APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 35
HCA/2018/427/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION

by

SCOTT COLIN FOWLER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Moggach; Faculty Appeals Unit (for Mackie & Dewar, Aberdeen)
Respondent: the Lord Advocate (Wolffe QC) AD; the Crown Agent

30 May 2019

General

[1] On 7 August 2018, at the High Court in Aberdeen, the appellant and a co-accused, namely Slessor Buchan, were convicted of a charge which libelled that:

> "(001) on 6 January 2018 at ... Gray Street, Fraserburgh you ... did, with faces masked and whilst acting along with others, assault Colin ... Verrall ... and did push him to the ground, strike him on the face with your knee, kneel on top of him,

> instruct him to enter the bedroom, demand drugs and money, present a shotgun at him, remove his trousers, seize hold of him by the neckm, discharge said shotgun into the ceiling, all to his injury and distress and did rob him of his wallet and contents, £118 of money and a mobile telephone".

They were also convicted of a related charge of having a loaded shotgun, contrary to section 19(a) of the Firearms Act 1968. The appellant was sentenced to 10 years imprisonment and his co-accused to 7 years.

The evidence

[2] The complainer was a 44 year old, unemployed man living in a top flat on Gray Street, Fraserburgh. On the date libelled, he had received phone calls from a woman called Lee-Ann Shaw, who said that she was going to come and see him. She later called at his flat crying. He opened the main door to the flat. She stood at the bottom of the stairs. He sat on one of the steps and asked her what was wrong and why she was crying. At that point three people charged into his house. They were wearing Mexican wrestling masks. He thought that one of the three was a female. The smaller of the two men had a bright orange mask. The taller one a blue one. He was putting on a Liverpool accent. The events libelled then took place. These included the discharge of a shotgun into the ceiling. Mr Verrall's mobile was taken during the course of the robbery.

[3] Mr Verrall identified the appellant as having a build resembling the smaller of the two men. He identified the co-accused as having a built resembling the taller man. He identified an image from the appellant's Facebook page, dated 5 June 2006, which showed the appellant with an orange mask of a similar nature.

[4] Ms Shaw pled guilty to her part in the robbery. She said that she had been staying at the co-accused's house in Fraserburgh. The appellant had come to that house a couple of

times. A woman of small stature was with him. Ms Shaw said that she had received a phone call from a man with a Liverpool accent, who told her to go to the address in Fraserburgh on the pretext of wanting to buy drugs from Mr Verrall, which she had done before. She was given a lift to the flat by the appellant. The co-accused, and the small woman, were also in the car. Ms Shaw said that she had walked through the main door when three people, wearing masks, pushed her aside and attacked Mr Verrall. She thought that all three were male and wore masks, which looked like those of "evil Power Rangers". After she left the flat, she was picked up in the same car in which she had arrived. She did say that the appellant had not left the car, but she went back in that car, with the same former occupants, to the co-accused's house.

[5] On 6 December 2017, the police had called at the house of the co-accused. They had had a conversation through the closed door for about 2 minutes with a male occupant, who spoke with a Liverpudlian accent. When they entered the property there was a man and a woman present. The man was the co-accused, who spoke inside the house with a normal local accent.

[6] The appellant's wife said that she had bought two wrestling masks at the Beach Ballroom, Aberdeen in 2016. She had not seen them since 5 January 2018. The co-accused's partner testified that she had been given Mr Verrall's phone by the co-accused on 6 January 2018.

[7] A single particle of firearms residue was found on a hat belonging to the co-accused. Another particle was found on his jacket. Two particles were found on the appellant's jacket. A forensic scientist explained that, where there was only a single particle, it was not "really safe" to come to any conclusion, because it could have got there in numerous different ways. There was some 17 particles found on Ms Shaw's clothing.

Jury speeches and charge

[8] In addressing the jury, the advocate depute commented on the scientific evidence, by saying, in relation to the case against the co-accused, and the finding of a single particle, that:

> "... [w]hat assistance that provides in relation to the evidence is a matter for you. It is not a matter for ... a forensic scientist. It's certainly not a matter for a lawyer as to what assistance it provides, as to what direction it takes you in. It's not a matter for me or any other lawyer in this court; it's a matter for you and you alone. And you will have regard ... to what the scientist said in relation to ... the number of particles that were found here. ... but I suggest it's for you to decide what that means ... and whether it fits with the rest of the evidence taking you a particular direction towards identification."

