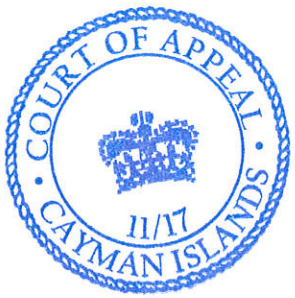
IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA Criminal Appeal 2 of 2018
Ind. Nos. 1/17 and 2/17

BETWEEN:



GARY OLIVER

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

BEFORE: The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Hon Dennis Morrison, Justice of Appeal

Date of Hearing: **Wednesday, 29 August 2018**

Appearances: Mr. Philip Rule of Samson Law for the Appellant
Ms. Eleanor Fargin of the DPP for the Crown

JUDGMENT

Transcript of oral judgment 29th August 2018 and Approved for Release 14th September 2018

Field, JA:

1. On 5th September 2017 in the Grand Court before Justice McDonald-Bishop ("the judge") and a jury, the appellant, Gary Oliver, was convicted on one count of attempted burglary (count 1) and on two counts of burglary (counts 2 and 3).

2. On 19 January 2018, the appellant was sentenced as follows: on count 1, two years nine months imprisonment and ordered to pay compensation in the sum of $1,200; count 2,

four years' imprisonment; count 3, three years' imprisonment. All three prison sentences were ordered to run concurrently.

3. The appellant now appeals against his conviction on all 3 counts and, if that appeal fails, he appeals against the sentences imposed by the judge.

4. The factual background to the appeal against conviction is as follows. On 17 August 2015 at about 12.30 at night, two commercial premises, the office of Marshalls Rent-A-Car on Owens Roberts Drive ("Marshalls") and the office of Cayman Business Machines ("CBM") on Hospital Road were each broken into, in that order, within a short period of time. The break-in at the first set of premises was achieved by battering the front door with a breeze block and once entry had been gained, the electrical power to the office was cut at the back of the premises. However, in this instance, nothing was taken.

5. Entry into the office of CBM was through a broken window, after which the security alarm was turned off using a code that had been supplied to one of CBM's employees. The following property was taken: KYD $1500 in cash and a Samsung Tablet belonging to an employee, Ms Marcela Rondon (charged in count 2) and KYD $450 in cash and ten blank cheques each in the sum of KYD $300 belonging to CBM (charged in count 3).

6. No-one witnessed the break-ins and the police found no finger print evidence or DNA evidence that they regarded as helpful in respect of the appellant. However, there was CCTV footage taken on the night of 17 August 2015 from a camera belonging to the Dollars and Thrifty Car Rental Company which occupied premises adjacent to Marshalls' office, which was uploaded on to a USB stick ("RS1") and provided to the officer in charge of the investigation, DC Sillitoe. These images were shown to the jury. There was also footage from a camera located outside CBM's office from which stills were extracted and put before the jury. The images on these two pieces of footage showed that two men and a woman were involved in the break-in at Marshalls and that it was the same three persons who broke into CBM's office. The images of the two men showed that their faces were covered. The face of the third person, the woman, was

not covered. The images from the camera near Marshalls were clearer than the images on the CBM footage but neither piece of footage was of particularly good clarity. One of the men was stouter than the rest and had a tattoo on the bicep of one of his arms.

7. DC Sillitoe viewed the footage to see if she could identify any of the persons it showed but she was unable to recognise any of them. She therefore asked DC Mendez, who was then a longstanding member of the burglary squad, to view the footage to see if he recognised any of the persons shown within it. DC Mendez testified that he watched some of the footage for 20 minutes in the presence of a fellow officer with whom he worked closely, DC Hayden. He identified the stouter of the three persons as being the appellant whom he had known for eight of the last ten years he had been a Cayman Islands police officer. He was able to do this, he said, on the basis that the stout man was chubby, had a tattoo on one of his biceps and had a highly peculiar gait, all which characteristics were shared by the appellant. At the same time, DC Mendez accepted that he could not see the design of the tattoo on the man's biceps shown in the footage and he could not say what was the design of the appellant's tattoo.

8. The viewing of the CCTV footage was carried out in uncontrolled conditions in line with the practice of the Cayman Islands police force. No contemporaneous record was made as to which part of the footage was viewed by DC Mendez, for how long he viewed it and the reasons he gave at the time for identifying the appellant as being one of the men captured on the film. Nor was any attempt made to insulate DC Mendez from the opinions of other officers. Indeed, as we have already recorded, DC Mendez viewed the footage in the presence of his colleague, DC Hayden, and DC Sillitoe testified that it was common police practice for CCTV footage to be circulated within the force, including to the Intelligence Unit, to see if any officer could identify anyone shown on the film. She also said that it was the practice for a group of officers to watch such footage together.

