

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WINCHESTER CROWN COURT
HIS HONOUR JUDGE HOOTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2009

Before :

LORD JUSTICE BURNTON

MR JUSTICE GROSS

and

MR JUSTICE ROYCE

Between :

SHANE CORNELIUS CHANEY

Appellant

- and -

THE QUEEN

Respondent

(Transcript of the Handed Down Judgment of
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Kate Fortescue for the **Appellant**
Kate Lumsdon (instructed by **the CPS**) for the **Respondent**

Hearing date: 10 December 2008

Judgment

Lord Justice Stanley Burnton:

Introduction

1. On 7 March 2008 at the Crown Court at Winchester before HH J Hooton and a jury, the Appellant was convicted of theft of a shotgun (count 1), acquiring a shotgun without a certificate (count 2) and driving whilst disqualified. On the same day he was sentenced to 6 years' imprisonment on count 1. Concurrent sentences were imposed on counts 2 and 3, and a disqualification from driving was imposed on count 3. He appealed against conviction by leave of the single judge. Having heard the submissions of counsel, we stated that the appeal would be dismissed for reasons we would set out in our written judgment.
2. This is the judgment of the Court on the appeal.

The facts

3. On 28 October 2006 a man walked into Chaplin's gun shop in Winchester. He was seen by two witnesses, Mr Yates and Mr Fyffe, who were in the shop. He appeared to be walking normally. He went straight down the stairs to the lower floor. About two minutes later, he came back up the stairs. The witnesses noticed that he appeared to be limping, not bending one of his legs. He walked out of the shop and turned right.
4. In fact, the cabinet in which shotguns were kept on the lower floor had been left open by one of the shop's employees, Mr Saunders. When Mr Yates and Mr Fyffe went downstairs, they noticed that the gun cabinet was open and that there was an empty space for a gun. They reported the matter to the shop staff, and were able to give a description of the man they had seen.
5. It was not in dispute that the shotgun had been stolen from Chaplin's by the man seen by Messrs Yates and Fyffe.
6. Down the street in the direction taken by the man seen by Messrs Yates and Fyffe is the car park of the Hotel du Vin. It was monitored by CCTV. The recording of the CCTV video images taken in the period following the taking of the shotgun from Chaplin's was recovered by the Police. It was shown in Court at the trial and on the hearing of this appeal. It shows, at 12.15, shortly after the theft of the shotgun, a man appearing from the direction of Chaplin's, walking stiffly. He goes over to what appears to be an enclosure or shed, in fact a wood store, with a black door to the left of the car park (looking towards its entrance). He lifts something up and puts it behind the door. It is long, thin and black, and could well be a shotgun. He leaves the car park. Shortly afterwards, at 12.41, what appears to be the same man reappears and looks around the car park, goes to the wood store and again leaves. At 12.44 a white car drives to the entrance of the car park and stops there. The driver gets out and goes straight over to the black door. He looks like the man seen in the previous extracts from the CCTV recording. He is seen to remove something from behind the door and to put it in the car. He re-enters the car and drives off. The car is the same colour, make and model as the Appellant's and has the same registration number. The prosecution case was that the CCTV recording to which we have referred showed the same person, that he was the thief, and that he was the Appellant.

7. The Appellant was known to DC Elspass-Collins by reason of an unrelated matter. He had interviewed him and dealt with him for several hours on 24 October 2006. The Appellant had been photographed. On 31 October the Appellant was photographed again in connection with the same matter. On that day he saw him for ten to fifteen minutes.
8. Following the theft of the shotgun, on 19 November 2006 DC Elspass-Collins received an email from PC Cawkill with still images from the CCTV attached. PC Cawkill stated:

“I’ve attached some stills of our offence ... which officers in Kent also believe to be Chaney. The stills are not clear, but I would be interested in your thoughts.”

DC Elspass-Collins sent an email in reply stating:

“I’ve looked at the CCTV you’ve sent, and I can identify Chaney for you, and will complete a statement.”

At around the same time he learned from PC Cawkill that the registration of the car in the still images had been checked and was registered to the Appellant. DC Elspass-Collins did not in fact make a statement until 4 January 2007.

