APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 65
HCA/2017/345/XC

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

following a reference from the Scottish Criminal Cases Review Commission

by

STEPHEN RODGER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: D Hughes; McKinlay & Suttie, Barrhead
Respondent: A Prentice QC (Sol Adv), AD; the Crown Agent

24 August 2017

Introduction

[1] On 12 September 2013, at the Sheriff Court in Glasgow, the appellant and his co-accused, Duncan Stanulis, were found guilty of two charges, which libelled that:

> "(1) on 29 April 2013 at ... Glasgow you ... did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that

> you did enter motor vehicle displaying the registered number ... and follow EM, LG and SN, ... then within a motor vehicle being driven by ... LG and thereafter ... did, whilst one of you had your face masked, present a handgun or imitation handgun at them; CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (2) on 29 April 2013 at ... Glasgow you ... did have in your possession a firearm or imitation firearm with intent to cause a person, namely LG, SN and EM ... to believe that unlawful violence would be used against them; CONTRARY to the Firearms Act 1968, section 16A ...".

[2] On the same date, the appellant and Mr Stanulis were both sentenced to 3 years imprisonment in respect of charge (1) and five years in respect of charge (2); the sentences to run concurrently.

The trial

[3] On 29 April 2013, a flat near Hampden Park was broken into and items stolen. The householder, RM, returned to the flat with his girlfriend, LG, his daughter, EM, and her boyfriend, SN, to find it in a state of upheaval. One of the many items stolen was RM's iPhone. EM tracked the whereabouts of the phone via a computer application. Together with SN and LG, EM got into LG's car and "followed the phone to the west end of Glasgow". They ascertained that the phone was in a block of flats. They stayed in the vicinity of the flats for some hours making observations, watching people including the appellant and Mr Stanulis coming and going. Mr Stanulis was identified by LG as coming out of a SAAB car with another man. During this time, the appellant and Mr Stanulis must have become aware that they were being watched. Mr Stanulis had looked directly at LG's car, first, from the street and, secondly, with binoculars from a window in the flats. The male, who had been with him and who was identified by SN as the appellant, emerged from the flats with a dog and beckoned towards LG's car as it moved off. At about 10.00pm, the appellant and Mr Stanulis began to follow LG's car.

[4] LG, the driver, testified that the incident took place at the junction of Haugh Road and Argyle Street. She had driven the car up Haugh Road, to the junction with Argyle Street. The car, which was being driven by the appellant, was right behind her. It was about 10.00pm and really dark. The traffic lights were at red. She waited at the lights. SN, who was in the back seat, shouted "Oh my god, I think they've got a gun". EM turned round and shouted "Oh my god, they have got a gun. [S], is that a gun?" LG ducked down to steering wheel level. She did not see a gun. The lights changed to amber and she turned left. LG said that the passenger had been wearing a grey hoodie similar to that worn by Mr Stanulis earlier.

[5] CCTV images showed the appellant's car located behind LG's car on Haugh Road at the junction of Argyle Street at approximately 10.04pm.

[6] EM, the front seat passenger, said that, as LG's car was driven down Haugh Road, the appellant's car pulled out of a side street and came up behind it. LG's car was sitting at the traffic lights, waiting to turn right. The appellant's car pulled out and blocked them. LG reversed and drove forward into the left-hand lane. The appellant's car pulled right in behind her and started flashing its headlights. SN, referring to the appellant, said "He's got his visor down so we can't see him". EM turned round, looking over her right shoulder. The appellant's car had kept its full beam on. EM saw a man, with a black balaclava on his head and what she thought was a gun pointing towards her and SN, lean through the middle of the front seats of the car. EM could see his eyes. He was wearing a black balaclava and black gloves. His left hand was on the passenger seat and his right hand was holding a gun, which was pointing straight at her. The gun was black. It was the size of a handgun. A soon as she saw the gun, she shouted "[S], was that a gun?" or "[S], has he got a gun?" SN said "I think so. Just duck down anyway." EM ducked down. She was petrified.

