APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 21
HCA/2018/309/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL CONVICTION

by

RICHARD MACPHERSON (aka COWAN)

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Hay; Faculty Appeals Service (for Gavin McBain & Co, Aberdeen)
Respondent: Prentice QC (sol adv) AD; the Crown Agent

19 March 2019

Introduction

[1] On 11 June 2018, at the Sheriff Court in Aberdeen, the appellant was found guilty of theft by housebreaking. He was sentenced to 3 years and 6 months imprisonment. He appealed against the sheriff's refusal of his no case to answer submission. The appeal raised

an issue about the sufficiency of evidence in circumstances in which an item, to which an accused has been linked, has been found at the scene of a crime.

The evidence

[2] Most of the facts were agreed by joint minute. The housebreaking had taken place. The house in Spital, North Aberdeen, had been secured when the student occupants had left at about 2.00pm on Wednesday 20 December 2017. At about 12.30 pm on Thursday 21 December, the appellant had bought a mobile phone at the Union Street branch of Vodafone. He had left the shop at about 1.00pm, when he was thought by the staff to be in an intoxicated state. He had a red Vodafone plastic bag containing the box for the phone and a receipt, on which the phone number had been recorded for his benefit. At about 7.30pm on 21 December, a friend of the occupants, who had permission to enter, noticed that items in the house had been disturbed. Although he did not notice that the kitchen window had been damaged, he had required to slam it shut. When the students returned at about 7.30pm on Friday 22 December, the Vodafone bag, containing the box, the receipt, a screwdriver and a newspaper dated 21 December, was found in the house. The kitchen window showed signs of fresh damage, consistent with it having been prised open with a screwdriver. Various items had been stolen.

[3] A forensic scientist spoke to DNA being recovered from the Vodafone bag and the screwdriver. DNA, which had been found in the area of the handles of the bag, had a mixed DNA profile, of which the appellant was the major contributor. At least four others could have made minor DNA contributions, but these were unsuitable for comparison. One explanation was that appellant had handled the bag, while others had not; their DNA being deposited by indirect or secondary transfer (ie through speaking, coughing, sneezing or via

an intermediate surface). Another explanation was that a number of people had all handled the bag. From a scientific point of view, it was not possible to say when the appellant's DNA had been deposited on the bag. The DNA on the screwdriver had a mixed profile, but it was unsuitable for further interpretation.

[4] The appellant made a no case to answer submission on the basis that there was only a single piece of circumstantial evidence pointing to his involvement. That evidence was weak because innocent explanations could quite readily be advanced as to how the bag might have come to be in the house. In due course, the appellant testified that he had left the bag containing the box and receipt on a bus.

Submissions

Appellant

[5] The appellant maintained that the evidence was insufficient to demonstrate that he had been at the *locus* at the time of the offence. In order to create a sufficiency, the Vodafone bag required to be associated in time and place with both the crime and the appellant. Although he had had possession of the bag earlier in the day, it had not been proved that he still had it at the time of the offence, or that he had left the bag within the *locus*. There was a window of opportunity with a maximum time span of some 6½ hours between the appellant's proved possession and the housebreaking.

[6] Sufficiency of circumstantial evidence depended on the particular facts. There was no direct evidence of who had left the bag at the *locus*. By the time of the offence, the bag had been "repurposed" to contain a screwdriver and a newspaper, thus breaking the "chain of circumstantial of evidence" (*Hamilton* v *HM Advocate* 1934 JC 1, LJG (Clyde) at p 4). Something more was required, beyond the presence at the scene of an object previously

handled by the appellant (*Campbell* v *HM Advocate* 2008 SCCR 847). It would have been different if the appellant's DNA had been on the screwdriver. As in *Reid* v *HM Advocate* 2017 JC 37, that would have been an object which, it could be inferred, had been introduced to the crime scene by the perpetrator. Equally, if DNA or a fingerprint had been left on a fixed object at the scene, presence of the accused at the scene could be inferred (*Anderson* v *HM Advocate* 2017 JC 287). The same would apply if DNA or a fingerprint had been found on a moveable object which had already been at the *locus* prior to the break-in (*Hamilton* v *HM Advocate* 1934 JC 1).

Crown

[7] The advocate depute reminded the court that, at the stage of a no case to answer submission, the Crown case had to be taken at its highest (*Mitchell* v *HM Advocate* 2008 SCCR 469 at para [106]). It was in the nature of circumstantial evidence that it may be open to more than one interpretation. It was the role of the jury to decide which one to adopt (*Fox* v *HM Advocate* 1998 JC 94 at 100). "If ... the accepted circumstances in combination – the strands in the cable – support the fact in issue; it can be regarded as proved" (Walker & Walker: *Evidence* (4th ed) para 5.9.3). The appellant had had possession of the bag at about 1.00pm and the crime had been committed by 7.30pm. That established a close link between the appellant and the crime and certainly amounted to a case to answer.