9. DC Mendez testified that once he had identified the appellant he made a note "*draft a statement*" and then began to draft a statement on his computer, which was not written up as a full statement until sometime afterwards, once the appellant had been arrested as charged.

10. In the third paragraph of his statement, DC Mendez states on the 11 September 2015 at 0800 hours he reported for duty at the George Town Police Station and at 10.30 hours he saw and spoke to DC Sillitoe and he viewed the CCTV footage of the burglary at Marshalls and at CBM. During the viewing, he recognised Mr. Gary Steven Oliver on the footage. He had known Mr. Oliver for over eight years by working in George Town as a Uniform First Response officer. He stated: *"..Mr. Oliver, who is of dark brown complexion, chubby build and walked with a slight limp, was identified by me as one of the 3 persons seen on cameras fixed on the premises, although his face was covered with a piece of light coloured material, I still recognised Mr. Oliver by his distinct tattoo on the bicep of his right arm, and his unique walk."*

11. Having identified the appellant as one of the men shown on the footage, DC Mendez arrested the appellant who was interviewed on 20 October 2015 under caution without requiring the presence of a legal representative.

12. In that interview, the appellant admitted that he knew the location of Marshall's office but denied that he was the man in the CCTV footage identified as him by DC Mendez. He also said that he did not know anyone working at the burgled premises and stated that he did not recognise a key fob exhibit shown to him. In addition, he denied that his DNA or his fingerprints would be found in the burgled premises. He also said that he could not remember where he was at the time in question on 17 August and denied that he had broken into Marshall's office or had had any involvement in the CBM burglary. He spoke about his employment and explained that the tattoo on his bicep consisted of the Chinese characters for "*Happiness*" and he described the location of the place where he had it had been done in Grand Cayman. He accepted that at times he walked with a limp but said that it was his choice whether he did so.

13. The Crown also relied at trial on the following evidence that was very much of a "*make weight*" quality: (i) the appellant was found to be in possession of similar undistinctive sneaker shoes and mariner tops to those being worn by the man in the footage said to be the appellant; (ii) the appellant had hired a car from Marshalls a few weeks before the break-in; and (iii) a car matching the description and size of the car hired by the appellant from Marshalls, save as to a discrepancy as to its colour, was captured on the

CCTV footage; (iv) a poor picture of the tattoo as shown on the CCTV footage and a picture taken of the tattoo on the appellant's bicep which were given to the jury.

14. At the trial, there was a *voire dire* on the question whether the evidence of identification relied on by the Crown should be excluded pursuant to s. 40 of the *Evidence Law* (2011 Revision) on the basis that it would operate unfairly against the appellant. In support of his submission that the evidence should be excluded, the appellant's trial counsel, Mr Philip Rule, submitted that there had been no attempt to observe basic common law standards of fairness in the identification of the appellant but instead the identification had been undertaken in uncontrolled conditions giving rise to the possibility that it had been influenced by the views of other officers and had not been supported by a written contemporaneous record evidencing in detail how the identification was made against which the oral evidence of the identifying officer could be tested.

15. The judge refused the application to exclude the identification evidence and the trial proceeded with the appellant choosing not to give evidence. When dealing with the issue of identification during her summing up to the jury, the judge gave a *Turnbull* direction and enumerated the complaints Mr Rule had made in cross-examination as to the safeguards that ought to have been, but were not taken, in the identification of the appellant. She instructed the jury that if they thought that the lack of those safeguards rendered that evidence unfair, they were free to reject it.

16. The principal submission advanced in the appeal against conviction is that the evidence of identification should have been excluded by the judge and that the failure so to do renders the appellant's conviction unsafe.

17. Amongst the other grounds of appeal also relied on, the appellant submits that the judge wrongly failed to direct the jury as to the evidential value of his account in interview and the use to which it could be put in support of the defence case. In the course of her summing up the judge said, "*Although what the defendant said in interview is evidence of his reaction when first challenged by the police, it is not capable of being evidence that he was elsewhere at the time of the burglary. It is simply an assertion made by the defendant on an occasion when he was not giving evidence.*"

18. For the reasons that follow, we agree with the appellant's primary submission that his convictions on all three counts are unsafe by reason of the judge's failure to exclude the identification evidence that was vital to the Crown's case.

