



SHERIFF APPEAL COURT

**2021 SAC (Crim) 1
SAC/2020/000201/AP**

Sheriff Principal D C W Pyle
Sheriff S Murphy QC
Sheriff A L MacFadyen

OPINION OF THE COURT

delivered by SHERIFF A L MacFADYEN

in

STATED CASE

by

MARCUS WISHART

Appellant

against

PROCURATOR FISCAL, KIRKCALDY

Respondent

**Appellant: Ms Hay, advocate; Faculty Services Limited for Ward & Co Perth
Respondent: Ms Edwards QC AD; Crown Agent**

1 December 2020

Introduction

[1] The appellant was convicted at the Justice of the Peace Court at Kirkcaldy of contravening sections 170(2) and (4) and 170(3) and (4) of the Road Traffic Act 1988 as the driver of a motor vehicle which had been involved in an accident causing damage to another car on a road or other public place, namely the car park at Kirkcaldy Leisure Centre,

Esplanade, Kirkcaldy on 14 September 2018, by failing to stop and give the necessary, relevant information to any person having reasonable grounds for so requiring; and, having failed to do so, by failing to report the accident to the police as soon as reasonably practicable and in any case within 24 hours. In refusing this appeal by stated case, we indicated that we would set out our reasons in writing.

[2] The conviction rested on proof of the occurrence of an accident, namely the collision between two motor vehicles. There were no eye witnesses. There was however Closed Circuit Television (“CCTV”) footage contained on a disc which, when taken with other evidence, proved that a collision occurred between the appellant’s van and a parked car in a car park.

[3] That footage was produced by the Crown and played at the trial without objection from the defence. Witnesses watched it, were asked questions and gave evidence about it. CCTV images are real evidence. In a criminal trial the provenance of real evidence must be established. One of the methods of that establishment, unique to CCTV images, is by way of a party lodging a certificate authorised by the Criminal Procedure (Scotland) Act 1995, section 283.

[4] Section 283(1) and (2) of the 1995 Act are in the following terms:

“Evidence as to time and place of video surveillance recordings.

- (1) For the purposes of any criminal proceedings, a certificate purporting to be signed by a person responsible for the operation of a video surveillance system and certifying—
- (a) the location of the camera;
 - (b) the nature and extent of the person’s responsibility for the system; and
 - (c) that visual images (and any sounds) recorded on a particular device are images (and sounds), recorded by the system, of (or relating to) events which occurred at a place specified in the certificate at a time and date so specified, shall, subject to subsection (2) below, be sufficient evidence of the matters contained in the certificate.

- (2) A party proposing to rely on subsection (1) above ('the first party') shall, not less than 14 days before the diet, serve on the other party ('the second party') a copy of the certificate and, if the second party serves on the first party, not more than seven days after the date of service of the copy certificate on him, a notice that he does not accept the evidence contained in the certificate, subsection (1) above shall not apply in relation to that evidence."

The Crown timeously served on the appellant a copy of what purported to be a certificate under that section in respect of the CCTV footage. No counter-notice under section 283(2) was served by him on the Crown. The notice was produced without objection at the trial.

[5] The appellant made a submission of no case to answer under section 160 of the Criminal Procedure (Scotland) Act 1995. The part of the submission relevant to this appeal was to the effect that the provenance of the CCTV disc had not been "properly made out".

The section 283 certificate was deficient in several respects: it did not lay out all of the information required by the section and therefore did not prove the provenance of the CCTV footage. Without that proof, there was insufficient evidence to justify a conviction.

[6] The Crown opposed that submission, submitting to the Justice that he should take the prosecution case at its highest. That included the evidence of all the witnesses and the CCTV evidence. The section 283 certificate had been served on 21 September 2018 and no notice had been received from the appellant saying that he did not accept the matters within.

[7] The Justice repelled the submission of no case to answer, saying that the necessary details required by section 283(1) were contained within the certificate and the reference to "Alan Shields, Fife Council" [explained later in this judgment] did not render the certificate invalid and the serial number given on the certificate matched up with the disc played in court.

[8] He noted that no notice disputing the CCTV had been served within the requisite time period and found that there was no issue with the provenance of the CCTV footage.

[9] No defence evidence was led and the Justice found the appellant guilty of both charges. No appeal has been marked against sentence.

[10] The appellant has appealed against conviction by stated case. There were two grounds of appeal. Only one of those was argued before us. It was to the effect that given that the certificate did not contain all of the relevant information laid down in section 283, in particular in respect of the nature and extent of the signatory's responsibility and the detail of where the images were recorded, the provenance of the disc was not properly made out as routine evidence and was therefore not available as a source of evidence to establish the facts sought to be proved by the Crown.

[11] The Crown opposed the appeal.

[12] The issue at the appeal therefore was whether the Justice had erred in repelling the submission of no case to answer for the appellant.

