



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 1  
HCA/2023/000241/XC

Lord Justice Clerk  
Lord Doherty  
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal against Conviction

by

FRANCIS MOONEY

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

**Appellant:** G R Brown (sol adv); Paterson Bell, Edinburgh for Penmans Solicitors, Glasgow  
**Respondent:** J Keenan, Sol Adv, KC, AD; the Crown Agent

14 December 2023

**Introduction**

[1] On 5 May 2023 at the High Court of Justiciary at Paisley the appellant was convicted after trial of the following charge:

“on 24 September 2021 at Dunn Street, Glasgow you FRANCIS MOONEY did purchase and have in your possession a firearm to which Section 1 of the Act aftermentioned applies without holding a firearms certificate in force at the time, and

you did commit this offence in an aggravated form within the meaning of Section 4(4) of the said Act, the barrels of which had been shortened to a length less than 60.96 centimetres, (24 inches): CONTRARY to the Firearms Act 1968, section 1(1)(a) and 4(4) as amended by the Firearms Amendment Act 1988.”

The verdict was unanimous.

[2] Two issues arise in this appeal. First, whether the trial judge was correct to repel a submission of no case to answer. Second, whether the trial judge’s charge contained a material misdirection which resulted in a miscarriage of justice.

[3] The appeal was heard on 14 December 2023. At the conclusion of the hearing the court refused the appeal, indicating that reasons in writing would be provided in early course. This opinion now provides the court’s reasons.

[4] It was common ground that there was sufficient evidence that the offence libelled was committed by someone. However there was a dispute as to whether there was corroborated evidence identifying the appellant as the perpetrator.

### **The trial**

[5] The appellant did not lodge a notice of incrimination, and it was not suggested on his behalf during the trial that the offence had been committed by his companion, Stephen Kyle. For the purposes of the appeal it is only necessary to narrate the following parts of the evidence.

[6] On the evening of 24 September 2021 the police had information which led them to believe that a firearm was about to be transferred. Plain clothes police officers took up position in parked unmarked police cars. The occupants of a car parked in Dunn Street were Constable Dinnen and Sergeant Scrafton. Constable Paterson and Constable Glen were in another car in a nearby street.

[7] Constable Dinnen gave evidence that he was in the driver's seat of his car. The appellant and Kyle arrived at Dunn Street in a taxi. They alighted and loitered for about 5 minutes as if waiting for someone. The appellant appeared to make a call and speak on his mobile phone. He sat on a rail. Derek Eadie emerged from a nearby house and joined the appellant and Kyle. Eadie passed a bag containing a firearm and ammunition to the appellant which the appellant placed on the ground. Eadie and the appellant then shook hands or passed something between them. Constable Dinnen and Sergeant Scrafton drove towards the men and got out of their car to apprehend them. They were swiftly followed by the car containing Constable Paterson and Constable Glen. Eadie ran away but the appellant and Kyle remained. Constable Dinnen brought the appellant to the ground and Sergeant Scrafton brought Kyle to the ground. Constable Dinnen detained the appellant. The appellant's phone was seized. At London Road Police Office Constable Dinnen obtained a DNA sample from the appellant and he cautioned and charged him. Later he visited him in the cells and the appellant provided him with the PIN number for his phone. Constable Dinnen was clear that it had been the same man who took the bag, was taken to the ground by him, was apprehended by him, and was processed by him at the police office, and that that man was the appellant.

[8] There was CCTV footage which showed the events which Constable Dinnen described. The man who took the bag appeared to be wearing a gilet. He had a cap on his head. The other man who had arrived by taxi was bare-headed. The bare-headed man faced the camera more often than his companion. The footage was filmed at night and there was good street lighting but it was common ground that the quality of the footage was insufficient to enable the jury to identify the appellant as the perpetrator by comparing the footage of the man who took the bag from Eadie with the appellant's appearance in court. It

was clear from the footage that it had been the police officer who emerged from the driver's door of Constable Dinnen's car who apprehended the man wearing the gilet and the cap.

[9] Constable Paterson also gave evidence. He confirmed that Constable Dinnen's car was the first to reach the men and that Constable Dinnen had been the driver. Constable Paterson saw the appellant, Kyle and Eadie standing together in Dunn Street. He chased after Eadie when he ran away, apprehending him a short distance away. He identified the appellant as one of the other two men. At the police office he cautioned, charged and processed Kyle.