Either she or SN shouted to LG to drive away. LG turned left. In cross-examination, EM was asked whether what she thought was a gun could have been an iPhone (*sic*) being held up to take a photograph. She replied "No, it wasn't that."

[7] SN, the back seat passenger, said that he was in the Army. LG had driven to the lights at the junction. She had pulled into the right-hand lane to turn onto Argyle Street. He told her to change into the left-hand lane, because there were two cars in the right-hand lane and none on the left to block their path. LG changed lanes. The appellant's car did likewise. SN turned round and looked out of the rear window. He had his phone and was video-recording the appellant's car. The driver's visor was down, but SN identified the appellant as the driver. The appellant's car's lights were on full beam for 20 to 30 seconds. SN saw someone come from the back seat of the appellant's car and hold a gun towards LG's car. The gunman, who was wearing a grey tracksuit, black gloves and a black balaclava, pulled himself through the gap between the two front seats. The gun was in his right hand. It was grey or black chrome with a barrel. It was an ordinary handgun, but SN could not tell which type. He could not identify the gunman. He described the gunman's eyes as dark. The gunman was wearing the same colour of grey top as the male he had seen earlier, when he had been watching the block of flats. When he saw the gun, he ducked down, because he thought it was going to be fired. He was frightened and shocked. He said "You serve in Afghanistan and then come back to Glasgow and some arsehole pulls a gun on you". EM had asked him if it was a gun. He had said that he thought it was. He had had a good enough view to see that it was a gun. He rejected the suggestion in cross-examination that the object was a Blackberry phone and that the person who was holding the object was trying to film them. After a couple of minutes, LG turned left onto Argyle Street. SN had

dialled 999. The complainers were hysterical. The operator gave them directions to Anderston Police Office. They drove there.

[8] At the close of the Crown case, the charges of theft by housebreaking, libelled against Mr Stanulis, and reset of the SAAB car, libelled against the appellant, were withdrawn. The appellant and his co-accused did not give evidence, nor did they lead any evidence. The appellant had made no comment when interviewed by the police. The co-accused had made no admissions in his interview. He maintained that he was elsewhere at the material time. This was translated into a formal defence of alibi. However, the minutes do not mention the alibi and it is not clear what happened to it.

[9] The appellant and his co-accused appealed against their conviction on a number of grounds. The first was insufficiency of evidence of identification. This was based on a contention that the eye-witnesses had been contradicted by the images on SN's phone. The sole ground, for which leave to appeal was granted, was whether the sheriff had erred in repelling a submission that leaving both charges before the jury would give rise to double jeopardy. On 9 December 2014, the High Court refused the appeal on the basis that the *species facti* of the charges differed.

SCCRC

[10] In April 2015, the appellant and his co-accused asked the Scottish Criminal Case Review Commission to refer their convictions back to the High Court. On 26 February 2016, the Commission decided not to do so. In June 2016, the appellant applied again to the Commission. On 29 July 2016, the appellant asked the Commission to review the matter, but this was declined.

[11] In September 2016, the appellant made a further application to the Commission; this time raising various points under the headings of "non-disclosure" and "defective representation". The application focused on the non-disclosure by the Crown of CCTV images and statements of the complainers until the morning of the trial. The appellant's representatives were said to have failed to precognose the witnesses, and to make use of the statements to test the complainers' evidence. The Commission did not consider that these complaints raised any new or stateable ground for review.

[12] On 13 October 2016, the applicant contacted the Commission to advise that he had obtained his co-accused's Blackberry from the police. The phone contained a photograph of the rear of the complainers' car, taken at the *locus* at the material time. The significance of the image, according to the appellant, was that it supported his contention that what the co-accused had held up had been a phone and not a firearm. In November 2016, the co-accused applied to the Commission, raising the same point.

