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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL
Monday, 8 June 2009

B e f o r e:

LORD JUSTICE MOORE-BICK
MRS JUSTICE RAFFERTY DBE
HIS HONOUR JUDGE LORAINE-SMITH
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A
v
JUSTIN LEE CHEVANNES

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165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Miss T Panagiotopoulou appeared on behalf of the **Appellant**
Mr R Barton appeared on behalf of the **Crown**

J U D G M E N T
(As approved)

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1. LORD JUSTICE MOORE-BICK: On 30 May 2008 in the Crown Court atChichester before His Honour Judge Wood QC, the appellant was convicted on a single count of aggravated burglary and on 15 August 2008 he was sentenced to seven years' imprisonment, less 300 days spent on remand in custody. He now appeals against conviction by leave of the single judge.

2. The facts giving rise to the conviction were these. On 18 October 2007 the appellant and three co-accused, Ashley Brogden, Joshua Perry and Emmanuel Kibaya, went to a house at 7 Colt Street, Selsey, the home address of a Mr Adrian Settle, Carol Roberts and Mrs Robert's foster child, Che. The prosecution's case was that the men, all of whom were wearing hoods and three of whom were wearing balaclavas, knocked on the door and asked to see Che. When Mr Settle told them Che was not there, they said he owed them money for drugs and that they would get the money from Mr Settle if they could not get it from Che. As Mr Settle tried to close the door he was squirted in the face with a mixture of water and ammonia from a bottle. The four men then entered the property, threw more liquid at him, punched him to the floor and kicked him. The bottle which contained the noxious liquid was discarded in the hallway. Two of the men went upstairs and commenced looting in the bedrooms. They all left the property after about ten minutes taking with them two computer games consoles, some games and a purse.

3. The three co-accused pleaded guilty to an offence of aggravated burglary, but the appellant pleaded not guilty. He admitted being present but denied being a party to any agreement to commit a burglary and denied knowing anything about the bottle containing the amonia solution. So in his case there was a trial.

4. The issues for decision by the jury at the trial were, first, whether a burglary had been committed, second, if so, whether it was an aggravated burglary, and, third, whether the appellant had participated in any offence.

5. Before the trial started counsel for the prosecution applied to adduce the guilty pleas of the co-accused under section 74 of the Police and Criminal Evidence Act 1984 as evidence that they had committed the offence with which they were charged. Counsel for the appellant opposed that application on the basis that if the jury were to be told about the guilty pleas they would inevitably find that there had been an aggravated burglary and the only issue for them to determine would then be whether the appellant had been part of a joint enterprise. The judge ruled in favour of admitting the evidence.

6. The indictment in this case was drawn in the following terms:

> "... having entered as trespassers ... a dwelling at7 Colt Street, Selsey, stole therein [the relevant property] and at the time of committing the said burglary had with them a weapon of offence, namely a bottle filled with a noxious substance."

7. At the trial counsel for the appellant submitted that the indictment as drawn was defective, or, at any rate, that he could not properly be convicted on it was drawn because after the men had entered the house they discarded the bottle which had contained amonia solution in the hallway, it then being almost empty, and therefore did not have with them a weapon of any kind at the time they committed the offence of burglary.

8. The Crown argued that there was one continuous course of action, beginning when one of the men shouted "If we cannot get it [meaning the money] off him we will get it off you" and continuing until they left the house taking with them the various items to which we have referred.

9. The judge rejected the submission made on behalf of the appellant. He said that it would be a nonsense if, having used a weapon to enter premises and having then stolen property that he found there, a person could only be charged with burglary under section 9(1)(a) of the Theft Act, which involves entering with intent to steal, despite the fact that the intention had been carried out and the theft had been committed.

10. In due course he directed the jury as follows. In relation to the coaccused's pleas he said:

> "You have been told that three other people have pleaded guilty. Now that is background material provided to you so that you know why this defendant is on trial by himself alone in the dock. The prosecution are also entitled to say that it shows that an aggravated burglary was committed by these three men, since they have pleaded guilty to it. But their pleas of guilty cannot prove anything more than the fact that they have admitted something. That cannot add anything to the prosecution case against this defendant and is not evidence against him in any way. He denies that he played a part in an offence which they say they committed. That does not help you decide the question: did he play a part? which the prosecution say he did. That is for you to decide on the evidence."