[10] Constable Dinnen's identification of the appellant was not challenged during cross-examination. Nor was Constable Paterson's identification of the appellant as one of the two men who remained when Eadie left. It was put to Constable Paterson that his view of the three men standing together was "somewhat obscured by the car in front of you", to which he responded that the vehicles were almost side by side and he had "quite a clear line of sight of the males in front of me".

[11] At the close of the Crown case the solicitor advocate for the appellant made a no case to answer submission. It was submitted that there was insufficient evidence to corroborate Constable Dinnen's identification of the appellant as the perpetrator. The trial judge repelled the submission. No defence evidence was led.

[12] The trial judge directed the jury that the Crown sought to prove the charge by a combination of direct and circumstantial evidence. She reminded them that the evidence consisted of the facts contained in a joint minute, CCTV footage, photographs, and the witnesses' testimonies. In relation to the CCTV footage she stated:

"You may think there are three aspects to what you might draw from the recording. What is happening in the recording, who is shown in the recording and what inferences might you be prepared to draw from what you are satisfied you see

people doing... [Y]ou can take into account in determining the facts what you consider to be shown in the images. You can have regard to images when deciding who did what. You can make up your own mind about what could be seen and what happened in the recording and what you could deduce from the recordings (sic) which you saw when considering it along with the other evidence in the case... [Y]ou are entitled to form your own conclusions about the recordings (sic) if it is of sufficient quality to make out what can be seen with sufficient clarity. It's also open to you to conclude that the quality of the images is such in particular instances that nobody could make out what was going on or who was depicted. Now in this case I must direct you that the quality of the CCTV footage is not sufficient to allow you to make an identification for yourselves of the accused simply by making a comparison between his appearance in court and the figures on the recording. But you are allowed to draw inferences from the evidence as a whole when considering the CCTV footage, considering other evidence and any inferences drawn from it could permit you to reach your own conclusions about who and what is shown in the recordings (sic) by inference. As I understand it the Crown relies upon the direct evidence of Police Constable Dinnen given yesterday which may identify the accused as the person to whom the bag was given by Derek Eadie. And if you accept PC Dinnen's evidence as identification of the accused as that person the Crown thereafter relies upon the identification by Police Constable Paterson ... of the accused as one of the two who remained at the scene. And the Crown relies upon the CCTV footage in so far as it may provide support for or confirmation of or fits with PC Dinnen's evidence about the identification of the accused as it may show the accused in a certain position or location. It may show the accused as the man using his mobile telephone before Derek Eadie appeared or being the man put to the ground by ... Police Constable Dinnen."

### **The appeal**

[13] The first ground of appeal is that the trial judge was wrong to repel the no case to answer submission. Mr Brown accepted that since Constable Dinnen's identification of the appellant had been clear and unequivocal, little was needed to corroborate it (*Ralston v HM Advocate* 1987 SCCR 467). However, it was submitted that the only other evidence which went to identification was Constable Paterson's identification of the appellant as one of the two men who remained when Eadie ran off. That piece of evidence was insufficient to corroborate identification because it did not identify the appellant as the perpetrator. All that it did was confirm that he had been one of the two men who met with Eadie. It did not distinguish between the man who received the bag and the other man. That was critical,

because only the man who received the bag had been a perpetrator. The Advocate-depute submitted that not much was needed to corroborate Constable Dinnen's clear and unequivocal identification (*Ralston*). In assessing sufficiency, and whether evidence is capable of affording corroboration, the correct approach was to take the evidence at its highest and for circumstantial evidence to be interpreted in the way most favourable to the Crown (*Mitchell v HM Advocate* 2008 SCCR 469 at [106]). Corroborative evidence need not be more consistent with guilt than innocence. All that was required for corroboration was evidence which provided support for, or confirmation of, or fitted with the main source of evidence. It was then for the jury to decide if it did provide corroboration (*Lord Advocate's Reference (No.1 of 2023)* [2023] HCJAC 40, 2023 SLT 1115, 2023 SCCR 340, at [220] approving *Fox v H M Advocate* 1998 JC 94). Constable Paterson's evidence and the footage provided sufficient corroboration. An example of an aspect of the footage which supported Constable Dinnen's identification evidence was that it showed that the driver of the first car was the person who brought the perpetrator (the man who took the bag from Eadie) to the ground.