[13] On 19 October 2016, the appellant delivered the Blackberry to the Commission's office. After ascertaining that it was the same phone as had been found by the police in the co-accused's flat, the Commission arranged for it to be examined. This revealed a memory file, in the form of a photograph, which had been stored at 22.05pm on 29 April 2013. The image showed the rear of a car, but the number plate was obscured. Digital enhancement was inconclusive, although the car shown was consistent with the make and model of the complainers' car.

[14] On the basis of the photograph, the appellant complained that his solicitor, by not having the phone examined, had represented him defectively. Both the appellant's instructed solicitor, namely Abdullah Hamid, and the solicitor advocate who conducted the trial, namely Iain Bradley, ought to have investigated the possibility that there was

photographic evidence on the phone. The Commission considered that this was an obvious line of inquiry and was "integral to the defence that the applicant was running". The solicitors ought to have sought instructions on the matter and, unless told not to do so, ought to have pursued it. The photograph would have been recovered and this might realistically have produced a different outcome. There had been a police report on the phone produced at the trial. The phone had been examined by the police to see if there was anything incriminating on it. The report contained no reference to a photograph of the car.

Grounds of appeal

[15] The appellant now advances a defective representation appeal. His solicitors had failed: to consider the evidential value of the photograph, to advise him fully, to take his instructions, to present the evidence properly in accordance with his written and verbal instructions and to seek and/or take possession of the Blackberry for examination. There was a failure to lodge the phone as a defence label. It had been suggested in cross-examination that the co-accused had been brandishing a phone instead of a firearm. Presentation of the photographic evidence would have undermined the credibility and reliability of the complainers in cross-examination and supported or bolstered the appellant's credibility.

[16] The decision not to adduce the Blackberry phone had not been a tactical decision. It had constituted a failure to put forward the appellant's case. The non-presentation of the photograph at the trial was not a reasonable exercise of counsel's discretion. The failure to seek and produce the phone meant that the defence was not prepared, presented and conducted in a competent manner. It was presented in conflict with the appellant's instructions.

The Competing Accounts

(i) The Appellant

[17] At the hearing, the appellant testified that what he had told his legal representatives had been consistent throughout the proceedings at first instance. In particular, he had set out this position in the initial letter to Mr Hamid. He had asked Mr Stanulis, who was a friend, to take his phone out and to take a photograph, so that they would have evidence to show to the police if that became necessary. He wanted Mr Stanulis to concentrate, in particular, on the registration plate of the car. At the time, he was not sure if a photograph had been taken, as there had been no flash. However, he had had a conversation with Mr Stanulis and he (Stanulis) had been adamant that he had taken a photograph. This was when the appellant had been on remand. He appeared to waiver somewhat in his evidence, in saying at one point that he had told Mr Bradley only of the possibility of a photograph having been taken. In his statement to the Commission (Reference para 56) he said that he had raised the issue of examining the phone with Mr Bradley on the first day of the trial (see also para 67).

[18] The appellant maintained that he had not given evidence for two reasons. First, it was his right to remain silent. He had thought that the jury would not believe the complainers. Secondly, if he had gone into the witness box and attacked the character of the complainers, then he was under the impression, which he attributed to advice from Mr Bradley, that his own character would be attacked; in particular, that his substantial record of criminality would be revealed. He had thought that Mr Stanulis was running the same defence. He did not know why Mr Stanilus had decided to change that defence. Initially the appellant had been under the impression from Mr Stanulis that Mr Stanulis's

solicitor was going to arrange for the phone to be examined, but this changed when the solicitor changed.

[19] Throughout his evidence, the appellant was keen to emphasise the need for his solicitors to do their job properly and to carry out the appropriate investigations. He did not consider that he had been at fault in any way.

[20] When the jury had returned their verdict, Mr Stanulis had broken down into tears and said that he had definitely taken a photograph. There was no truth in the evidence that Mr Stanulis had been wearing a balaclava or a hood. The appellant had not been influenced by Mr Stanulis's position in relation to the phone.