Decision

[8] The finding at the scene of a crime of an item, which is proved to belong to an accused or upon which the accused's DNA or fingerprint has been left, is a piece of circumstantial evidence which links the accused to the item. It may link him to the scene

and give rise to an inference that he was present at the material time. This in turn may lead to an inference that he committed the crime. Whether these inferences can be drawn from the circumstantial evidence "is the result of reason exercised upon the facts, or of reason and experience conjoined" (Dickson: *Evidence* (Grierson ed) para 64 citing Starkie: *Practical Treatise of the Law of Evidence* 839). Whether an inference from proved fact is a legitimate one, thus amounting to a sufficiency of evidence, is, first, a matter for the judge or sheriff, should he or she be faced with a submission to the opposite effect. Secondly, it will be a matter for the fact finder (whether jury or sheriff) to determine whether to draw the inference in the face of any other inferences which may be open on the evidence led at trial.

[9] A variety of situations may arise. First, there is one involving an accused who has left DNA or a fingerprint on an item which is fixed at the scene (*Anderson* v *HM Advocate* 2017 JC 287; *Welsh* v *HM Advocate* 1992 SCCR 108; *Langan* v *HM Advocate* 1989 JC 132). Secondly, there is the situation where the DNA or fingerprint is left on a moveable item which is proved to have been at the *locus* at the time of the crime (*Hamilton* v *HM Advocate* 1934 JC 1). Thirdly, there may be a moveable item which is introduced to the scene (ie not having been there previously) which is proved to belong to the accused. In both of these situations, the item may be an everyday object such as a cigarette butt (*Reid* v *HM Advocate* 2017 JC 37), a plastic bag (*Slater* v *Vannet* 1997 JC 226) or an item used to commit the crime (*Maguire* v *HM Advocate* 2003 SCCR 758). Fourthly, there is the situation where an illegal or stolen object, or its wrapping, is linked to the accused by the finding on it of DNA, a fingerprint or other scientifically examined material (*McGartland* v *HM Advocate* 2015 SCCR 192; *Campbell* v *HM Advocate* 2008 SCCR 847; *Ross* v *HM Advocate* [2016] HCJAC 54).

[10] In each situation, reason has to be applied to the proven facts to determine whether it is legitimate to draw the inference of involvement in the crime. This will involve questions

of fact and degree. In the first situation, if the accused is proved to have visited the *locus* previously, the inference may not be open, at least without more. In the second and third, when a moveable item, even one used in the crime, is linked to the accused, he may be able to explain why it might be linked to him in a non-incriminating manner. In the fourth, similar considerations apply. However, if one reasonable inference from the evidence is that the accused was the, or a, person who committed the crime, there will thereby be a sufficiency of evidence, notwithstanding the existence of other possible explanations. It is only if the inference is an unreasonable one that an insufficiency will arise (*Reid* v *HM Advocate* (*supra*), LJG (Carloway) at para [18] citing *Hamilton* v *HM Advocate* (*supra*), Lord Sands at 5). Where more than one reasonable inference may be drawn, or if the inference is one which may or may not be drawn, it will be for the fact finder to determine the result, applying the customary standard of proof. In that situation, the issue is not one of sufficiency of evidence, but one of its quality or strength.

[11] In this case, it is a legitimate inference, from the appellant having bought the Vodaphone bag in which to carry the box for the phone and the receipt with the information about the number, that he had left the shop with the intention of transporting the items home or to some other place in that bag. In the absence of acceptable evidence that he had discarded the bag *en route*, it is a legitimate inference that he would still have had it a few hours later when the crime was committed (ie he had used it to carry the screwdriver and the other items to the *locus*). Applying reason to the facts, the prospect, of: (i) the appellant having lost or discarded the bag; (ii) the bag being picked up by chance by a random housebreaker; (iii) that person electing to carry the empty phone box and receipt with him, and to use the bag to carry the screwdriver and a newspaper; before (iv) finally leaving the bag at the scene of a crime, is very remote indeed. It is a reasonable inference that the

appellant had the bag with him from the point at which he left Vodafone until the time when, in an inebriated state, he forgot to take it with him along with the fruits of the housebreaking.

[12] The appeal must therefore be refused.