



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 14
HMA/2023/362/XC

Lord Matthews
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in

Appeal against Conviction

by

SAHAIL AHMED

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Barr; Collins & Co, Edinburgh
Respondent: Jessop AD; Crown Agent

26 April 2024

[1] The appellant was indicted, along with his brothers Kasim and Adum, on two charges of attempted fraud and wilful fire-raising. The Crown withdrew the charge of wilful fire-raising in the course of the trial.

[2] On 12 July 2023, the appellant was convicted following trial at the High Court of Justiciary in Glasgow in the following terms:

“(1) Having formed a fraudulent scheme to obtain money by wilfully setting fire to premises owned by you Sahail Ahmed and submitting a false insurance claim in relation thereto, in pursuance of said scheme you Sahail Ahmed and Kasim Ahmed [...] did between 16 May 2020 and 11 June 2020 at International Mobile Phone Centre, 149 Gallowgate, and Welsh and White Insurance Brokers, 901-903 Dumbarton Road, both Glasgow, and elsewhere, in furtherance of said scheme (a) wilfully set fire to the said premises at 149 Gallowgate, Glasgow, (b) pretend to an employee of Welsh and White Insurance Brokers, 901-903 Dumbarton Road, Glasgow that said fire was started by unknown or accidental means in the full knowledge that this was false, and (c) induce an employee of the said Welsh and White Insurance Brokers to initiate a claim under the insurance policy for the said premises and did thus attempt to obtain funds to which you were not entitled by fraud.”

[3] Kasim Ahmed was convicted of the same charge. Adum Ahmed was acquitted. In due course both the appellant and Kasim Ahmed were sentenced to 2 years imprisonment.

Both the appellant and Kasim Ahmed appealed against their convictions and in due course both were granted interim liberation. Kasim Ahmed’s appeal failed at first sift.

He appealed to the second sift. On 16 October 2023 he was notified that the appeal had been refused at second sift and accordingly he would be required to serve the remainder of his sentence. On 19 October 2023, before being taken into custody, Kasim Ahmed swore an affidavit in which he took sole responsibility for the offence and said that neither of his brothers knew of his intentions.

[4] Subsequently the appellant was allowed to amend his grounds of appeal to include an appeal under section 106(3)(a) of the Criminal Justice (Scotland) Act 1995 based on the evidence contained in Kasim Ahmed’s affidavit. The appellant’s other grounds of appeal were refused at sift. Accordingly the appeal proceeded on the basis of the fresh evidence from Kasim Ahmed. At a procedural hearing a warrant was granted to cite Kasim Ahmed to give oral evidence, which he did on 12 April 2024.

[5] Before the hearing counsel for the appellant and the advocate depute both lodged comprehensive written submissions. These were supplemented by short oral submissions. We have taken these into account in determining the appeal.

The evidence at trial

[6] The appellant was the registered proprietor of the shop premises, the International Mobile Phone Centre, at 149 Gallowgate, Glasgow, which mainly undertook the sale and repair of mobile phones. The shop had a front retail section and a back section consisting of an office area, a workshop and storage room.

[7] CCTV recordings played at the trial showed the following:

- The three brothers were at the shop at various times during the afternoon of Saturday 16 May 2020, the day of the fire.
- They were occasionally coming out of the shop and putting things into cars parked outside.
- At 4.44pm Kasim left the shop carrying a carrier bag and entered a BMW motor car. A few minutes later this vehicle was shown parked at fuel pumps on the forecourt of a nearby Asda fuelling station in Duke Street, Glasgow. The boot was open and Kasim was seen putting petrol into a fuel canister. He paid for the fuel, drove back to the shop and went back inside at 5.01pm carrying the same carrier bag he had left with, which now appeared heavier.
- At around 5.20pm the appellant hurriedly came out of the front door of the shop holding a plastic storage box. Almost immediately the shop door appeared to be forced open outwards and Kasim and Adum emerged at

speed. Debris was thrown across the pavement and smoke started billowing from the premises.

[8] At 5.22pm the Scottish Fire and Rescue Service received the first of a number of calls about the fire. Three appliances were dispatched. The first firefighters were on the scene at 5.26pm, by which time the fire was well-developed. Additional appliances were requested and sent. The fire was then extinguished.