[21] Under cross-examination, the appellant referred to speaking to Mr Bradley about giving evidence. His conversation had, according to the appellant, been overheard by Mr Stanulis's solicitor, KM. She had asked him directly if he would consider Mr Stanulis's position, which had become that he had not been in the car at all. However, the appellant still believed that the jury would come back with a not proven verdict. He had no reason to incriminate Mr Stanulis. He did not give evidence because he could not trust himself not to say something about the complainers. He knew that he would get irate and annoyed and attack their character. He did not decline to give evidence because he would compromise Mr Stanulis's position.

[22] Mr Bradley had not advised him to incriminate Mr Stanulis. He had asked the appellant to consider giving evidence. It was no concern of the appellant that, if he had given evidence, he would have to have said who else had been in the car at the time. He had discussed the case with Mr Stanulis whilst he had been on remand. Mr Stanulis had told him that he had asked his solicitors to have the phone examined. The appellant denied telling Mr Hamid that it had not been possible to take photographs on the Blackberry.

(ii) Mr Hamid

[23] Mr Hamid testified that he recalled visiting the appellant in prison on four or five occasions. He had also received letters from him. Any letters that were received would be with the papers. He did not have them. When he visited the appellant in custody he was adamant that Mr Stanulis had had a Blackberry and not a firearm. He had been attempting to take pictures of the other vehicle, or rather the occupants of the other vehicle. It was "crystal clear", from what the appellant had said, that no photographs had been taken, as the car had been moving and it was dark at the time. It was not true that the position was uncertain and that the appellant had later firmed up to the effect that a photograph had been taken. His position that there was nothing on the phone had been clear.

(iii) Mr Bradley

[24] In evidence, Mr Bradley said that he had first met with the appellant in Low Moss. He had discussed the scope of the Crown case with him. The appellant had admitted being the driver. He said that Mr Stanulis had been a passenger in the back seat of the car and that he had a Blackberry, with which he had been attempting to take a photograph. He did not say that the purpose of this was to give any photograph to the authorities. The appellant did not have an answer to the question of why, in the first place, he had not phoned the police about the activity of the complainers.

[25] The position of the appellant after trial had been that he had been aware that a photograph had been taken, but he had not made that clear at the time of the trial. He had only said that Mr Stanulis had been attempting to take a photograph. Mr Bradley had not been told that any photograph had been taken until the appeal stage. When he was told that one existed, he was "dumbfounded" or "flabbergasted". He thought at first that there might

be a fresh evidence appeal, but then ascertained that the appellant had known about the photograph at the stage of the appearance on petition. It was "categorically" the position that the appellant had never said that a photograph had been taken. It was only after the grounds of appeal had been lodged, and the appeal had gone through the sift, that this matter was raised.

[26] It had been clear that the appellant would not be giving evidence from a very early stage in the case. This was because the appellant did not wish to incriminate Mr Stanulis. There had been a discussion in the cells, after the conclusion of the Crown case, during which Mr Bradley's advice to the appellant had been that he would have to give evidence. Having reviewed the testimony of the complainers, Mr Bradley had advised the appellant to give evidence. He regarded the appellant as an intelligent man, who would be "pretty good" in the witness box. He recalled meeting in the cells when the solicitor for Mr Stanulis had been consulting with her client. This had been after the refusal of the no case to answer submission, when the sheriff had asked Mr Bradley if there would be any evidence. He had replied that there would be, but had later returned, the appellant having declined to testify, and said that there would be no evidence. This had been awkward, as the procurator fiscal then had to make a speech unexpectedly. Mr Bradley did not think that the case against the appellant was a strong one, because of the work which had been done to undermine the credibility and reliability of the complainers by referring to the different accounts which each had given, the inconsistencies with their statements to the police and what had been shown in the recorded images. His advice had been that giving evidence would be a good idea. Mr Bradley had no recollection of advising the appellant of the possibility that his criminal record might be opened up.

