APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 59
HCA/2016/290/XC and HCA/2016/286/XC

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION

by

JUSTINAS GUBINAS and NERIJUS RADAVICIUS

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (Gubinas): McConnachie QC, Findlater; Gray & Gray, Peterhead
Appellant (Radavicius): Duguid QC, Hughes; Faculty Services Ltd (for Adam & Flowerdew, Peterhead)
Respondent: W McVicar (sol adv) AD; the Crown Agent

8 August 2017

Introduction

[1] On 29 April 2016, at the High Court at Aberdeen, the appellants were convicted of

sexually assaulting and repeatedly raping RD on 1 November 2014, at a farmhouse in Fraserburgh, contrary to sections 1 and 3 of the Sexual Offences (Scotland) Act 2009:

> "whilst acting together, whilst she was intoxicated and incapable of giving or withholding consent".

Part of the libel was that the appellants had recorded the event on mobile phones.

[2] On 9 May 2017, the court, having rejected grounds of appeal based upon insufficiency of evidence and misdirections on mixed statements (2017 SLT 663), remitted the appeal to a bench of five judges on a ground which maintained that the trial judge had misdirected the jury on the manner in which they could approach the video images taken on the mobiles. The appeal therefore raises the issue of the extent to which a fact finder, including jury or sheriff, can decide for themselves what the images depict. This in turn requires consideration of the form which directions to a jury should take. These are matters of general importance in terms of both evidence and procedure.

Evidence

[3] The complainer had been in the same nightclub as the appellants. According to her testimony, she had left in a car with the second appellant, thinking that he was taking her to a party in Fraserburgh. She was already heavily intoxicated, as could be seen from CCTV images taken of the nightclub car park. Two other men got into the car. The complainer was driven to a farmhouse, where both appellants were living. This was in a remote location, from which she would have been unable to walk home. She was forced to drink more alcohol. She would have been manifestly drunk.

[4] The complainer described herself as overwhelmed. She was forced and coerced into having oral and vaginal sex with the second appellant and then the first appellant. These

events were in part shown in images taken by the appellants' mobile phones. It was accepted by the complainer that the mobile images might appear to show consensual sexual activity. However, she said, "appearances can be deceptive". The images showed her in a state of intoxication; such that she was deprived of her ability to consent. At one point in the audio recording she could be heard saying "no".

[5] The complainer spoke about bruising to the back of her neck, lower back and buttocks. She had vaginal injuries, although these were, according to the medical evidence, "not necessarily" consistent with rape. There was evidence of distress on her return home. She had been sobbing uncontrollably.

[6] The mobile images were shown to a police officer, namely DC WR, during the trial. WR was asked to express a view on whether they were consistent with consensual sex taking place (see 2017 SLT 663 para [5]; and trial judge's charge (*infra*)).

[7] In his interview by the police, the first appellant admitted having oral and vaginal sexual intercourse with the complainer and videoing her having sex with the second appellant. All sexual activity had been consensual. It had been instigated by the complainer. She had made a beckoning gesture to him. The first appellant did not testify. However, according to his counsel, this gesture could be seen in the recording taken by the second appellant. The second appellant did not testify. In his interview, he denied rape.

Directions

[8] Having reminded the jury of the conflicting stances taken by the Crown and the appellants on what the mobile recordings had shown, the trial judge directed them as follows:

"You are here as judges ... and not as witnesses so you form a judgement about what the footage shows, just as you would form a judgement about eye witnesses' descriptions of what has happened otherwise. ... just because you have seen a record of the events made on the phone at the time or through the CCTV cameras at [the nightclub], you do not somehow become witnesses to these events yourselves. You stand back from what is depicted on the screen so far as this video evidence and CCTV footage is concerned, and you form your own conclusions about what it depicts.

... [W]e have had witnesses who have given in their evidence descriptions of what they say the phone film footage shows. [RD] did that. DC [WR] was asked for her views about what she thought it showed. You have to determine if their interpretation of what the footage shows as happening is correct. You have to decide what the footage shows and if it supports proof of the crime charged.

... [Y]ou can take into account what witnesses have said it showed, but you are not bound by their views. You must form your own views about what this video footage depicts and what inferences you can draw from it, such as whether or not the acts depicted were consensual on the part of [RD].

You've heard conflicting interpretations about what the video evidence shows. In assessing that evidence, you'll have to decide which view you prefer just as you'll decide between conflicting accounts by eye witnesses in any other aspects of the evidence in the case.

... [A]s I have been saying, in general you could form your own view about what the video evidence depicts, but the identification of a person depicted in the video or CCTV footage must come from a witness and, in that situation, you would have to decide if the witness's identification of the person said to be participating in the footage is correct.

And so far as reasonable belief is concerned, then, again, the starting point for you is RD's evidence. You'll have to take into account what she said about the video footage taken by the phone depicts. You'll remember her comment 'appearances can be deceptive'. Her position was that what we see on the video is a person not knowing what she's doing, so you'll have to take that into account in this regard."

[9] After the jury had been secluded, they requested a further viewing of the video; notably that part which allegedly showed a gesture. This was permitted in the court room, in the presence of the judge, clerk and video operator.

Submissions

First appellant

[10] Under reference to *Bowie* v *Tudhope* 1986 SCCR 205, *Steele* v *HM Advocate* 1992 JC 1, *Gray* v *HM Advocate* 1999 SCCR 24, *Donnelly* v *HM Advocate* 2000 SCCR 861, *Robertson* v *HM Advocate* 2007 SLT 459 and *HM Advocate* v *Ronald (No. 2)* 2008 SCL 176, the first appellant maintained that, although the law was not clear, certain broad principles could be understood. Finders of fact were not entitled to make identifications of accused persons simply by viewing video images. There had to be testimony from witnesses. Apart from that, fact finders could form a view of what the images showed. Because jurors were not witnesses, that view could not be translated into evidence. Even relatively innocuous parts of what was shown were not evidence, but were inextricably bound to, and defined by, the testimony given.

[11] Real evidence required to be spoken to (*Hogg* v *Clark* 1959 JC 7, *Patterson* v *Howdle* 1999 JC 56). This was not the same in other jurisdictions, where the fact finders could draw their own conclusions from what could be seen (eg Bryant: *Law of Evidence in Canada* (3rd ed) paras 2.13 *et seq*; Hoffman: *South African Law of Evidence* (2nd ed) 285-6; May *Criminal Evidence* (6th ed) para 2-33). The images spoke for themselves and should be shown without comment, since it was for the jury to decide what they revealed (*R* v *Dodson* [1984] 1 WLR 971; *R* v *Downey* [1995] 1 Cr App R 547). The approach in England had been codified in *Attorney General's Reference (No. 2 of 2002)* [2003] 1 Cr App R 21 (p 321), but this was far removed from Scots law because of the different approach to real evidence.