19. In *R v Smith (Dean Martin)* [2009] 1 Cr App Rep 36 (p521), one of the defendants was identified as being part of a crowd outside a club by a police officer having examined CCTV footage of the events outside the club. The defendant appealed his conviction for murder on the ground that the officer's identification had been in breach of that part of Code D of the Code of Practice that deals with the identification of a person by police officers. In paras 67 to 71 of the judgment of the Court, Moses LJ said:

> "67. *A police officer asked to review a CCTV recording is not in the same shoes as a witness who is asked to identify someone he has seen committing a crime. But as the prosecution accepted, safeguards which the Code were 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 recognises 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 in comparing the initial observation of the 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.*
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> 68. *Absent any 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 reaction to the recording is set out and available for scrutiny. Thus if a police officer fails to recognise anyone on first viewing but does so subsequently, those circumstances should be noted. The words that the officer uses by way of recognition may also be of importance. If an officer fails to pick anybody else out, that should also 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 trigger the recognition.*
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> 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 such 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.

70. *In the instant case the only contemporary record was of the identification by WPC Smith on 27 January 2005. There was no record of what was said or of any failure to recognise the suspect in other images. Nor was there any record of what features or aspect led the officer to make the recognition. The difficulties in which that placed the witness were obvious. During cross examination she was unable to give any convincing explanation as to how it was she came to recognise Christie from the images.*

71. *Had the evidence been that of WPC Smith alone, we would have agreed with the submission that the procedure by which her recognition was achieved was inadequate, and that her recognition was, accordingly, unsafe. We would have reached that conclusion notwithstanding the admission at trial that the identification procedure was properly conducted."*

20. The Court in that case went on to find that other identification evidence was reliable, and dismissed the appellant's appeal. However, the judgment of Moses LJ has been followed in subsequent cases, and Code D was amended to take account of the need for protection confirmed in Moses LJ's judgment.

21. This was noted by the Court of Appeal of England and Wales in *R v JD* [2012] EWCA Crim 2637, a decision which is of particular application in this appeal. In this case, the prosecution of the appellant depended entirely upon the identification of him from CCTV coverage by a police officer who gave evidence at the trial. The officer had looked at the coverage three times but made no notes at the time. The relevant part of Code D dealing with identification by police officers using CCTV coverage provided:

> "*3.35 The films, photographs and other images shall be shown on an individual basis to avoid any possibility of collusion and to provide safeguards against mistaken recognition (see note 3G), the showing shall, as far as possible, follow the principles of video identification if known, see Annexe A, or identification by photographs if the suspect is not known, see Annexe E.*

3.36. A record of the circumstances and conditions under which a person is given an opportunity to recognise the individual must be made, and the record must include:

(a) Whether the person knew or was given information concerning the name or identity of any suspect.

(b) What the person has been told before the viewing about the offence, the person(s) depicted in the images or the offender and by whom.

(c) How and by whom the witness was asked to view the image or look at the individual.

(d) Whether the viewing was alone or with others and if with others, the reason for it.

(e) The arrangements under which the persons viewed the film or saw the individual and by whom those arrangements were made.

(f) Whether the viewing of any images was arranged as part of a mass circulation to police and the public or for selected persons.

(g) The date time and place images were viewed or further viewed or the individual was seen.

(h) The times between which the images were viewed or the individual was seen.

(i) How the viewing of images or sighting of the individual was controlled and by whom.

(j) Whether the person was familiar with the location shown in any images or the place where they saw the individual and if so, why.

(k) Whether or not on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone known to them, and if they do: (i) the reason (ii) the words of recognition (iii) any expression of doubt (iv) what features of the image or the individual triggered the recognition.

3.37 The record under paragraph 3.36 may be made by:

- *the person who views the image or sees the individual and makes the recognition*
- *the officer or police staff in charge of showing the images to the person or in charge of the conditions under which the person sees the individual.*

22. The deficiencies in the identification process that the court found were these:-

i. The Officer had to rely on recollection some 6 months after the event, with regard to the circumstances of the viewing, and the defence could not test his account; that he watched the footage alone and that nobody else was present.

ii. The Officer was given the name of the suspect rather than being asked to watch the video to see if he recognised anybody.

iii. No record was made of any question of doubt.

iv. No record was made as to what features of the image triggered the recognition.

v. No record was made as to the words of recognition.

vi. No contemporaneous note was made as to the officer's recollection at the time of the viewing as to what he recalled about seeing the appellant on earlier occasions.