9. The Appellant’s car was discovered by police officers parked outside his flat. It was impounded. In it were found court documents in the name of the Appellant. On 23 November 2006 officers conducted a search of the Appellant’s home address and seized a cap and steel toe-capped trainers. The shotgun was not found, and has never been recovered.
10. In interview the Appellant said that on 28 October 2006 he probably would have been at home and would have done housework and some shopping. That was his usual habit on a Saturday. He had never been to Winchester or the Hotel du Vin in his life. He owned a white Citroen car. It had been parked outside his flat in Kent. He did not lend the car to anyone, and no one else had keys to it as far as he knew. He did not know the registration number. He had not driven the car and no one had his permission to do so. He was disqualified but he was planning to retake the driving test. He did not accept the car in the still CCTV images was his. His car looked much older. He denied being the man in the still images. He did not recognise him and said that the man in the images looked older.

The evidence at the trial

11. It was not in issue that the man seen in the CCTV was the thief of the shotgun. The only issue therefore was whether he was the Appellant. In other words, the issue was whether he was correctly identified as the thief.
12. The evidence of Messrs Yates and Fyffe was read. They had not participated in an identity parade, and had not therefore identified the Appellant. Mr Saunders, the assistant at Chaplin’s to whom they had reported their suspicions, confirmed that a shotgun was found to be missing from its cabinet when they spoke to him. He had not observed the man who was the subject of their suspicion.

13. On behalf of the Appellant, objection was taken to the admission of the evidence of his identification by DC Elspass-Collins. The judge ruled against the objection.
14. DC Elspass-Collins gave evidence of his knowledge of the Appellant's appearance, derived from his having met him as described above, and of his identification of the Appellant as the man shown in the CCTV stills sent to him by PC Cawkill. Their exchange of e-mails was before the jury. DC Elspass-Collins said he could not remember whether the still images were black and white or colour. The jacket the Appellant was wearing in the still images was "the same if not similar" to the one he had been wearing on 24 October 2006. The hairline, facial features and stature of the man in the stills were the Appellant's. The shoes also looked like the Appellant's. He was of the view that the shoes and cap were the same as those the Appellant wore on 24 October, and similar to those worn by the thief in the still CCTV images.
15. PC Elaine Cawkill gave evidence that the Appellant was interviewed on 19 December 2006. He agreed to take part in an identification procedure and so she took steps to arrange one. However in January 2007 the Appellant was admitted to hospital for psychiatric treatment. On numerous occasions between 31 January and 5 April 2007 she made regular enquiries with the hospital as to whether the Appellant was available. At some time between January and April the Appellant wrote to police informing them he was no longer prepared to attend an identification procedure. Police arranged an identification procedure in May but Mr Yates was unable to attend and Mr Fyffe informed police he was no longer willing to attend because the theft was too long ago
16. The Appellant did not give evidence and no evidence was called on his behalf. According to his Defence Statement, he was never in Winchester; it followed that the person shown in the CCTV and in the stills taken from it was not him; and the vehicle shown in the video recording was on false plates.

The grounds of appeal

17. On behalf of the Appellant, it was submitted that the admission of DC Elspass-Collins's identification of the Appellant rendered the conviction unsafe in that:
 - (a) The purported identification by DC Elspass-Collins was procedurally flawed and unfair.
 - (b) The evidence was more prejudicial than probative and its admission in evidence at trial rendered the conviction unsafe.
 - (c) The trial judge, having allowed the identification in evidence, failed adequately to warn the jury of the 'special need for caution' in cases which rest on identification evidence and to outline breaches of the principles of Code D and the significance of those breaches.
 - (d) The judge failed properly to deal in his directions with the issue of lack of identification parades in respect of the eyewitnesses, Messrs Yates and Fyffe, which added to the "unsafeness" of the conviction.

Discussion

18. The submission that the identification by DC Elspass-Collins was procedurally flawed and unfair depends, in large part, on the requirements of Code D of the Police and Criminal Evidence Act 1984 as revised. The part of the Code relied on is paragraph 3.28, together with paragraph 3A of the Notes for Guidance:

“3.28 Nothing in this Code inhibits showing films or photographs to the public through the national or local media, or to police officers for the purposes of recognition and tracing suspects. However, when such material is shown to potential witnesses, including police officers, see *Note 3A*, to obtain identification evidence, it shall be shown on an individual basis to avoid any possibility of collusion, and, as far as possible, the showing shall follow the principles for video identification if the suspect is known, see *Annex A*, or identification by photographs if the suspect is not known, see *Annex E*.”

