APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 35
HCA/2017/440/XC and HCA/2017/442/XC

Lord Justice General
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEALS

by

JOSEPH FRANCIS McHALE and KEVIN CHARLES SCHRUYERS

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (McHale): Kerrigan QC, Findlater; Beaumont & Co
Appellant (Schruyers): Allan QC, Armstrong; Faculty Services
Respondent: Stewart QC AD; the Crown Agent

31 May 2017

General

[1] On 25 April 2016, at the High Court, Glasgow, the appellants, along with Robin Vaughan, went to trial on a series of charges generally involving successful and unsuccessful attempts to force open Automated Teller Machines in the Aberdeenshire area

between August and November 2013. There was also a charge (22) of theft of golf equipment, including Galvin Green golf clothing, from the Paul Lawrie Golf Centre on South Deeside Road on 26 October 2013. Another co-accused, Peter O'Brien, failed to appear.

[2] During the course of the trial, Mr Vaughan pled guilty to charges 2, 9 and 10 (*infra*). On 19 May, the appellants were convicted of these charges and charges 15, 22, 24, 25 and 27. The charges involved ATM machines on the following dates at the specified locations:

Charge	**Date (all 2013)**	**Location**
2	26 August	Co-op, Mintlaw
9	18 September	RBS, New Deer
10	19 September	Co-op, Bieldside
15	25 October	Clydesdale Bank, Ellon
24	28 October	Clydesdale Bank, Stonehaven
25	28 October	Bank of Scotland, Inverurie
27	10 November	Lloyds TSB, Oldmeldrum Road (Bucksburn)

[3] On 5 August 2016, Mr McHale was sentenced to 12½ years imprisonment (reduced from 13 years to take into account an interrupted period in custody); Mr Schruyers was sentenced to 13 years; and Mr Vaughan to 11 years.

Evidence

[4] The crimes involving the ATMs were described by the trial judge as a "highly distinct – if not unique – course of conduct". Eye witnesses spoke to seeing up to four dark clothed persons acting in concert. They involved targeting small Aberdeenshire towns in

the hours of darkness, placing tape over any cameras at the *loci*, using crow bars to break into the premises and introducing gas and wiring into the ATMs with a view to blowing them up and stealing the money inside. The *modus operandi* required a degree of expertise to improvise a hot wire ignition system, the wires being heated by a battery and attached to matches. Some £21,000 was obtained from the events in charge 9 and £112,000 from charge 10. There was fresh blood found on the ATM in charge 10 which did not belong to any of the accused.

[5] In charge 9, a black Audi was used as the getaway car. In charge 10, a silver Audi was seen. In charges 15 and 24, a white Audi, which had been stolen from outside a DW Sports Club in Aberdeen on 15 October, was used. In charge 25 a white Audi, presumably the same one, was also used. The white Audi was observed at the Norvite farm shop, Old Meldrum, on 25 October. That was the same day as the crime in charge 25. The appellants, Mr O'Brien, and an unidentified male left the Audi and entered the shop. A shop assistant became suspicious and, when challenged, Mr McHale handed over a pair of black gloves which had been in his pocket. Subsequently Mr O'Brien was found to have a pair of black gloves which had been stolen from the shop. When recovered from woods near Methlick on 29 October, the Audi had materials in it for use in blowing up ATMs, including gas cylinders, a battery with leads attached to matches, a sledge hammer and a pair of gloves. Mr Schruyers' DNA was matched to DNA recovered from the Audi's steering wheel. Nearby, "Galvin Green" golf clothing from the Paul Lawrie Golf Centre break-in on 26 October (charge 22) was recovered.

[6] Another car, which had been stolen from the same DW Sports Club on 3 September, was seen in woods near Ellon on the following day. There was no link established between this car and any of the charges. A stolen silver Audi was being driven by Mr O'Brien when

he was detained by the police in Liverpool on 31 October. This too contained Galvin Green golf clothing and equipment suitable for use in the crimes (eg power tools and a crowbar).

