

SCOTLAND / JUDGMENT

Boath v HM Advocate [2016] ScotHC HCJAC_81 (21 September 2016)

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[2016] ScotHC HCJAC_81 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 81 HCA/2015/3251/XC Lord Justice General Lady Paton Lord Menzies OPINION OF THE COURT delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL in APPEAL AGAINST CONVICTION AND SENTENCE by PETER BOATH Appellant ; against HER MAJESTY'S ADVOCATE Respondent : Appellant: Party Respondent: I McSporran AD; the Crown Agent 8 September 2016

Introduction

- [1] On 7 September 2015, at the High Court in Edinburgh, the appellant was found guilty of two charges which libelled that, on 27 March 2015 at “Subway” on Leith Walk: “
- (001) ... you... did, with your face masked, assault and abduct [AH], ... a customer within said shop, threaten him with a metal pole or similar instrument, utter threats of violence against him, refuse to let him leave said premises and detain him against his will;
- (002) ... you ...did with another, with your faces masked, assault [BS] ... an employee there, present a knife at him, seize him by the body, struggle with him, demand that he open the till, threaten to kill him, cut him on the abdomen and hand with said knife to his injury, and rob said [BS] of £200 of money or thereby.” There had originally been a co-accused, Alexander Johnston, but he had pled guilty to charge 2 at a Preliminary Hearing on 24 July 2015 and was sentenced to 5 years and 7 months imprisonment, discounted from 8 years for the early plea. The trial judge sentenced the appellant to 9 years imprisonment.
- [2] The appellant appeals on the ground of defective representation in the preparation for trial. He submits that his solicitors and counsel failed to carry out the necessary pre-trial investigations, including the commissioning of reports relative to CCTV and DNA evidence. Leave to appeal against conviction was granted at first sift. Evidence at trial

- [3] The events of the evening of 27 March 2015 were captured on Closed Circuit Television images, which were duly proved and shown at the trial. Two men entered the shop; one was carrying a long metal pole and the other a knife. The man carrying the knife approached the shop assistant, grabbed him by the collar, brandished the knife at him and forced him to open the till, which the man then emptied. The other guarded the door. The sole customer managed to escape on to Leith Walk.
- [4] The robbers ran along Leith Walk and entered the car park at Tesco. Tesco's CCTV showed a man with a knife going into the shop, and apparently disposing of a hat that he was wearing and the knife in the shelving in the bread aisle.
- [5] This issue at trial was identification. The shop assistant, although unable to identify the appellant, did identify the knife recovered from Tesco as the knife used in the robbery. He said that the man who had assaulted him had been wearing a hat, which resembled that recovered from Tesco. The customer could not identify the appellant, but did identify the knife.
- [6] Two uniformed constables, who had been on mobile patrol in Leith Walk, had been approached by the customer, who had pointed out the robbers. The police had entered Tesco and taken possession of the knife and the hat, which a Tesco security guard had recovered from the bread aisle.
- [7] On examination, both the hat and the knife contained DNA which was identified as having come from, amongst others, the appellant. In particular, a blood stain from the back of the hat had a mixed DNA profile which could have been produced by a combination of the appellant and the co-accused. It was greater than a billion times more likely that the DNA originated from the appellant and another individual rather than two individuals unrelated to the appellant. A blood stain from the handle of the knife contained a mixed DNA profile which could also have come from the appellant and the co-accused. It was greater than a billion times more likely that the DNA originated from the appellant and another individual, rather than two individuals unrelated to the appellant. There was also evidence linking the hat and knife to the co-accused. Also analysed were part of a stocking, found within the hat, and the shop assistant's polo shirt. The appellant's DNA was not found on these items, although an unknown person's DNA was found.
- [8] A police officer had studied the Tesco images and identified the appellant as the person shown. It seems that the appellant does not deny that. Grounds of appeal and "Anderson" responses
- [9] The Note of Appeal, in so far as directed towards conviction, consists of five grounds. These are primarily directed towards deficiencies in the appellant's legal representation. Regrettably, the first sift judge did not ask for responses to these various assertions before granting leave to appeal. Ground 1