[12] The Australian position (*Smith* v *R* [2001] 206 CLR 650) was not to permit testimony to be given by the police about what a video recording showed, since the jury could do that themselves. In Canada (*R* v *Nikolovski* [1996] 3 SCR 1197) a video recording was regarded as

real evidence and the court could decide what it showed. In New Zealand (*R* v *Howe* [1982] 1 NZLR 618), a commentary by the police was regarded as a legitimate aid for the jury.

[13] In this case, the jury had asked to view the mobile images, notably the gesture part, as part of their deliberations. The recording was of importance. The trial judge's directions had been confusing and, in so far as they permitted the jury to decide for themselves what was shown, wrong in law. A jury could not be invited to consider a production or a label without relative testimony. Although the jury could use what they made of the images in assessing that testimony, their views could not be used in substitution for those of the witnesses. Where the jury's view differed from the testimony, that view required to be set aside. It could not be used to prove fact.

[14] If fact finders were entitled to consider what video images showed, that would amount to one source of evidence. At present, a number of witnesses could look at the images and, if their evidence coincided, this would provide corroborative testimony. If the images were "self proving", that would be a change in the law which ought to be considered by the Scottish Law Commission. In terms of section 283 of the Criminal Procedure (Scotland) Act 1995, the time and place of CCTV images could be certified. The images would then enable the fact finder to determine the essential facts, without supporting testimony which could be tested by cross-examination. In that event, parties ought to be allowed to object to the images as lacking a sufficient baseline quality to allow such a determination.

[15] The basis of the jury's verdict would not be known if images were self proving. It would not be possible to ascertain the reason for the jury identifying the accused as the perpetrator. The jury could not be cross-examined. Section 97D of the 1995 Act, which provided that a judge could not sustain a submission that no reasonable jury could convict

on the basis of the evidence led, would restrict the circumstances in which a "no case to answer" submission could be made.

[16] There were three possible outcomes. First, the law as explained in *Steele* v *HM Advocate* (*supra*) was correct and there was a discretion vested in the trial judge to direct the jury that they were bound by the descriptions provided in testimony. Secondly, the first appellant's submissions were correct and the jury could only base their verdict on such testimony. In either event, the appeal had to be sustained. Thirdly, the jury did not need to pay any heed to testimony, or to choose between conflicting accounts given by the witnesses, as to what video images showed. At present, the model jury directions, which had been adopted by the trial judge, encompassed all three possibilities. They constituted a misdirection. A material miscarriage of justice had resulted.

Second appellant

[17] The second appellant contended that the law was soundly set out in *Steele* v *HM Advocate* (*supra*) and had been followed in *Donnelly* v *HM Advocate* (*supra*) and *HM Advocate* v *Ronald (No. 2)* (*supra*)). There was no general principle applying to video images. However, a jury could only proceed on the evidence. In so far as essentials such as place, time, identity and the crime were concerned, a jury could not speculate upon matters which had not been the subject of testimony. In this case the correct interpretation of the mobile images had been disputed. The trial judge's directions were conflicting, contradictory and, in part, erroneous. The erroneous part was where the jury had been told that they could form their own views on what the images demonstrated. Such a direction should not be given where: (a) identification was an issue; (b) there was a need for expertise to understand

what was shown; or (c) there was a substantial dispute in the testimony about what was shown.

[18] The approach in England and Wales (*Attorney General's Reference (No. 2 of 2002)* (*supra*); *R* v *Downey* (*supra*); and *R* v *Shanmugarajah* [2015] 2 Cr App R 14 (p 215)) was substantially different. Were such an approach to be adopted in Scotland, substantial safeguards, along the lines of the direction given in eye-witness identification cases (*R* v *Turnbull* [1977] QB 224; Code of Practice D), would be needed.

[19] Any alteration of the law, as set out in *Steele*, would change some fundamental tenets; notably that jurors were judges and not witnesses. If the jury were entitled to determine what video images showed for themselves, no "no case to answer" submission could be upheld.

The Crown

[20] The written Case and Argument for the Crown set out what were said to be the principles in *Steele* v *HM Advocate* (*supra*), *viz.*: a jury required to proceed only on the evidence; a judge could direct the jury that they could be guided only by testimony of what video images showed; and it was undesirable to replay recordings when testimony could highlight the points shown more effectively. The purpose of leading witnesses to speak to the content of video images was: to prove their provenance, the identity of participants and what had occurred; to direct the jury to relevant parts; and to prevent the jury from speculating. Otherwise, if no expertise was required, the jury could assess the content of a video for themselves.

[21] Contrary *dicta* could be found in *Gray* v *HM Advocate* (*supra*) but, as observed in *Hunt* v *Aitken* (*supra*), *Gray* had proceeded upon a concession and was of little value as a

precedent. *Donnelly* v *HM Advocate* (*supra*) was about identification and thus distinguishable. There could be circumstances in which a judge should direct a jury that they could not assess the content of video images, such as where that would involve speculation, but generally a jury was free to assess content. In *Singh* v *HM Advocate* 2013 SCCR 337, leave to add a new ground of appeal, which alleged a misdirection to the effect that a jury could reject testimony on the basis of what they thought a video showed, was refused. The law was clear. A jury was not entitled to make a comparison between video images and the accused as he or she appeared in court. The jury had to be guided by the testimony of witnesses who were familiar with the accused (*Bowie* v *Tudhope* 1986 SCCR 205; *Robertson* v *Docherty* 2011 SCCR 123).

[22] A warning in relation to the dangers of identification evidence was required (*McAvoy* v *HM Advocate* 1991 JC 16 at 26). Identification had not been a live issue in this case. The mobile images were shown as evidence of the crime. No expertise was required to understand what the images showed. The jury had been entitled to make up their own minds. In any event, no miscarriage of justice had occurred. The jury had been directed that they could only convict if they accepted the complainer as credible and reliable.

[23] The Case and Argument did not seek to advance any propositions in relation to the development of the law or to analyse any of the Commonwealth cases upon which the court sought guidance. However, in oral submission, the advocate depute acknowledged the direction of travel in the cases from England. In *Clare and Peach* [1995] 2 Cr App R 333, Taylor LCJ (at 339) had made reference to the need for "evidential practice to evolve to accommodate unfamiliar material." Ultimately, the advocate depute, in response to some probing by the court, submitted that a jury should be entitled to make up their own minds on what video images showed, subject to a direction not to speculate in that exercise. This

included the identification of participants. There ought to be no distinction between identifying persons seen in the images and determining what events were shown.