[27] In relation to the police report about the Blackberry, Mr Bradley confirmed that he had not known that there was anything on the phone, since the appellant had not told him that there was. If he had told him that there had been something on the phone, he would have done something about it. The appellant had not told him why Mr Stanulis had been taking a photograph. The registration number of the car would not matter if nothing was to be done with the photograph. The photograph would have shown that Mr Stanulis had been there at the time. The appellant did not want to make the situation worse for Mr Stanulis, who had created the problem in the first place by stealing the complainers' phone. There was a compromising image on the Blackberry which Mr Stanulis did not want the authorities to know about. At the point of being flabbergasted, the relationship of trust between agent and client had broken down.

Submissions

[28] The appellant maintained that this was a case of inadequate pre-trial preparation. Mr Bradley had been aware, according to the appellant's evidence, of the use of a phone by Mr Stanulis. Mr Bradley should have known that there was a strong likelihood that a photograph existed. He should have sought access to the phone for the purposes of examination. The photograph would have supported the appellant's account of events, which was integral to his defence, and bolstered the credibility of that account. There was clear and cogent evidence of a failure to present the appellant's case properly and as instructed (see *Garrow* v *HM Advocate* 2000 SCCR 772 at paras [12]-[14]; *Hemphill* v *HM Advocate* 2001 SCCR 361 at para [20]). There would have been a reasonable possibility of a different outcome and therefore a miscarriage of justice could be said to have occurred

(*Griffith* v *HM Advocate* 2014 JC 141). It was accepted that the appellant could only succeed if his account of what he had told Mr Bradley was accepted by the court.

[29] The advocate depute referred to the test in *Grant* v *HM Advocate* 2006 JC 205. The essence of the appellant's defence had been put to the complainers. Mr Hamid had said it had been crystal clear that there was no image on the phone and thus it would have been speculation to investigate that matter. Mr Bradley said that there was no basis upon which to carry out any such investigation. The existence of the phone would have assisted the Crown case against Mr Stanulis. The appellant had been aware from the outset of the position and had kept the information to himself. The conduct of the solicitors in the case had been unimpeachable. The evidence, in any event, would have been of little probative value beyond drawing in Mr Stanulis.

Decision

[30] The test for a successful appeal based on defective representation is set out in *Grant* v *HM Advocate* 2006 JC 205, within the context of the appellant having to establish that the conduct of the defence resulted in a miscarriage of justice. The Lord Justice Clerk (Gill) said (at para [21]) that this ground could only succeed where the appellant's defence:

> "was not presented to the court, and he was therefore deprived of his right to a fair trial, because counsel either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it…".

It was stressed (at para [22]) that the ground could not rest on strategic and tactical decisions reasonably and responsibly taken by trial counsel.

[31] The starting point is that the appellant had told Mr Hamid and Mr Bradley that he had been in the car with Mr Stanulis. Mr Stanulis had a Blackberry and not a gun. He had pointed the phone at the complainers or their car. That much is not in dispute. The

proposition for the appellant is that this fact alone ought to have prompted an examination of the phone, which was then in the possession of the police, in order to see whether a photograph existed. The court does not accept that this follows.

[32] Defence preparation can be a delicate matter. Steps which might result in providing proof, or prompting the authorities to find proof, that the client was at the scene of the crime are often to be avoided especially where, as in this case, there was a prospect of the Crown failing to establish that presence because of perceived weaknesses in the complainers' evidence of identification. Drawing the attention of the police to the fact that there was something significant on Mr Stanulis' phone (which the police had not found and against a background of Mr Stanulis at one point running an alibi) carried an acute danger of establishing Mr Stanulis' presence in the car and also, by reference to the evidence linking him to the appellant, the appellant's presence as driver. Such a course would have been foolhardy, at least in the absence of specific instructions to carry out such an exercise, especially given the limited probative value that the existence of a photograph would carry (see *infra*).