“3A Except for the provisions of Annex E, paragraph 1, a police officer who is a witness for the purposes of this part of the Code is subject to the same principles and procedures as a civilian witness.”

19. PC Cawkill’s email to DC Elspass-Collins was within the first sentence of paragraph 3.28. At that stage, as the content of her email indicates, it was not thought that DC Elspass-Collins would be a witness. The email and the stills were sent to him for the purposes of recognition of the suspect shown in the stills. He was not a witness to the theft of the shotgun and was not at that stage the subject of the second sentence. Once he had reacted to the email as he did, he became a potential witness, but compliance with Annex A or Annex E, if they were applicable, was not practicable.
20. This situation was considered by this Court, differently constituted, in *R v Dean Smith and others* [2008] EWCA Crim 1342, in which judgment was given on 25 June 2008, after the trial in the present case. The guidance it gave was therefore not available to HH Judge Hooton in the present case. Giving the judgment of the Court, Moses LJ stated:

66 There was some controversy as to whether Code D has specific application to the process undertaken in this, as in many other cases, when police officers are asked to view CCTV records in the hope that they might pick out someone of whom they have previous experience. The introduction to the code at D1 provides:—

“1.1 This code of practice concerns principal methods used by the police *to identify people in connection with the investigation of offences* ... (our emphasis)

1.2 Identification by witnesses arises, e.g., if the offender is seen committing the crime and the witness is given an

opportunity to identify the suspect in a video identification, identification parade or similar procedure ...”

67 A police officer asked to view a CCTV is not in the same shoes as a witness asked to identify someone he has seen committing a crime. But, as the prosecution accepted, safeguards which the code is designed to put in place are equally important in cases where a police officer is asked to see whether he can recognise anyone in a CCTV recording. The mischief is that a police officer may merely assert that he recognised someone without any objective means of testing the accuracy of such an assertion. Whether or not Code D applies, there must be in place some record which assists in gauging the reliability of the assertion. In cases such as these, there is no possibility of comparing the initial observation of a witness, as recorded in a contemporaneous note of description or absence of description, who purports to make a subsequent identification. The police officer can hardly be asked to record his recollection of a description of a particular suspect before he has picked that suspect out from the CCTV recording.

68 Absent any such check as would be available had a witness described the commission of an offence and recollected his description of the offender, it is important that the police officer’s initial reactions to the recording are set out and available for scrutiny. Thus if the police officer fails to recognise anyone on first viewing but does so subsequently those circumstances should be noted. The words that officer uses by way of recognition may also be of importance. If an officer fails to pick anybody else out that also should be recorded, as should any words of doubt. Furthermore, it is necessary that if recognition takes place a record is made of what it is about the image that is said to have triggered the recognition.

69 Absent any such record, it will not be possible to assess the reliability of the recognition. We were told that a protocol is being prepared for such cases. With the increasing use of CCTV recognition it is vital that a protocol is prepared which provides the safeguard of measuring the recognition against an objective standard of assessment. Only by such means can there be any assurance that the officer is not merely asserting that which he wishes and hopes, however subconsciously, to achieve, namely the recognition of a guilty participant.

...

72 Moreover, in summing up the evidence of identification to the jury the judge made no reference to the inadequacies of the procedure and the record of recognition. The judge ought to have directed the jury that by reason of the inadequacies of the

procedure there was no objective standard or record against which to measure the reliability of WPC Smith's mere assertion. Nor did the judge identify the inadequacies revealed in her cross-examination, although he did refer to the cross-examination by defence counsel."