[7] Very soon after the golf centre break-in, which occurred at about 1.00am, Messrs McHale, O'Brien and Schruyers were observed at Mr O'Brien's flat in Torry. There was much to-ing and fro-ing, with a large bag and clothing being transported. Subsequently Mr McHale and Mr O'Brien left the flat wearing golf clothing of the type stolen from the golf centre. All of this was consistent with CCTV footage recorded at the golf centre which showed three men leaving a silver saloon car and breaking into the premises with a large black bag or sack. Two of the men were identified as similar to Mr Schruyers and Mr O'Brien. A laptop computer was recovered from the flat, upon which searches had been made, on 13 and 14 October, for Audi cars and, on 26 October, on an "ATM locator". On the latter date, a Google map was downloaded which showed "Norvite Animal Nutrition", along with a location mark for the farm and nearby banks.

[8] According to Francis Clark, who had a chalet at Cruden Bay, Mr Vaughan had asked to come and stay at the chalet along with a few friends. Four had come in late August or September and had stayed for a week or 10 days. They went away and came back again. It was not always the same group. Mr Vaughan and a person called Terry were always part of the group. Mr Clark mentioned a small man with white skin, and short or no hair, with a weird last name, "shrewd or something". They had three or four Audis; first a black, then a white, then, possibly another black one. They had told him that they were going to blow up ATMs. On 19 September they had mentioned obtaining £100,000 from Bieldside (charge 10). They had equipment, such as gas cylinders and various car number plates, stored in a garage. On one occasion Mr Clark found the group wiping red dye from the stolen money.

In October he saw a couple of thousand pounds on the table. One of them explained how they went about blowing up the ATMs.

[9] On 27 October Mr Vaughan had phoned Mr Clark from a car to say that he was on his way back up to "do" more machines. There were three or four Liverpool voices in the background. With regard to the raid on 10 November (charge 27) DNA matching that of Mr McHale was found on tape surrounding a wire which was part of an explosive device abandoned at the bank.

[10] The evidence linking the individual appellants and the co-accused to the particular crimes was circumstantial; some of the connectors being strong and others weak. In relation to Mr McHale:

(1) he was present at the DW Sports Club when the white Audi, used in charges 15, 24 and 25, was stolen on 15 October; the car later being found to contain equipment which could have been used in the raids;

(2) he was in the white Audi, with Messrs O'Brien and Schruyers, when it was at the Norvite farm shop on 25 October when he tried to steal a pair of gloves;

(3) he was in the company of Messrs O'Brien and Schruyers going into Mr O'Brien's flat in Torry at about 1.00am, shortly after the golf centre break-in on 26 October. On the following morning he was seen, with Mr O'Brien, leaving the flat wearing Galvin Green "Insular" clothing of the type stolen (charge 22), and of the type later recovered from the flat and from the woods where the white Audi was discovered;

(4) his DNA was found on tape surrounding wires recovered from material left at Lloyds TSB, Old Meldrum Road (charge 27); and

(5) Mr McHale is from Liverpool.

[11] In relation to Mr Schruyers, his DNA was found on the steering wheel of the recovered white Audi, thus linking him to charges 15, 24 and 25. He too was at the flat in Torry. Francis Clark said that one of the men who came to stay at his chalet had a weird name, "shrewd or something". He had really short, or no, hair, white skin and was quite small. The description matched that of Mr Schruyers in court and the description given to the jury by a detective sergeant when viewing CCTV footage. Mr Schruyers is also from Liverpool.

[12] Mr O'Brien's DNA was found on a pair of black gloves found in the recovered white Audi, thus linking him with charges 15, 24 and 25. He was also at the Norvite farm shop. He was detained in Liverpool in a silver Audi wearing the gloves which he had stolen from the Norvite farm shop. The car contained Galvin Green golf clothing, linking him to the Galvin Golf Centre break-in (charge 22).