Precedent

[24] In delivering the earlier Opinion of the Court (*supra*), the Lord Justice Clerk observed (at para [26]) that the circumstances in which a jury may examine for themselves the content of a video recording are ill-defined.

Scotland

[25] Twenty five years ago, in *Steele* v *HM Advocate* 1992 JC 1, there was evidence of surveillance video recordings; the nature or relevance of which is not clear from the Opinion of the Court. The sheriff had directed the jury that:

> "... you cannot make, draw any conclusions yourselves from your viewing of the video tape and you must be guided by the evidence of the witnesses as to what they believe that they saw on the tape ... [T]his is purely a question of whether you accept the evidence of these witnesses or not and ... where there may be ... a conflict of evidence as to what they saw, it is really a matter for you to decide which evidence you accept and which evidence you don't accept, but you are not entitled ... to become witnesses in the case because ... you haven't been put on oath".

The argument for the appellant was that the video was the best evidence and the jury were entitled to form their own view as to what it showed. The Crown had argued that there had to be testimony from witnesses. The jury's function was limited to whether or not to believe what the witnesses said.

[26] The court approached the matter as one of practicality rather than principle. The Lord Justice General (Hope), delivering the Opinion of the Court, referred to the "rule" that the jury must proceed "only on the evidence" and continued (at 5):

> "for this reason evidence will almost always be required to speak to such essential details as place and time and the identity of persons or things shown on the recording".

He placed reliance on the view expressed in *Hopes and Lavery* v *HM Advocate* 1960 JC 104 (LJG (Clyde) at 111) about the undesirability of repeated replays in the court or jury room. *Hopes and Lavery* concerned a tape recorded (bugged) conversation which had been transcribed by a stenographer.

[27] The Lord Justice General in *Steele* continued (at 5):

> "So it is likely to be of advantage for the witnesses to be asked to give their own opinions as to what is being shown on the tape in order that the jury's minds can be directed to the relevant points while the tape is being played. But, except in cases where some particular expertise is required to understand what is going on, the jury are free to make up their own minds about what the tape reveals. It is not necessary for them to be provided with a running commentary on every detail."

The somewhat confusing conclusion was that the sheriff's direction was not "accurate as a statement of principle" even if it "may well have been appropriate".

[28] In *Gray* v *HM Advocate* 1999 SCCR 24, the video recording of a robbery in an off-licence was shown to witnesses who had not been present. They had identified the accused, having seen him earlier in the day. The issue was whether the trial judge had erred in refusing a request from the jury to see the recording again during their deliberations. The judge had wrongly held that this was incompetent, but, the court held, he had nevertheless correctly refused the application because the "real issue" was the quality of the identification evidence given by the witnesses rather than that of the video recording. The Lord Justice General (Rodger), in delivering the Opinion of the Court said (at 26), that it was "common ground" that the jury were not permitted to view the video and to decide for themselves whether they could identify the appellant. The video could only be used to assist in the assessment of the evidence of identification from witnesses.

[29] *Donnelly* v *HM Advocate* 2000 SCCR 861 concerned the murder of a woman in Central Glasgow. She had been wearing a black jacket when she had met the appellant, who was jacketless. The jacket was never recovered, but a photograph, which had been in it, had been found in a loading bay in Bath Street. There were CCTV images at the relevant time of a man wearing a black jacket walking from the *locus* along Bath Street. The accused had not been identified from these images. However, the trial judge mentioned the images in his charge as showing a young man in a dark jacket. The argument, which was sustained, was that, if the jury had identified the appellant as the young man from their own assessment of the images, and had held that he had been wearing the deceased's jacket, that would have been "a very serious matter for the appellant's defence" (at 869).

[30] Lord Allanbridge, delivering the Opinion of the Court (at 871), endorsed the earlier view expressed by the Lord Justice Clerk (Cullen) (at 867, following *Gray*) that the jury were not entitled to decide for themselves whether they could identify the appellant from the images. Under reference to the *dictum* in *Steele* (*supra*), he said (at 871):

> "These observations support the view that a jury cannot decide for themselves the identity of a person shown on a video recording".

The court held that it had been an error to have allowed the jury to speculate on the identity of the man shown in Bath Street.

[31] *Robertson* v *HM Advocate* 2007 SCCR 129 involved an assault in a bus shelter in Falkirk town centre. The Crown had served certificates under section 283(1) of the Criminal Procedure (Scotland) Act 1995. This permits an operator of a video surveillance system to certify that images recorded on the system are of events at a particular place and time. The certificate becomes sufficient evidence of these matters. The certificates were productions, but no mention was made of them prior to the close of the Crown case. The images were not

shown to the complainer, who had identified the appellant as the red shirted man who had attacked him. Police officers spoke to having obtained excerpts from the system which showed the assault. They were able to speak to the *locus* and said that the images showed the assault. They identified the appellant as the red shirted assailant. The court held that the certificates were not evidence unless they were brought to the jury's attention. The court was of the view that this left the evidence "barely" sufficient, but that the jury had been entitled to hold that the images did show the assault and were thus corroborative of the complainer's evidence of identity.

[32] *HM Advocate* v *Ronald (No. 2)* 2008 SCL 176 involved, like the present case, video images of sexual activity involving a complainer, taken by the accused on his mobile phone. During the course of his interview, the police put to the appellant that, in the view of one officer, the images showed that the complainer had been asleep or unconscious at the relevant time, since there was no noise recorded. This prompted the appellant to admit that the complainer had probably been asleep. It was argued that this admission had been unfairly obtained, since the officer's view would itself have been inadmissible. The judge at first instance (Lord Hodge) repelled this objection. He was (at para [15]) not satisfied that there is a rule of law that renders inadmissible evidence from a witness of his or her understanding of what a video shows, even if what was shown addressed the principal issue for the jury. In so doing, he relied on the comments in *Steele* v *HM Advocate* (*supra*) that it was advantageous for witnesses to express their own opinions on what a tape showed.

[33] In *Henry* v *HM Advocate* 2012 SCCR 768, the appellant had taken an objection, as a preliminary issue, to police officers, who had not known the appellant prior to his arrest, testifying that he was the masked raider of a shop in Cumbernauld. Lord Pentland repelled the objection, but in doing so (see para [10] 8) left open the possibility that such an objection

could be sustained if unfairness would inevitably arise from this type of evidence. Lord Brodie, delivering the Opinion of the Court (at para [19]), agreed but qualified that by saying that the "supposed inadequacy of the evidence would have to be capable of being very clearly demonstrated" given that the assessment of the quality of the evidence was a matter for the jury. It would only be in an "extreme" case that such an objection would be upheld.