[9] Fire investigators concluded that the fire was deliberate with multiple unconnected seats of fire. An expert fire investigator, David Burns, gave evidence in support of that conclusion. He explained that the multiple seats of fire were unconnected in the sense that the fire had not spread from one to another. In the front shop area there were two separate seats of fire. In the rear area there were three separate seats of fire in the office area, two separate seats of fire in the workshop area and two separate seats of fire in the storage room. No electrical fault or any other possible accidental cause of the fire was found. Fire investigation dogs exhibited positive responses for the presence of petrol and forensic scientists confirmed the presence of petrol on some of the debris and on a petrol cap found in the office part of the premises.

[10] Mr Burns said that in his opinion the fires could not have all started at the same time. He accepted that petrol vapour could be an explosive substance and that the front door being blown outwards could be indicative of an explosion but said that if there had been an explosion he would also have expected damage to the large front windows. It was possible that a fireball type of explosion might have occurred but that would not explain how the fire started in the other sealed areas. An explosion did not have the same effect as a naked flame.

[11] Kasim Ahmed was interviewed by the police on 26 May 2020. He confirmed that he and his two brothers were at the shop at various times during the afternoon of 16 May 2020. He said that they were just ready to leave when they heard banging noises like gunshots. He thought the appellant was already outside at that point. The front door swung open outwards, the door screen shattered and he and Adum were suddenly outside trying to figure out what was going on. He confirmed that that he had bought petrol in a petrol canister earlier that afternoon at the Asda fuelling station in Duke Street and said that it was for another car he owned. He did not know how the fire started.

[12] A witness Steven Finlayson, an insurance broker, owned the business known as Welsh and White Insurance Brokers, 901-903 Dumbarton Road, Glasgow. His company had for a number of years provided insurance cover for the shop. Annual cover had started or been renewed on 13 April 2020. The insured and policy holder was the appellant, who Mr Finlayson had known as a client for a number of years. It was a landlord's policy and provided insurance cover for the building and loss of rental income. It did not cover the contents.

[13] Mr Finlayson was aware of the fire at the shop on Saturday 16 May 2020. The appellant phoned him at 8.30am on Monday 18 May 2020 and said that there had been a fire at the shop, that his brother Kasim had been there at the time, that there had been banging noises and that the fire had then started. He said that there was a lot of damage, that he was not sure of the extent of the damage and that he would get Kasim to phone him about it. Despite the insurance cover having started the previous month on 13 April 2020, the appellant had not yet paid the premium. This was not unusual as the insurance company would invoice his business on a monthly basis rather than in relation to each policy and it would be at that stage that they would need the money from the client. Mr Finlayson told

the appellant that if he wanted to put in a claim he needed to pay the premium. The appellant paid the premium of £221.99 that day, 18 May 2020. The witness took it from the phone call and the payment of the premium that a claim was to be made and emailed the insurer, Axa Insurance, that day telling them that there had been a fire at the shop and that the damage appeared to be substantial. This was the first step in initiating an insurance claim. A Lucy Phillips from Axa responded by email of 26 May 2020 asking him for a note of the policy number and a copy of the insurance schedule. She sent him a reminder on 5 June 2020 and he responded that day with a copy of the schedule. Lucy Phillips responded by email of 8 June 2020 confirming that they had now registered the claim and had appointed a loss adjuster.

Defence evidence

[14] The appellant, who was the only defence witness, said that the shop belonged to his father but that when he bought it in 2002 he put it in the appellant's name. He, the appellant, was the insurance policy holder. In January 2020 his father went to Pakistan and gave the shop to Kasim, who was to pay £300 per week in rent to their mother. The Covid lockdown started in March 2020 and resulted in trading conditions being tough. The appellant visited the shop on a regular basis and in particular visited it on 16 May 2020. He was aware that there had been a problem in relation to the payments due to his mother and wanted to discuss it with Kasim. His other brother Adum also wanted to be involved in the discussion. He arrived at the shop at 3.35pm. Adum was already there. The three of them had a discussion for 15 to 20 minutes. He and Adum told Kasim that he needed to start paying their mother the money due to her. Kasim said that he did not have the money as the shop was not doing any business. The meeting was getting quite tense and they were

not really getting anywhere. He had come to the shop by bike and asked Adum to drop him off at home. Adum agreed and he put his bike in the back of Adum's car.

