APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 24
HCA/2018/000415/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

JAMIE COOK

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: I Duguid, QC, C Findlater; Paterson Bell, Edinburgh for David Kinloch & Co, Glasgow
Respondent: R Goddard QC, AD; Crown Agent

3 May 2019

Introduction

[1] The appellant and two others, his father James Cook and a co-accused Peter Brown, were unanimously convicted of murdering Jason McCue on 11 July 2017. In this appeal the appellant maintains that his conviction constitutes a miscarriage of justice, the trial judge having refused, erroneously, to allow a section of a 999 emergency call recording (Crown label 17) to be played during the cross examination of three Crown witnesses. A transcript

of the recording had been prepared, and agreed by joint minute. However, it transpired that on the recording a voice in the background could be heard saying words somewhat to the effect "Peter did that".

Background

[2] The evidence disclosed that Peter Brown and the appellant visited the homes of Colin Ramage and Colin James Inglis on 11 July 2017 seeking to obtain payment of certain debts. In the course of this, Ramage was stabbed with a knife to his severe injury and danger of his life as well as being kicked on the head. Inglis was assaulted to a lesser degree. Brown and the appellant were convicted at trial of these assaults (charges 2 and 3). After the assault on him, Inglis travelled to the home of the deceased, McCue, where he met not only McCue but two other men, James Adams and Thomas Sinclair. Adams contacted the appellant to make arrangements for what he described as a "square go". Adams, Sinclair, Inglis and the deceased travelled to a nearby park in Strathaven. They had with them at least two weapons. The deceased had a knife and there was also an axe, which on the evidence was in the possession of James Adams. In the park they met the three accused. Peter Brown and the appellant were on the scene before James Cook. There was evidence that Peter Brown had at least one knife, and possibly a golf club, and that the appellant had a knife. There was no evidence that James Cook was armed but when he arrived there was evidence that he shouted encouragement to the others, or at least to his son, the appellant. There was evidence of assaults on Adams and Sinclair (charge 4, all three convicted; charge 5, appellant convicted). Of more significance was evidence of a concerted attack on the deceased, who suffered several stab wounds, one of which pierced the right ventricle of the heart, causing death.

The 999 call

[3] The 999 call was made by Nicola Robertson, an office administrator who was in the park at the time of the incident. She administered CPR to the deceased on the instructions of the 999 operator. The advocate depute intended to play the 999 recording during the evidence of this witness, but she became upset about that prospect and the recording was not played. The label and production consisting of the recording of the call and the transcript thereof were agreed by joint minute. The transcript did not contain the words, heard in the background of the recording, said to be along the lines "Peter did that".

How the issue arose at trial

[4] The issue which is the subject of the appeal arose during the evidence of Colin Inglis. His evidence was described by the trial judge as evasive, inconsistent and contradictory. In the course of his evidence Inglis was asked about certain statements he was said to have made, or heard, implicating Peter Brown. How the latter point could have related to admissible evidence is difficult to identify. As to what he himself may have said, he was shown a video of a recording made in the shop owned by Cook's wife, in which Inglis was heard to say, amongst other things "Peter done the damage." He was again evasive and contradictory in the evidence he gave about this, saying this could have been about Brown kicking the deceased. He was asked about a statement allegedly made to the Park Ranger, David Leggate. (Leggate later gave evidence that Inglis had said "big Peter did it but don't tell anybody". This was said at a different time from the remark heard on the 999 tape.) In cross-examination by the appellant's counsel, Inglis at one point agreed that he had said this to the Park Ranger, then said the Ranger was mistaken.

[5] It was at this point in the evidence that counsel for the appellant indicated that he wished this witness to listen to at least part of the 999 recording. During discussion as to the reason for this, it emerged that words to the effect "Peter did that" could be heard spoken by someone in the background. Counsel for the appellant asked to play the recording to Inglis, failing which asked for the trial to be deserted. Counsel for the second accused also asked for the trial to be deserted. The advocate depute objected that the evidence which was sought to be led for the appellant was inadmissible, and also opposed any motion for desertion. The trial judge refused both motions.

