APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 83
HCA/2018/641/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

MICHAEL McCARROLL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh QC; John Pryde & Co
Respondent: A Prentice QC AD (sol adv); the Crown Agent

7 November 2019

General

[1] On 6 November 2018, at the Sheriff Court in Airdrie, the appellant was convicted of a charge that:

> "(1) on 4 November 2017 at Kirk Place, Cumbernauld you ... did assault Mark Brown ... and did repeatedly punch and kick him to the head and body, cause him to

> fall to the ground and throw a bottle at him, all to his severe injury and permanent impairment;".

He was also convicted of having cocaine in his possession on the same date.

[2] On 11 December 2018, the sheriff imposed a 6 month Restriction of Liberty Order on the appellant, together with a Community Payback Order with an unpaid work requirement of 150 hours and a compensation requirement of £750, in respect of the assault charge. He admonished him on the drugs charge.

Evidence

[3] The complainer, who was a 24 year old university student, gave evidence that, at about 10.30pm on 4 November 2017, he had been in Kirk Place, Cumbernauld. He had been in the company of his father and his father's partner earlier in the evening, but had recently left them to walk home alone. He saw two men by the stairs on Kirk Brae. On hearing the men make what he described as grunting noises, the complainer, who had passed the men, turned and said "What did you say?" One of them spoke to him aggressively saying "What the f... are you wanting?" The man approached him. He said that he and his companion were going to the Weavers pub, which is about 10 minutes away from the *locus*. He invited the complainer to join him and go with them to the Weavers. The complainer refused. The man then punched the complainer on the right side of the face, causing him to fall to the ground. He kicked and punched the complainer on his arms and body. He threw a bottle at him, before leaving with his companion and jogging towards the Weavers.

[4] The complainer identified the appellant in the dock, having referred to the shape of his face and his hairline. He had identified the appellant after the event using an emulator

sheet. He described the complainer as wearing a cream cotton tracksuit; the top having a distinctive black GK (Gym King) logo. He identified the tracksuit produced.

[5] The complainer's father had been walking home with his partner, when he received a phonecall from the complainer saying that he had been attacked. The complainer had told him that his assailant was on the way to Weavers pub. He and his partner turned round and walked to Weavers pub, which was about 250 yards away, and about 400 yards from the place of the assault. The complainer had described the assailant to him as wearing a grey tracksuit. The complainer's father saw a person matching that description in Weavers' car park. He identified the tracksuit top, as worn by the person whom he saw, from its colour and logo. He followed the person until he went into a private house. The complainer's father and his partner stood outside the house. The appellant came out and asked them what they were doing. He was aggressive. The father's partner told the appellant that they were waiting for the police to arrive. The appellant did not say anything about a mistaken identity. The complainer's father made a positive identification of the appellant as having a face "I wouldnae forget". In cross, it was put to him that, when the appellant had been told about the complainer's father and his partner waiting for the police, he had said "Tell 'em I'm in this house". He denied that this had been said or at least that he could not remember it.

[6] The complainer's father's partner gave evidence of a similar nature. She identified the appellant as a person whom she had seen going down the steps to Weavers. She had said to him, "You were over at the red bridge and you mugged somebody". He had replied, "Well, I never mugged him". She had then said, "Well, you didn't steal anything but you broke his arm". The appellant had a "slight reaction, like it was shock that they've actually done that damage". He had said that he was looking for money which he had lost. She and

her partner had followed him and had stood outside the house. The appellant had come out and asked what they were doing. She had told the appellant: "We're waiting on the police". In cross-examination there was some confusion about whether the conversation about the red bridge had happened then or earlier at the Weavers.

[7] When the police arrived at the appellant's house, the appellant appeared in the close and said "I take it it's me you're looking for?" or "I take it you are here for me?" He was wearing the clothing which had been identified by the others. When detained, he made no reply to the common law caution. He did not say anything about a mistaken identification. The house was about 5 or 10 minutes from Weavers pub on foot, and about 15 minutes from the *locus*.

[8] A no case to answer submission was made, but repelled.

Crown speech and charge

[9] The procurator fiscal depute referred to the need for corroboration, which he described as a "cross-check", of the complainer's evidence on the identity of the appellant as the assailant. He said that this could be found in the evidence of the complainer's father and his father's partner about encountering the appellant at the Weavers pub, his aggressive behaviour towards them, and the fact that he was wearing the clothes which were consistent with the complainer's description. The clothes constituted a "single thread of continuous evidence running right through this case". The PFD also relied upon what the appellant had said to the police. This, he maintained, was an admission that the appellant knew that he had been involved in "some sort of incident".

[10] The sheriff gave the jury the standard direction on the need to have corroborated evidence that the appellant was responsible for the crime. This was not expanded upon.