[15] He accepted that the CCTV footage showed the following:

1. He arrived at the shop at 3.35pm.
2. At 3.56pm he pulled down the shutters at the front of the shop.
3. At 4.34pm he put his bike in a Vauxhall motor vehicle outside belonging to Adum.
4. At 4.44pm Kasim left the shop carrying a drawstring carrier bag
5. At 5.01pm Kasim returned to the shop, then returned to his car and then returned to the shop carrying the drawstring carrier bag which a police witness had said now appeared heavier.

Asked what was happening between 4.44pm when he put his bike in Adum's car and the fire starting at around 5.20pm, he said that he was just getting ready to go and asking Adum to drop him off. He was not aware of Kasim leaving the shop and had no idea what he was doing as it had not been discussed. When Kasim returned to the shop at 5.01pm he, the appellant, was standing inside, just behind the door. He was keen to get away. While waiting for a lift home he was looking at an App on his phone relating to investing in stocks and shares as this was a keen interest of his. He was not aware of what Kasim was doing. Asked if there came a point when Adum was ready to leave he said that he had shouted to him "let's go". At that time Adum was further into the front section of the shop and Kasim was in the back section. He opened the door and had been standing there facing out for some 10 seconds when all of a sudden he heard a loud bang, the door was blasted outwards and he fell out at speed onto the street, followed by Adum and Kasim. He was carrying a plastic tub which he put in Adum's car. He did not know how the fire started.

[16] On the Monday after the fire he phoned the insurance broker Steven Finlayson and told him about the fire. He remembered him saying that the insurance premium had not been paid and he paid it. He did not instruct him to put in a claim. He only called him to make him aware of the fire. At that stage he did not know the extent of the damage. He told him that Kasim would be in touch about that.

[17] In cross-examination on behalf of Kasim he said that he could not see any point in setting the place on fire and that it was not something that he would think of doing. Cross-examined by the advocate depute he accepted that when Kasim came back into the shop with the carrier bag he would have walked past him. He said that he did not take any notice of him because he was on his phone checking stocks and shares. During the 20 minutes between then and the fire he was on his phone and waiting for Adum. He did not know what Adum was doing. After the blast the three of them were outside and were in shock. He never asked them what had happened. It was put to him that that was because he knew what had happened, which he denied. As regards speaking to the insurance broker Steven Finlayson on the Monday morning, it was put to him that Mr Finlayson said in evidence that he told him, the appellant, that if he wanted to submit a claim he had to pay the premium. He accepted that he said that and that in response he paid the premium.

The law

[18] Section 106(3) of the 1995 Act provides:

“(3) By an appeal under subsection (1) ...a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on-

(a) subject to subsections (3A) to (3D) ..., the existence and significance of evidence which was not heard at the original proceedings; and

(b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned.

(3A) Evidence such as is mentioned in subsection (3)(a) ...may found an appeal only where there is a reasonable explanation of why it was not so heard."

The test for appeals under section 106 was stated authoritatively in *Megrahi v HMA* 2002

JC 99 (paragraph 219). So far as relevant it states:

"(1) The court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice.

(2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.

(3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.

(4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.

(5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

In *Fraser v HMA* 2008 SCCR 407 the court emphasised that the onus was on the appellant to furnish a reasonable explanation why the evidence was not heard at trial. Further guidance was provided by Lord Gill LJ, at paragraphs 132 and 133:

"[132] If the appellant provides such an explanation, the onus being on him, the court must consider whether the new evidence would have been capable of being regarded by a reasonable jury as credible and reliable. If the court is so satisfied, it must next

consider the cogency of the new evidence. The new evidence must be important evidence of such a kind and quality that it was likely to have been found by a reasonable jury, under proper directions, to have been of material assistance in their consideration of a critical issue that emerged at the trial ...

