APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 75
HCA/2018/100/XC

Lord Justice General
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

JAMIE HYSLOP

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Appeals Unit (for Dunnipace Brown, Cumbernauld)
Respondent: Meechan AD; the Crown Agent

29 November 2018

Background

[1] On 2 February 2018, after an extraordinary 38 day trial at the Sheriff Court in Hamilton, the appellant was convicted of two charges. The first was that:

> "on 7 July 2017 at Thorndean Crescent, Bellshill you ... did whilst acting with others assault [DM] ... and did pursue him and did punch and kick him on the head and

> body and strike him with knives or other similar instruments to his severe injury and permanent disfigurement".

He was also convicted of attempting to pervert the course of justice by arranging with the fifth accused to set up a false alibi. The alibi had been discussed in what transpired to be an ill-advised, and recorded, phone call which he made to his co-accused from Saughton Prison.

[2] On 2 February 2018, he was sentenced to 3 years imprisonment on charge 1 and a consecutive 4 months on charge 5.

Evidence

[3] The principal charge involved the complainer being chased by a group of men who struck him with knives or other similar instruments. There was evidence from the complainer that it had been the appellant, whom he had identified at a VIPER parade and knew already anyway, who had struck him with a meat cleaver. The corroboration of this was his own statement in the phone call from the prison to the fifth accused in which he said that:

> "I will not be on the CCTV. I know for a fact that I am no n I had my hood up n all that anyway".

The sheriff considered that this amounted to an admission that the appellant had been at the scene; there being evidence not only of the existence of CCTV but also that several of the assailants did have their hoods up, albeit that the offence took place in July.

[4] The defence appears to have been one of mistaken identity, although exactly how that matched with what the appellant had said on the phone is uncertain. The appellant did not give evidence.

Ground of Appeal

[5] The only ground of appeal that passed the sift is in the following terms:

> "The sheriff erred in allowing a motion by the Crown in terms of section 268 of the Criminal Procedure (Scotland) Act 1995 for the admission of CCTV footage as additional evidence. ... [T]he CCTV footage did not satisfy the statutory test ... The failure of the police and the Crown in their disclosure duties relative to this CCTV was a miscarriage of justice. ... [T]his important evidence ... was properly inadmissible ... the Crown not having included the CCTV on the list of productions attached to the indictment or on a section 76 notice".

[6] The sheriff reported that the trial had started on 21 November 2017. Although the estimate of its duration had been, as might have been expected, 4 to 6 days, it did not finish until 2 February 2018. On 13 December 2017, which was several days into the trial, DC Jacqueline McCann gave evidence that, on the day after the assault, she and the reporting officer, namely DC Lindsay McIntyre, had viewed a CCTV recording taken from cameras outside a shop near the *locus*. She was asked about the content of the recording and gave evidence about what was on it, without objection. The recording, which had been viewed by the police *in situ*, had shown a number of people, possibly four or five, running from a lane at the side of the shop towards the *locus* at Thorndean Crescent and back again; all at the relevant time. It was not possible to identify anyone in the recording because it was dark. In the course of cross-examination by the first accused, DC McCann said that she had understood that arrangements had been made by DC McIntyre to seize the hard drive.

[7] It was explained at the appeal hearing that, prior to the reporting officer giving evidence, the procurator fiscal depute had asked her what had happened to the recording. The reporting officer told him that she had arranged for the recording to be transferred onto disc. This had been done and the disc had been lodged with the production keeper at Bellshill. She was under the impression that the disc had been forwarded to the Crown.

Upon inquiry, this was found not to be the case. DC McIntyre discovered that it was still at Bellshill Police Office. The PFD recovered the disc and it was available in court on 14 December when DC McIntyre gave evidence to the same effect as her colleague.

[8] There was no clear explanation as to why the recording had not previously been disclosed to the Crown and thence to the defence, other than that it had been simply overlooked. The existence of the recording had been mentioned in the police summary of the evidence, which had been made available to both the Crown and the defence, when the accused had appeared on petition. The case was adjourned from Thursday 14 December until Monday 18 December to enable the defence to view the recording. When the trial resumed, motions were made by several of the accused, not that the recording should not be introduced into the proceedings, but to desert the trial diet. The argument was that the recording had been of such major evidential value that it would have affected the cross-examination of those witnesses who had already departed from the witness box. It may have changed the emphasis of the trial. The motions to desert were refused.

[9] The refusal to desert provoked a number of motions to adjourn the trial for several days to allow the defence to carry out investigations relative to the recording. These motions were refused. The agents for the first, third and fourth accused each intimated that their respective clients had all lost confidence in their ability to represent them. Each agent intimated that he was therefore withdrawing from acting. The appellant and the fifth accused had failed to appear and warrants for their arrest were granted. The trial was adjourned on various occasions between 18 December and 3 January 2018 to enable the three unrepresented accused to obtain new agents. On 3 January the agents for the appellant and the fifth accused intimated that their instructions had been withdrawn. They too withdrew from acting. The trial was adjourned until 4 January for them to obtain legal representation.

