APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 44
HCA/2018/000008/XC

Lady Paton
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MALCOLM

in

APPEAL AGAINST CONVICTION

by

MALCOLM CUMLIN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg (sol adv); Paterson Bell Solicitors
Respondent: R Goddard (sol adv), AD; Crown Agent

9 August 2018

[1] By verdict of a jury the appellant was convicted of two charges of assault upon two women in a hairdressers in Glasgow. Evidence was led from a number of witnesses. A male wearing a hoodie entered the premises and lunged at one of the customers. Her hairdresser instinctively put out her hand, then noticed that it was covered in blood. She

required hospital treatment to repair a tendon, and has been left with a visible unsightly scar.

[2] The customer ended up on the floor, where she saw the neck of a lemonade bottle. About eight days later she identified the appellant as the assailant by reference to photographs, including from a photograph on an emulator sheet. She made reference to "distinctive" eyebrows. However when she came to give evidence before the jury she was unable to identify anyone in court as the attacker. She conceded that she may have made a mistake when she identified him from the photographs. She was a lot less sure, and thought that the eyebrows in the photographs differed from those of her attacker. She stated that she did not want to come to court to give evidence. In cross-examination it was put to her that she was saying that the man in the dock was not the person who came into the shop – she answered "I don't think so". At the appeal hearing the court was told that, according to a note taken at the time, earlier she said that the man in the dock did not look like the assailant.

[3] Other witnesses gave certain descriptions of the man, but only the injured customer made an identification of the appellant as the responsible person. There was evidence that the broken lemonade bottle was not there before the attack. Forensic expert evidence was to the effect that the major contributor of DNA found on the mouthpiece of the bottle was that of the appellant. The witness was able to conclude that the appellant had been drinking from the bottle, but not when he did this.

[4] The sheriff refused a no case to answer submission. Leave to appeal was refused in respect of a proposed challenge to this decision. Leave was granted for the proposition that the sheriff erred in failing to direct the jury that before there could be a prima facie case against the appellant, they would have to discount the evidence given in court "that the

appellant was not the assailant" and accept the evidence as to the earlier identification of him based upon photographs. In granting leave, the first sift judge said that it is arguable that the sheriff should have given specific directions on the evidence, in particular, that if the jury rejected certain evidence (the identification and/or the DNA evidence) they were bound to acquit.

[5] On behalf of the appellant it was accepted that the evidence of the earlier identification was available to the jury as evidence pointing to the involvement of the appellant. Reference was made to *Muldoon* v *Heron* 1970 JC 30, and *Sangster and another* v *HM Advocate* 2017 SCCR 119. However, unless the identification was accepted by the jury, there was an insufficiency of evidence. Under reference to *Niblock* v *HM Advocate* 2010 SCCR 337 it was submitted that it was incumbent upon the sheriff to explain this evidential significance to the jury. The sheriff did not do so. He should have told the jury that in order to convict they would have to discount the evidence in court that the man in the dock was not the assailant, and accept the evidence from the customer and from the police as to the earlier identification from the photographs. It is accepted that it was open to the jury to do this; the complaint is to an alleged omission in the charge.

[6] Echoing the remarks of the sifting judge, a similar submission was made in respect of the evidential significance of the DNA evidence. There was a failure to direct the jury that if either of these two incriminatory adminicles of evidence was not accepted, there had to be an acquittal. In summary it was submitted that there had been a misdirection by omission which amounted to a miscarriage of justice.

Decision

[7] It is clear that the identification and DNA evidence were the building blocks of the Crown case. In his speech to the jury the procurator fiscal depute said that in order to convict, the jury would have to accept both pieces of evidence. Thus they would have to find that the customer was "lying or for some other reason mistaken when she took back her earlier identification."

[8] We are not persuaded that the jury was misdirected. The jury was given a number of standard directions of relevance in the present context. They were told that they could accept some parts of a witness's evidence and reject other parts. Plainly this could include acceptance of the evidence that the appellant had been identified as the assailant eight days after the incident, and rejection of the retreat from that position – see *Sangster* (cited above) paragraph 30. The jury was given the standard directions on the need for evidence from two separate sources pointing to the guilt of the accused, and that the sources could be of differing types, namely eyewitness and circumstantial evidence (both of which are in play here). The jury was told that they would have to acquit if anything said by a witness raised a reasonable doubt as to the guilt of the accused. The charge included the standard directions on the need to take care with identification evidence. It was stressed that the identification evidence was an important aspect of the case.

[9] Some judges may well have given the additional directions desiderated on behalf of the appellant, but that is not the touchstone for a miscarriage of justice arising from a misdirection by omission. It must be shown that they were necessary for a proper verdict. The jury heard all the evidence and both speeches in advance of the sheriff's charge. The jury was told by the prosecution that its case depended upon acceptance of both the identification and the DNA evidence. Members of juries can be expected to use their

intelligence and common sense. We refer to the sentiments expressed by the LJG (Carloway) in *Sim* v *HM Advocate* 2016 JC 174 at paragraph 32, including "…a charge is not to be scrutinised as if the jury had not heard the evidence and the speeches". The key importance of the identification and DNA evidence will have been obvious to the jury. The directions as to corroboration were sufficient for the jury to appreciate the significance of rejecting either piece of evidence. The charge was also sufficient to allow the jury to assess the evidence that on an earlier occasion the witness had identified the appellant and, in the light of her retraction, to decide whether to accept or reject that identification evidence. Some reliance was placed upon observations made in the case of *Niblock* (cited above). Even if the witness's evidence that she had earlier identified the appellant is to be treated as a matter of adoption, as opposed to direct evidence of the kind discussed in *Sangster*, the omission in the charge in *Niblock* was of a different level of importance from any alleged gaps in the present charge. We gain little or no assistance from that decision.

[10] For the above reasons the court is not satisfied that there has been a miscarriage of justice and accordingly the appeal is refused.