[34] Finally, *Singh* v *HM Advocate* 2013 SCCR 337 involved a conviction of raping a woman in a doorway in central Glasgow. The court refused to allow a Note of Appeal to be amended by adding a new ground that the trial judge had erred in directing a jury that they required both to consider the testimony about what CCTV images revealed and to form their own judgment as to what was shown in the images. The complainer had testified to the content of the images, the provenance of which had been agreed. The Lord Justice Clerk (Carloway), delivering the Opinion of the Court, observed (at para [7]) that the judge had correctly told the jury that it was the testimony of what the CCTV images showed that they had to consider, albeit that, in carrying out that exercise, they were entitled to take into account what the images appeared to show.

[35] These solemn cases have resulted in a form of direction, currently enshrined in the Jury Manual (35.2/123) as follows:

> "You are here as judges, not as witnesses. You form a judgement about what this video tape shows, just as you form a judgement about eye-witnesses' descriptions of what happened. Just because you have seen a record of events made on video at the time they took place, you do not become witnesses to these events yourselves. You stand apart from these events, and form your own conclusions about the video evidence."

These sentences may not be very helpful. The directions go on as follows:

> "Where video relied on as proof of the commission of crime
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> 'Witnesses have told you about what this video shows concerning the commission of the crime charged. You have to decide if their interpretation of what the tape shows

> as happening is correct. You have to decide what the tape shows and if it supports proof of the crime charged. You can take into account what they said it showed, but you're not bound by their views. (Where witnesses give conflicting interpretations add) – Here you've heard conflicting interpretations on what the video shows. You'll have to decide which view you prefer, just as you'll decide between conflicting accounts given by eye-witnesses.'
>
> Where video relied on as proof of identification
>
> 'Very often because of the quality of the video, it would be difficult for you to conclude that it was the accused who was participating in the events it showed. In such cases you cannot make an identification yourselves of the accused from the video. The identification of a person must come from a witness. You have to decide if the witnesses' identification of the accused as participating in the commission of the crime is correct. You will want to consider whether the witnesses and the accused were strangers to one another, how recently they had seen one another, how well acquainted they were with each other or in general the circumstances under which the identification was made.'
>
> Where quality of video is challenged
>
> 'Here the defence challenge the quality of the footage. It is said that it is so poor that the witnesses' evidence about identification/what the tape shows is happening is not reliable. You have to consider the quality of the tape in assessing the reliability of this evidence, but you cannot make your own independent judgement of who or what is shown on the tape.'"

[36] As with the cases, there appear to be two strands or approaches being illustrated, but which may be seen as pulling against each other. The first is that the jury can "form [their] own conclusions about the video evidence". That would entitle the jury to decide that the video shows an event or a person not mentioned or even contradicted, by the testimony of the witnesses. The second is that they can only use the video in gauging the acceptability of oral testimony; at least where the video is not clear.

[37] Two summary cases fall to be noticed. First, in *Bowie* v *Tudhope* 1986 SCCR 205, the principle that a police officer, who knew the accused, was entitled to identify him having viewed video images taken at the scene of a robbery, was (following *R* v *Fowden & White* [1982] Crim LR 588) endorsed. It is of some note that the sheriff (but not the court), in considering *Fowden & White*, observed (at 207) that reliance on the police identification was

legitimate as it prevented the jury from speculating about identity by comparing the images with the accused in court.

[38] The second is the Scottish Criminal Cases Review Commission reference in *Hunt* v *Aitken* 2008 SCCR 919. Despite his plea of self-defence, the appellant had been convicted of assaulting a neighbour. The complainer's wife had been driving down a disputed road, which ran through the appellant's garden. The complainer was at the *locus*. As he walked back to his own house, the appellant punched him. The Crown had adduced the appellant's wife as a witness. She had said that she had looked out of a window and had seen the complainer elbowing the appellant, and the appellant reacting to that by punching him. In cross-examination, the appellant put a photograph to the appellant's wife, upon which an "x" had marked the *locus* of the punch. This was about 15 metres from the window. Contrary to the appellant's wife's testimony that she had had a clear view, the Justice of the Peace, upon examining the photograph, did not consider it possible that she could have seen the incident as the view would have been obscured by outbuildings.

[39] The reference was on the basis that the JP had not been entitled to draw his own conclusion from the photograph "in private". In delivering the Opinion of the Court and refusing the appeal, Lord Reed drew attention to the distinction between hearing or taking evidence and assessing it. The submission for the appellant, based on *Gray* v *HM Advocate* (*supra*), that the JP had turned himself into a witness was rejected. Lord Reed noted (at para [16]) that, as *Gray* had proceeded upon a concession, it was of "little value as a precedent". The JP had, "rather like the jury in ... *Gray*" been entitled to look at the photograph in order to test the witness's testimony. Most important, the court endorsed the sentence in *Steele* v *HM Advocate* (*supra*) that, except where expertise was needed, "the jury are free to make up their own minds about what the tape reveals".

[40] As is often the case, it is instructive to look at how this matter is approached in other jurisdictions, especially those which use a jury in a similar way to that in Scotland.

England and Wales

[41] In England and Wales, the issue had been raised in a number of cases in the 1980s and 1990s. *R* v *Fowden & White* (*supra*) has already been noticed. In *R* v *Dodson* [1984] 1 WLR 971, security cameras at the scene of a building society robbery had taken photographs at half second intervals. These were developed and enlarged. They "plainly" showed the robbers, who were originally from Guyana and Jamaica. One of them admitted to the police that he was shown in the photographs. The other accepted that he had participated in the robbery. The jury were provided with copies of the photographs. The jury were, the Court of Appeal noted (Watkins LJ at 975), able to compare them both to the accused in court over the 12 days of trial and to photographs of the accused at the time of their arrests. The appellants' argument was that this was worse than dock identification. Foreshadowing the first appellant's submissions, it was said that the jurors could not be cross-examined and it would not be possible to tell what the basis for their verdicts might be. The court was content (at 978-979) that the jury could carry out this comparison since it involved no special training or expertise. The jurors were doing no more than an average person did in domestic, social or other situations. They would, however, require to be warned of the relevant perils, notably those arising from the quality of the photographs.

