



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 12  
HCA/2019/20/XC

Lord Justice Clerk  
Lord Drummond Young  
Lord Turnbull

OPINION OF LADY DORRIAN, the LORD JUSTICE CLERK

in

REFERENCE ON A POINT OF LAW FROM THE SHERIFF APPEAL COURT

in Appeal by

JACQUELINE SHUTTLETON

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

**Appellant: Ogg, Sol Adv; Paterson Bell**  
**Respondent: Prentice, QC, AD; Crown Agent**

27 February 2019

[1] This case has been referred from the Sheriff Appeal Court on issues relating to the status of CCTV evidence. The appellant was convicted after trial of a breach of section 3 of the Road Traffic Act 1988, as amended. Leave to appeal against conviction was granted on the question whether the justice erred in admitting evidence contained on CCTV footage from the locus. The justice explains that between 10 and 11 pm on 14 March 2017, PC Birrell was on uniform mobile patrol in a marked police vehicle when he observed the two vehicles

in question at the locus, blocking the right hand carriageway. They were positioned in the “wrong” lane for their apparent direction of travel, and at an angle to the kerb. PC Russell attended shortly thereafter, when the vehicles had been moved to the road side. Both vehicles were damaged. The appellant was the driver of one of these vehicles, a white Volkswagen polo. PC Birrell established that the vehicles had been involved in a collision which had been captured on Glasgow City Council (GCC) public access CCTV. That footage was lodged as Crown label 1. It showed the car driven by the appellant travelling on the main carriageway in the direction of the camera. The vehicle was then seen to display a left indicator, before suddenly, and without indication, turning right, driving into the path of the vehicle which was following, and causing the collision. The vehicles could be seen to block the carriageway in the positions in which PC Birrell later found them.

[2] During the trial, objection was taken to the admission of the CCTV evidence, including objection on the basis that the provenance of the video was not proved. The justice was satisfied that the provenance had been established. That matter is not in dispute. However, the justice also considered that the footage thereby became real evidence which was then available as proof of fact (*Gubinas & Radivicius v HMA* 2017 SCCR 463, para 59). In an opinion dated 31 August 2018, the Sheriff Appeal Court considered that an issue of novelty and complexity arose, namely

“whether the evidence of the two police officers who attended after the collision and viewed the CCTV footage could amount to corroboration or whether it is no more than descriptive of a piece of (uncorroborated) real evidence.”

[3] The Sheriff Appeal Court considered it appropriate to refer the matter for the opinion of the High Court of Justiciary. The points of law which the court considered to arise are specified in the reference, namely:

“(i) where the *actus reus* of an offence libelled is captured on CCTV footage, and the only evidence of the *actus reus* of that offence is said CCTV footage, can the evidence of two police officers who attended after the incident and viewed the CCTV footage amount to corroboration or is it no more than descriptive of a piece of real evidence?

(ii) where the *actus reus* of an offence is captured on CCTV footage, the only evidence of the *actus reus* is said CCTV footage, and the provenance of the CCTV footage is established, can said CCTV footage alone constitute sufficient evidence of the *actus reus* of the offence?

(iii) where the *actus reus* of an offence is captured on CCTV footage, the only evidence of the *actus reus* of the offence libelled is said CCTV footage, and the provenance of the CCTV footage is thus established, is the fact finder entitled to find the *actus reus* established based on the fact finder’s viewing of the CCTV footage?”

[4] The Sheriff Appeal Court considered that it was “at least arguable that *Gubinas & Radavicius* suggests that a corroborated case can be established on the basis of a single piece of CCTV alone, where the provenance of the CCTV is properly established”. This being an issue which arose regularly before the Sheriff Appeal Court, the court decided to make the reference to the High Court of Justiciary.

### **Submissions for the appellant**

[5] For the appellant, it was submitted that in *Gubinas* the court had not attached some special status to CCTV evidence. It had not removed the central requirement of corroboration for the commission of the crime and the identification of the perpetrator. At para 59 of *Gubinas* the court stated that:

“...once the provenance of the images is shown, they become real evidence in causa which the sheriff or jury can use to establish fact, irrespective of concurring or conflicting testimony. Even if all the witnesses say that the deceased was stabbed in the conservatory, if CCTV images show that he was shot in the library, then so be it.”

This was the passage (“the cluedo reference”) which had caused the Sheriff Appeal Court to consider that the *actus reus* might be established on the CCTV evidence alone. However, in light of the contents of the opinion as a whole, this cannot be interpreted as meaning that the

commission of the crime or the identification of the accused could be proved by one source of evidence. Neither the cause of death nor the locus is an essential fact requiring corroboration.