11. In relation to the element of aggravation he said this:

> "Were you to be sure that the offence of burglary had been proved, then you need to go on to decide whether it was an aggravated burglary. In law a person is guilty of aggravated burglary if he commits burglary and at the time when he takes the property he has with him any weapon of offence. That rather old-fashioned phrase 'weapon of offence', what does that mean? It means anything which could be used to injure another person and it has not been argued before you that a bottle containing ammonia would have not constitute a weapon of offence. You may well decide that it does.
>
> The prosecution say that when the bottle of ammonia was used to attack Mr Settle and gain entry into the

house, it remained there in the control of those who had just used it, so when they proceeded to ransack a bedroom and take electrical goods and phones, it was, the bottle was, at that time with them. Of course it would not have much ammonia in it and after being used to incapacitate Mr Settle, it would have served its purpose of intimidating him and discouraging him from putting up any resistance.

So it is for you to decide whether when the property was being stolen the burglars did have with them a weapon of offence and if they did it was an aggravated burglary.

The prosecution also say that before the ammonia was used these criminals, or one of them, told Mr Settle that they would have his money or goods if they could not get what was owned by Che. So the prosecution argue that this was a burglary right from the start and the ammonia was used in the course of it in order to take the householder's property. If you accept that you may decide that the bottle of ammonia was with them at the time of taking because the taking began with the demanding of property from the householder."

12.In relation to the issue of participation the judge gave the jury lengthy directions which dealt with the law relating to joint enterprise fully and related it to the evidence in the case. No complaint is made about those directions, but what is said is that on two occasions the judge gave the jury the impression that participation was the only issue in the case, whereas, in fact, the appellant denied that the offence charged in the indictment had been committed at all.

13.At an early stage in his summing-up and when dealing with the co-accused's pleas the judge directed the jury in the following terms. He said:

"But their pleas of guilty cannot prove anything more than the fact that they have admitted something. That cannot add anything to the prosecution case against this defendant and is not evidence against him in any way. He denies that he played a part in an offence which they say they committed. That does not help you decide the question: did he play a part? which the prosecution say he did."

14.Later, as he was beginning his direction on participation, the judge said this:

"I am now going to turn to the question of participation. Defence counsel does not suggest that there was no crime committed here and concentrates her case on the issue of participation."

15.The grounds of appeal in this case are, first, that the judge was wrong to direct the jury that it was open to them to find that the accused had a weapon of offence with them at the time of theft. Second, it was wrong to direct the jury that what the accused said about their intentions before they entered the house was relevant to the offence with which the appellant was charged. Third, that the judge should not have admitted the offence of the co-accused's guilty pleas. Fourth, that the judge directed the jury that the only issue in the case was participation and so effectively withdrew the issues relating to aggravated burglary.

16.It is convenient to deal first with the question of aggravated burglary.

17.On the indictment as drawn two questions had to be considered. First, at the time the theft occurred did the intruders still, in the words of the statute, have with them the bottle that contained the last few drops of ammonia solution, and, second, if they did, was it a weapon of offence?

18.The first of these questions is the easier to answer. In our view the judge's direction to the jury was unsatisfactory insofar as it invited the jury to treat the taking of the property as beginning with the demanding of property from Mr Settle at the front door. That is a matter to which we shall have to return. The demand was in fact for money, no property had been identified at that stage as an alternative, and no one had at that stage laid a hand on anything inside the house. Of course in one sense the entry and subsequent theft were part of a continuous course of conduct but the taking of the property occurred only at the moment when one of the men laid hands on it.

19.Section 9 of the Theft Act creates a clear distinction between entering with intent to steal, the offence being committed whether anything is subsequently stolen or not, and stealing having entered as a trespasser, the original intention being irrelevant and the offence being committed only at the point when property is actually stolen. In the present case the latter type of burglary was the subject of the charge. The distinction is an important one as is exemplified by the case of O'Leary (1986) 82 Cr App R 341 to which our attention has been drawn.