Submissions

Appellant

[13] At the hearing before us, counsel for the appellant accepted that CCTV footage could establish the *actus reus* of an offence. However, this case failed at the stage before that as the provenance of the CCTV images required to be proved or otherwise admitted into the evidence before it could even be considered, *Gubinas v HM Advocate* 2018 JC 45 and *Shuttleton v Orr* 2019 JC 98. In light of the contents of the certificate that first essential step had not been taken.

[14] Otherwise, there was insufficient evidence of provenance of the CCTV footage.

[15] She therefore submitted that the Justice had erred in repelling the section 160 submission and this appeal should be granted.

Respondent

[16] The Crown opposed the appeal. The advocate depute accepted that there was no obligation on the defence to draw attention to any deficiencies in the certificate prior to the commencement of the trial, *Hunter v Cottam* 2011 SCCR 130.

[17] However, the evidence of the CCTV footage had been led without objection and the challenge made only after the Crown had closed its case by way of the submission under section 160.

[18] The advocate depute submitted that in any event the certificate did provide all of the information required by section 283. Accordingly, no timeous intimation of non-acceptance of the evidence contained in the certificate having been given, the certificate was evidence in the trial and provided sufficient evidence of provenance of the CCTV recording.

[19] The Crown had a fall-back position. Even if the certificate were excluded from the evidence, there had been sufficient evidence of the provenance of the footage in the evidence of the witnesses.

[20] The appeal should be refused.

Decision

[21] It was common ground that if the CCTV footage had not been before the court there would have been insufficient evidence to justify the appellant's conviction on either charge. Before real evidence, which CCTV footage is, can be considered by the court in a trial, its provenance must be established. That is achieved by evidence, agreement between the parties or certification, such as a section 283 certificate. The issue was whether the provenance of the CCTV footage relied on by the prosecution in this case had been

established. It is significant that it was shown without any objection being taken on behalf of the appellant.

[22] Further, the section 283 certificate said to certify the provenance of the CCTV footage had been lodged during the case for the prosecution without objection.

[23] That absence of objection was a critical difference from the situation in *Hunter v Cottam*. It is quite correct that in that case it was said by the High Court of Justiciary that section 283(2) did not impose any responsibility on the party upon whom service was made intimating non-acceptance of the evidence in the certificate to draw attention to deficiencies in the certificate itself. However, that has no bearing on the correct procedure to follow in the trial itself.

[24] In order to prevent the CCTV footage being viewed and considered by the court, objection should have been taken when the Crown attempted to show it and lodge as a production the section 283 certificate. That was the procedure followed in *Hunter v Cottam*. The appeal in that case then turned on the decision of the sheriff to grant an adjournment to allow time for the Crown to rectify the difficulty that had emerged.

[25] In the instant case, the appellant having failed to make any objection to the viewing of the footage or the court's ability to rely on the certificate during the prosecution case, the CCTV images were shown to the witnesses and the court. That is to say the CCTV footage became real evidence in the case. The Justice was entitled to view it and decide what it showed, *Gubinas*. Further it was also commented on in evidence by Miss Mayhew and Police Constable Paterson, as recorded by the Justice in his stated case and narrated below.

[26] Was the failure to raise the issue of the alleged deficient nature of the certificate by way of objection a mere technical question, given that it was raised in the course of the trial by the making of a section 160 submission?

[27] In our view, that was more than a mere technical question. Had objection been taken when the Crown attempted to play the CCTV footage or to lodge the certificate, then, if after considering any objection the Justice had ruled that the certificate did not establish the provenance of the footage, that might not have been the end of the matter.

[28] Other steps might have been open to the Crown, such as asking more searching question of Ms Mayhew and Police Constable Paterson regarding the footage. Police Constable Paterson could have been asked in more detail regarding how the footage had come to be recovered by the police. Ms Mayhew might have been asked in more detail to identify the locus and details of where and when she had parked her car. That is to say the Crown might have been able to fill any alleged gap in the sufficiency of its case.

[29] No objection having been taken, the CCTV footage formed part of the evidence at the trial. Whether or not the certificate established its provenance, ie where and when the images were recorded, depended on its terms.

[30] That leads to the next issue, namely whether the section 283 certificate was actually deficient in any way. That is to say: did it provide sufficient evidence of the provenance of the CCTV footage?

[31] Section 283 sets out the factual matters which can be established as evidence by the service of a certificate which is not challenged. Rule 27.2 of the Act of Adjournal (Criminal Procedure Rules) 1996 provides that a certificate under section 283(1) shall be in Form 27.2. The operative section of Form 27.2 is blank and the author is prompted to complete it by these words in parenthesis:

“(here insert the matter which is being certified and specify enactment in respect of which evidence is being given.)”

[32] The certificate which was produced at trial was headed: "POLICE SCOTLAND CERTIFICATE IN TERMS OF SECTION 283 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995" It runs in the name of "Adrianus Hendricus Segerius, duty manger" identified as a person responsible for the operation of a video surveillance system and a person who may sign a certificate under section 283. It bears to have been signed by Mr Segerius on 21 September 2018.