[6] In *Gubinas* the court made it clear (para 56) that the CCTV footage was but one source of evidence, comparable to a witness speaking to events seen or heard, making it equivalent simply to one source of evidence. This did not suggest that the evidence was available as corroborated proof of fact, rather that further, corroborative evidence was required for sufficiency of proof. That this was so could be seen in the discussion of the role such evidence played in the issue of identification.

[7] Corroboration was considered in *Gubinas* in an addendum to the opinion. There the court stated (para 68) that where identification came by way of comparison of CCTV images with a photograph of the accused there would be corroboration if the provenance of the recording and the photograph were each spoken to by two witnesses. Analogy was drawn with fingerprints or DNA, but the mere finding of a fingerprint or DNA is not itself sufficient: the circumstances in which this was found are relevant, for example DNA on a mask at the locus of a robbery (*Maguire v HMA* 2003 SCCR 758) or a fingerprint in blood, found at the locus (*Langan v HMA* 1989 JC 132).

[8] Great emphasis was placed on two passages in particular in *Gubinas*. The first was in para 70 where the court, addressing the making of a no case to answer submission said

“Judges and sheriffs may have to decide whether the totality of the evidence reaches the base line of quality required to constitute a sufficiency. This does not involve a decision on the reasonableness of a verdict, but is a straightforward determination of whether there are two sources of evidence which, taken at their highest, are sufficient to enable the fact-finder to return a verdict of guilt.”

The second is in para 74:

“Where appropriate directions are also given on the operation of corroboration, there ought to be little difficulty in understanding the basis for a jury’s verdict. Where it is one of guilt, they will have been satisfied beyond reasonable doubt, upon the evidence of two sources (which may include the content of the video images), that the accused committed the crime charged.”

[9] These passages were relied upon for the submission that it was not sufficient merely to establish the provenance of the footage in question. A cross check was required in the form of further evidence which confirms that what was seen on the CCTV footage was accurate. In this case, one of the police officers spoke to having viewed further CCTV footage from a local shop. Had that been shown to the court it would have provided the necessary corroboration. Footage from two separate cameras would be sufficient, as long as these were two systems separate from each other.

The questions posed in the reference should be answered as follows:

1. No. The evidence of the police officers is descriptive only.
2. No, two sources are required. The CCTV footage is not “self-corroborating”.
3. No, the fact finder is still viewing one source of evidence. Another source of evidence is required.

### **Submissions for the respondent**

[10] The Advocate Depute agreed that question 1 should be answered in the negative, and that the evidence of the police officers in relation to the footage was descriptive only, and not corroborative. Otherwise, in relation to the CCTV footage no distinction fell to be drawn between the events shown or the identity of persons involved (*Gubinas* para 60: “The same principles must apply in relation to proof of the identity of persons as they do to proof of events.”).

[11] The Advocate Depute, relying on paras 56, 59 and 68 of *Gubinas*, submitted that where the provenance of the recording was established by corroborated evidence, agreement, or certification, the content was thereafter available as proof of fact, including commission of the offence. Para 68 of *Gubinas* is in these terms:

“In relation to corroboration, no difficulty arises. If the only evidence of, for example, identity comes by way of a comparison of video images with the accused in a photograph, there will be corroboration if the provenance of the recording and the photograph are each proved by two witnesses. In this respect, the situation is little different from proof that a fingerprint or DNA has been found at a particular location and is that of the accused (*Reid v HM Advocate*, following *Langan v HM Advocate*). The only difference is that in fingerprint or DNA cases a comparison requires the involvement of an expert. Identification does not.”

The second and third questions in the reference should therefore be answered in the affirmative.

### **Analysis and decision**

[12] In my opinion it is clear from *Gubinas* that as long as the provenance of the recording is proved by corroborated evidence, or otherwise properly established, the content of the recording becomes proof of fact of the events shown thereon (*Gubinas* para 56). This principle applies equally to identification, but there is one major difference: proof of identification necessarily relies upon comparison. For that reason alone, where a photograph is used for comparison purposes, the provenance of the photograph must also be established (*Gubinas* para 68).

[13] In referring to the CCTV footage as “a silent witness” the court should not be understood as indicating that the footage is to be considered equivalent to the testimony of one eye witness, rather than real evidence which itself is sufficient proof of the inferences of fact which might reasonably be drawn from a viewing of its contents. In fact, the court noted the difficulty which can arise when “evidence” is equated with “testimony” (para 57).