[33] The appellant goes further and says that, by or at the start of the trial, he had told Mr Bradley that Mr Stanulis had told him that a photograph existed or might exist. Both Mr Hamid and Mr Bradley are adamant that the appellant had not told them that a photograph existed. There is no material whatsoever to support the appellant's contrary version. It is of some note that the court was shown no contemporaneous material vouching the appellant's pre-trial instructions. There is no precognition of the client which, at least at one time, was the cornerstone of defence preparation and which would have demonstrated what his position had been. There are no notes of meetings with the client. The letter, which the appellant maintains he wrote to Mr Hamid, is not produced. It was not found by the

Commission (fn 74). In the absence of such material, the court does not accept the evidence of the appellant that he told his solicitors that a photograph existed or suggested to them that the phone should be examined.

[34] The appellant was a friend of Mr Stanulis. Contrary to his testimony, the court is satisfied that the appellant would not have done anything to compromise Mr Stanulis' position and, in particular, to put Mr Stanulis in the car. Although the appellant maintains that he thought Mr Stanulis was running the same defence as he (the appellant) was, there is no support for this contention. On the contrary, Mr Stanulis' pre-trial position was that he was elsewhere at the material time. His position at trial may not have involved the alibi lodged, but it reflected a contention that there was insufficient evidence to prove his presence in the car.

[35] Mr Bradley's position that the appellant did not wish to incriminate his co-accused is consistent with his line in cross-examination, which made no mention of Mr Stanulis in the car, and the absence of any notice of intention to lead evidence incriminating him. It is also consistent with the fact that the appellant declined to testify on his own behalf. The court is satisfied that the appellant's position pre-trial was that he was not going to give evidence. The reason for that was that he could potentially strengthen the case against Mr Stanulis.

[36] It is not disputed that Mr Bradley advised the appellant that it was a matter for him to decide whether to give evidence. However, the court is satisfied that, as Mr Bradley said, he had advised him positively to do so. That would have been the obvious course of action once the no case to answer submissions had been rejected. At that point, it is important to note, there was no evidence before the jury that the passenger in the appellant's car had been holding a phone and not a gun. The fact that this had been put to the witnesses in cross-examination would have been of no moment in the absence of evidence to support it.

At the close of the Crown case, notwithstanding the optimism of the appellant, two out of the three occupants of the car had testified to seeing the passenger with a handgun and the third spoke to the remarks about a gun as part of the *res gestae*. The odds would have been against both accused, in relation to the events themselves and leaving aside any issue of identification, if the evidence remained, as it did, solely to one effect.

[37] Evidence that the passenger had a phone and not a gun could only emerge, in the circumstances of this case, if the appellant (or technically Mr Stanulis) testified to that effect. Production of the photograph in isolation would have established very little without testimony to put it into proper context. The contention that it would have bolstered the appellant's position or credibility cannot succeed where he had no position, given his refusal to present one. There was no testimony from him which might be bolstered by the production of the photograph.

[38] In short, if the appellant had wished to advance a positive defence based upon it being a phone rather than a gun which had been presented, he was bound to give evidence to that effect. He declined to do so. His decision meant that the jury could never know what his version of events was. It was the appellant himself who cut off this line of defence, contrary to the advice to give evidence. In these circumstances, the case of defective representation is not made out.

[39] Assuming, as appears to be the case, that a photograph was taken of the rear of the complainers' car by Mr Stanulis' phone at about the time of the incident, the final question is whether, as the Commission have concluded, this would have had a material bearing on the jury's deliberations. The court does not consider that the photograph's existence undermines the credibility or reliability of the complainers' testimony to the extent that it is demonstrated that a miscarriage of justice has occurred. The fact that a photograph of the

car was taken, and that Mr Stanulis may have taken it, at some point, does not detract from the testimony that, either before or after the photograph, Mr Stanulis pointed a gun at the complainers. In short, the probative value of the photograph is low, other than in the context that, had it been produced, it would have linked Mr Stanulis and, though the circumstantial evidence, the appellant to the crime.

[40] The appeal is accordingly refused.