[133] Since there is a danger that fresh evidence may assume greater strength than it would have had if it had been led at the trial, it is essential that this court should assess it in the context of the whole evidence led at the trial.”

Reasonable explanation

[19] Kasim Ahmed was the appellant’s co-accused. He did not give evidence in the trial and was not a compellable witness. The Crown concedes that there is a reasonable explanation why the evidence was not heard at trial. That concession was appropriate. Accordingly the appellant’s first hurdle has been crossed.

Analysis

[20] The issue for us whether Kasim Ahmed’s evidence is capable of being regarded by a reasonable jury as credible and reliable and, if so, likely to have had a material bearing on a critical issue in the trial. The evidence requires to be assessed in the context of the whole evidence in the trial.

[21] Giving evidence at the appeal hearing, Kasim Ahmed told us that he had been released from prison only the day before. He said that he found the experience traumatic and he has been signed off work with anxiety. We have subsequently been shown a sick note confirming his diagnosis. We take that into account. Nevertheless his evidence was highly unsatisfactory with many and obvious discrepancies in his various accounts and conflicts with other evidence in the case.

[22] The first issue is how Kasim came to swear the affidavit on 19 October 2023. In the appellant's affidavit he stated that on 18 October Kasim had called him and told him that his appeal had been refused and he was going to surrender himself to the police. He thereafter confessed that he was responsible for setting the premises on fire. He confirmed that he purchased petrol from the local petrol pump and thereafter poured petrol within the back area of the shop.

[23] In evidence to the court, Kasim said that while he had had a conversation with his brother before going back to prison he had not told Sahail that he was responsible for setting the fire. He did not know how it came about that he had sworn the affidavit. According to Kasim he was told by his solicitor that he had to provide a statement about what had happened. He understood it was for a further appeal. He was not aware at the time that the appellant's appeal was still ongoing.

[24] The second issue relates to evidence of timings of when his brothers arrived at the shop. In paragraph 4 of his affidavit Kasim said this:

"On the 16th May 2020 I was working (in the shop). This is my place of work. I spend the day there from approximately 11.00am until 5.00pm and I would normally lock up the shop at 5.00pm. On the 16th of May 2020 (the day of the fire) I worked there on my own ... My two brothers Sahail Ahmed and Adum Ahmed attended shortly prior to the close of business on the 16th of May 2020 at approximately 5.00pm."

It is clear from the CCTV evidence that the appellant arrived at the shop at 3.35pm and that Adum was already there. This was almost 1½ hours before close of business. The evidence of timings in the affidavit is clearly incorrect. In evidence, Kasim accepted that he was wrong. He had no satisfactory explanation for the discrepancy. A jury would be entitled to conclude that he was attempting to minimise the time the appellant spent at the premises prior to the fire.

[25] A further problem with the timings arises from paragraph 5 of Kasim Ahmed's affidavit. It states that the appellant and Adum "arrived at 5.00pm knowing that I was closing up simply just to catch up and discuss family business." That does not fit with the appellant's evidence that there was a tense discussion for 15 to 20 minutes since by 5.20 the shop was on fire, Kasim having gone for petrol to set it alight. Nor does it explain why, if the normal closing time was 5pm, the appellant brought down the shutters at 3.56pm. In his evidence to the court, Kasim Ahmed suggested that the shutters were pulled down at the normal closing time and that he was wrong to say in his affidavit that the normal closing time was 5pm. When asked how that had come to be in his affidavit he said that it been put together by his solicitor the day before he went back into custody and had not been checked.

[26] We do not accept that discrepancies in the timings between the evidence given in the affidavit and the evidence in court can be explained away by errors in compiling the affidavit.

[27] Paragraph 8 of Kasim Ahmed's affidavit states:

"I started pouring the petrol canister all over the inside of the premises however I didn't get the chance to light the petrol with an accelerant. The shop premises burst into flames I presume simply by the fumes of the petrol because I hadn't lit the petrol with anything and therefore this took us all three of us by surprise. It was almost instantaneous."