In relation to the appellant, the advocate depute said that, in relation to the finding of the residue:

> "What to make of that is a matter for you ... But the Crown does not just bring you that; the Crown brings you that together with all the other strands of evidence which I have ... already outlined ... The forensic findings ... in relation to the clothing fits will all these other strands of evidence and confirms ... that the identification of the culprits here is indeed the two accused".

[9] In his speech to the jury, the co-accused's counsel expressed disagreement with the advocate depute. An expert was there to assist the jury in a field in which they did not have the requisite knowledge. The jury had to accept the expert evidence. Therefore there was no forensic link with the co-accused at all. In the speech for the appellant, exception was also taken with what the advocate depute had said. The reason for calling the expert was to assist the jury, although the expert did not usurp the jury's role. He or she was there to help the jury "get to the bottom" of some pieces of evidence with which the jury were not familiar. If the jury disregard the evidence of the expert, there was no evidence of the provenance of the residue. There was, as the expert had said, an endless list of possibilities

of how a piece of firearms residue could find its way onto clothing. Two particles did not take the jury far in relation to the list of possibilities.

[10] In his directions to the jury, the trial judge said that the scientist had said that she could not comment on the presence of a single particle. She accepted that it could have got onto the jacket in numerous different ways. He continued:

> "... [s]he was looking at that evidence in isolation, but you can look at it against the whole picture and decide if it's a significant piece of evidence in the case against the [co-accused].
>
> ...
>
> What I've said about the firearms residue in relation to the [co-accused] applies equally in the case of the [appellant] and the possibility that it could have got there in numerous ways, but it's part of the circumstantial case."

Submissions

[11] The fundamental complaint made by the appellant in the appeal related to the advocate depute's speech to the jury. To proceed in the manner urged by the advocate depute was, it was said, unsound. The trial judge had failed to direct the jury sufficiently on the forensic evidence and the role of the expert. The expert had not considered her findings in isolation, but in the context of the evidence, which had included Ms Shaw's return from the *locus* to the appellant's car. Under reference to *Lundie* v *HM Advocate* 2018 SCCR 269, *Morrison* v *HM Advocate* 2013 SCCR 626 and *KP* v *HM Advocate* 2017 SCCR 451, the remarks of the advocate depute had been inappropriate. The jury had been asked to engage in speculation. The remarks had not been adequately dealt with by the trial judge.

[12] The respondent replied that the presence of firearms residue on clothing belonging to the appellant was available to the Crown as one element in the circumstantial case. It was for the jury to consider whether or not, in the whole circumstances, the charge against the

appellant had been established. The expert did not usurp the fact-finding function of the jury (*Wilson* v *HM Advocate* 2009 JC 336

[13] The criticisms of the advocate depute's speech were unwarranted. There was no foundation for the criticism. The advocate depute had submitted correctly that the assistance which the forensic evidence provided in relation to the evidence as a whole was a matter for the jury and not for the expert. He had correctly invited the jury to have regard to what the forensic scientist had said about the number of particles found, but correctly submitted that it was the jury to decide what that meant and whether it fitted with the rest of the evidence taking them in a particular direction towards identification.

Decision

[14] The remarks made by the advocate depute were entirely appropriate in the context of the Crown case. It was for the jury to decide what they made of the finding of one or two particles of firearms residue on the clothing of one or other, or both, of the two accused in the context of the other evidence in the case. The defence had had, and took, the opportunity of expressing their own viewpoint on that evidence to the jury. It was not correct to say that the jury were bound to accept what the expert had said about the significance of the residue, at least once all the other evidence was taken into consideration.

[15] The trial judge was correct in directing the jury that, whatever may be the position from a scientific viewpoint, the scientist was not considering the finding of residue in the context of the other potentially incriminating evidence. The context in which the residue had to be regarded was that it had been found not just on one accused but on both. These accused were, according to Ms Shaw, near the *locus* at the relevant time. They had driven her there so that she could participate in the robbery. The accused were also there when she

returned to the car at the conclusion of the robbery. The complainer had identified both accused as having physical characteristics resembling the robbers. He had said that one of the three people who had attacked him had been a woman. Apart from the remarkable coincidence that these characteristics demonstrated, the co-accused was linked to the robbery by his previous use of the Liverpool accent and his possession of the complainer's phone. The appellant too was linked by his previous possession of the Mexican mask, of a similar design to that used in the robbery.

[16] In that state of the evidence, the significance of the finding of one or two particles of residue on the appellant's clothing would be apparent. No miscarriage of justice can be seen to have occurred. This appeal is accordingly refused.