Submissions for the appellant

[6] The trial judge had erred in refusing to allow the tape to be played. Only if the speaker remained unidentified would the evidence be inadmissible hearsay. There was "every possibility" that asked on oath Inglis could have accepted that it was his voice. Furthermore, the jury ought to have been directed, *per Gubinas* v *HMA* 2018 JC 45 that they could form their own conclusions as to the identity of the speaker, and consequently the inference to be drawn from it, namely that the co-accused Brown had fatally stabbed the deceased. Even if no witness was able to attribute the remark to any named person, making the evidence inadmissible hearsay, the jury themselves would have been entitled to reach a conclusion as to what had been said and by whom. The evidence was not inadmissible at the time counsel sought to elicit it: it would only have become inadmissible if (a) no witness attributed it to anyone; **and** (b) the jury were unable to attribute it to anyone for themselves.

[7] There was no prejudice to Brown who had already been incriminated by the appellant, and who had in turn incriminated the appellant. The refusal led to a miscarriage of justice. It may be said that the appellant could have been convicted either as actor or art

and part, but it is not possible to know which of these routes was taken by the jury. If the conviction had been on the basis that he was actor, the issue in question would have had a significant bearing on that.

Submissions for the Crown

[8] There was no error in refusing to allow the extract to be played. In any event, if the trial judge erred there was no miscarriage of justice. Allowing the recording to be played would have allowed the leading of unattributed hearsay evidence prejudicial to the second accused. The jury would be unaware of the maker of the remark or on what basis it was made. The male witnesses present at the time all denied making the comment, and it was inevitable that this would remain the position if they were asked about the matter. The trial judge was correct to decide that there was no prospect of the remark being attributed. The risk of hearsay being led was heightened by the failure to follow the proper procedure for the use of section 263.

[9] *Gubinas* related to evidence which was admissible. It is not authority for the proposition that a jury would be entitled to make a comparison in any circumstances whatever. There was a benchmark of sufficient clarity which required to be met.

[10] The only basis for using the tape would have been to challenge the witness on the basis of a prior inconsistent statement. There was already ample evidence regarding the making of similar remarks by the witness to others.

Analysis and decision

[11] The background voice on the 999 recording was clearly hearsay evidence. The reasons for which counsel sought to play the relevant section of the recording to Inglis were "to ascertain if it was himself who made the remark or if he could identify the voice" (see

court minutes for 19 June 2018). It was not explained to us how the recording could properly be used for the latter purpose, or how an answer to that question would have rendered the evidence anything other than hearsay. So far as the first purpose is concerned, as counsel came to recognise during the hearing, the only potential use of the evidence would have been as a prior inconsistent statement in terms of section 263 of the Criminal Procedure (Scotland) Act 1995. However, there was no basis upon which the comment could even be attributed to the appellant, far less be treated as a prior inconsistent statement. On all the information available, it could not be attributed to anyone. Adams, Inglis and Sinclair had all denied the voice was theirs. It could only be expected that Colin Inglis would have persisted in his denial if he were to be played the tape in court. It seems that the basis for considering that Inglis made the remark on the tape was that the remarks were said to be similar to what Leggate said the appellant had told him. There was no other basis for considering that the witness had said these words, and as is known, when precognosed on the issue he had denied doing so. It is clear from *Leverage* v *HM Advocate* 2009 SCCR 371 (para 16), that before questions are allowed to be put to a witness impugning the witness's reliability or credibility by means of a prior statement there must be a proper basis for doing so. We do not consider that the speculative basis upon which the matter was advanced in the present case provided such a basis.

[12] The trial judge was in our view correct to conclude that it would not be proper to allow questions to be asked about the background remark knowing full well the position adopted by each of these witnesses. The effect would have been to elicit inadmissible hearsay which the trial judge would have had to have directed the jury to ignore. The implication in the submissions for the appellant was that since the Crown might have played the 999 tape during the evidence of the witness Robertson, it thereby became

available for any use whatsoever. That is not correct. In our view the trial judge was correct to refuse to allow the extract to be played for the purpose sought.