This account of petrol being poured out at various locations in the shop is consistent with the evidence that there were multiple seats of fire and that petrol was used as an accelerant. It was not, however, Kasim Ahmed's evidence in court. He told the court that he only poured petrol in the office and he did not light it. If true, that evidence begs the question as to who did pour petrol in the other seats of fire. There are only two possibilities – the appellant and Adum. Kasim denied that either poured petrol. He had no explanation for the multiple seats of fire other than the existence of other accelerants within the shop such as

fireworks, which the shop also sold, and isopropyl alcohol. There is no evidence that either accelerant was involved in starting the fire.

[28] There is a discrepancy between the appellant and his brother on the disagreement between the brothers, which might explain a motivation for the fire. The appellant's evidence was that the business was in trouble as a result of the Covid-19 pandemic.

Kasim was not able to pay the £300 per week due to their mother. That was the reason for the disagreement and discussion at the shop. According to Kasim however he had his own money and was financially stable. He was motivated to start the fire because he had fallen out with his father who had gone to Pakistan, married and fathered a child with his new wife. He told the court that his head was all over the place. There was pressure on him to financially support the family. He said that his head was in a spin, he had not formed an intention to set fire to the premises and his actions were uncontrollable.

[29] Kasim also told the court that when he went to ASDA to buy the petrol he did not intend to start a fire in the shop. It was for his wife's car which had broken down. That is consistent with what he told the police but is not consistent with what he said in his affidavit, which is in the following terms:

"I asked my brothers to assist me by removing items out of the premises. I did not explain to them the reason why... Both of my brothers did this.... I then left and drove my car alone to the Asda fuel station at the Parkhead Forge in Glasgow.....I filled the canister with petrol and drove back to the shop."

There is no mention of his wife's car in the affidavit. The clear implication is that he drove to the petrol station to buy petrol to start the fire. Cross-examined by the advocate-depute, Kasim instead told the court that he had only formed the intention to start the fire *after* he returned to the shop with the petrol and took it inside. Kasim could not explain to the court why, if the petrol was intended for his wife's car, he had driven back to the shop and taken

the petrol inside with him, rather than going to put the petrol in his wife's car or leaving it in his own meantime. Kasim's evidence on this point gave the impression of having been improvised in response to the Crown's cross-examination.

[30] Finally, in considering the discrepancies in the evidence we note that in evidence to the court Kasim was asked whether he knew that the appellant had contacted his broker. He replied that afterwards it came to his knowledge. He did not accept that initiating the insurance claim was part of the plan having deliberately set fire to the shop. He denied that there had been any intention to initiate a claim. That, however, is inconsistent with the fact that, before the trial commenced, Kasim had offered to plead guilty to charge 1. We note, too, that Kasim only swore his affidavit shortly after his application for leave to appeal was finally refused. While these facts would not have been known to the jury and could not have been taken into account by them in assessing the impact of his evidence on the Crown case, they are a further demonstration of the witness's lack of credibility.

[31] In his report to the court the trial judge notes that the case against the appellant was circumstantial. He states that in his opinion the Crown case was highly persuasive. We agree. On the evidence the jury would have been entitled to take the view that it was inconceivable that the appellant was unaware of what Kasim was doing and indeed was part of it. The jury would have wondered why the appellant had not noticed Kasim leave the shop; had not questioned where he had gone; had not noticed him return to the shop with a can of petrol; had not noticed petrol being poured in a total of nine separate locations; including every area of the shop premises; had not noticed these being lit and had not smelt petrol fumes. They would be entitled to take the view that the shutters had been closed early by the appellant so that passers by would not see what was going on in the shop. They would be entitled to consider that the appellant, in making the phone call to the

broker and paying the premium was initiating an insurance claim. Counsel for the appellant made the point that he was contractually bound to pay the premium. That may be so but the appellant had been told by Mr Finlayson that if he wanted to make a claim he would need to pay the insurance premium. It was paid the same day. The jury would also be entitled to consider that there was a strong motive for making the claim given the financial difficulties that Kasim was experiencing with the business and as spoken to by the appellant.

Decision

[32] Having heard the evidence of Kasim Ahmed and considered it in the context of the strong circumstantial case against the appellant we are satisfied that his evidence is not capable of being regarded as credible and reliable by a reasonable jury. There has been no miscarriage of justice. The appeal is refused.