Unlike the testimony of a witness, which must be assessed for accuracy, reliability and credibility, footage of adequate quality requires no such assessment. The only issue is what the footage shows, objectively viewed, and what inferences that footage might reasonably bear.

[14] I do not consider that the extracts from paras 70 and 74 of *Gubinas* bear the weight which the solicitor advocate for the appellant sought to attribute to them. In para 70, it is clear that the court was addressing sufficiency from the point of view of the quality of the footage, an issue which does not arise in the present case; and in para 74 the court was merely addressing the conventional approach to be taken to an understanding of the verdict of a jury.

[15] The recognition that the footage constitutes real evidence is the key to understanding its status. What is to be understood by real evidence was considered in detail in *Gubinas*, starting with the position of such evidence in South Africa, where real evidence is described as being

“things, which are examined by the court as a means of proof, and which ‘upon proper identification, becomes, of itself evidence’. Examples of weapons, handwriting, personal appearances, casts of footprints are given.”

The court specifically noted that in such circumstances

“The judge is entitled to rely upon his or her perceptions and to draw such inferences as may reasonably be drawn...”

[16] The position of real evidence in Scotland is considered at para 55:

“Dickson, *Evidence* (para 1815) equates real evidence with ‘evidence derived from things’. This is referred to in Walker and Walker, *Evidence* (para 18.1), where the editors (Ross and Chalmers) cite the observation in Cross and Tapper, *Evidence* (p 60), that the term ‘covers the production of material objects for inspection by the judge or jury in court’ (emphasis added; see also Davidson, *Evidence*, para 5.01). The purpose of any such inspection by the fact-finder is with a view to drawing inferences from what can be observed upon examination. As the editors correctly state:

‘Matters which in the past might have been left to the recollection of a witness may now be the subject of real evidence in the form of an automatic recording’.”

[17] In para 68 the court noted that

“If the only evidence of, for example, identity comes by way of a comparison of video images with the accused in a photograph, there will be corroboration if the provenance of the recording and the photograph are each proved by two witnesses.”

[18] The flaw in the appellant’s argument is apparent from this sentence: in this example, the photograph does not provide independent evidence of an accused’s commission of the offence in question. It does not constitute “corroboration” of the identification of the offender, rather it is merely the method by which the comparison necessary for the proof of identification may be carried out. In *Gubinas* the court made it clear (paras 57-61) that it considered that the correct understanding of *Steele v HMA* 1992 JC 1 was that a fact finder may rely on CCTV footage as proof of the commission of the offence or that the accused committed it. The court adopted (para 63) the reasoning in the Canadian case of *R v Nikolowski* [1996] 3 RCS 1197:

“In particular, “so long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator”. It may assist in the assessment of testimony. It may supplement testimony concerning identity, but it may also supersede it.”

[19] CCTV footage could only supersede the testimony of witnesses if the footage itself, once provenance was established, constituted sufficient proof of the facts shown thereon. This is equally applicable to the “cluedo” reference in para 59 of *Gubinas*. It is the provenance of the real evidence, not its substance, which must be proved by corroborated evidence; the finding of a fingerprint; or of DNA; or in the case of CCTV footage, proof that the footage is a recording of the event which gives rise to the charge. It is in my view



misleading to talk of corroboration in the conventional sense when referring to real evidence, or to refer to it as “self-corroborating”.

[20] The analogy with fingerprint or DNA evidence, made in para 68 of *Gubinas* is a sound one. There are many cases in which the sole evidence implicating an accused person in the commission of an offence comes from a fingerprint alone, additional evidence being required merely to carry out the comparison exercise. It is the real evidence of the fingerprint itself which provides proof of the accused as the perpetrator of the offence, and no “corroboration” of that is required. It is sufficient for the finding of the fingerprint to be spoken by two witnesses. Examples include *Hamilton v HMA* 1934 JC 1; *HMA v Rolley* 1945 JC 155; and *Langan v HMA* 1989 JC 132.

[22] The fact that additional evidence may often be led (as it was in fact in the present case) does not undermine the status of the recording as real evidence which constitutes sufficient proof of what it shows happening. The court noted this in unequivocal terms in *Gubinas* (para 59):

“None of this detracts from the fundamental position that, once the provenance of the images is shown, they become real evidence in causa which the sheriff or jury can use to establish fact, irrespective of concurring or conflicting testimony. Even if all the witnesses say that the deceased was stabbed in the conservatory, if CCTV images show that he was shot in the library, then so be it.”

This passage confirms that the footage itself may be conclusive.

