No: 201903124/B4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA Crim 1288

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 17 June 2020

B e f o r e:

LADY JUSTICE CARR DBE

MR JUSTICE WILLIAM DAVIS

THE RECORDER OF SOUTHWARK
HER HONOUR JUDGE KARU
(Sitting as a Judge of the CACD)

R E G I N A
v
DWAYNE BATES

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Mr I Mullarkey appeared on behalf of the **Appellant** (via video link)
Mr P Morley appeared on behalf of the **Crown** (via video link)

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 25 July 2019 in Teesside Crown Court before His Honour Judge Armstrong ("the Judge"), the appellant, now 30 years old, was convicted after trial of theft, contrary to section 1(1) of the Theft Act 1968 (count 2) and handling stolen goods, contrary to section 22(1) of the Theft Act 1968 (count 3). He was acquitted of burglary, contrary to section 9(1)(b) of the Theft Act 1968 (count 1), a count to which the appellant's co-accused Dylan Turner had pleaded guilty in the Youth Court. The applicant was sentenced on 28 October 2019 to eight months' imprisonment on each count, such sentences to run concurrently to each other. On the same day he was also sentenced to 32 months' imprisonment to run consecutively to the overall term of eight months for further offences which are not the subject of this appeal. This is his appeal against conviction on counts 2 and 3 for which leave has previously been granted.

The facts

2. On 16 April 2018, Sean Scott left his Toyota Hilux vehicle ("the Toyota") parked outside his home address in Verbena Drive, Billingham. When he woke up the following morning he discovered that he had been burgled. Car keys, a wallet, an iPad and other items had been taken from within his home and the Toyota was also missing. He reported the incident to the police.

3. The Toyota was fitted with a tracking device. In addition police investigation revealed that the Toyota had triggered one of the Automatic Number Plate Recognition cameras as it travelled towards Hartlepool in the early hours of the morning on 17 April. The Toyota was followed closely by a second vehicle, an Audi A4 registered to the appellant's girlfriend, Demi Gales.

4. The police subsequently attended the home of the appellant's stepmother to find the stolen Toyota parked on the driveway and one of the items stolen during the burglary inside the property. The appellant was inside the address with Dylan Turner and another male. All three were arrested on suspicion of burglary. Police officers attended the home of Miss Gales and searched her vehicle. It contained various items which had been stolen during the burglary.

The indictment and prosecution case

5. Count 1 averred that the appellant "between the 15th day of April 2018 and the 17th day of April 2018 together with Dylan Turner having entered a building ... as a trespasser, stole therein car keys, wallet, an iPad and a hoover." Count 2 averred that the appellant "between the 15th day of April 2018 and the 17th day of April 2018 together with Dylan Turner stole a Toyota Hilux motor vehicle ... belonging to Sean Scott." Count 3 averred that "on the 17th day of April 2018 dishonestly undertook or assisted in the retention, removal, disposal or realisation of stolen goods namely a Toyota Hilux motor vehicle... a set of keys, a wallet, a hoover, an I-pad, a bag of rugby balls, clothing and a music CD, belonging to Sean Scott, by or for the benefit of another or dishonestly arranged so to do, knowing or believing the same to be stolen goods."

6. The prosecution put its case in accordance with its opening note on the basis that the

appellant was party to the burglary offence and that:

i. "…after burgling the address the appellant and his accomplice then also took a Toyota which was parked on the driveway. The taking of the car is not a burglary but a separate offence of theft, so that is why you have an indictment with the two separate offences upon it."

7. The prosecution put its case in respect of count 3 on the basis that:

i. "[t]he final count is handling stolen goods. It is an alternative to the burglary. So if you are not sure the defendant took part in the burglary, but you were left sure that he was involved in assisting with the handling of the stolen items after the burglary, then you would find him guilty of count 3."

The defence case

8. The defence case was that the prosecution had not established that the appellant had committed the offences as alleged or at all. The appellant did not give evidence at trial. In his defence statement it was submitted that he had been in the company of others, including Dylan Turner, on the evening of 16 April 2018. He had consumed a large quantity of illicit substances and could recall that the group had gone out for a drive in his girlfriend's car. He could recall returning to his stepmother's address and discovering that the others had taken various items and the Toyota belonging to Mr Scott.