[42] Ten years later, in *R* v *Downey* [1994] 1 Cr App R 547, a still from a video recording of a stocking masked petrol station robber was shown to the jury. The jury were directed that they could compare the still with a photograph of the accused taken at the time of his arrest and with his appearance in court. The complaint on appeal concerned the absence of a

direction on the need for a special warning, as had been given in *R* v *Dodson* (*supra*). However, the Court of Appeal (Evans LJ at 555) distinguished the situation from that where a witness identified a person based on his recognition of the accused as the person he had seen at the time, since experience demonstrated fallibility in that regard. The same principle applied, the court said, to the need for corroboration (at that time) in sexual offence cases. Evans LJ continued:

> "In both kinds of situations, the jury is cautioned against accepting too readily the evidence of a witness whom they have heard. Inviting the jury to consider whether the person shown in a photograph is the defendant who has appeared before them is a different process."

Any difficulties, he added (at 556), such as the quality of the photograph, would be obvious to any layman.

[43] The authorities were reviewed by the Court of Appeal in *Attorney General's Reference (No. 2 of 2002)* [2003] 1 Cr App R 21 (p 321). This prosecution had involved police officers identifying rioters from video film. One officer had known the appellant, but the trial judge had ruled his evidence to be inadmissible as he had no specific skills beyond those of the jury, albeit that he had studied the film under controlled conditions. The subsequent ruling was that there was then an insufficiency of evidence. The Court (Rose LJ, delivering the Opinion of the Court, at para 19) concluded that:

> "... there are at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up, a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:
>
> (i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock [*R* v] *Dodson* [(*supra*)];
>
> (ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence ([*R* v] *Fowden ...* [(*supra)*] ...; and this may be so even if the photographic image was no longer available for the jury (*Taylor* v *Chief Constable of Chester* [(1987) 84 Cr App R 191]);

> (iii) where a witness who does not know the defendant spends time viewing and analysing the photographic images from the scene, thereby acquiring special knowledge that the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the contemporary photograph are available for the jury (*R* v *Clare and Peach* [(*supra*)];
>
> (iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available to the jury ...".

[44] Where, in England and Wales, a jury is invited to compare a photograph with the accused in court, they may require to be directed on the dangers of doing so, whether or not there is supporting testimony, but this depends upon the facts. In *R* v *Shanmugarajah* [2015] 2 Cr App R 14 (p 215), there was no witness identification of the accused as one of a group of men, caught on CCTV recording attacking a woman at night in a railway station. The jury were invited to compare the accused with a still from the recording. No warning of the dangers of identification was given, although the trial judge did direct the jury to bear in mind the quality and clarity of the photography. The appeal was refused. The court, Hallett LJ at para 9, following *R* v *Downey* (*supra*), said:

> "... the approach and analysis in *Downey* is correct. There is no invariable or inflexible rule that a jury have to be expressly warned in every case of the risk that they might make a mistaken identification. As Watkins LJ pointed out [in *R* v *Dodson* (*supra*)], and as the court approved in [*R* v] *Downey* [(*supra*)], the task that the jury are being asked to perform is a perfectly straightforward one, and it is a statement of the obvious to direct the jury that they must be careful and that they must bear very much in mind all the kinds of warnings that [counsel for the appellant] has insisted should be given. Modern practice in these courts is not to require trial judges to direct the jury as to the obvious ...".

Ireland

[45] In Ireland, the issue of video evidence for the purposes of identification was

considered in *People (DPP)* v *Maguire* [1995] 2 IR 286. The accused had been convicted on the basis of video images of a robbery and stills taken from them. There had been no other evidence of identification. The appeal succeeded on the basis of inadequate directions rather than insufficiency. Barron J, delivering the Opinion of the Court of Criminal Appeal, noted (at 288) that it was common to ask a jury to identify an accused from film and stills taken of a crime. He referred to three situations in which video evidence could be used: (1) to bolster or undermine the testimony of a witness purporting to identify the accused; (2) to allow persons who are known to have seen the accused, but who were not at the scene, to identify the person in the video images; and (3) to allow persons, such as police officers, to compare the image of the miscreant to that of the accused. He continued (at 290):

> "Even though the evidence of the video film is admissible, nevertheless the usual and proper warnings required in relation to evidence of identification must be given to the jury. It must be made clear to the jury also that its function is to assess the credibility of the witnesses and that, only where there is no independent evidence of identification, should it seek to form its own view of the identity of the accused. When it is proper for it do so, it may use such view together with its view as to the rest of the evidence in making its decision. Such direction must also make it clear to the jury that before it can convict it must be satisfied that the person in the dock is the person shown on the film.
>
> Whichever way the video is used, the role of the jury is not primarily to decide on its own view of identity, but to decide whether the evidence which it has heard is credible. In so doing, it must have regard to the video evidence, but in the same way as it has regard to maps, photographs, drawings etc. Its role is similar to that of a jury brought to the scene of a crime. It is not brought so that it can decide for itself whether some action was or was not possible, but to decide whether the evidence of a witness giving evidence that it was or was not, as the case may be, should be accepted as credible.
>
> ...
>
> It is clearly unsatisfactory to ask a jury to identify an accused from a video film without adducing any evidence in support of such identification. There may be cases where no one can be found who can or who is prepared to come to court to identify an accused. In such cases, where the trial judge is satisfied that no such evidence is available, then the matter can be left to the jury. That appears to have been the case here. There was apparently no evidence to identify the applicant as one of the two persons shown on the video film."

The preferred route is then to use the video as an accessory to testimony, but a jury could convict (or acquit) on the basis of their own view of what, or rather who, the video showed, provided that adequate warnings, along the lines of those given in eye-witness identification cases, are given and there is no alternative to doing so (see also *People (DPP)* v *Allen* [2003] 4 IR 295).

Canada

[46] In Canada, the issue was addressed comprehensively by the Supreme Court in *R* v *Nikolovski* [1996] 3 RCS 1197. This was a videoed robbery in which the employee was unable to identify the robber in court. A police officer, who knew the accused, testified that the accused's appearance in court differed from that at the time of his arrest. The trial judge took the view that the video was sufficiently clear to allow her to conclude that the robber was the accused and found him guilty. The Court of Appeal quashed the conviction on the basis that the trial judge ought not to have relied solely on her own comparison of the video images and the accused in court. The Supreme Court, by a majority of 7-2, reinstated the verdict at first instance.

[47] The Opinion of the majority, contained in a judgment delivered by Cory J, is worth repeating at length:

> "14 With the progress of scientific studies and advances in technology, evidence put forward particularly as to identification has changed over the years. The admission of new types of evidence is often resisted at first and yet, later accepted as commonplace and essential to the task of truth finding.
>
> ...
>
> 15 It may be helpful to consider the evolution of the use of audio and video tape evidence in Canada. In *R* v *Pleich* (1980), 55 C.C.C. (2d) 13, at p 32, the Court of Appeal for Ontario recognized that tape recordings are real evidence that had, as well, many of the characteristics of testimonial evidence. In *R* v *Rowbotham* (1988), 41 C.C.C. (3d) 1, the use of audio tapes was considered by the same court. It found that

it was the tapes themselves that constituted the evidence which should be considered by the jury.