[23] That real evidence, so long as its provenance is properly established by corroborated evidence (or, of course, agreement or certificate) can itself be sufficient for proof of the *actus reus* of an event can be seen from *Ryrie v Campbell* 1964 JC 33. In that case the occurrence of an offence of driving without due care and attention was established entirely by proof of real evidence in the form of tyre marks, paint and damage, which was established by the testimony of two police officers. A submission that such evidence could not provide

sufficient proof of the commission of an offence was rejected. The Lord Justice General

(Clyde) stated (p36):

“It was maintained to us, however, that real evidence of this kind alone could never be sufficient to establish a criminal charge of careless driving and that the evidence of an eye-witness to the nature of the driving was an essential prerequisite of a conviction under such a charge. If this view is held anywhere in Scotland, it is a view for which there is no justification in law whatever. There must be many cases where, in the absence of an eye-witness to what has happened, the real facts are so eloquent as to entitle the Court to hold that careless driving is established. The present case seems to me to be a glaring illustration of such a situation. In an unreported case of *Dishkin v Cuthbert*, decided in this Court on 18th January 1951, a conviction of careless driving was upheld where the only evidence in support of the Crown case for the carelessness of the driving was the real evidence as to the damage found at the scene of the accident after the vehicle in question had driven away.”

[24] Lord Guthrie’s opinion was to like effect (pp36-37):

“I also agree. There is no rule of law to the effect that a conviction in a criminal proceeding cannot be obtained on real evidence alone. Like other kinds of evidence, real evidence may or may not be sufficient to justify a conviction, according to the circumstances of the particular case. The sufficiency of real evidence to entitle a Judge or jury to convict will depend upon how strongly it points to a conclusion of guilt. If the real evidence leaves no reasonable doubt as to the guilt of the accused person, then it is in law sufficient for a conviction.”

This is entirely consistent with the conclusions in *Gubinas* that once the provenance of a recording is established, the contents may provide sufficient evidence as to the commission of the crime or the identity of the perpetrator.

[25] I therefore consider that the questions in the reference should be answered as follows:

1. No. Any evidence of the police officers relating to the contents of the footage, as viewed by them, would be descriptive only.
2. Yes, in the circumstances identified in the question the footage would constitute sufficient evidence of the *actus reus*.

3. Yes, in these circumstances the fact finder would be entitled to find the *actus reus* established from his own viewing of the footage.



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[26] I agree with the opinion of your Ladyship in the chair, and with the answers proposed by your Ladyship to the questions in the reference from the Sheriff Appeal Court.

I would like, however, to add some comments of my own in view of the general importance of the principal question that arises in this case.

[27] That question is the relevance of the principle of corroboration to real evidence.

Corroboration is regarded as a fundamental requirement of Scots criminal law. At a very

general level, more than one source of evidence is required to establish first, that a crime has been committed (the *actus reus*), and secondly, the identity of the perpetrator. Nevertheless, in assessing the sufficiency of evidence, it is essential to have regard to the fundamental purpose of the requirement of corroboration.

[28] That purpose is to provide a reasonable level of certainty of evidence in relation to the two essential facts: that a crime has been committed and the identity of the perpetrator.

The justification is stated by Hume in his *Commentaries* (4<sup>th</sup> ed, 1844, ii, 383):

“No matter how trivial the offence, and how high so ever the credit and character of the witness, still our law is averse to rely on his single word ... and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape”.

The essential feature is in my opinion the notion of a “concurrence of testimonies”. The word “testimony” in this context refers to a witness’s account of what he or she saw or did.

It is obvious that the witness may not have been a good observer and may have failed to notice important features of what happened; or may have a poor recollection, for a wide range of reasons; or may be telling lies. In relation to testimony of this nature, corroboration clearly serves a useful purpose, to reduce the risk that the witness’s observation or recollection is misleading or wrong, or simply untrue.

[29] In some cases, however, evidence adduced does not take the form of the testimony of eyewitnesses. Perhaps the most important example of such evidence is what is generally known as real evidence. Real evidence can take many forms, ranging from straightforward physical objects to the results of complicated medical procedures, such as blood tests carried out for the purposes of DNA comparison. If real evidence is available to a court, the principle of corroboration is in my opinion irrelevant, as a matter of principle. What is produced is the thing itself, not a description of the thing mediated through the testimony of

witnesses. Thus the jury, or the judge, sheriff or justice, can observe the thing itself, directly, and make up their own minds on the basis of that observation. There is no need for a “concurrence of testimonies”; indeed there is no “testimony” in the narrow sense of that term as an account by a witness of what he or she has seen or done. Nor is there any question of relying on the “single word” of the witness, to use Hume’s expression. Consequently, so far as the substance of real evidence is concerned, corroboration serves no useful purpose; the fundamental reasons for requiring more than one source of evidence are absent. To the extent that there is any uncertainty or error in the assessment of real evidence, that uncertainty or error is that of the court itself, and in the assessment of real evidence it can be expected that the court will have due regard to the requirement of proof beyond reasonable doubt, which tends of itself to resolve cases of uncertainty and reduce the risk of error.