The summing-up

9. The Judge provided written directions to the jury which made clear that counts 1 and 3 were alternative counts and that the defendant could not be convicted of both. The written legal directions did not provide such a direction in respect of count 2.

10. In the Judge's written route to verdict on count 3, which he also read out to the jury, the Judge directed as follows:

i. "Route to verdict - Count 3.
ii. If you find the defendant guilty of Count 1 you should find him not guilty of Count 3. If you are not sure the defendant is guilty of Count 1 and you find him not guilty of the burglary, you may go on to consider the offence of handling stolen goods in Count 3 as an alternative."

11. All this reflected the manner in which the prosecution case had been presented.

12. The Judge also directed the jury in respect of this aspect of the case during his oral summing-up. At pages 3D to E he stated:

i. "Well what is it the prosecution set out to prove in this case? You have got a copy of the indictment and you know that it has three

counts on the indictment, and the first thing to note is that Counts 1 and 3 are alternative counts. So on Count 1 the defendant is charged with burglary. On Count 3 the defendant is charged with handling stolen goods. The important point here is that the defendant cannot be found guilty of both counts because they are alternative charges, okay, so you may wish to consider Count 1 first, and if your verdict on Count 1 is guilty then your verdict on Count 3 must be not guilty. I will explain why when we come to the definitions of the offences, but they are alternatives. If you want to you can consider Count 3 first. If your verdict on Count 3 is guilty, your verdict on Count 1 must be not guilty."

13. At page 7D to F the Judge stated:

    i. "I was explaining how Counts 1 and 3 are alternatives, okay, you cannot convict of both, and saying the way to approach it is to take Count 1 first. The prosecution case is that the defendant is guilty of the burglary, that is what they say, and Count 3, the alternative of handing stolen goods is a sort of back stop ... It is a fall back, if you are not sure the defendant is guilty of Count 1 you can go on to consider Count 3...

    ii. ... Now, because there are three counts on the indictment, there is Count 2 as well, the charge of theft, and you have got to return separate verdicts on each of the three counts, so you have to consider the evidence against and for the defendant on each count separately. So your verdicts do not have to be the same, it all depends on your view of the facts."

14. At page 8A the Judge set out the rationale for count 2:

    i. "Now the reason why there is a separate count for theft is that the car, the Toyota Hilux, was outside the building, and so when the Toyota Hilux was taken then that was not burglary, that was theft. So the keys were inside, that is part of the burglary, but then using the keys the Toyota Hilux was stolen from the drive outside, and theft is defined, it is stealing or theft, being the same thing, a person steals or commits theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. So again, there is no dispute in this case that theft was committed."

15. Finally, at page 9E to F the Judge stated that counts 1 and 2 both involved joint offending:

    i. "Well the prosecution put this as a joint offence, so they say that the offences of burglary in Count 1, and the theft in Count 2, were

committed jointly with someone called Dylan Turner, that is that the two of them were in it together, and where two or more persons commit an offence, it is not necessary for the prosecution to prove the precise role of each participant, it is sufficient if you are sure that the defendant either committed the offence himself or intending that a crime be committed he assists or encourages or causes it to be committed by somebody else, in which case the defendant is guilty of the crime even if someone else actually carries it out."

Grounds of appeal

16. For the appellant, Mr Mullarkey submits that count 3 was, on the facts, an alternative to count 2 as it was to count 1 and the jury ought to have been directed accordingly. The omission of such a direction is said to have resulted in verdicts which ought not properly on the evidence and in accordance with the principles elucidated in R v Shelton (1986) 83 Cr App R 379 to have been returned by the jury. It was open to the jury to convict the appellant of one or other offence as reflected in counts 2 and 3, but not of both as particularised. The offences should have been treated as true alternatives and mutually exclusive. Moreover, the jury's verdicts are impossible to reconcile with the way in which the prosecution advanced its case since the vehicle was stolen from outside the burgled premises by those directly involved in the burglary, the Judge having described the prosecution case as those being "joint" offences. In all the circumstances, it is submitted that the jury's verdicts in respect of counts 2 and 3 are unsafe. Since the basis upon which the jury convicted the appellant of counts 2 and 3 cannot be established, both verdicts ought to be quashed.

