APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 60
HCA/2018-000597/XC

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST CONVICTION

by

GRAHAM PATERSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Keenan (sol adv); Paterson Bell, Edinburgh
Respondent: Kearney AD; Crown Agent

22 August 2019

Introduction

[1] At Hamilton Sheriff Court on 20 September 2018, after trial on indictment, the appellant was convicted, by a majority, of charge (1) which was in following terms:

> "(001) on 2 October 2017 at Muir Street, Motherwell you GRAHAM PATERSON did assault [the complainer] …in that you did approach her when she was walking on her own, repeatedly seize her on the body, utter a sexual remark at her, pull her towards you, refuse to let her go, repeatedly struggle with her in an attempt to

> restrain her, slap her, kick her, push her on the body and hold her against a wall and you did sexually assault her in that you did handle her buttocks over her clothing and this you did with intent to rape her as defined in section 1 of the after mentioned Act;
>
> CONTRARY to section 3 of the Sexual Offences (Scotland) Act 2009 and the common law"

The appellant had one minor previous conviction. The sheriff adjourned the case in order to obtain a Criminal Justice Social Work Report. On 22 October 2018 she sentenced the appellant to 3 years imprisonment.

[2] The appellant has appealed against conviction and sentence but leave has only been granted in respect of the appeal against conviction. Put short, the ground of appeal which has been granted leave is that, in a context where there was CCTV evidence and the only issue to be determined by the jury was whether the admitted assault on the complainer by the appellant was with intent to rape her, the sheriff's directions to the jury (at pages 13 to 15 of the transcript of the sheriff's charge) were confused and prejudicial.

The evidence at trial

[3] The sheriff reports the evidence of the complainer as follows (report paras [3] to [7]:

> "[3] The complainer in charge one, [KBL], age 32, was employed as a Freight Operator and lived and worked in Dublin. On 2 October 2017 she was visiting her partner who lived in the Motherwell area. She and her partner went out for the evening to Weatherspoon's public house in Motherwell. In the course of the evening they had an argument. About midnight the complainer went to find her partner to return to his house but discovered that he had already left. The complainer was a stranger to the area and was unable to phone for a taxi as the battery on her mobile phone was dead. She was aware the railway station was nearby but did not know in which direction. She knew she could get a taxi at the railway station to take her back to her partner's home. She accepted she was under the influence of drink and also distraught at finding herself alone. She left the public house, and apart from herself and the barman, who was locking up the premises, there was no one else in the vicinity.

[4] As the complainer walked along the street trying to find the railway station she saw the appellant who was a stranger to her. She described him as having white hair, looking smart and seemed to be friendly. She said she felt safe because he reminded her of her father. She was crying and upset and explained her problem to the appellant. He told her not to worry and pointed to a black car parked nearby telling her it was a taxi. The complainer could not see any taxi signs on the car and decided not to get into it. When she refused to get into the car the appellant started to block her from moving forward towards the corner of the street. She described him as stalling her. She said he was trying to get her to return in the direction from which she had come. Unknown to her the appellant lived in that direction. The complainer kept trying to make her way towards the corner and told the appellant she did not need any help. When she eventually reached the corner and turned the corner she saw the railway station was directly ahead of her on the opposite side of the street. She managed to get passed the appellant and walked quickly towards the station. She was unaware the appellant was following her. His actions were caught on CCTV. It showed the appellant breaking into a run and catching up with the complainer. When he reached her he grabbed her around the waist and pulled her in towards him. The complainer said he grabbed her tightly. She tried to push him away but his grip got stronger. The appellant said to her, 'You're just a dirty tramp looking for a ride'. The complainer continued to struggle, and slapped the appellant to try and get away from him. The appellant slapped her back and continued pulling her in towards him, pressing his body against her body. The complainer said the lower part of the appellant's body made contact with the lower part of her body. She described the appellant's behaviour as horrifying. She said he behaved like two completely different people, from the one who was trying to help her earlier, to the one who suddenly attacked her.

[5] The complainer described her struggle with the appellant as a 'bad struggle. The CCTV showed the complainer managing to break free at one point from the appellant, but he immediately grabbed her, held her even closer, and pressed her against a wall. The appellant was also seen kicking the complainer and dragging her back towards him. After watching the CCTV the complainer said the incident went on a lot longer than she initially thought. After she managed to get away the complainer ran to the railway station where she found her partner. He ran off to try and find her attacker but the appellant had disappeared. The taxi office at the railway station called the police, and the complainer was taken to the police station where she gave a statement. She agreed she told the police the appellant touched the small of her back and then the top of her bottom.

