

SCOTLAND / JUDGMENT

Fletcher v HM Advocate [2012]

ScotHC HCJAC_91 (15 June 2012)

[2012] ScotHC HCJAC_91

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[2012] ScotHC HCJAC_91 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY
Lord Carloway Lord Hardie Lord Marnoch

[2012] HCJAC 91 Case No. XC625/11 OPINION OF THE COURT delivered by LORD CARLOWAY in
APPEAL AGAINST CONVICTION by HUGH GRAHAM FLETCHER Appellant ; against HER
MAJESTY'S ADVOCATE Respondent :

Appellant: Moggach; Gavin Bain & Co., Aberdeen Respondent: Prentice QC, AD; Crown Agent 15
June 2012

- [1] On 2 September 2011 , at the High Court in Inverness , the appellant was convicted of robbing Brunswick Stores, Beach Boulevard , Aberdeen , of £400 and some vodka and cigarettes on 16 March 2011 . The conviction involved acting along with a co-accused, namely Michael Taylor, and presenting an imitation firearm at the shop proprietor whilst partially masked.
- [2] The evidence from the proprietor and his assistant was that the robbers had entered the shop at about 7:00 pm wearing plastic bin bags on their shoes. One man was described as wearing a red hooded top with a chain around his right arm. This person was known to the proprietor and identified by him to the police as the co-accused Taylor . The other person, who could not be identified at the time, was wearing a white T-shirt and a black jacket. The shop assistant bravely followed this person out of the shop and along Wales Street , an event recorded as occurring between 7:11 and 7:14 . He identified a person shown in a CCTV recording of an area in front of flats at Marischal Court at about 7:08 as being the man he had followed. This recording was downloaded to a still photograph and depicts a person at a stage immediately prior to the robbery. The distance from Marischal Court to the shop was estimated by the police to be about three minutes, if running. The central issue in the case

was whether the person shown in the photograph could be linked with the appellant.

- [3] Mr Taylor gave evidence that, prior to the robbery, he had been in a flat at Marischal Court with Karen Storey, the tenant. They were in the company of Malcolm Campbell, the appellant, the appellant's brother, namely Daniel Bell, and another female. Mr Taylor said that the appellant was a friend of his.
- [4] In a statement to the police taken on 19 March 2011, Miss Storey said that the scarf worn by the man shown in the photograph was identical to one which had been in her flat prior to the robbery. It had been owned by Mr Campbell and usually worn by herself. It had been missing after the robbery. In addition, in this statement she described the person in the photograph as someone who could be the appellant, because of the way he was standing. The court will return to this statement in more detail in due course, but it was not disputed either at the trial or in the appeal that the content of the statement had become part of Miss Storey's evidence.
- [5] Apart from this tentative identification of the appellant, Miss Storey had accepted that the man, whoever he was, must have come from her flat; hence the presence of the scarf. Examining the issue of who the other candidates from the flat might be, it was demonstrated at the trial that the person in the photograph could not have been Mr Taylor, as he had been identified as wearing a red top during the course of the robbery. It could not have been Mr Campbell, whom the trial judge described as being of an entirely different build. It could not have been Mr Bell, because he had been identified by police officers as having left the flat at an earlier stage. The trial judge's report contains the following conclusion: "Accordingly, if it were to be supposed that the second man was someone who had been drinking in the flat at 31 Marischal Court, on the afternoon of 16 March 2011, the appellant would appear to be the only candidate".
- [6] There was additional evidence to the effect that a toy gun brought to the flat by the appellant's child had not been there after the robbery. Another witness spoke to driving the appellant to Paisley on the day after the robbery, because the appellant had expressed a wish to be "out of the way" because the police were looking for him in relation to the "doing of a shop". Finally, albeit of presumably peripheral importance, the flat at Marischal Court did contain bin bags of a similar type to those selected by the robbers for their footwear.
- [7] The sole ground of appeal is that there has been a miscarriage of justice because a reasonable jury properly directed could not have returned a verdict of guilty. The particular focus of this ground is that the jury should not have accepted the identification of the appellant by Miss Storey from the image taken from the CCTV recording. The submission was based upon an analysis of Miss Storey's evidence. Initially, she had said that she had no recollection of giving a statement to the police at all. That, no doubt, had to be departed from, when the statement containing her signature on several pages was shown to her. Thereafter, she said that she could not say whether her statement was truthful or not, but accepted, in response to what was a leading, but entirely appropriate, question to a hostile

witness, that she would have told the truth at the time. The statement contains a particular reference to the photograph, notably that: "It could be Hughie by the way he was standing but I could not say for definite". Under cross-examination, she denied that the person shown in the photograph was the appellant and said that her reasoning, as to why it might have been the appellant, was, on reflection erroneous.

- [8] In response to the appellant's contentions, the Advocate Depute focussed on the need for the verdict to be unreasonable rather than the identification, seen in isolation. Having regard to the various strands of evidence, which have already been noted, the submission was that there had been a compelling and convincing case against the appellant and the verdict could not be regarded as unreasonable.
- [9] In addressing a contention that a jury's verdict is unreasonable, the question for the court is whether, looking at the totality of the evidence, a miscarriage of justice has occurred because no reasonable jury could have held the case proved beyond reasonable doubt. In answering that single question, the testimony of a particular witness should not be looked at in isolation to see if it was unreasonable for a jury to have accepted it, but taken along with, and in the context of, all the other evidence in the case in order to determine whether the verdict was an unreasonable one in the circumstances. This follows from the dicta of the Lord Justice-Clerk (Gill) in *AJE v HM Advocate* 2002 JC 215 (at paras [28] to [37]) and the Lord Justice General (Rodger) in *King v HM Advocate* 1999 JC 226 (at pages 229 - 230). In dealing with appeals under the relevant provision of the Criminal Procedure (Scotland) Act 1995 (s 106(3)(b)), the court is not concerned strictly with the legal sufficiency of the evidence. What it requires to do is to carry out its own assessment of the reasonableness of the verdict "with the benefit of its collective knowledge and experience" (LJ-C (Gill) *supra* at para [30]).
- [10] This was fundamentally a circumstantial case, rather than one involving a direct identification by a witness followed by a search for corroboration. It was established, from the evidence of the shop assistant and other adminicles, that the person shown in the photograph was one of the robbers; and it was not Mr Taylor. That robber was shown outside the flat wearing a scarf which came from the flat. Having regard to the exclusion of other potential candidates who had been in the flat, the only reasonable conclusion that can be reached is that the image in the photograph is that of the appellant. Since the court considers that that was the only reasonable conclusion, it cannot be said that the jury's finding to the same effect was unreasonable. This appeal must therefore be refused. DAW
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