[10] On 4 January all five accused appeared unrepresented. The PFD moved to lodge the recording as additional label, in terms of section 268 of the 1995 Act, on the grounds that it was *prima facie* material evidence which had not been disclosed to the Crown or the defence prior to the trial and that it was in the interests of justice that it be lodged. The minutes record that this motion was unopposed. However, the sheriff accepted that she had not asked the unrepresented accused to express any views on the motion. She explained that she had already heard extensive submissions regarding the recording. She considered that the recording was *prima facie* material, because it showed a number of people running down a lane past the shop, towards the *locus* in Thorndean Crescent at the material time, and returning shortly thereafter. The timing was consistent with evidence which had been given about the time of the assault and with the complainer's account about being pursued down the lane before being assaulted in Thorndean Crescent. There had been evidence from other witnesses that the assailants had run away in the direction of the lane. The sheriff allowed the application. The examination of DC McIntyre resumed.

[11] On 8 January 2018 all the defence agents re-appeared; explaining that they had been re-instructed. Presumably, each accused had regained confidence in their agents. Apparently the agent for the first accused had remained in court on 4 and 5 January; despite an absence of instructions. The next phase of the trial was the cross-examination of DC McIntyre.

Submissions

[12] It was accepted by the appellant that, in terms of section 268, the recording was "*prima facie* material". However, it was submitted that it had not been established, in terms of sub-section 268(2)(b), that it had neither been available, nor could it reasonably have been

made available, at the commencement of the trial. The existence of the recording had been referred to in the summary. It could have been found and lodged. It had not been established that its materiality could not reasonably have been foreseen by the party. The materiality was clear, given that it showed events at or around the time of the incident. A miscarriage of justice had arisen as a result. The recording had been of great significance. It had been unhelpful for the appellant, as it showed the presence of multiple people with their hoods up; a matter which had particular significance in relation to the prison phone call.

[13] The advocate depute submitted that there had been no failure to disclose on the Crown's part. The PFD had not been aware of the existence of the recording, as distinct from the fact that the police had viewed it, until the police officers were giving evidence. The motions to desert had been made on the basis that the recording was inconsistent with the complainer's account. Once the accused had become unrepresented, the PFD had considered it to be his duty, as a matter of fairness to the accused, to ask that the disc be lodged (*Morrison* v *HM Advocate* 2013 SCCR 626, Lord Brodie, delivering the Opinion of the Court, para [27] citing *Boucher* v *The Queen* [1955] SCR 16). If the matter had been opposed, that opposition would have run contrary to the arguments advanced in support of the motions to desert.

[14] It was accepted that the recording had been *prima facie* material and that it could have been made available at the commencement of the trial. Its materiality could not have been foreseen by the Crown. The Crown had not been aware of its existence. Its admission was thus a matter for the discretion of the trial judge; the test being one of fairness. In any event, no miscarriage of justice had occurred. Secondary evidence had already been given, without objection, about the content of the recording. All parties had been proceeding on

the basis that the recording no longer existed. The recording, once played, did not reveal anything different from the secondary evidence.

Decision

[15] Section 268 of the Criminal Procedure (Scotland) Act 1995 provides that additional evidence may be led where it is *prima facie* material and that, at the commencement of the trial, either:

> "(i) the additional evidence was not available and could not reasonably have been made available; or
>
> (ii) the materiality of such additional evidence could not reasonably have been foreseen by the party."

It is accepted that the recording was *prima facie* material, at least at the point when the motion to introduce it was made. It was conceded that the recording could reasonably have been made available at the commencement of the trial. It was referred to in the summary of the evidence. Had the Crown asked the reporting officer, it would have been located and could have been lodged. Its materiality, however, had not have been foreseen by the Crown. The recording was described in the summary of the evidence (and presumably also the police statements) as not showing the events at the *locus* and not revealing the identity of the accused as attackers. It did not obviously contain material relevant to the case. The issue was not whether the complainer had been chased and attacked, but whether the individual accused had been involved.

[16] In these circumstances, since the terms of section 268 had been satisfied, it was a matter for the discretion of the sheriff to decide whether the recording should be admitted in the interests of justice or whether its admission would be unfair. Given its eventual materiality, it was undoubtedly in the interests of justice that the recording should have

been played. Any potential unfairness could have been met by recalling any witness who had already testified and whose evidence differed from that which was subsequently revealed by the recording. No motion to recall any such witness was made.

[17] The court is not satisfied that the sheriff erred in her decision. It may be that she ought to have asked the unrepresented accused for their views. However, it is not apparent that any of the accused, and in particular the appellant, would have raised any objection or, if they had, what the ground of objection might have been. The motions to desert appear to have been predicated upon an assumption that the recording would be introduced as evidence mid-trial.

[18] In any event, it is impossible to see how a miscarriage of justice can be said to have occurred. The content of the recording had already been described, without objection and apparently accurately, in the course of the trial. In particular, from the appellant's point of view, in relation to the prison phone call, there had been evidence that there was CCTV at the *locus* and that the attackers were wearing hoods.

[19] The appeal is according refused.