...

17 The admission of videotapes as evidence seems to be a natural progression from audio tapes. In *R* v *B (KG)*, [1993] 1 S.C.R. 740, at pp 768 and 774, this Court praised the evidence obtained from videotapes as a 'milestone' contributing to the 'triumph of a principled analysis over a set of ossified judicially created categories'. In *R* v *Leaney*, [1989] 2 S.C.R. 393, the main identification evidence against the accused was a videotape of the crime in progress and the testimony of five police officers. Although this Court held that the evidence of four of the police officers ought to have been excluded, it upheld the conviction of Leaney on the basis of the trial judge's own observations of the videotape and his comparison of the tape to the accused in the box. ...

18 Similarly in *R* v *L (DO)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J, in concurring reasons, noted that the modern trend had been to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result. She observed that this is most likely to be achieved when the decision makers have all the relevant probative information before them.

...

20 It cannot be forgotten that a robbery can be a terrifying traumatic event for the victim and witnesses. Not every witness can have the fictional James Bond's cool and unflinching ability to act and observe in the face of flying bullets and flashing knives. Even Bond might have difficulty accurately describing his would be assassin. He certainly might earnestly desire his attacker's conviction and be biased in that direction.

21 The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often as desired. The tape may be stopped and studied at a critical juncture.

22 So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robbery and the actions of the robbers. Should a trier of fact be denied the use of the videotape because there is no intermediary in the form of a human witness to make some identification of the accused? Such a conclusion would be contrary to common sense and a totally unacceptable result. It would deny the trier of fact the use of clear, accurate and convincing evidence readily available by modern technology. The powerful and probative record provided by the videotape should not be excluded

> when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by *viva voce* testimony.
>
> 23 It is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime. It is clear that a trier of fact may, despite all the potential frailties, find an accused guilty beyond a reasonable doubt on the basis of the testimony of a single eyewitness. It follows that the same result may be reached with even greater certainty upon the basis of good quality video evidence. Surely, if a jury had only the videotape and the accused before them, they would be at liberty to find that the accused they see in the box was the person shown in the videotape at the scene of the crime committing the offence. If an appellate court, upon a review of the tape, is satisfied that it is of sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt then that decision should not be disturbed. Similarly, a judge sitting alone can identify the accused as the person depicted in the videotape."

[48] The court considered some of the cases from England and Wales, notably *R* v *Dodson* (*supra*) and *R* v *Downey* (*supra*), before looking at an interesting passage, relating to the position in the United States of America, in Wigmore: *Evidence* (vol 3, rev. ed 1970, para 790). This contained an advance on the previous position that a photograph was only admissible as an adjunct to the testimony of a witness. Wigmore recognised that:

> "once there is an adequate assurance of the accuracy of the process producing the picture, the photograph should be received as a so called silent witness or a witness which 'speaks for itself'."

Cory J continued:

> "28 Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

> ...
>
> 31 The jury or trial judge sitting alone must be able to review the videotape during their deliberations."

The fact finder can thus draw his or her own conclusions from a video, whether in relation to events or identity, without the need for a witness to describe what is shown in the relative images (see also eg *R* v *Delorme* 2017 SKCA 3, citing (at paras [37-40]) *R* v *Nikolovski* (*supra*) and *R* v *Benson* 2015 ONCA 827 and *R* v *Turpin* 2011 ONCA 193).

Australia

[49] In *Smith* v *R* [2001] 206 CR 650, the High Court considered an appeal concerning the admissibility of the testimony of police officers who identified the accused, whom they knew, from security photographs taken at a bank robbery. The majority regarded the evidence of the police as irrelevant because they were in no better a position to identify the accused from the photographs than the jury, or any member of the public. In this regard, it was not suggested that the accused's appearance in court differed from that at the time or that the police officer's knowledge of his appearance gave them an advantage. In an interesting concurring opinion, Kirby J expressed the view that, although the majority's reasoning was wrong, the officers' testimony was inadmissible as being evidence of opinion and incapable of proving the facts underlying it.

New Zealand

[50] In *R* v *Howe* [1982] 1 NZLR 618 a police officer provided a commentary to a series of photographs of a riot. He identified accused persons in the course of that exercise. It was held (at 627) that the commentary was legitimate as an aid to the jury in understanding the photographs. The identifications were also admissible, as the officer had made a study of

the photographs for the purposes of reliably identifying the individuals in them. The court approached the issue of the admissibility, of what it regarded as a type of opinion evidence, as it was described, from the angle of fairness. It regarded it as fair, even if it suggested (at 628) that any commentary should be kept to a minimum.

[51] In *Matara* v *R* [2015] NZCA 261, the Court of Appeal determined that a warning to a jury, to take care, in relation to the jury comparing video images with accused in court or arrest photographs, was not required. The jury was not considering evidence of identification from a witness, nor would the comparison have been decisive. There were a number of other strands of evidence available.

South Africa

[52] Under reference to *S* v *M* 2002 (2) SACR 411 (SCA) Zeffertt; *South African Law of Evidence* (2nd ed) (at 849) describes real evidence as being things, which are examined by the court as a means of proof, and which "upon proper identification ... becomes, of itself evidence." Examples of weapons, handwriting, personal appearances, casts of footprints are given. The judge is entitled to rely upon his or her perceptions and to draw such inferences as may reasonably be drawn without expert qualifications. However, it is also said that real evidence is seldom of assistance without testimony. Nevertheless, video recordings are real evidence (*S* v *Mpumlo* 1986 (3) SA 485; *S* v *Mdlongwa* 2010 (2) SACR 419). They require to be identified but not necessarily by the photographer. A witness can be asked whether he recognises a particular scene or person shown in a photograph, the origin of which may be unknown (*S* v *Ramgobin* 1986 (4) SA 117 (N), Milne JP at 125).

Conclusions

[53] The court does not consider that there is a material difference, between Scots law and that in the other jurisdictions examined, concerning the general approach to real evidence. In any system there will be a requirement to demonstrate the provenance of the thing. For a video recording to be used as proof of fact in a criminal trial, it will be necessary to show that the recording is of the relevant event. How that is done will depend upon the circumstances. Section 283 of the 1995 Act is an obvious method. The person responsible for the operation of the system can certify that visual images and sounds recorded on a particular device are of, or relate to, events at a particular time or place. That certificate, when formally produced at trial, will be "sufficient evidence" of what is certified. However, that is not the only mode of proof.