[14] The second ground of appeal is that the trial judge misdirected the jury when she directed them that they could use the CCTV evidence to corroborate Constable Dinnen's identification of the appellant. Mr Brown submitted that the misdirection was contained in the two sentences:

“And the Crown relies upon the CCTV footage in so far as it may provide support for or confirmation of or fits with PC Dinnen's evidence about the identification of the accused as it may show the accused in a certain position or location. It may show the accused as the man using his mobile telephone before Derek Eadie appeared or being the man put to the ground by ... Police Constable Dinnen.”

No exception was taken to the remainder of the charge. The two sentences were a misdirection because the judge had directed the jury that the quality of the footage was not sufficient to allow them to make an identification for themselves of the accused simply by

making a comparison between his appearance in court and the figures in the footage. It followed that there was nothing in the footage which they could use to corroborate Constable Dinnen's identification. The examples which the judge gave were evidence that a crime was committed but they were not evidence that the appellant was the perpetrator. In reply the Advocate-depute submitted that the judge had not erred in suggesting that the footage taken together with Constable Paterson's evidence might provide sufficient corroboration of Constable Dinnen's identification evidence. There had been no misdirection, and no miscarriage of justice.

### **Decision and reasons**

[15] We begin with the first ground of appeal.

[16] The provenance of the CCTV footage was agreed by joint minute. Its content was proof of fact of the events shown in it. It was real evidence which itself was sufficient proof of the inferences of fact which might reasonably be drawn from a viewing of its contents (*Gubinas v HM Advocate* 2018 JC 45; *Shuttleton v Orr* 2019 JC 98). The jury was also entitled to consider whether, looking at the footage and other evidence which they accepted, reasonable inferences might be drawn as to whether the crime charged was committed and who the perpetrator was.

[17] We are mindful that in assessing sufficiency and whether evidence is capable of affording corroboration the correct approach is to take the evidence at its highest, and for circumstantial evidence to be interpreted in the way most favourable to the Crown (*Mitchell v HM Advocate* 2008 SCCR 469 at [106]); and that where a witness makes a clear and unequivocal identification little is needed to corroborate that evidence (*Ralston v HM Advocate* 1987 SCCR 467).

[18] Here, Constable Dinnen gave clear and unequivocal evidence identifying the appellant as the perpetrator. Not much was needed to corroborate that evidence. The question is whether, taken together, the evidence of Constable Paterson and the CCTV footage could provide the required corroboration.

[19] Constable Paterson spoke to the appellant being one of the two men left when Eadie ran off. He indicated that Constable Dinnen rather than Sergeant Grafton had been the driver of their police car. Finally, he confirmed that when they got to the police office he cautioned and charged and processed Kyle.

[20] The CCTV footage showed that it was the man wearing the gilet and cap who used his telephone, who took the bag from Eadie, and who was apprehended by the driver of Constable Dinnen's police car. In short, it showed that that man was the perpetrator and that the driver had brought him to the ground.

[21] Corroborative evidence need not be more consistent with guilt than innocence. All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with the main source of evidence. It is then for the jury to decide if it does provide corroboration (*Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40, 2023 SLT 1115, 2023 SCCR 340, at [220] approving *Fox v H M Advocate* 1998 JC 94). Taking the combination of Constable Paterson's evidence and the CCTV footage at its highest, as we require to, we are in no doubt that it was capable of providing corroboration of Constable Dinnen's identification of the appellant. It was capable of providing support for, or confirmation of, or fitting with Constable Dinnen's identification. It put the appellant at the scene as one of only two men with Eadie when the bag was handed over. It confirmed that Constable Dinnen had been the driver of his police car, and that he had been the man who had tackled the perpetrator. Moreover, Constable Paterson's evidence that he cautioned and charged

and processed Kyle at the police office fitted with Constable Dinnen's evidence that the person he brought to the ground and dealt with at the police office was the appellant. It follows that the trial judge was correct to repel the submission of no case to answer.

[22] We turn to the second ground of appeal. We are satisfied that the trial judge's charge did not contain any material misdirection. Mr Brown accepted, correctly, that, leaving aside the final two sentences, the directions we referred to in paragraph [12] above contained no misdirection. We are also satisfied that, read in context, the final two sentences were not a misdirection. The footage showed that the man wearing a gilet and cap who spoke on his phone and sat on the rail was the man who took the bag, and that the driver of the first police car was the person who took him to the ground. The combined effect of Constable Paterson's evidence and the footage was capable of providing support for, or confirmation of, and it fitted with, Constable Dinnen's identification evidence.

[23] Neither ground of appeal is well-founded. There has not been a miscarriage of justice. The appeal is refused.