APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 54
HCA/2018/000573/XC

Lord Menzies
Lord Drummond Young
Lord Glennie

OPINION OF THE COURT

delivered by LORD MENZIES

in

SOLEMN APPEAL AGAINST CONVICTION

by

CHRISTOPHER McCORMICK

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson (sol adv); Paterson Bell Solicitors
Respondent: A Edwards QC AD; Crown Agent

11 July 2019

[1] The appellant appeared for trial before a sheriff and jury at Glasgow Sheriff Court on 19 October 2018, to answer an indictment which contained the following charge:

> "On 30 May 2018 at 114 Woodland Crescent, Cambuslang, being a public place, you CHRISTOPER McCORMICK did, without reasonable excuse or lawful authority, have with you an offensive weapon, namely a sword: CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, section 47(1) as amended."

[2] The Crown case was closed during the course of the second day of the trial, at which time the procurator fiscal depute moved the court in terms of section 96 of the Criminal Procedure (Scotland) Act 1995 to amend the indictment by deleting the word "at" in the first line of the charge as set out above, and substituting therefor "in the wooded area near to". This motion was opposed. After hearing submissions on behalf of the Crown and the defence, the sheriff granted the motion and directed the Clerk of Court to amend the indictment accordingly. Thereafter the solicitor for the appellant made a submission of no case to answer, on the grounds set out in para [35] of the sheriff's report to this court. The sheriff sets out the factors relied on by the Crown in response at para [36]. He repelled the submission and concluded that there was a sufficiency of evidence in relation to this charge for the reasons given at para [37]. Thereafter no defence evidence was led, and in due course the appellant was convicted by a majority verdict on the amended charge. He was sentenced to 3 years and 6 months imprisonment, backdated to 31 May 2018. No appeal is taken against this sentence.

Grounds of appeal

[3] The appellant appeals against conviction on two grounds, which may be summarized as follows:

1 The sheriff erred in granting the Crown motion to amend the charge. The locus originally libelled was a private dwelling house with a private garden. The amendment changed the character of the offence from an allegation that the appellant was in possession of the item in a private place to being in possession of it in a public place.

2 The sheriff erred in repelling the submission of no case to answer.

(a) One source of evidence from Sergeant Lee was that he saw the appellant discard a bag into woodland, he recovered the bag and found a sword. Miss Leonard gave evidence that she had seen the appellant with something shiny in the private garden of 114 Woodland Crescent, Cambuslang. She thought it was a machete. She was shown the sword in court and by the police and said that was not what she saw the appellant with. She could not state when she saw the appellant. There was no link between the sighting by Miss Leonard and the incident referred to by Sergeant Lee. There was no evidence that the shiny item seen by Miss Leonard was the same item recovered by Sergeant Lee or that it occurred on the same day.

(b) The evidence of Miss Leonard was that she saw the appellant in a private place with the shiny item. Sergeant Lee spoke to a public place. The Crown argued that the corroboration of Sergeant Lee was from the lawful activity as spoken to by Miss Leonard at a time and on a date unspecified by Miss Leonard. There was insufficient evidence in law, there was no corroboration of Sergeant Lee, and the sheriff erred in repelling the submission of no case to answer.

The evidence

[4] The sheriff set out in some detail in his report to this court the evidence of the three witnesses who were called for the Crown, namely Mrs Ruby Leonard, Sergeant James Lee and police constable Stuart Dunsmore.

[5] Mrs Leonard resided at 14 Woodhall Crescent, Cambuslang with her five children. The appellant was her nephew. She was standing at her back door when the appellant

came round the back of her house into her back garden. He was angry and shouting abuse at her. He was holding a shiny item out at chest height; it had something covering it, namely a pillow or a bag, but it was a shiny thing and it was 18 inches long. Her impression was that it was a knife. He had been able to get into her back garden because it was open ground and anyone could get in. He had then gone "over the wall" which led to the woods. She had telephoned her sister (the appellant's mother) after this happened, and her sister telephoned the police less than half an hour after the incident had occurred; she was upset and crying as she phoned her sister. Later that same day the police had shown her a knife; she had told them that she did not know if it was the knife which the appellant had had.

