APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 7
HCA/2019/327/X

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

MICHAEL SCOTT RITCHIE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell (for James McKay, Elgin)
Respondent: A Cameron AD (sol adv); the Crown Agent

30 January 2020

[1] On 6 June 2019 at the Sheriff Court in Elgin the appellant was found guilty of a charge which libelled that:

> "on 11 or 12 May 2018 you … did break into the dwelling house owned by [JR] … at Strathville, South Street, Forres, Moray and steal a quantity of jewellery, medals, coins and a box;
>
> You … did commit this offence while on bail, having been granted bail on 15 June 2017 at Elgin Sheriff Court."

The appellant was sentenced to 21 months imprisonment; 3 months being attributable to the bail aggravation.

[2] The occupier of the house in the libel had died on 21 April 2018. The house had been checked on 11 May, when it was found to be in order. By the following day it had been ransacked, with jewellery, war and constabulary medals, coins and a box stolen. One of the windows had been forced. A small black torch, which did not belong in the house, was found on the floor inside the front door. It was not disputed that this torch had belonged to the appellant. It was also not disputed that his DNA was found on it.

[3] Expert evidence about the deposit of DNA was led by both the Crown and the defence. There were various scenarios put to the experts about how DNA can be deposited, how long it could remain, how it could be transferred and whether it was primary or secondary. The sheriff described all of this evidence as essentially common sense. There was, however, a disagreement between the experts in relation to four peaks, which had been identified from the DNA print-out upon testing. The Crown expert considered that these were simply artefacts. The defence expert considered that they were part of the DNA profile of an unknown person or persons.

[4] In an interview with the police, the appellant, who lived in Elgin, admitted being in the vicinity of the house, having been visiting someone about 150 metres away. He was asked about how a black torch with his DNA on it came to be in the house. He explained that it was possible that he had given his brother a torch. He had given him torches, not that recently, but about a month previously. He said that the torch had been a black rubber torch, although he also had "heaps of wee silver torches". If the torch had been his, his DNA would have been on it.

[5] In addressing the jury, the Crown had focussed on evidence pointing to the involvement of the appellant's brother, who had been incriminated. The appellant had demonstrated that the brother had previous convictions for theft, although those related to commercial premises. The torch was not a rubber torch, but metal. The procurator fiscal depute said:

> "I suspect the only thing that could raise any doubt about the accused's involvement is in his answers at the police interview – if you accept that it raised a reasonable doubt, you would have to say that it is credible and reliable. Now I say to you that it is not and you should put it to one side."

The defence agent took issue with this in advance of the sheriff's directions. However, the sheriff considered that the standard directions on this matter would be sufficient.

[6] The sheriff gave the jury the general directions on the onus and standard of proof. She said in particular that the appellant did not have to prove his innocence and that the appellant's position had been that contained in the interview. She stressed that it was for the jury to decide what to make of the evidence. She drew the jury's attention to the appellant's explanation that he had lent his brother a black rubber torch. If the jury believed the parts of his interview that pointed to his innocence, or if they raised a reasonable doubt about the appellant's guilt, they were bound to acquit. She stressed that it was for the Crown to "meet the defence case" as set out in the interview and to satisfy the jury beyond reasonable doubt that that defence should be rejected.

[7] The sheriff directed the jury that the experts had put forward largely similar views. She focused on the particular area of difference. She said that it was up to the jury to decide which of the experts' evidence they accepted, but that "Any hypothetical situations given to you in the speeches are not evidence." She continued:

> "I should mention … the various scenarios which were put to the expert witnesses by both [the PFD and the defence agent] that should be treated with care. … they

> were for the purpose of helping to understand the transfer of primary and/or secondary DNA. You can only accept them into evidence if you have heard evidence relating to them. So if you are to consider the example [the PFD] gave of the torch having been on the bus, you would require to have evidence of the fact the torch had been on a bus. Or the example given by [the defence agent] that the torch had been touched fleetingly by [the appellant's brother] you would have to have heard evidence that [the brother] had touched the torch fleetingly, and in each case, both the scenarios [by the PFD and the defence agent] you would have to be satisfied on any evidence that it was the torch which had been found at the scene."

[8] The appellant submitted that the sheriff had misdirected the jury relative to the various scenarios. What she had said had the effect of reversing the onus of proof. The defence scenario had been that the torch may have been given by the appellant to the incriminee and used in the commission of the offence. It had been this torch that had been found at the scene. The sheriff had suggested that the jury had to have evidence that the incriminee had touched the torch fleetingly and that it had been the torch which had been found at the scene. This would, it was argued, suggest that the same onus applied to both the Crown and the defence. In this context, it was accepted that the charge had to be read as a whole (*Black* v *HM Advocate* 2011 SCCR 87). The sheriff had said to the jury that the hypothetical situations given in speeches were not evidence. This suggested that the defence position was hypothetical. This too was incorrect. The defence position had a clear evidential basis. The appellant had said that this brother had borrowed the torch or torches from him. The expert evidence from the defence had suggested that the DNA of an unidentified person was on the torch. When all these matters were taken together, the jury had been encouraged to the view that there was an onus on the appellant. This had been compounded by the remark made by the PFD about the appellant's answers at police interview. The sheriff had failed to correct what was an error of law on the part of the PFD. It had been misleading and apt to confuse the jury.

[9] The Crown responded that all that the sheriff had done was to encourage the jury to scrutinise the evidence with care and be satisfied that there was an evidential basis for the submissions which had been made to them. She had given sufficient directions on the burden of proof, when the charge was read as a whole. In relation to the PFD's comment, this had not been intended as a statement of the law, but a submission about what the jury should do with the appellant's interview. The sheriff had been in the best place to consider the appropriate response to that remark. She had correctly determined that the standard directions would suffice.

[10] The evidence in this case was that the appellant's DNA had been found on a black metal torch which had been left by the housebreaker at the *locus*. This evidence was highly incriminatory. The appellant did not testify and, in particular, did not identify the torch which was produced at the trial as one which he had given to his brother. He did, however, say in his interview that he had given his brother torches in the past and that about a month before the incident, he had given him a black rubber torch. As already mentioned, the torch which had been found at the *locus* was not a rubber one.

[11] In her directions to the jury the sheriff made it clear that the onus was on the Crown to prove the case against the appellant beyond reasonable doubt and that no such onus rested upon the appellant. She correctly explained to the jury that various hypothetical situations ,which had been put by both parties to the experts and perhaps to the jury themselves, did not constitute evidence of fact in the absence of evidence to support them. The sheriff could have expressed herself with greater clarity in relation to the onus remaining on the defence when dealing specifically with the appellant's version, as given in his interview, and when dealing with the torch and the defence expert's view of the DNA coming partly from an unknown source. However, the directions must, as it was accepted,

be read as a whole. When that is done, it can be seen that the sheriff made it clear that the onus remained on the Crown and that there was no such onus on the defence. The sheriff's reference to hypothetical situations was merited in the circumstances. Anything said by the PFD was adequately covered by the sheriff in her general directions on onus; the sheriff being in the best position to determine what was required in order to correct any misconception that the jury might have had from what the PFD had said.

[12] In these circumstances, no material misdirection is apparent from the sheriff's directions. In addition, no miscarriage of justice has occurred. In that situation, the appeal must be refused.