[13] Mr Vaughan had been identified as an ever present member of the group in the chalet. It would seem that he was the organiser of that accommodation. His DNA was found on tape covering the camera in charge 2. He was found in possession of £1,000 in Scottish bank notes on 3 October near his home in Liverpool. During the period 27 September to 13 October, there had been attempts to launder RBS notes, stained with red dye, in Liverpool betting shops. Mr Vaughan told Mr Clark on 27 October that he was on his way back up to raid more ATMs in the area. This was the day before the events libelled in charges 24 and 25.

Grounds of Appeal

1 Unfair Trial

[14] Mr Vaughan pled guilty during the trial. At that point, the advocate depute, in

moving for sentence before the jury, tendered a schedule of his previous convictions. The nature and extent of his record was not disclosed. On the following day, Mr McHale moved the trial judge to desert the diet on the basis of unfairness "by analogy" with section 101 of the Criminal Procedure (Scotland) Act 1995. That motion was refused because section 101(1) did not apply and that, if any prejudice had been caused, it was not sufficiently serious to peril the continuing trial. It could be cured by a direction even in the case of the revealing of an accused's previous convictions (*Crombie* v *HM Advocate* 2015 SCCR 29). No specific direction mentioning previous convictions was given in the judge's charge 10 days later. She thought that any such direction would draw attention to the matter. She did, however, state that the jury should not regard Mr Vaughan's plea "and any information in respect of that plea" as evidence in the case. The jury required to "put it aside and have no regard to it".

[15] The submission on appeal was that revealing Mr Vaughan's record was grossly prejudicial in that it showed that the appellant had associated with a known criminal. This rendered the trial unfair, not in common law terms, but under Article 6 of the European Convention on Human Rights. The judge's directions were insufficient to cure the error.

2 Admission of Hearsay

[16] Objection was taken to the testimony of Mr Clark about the phone call from Mr Vaughan, with Liverpool voices in the background, on 27 October to the effect that he was on his way up to "do" some machines. The trial judge repelled this on the basis that the case involved concert (Dickson: *Evidence* para 363; *Docherty* v *HM Advocate* 1980 SLT (notes) 33). On reflection she considered that this may have been an error (*Beacom* v *HM Advocate*

2002 SLT 346; *McLay* v *HM Advocate* 1994 JC 159 at 165 and 179). However, the judge reports that this evidence was not significant and would not have caused any material prejudice.

3 Sufficiency

[17] Both appellants maintained that the trial judge ought to have sustained their no case to answer submissions. Although it is said that the judge had relied upon *Howden* v *HM Advocate* 1994 SCCR 19, she reports that she did not apply it. She took from it only the approach to take in the identification of peculiar features which would entitle a jury to conclude that the crimes were committed by the same person or, she reasoned, group. If the jury concluded that the same group had been involved, and there was a common criminal purpose, the question then was whether there was evidence to prove that the particular accused had been one of the group and party to that common criminal purpose. Emphasis was placed on the discovery of blood from an unknown person on one of the ATMs.

[18] It was submitted on behalf of Mr McHale that, as distinct from *Howden*, there was no "sufficient identification" of the appellant in any of the ATM charges. The finding of his DNA on the tape, as distinct from the wires, was insufficient. The ratio in *Howden* could only apply where there was some form of identification, albeit a tentative one, in relation to each charge. The reasoning in *Howden* could not apply where there was evidence that the group varied. On behalf of Mr Schruyers it was said that it was not enough to show that the appellant was in the company of others who may have been involved in criminal activity. It was not enough to show participation, as part of the group on one occasion, when there was no identification of the appellant being a member of the group on another occasion.

4 Misdirections

(i) The Same Group

[19] Following from the submissions on sufficiency, it was said that the trial judge had misdirected the jury. The evidence did not show that the ATM crimes were committed by the same group of four men.