[13] Furthermore, there is a recognised procedure to be followed where counsel seeks to utilise the provisions of section 263(4). It is necessary to set up the statement in order to take advantage of the statutory provisions. This was not done: the witness was asked about what might have been said to Leggate and counsel then proceeded simply to ask for the recording to be played. The recording is not said to relate to what was said to Leggate so it is clear that the correct process was not followed. Following the correct procedure is a pre-requisite for taking advantage of the statutory provisions (*Paterson* v *HMA* 1997 SCCR 707). It would, of course, have been impossible to follow it, given that the attribution to the witness was purely speculative, which merely emphasises the inadmissible nature of the evidence which counsel was seeking to lead.

[14] As to the case of *Gubinas,* the jury's entitlement to reach a conclusion about a matter such as identification, or the maker of the statement, is predicated both on the evidence being admissible and on it being reasonably possible to make a comparison. The evidence being inadmissible hearsay, no issue under *Gubinas* can arise. In any event, in the situation where an issue of identification through voice recognition arises, not only would the questioned evidence have to be sufficiently clear to enable such a comparison to be made, there would require to be clear evidence of the voice of an individual available for proper comparison purposes. The exact circumstances in which a voice comparison may legitimately be made by a jury without expert assistance do not require to be examined in detail in the present case. What is important is to recognise that any operation of the exercise referred to in *Gubinas* requires to be made on the basis of the existence of a reasonable basis for a comparison to be made by a jury, as opposed to an expert. Even if we

proceed on the basis that it may be that in certain circumstances the giving of evidence by an individual would provide sufficient for one part of the equation, there is in our view an insuperable difficulty in the present case as to the other part of that equation. At trial, counsel for Cook senior had submitted that the section in question was not of sufficient quality to allow its admission. Counsel for Brown submitted that it was inaudible. The trial judge did not consider that the words spoken were clearly audible. He listened to the recording and whilst accepting that a remark somewhat along the lines indicated appears to have been made, it was by no means clear and there was no unanimity as to the exact words spoken. He noted that neither Adams nor Inglis had been able to hear the words on first listening to the tape, and could only do so after listening through headphones. The trial judge concluded that the recording was far too unclear for him to allow the jury to make up their minds who was making the comment, even assuming they could make it out in the first place. It would have involved pure speculation on their part. We endorse this approach by the trial judge, which is in our view consistent with the comments made in *Gubinas* at paragraphs 62 -64. The court there endorsed the comments made in *R* v *Nikolovski* that the video in question may be the best evidence "so long as the videotape is of good quality". For the jury to be able to conduct the exercise of comparison referred to in *Gubinas*, it must be reasonably possible in the first place for a comparison to take place.

[15] As the advocate depute had submitted at trial, the issue whether comments had been made by Colin Inglis at different stages was fully canvassed at the trial in other ways, and this unattributable comment would not have advanced the case for the appellant any further. Furthermore, against the background of evidence of a concerted attack by the accused, in which both Brown and the appellant had a knife, the alleged statement would not exclude the guilt, art and part of the appellant.

[16] In these circumstances, even had we been persuaded that the trial judge had erred, we would not have been able to conclude that there had been a miscarriage of justice. There was a body of evidence available to the jury capable of demonstrating that the appellant was party to a common criminal purpose to assault the deceased with weapons including a knife or knives and the jury were entitled to convict of murder. Both Brown and the appellant were in possession of a knife. The witness Nicola Robertson, a neutral witness, gave evidence that as the three accused stood over the deceased, the appellant exchanged shouted remarks with Inglis at the other end of the park. Inglis shouted, "I didn't do anything to you, I didn't stab you" and the appellant replied, "no but he did," seeming to refer to the deceased (there was evidence that the appellant was stabbed during the fracas). This was followed by the words from the appellant, "this is payback for stabbing me. In this context, any evidential value to be given to the background remark would in our view be minimal. Against the background of evidence of a concerted attack by both accused, in which both had a knife, the alleged statement does not exclude the guilt, art and part of the appellant, and it would be impossible to consider that exclusion of the evidence in question had led to a miscarriage of justice.