21. As Miss Lumsdon pointed out, in the present case the jury did have "the police officer's initial reactions to the recording" and "the words that (he used) by way of recognition", as suggested by the Court of Appeal in paragraph 68 of its judgment, in his email response to PC Cawkill. Moreover, this response was not drafted for the purposes of being given in evidence: there is no reason to believe that it was other than DC Elspass-Collins's genuine and spontaneous reaction to the still photographs.
22. The only justifiable complaints that could be made on behalf of the Appellant are that he was led by PC Cawkill's email to identify the Appellant, who was suggested as the person depicted in them, that he did not at that time identify what features of the man depicted in the photographs led him to the conclusion that he was the Appellant, and that the judge failed to give any warning in his summing up as to the dangers of identification evidence.
23. However, the fact that the name of the Appellant was in the e-mail received by DC Elspass-Collins was before the jury. They were able to consider and to assess the still photographs, as were we. Photograph C is relatively clear, and sufficiently so for it to have been open to the jury to conclude that the officer's identification was accurate. In addition, the jury had the photographs of the Appellant taken at the time when the officer got to know the Appellant. It may be significant that the Appellant denied that these photographs were of him. The jury were able to compare those photographs with the Appellant. Evidence was called as to the procedure for taking such photographs, and DC Elspass-Collins gave evidence that they were of the Appellant. It is hardly surprising that the jury accepted this evidence.
24. It is true that DC Elspass-Collins did not at the time identify the features in the photograph that led to his identification of the Appellant. However, it may be difficult to identify those features of a person that enable one to recognise him. A vague description is not inconsistent with subsequent recognition; indeed, it is not unknown for an accurate recognition to be preceded by a description which is materially inconsistent with that of the person identified. When he gave evidence the officer did state what features led him to his identification: the Appellant's hairline, facial features and stature. The jury were able to assess whether the first two of those features at least were visible in the still photographs that had been e-mailed to DC Elspass-Collins.
25. Although this was a case of recognition rather than identification, in our judgment it would have been appropriate for the judge, in his summing up, to have referred to the need for caution. A full *Turnbull* direction would have been inappropriate: this was a recognition case, not an identification case. However, this was a case in which the evidence against the Appellant was overwhelming. The principal evidence identifying him as the thief was his car. The suggestion that it had been cloned (since the car seen in the CCTV recording had not only the same number plate, but was also the same make, model and colour as that of the Appellant) was of the same order as "pigs can fly". Quite why anyone should want to clone the Appellant's car was never explained.

Unless that suggestion was confirmed by credible evidence, which it was not, the jury was right to exclude it.

26. In addition, there were other items of evidence, albeit less unequivocal, linking the Appellant to the theft. The man shown in the CCTV was wearing a dark coloured baseball cap with a distinctive rounded crown. A similar baseball cap was found at the Appellant's home. At the trial, it was suggested on his behalf that the baseball cap had been planted at his home by police officers, but, like other suggestions made on his behalf, he did not give evidence in support of it. There were also similarities between a pair of trainers found at the Appellant's home and those described by Mr Fyffe and those seen worn by the man in the CCTV recording. In interview, the Appellant accepted that the trainers "probably are his". DC Elspass-Collins gave evidence that he had seen the Appellant with a jacket similar to that worn by the man in the CCTV and similar to that described by the witnesses in the shop: the Appellant had had the jacket when he had been in custody on 24 October 2006.
27. In our judgment, the judge was entitled to admit the identification/recognition evidence of DC Elspass-Collins. The full circumstances of that purported recognition were before the jury. We see no unfairness in its admission. In his summing up, he made it clear that the issue in the case was identification. DC Elspass-Collins's evidence was fully summarised, including his evidence that:

"I wouldn't say I've put the fact that I was told that Chaney was suspected or that his car had been identified completely out of my mind, but I'd still say it was him, and even if I'd only been told, 'Do you recognise that man?' I would have recognised that man as Chaney."

28. Lastly, it is regrettable that there was no identification parade attended by Messrs Yates and Fyffe, but the reasons for that were before the jury. While it is true that the Appellant did not have the benefit of their failure to identify him, he did not have the disadvantage that they might have in fact identified him.

Conclusion

29. Having reviewed the summing up and the CCTV and still photograph evidence in this case, we have no doubt, as we have already indicated, that the Appellant was rightly convicted.
30. For the sake of completeness, we should mention that, following the judgment of this court in *Dean Smith*, guidance has been issued to officers as to the procedure to be followed when the CCTV or other photographic evidence is submitted to officers in the hope that they may be able to identify a person shown in them. Like the judgment in that case, it was not available to the officers in the present case or to the judge at the trial. It begins:

" Following the case of (*R v Dean Smith*), there is a need to provide guidance relating to the showing of images to police Officers/Police Staff in circumstances that support, but are **NOT** directly covered by Code D of PACE."

(The emphasis is in the original.) The guidance is along the lines given by the Court in that case. As can be seen, it assumes that Code D is not directly applicable, an assumption which we consider to be well-founded and which is consistent with the judgment of this court in *Dean Smith*.