[30] The present appeal relates to evidence obtained from CCTV cameras, a form of evidence that has assumed considerable importance in recent years. In *Gubinas and Radavicius v HM Advocate*, [2017] HCJAC 59, the status of video recordings was considered at length by the full court. It was held that CCTV images or recordings were a form of real evidence, and extensive guidance was given as to the use of such evidence in a jury trial: see paragraphs [53] *et seq.* In large measure that guidance serves to remove the confusion that had arisen in earlier cases as to the use of CCTV evidence. Corroboration is dealt with at paragraph [68], where it is indicated that the provenance of the CCTV recording will be established by a sufficiency of evidence, either by two witnesses who can each speak to that provenance, or using the procedure in section 283 of the Criminal Procedure (Scotland) Act 1995, under which the person responsible for the operation of the system can grant a certificate that the visual images and sounds recorded on a particular device relate to events

at a particular time or place. A joint minute is another possible procedure. The important point for present purposes is that the requirement of corroboration, or an equivalent of corroboration, applies to establishing the source of the CCTV recording.

[31] Once that is done, however, the law is in my opinion clear that what is shown in the recording does not require corroboration because it is real evidence. In *Gubinas and Radavicius* an analogy is drawn with fingerprint or DNA evidence, where it is established by corroborated evidence that the fingerprint or DNA was found at a particular location and was that of the accused. In that case expert evidence would be required to carry out the comparison exercise to establish that the accused was implicated, but the real evidence itself would not have to be corroborated. In the case of CCTV evidence, by contrast, it was held that no expert evidence is required to carry out the comparison; the jury, or in summary cases the sheriff or justice, can examine the CCTV images, look at the accused, and form their own opinion about identification.

[32] That conclusion follows inevitably from the classification of CCTV images as real evidence. In assessing the substance of real evidence, the concept of corroboration is essentially meaningless, for the reasons stated above. This does not merely extend to identification of the accused as the perpetrator; it also extends to the *actus reus* that is alleged in the charge. Thus in the present case, once the provenance of the CCTV recording had been established by sufficient evidence, the justice was entitled to examine it to determine whether it disclosed driving without due care and attention without reasonable consideration for other persons using the road, contrary to section 3 of the Road Traffic Act 1988. So far as that exercise is concerned, no corroborative evidence was required: the justice was able to see what actually happened in the CCTV recording. More generally, the obvious advantage of CCTV evidence is that it enables the court to see exactly what

happened; in words adopted in *Gubinas and Radavicius*, such evidence provides a “silent witness” that gives an objective and dispassionate account of events. In view of that advantage, as a matter of common sense, corroboration of the *actus reus* from another source should not be required, provided that the recording is sufficiently clear.

[33] Obviously, in some cases a CCTV recording may be unclear, so that the court is left with a reasonable doubt about what actually happened. In such a case, if the CCTV recording is the only evidence of what happened, the court will inevitably acquit the accused. In some cases, however, the CCTV recording may be relied on in support of other evidence: the evidence of eyewitnesses, or possibly in support of expert evidence that has other foundations. An example of the latter would be expert evidence based on the marks and damage left after a road accident or the location of the vehicles following such an accident. In these cases the CCTV recording is only used in support of other evidence, and its lack of clarity is not necessarily a barrier to such use.

[34] In a case where the CCTV evidence is sufficiently clear to be relied on as the only evidence of the *actus reus* of the crime charged, or of the identity of the perpetrator, it will normally be important to establish by appropriate evidence where the CCTV camera was located and in general terms what is shown in the images. This should not involve telling the court what to make of the images, but rather to explain the location, in order that those viewing the CCTV images can be properly oriented. This will usually be done by the police officers who took possession of the CCTV images. At the same time those officers, or other relevant witnesses, will require to speak to the timing of the CCTV images, and on occasion to clear up discrepancies between the timing used in the CCTV system and the actual time. These are practical matters, however, that can be determined on a common sense basis. They are not relevant to the requirement of corroboration. The status of the CCTV recording as



real evidence renders corroboration irrelevant as to the substance of what is shown in the CCTV recording.

[35] For the foregoing reasons I agree entirely with your Ladyship's proposed disposal of the questions raised in this appeal.



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