[11] The sheriff's directions were not criticised in the original Note of Appeal. Rather unusually, in his report, the sheriff stated that his directions should have been challenged. The sheriff reasoned that, in addition to the complainer's testimony, there had to be evidence "also pointing to the accused as the assailant". The evidence in relation to clothing was not "independent evidence of circumstances *extrinsic* to the complainer's evidence". It was not corroborative as it all derived from the complainer's account. It only added "verisimilitude" to the complainer's account (see *Smith* v *Lees* 1997 JC 73 at 95). The sheriff considered that he ought to have explicitly directed the jury that the Crown's contention, as regards what evidence might constitute corroboration, was not entirely sound. He ought to have distinguished for the jury the evidence that went towards credibility and reliability and that which was corroborative as a matter of law. He failed to direct them that the evidence of the witnesses, the clothing and the emulator board, was not corroborative of the complainer's testimony and that the only source of corroboration was the "blurt" admission made by the appellant to the police. The sheriff considered that he ought to have directed the jury that this was the only source of corroboration and that the jury would have to consider carefully whether it constituted an admission. If not, an acquittal ought to follow.

Submissions

[12] The appellant submitted that there was insufficient corroboration of the identity of the appellant. It was accepted that, where there was emphatic positive evidence of identity from one source, very little else was required (*Ralston* v *HM Advocate* 1987 SCCR 467 at 472). The evidence in relation to the clothing, as the sheriff said in his report, was not corroborative. The statement of the appellant to the police that "It's me you're looking for" did not constitute an admission, since the appellant knew that the police had been called

(*McAvoy* v *HM Advocate* 1982 SCCR 263 at 268; *Greenshields* v *HM Advocate* 1989 SCCR 637) nor was his response to the complainer's father's partner's earlier questions (*Wilson* v *HM Advocate* [2017] HCJAC 52; *Buchan* v *HM Advocate* 1993 SCCR 1076 approving Renton & Brown: *Criminal Procedure* (5th ed) at para 18-4(a); see now (6th ed) at para 24-56)). The trial judge ought to have directed the jury that the evidence of the complainer's father and his partner was not corroborative of the complainer's testimony.

[13] The Crown responded by maintaining that there was a sufficiency and that corroboration was provided by: (1) the appellant being found near the *locus* wearing the distinctive clothing described by the complainer; (2) the appellant being found outside the pub where the assailant had told the complainer that he was going; (3) the response by, and reaction of, the appellant when challenged by the complainer's father's partner; (4) the appellant's aggressive demeanour when speaking to the complainer's father and his partner; and (5) the appellant's comment to the police upon their arrival at the appellant's house. It was accepted that, if the evidence of the complainer's father and his wife was not capable of providing corroboration, then the sheriff's directions had been in error. It had not, however, been a material misdirection.

Decision

[14] The complainer gave unequivocal positive evidence that the person who attacked him was the appellant, who was wearing a track suit with a distinctive logo and who had told the complainer that he was going to the Weavers pub. The fact of the assault was corroborated by evidence of injuries to the complainer. What was then required was not evidence which, of itself, pointed to the appellant as the assailant but evidence from a source other than the complainer which confirmed or supported the complainer's identification

(*Fox* v *HM Advocate* 1998 JC 94, LJG (Rodger) at 100). The complainer's direct identification of the appellant was confirmed or supported by evidence from two other sources, notably the father and his partner, that, very soon after the assault, a person (ie the appellant) was found nearby dressed in the manner described by the complainer and emerging from the very place where the complainer had said that his assailant had told him he was going. This is not just material which bolsters the complainer's testimony, but emanates from the same source (eg a *de recenti* statement), it is independent evidence which supports the complainer's description of his assailant and confirms the assailant's stated destination. It provides a clear sufficiency of evidence of identity.

[15] The sheriff provided the jury with the standard direction on corroboration. In a short, straightforward case such as the present, in which the jury had just heard from the procurator fiscal depute and the defence agent on the live issues at trial, there was no need to say more by delving into the evidence. The PFD did rely on the appellant saying to the police, "It's me that you're looking for" as an adminicle in the search for corroboration. On any view, however, this was a very small part of the incriminating evidence. The sheriff might have given a specific direction on the point, but his failure to do so could not have resulted in a miscarriage of justice given the strength of the Crown case. Anything which the appellant had said to the police was extremely weak in that context. If anything, it was the appellant's responses, both verbal and physical, to the complainer's father's partner's statement that the appellant had been over at the red bridge which might have been available as part of the corroborative circumstances, but these were not founded upon by the Crown or mentioned by the sheriff.

[16] The appeal against conviction is refused.