions. All they wanted to do was to review a particular part of the video recording. They were permitted to do that without objection. In any event, for the reasons in *Gubinas v HM Advocate (supra)*, the court is satisfied that there was no material misdirection.

[11] The appeal is accordingly refused.