[33] He certified the following matters in three numbered paragraphs:

I That the camera is located at 'Camera 6, Kirkcaldy Leisure Centre Esplanade KY1 1HR.'

II That the nature and extent of his responsibility for the system is 'Alan Shields, Fife Council.'

III That the visual images recorded on the video tape(s)/computer recording medium/computer hard drive: PS-2018 0914-3905 are images recorded by the system of events which occurred at 'Serial Number 16876' on '14/09/18' at 11.52-12.04."

It is clear that the numbered paragraphs I, II and III reflect the requirements of section 283(1)(a), (b) and (c). It is also clear that notwithstanding prompts in the form to insert the correct details at paragraph II and in paragraph III the location of the recording of the images, the compiler of the certificate had not done so. However, in our view those failures did not invalidate this document as a certificate under section 283. So long as the information required by the section was contained somewhere in the document, it was in fact a certificate under section 283.

[34] Reading of the certificate conveys the following:

- Adrianus Hendricus Segerius was a person responsible for the operation of a video surveillance system and a person who may sign a certificate under section 283 of the 1995 Act.

- The location of the camera is clearly identified - Camera 6, Kirkcaldy Leisure Centre Esplanade KY1 1HR. That is to say it identifies the location of the camera as at Kirkcaldy Leisure Centre.
- While the nature and extent of Mr Segerius's responsibility for the video surveillance system cannot be gleaned entirely from numbered paragraph II, the relevant information is described in the first paragraph of the certificate and in the words "Fife Council" in paragraph II.
- The storage information and identification of the images in the holder's system are described.
- While the details of the place where the video images occurred cannot be found on the face of paragraph III, it does identify a serial number, date and specific time of the images. However, the place where the images occurred can be inferred from the location of the camera, described in paragraph I.

The purpose of the lodging of such a certificate is to provide sufficient evidence of the facts contained therein, unless challenged timeously by notice under section 283(2). The underlying, pragmatic purpose is to save the time and expense of attendance at court of public servants responsible for public space CCTV systems or members of the public, such as shopkeepers who have CCTV systems installed in their premises, to give what is straightforward, uncontroversial evidence. That is always subject to the safeguard of timeous non-acceptance provided for in section 283(2).

[35] It seems that this document was carelessly filled in. However, if it is read as a whole, all of the necessary information required by section 283(1) is contained in it and it meets the requirements of that section sufficiently to amount to a certificate thereunder.

[36] It was not challenged in terms of section 283(2), so there was the necessary evidence of provenance of the CCTV images before the court at trial. That is sufficient to justify refusal of the appeal.

[37] However, as submitted by the Crown, the matter did not end there, when the evidence of the witnesses is considered. In the stated case, the Justice narrated the relevant evidence as follows:

[38] Samantha Mayhew, the owner of the parked car, gave evidence. She said that the CCTV footage showed the appellant driving his van close to her car which she had parked on 14 September 2018 in the car park outside her place of work, Kirkcaldy Leisure Centre. After the appellant had gone forward and back into his parking space a few times he got out of the van and looked at her car as if he had hit it. She was called out by reception at the Leisure Centre and was asked to move her car. She went out to the car park. The appellant was then present in his van but said nothing. She moved her car and returned to work. When she got home after 6.00pm, she discovered that her car had suffered a new big scrape on the offside. She inferred that this had been caused by the appellant's driving, as seen on the CCTV footage. She called the police.

[39] Police Constable Alistair Paterson gave evidence. He was shown the CCTV footage and said that it showed the appellant driving his van and trying to force it out of a space which it could not get through. He identified the appellant and his vehicle on the CCTV footage. He confirmed the presence of Ms Mayhew's car on the footage.

[40] Police Constable Paterson said that on 20 September 2018 he picked up a routine appointment, presumably meaning an instruction to deal with Ms Mayhew's complaint regarding the damage to her car, interviewed her, did not see her car, and noted a statement from her. He could not get the CCTV for the incident until the next day.

[41] Police Constable Fraser Wilson gave evidence, was shown the CCTV footage and identified the driver of the van on the CCTV footage as the appellant. When he and his colleague called upon the appellant at his home, he saw the white van from the CCTV footage parked close to the appellant's house.

[42] That evidence from the witnesses established that the CCTV footage had been taken at the Kirkcaldy Leisure Centre Car Park, recognised by Ms Mayhew and taken on the date of her discovery of previously non-existent damage to her car, namely 14 September 2018. Police Constable Paterson's evidence that he could not recover the CCTV until the following day led to the inference that he did uplift it the following day.

[43] In *Gubinas* at paragraph 54 the Lord Justice General said:

“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.”

[44] In our view, even if the provenance of the CCTV images had not been established by the section 283 certificate, there was sufficient evidence thereof from the combination of the evidence of the witnesses Mayhew and Paterson.

[45] In all the circumstances, the Justice's decision to refuse the section 160 motion was correct and this appeal failed.

[46] We therefore answered the questions in the stated case as follows:

Question 1, so far as the ground of appeal before us was concerned, in the affirmative; and

Question 2 in the affirmative.