23. The Court concluded as follows in paragraph 24:-

> "*This court is of the view that this recognition evidence of Detective Constable Churton should have been excluded. There was a wholesale breach of Code D, "lamentable" in the judge's own word, which undoubtedly would have created very significant difficulties for the defence in testing the position being articulated by the police, and indeed posed exactly the kind of difficulties identified in the case of Smith.*

24. In seeking to uphold the safety of the appellant's convictions, Ms. Eleanor Fargin cited in her written submission, the decision of the Court of Appeal of England and Wales in *R v Spencer* [2014] EWCA Crim 933. In our view this case was a very different case from the instant case before us and provides no basis for upholding the appellant's convictions. There, the appellant challenged his conviction for robbery on the basis of the identification evidence relied on by the Crown being in breach of Code D as it was

then worded, and should have been excluded under section 78 of the *Police and Criminal Evidence Act* 1984 at the start of the trial. That evidence included the recognition by a police officer of the appellant in CCTV footage captured outside the premises where the robbery was committed. The circumstances of that recognition were that ten days after the robbery, the appellant was one of several men arrested for other matters and was for about one and half hours in the same room as a P C Challis. When P C Challis returned to the police station, he had the feeling that he had seen the appellant somewhere else recently, and on searching his computer he viewed an article published in a local paper which included a still image of the three men extracted from the CCTV footage, and he recognised one of those men as the appellant. The appellant was then arrested and P C Challis sent an email to one of the officers investigating the robbery informing him that he had recognised the appellant. Also, the following morning, PC Challis made a formal witness statement setting out the circumstances and basis of his recognition. There was then conducted an identification parade in which the appellant participated attended by a witness to the robbery who at the end of the parade said she was between 80%-85% sure that the appellant was the man she saw committing the robbery.

25. The Court of Appeal held that: (i) Code D did not apply to the identification made by the officer because he had not been asked to look at the image in the newspaper and say if he recognised anybody on the basis that the police had identified a suspect; and (ii) the judge was entitled to take the view that the officer's evidence should be admitted leaving it to the jury to assess the quality of that evidence against the image which would be put before them. The Court of Appeal also dismissed a contention that the judge erred in refusing a submission of no case at the end of the prosecution case, during which the jury had heard the evidence of the identity parade.

26. It is true that Code D has no direct application in the Cayman Islands but nonetheless the requirement of basic fairness in the identification of persons by police officers from CCTV footage, is a matter of the common law and those requirements were, in our judgment, not met in this case where the identification evidence was weak. We note the following: (1) no attempt was made to ensure that DC Mendez had no communication with other officers about the case that might influence his

identification; on the contrary, the CCTV footage had been circulated generally and in particular to the Intelligence Unit and DC Mendez made the identification in the presence of his colleague DC Hayden; (2) no note was made: (a) of what footage DC Mendez examined in making his identification and for how long he examined it or where he examined it; and (b) no note was made immediately after DC Mendez had made the identification as to his reasons for doing so. As a result, it was impossible effectively to examine the reliability of the officer's recognition of the appellant.

27. In these circumstances, we are in no doubt that the judge should have excluded the identification evidence on the *voire dire* and not left it to the jury to decide whether the process of identification had been fair.

28. The identification evidence was central to the prosecution case. It follows that the appellant's appeal must be allowed. His convictions on the three counts in the indictment are all unsafe and must be set aside.

29. We would add that we are of the view that urgent consideration should be given to amending the Cayman Islands Police Standing Order C4 to include a section on the identification of persons by police officers viewing CCTV footage based on the current version of the relevant parts of Code D now in force in England and Wales.

30. Given our conclusion on the appellant's primary ground of appeal, it is strictly unnecessary for us to deal with the ground of appeal based on the judge's direction as to the use that could be made by the jury of the appellant's account given in interview which, taken as a whole, was a mix of admissions and exculpatory statements.

31. In fairness to the Judge, it is right to point out that there were and are other passages in her summing up where she makes reference to the interview. Thus at an early point she reminds the jury of the contents of the jury bundle which included the record of the interview, telling them that that was evidence in the case. She also made reference to parts of what was said in the interview where those matters had tended to assist the prosecution. She further made a reference to the interview in respect of the tattoo. In addition, fairly shortly before she directed the jury in the manner objected to by the appellant, she told the jury that the entire contents of the interview had been put before

them as evidence as to the appellant's explanation and responses to questions asked of him, which were largely exculpatory, in that they do not incriminate him in the offence charged, and told them that they would appreciate that he was not giving evidence under oath. He had not decided to support it on oral evidence for the jury to see him in the witness box under questioning, so he had not had his account tested in cross-examination. The value to be placed on any part of the evidence, including the appellant's interview which was put before the jury by the prosecution, was a matter for them to decide.

32. In our judgment, notwithstanding these other references to the interview in the summing up, and in particular the last reference to which we have just referred, the judge's direction to the jury complained of by the appellant was a direction that was inconsistent with the long-established practice following the decision in *Duncan* 73 Cr App R 359 of instructing a jury that they should take the whole of a mixed statement made by a non-testifying defendant into account when deciding on the truth of the matter.

33. It was in our view important that the Judge should have given the jury that direction, where she was dealing with the question of the defendant's failure to go in to the witness box and give evidence.

34. For the reasons we have given, this appeal is allowed.