Grounds of opposition

17. For the respondent, Mr Morley submits that although the offences of theft and handling are usually treated as mutually exclusive alternative counts, a person can in law be guilty of the theft and the handling of the same goods. The jury was properly directed as to the elements of the offences, the appellant's convictions on counts 2 and 3 can be seen as a "mere technicality" as in the case of R v Dolan (1975) 62 Cr App R 36 at 38. Concurrent sentences of imprisonment were subsequently imposed. It cannot therefore be said that the appellant's convictions are unsafe.

Analysis

18. In deference to the arguments presented to us we set out briefly the law. Section 1 of the Theft Act 1968 provides:

    i. "(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it..."

19. Section 3 of the Theft Act 1968 defines "appropriates":

i. "(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."

20. Section 22 of the Theft Act 1968 provides:

i. "(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so."

21. The offence of handling stolen goods thus arises separately and subsequently to the offence of theft (since the handling must be of goods which have already been stolen, but the handling must occur otherwise than in the course of the theft). As a matter of law, a person can steal and dishonestly handle the same goods if the evidence warrants such a conclusion. If the handling of the goods occurred only in course of the theft he cannot be found guilty of handling: see R v Dolan (supra) at [39]. But as Scarman LJ put it, it is "perfectly possible" for a person to be guilty of stealing and receiving the same goods.

22. In R v Shelton (supra) Lawton LJ provided guidance for the setting of indictments and verdicts when dealing with alternative counts of theft and handling, including the following:
23. The long-established practice of charging theft and handling as alternatives should continue whenever there is a real possibility, not a fanciful one, that at trial the evidence might support one rather than the other;
24. A jury should be told that a handler can be a thief, but he cannot be convicted of being both a thief and a handler.

25. Archbold (at 21-238 and following) comments:

i. "Lawton LJ's third point, that a jury should be told that a handler can be a thief, but that he cannot be convicted of being both a thief and a handler, refers both to the alternative nature of the counts and to the legal relationship between the offence.

ii. Because of the definition of the offence of theft and, in particular, the definition of 'appropriates' in section 3, almost everyone who commits the offence of handling stolen goods contrary to section 22(1) of the Act will also commit the offence of theft. On the other hand, it will by no means be the case that every thief will also be guilty of handling. As a matter of law, however, it was said in R v Dolan ... that a person may steal and dishonestly handle the same goods.

iii. In practice, the two offences are treated as alternatives, robbery, burglary or theft on the one hand and handling on the other. Where there are two such counts in the indictment, the prosecution invariably put the case on the basis that the jury should convict of one or other offence, but not of both. Where the prosecution so put their case, the Court of Appeal said in Dolan and again in R v Smythe (1981) 72 Cr App R 8 that the offences should be regarded as true alternatives and mutually exclusive."

26. Having set out the law, we do not in fact consider that the result on this appeal turns on any detailed legal analysis, but rather on the facts.

27. Here, the prosecution did not put its case on the basis that count 3 was an alternative to count 2, only as an alternative to count 1. It was entitled to do so both as a matter of law and on the facts. The applicant's handling of the stolen goods did not occur only in the course of the theft and was not limited to the Toyota, as count 2 was. It included all of the items taken from the house, as well as the Toyota.

28. This approach was in no way inconsistent with the comments of Lawton LJ in Shelton (supra). Count 3 was included as an alternative count and an alternative count only. As the Judge clearly directed the jury, both in his directions and route to verdict, count 3 was only ever to be considered by the jury as an alternative to count 1, not count 2.

29. In the event that the jury was sure that the appellant had committed the burglary, the jury could not convict the appellant on count 3. In the event that the jury was not sure that the appellant had committed the offence of burglary, to which, as the jury knew, Dylan Turner had pleaded guilty, it could consider and convict the appellant on count 3. This is what the jury did.

30. There is nothing in any suggestion that acquittal on count 1 is inconsistent with the jury's verdict on count 2. On the facts it was open to the jury to decide that the appellant was party to the theft of the car, whilst not being sure that he was a burglar. The counts were not joint offences, rather they were separate and distinct as the jury was directed. References in the summing-up to "joint offending" were obviously references to the joint nature of the offending with Dylan Turner; the Judge was not saying that the offences were necessarily committed by the same parties in each case. It was properly open to the jury on the facts to be sure that the appellant and Dylan Turner jointly stole the Toyota but not sure that the appellant was involved in the burglary. It is clear that the jury was not sure that the appellant was involved in the burglary.

31. For these reasons, there is in our judgment nothing unsafe in the verdicts on counts 2 and 3 and the appeal will be dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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