- [10] The first ground is that there was no eyewitness identification evidence of the appellant in the shop or running down Leith Walk. The knife, it is said, was not identified as having been used in the robbery (cf *supra*). The facial features of the appellant, it is said, do not match those of the person in the Subway images. The operative part of this ground is that the appellant maintains that he instructed his legal representatives to have an analysis of the CCTV images from Tesco and Subway carried out because this would have established that the male in the Tesco CCTV (the appellant) was not the robber. Although the individuals were wearing similar clothing, the facial features of the robbers in Subway were nothing like those of the man in Tesco.
- [11] The appellant's trial agents reported, in relation to this ground, that the images from Tesco clearly showed the appellant entering the shop and disposing of the hat and the knife. The knife and hat had been identified by the shop assistant. The appellant could not be identified from the Subway images as the view of the robber's face was only a partial side one. The appellant did not instruct that CCTV images from Subway be examined. His counsel at the time had watched the images with the appellant and had raised this issue with him. Counsel had explained the limitations of such an enquiry. The appellant had accepted this. The Crown had used the images to show the similarities in the clothing worn by the robber in Subway and the appellant, as he was seen minutes later in Tesco. The Subway images showed a man wearing white trainers, jeans, a dark coloured Berghaus jacket and a hat with a Ferrier Pumps Limited label on it. The robber had placed the knife in the back of his waistband. The Tesco images showed the appellant wearing white trainers, jeans, a dark Berghaus jacket and a hat of the same design as that seen in the Subway images. The appellant had walked into the bread aisle, thrown the hat to the ground, reached into the back of his waistband, removed the knife and put it on a shelf. According to his agents, therefore, any enhancement or further analysis of the CCTV would have made these aspects of the case worse. The appellant had accepted that.
- [12] The appellant's counsel at trial reported that the robbers had been masked. This had ruled out facial analysis. CCTV analysis would only have served to highlight the very distinctive hat which the robber had been wearing and was the same hat which the appellant accepted he had discarded very shortly after the robbery at Tesco. The same considerations applied to the knife. Ground 2
- [13] The appellant maintains that he had wanted his legal representatives to obtain an independent DNA report, but this was not done, despite his express instructions.
- [14] His solicitors responded by saying that this criticism was not well founded. The appellant's DNA was found on the knife and the hat. The appellant accepted that the knife and hat were his and that there would thus have been no point in having the analysis redone or checked. The shop assistant's DNA was not found on the knife recovered from Tesco and the appellant's DNA was not found on the clothing of the shop assistant. Counsel had advised the appellant that the lack of DNA evidence linking the appellant to the locus , or to the complainers in the shop, was in his favour and would be highlighted before the jury. It was

explained that no expert would say that the absence of DNA proved that there had been no contact between the appellant and the shop assistant. The appellant had again accepted that at the time.

- [15] Counsel reported that the appellant had been “fixated” on DNA 17 analysis. This aspect of his case had been discussed with him at length. It was repeatedly explained that the lack of DNA could be dealt with using the Crown experts and report. The decision taken here was tactical. Ground 3
- [16] The appellant states that he had wished to call the co-accused as a witness, as he understood that the co-accused would say that the appellant was not the other robber. He complains that no steps were taken to precognosce the co-accused.
- [17] His agents comment that the appellant instructed that the co-accused should not be precognosced prior to trial. The advocate depute had said that the co-accused would not be called as a witness in the Crown case. Agents discussed precognition with those representing the co-accused. They were told that the co-accused’s position would be that the appellant was the other robber. The co-accused would not co-operate with precognition. The appellant advised his agents to “leave it” and repeated that the co-accused should not be called as a witness. At the close of the Crown case there was a further meeting and the appellant’s instructions had remained the same.
- [18] Counsel recollected that the appellant’s agent had been told by the co-accused’s solicitor that the co-accused would not co-operate with any precognition and would incriminate the appellant. The appellant had spoken with the co-accused personally when they had been in adjoining cells in Edinburgh High Court. As a result of this conversation, the appellant did not want his former co-accused precognosced or called as a witness. Ground 4
- [19] The appellant states that he sought to dispense with the services of his trial representatives as he believed that his instructions were not being followed. He states that he was asked to sign a disclaimer, which he refused to do.
- [20] His agents described the appellant’s behaviour during the trial as “deplorable”, forming the view that his intention had been to thwart the trial process. At no point had he sought to dispense with their services. He had not been asked to sign a disclaimer, but a confirmation of his decision not to give evidence.
- [21] Counsel noted that he had been told by his instructing agents that the appellant had threatened to assault him. The appellant had refused to sign written confirmation that he did not wish to give evidence or call any witnesses. Ground 5
- [22] This is a catch-all ground stating that, as a consequence of the foregoing grounds the appellant did not receive a fair trial. A miscarriage of justice had occurred. There had been no DNA from the appellant on the shop assistant’s clothing, albeit that the robber had seized him by his clothing. Decision