[20] The judge had told the jury that the Crown case was that all of the offences, other than charge 27, were committed by the same group of four men; the appellants and Messrs O'Brien and Vaughan. On charge 27 it was the appellants and Mr Vaughan. The Crown relied on the jury drawing two conclusions from the circumstantial evidence. The first was that it was the same group. The judge directed the jury that if they were not so satisfied, they could not convict. She made it clear that they had to be satisfied that the same four men had acted together to commit these crimes. It was not enough that there were similarities. The unusual features had to point to it being the same group. Secondly, the jury had to be satisfied that each accused was part of that group and an active participant in the common plan to commit the particular crime charged. If they were not, they required to acquit.

(ii) Search for Norvite

[21] It was submitted that the trial judge erroneously directed the jury that the Norvite farm shop had been searched for on the laptop. The evidence was that any such search had been on the day after the Norvite visit. The judge accepts that there was no specific search for the shop but that the map produced, from whatever search there was, showed the location of Norvite farm. The anomaly in date was not explored in evidence.

Decision

(1) Unfair Trial

[22] In human rights terms, it is not a breach of Article 6 of the Convention to reveal an accused's previous convictions during his trial (*Andrew* v *HM Advocate* 2000 SLT 402, LJC (Cullen), delivering the Opinion of the Court, at 406). As was recognised by the European Commission in *X* v *Austria* (App No 2742/66), evidence of an accused's previous convictions is regularly given in a number of Convention countries without it being perceived as a breach of Article 6 (see *Boyd* v *HM Advocate* 2001 JC 53, LJG (Rodger) at para [9]). In these circumstances, disclosure of a co-accused's convictions can hardly be regarded as a breach of the rights of another accused. It is not a fact which inevitably leads an unfair trial by disabling the jury from reaching an impartial verdict.

[23] Section 101 of the Criminal Procedure (Scotland) Act 1995 provides that an accused's previous convictions shall not be laid before the jury, or referred to in their presence, in advance of their verdict. That section was not breached. Furthermore, the trial judge directed the jury that the co-accused's plea of guilty, and any information in respect of it, was not evidence in the case. The jury were directed to put it aside and have no regard to it. These directions remove any question of the tendering of the co-accused's record prejudicing the appellant. No specification of the co-accused's record was given. No miscarriage of justice has been demonstrated on this ground. That having been said, leaving the tendering of a schedule of a co-accused's previous convictions until after a jury's verdict is the better practice.

(2) Hearsay

[24] The evidence objected to related to the telephone call with Mr Vaughan on

27 October. This was the day before the Clydesdale and RBS charges (24 and 25). It is the day after Mr Schruyers, Mr O'Brien and Mr McHale were in the flat in Torry. In the call, Mr Vaughan said that he was on the way up to Aberdeenshire to "do" more of the machines. There were Liverpudlian voices in the background. That is hardly surprising as that was where Mr Vaughan lived and was apparently coming from. The call was made from a car.

[25] Despite the acceptance of a plea of not guilty from Mr Vaughan to the charges occurring in October and November, the Crown were still maintaining that he was involved in these charges; hence the terms of the judge's charge. No point was made in the appeal about this apparent inconsistency in the Crown's approach. In that situation, in which the Crown were still seeking to prove the guilt of the appellants in concert with Mr Vaughan, the terms of the call were admissible as part of the *res gestae*; ie to prove that Mr Vaughan and other Liverpudlians were coming up to commit the crimes (*HM Advocate* v *Docherty* 1980 SLT (notes) 33, Lord Stewart at 34, citing Walker & Walker: *Evidence* (1st ed) p 35 (para 37; see 4th ed para 9.9) and Dickson: *Evidence* (Grierson ed) 363. *Beacom* v *HM Advocate* 2002 SLT 349 involved the leading of a post crime interview of an accused against whom the Crown had decided to withdraw the libel. That conduct was regarded as unconscionable, but it is of no relevance here. This call was not a statement made after the completion of a crime, but one made beforehand which demonstrated preparation for crimes proved to have been committed the next day involving Mr Vaughan and Liverpudlian accomplices.

