APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 33
HCA/2023/617/XC

Lord Justice General
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD CARLOWAY the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

DARREN FINNEGAN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: IM Paterson (sol adv); Paterson Bell (for Jim Friel, Glasgow)
Respondent: CM Murray AD; the Crown Agent

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25 July 2024

Introduction

[1] The ground of appeal is that the sheriff failed to provide the jury with a balanced charge. The issue was one of identification. It is submitted that the sheriff failed adequately to deal with a prior statement which had been put to one of the witnesses and failed to warn

the jury about the problems with identification evidence generally in circumstances involving a fast moving traumatic event.

Background

[2] On 26 October 2023, at the Sheriff Court in Glasgow, the appellant was found guilty, after a trial lasting only two days, of the following charges:

> "(1) on 29 November 2022 at … Glasgow … being a public place, you … did, without reasonable excuse or lawful authority, have with you an offensive weapon, namely a knife; CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, section 47(1) …;
> (3) on 29 November 2022 at … Glasgow … you … did assault Lee McDaid … and did repeatedly strike her on the body with a knife, to her injury".

Charge (2), which involved the stabbing of the partner of one of the principal witnesses, namely Charlene Keith, was found not proven.

[3] On 16 November 2023, the sheriff imposed a 6 year extended sentence; the custodial element being 4 years.

Evidence

[4] On the evening of 29 November 2022, Lee McDaid and Charlene Keith had been in their ground floor flats. There was a commotion outside the common close; it being reported that some female teenagers were trying to gain entry.

[5] According to Ms Keith, she and Ms McDaid went to the end of the path outside the close to speak to two females who were causing the commotion and appeared to be intoxicated. A number of other females began to arrive on the scene. Suddenly, a male ran towards the group with a hood up over his head. He had a knife and was making stabbing motions. One of the females, who had been causing the commotion, shouted "F...ing stab

them Darren" along with "Stab the Paki"; a reference to Ms Keith's partner, who is an Albanian. Ms Keith described the attacker holding the knife at head height and aiming both over and under arm blows. At some point, the blade of the knife broke and the group of females and the appellant ran off. Ms Keith identified the appellant at an electronic identification parade (VIPER) on 18 April 2023.

[6] In cross-examination, Ms Keith explained that the hood did not completely cover the appellant's head. She could see the top of his head. She had not known the appellant previously, but had been shown a photograph of him from Snapchat by her sister. Her sister had asked her if this was the man who had been involved and she had confirmed that he was. The appellant was the boyfriend of one of the females trying to enter the close. When it was suggested to Ms Keith that her identification was wrong, she replied "You are not going to forget the face of a man who tried to kill my children's father".

[7] The only other witness was Lee McDaid. She also spoke of going to confront the females who were trying to get into the close. She described a man running towards the group shouting. She had put her hand up to prevent being struck by the knife which the man was wielding. He was raining blows down on her arm and striking her in an upwards direction. She ended up with two scratches down the sleeve of her jacket and a cut on her upper arm, together with a bruise on her wrist. Ms McDaid spoke to the "Stab the Paki" remark. In due course, on 14 March 2023, she identified the appellant from an emulator sheet.

[8] In cross-examination, Ms McDaid said that she had not known the appellant previously. A police statement was put to her concerning the use of a baseball bat by Ms Keith's boyfriend. She had testified to the boyfriend having a toy baseball bat and using it to break the knife. However, she accepted that there was no mention of the use of a

baseball bat in the statement. She had referred to injuries in her evidence, but these were not mentioned in her statement. She explained that, at the time of the statement, she had just been attacked by a man with a knife, which had left her with post-traumatic stress disorder. When it was suggested to her that her identification was mistaken, she replied "Absolutely not".

Charge

[9] The sheriff directed the jury specifically on the effect of prior inconsistent statements. He said that these may have a bearing on the jury's assessment of that witness's evidence. Ms McDaid had accepted that she had said what was recorded in her statement to the police. The jury had to decide whether the differences were such as to undermine her credibility or reliability. The sheriff commented that no one was likely to give precisely the same account on different occasions separated by many months. There may be a good explanation for a difference. When someone had suffered a traumatic event and they were asked to recount it later, there may be a lack of coherence or gaps in memory which change over time. It was for the jury to determine how to address this and to decide what impact the difference had on the evidence given by the witness in court.

[10] The sheriff dealt with the remark "F…ing stab him, Darren". He described this as part of the *res gestae*; the shout therefore being part of the events which were happening at the time. This was an independent piece of evidence which could corroborate other testimony.

[11] The sheriff dealt with the challenges to the identifications. These were that the incident had taken place over a short period of time. Ms Keith's identification was tainted by her having been shown a photograph before her identification. The sheriff said it was a

matter for the jury to assess all of this and the submissions made in their assessment of the quality, strength and effect of the identification evidence and whether it was sufficient to prove the case against the appellant.