[6] The complainer was extremely upset by the sexual comment made by the appellant. In her evidence she said she could not forget what he said to her and the manner in which he said it. Because of her experience that night, she said she never goes near Motherwell and finds herself constantly looking over her shoulder whenever she sees any man with white hair.

[7] It was suggested to the complainer in cross-examination that when she first encountered the appellant she said to him he looked smart. She vehemently denied

> that suggestion. She said she was sobbing because she knew she was lost. Initially her impression of the appellant was that he was being helpful and she could trust him as he reminded her of her father. She said when she realised the appellant was not being any help to her she thanked him and tried to move on. She believed the appellant's assistance was false, as he could have let her get round the corner and she would have immediately seen the railway station ahead. She was adamant that he was trying to stall her and pretending to be helpful. When she reached the corner and saw the railway station she realised the appellant had been preventing her from getting to safety. That was the reason she ran away from him. It was suggested she head butted the appellant, which she denied. She insisted the appellant made the sexual comment to her and she particularly remembered the word 'ride' as it was Irish slang. She said she was particularly upset by this comment and said to the police officer that she could not understand why anyone would say such a thing to her because she did not look like that sort of person."

[4] A police officer described the CCTV footage which had captured the assault. The sheriff gives an account of the officer's evidence in these terms (report para [8]):

> "[8] …She described the footage showing the appellant touching the complainer's arm, talking to her and then backing her against a wall. As the complainer tried to leave, the appellant grabbed her around her waist. She saw the complainer trying to get away but the appellant grabbing her again, and striking her to the face. She said the CCTV showed the appellant continually pushing the complainer towards a wall, and then pinning her against a wall. She described the appellant appearing to kick the complainer."

[5] The appellant gave evidence. The sheriff reports his evidence as follows (report para [11]):

> "[11] The appellant said that he was aged 49, single and unemployed. He admitted he met the complainer before he appeared on the CCTV footage. He said the complainer told him she was looking for the railway station to get a taxi. He admitted he pointed out a black motor vehicle which he thought was a private taxi. He said he did not notice that the complainer was distressed. He claimed that the complainer said to him, 'You're looking very smart', to which he replied, 'You're not looking too bad yourself'. He admitted he followed her and 'made a pass at her'. He accepted slapping the complainer and touching her buttocks over her clothing. He denied he made a sexual comment to her. He then said he could not remember and it was probable that he did make a sexual comment to the complainer as he had a lot to drink. He admitted grabbing the complainer and lifting her off her feet. The appellant remembered four officers coming to his house in the early hours of the morning and telling him that they were there about an assault on a female. He said he knew what he had done and admitted to the officers that he had groped the complainer. He accepted that he asked the officers if it was bout a rape. He could not explain why he used the word rape. He accepted it was a

> sexual incident. He said he was frank in his interview with the officers, and that he now felt terrible about what had happened. It was out of character and he felt ashamed. In cross-examination the appellant said the complainer was lying about him trying to get her to go in the opposite direction from the station. He said he followed the complainer because he thought she 'fancied' him. He said his behaviour was a moment of madness which he could not explain. He maintained his intentions were to try and help the complainer get to the railway station. He however accepted he grabbed the complainer as she tried to get away from him and held her tightly. He said he made a sexual remark to her, but not the one the complainer referred to. He admitted groping her and admitted his conduct was sexual. When asked what his intentions were he said he had no idea. He said when he pushed her against the wall his intention was to kiss her. He denied his intention was to take her back to his flat. He denied his intention was to have sex with her. When asked why he made the comment to the police officers about the investigation relating to a rape, he said this was because when the police came to his house and mentioned an incident between a man and a woman he would always think of someone 'trying it on'."

The defence position at trial

[6] On the first day of the trial the appellant had offered to plead guilty to charge (1) under deletion of the words "utter a sexual remark at her", " kick her", "and this you did with intent to rape her as defined in section 1 of the after mentioned Act" and "and the common law". Consistent with that plea, in her cross-examination of the complainer counsel for the appellant disputed very little of the complainer's evidence in chief. In her address to the jury she described what the appellant had done as "a terrible thing; …an awful thing". She continued (transcript of defence counsel's speech pages 1, 2, 3, 6 and 10):