[54] With public area CCTV images, for example, a police officer downloading images may be able to testify to recovering them for a particular location or time. The content of the images, when compared with other evidence of events, may be such that an inference can be drawn that what is shown is a recording of the event. In this regard, the evidence in *Robertson* v *HM Advocate* (*supra*) may be seen as more than "barely" sufficient. Private CCTV may involve an employee of the relevant organisation testifying to the same effect. Individuals recording events on cameras or mobile phones, which are matters not covered by section 283, can speak to doing so. Even without anyone speaking to the recovery of the images, a witness to the scene may legitimately be asked if what is shown in images produced is of the relevant event. The fact finder may infer from that that someone, perhaps unidentified, recorded the images at the time. This may be sufficient evidence of provenance. Once the provenance has been established, the question is then what can the fact finder make of the images.

[55] Dickson: *Evidence* (Grierson ed, at para 1815) equates real evidence with "evidence derived from things". This is referred to in Walker & Walker: *Evidence* (3rd ed, at para 18.1), where the authors (Ross and Chalmers) cite the observation in Cross & Tapper: *Evidence* (11th ed, at p 60) that the term "covers the production of material objects for inspection *by the judge or jury in court*" (emphasis added; see also Davidson: *Evidence* para 5.01). The purpose of any such inspection by the fact finder is with a view to drawing inferences from what can be observed upon examination. As the authors correctly state:

> "Matters which in the past might have been left to the recollection of a witness may now be the subject of real evidence in the form of an automatic recording".

[56] In *Hopes and Lavery* v *HM Advocate* (*supra* at 110) the Lord Justice General (Clyde) said that the recording is "primary evidence". It is thus, if duly proved to have been made at the relevant time and place, equivalent to a witness speaking to events seen or heard. In this sense it is indeed Wigmore's "silent witness" (Wigmore (*supra* at 219-21, cited in *R* v *Nikolovski* (*supra*, Cory J at para 26)). Once before the fact finder, the recording's content is available as proof of fact. The fact finder is free to make such inferences from the audio or video components as would be open to any judge or jury hearing oral testimony descriptive of the same events. This does not convert the fact finder into a witness.

[57] This approach is consistent with the *obiter dictum* in *Steele* v *HM Advocate* (*supra*) about the freedom of fact finders, including a jury, to make up their own minds about what video images reveal. Interpreting what the court said in *Steele* may not be entirely straightforward. On the one hand, the court equates "evidence" with testimony and states that testimony is "almost always" needed to speak to the essentials, including identity of the perpetrator and the facts of the crime. Leaving aside the qualification of "almost always", the statement, that a jury are at liberty to form their own view, may be interpreted as

contradicting this, since a recording may clearly show a crime being committed and the accused committing it. It may be because of this perceived contradiction that the law developed in a somewhat confused manner.

[58] However, what was said about the freedom of the fact finder in *Steele* is consistent with *Hunt* v *Aitken* (*supra*), which endorsed that *dictum*, and with *Singh* v *HM Advocate* (*supra*). *Hunt* dealt with the common-place situation in which the fact finder has a piece of real evidence, in that case a photograph, and can see for himself or herself what is demonstrated by, or can be inferred from, the state of the thing. Sheriffs and juries are regularly shown things, particularly photographs but also weapons and other objects, with a view to being able to understand what appears from looking at them.

[59] No doubt, as was said in *Steele*, testimony will "almost always" be given by eye witnesses who were present at the event shown in the video images. It will often, as the court in *Steele* also said, be advantageous for witnesses, who were present and who saw what happened, to comment on what the images depict. This will be so, especially if the witness testifies to something not obviously apparent from the images or denies something apparently shown in the images. None of this detracts from the fundamental position that, once the provenance of the images is proved, they become real evidence *in causa* which the sheriff or jury can use to establish fact, irrespective of concurring or conflicting testimony. Even if all the witnesses say that the deceased was stabbed in the conservatory, if CCTV images show that he was shot in the library, then so be it.

[60] The same principles must apply in relation to proof of the identity of persons as they do to proof of events, including, but not exclusively, the identity of accused shown in video images. There is no logical reason for any distinction. The "common ground" upon which the court proceeded in *Gray* v *HM Advocate* (*supra*) must therefore be regarded as more than

shaky. It contradicted the position outlined in *Steele*, to which the court had been referred, concerning the jury's ability to make up their own minds. It may, with hindsight, be regarded as regrettable that the court in *Gray* was not taken to the developing jurisprudence (*supra*) in England, and especially Canada, rather than the case proceeding upon common ground of doubtful validity.

[61] Similarly, the approach in *Donnelly* v *HM Advocate* (*supra*) must be seen as erroneous. The court in *Donnelly* took the view that *Steele* was authority for the proposition that a jury could not decide for themselves the identity of a person shown in a video recording. It is not; if anything it says the opposite. Once again, with hindsight, it is unfortunate that, in such an important area of the law of evidence, there appears to have been no consideration of the foreign jurisprudence.

[62] It follows that, in an appropriate case, a fact finder, including jury or sheriff, will be entitled to form their own view on whether or not an image is that of an accused. They may also hold that it shows a person resembling the accused, so as to provide corroboration of a single eye witness identification (see *Ralston* v *HM Advocate* 1987 SCCR 467) and in a circumstantial case. In carrying out this task they would be entitled to compare the image with a photograph of the accused taken at or about the time of the incident and/or with his appearance in court (*Irvine* v *Donnelly* 2012 SCCR 486).

[63] In reaching this view, which attempts to resolve the conflicting authority in Scotland, the court has paid particular attention to the sound reasoning of Cory J in the Canadian Supreme Court case of *R* v *Nikolovski* (*supra*). This represents an enlightened and sensible approach to video or audio recordings. This court adopts that reasoning in so far as quoted above. In particular, "so long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the

perpetrator." It may assist in the assessment of testimony. It may supplement testimony concerning identity, but it may also supersede it.

[64] The court agrees with the circumstances in which a jury can be invited to conclude that the identity of an accused as perpetrator is proved, as set out by the Court of Appeal of England and Wales in *Attorney General's Reference (No. 2 of 2002)* (*supra*). If the image is sufficiently clear, the jury can compare it with the accused in court. A person who knows the accused can be asked to identify him from the image (even if the image has been lost). If a person, such as a police officer, has spent time viewing and analysing the images and thus acquires a knowledge beyond that which the jury might attain in the course of a trial, he or she can give comparison evidence if there is a contemporary photograph available. Such a photograph may not be necessary where it is not disputed, or it is proved, that the accused's appearance in court is not materially different from his appearance at the time of the crime. The court does not agree with the approach of the Irish courts, as set out in *People (DPP)* v *Maguire* (*supra*), to the effect that comparing the images to the accused in court by the jury should only be permissible *in extremis*. If it is possible for the jury to make a comparison, then the fact that there is testimony on identity should not operate as a bar to that exercise.