- [23] In *Grant v HM Advocate* 2006 JC 2005, it was made clear by the Lord Justice Clerk (Gill) (at paras [21-22]) that, in order to persuade the court that there has been a miscarriage of justice, an appellant would require to persuade the court that his defence had not been presented and that he had been deprived of a fair trial because his counsel had either disregarded his instructions or conducted the defence in a way which no reasonable counsel could reasonably have done. A defective representation ground cannot be based simply upon a criticism of strategic and tactical decisions reasonably and responsibly made. Leave to appeal should not be granted, if all that is alleged is that the defence would have had a better prospect of success had a certain line of evidence or argument or a different strategy been pursued. Leave should, in particular, not be granted on the basis of allegations of breach of instructions that rest only on the say-so of the appellant or criticism of decisions *prima facie* within the legitimate scope of counsel's discretion or on speculative allegations which, it is hoped, might be substantiated later. It was specifically said that there required (para [25]) to be objective support for the allegations advanced in a defective representation appeal.
- [24] In this case there was and is no objective support for the appellant's allegations. There is no material upon which to have based the assertion that CCTV analysis would have established that the facial features of the man in the images from Subway were different from those of the man in the Tesco CCTV. If this type of ground of appeal is to succeed, an appellant requires to place before the court evidence of such an analysis having taken place and so established the differences involved. That has not been attempted here. Trial counsel has explained that he did not focus upon the images for tactical reasons; notably the danger of highlighting the "glaring similarities" of the clothing of the robber and the clothing of the appellant.
- [25] Similar considerations apply to the assertion that there ought to have been an independent DNA analysis. There is no basis upon which it can be said that any further analysis would have differed from that produced by the Crown. The appellant accepted, in discussions with his legal representatives, that the hat found in Tesco, with the stocking within it, had belonged to him. The lack of DNA evidence linking the appellant to the stocking and to the shop assistant's clothing was before the jury for what limited effect that that might have had.
- [26] The decision not to call the co-accused was a tactical one which was fully justified on the basis that, not only would he not be precognosced, he would, if called, incriminate the appellant.
- [27] The fourth ground does not advance matters further and the fifth is dependent upon the force of the three specific points made. Since these do not contain any merit, the appeal against conviction must be refused.
- [28] In submission, the appellant raised a new point about the knife being tested for the shop assistant's fingerprints because, it is said, he could be seen picking it up in CCTV images. The appellant admitted that the knife found in Tesco was his. The shop assistant confirmed

it was that used in the robbery. Even if the knife had been tested and no fingerprints had been found, that would not demonstrate that it was not the knife used in the robbery. Thus, even if this point had been validly raised in the appeal, which it was not, it was one of no substance. Sentence

- [29] The appeal against sentence is based on a contention that the advocate depute misled the court by stating that the appellant had a conviction in the sheriff court in 2005 for assaulting a 91 year old woman by tying her up and stabbing her with a nail file. Enquiries of what the advocate depute said, on moving for sentence immediately after the verdict had been returned, reveals that this contention is correct. The advocate depute said that in 2005 the appellant had received a sentence of 4 years for theft by housebreaking in which he had assaulted a 90 year old home owner, forced his way into her house, robbed her of jewellery, threatened her with a nail file and gagged her with a nightdress. In fact this conviction was one in the High Court in 2007 and was only for theft by housebreaking, the former libel in the indictment of violence having been deleted. The trial judge has indicated that he took into account the previous convictions of the appellant and the narrative which had been given by the advocate depute. It has to be assumed from this that, not only did he have regard to the terms of the previous convictions, but also the account given of the assault on the householder.
- [30] It was also said that the trial judge had said in his sentencing remarks that the sentence which he was to impose on the appellant included “the bail aggravation”. However, as was correctly submitted by the appellant, he had not been charged with, far less convicted of, any bail aggravation. It had been the co-accused who had faced this aggravation.
- [31] For these reasons, this court requires to review the sentence imposed on the appellant in light of what can only be described as most unfortunate circumstances. Nevertheless, this was an armed robbery against a background of offending. The court has also had regard to the sentence imposed on the co-accused. It will, nevertheless, substitute a sentence of 7 years imprisonment. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotHC/2016/\[2016\]HCJAC81.html](https://www.bailii.org/scot/cases/ScotHC/2016/[2016]HCJAC81.html)

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