> "On his own admission …he did a terrible thing to [the complainer]. He did commit a horrible, violent sexual assault, on his own admission, he admitted to each and every one of you and he admitted it to the police …I offered to plead guilty on behalf of Mr Paterson to the vast majority of charge 1, but more significantly under deletion of the attempt to rape. Because that, ladies and gentlemen, is the only real issue left for you to consider in respect of charge 1. …He admitted to sexually assaulting [the complainer], to touching her bum, and he did that, ladies and gentlemen, before he even knew about the existence of the CCTV, he admitted to touching her bottom.
>
> But the Crown case is this, they say that he sexually assaulted that woman with intent to rape her, with the intent of having sexual intercourse with her, that is what

> they ask you to accept. And that is the question that you will need to think about when considering your verdict on charge 1. Now, you have had the opportunity and you have all seen the video and we also heard from [the complainer] about what what was clearly a terrible and, no doubt, terrifying experience for her. It would have been awful and no one has ever suggested otherwise, not me and not Mr Paterson. And you got to see it with your own eyes. But it was not an assault with intent to rape.
>
> … I say when we look at all the evidence it is quite clear that while he did commit a terrible, sexual and violent assault, there was no intent to rape. … a terrible thing, it is a violent, sexual assault, that is what it is"

The criticised directions

[7] The two passages (at page 13 lines 1 to 9 and at page 14 lines 20 to 25 of the transcript) which are criticised as containing a prejudicial misdirection appear italicised in following extract from the sheriff's charge (transcript of charge at page 13, line 1 to page 15, line 15):

> "Now, how can you decide what was the intention of the accused? It's perfectly clear that you cannot look into his mind to see what he did intend, but [what] you can do is infer from what you have seen on the CCTV, of what you've heard in evidence, that *the inference can be drawn that the intention was to go further in the sexual assault and with the intention to rape*.
>
> The Crown have pointed out what the evidence is and you've heard from [the complainer] that she felt, as she was approaching the corner when she first met the accused, he was trying to stall her from getting to the corner and that he was trying to block her passage so that she couldn't get past him. He was trying to keep her at that particular point. She didn't know that as soon as she turned the corner she would see the train station, because she was a complete stranger to the area. So, she didn't know that the train station was nearby and that she would then be safe. So, that evidence you can draw on, if you wish, to decide and, if you accept it, that from her evidence the accused was trying to force her back down the road from where she'd come and she was aware of that and she tried to get past him. The accused said that this was a brief encounter and that he was merely making a pass at her. Well, you've seen on tele…on the CCTV what his actions were. You see when she turns the corner that [the complainer] breaks into a run and she's certainly moving very quickly along the road, and then the accused runs after her from behind, unknown to her. There is then an attack on her, which lasts between one and a half to two minutes. You see her being pushed against the wall. She, she referred to the

comment made by the accused, which was that 'You're just a dirty tramp looking for a ride'.

You've seen the nature of the attack. It was prolonged and it looked quite fierce and you saw the brave actions of [the complainer] in trying to, to get away and which she eventually succeeded in doing.

So, you'll have to look at that evidence and to decide what [was] the accused's intention. Was his intention more than just looking for a kiss and was it the intention to rape her, as the Crown say? You have seen the tape being played. It's accepted that it shows the incident; that the people shown in it are [the complainer] and the accused. It's for you to decide what you wish to draw from what you've [seen] on the CCTV. What is happening [in] that passage of CCTV evidence, who is shown – which is not disputed- and what inferences you may wish to draw from what you are satisfied you see happening in that footage."

Submissions

The appellant

[8] Mr Keenan, for the appellant, adopted his case and argument. He reminded the court that the appeal only related to the inclusion in the jury's verdict of the aggravation: "and this you did with intent to rape her as defined in section 1 of the aftermentioned Act" and, accordingly, if the appeal succeeded he would only move that the conviction be quashed to the extent of deleting the aggravation. While, no issue was taken with the accuracy of the sheriff's summary of the evidence at paragraphs [3] to [11] of her report, Mr Keenan submitted that the sheriff had misdirected the jury by commenting and expressing opinion on issues of fact which were entirely matters for the jury. The sheriff had directed the jury as a matter of fact that they could infer from the evidence including the CCTV footage that it was the appellant's intention to go further with the sexual assault, although that only really became a live issue because of what she had gone on to say. She had offered her interpretation of what was shown on the CCTV footage, describing "the attack" as "prolonged" and "fierce" and the actions of the complainer in trying to and

succeeding in getting away as "brave". While nothing that she said was inaccurate, her saying it went beyond the sheriff's proper function. There was clear authority that sheriffs and judges should avoid commenting on issues of fact which are for the jury to determine (*McDade* v *HM Advocate* 1994 JC 186, *McArthur* v *HM Advocate* 1990 JC 83, and *O'Donnell* v *HM Advocate* [2014] HCJAC 43). Here there was a very real risk that by expressing her opinion the sheriff had influenced the jury in coming to what had been a majority verdict. There had been a miscarriage of justice.