[65] The extent to which a witness may be asked to provide a commentary on the images will depend upon the circumstances. Clearly, witnesses who were at the scene may be asked about what is shown in the images, by way of an *aide memoire* or contradiction. There may, of course, be no such witnesses. In that event, and in any event, it may be helpful for an investigating police officer, or other person who was not present at the time, to provide a commentary on what is shown in the recording. The court agrees with the New Zealand Court of Appeal in *R* v *Howe* (*supra* at 627-8), and disagrees with that of the High Court in Australia in *Smith* v *R* (*supra*) that such evidence is admissible in so far as it can be said to

aid the jury's understanding of the images. It may assist in pointing out specific features. It is not opinion evidence on a matter which the jury are to decide. It is simply descriptive of a piece of real evidence. The court also agrees that any such commentary should be kept to a reasonable minimum.

[66] Where the line does requires to be drawn is where, rather than using the witness as a commentator to assist the jury to understand what is shown and what may be important, a party seeks to obtain from a witness, who was not present at the time, that witness's impression or interpretation of what the images show; that is to say, strays beyond what is physically obvious when pointed out. In this case, seeking evidence from the police officer about whether what was shown in the images was consistent with consensual sexual activity was illegitimate. The questioning of her should have been disallowed. It is legitimate to put such a proposition to a complainer or to those present at the time, but not to a police officer who is in no better a position to comment than a member of the jury.

[67] In this case, the trial judge's directions were generally correct in their material aspects. Those parts, derived from the Jury Manual, in which reference was made to jurors being judges and not witnesses were not helpful. It is not easy to understand what this distinction means. The passage concerning the need for a witness to testify to identity was wrong, but was not significant in this case in which identity was not an issue. The direction to the jury to form a judgment about what the images showed, just as if they would form a judgment about eye witness descriptions of what happened, was correct. The statement that the jury could draw their own conclusions about what the images depicted was also correct. The parts permitting the jury to assess the testimony of the witnesses, but not being bound by that testimony, were consistent with the views expressed in this Opinion. Having admitted the testimony of the police officer on whether the images showed consensual

activity should have been excluded, the directions on this were not material and in any event favoured the appellants. It follows that there was no misdirection leading to a miscarriage of justice. The appeals must therefore be refused.

Addendum

[68] In relation to corroboration, no difficulty arises. If the only evidence of, for example, identity comes by way of a comparison of video images with the accused in a photograph, there will be corroboration if the provenance of the recording and the photograph are each proved by two witnesses. In this respect, the situation is little different from proof that a fingerprint or DNA has been found at a particular location and is that of the accused (*Reid* v *HM Advocate* 2017 JC 37 following *Langan* v *HM Advocate* 1989 JC 132). The only difference is that in fingerprint or DNA cases a comparison requires the involvement of an expert. Identification does not.

[69] In England and Wales a judge has a discretionary power to exclude evidence of identification from video images as inadmissible on the basis of the quality of the images (*R* v *West* [2005] EWCA Crim 3034). There is a general statutory power in that jurisdiction to exclude evidence, if it would have such an adverse effect on the proceedings that the court ought not to admit it (Police and Criminal Evidence Act 1984, s 78). In Scotland, as was said in *Henry* v *HM Advocate* (*supra*) at para [19]), it would only be in an "extreme" case that such evidence could be excluded as rendering a trial inevitably unfair in terms of Article 6 of the European Convention. Assessment of the quality of the evidence is generally a matter for the fact finder, ie the jury. If there is a concern about the inferences of fact to be drawn from the images, that would require to be expressed in the context of a submission based upon an insufficiency of evidence.

[70] A "no case to answer" submission could be made in relation to the evidential import of video images in the same way as it might be made about the sufficiency of testimony concerning the identity of a perpetrator. Just as witness testimony on the identification of an accused may be strong or weak, video images will have the same characteristic. Judges and sheriffs may have to decide whether the totality of the evidence reaches the base line of quality required to constitute a sufficiency. This does not involve a decision on the reasonableness of a verdict, but is a straightforward determination of whether there are two sources of evidence which, taken at their highest, are sufficient to enable the fact finder to return a verdict of guilt.

[71] The form of the direction to a jury in cases involving video evidence does require revisal in relation, in particular, to those parts which refer to juries being judges and not witnesses and to those other sections referring to the need for testimony in order to prove identification. In the normal case where there is both eye witness testimony of the events and relatively clear video images, the following would be regarded as acceptable, depending upon the circumstances:

[72] "Witnesses have testified about what they say is happening in the video images and who is shown in them. You have to consider which, if any, of the witnesses is credible and reliable. You may find the testimony of a witness helpful in interpreting what is shown in the images. You are not bound by what each witness says. You can take into account, in determining the facts, what and who you consider to be shown in the images. You can have regard to the images when deciding who did what."

[73] There ought to be no reason to give the jury a *cum nota* warning on the dangers of eye witness identification evidence when referring to the assessment of video images. The reasoning expressed by Hallett LJ in *R* v *Shanmugarajah* (*supra*, following *R* v *Dodson* (*supra*)

as approved in *Downey* (*supra*)) and by the New Zealand Court of Appeal in *Matara* v *R* (*supra*) is sound and ought to be preferred to the contrary views in, for example, *People (DPP)* v *Maguire* (*supra*) and R v *Nikolovski* (*supra*). The jury is not, in this exercise, being asked to look at the testimony of a witness purporting to recognise a person, perhaps a stranger, whom he or he saw at the material time, perhaps in a fleeting glimpse. The jury are being asked to analyse, at their leisure, video images to see if they depict the accused as he appears in court or in photographs taken at an earlier stage in the proceedings. In this respect, the comments about replaying audio tapes in *Hopes and Lavery* v *HM Advocate* (*supra*), where there was a prepared transcript of what was said, are not applicable to the current era where video images can be replayed with facility in the course of a trial, including after the jury have been secluded. That is not to say that, in a given case, the trial judge or sheriff may wish to say something about the quality of the images shown.

[74] Where appropriate directions are also given on the operation of corroboration, there ought to be little difficulty in understanding the basis for a jury's verdict. Where it is one of guilt, they will have been satisfied beyond reasonable doubt, upon the evidence of two sources (which may include the content of the video images), that the accused committed the crime charged.