Submissions

[12] The appellant maintained that there was a lack of balance because the sheriff had not given adequate directions on the effect of prior inconsistent statements. The sheriff had failed to warn the jury about the problems with identification evidence where there was a traumatic fast moving event which may only have afforded the witnesses a fleeting glace of the perpetrator. There ought to have been further directions on the problems with identification. In terms of the Jury Manual, a judge may feel it desirable to remind the jury that errors can arise in identification and that the evidence had to be looked upon with care. The judge might remind the jury that the witnesses were not familiar with the appellant at the time and that they should examine how long the witnesses had to identify the appellant. It was accepted that precisely what the trial judge should say was a matter for the judge's discretion (*McAvoy* v *HM Advocate* 1991 JC 16 at 26; *Kearns* v *HM Advocate* 1999 SCCR 141).

[13] The Crown argued that the directions on prior statements had been adequate. They had followed those in the Jury Manual. Equally, the sheriff had appropriately highlighted the appellant's position on identification, notably that the witnesses had not known the appellant prior to the incident. The incident had taken place over a short period and that they had been shown a photograph of the appellant. There was no lack of balance in the charge.

Decision

[14] Where the ground of appeal is that the trial judge failed to direct the jury in a balanced manner, an appellant required "to demonstrate that, looking at the charge as a whole, its tenor was unbalanced in the sense of demonstrably favouring the Crown upon a contentious issue of fact raised during the trial" *Snowden* v *HM Advocate* 2014 SCCR 663, it was explained (LJG (Carloway), delivering the Opinion of the Court, at para [51]).

[15] The Bryden Report: *Identification Procedure under Scottish Criminal Law* (1978) endorsed the approach of the Lord Justice General (Emslie) in his Practice Note of 18 February 1977. This referred to the need for judges to provide juries with such guidance and assistance in the assessment of the quality and weight of evidence as could properly be afforded. In cases where the *only* evidence inculpating an accused was visual identification, where the opportunity for accurate and reliable observation of the perpetrator has been limited in time or merely fleeting, and the accused was not previously known to the witnesses, the judge should remind the jury of the importance of approaching the evidence with particular care.

[16] In *Ferguson* v *HM Advocate* 2000 SCCR 954, the Crown relied on a dock identification, even though the witness had not picked out the accused at an identification parade. The sheriff did not direct the jury to take particular care. In delivering the opinion of the court, Lord Reed said (at para 12) in relation to the identification evidence:

> "The reliability of his evidence had been challenged by cross-examination and criticised in the appellant's speech to the jury. The sheriff reminded the jury of the need to take account of such criticisms in considering the evidence … [T]he sheriff was entitled to take the view that the directions which he gave provided the necessary guidance for the jury."

[17] In *Beck* v *HM Advocate* 2013 JC 232, under reference to the Practice Note, it was said (LJC (Carloway), delivering the Opinion of the Court at para [49]) that:

> "each case will depend on its own facts and circumstances (*Kearns* v *HM Advocate* 1999 JC 124, LJC (Cullen) at 126). A trial judge has to gauge whether and to what extent it is desirable to give a jury a *cum nota* warning in relation to particular testimony. Care must be taken not to patronise the jury, to offer them glimpses of the obvious or to trespass unnecessarily into their province".

If the only evidence is eye-witness identification and there is an objective reason to question its reliability, current practice is to advise the jury to take care when assessing that evidence (*Webb* v *HM Advocate* 1996 JC 166, LJC (Ross) at 172). The choice of words in which to do so is a matter for the trial judge. In a straightforward case: "little more than a broad statement on reliability of testimony may be needed" (*ibid* citing *McAvoy* v *HM Advocate* 1991 JC 16, LJC (Ross), delivering the Opinion of the Court at 26).

[18] In this case, the evidence lasted only a day. The speeches were relatively short and focused. It was, of course, incumbent upon the sheriff to direct the jury on the critical issues, notably identification and the effect of prior statements. The sheriff covered both of these matters adequately. This was not a fleeting glimpse case. It was certainly a traumatic, fast moving, event, but it cannot be said that the witnesses were not in a position to see who the attacker was and to be able to identify him in due course. These were not dock identifications but a VIPER and emulator sheet exercises. The issue of the previously shown photograph was adequately canvassed.

[19] This case was not one in which the only evidence was eye-witness testimony. One of the important features was the statement which was part of the *res gestae*; that is "F…ing stab them, Darren" coming from one of the females who had been causing the commotion and who clearly knew who the attacker was. One of the females was the appellant's girlfriend. In all the circumstances, the sheriff's directions were more than adequate to ensure a fair trial. It cannot be said that there was any imbalance in the charge, far less that a miscarriage of justice has occurred as a result.

[20] The appeal is refused.