The Crown

[9] The advocate depute submitted that while the sheriff's choice of the words focused on by Mr Keenan: "prolonged", "quite fierce" and "brave", were to some extent unfortunate, they reflected the evidence and mirrored some of the language used by defence counsel in the course of her address to the jury. A judge's directions must be looked at in the context of the oral tradition in which they are given as part of a trial process, words should not be scrutinised in isolation: *Sim* v *HM Advocate* 2016 JC 174 at paragraph [32]. When the charge is looked at as a whole, the significance of

> "but [what] you can do is to infer from what you have seen on the CCTV, [and] of what you have heard in evidence that the inference can be drawn that the intention was to go further in the sexual assault and with the intention of rape"

is readily to be understood as an explanation as to how the jury could go about drawing inferences as the appellant's intentions when he assaulted the complainer. Returning to "prolonged", "quite fierce" and "brave", which Mr Keenan had suggested compounded the sheriff's indication that the inference of intention to rape could indeed be drawn, these were both accurate and reasonable words to use in referring to what it was accepted had

happened. The risk of the jury being improperly influenced was simply not there. The appeal should be refused.

Decision

[10] In a trial on indictment it is for the jury to determine what evidence is to be accepted, what primary facts are to be taken to have been established by that evidence, how these primary facts are to be interpreted and what inferences and other conclusions are to be drawn from these primary facts, so interpreted. Where part of the evidence consists of a video recording of material events, once the provenance of the recording is established, the jury is entitled to form its own judgment about what the images show. If the images are such as to be capable of giving rise to an inference of fact, whether the inference should be drawn is again a matter for the jury. Every aspect of fact-finding is exclusively a matter for the jury and accordingly when discussing the evidence in his or her jury directions the presiding judge must be very careful to avoid saying anything which lends his or her authority to a particular interpretation of the facts that the evidence may, or may not, have established. A guilty verdict which is seen to have been influenced, or potentially influenced, by a failure to exercise such care may be quashed. That is illustrated in the cases to which we were referred: *McDade*, *McArthur*, and *O'Donnell*, but the origin of this line of authority (and some of the rather old-fashioned language which is repeated in the more recent cases) is an *obiter dictum* of Lord Justice-General Cooper in *Simpson* v *HM Advocate* 1952 JC 1 at 3:

> "It is always the right, and it may often be the duty, of a presiding Judge to review and comment upon the evidence; but in so doing it is essential that the utmost care should be taken by the presiding Judge to avoid trespassing upon the jury's province as masters of the facts. In this instance, while the learned Sheriff-substitute at one or two points appears to have paid lip service to that principle, he has, I fear, permitted

> himself to impress his own views of the evidence unduly upon the jury, and thus to have merited some of the criticism which Mr Duffy directed against the charge."

Both Mr Keenan and the advocate depute were content to accept impressing the judge's own views of the evidence unduly upon the jury as an appropriate test for a misdirection of the sort which the appellant contended had occurred in the present case.

[11] We do not consider that the sheriff in the present case was guilty of impressing her views unduly upon the jury or otherwise materially misdirecting them. As always, regard must be had to the context in which she was giving her directions and the whole terms of her charge.

[12] Here, the sheriff directed the jury, in conventional terms, that they were the judges of the facts (transcript of charge at pages 1, 2 and 3):

> "It is for you to decide what facts are proved and what facts are not proved. It is for you to decide what evidence is acceptable to you, which witnesses you believe and regard as reliable, and which witnesses you consider unreliable. It is for you to decide what evidence is acceptable to you. …It is also for you to decide what weight you wish to attach to a witness's evidence and what inferences you may wish to draw from any facts. These are all matters for you to determine and have nothing to do with me.
>
> In this charge, it will be necessary for me to mention some of the evidence, but I will do so only in an attempt to assist you. If what I say about the evidence does not accord with your recollection, you must disregard what I say and proceed on your own recollection."

[13] In relation to the only issue in relation to charge (1): whether the admitted assault was committed with intent to rape, the sheriff said this (transcript of charge at page 11):

> "The accused said yesterday in his evidence that his intention when he pinned her against the wall was to get a kiss. Now the intention and what his intention was is a matter for you to decide on the evidence before you."