(3) Sufficiency and Misdirections

[26] If an accused person is proved to have committed a particular offence and it is demonstrated that another identical offence has been committed, that may be sufficient to

prove that the accused perpetrated both offences (*Gillan* v *HM Advocate* 2002 SCCR 502, LJC (Gill) delivering the Opinion of the Court, at para [19]; cited in *Wilson* v *HM Advocate* 2016 SCCR 425, LJG (Carloway), delivering the Opinion of the Court, at para [19]). Whether it is sufficient will depend upon the particular facts and circumstances; notably the extent of the identical features and their proximity in time and place. There may also be situations in which it can be inferred that the same gang or group was involved in two crimes. In that situation, if an accused is proved to have been involved in one of the crimes, the identical features of the second crime and its proximity in time and place to the first, may provide sufficient evidence to draw the same type of conclusion. Identical crimes committed on the same night and at a nearby *loci* may be an example where the same numbers are involved.

[27] However, in a situation where there are near identical crimes committed in similar locations over a period of weeks, it may not be legitimate to conclude that they were committed by the same persons; albeit that they were perpetrated by a gang under the same leadership. In this case, assuming, as the Crown maintained, that Mr Vaughan was the director of operations, the question must be whether there was sufficient evidence for the jury to conclude that his cohorts were the same, when carrying out: first, the raid on 26 August; secondly, the successful crimes on 18 and 19 September; thirdly, the unsuccessful attempts and the golf centre break-in over a month later from 25 to 28 October; and fourthly, the final attempt (which did not involve Mr O'Brien) on 10 November. Although it may be legitimate to draw an inference, that those involved in a raid on one day were the same as those involved in a raid on the next day or two, it is far more difficult to infer involvement in events several weeks apart, without some evidence linking the accused to each block of crimes.

[28] In what was a circumstantial case based upon several different strands of evidence, the key question is whether the jury could reasonably find the ATM charges, or some of them, proven in respect of either or both of the appellants. It was not an "all or nothing" case, although the trial judge appeared to regard it as such. The proper approach is to look at the totality of the evidence pointing to the involvement of a particular accused. If that evidence is accepted, the next task is to assess whether, when taken along with the rest of the evidence, it proves participation in any of the charges, and if so, which. Proof that the same group of four persons committed all the ATM crimes was not an essential element in this case. The outstanding common feature was the particular *modus operandi* used in a series of planned and swiftly executed raids on, in the main, rural ATMs at night, relatively closely aligned in time and place. In each case there was an explosion, or an attempt to cause an explosion, by a method which at that time was otherwise unknown in Scotland. Other common features were the stolen Audi vehicles, the use of gloves and dark clothing, and a connection with Liverpool. The fact that the crimes were committed was not in issue. The only question was whether the Crown had proved the participation of each of the appellants. In these circumstances any involvement in planning and preparation could be significant, especially when added to the incriminating DNA evidence. The key contention for the defence was that, particularly in the absence of direct identification of an appellant as a participant in a raid, the evidence relied on by the Crown was not sufficient. A similar submission was presented to this court in support of the argument that the no case to answer submissions ought to have been upheld. It is therefore necessary to examine the relevant evidence in respect of each appellant.

[29] Mr McHale was linked to charge 27 by virtue of his DNA being found on tape surrounding the wires used in the interrupted attempt in Bucksburn on 10 November. The

submission to the contrary is rejected. The finding of his DNA on any component of the material to be used in causing the explosion forms an obvious link between Mr McHale and the crime. Sufficient proof of that link was, of itself, enough to prove his involvement on that charge. He was linked to the stolen white Audi and was in it at the Norvite farm shop with Messrs O'Brien and Schruyers. He was wearing Galvin Green clothing shortly after the break-in at the golf centre; more clothing being found near the recovered white Audi in due course. He was thus linked to charges 15, 22, 24 and 25. Again, that circumstantial evidence was sufficient to prove guilt on these charges. When taken with the totality of the evidence, the jury would have been entitled to hold, from his being at the sports club when the white Audi was stolen and his presence in it subsequently, that Mr McHale was involved in all of the ATM charges in the short time span from 25 to 28 October. In order to bring home charges 2, 9 and 10, however, there would have to be something linking him to them, occurring, as they did, a month earlier. The very similar nature of the crimes was not sufficient for the jury to draw the inference that the same four persons, and in particular Mr McHale, were involved in the earlier incidents.