[6] Sergeant Lee stated that he received a call to attend at 114 Woodland Crescent at about 5.00pm, and he arrived there between 5 and 10 minutes later. At least two, and possibly three, police cars had attended. He searched the area, in particular for the appellant, whom he identified in the dock.

[7] Woodland Crescent was 800 or 900 metres long, and backed onto woods which extended for 600 or 700 metres along Woodland Crescent and were about 100 metres in depth. He found the appellant at the corner of Gilbertfield Street standing close to three other people who were drinking there. When the appellant saw him, he turned quickly and ran away. He had a black bag in his left hand, which he discarded on the grass. Sergeant Lee picked this up and opened it, and found a large machete and items of clothing in it. He identified this as Crown label 1. The machete was covered by a sock, the handle was covered by a blue black top, and the blade was 12 inches long.

[8] Police constable Dunsmore stated that at about 5.00pm he was directed to attend an incident, and he met other police officers, including Sergeant Lee, outside 114 Woodland

Crescent under 5 minutes later. He was told to look for the appellant, whom he identified in the dock. The appellant was found in Cairnswell Avenue, which is near Woodland Crescent. He was irate and shouted abuse at the police; he was handcuffed, searched and taken to Motherwell Police Station.

Submissions for the appellant

[9] On behalf of the appellant it was pointed out that the terms of section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995 confine the offence to a public place, and that the section defines "public place" as meaning any place other than domestic premises, school premises or a prison. The charge as originally framed did not amount to a contravention of section 47, as what was libelled was possession of an offensive weapon in domestic premises, which were excluded from the section. Under reference to *Brown* v *McLeod* 1986 SCCR 615 it was accepted that the Crown are entitled to amend the locus in some circumstances, but the alteration of the locus in the present case went beyond curing any error or defect in the charge, or meeting any objection or curing any discrepancy between the indictment and the evidence. As Mr Paterson put it to us, it was a bridge too far. The sheriff erred in allowing the Crown to amend.

[10] With reference to the second ground of appeal, Ruby Leonard did not identify the item found by the police. Her evidence amounted to no more than that she saw the appellant in possession of something that was silver which she assumed was a knife in her back garden, and that she saw him leaving her garden but she could not say whether or not he was holding the item when he left the garden. There was no evidence that the bag had been taken out of the garden. The sheriff erred in considering this an adminicle of evidence which was contrary to the appellant's interest when considering the submission of no case

to answer. What was required was evidence which supported the principal testimony, that is, the evidence of Sergeant Lee. This was absent in the present case. There was insufficient evidence in law, and the sheriff erred in repelling the submission.

Submissions for the Crown

[11] The advocate depute submitted with regard to ground of appeal 1 that the charge was not fundamentally null - as the sheriff pointed out in his report, the garden ground could have been a public place, as it might have been communal ground. The charge was relevantly pled, and the amendment did not change the nature of the offence, nor was there any suggestion of prejudice to the appellant. She referred to *Watson* v *Vannet* 1999 SCCR 722 as a similar case. The amendment was properly allowed.

[12] With regard to ground of appeal 2 there was, she submitted, a sufficiency. Again, *Watson* v *Vannet* was relevant; indeed the present case was stronger than that case, because in this case the sheriff had before him evidence about how the appellant took access into the woods, as well as where he was seen holding the bag, and where the bag was found. There was no need in the present case to look for inferences such as those referred to in *Watson* v *Vannet*. Taking the evidence as a whole, and at its highest for the Crown, there was a sufficiency and the sheriff was correct to repel the submission of no case to answer.

Decision

Ground of appeal 1

[13] Whether or not to allow amendment is a matter for the sheriff's discretion, and his decision must stand unless it can be shown that he exercised his discretion upon a wrong principle or took into account matters which he should have ignored or failed to have

regard to matters which he ought to have had in view, and the remedy for any prejudice caused to an accused by an amendment is by way of adjournment - *Brown* v *McLeod* (per Lord Justice Clerk Ross at page 619).

