



IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION

CRIMINAL APPEAL 2013: No. 8

BETWEEN

ROBERT E. HEWEY

Appellant

and

LYNDON D. RAYNOR

(Acting Police Inspector) Respondent

Date of Hearing: 27th March, 2013

Date of Judgment: 1st April, 2013

Mr. Dantae Williams, Mussenden Subair for the Appellant

Mr. Geoffrey Faiella, Department of Public Prosecutions – for the Respondent

INTRODUCTORY

1. This appeal was heard on 27th March, 2013 against a conviction and sentence in the Magistrates Court on a charge of Burglary including theft at a night club, committed on 29th January 2012. At that time the appeal was allowed, the conviction and sentence were set aside and reasons were ordered to follow.

At the hearing counsel for the appellant sought and received leave to add two additional grounds, 5 and 6, to his previous four grounds of appeal.

THE EVIDENCE

2. The prosecution relied upon the evidence of four witnesses at the trial. They were a Mr. Peniston, the head bartender, who secured the club on the night of the 29th, returned on the 30th about 10:15 a.m. and found it broken. He reported it to the owner; another employee, Mr. Trott, who secured the club about 3 a.m. on the 29th and upon learning of Mr Peniston's report visited it on the 30th and found it ok. He again visited

on the 31st and found cash and liquor missing. He said, he with the owner checked the CCTV footage. The police were called, took the footage and did forensics.

3. A Mr. O'Connor the Managing Director, said the club has 16 cameras of which four are behind the bar. The bar used to open on Wednesdays, Fridays and Saturdays, 10:30 p.m. to 3:00 a.m. but in January it opened only on Fridays and Saturdays.

He received a call from Mr. Trott on 31st January at 11 a.m., went in, checked the CCTV footage and called the police. He said he checked the footage over and over and discovered cash and liquor missing. On 3rd February at 4:30 p.m. he forwarded the contents on his phone to the attending officer. In cross examination he pointed out in a photo, a gentleman behind the bar in the night club, which he said he recorded on his phone from the CCTV and forwarded to the police. He also said that such occurrences often occurred at the club, hence the reason for the cameras.

The final witness was DC Abraham who said he received an email with an attachment from Mr O'Connor on 3rd February and upon opening the attachment saw the photo and positively identified the appellant. He said he never saw the CCTV footage and didn't know what date the photo was taken. Counsel for the appellant said the question asked was really whether he knew what date the footage was made.

GROUND OF APPEAL

4. The six grounds of appeal were: 1. The magistrate wrongfully rejected the appellants no case submission; 2. The magistrate erroneously reversed the burden of proof from the Crown to the defendant to disprove the Crown's case; 3. The evidence did not support a finding of guilt; 4. The trial was unfair and now incapable of remedy on appeal; 5. The magistrate failed to provide sufficient findings and reasons for his decision contrary to Section 21 of the Summary Jurisdiction Act. 1930.

THE SUBMISSIONS

5. Counsel for the appellant firstly argued grounds 5 and 6 and then grounds 1 to 4 together. He submitted that taken together, in the absence of any date and time on the photo the magistrate could not be certain that the photograph reflected what occurred at the material time. That is, if the person in the photo was the appellant, that it was at the time of the offence and not at some earlier or later time.

Furthermore that the failure to produce the CCTV footage and or to prove that this photo was from that footage taken at the material time could not cause the magistrate to draw an inference leading to the sure conclusion that the defendant committed the offence at the material time.

The respondent conceded the absence of time and date on the photo and the absence of the CCTV footage bearing such as well but countered that since the burglary did occur on the 29th as the information stated, and Mr O Connor was concerned with that burglary at the time he examined the footage, the only reasonable inference to be

drawn was that he did so in relation to the relevant period and that the magistrate must have found that, particularly in a case in which no reasonable explanation was offered by the appellant who did not testify and whose counsel never raised these issues in cross examination of any witness. Hence the magistrate's reasons though sparse, were sufficient in the circumstances and the appeal should be dismissed.

THE DECISION

6. I find merit in the appellants' submissions. There is no doubt in my mind and there could not have been any in the magistrates mind after viewing the photograph that that was the appellant clearly shown in the photograph. Thus I would hold that there was sufficient evidence for the defence to be put to answer a case. In that sense ground 1 cannot stand.
7. However, the legal burden and standard rests' upon the prosecution. I am not satisfied that they were met in this case. I am not satisfied that the learned magistrate in the absence of a dated and timed photo or in the absence of a dated and timed CCTV footage, in an age when it is expected that such would be present, and or in the absence of some reasonable explanation given by Mr O'Connor in evidence as to why the dates and times were absent and or in the absence of evidence from Mr O'Connor that the footage was footage for the relevant period and or in the absence of some explanation by the police officer why he did not call for, viewed and or extracted the relevant footage from the CCTV and why it was not available for viewing by the magistrate, that the learned magistrate could be satisfied so that he felt sure, this photo was from footage made at the time of this burglary and not made, whether footage or photo at some other time in respect of this public establishment to which members of the public including the appellant must be taken to have had access. In addition there was no evidence from any witness tending to suggest that it was unusual or unnatural for the appellant to be at the position he is seen in the photo with or without permission. There is no doubt that an explanation from the appellant may have been helpful one way or another but there is no duty upon him to say anything. These are holes that the prosecution must close.

Furthermore it is conceded by counsel for the respondent that the exhibited photo seems to clearly show that the cash register screen was a lit. If that is so some reasonable doubt must arise as to what time this photo is showing this, since the evidence was that the establishment had been closed and secured at the time of the burglary. Certainly it cannot be for the defence to offer an explanation as to why the screen appeared to be lit whilst the appellant was in its precinct.

Of the various equal inferences that maybe drawn, including it must have been at the time the club was still open and thus before the burglary, or it must have been left on by an employee and remained on after the closing or it must have been turned on by the culprit seen in the footage during the burglary, or it must have been on a day

other than this 29th the date of the burglary, or it is not on at all and is merely a reflection, one favours the appellant and must be drawn in his favour.

In the magistrate's reasons for his decision, he offered no explanations for or consideration of these issues. He simply said, having heard the evidence I am satisfied so that I feel sure the defendant did enter the Moon Night Club on 29th January 2012 as a trespasser and therein stole money and liquor valuing in excess of \$3000 and is therefore guilty as charged.

With respect, I find that reasoning to be insufficient, given the context of this case.

In the circumstances the appellant is entitled to succeed on grounds 2, 3, 4 and 6. In short the conviction is unsafe. It is unnecessary to address ground 5. For these reasons I allowed the appeal. In the circumstances I think a retrial would not be useful and I therefore make no order for such.

Dated this 28th day of March, 2013 _____

GREAVES C, J