[14] The passages which are criticised are to found in that part of the sheriff's charge where she is addressing how the jury might use the CCTV evidence, together with the evidence of the complainer and the evidence of the appellant, to decide on what was the

appellant's intention when he carried out the assault. As can be seen from the extract quoted above at paragraph [7], that part of the charge ends with the sheriff saying:

> "You have seen the tape being played. It's accepted that it shows the incident; that the people shown in it are [the complainer] and the accused. It's for you to decide what you wish to draw from what you've [seen] on the CCTV. What is happening [in] that passage of CCTV evidence, who is shown – which is not disputed- and what inferences you may wish to draw from what you are satisfied you see happening in that footage."

That is an absolutely correct direction, as are the directions on the jury's function as finder of fact and its particular role in determining the issue of the appellant's intention which are quoted at paragraphs [12] and [13] above. Nevertheless, the appellant argues that what he characterises as misdirections cannot be cured by what the sheriff went on to say at the end of the relevant part of her charge.

[15] We disagree; the whole of the charge must be considered. However, even in isolation the passages focused on by Mr Keenan are, in our opinion, rather innocuous.

[16] The first of the two passages is:

> "[what] you can do is infer from what you have seen on the CCTV, of what you've heard in evidence, that the inference can be drawn that the intention was to go further in the sexual assault and with the intention to rape."

The point that the appellant makes is that by putting it that way the sheriff was directing that as a matter of fact an intention to rape should be inferred from the evidence. That is not what we would understand the sheriff meant to say or what the jury would have understood her to have meant to say. No doubt the matter could have been put more precisely and no doubt if the sheriff was preparing a written document she would have put it more precisely, but jury directions are not designed to be read; they are given as an oral communication and have the character of speech (see *Sim* v *HM Advocate*, the Lord Justice-General (Carloway) giving the opinion of the Court at para [32]). The sheriff

identified her purpose in the way she introduced the criticised passage: "Now, how can you decide what was the intention of the accused? It's perfectly clear that you cannot look into his mind to see what he did intend". Her purpose therefore was to direct the jury as to how they should go about determining what, if anything, had been the appellant's intention when he assaulted the complainer. The sheriff might then have said something along the lines of "It is open to you, if you see fit, to infer that the appellant had an intention to rape the complainer from what you have seen on the CCTV and what you have heard from the witnesses". That is what we would understand to have been her intention and, more importantly, that is what we would understand would have been the jury's understanding, given everything else that the sheriff said. Had the jury been in any doubt they would have immediately been pointed in the right direction by what the sheriff said in the passage quoted at paragraph [13] above. The advocate depute described this passage as the sheriff explaining to the jury how they should go about drawing inferences. We agree.

[17] The second of the two passages which are criticised is:

> "You've seen the nature of the attack. It was prolonged and it looked quite fierce and you saw the brave actions of [the complainer] in trying to, to get away and which she eventually succeeded in doing."

Mr Keenan suggested that the sheriff's choice of language was unfairly prejudicial to the appellant; the sheriff had illegitimately impressed her own views of the evidence upon the jury. He did not say that the sheriff's summary of what had been said by the complainer and what was shown in the CCTV footage was inaccurate. Neither could he have done so. The appellant had attacked the complainer. The attack had lasted for almost two minutes. Significantly, while counsel for the appellant had not used any of the words complained of in her address to the jury she had employed equivalent language in variously categorising

what had occurred as: "a horrible, violent, sexual assault, on his own admission"; "a terrible and, no doubt, terrifying experience for [the complainer]. It would have been awful and no one has ever suggested otherwise…"; "a terrible, sexual and violent assault"; and "a terrible thing, it's a violent, sexual assault, that's what it is." In characterising the assault in the way she had the sheriff was no more than echoing what had been said by the appellant's counsel. That it had been a fierce and prolonged attack to which the complainer had responded with determination was essentially uncontroversial.

[18] We would add this. It might be said that the words complained of by Mr Keenan were not entirely necessary. However, the jury had seen the assault as recorded by the CCTV footage. They were able to form their own impressions of the assault which are likely to have been much more influential on their thinking than anything the sheriff had to say about it. Moreover, the words which were criticised related to physical aspects of the assault. They did not address its sexual quality. In particular they did not address intention.

[19] We do not consider that the appellant's grounds of appeal are well-founded but, as always, the fundamental issue is whether there has been a miscarriage of justice. Given the evidence as summarised in the sheriff's report and undisputed by the appellant, there can be no question of there having been a miscarriage of justice by reason of the jury concluding that the assault was with intent to rape. We accordingly refuse the appeal.