[14] The sheriff explains his reasons for allowing the amendment at paras [41]-[43] of his report to this court. He rejected the argument that the amendment changed the character of the offence, and observes that the charge was clearly one of possession of the item in a public place; the amendment merely altered the narrative to reflect the evidence. There had been no challenge to the relevancy of the charge as originally framed, the agent for the appellant maintaining that the defence was entitled to keep its powder dry. It could not be known until evidence was led whether the address was a public place or not. The nature of the allegation was not changed by the amendment - Mrs Leonard spoke to the appellant having left her garden and gone into the area of woodland which was public.

[15] We are unable to hold that the sheriff exercised his discretion to allow this amendment improperly or upon a wrong principle, nor that he has taken into account irrelevant matters or failed to have regard to matters which he ought to have had in mind. The amendment cured a discrepancy between the charge and the evidence, and cured an error or defect in the charge. It was therefore competent. Moreover, if it was considered that the amendment caused prejudice to the appellant in any way, the remedy was by way of adjournment. No motion for adjournment was made. Indeed, there does not appear to have been any prejudice to which the appellant's agent could point at the time of the opposition to the motion to amend, and Mr Paterson was unable to point this court to any such prejudice.

[16] In all these circumstances the appeal so far as founded on the first ground cannot succeed.

Ground of appeal 2

[17] As we have already mentioned, the sheriff set out his reasons for rejecting the submission of no case to answer at para [37] of his report. These included the following:

> "1. Sergeant Lee identified the appellant as being in possession of the bag in the woods; he saw the appellant discard the bag; he had got there quickly after the call to the police; that call was made by the mother of the appellant who had been telephoned by Ms Leonard after the incident;
> 2. The woods are a public place; they did not meet the definition of a private place in the direction;
> 3. The bag contained the machete; it was wrapped in clothing;
> 4. Ms Leonard had spoken to an item which the appellant had had in his hand; it was shiny; it was silver; she thought it was a knife; what she described him doing with it was capable of supporting the inference that he was brandishing it;
> 5. She identified the appellant as the person with the item which she describes in her garden just before he was seen by Sgt Lee with the bag containing an item with the features described by her;
> 6. She said that he had gone over the wall from her garden which of course took him into the woods, a public place;
> 7. She said she didn't know if he was still holding it when he did that which is to say that she did not state that he was not holding the knife when he left her garden; that therefore was an adminicle of evidence capable of supporting the principal source of evidence ie that of Sgt Lee."

[18] At para [45] the sheriff explains that his recollection of parts of the evidence of Mrs Leonard differs from the grounds of appeal. Crown label 1 was not shown to her. She was asked if she would recognize the item the appellant had been holding in her garden, and which she thought was a knife, if it was shown to her again. She said that the police had shown her a knife, but she did not think it was the same one which the appellant had been holding. This happened at her sister's home on the same day as the incident. The sheriff points out at para [46] that the evidence had to be looked at in its entirety, and there was sufficient in Mrs Leonard's evidence to support the principal source of evidence, being Sergeant Lee. She spoke to the appellant being in her garden having a shiny item which was silvery and which she thought was a knife, held out in front of him while shouting

abuse at her. Her evidence indicated proximity in time and place, just prior to Sergeant Lee seeing the appellant discard the bag containing Crown label 1. She saw the appellant leave her garden towards the wooded area where he was seen by Sergeant Lee. All these adminicles of evidence amounted to a body of circumstantial evidence which could properly be seen as supporting Sergeant Lee.

[19] We are unable to find any error in the sheriff's reasoning in his consideration of the submission of no case to answer. The factors to which he refers were capable of being considered by the jury as amounting to a body of circumstantial evidence which supported the evidence of Sergeant Lee. At the time that the sheriff was considering the submission, the Crown case of course required to be taken at its highest. On that basis, we consider that the sheriff was correct to repel the submission.

[20] It follows that the second ground of appeal also fails. This appeal must be refused.