[30] Mr Schruyers is linked to the white Audi through his fingerprint on the steering wheel and his identification at the Norvite farm shop, and thus to charges 15, 24 and 25. He is linked to the golf centre break-in through his activities at the Torry flat. There appears to be nothing specific to link him to the Bucksburn charge the following month. He is identified as part of the chalet group through his distinctive name and Mr Clark's description, to which the jury were entitled to have regard from their own observations of Mr Schruyers in court. This linked him to the ATM raid gang as a generality. However, it is not clear from the trial judge's report when this appellant joined the chalet group and, in particular, whether he was there in the initial group of four or not. In these circumstances,

as with Mr McHale, there was insufficient evidence to link him to the earlier charges. The Notes of Appeal also challenged the convictions on charge 22 (the theft from the golf centre), but it is clear that there was sufficient evidence against both appellants in that regard.

[31] As already observed, if there had been sufficient evidence to satisfy the jury that all the ATM incidents involved the same members of the same gang, they would have been entitled to hold that each appellant had been involved in them all. That is how the trial judge directed the jury. There was insufficient evidence to link the appellants to the earlier charges. However, this does not render the judge's directions challengeable. Indeed, she made an erroneous direction in favour of the appellants in stating that the jury could not convict either appellant of any of the ATM charges unless they were satisfied that they had been involved in all of them. If, and in so far as, any of the directions can be regarded as productive of a miscarriage of justice, any difficulty extends only to those convictions which are to be quashed. It remained open to the jury to convict only of certain of the ATM charges, such as 15, 24 and 25, if they had not been satisfied of the appellants' involvement in the earlier offences.

[32] The alleged misdirection in relation to the search for the Norvite farm shop is of no materiality and, in any event, the trial judge's directions were broadly accurate, so far as they went. The fact that the search date was after the Norvite visit does not mean that the search results were not relevant.

[33] It follows that the appeals will be allowed to the extent of quashing the convictions of both appellants on charges 2, 9 and 10 and Mr Schruyers' conviction on charge 27. At the advising the court will hear any submissions regarding the effect of this on the appellants' cumulative sentences.

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Appellant (Schruyers): Allan QC; Faculty Services
Respondent: Niven-Smith AD; the Crown Agent

31 May 2017

General

[1] The circumstances of these appeals are set out in the Opinion of the Court of today's date ([2017] HCJAC 35). The court has also been provided with a sentencing statement, which was issued by the trial judge, on 5 August 2016.

[2] In relation to the co-accused, namely Mr Vaughan, on 22 November 2016 his sentence of 11 years was reduced to 10 years (HCA/2016/460/XC). The reason for that reduction was because the trial judge had erroneously thought that Mr Vaughan had been on licence at the material time.

[3] Although both appellants now stand convicted only of attempts in relation to the ATM charges, which were not the most serious on the indictment, and although it was accepted by the trial judge that Mr Vaughan was effectively the ringleader in respect of the offences, at least of those to which he pled guilty, these offences are still of considerable gravity. Both appellants, and Mr Vaughan, were described by the trial judge as career criminals with substantial previous convictions, including periods in custody. In relation to Mr McHale, that includes a conviction at the High Court in 2006 for robbery and, in the case of Mr Schruyers, a 6 year prison term imposed at Liverpool Crown Court for robbery in 2010. Both of the appellants were on licence at the material time.

[4] In all these circumstances, taking into account the reduced number of charges of which the appellants have been convicted following upon this appeal, the court will reduce the sentences in respect of Mr McHale to 8½ years imprisonment and Mr Schruyers to 8 years imprisonment.