20.However the judge was right, in our view, to direct jury to consider whether the bottle remained in the control of the intruders at the time when one of them ransacked the bedroom and took the various items of property that were stolen. What matters for the purposes of section 10 of the Act, which deals with aggravated burglary, is not whether the accused, or one of those with whom he was engaged in a joint enterprise, was actually holding the weapon at the time the theft took place, but whether the weapon was within his control so that it could be taken up and used if necessary. Whether the bottle was within the control of the accused at the time was a matter of fact for the jury. The fact that it had been dropped in the hall did not prevent that being the case since there was evidence that the four intruders were by that time in control of the house: only two of them went upstairs while two remained downstairs. It was open to the jury to find that those who remained downstairs could have recovered the bottle if they had wished to do so.

21.The second question is whether the bottle continued to constitute a weapon of offence. Miss Panagiotopoulou submitted that it did not because it was already empty. The expression "weapon of offence" is defined in section 10(1)(b) of the

Theft Act as including any article adapted for causing injury to or incapacitating a person or intended by the person having it with him for such use. Clearly a bottle filled with a solution of ammonia which can be squeezed or thrown in order to project the contents into the face and eyes of the victim falls within that definition and the contrary was not suggested. In the present case the bottle still contained a small amount of ammonia solution when recovered from the house and the judge left it to the jury to decide whether it was still capable of use for an offensive purpose. In our view he was right to do so.

22.However, the matter does not end there. Having given the jury what we consider to be correct directions thus far on the issue of aggravation, the judge said this:

> "The prosecution also say that before the ammonia was used these criminals, or one of them, told Mr Settle that they would have his money or goods if they could not get with a was owed by Che. So the prosecution argue that this was a burglary right from the start and the ammonia was used in the course of it in order to take the householder's property. If you accept that you may decide that the bottle of ammonia was with them at the time of taking because the taking began with the demanding of property from the householder."

23.The judge was there directing the jury that the taking of property began when the intruders demanded property from Mr Settle even before they had entered the house and since it was not really in dispute that ammonia had been used to force a way into the house this was an obvious invitation to the jury to convict on that basis. Mr Barton did not feel able to support that part of the judge's direction, which in our view is clearly wrong. The taking of property by way of theft required an appropriation and in this case that did not occur until one of the intruders laid his hands on it.

24.Given the questions surrounding the condition of the bottle and the fact that it had been discarded on the floor soon after the intruders had entered, we think that there is a real risk that the jury may have convicted the appellant on the far simpler basis that the bottle of ammonia had been used to gain entry into the house for the purposes of theft which subsequently occurred. That would amount to convicting him on a basis other than that with which he had been charged.

25.In these circumstances we have reached the conclusion that the conviction is unsafe and must be quashed. That makes it unnecessary to consider the question surrounding the admission of the evidence of the co-accused's pleas, nonetheless, we think it desirable to deal with the argument. Section 74(1) of the Police and Criminal Evidence Act 1984 provides:

> "In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purposes of proving that that person committed that offence where evidence of his having done so is admissible whether or not any other evidence of his having committed that evidence is given."

26.The judge held that the prosecution was _prima facie_ entitled to adduce the evidence of the co-accused's pleas and that the jury could be trusted to adhere to his directions in due course about their relevance.

27.The only question for us to decide is whether, as Miss Panagiotopoulou has submitted, the effect of doing so was to withdraw from the jury an important issue which they had to decide, namely whether there had been an aggravated burglary at all, and, accordingly, whether the judge should exercise his direction under section 78 of the Act to exclude that evidence because of the adverse effect it would have on the fairness of the proceedings.

28.In this connection she has drawn our attention to the case ofSmith [2007] EWCA Crim 2105. In that case the defendant and a prostitute were jointly charged with robbery of one of the girl's clients and the production of a firearm. The girl pleaded guilty but the defendant denied the charges. His case was that the girl had stolen money from the client, but that it had been theft not robbery, and that he had himself had had nothing to do with it. Moreover, there had been no gun.

29.The judge admitted the girl's plea under section 74 of the Police and Criminal Evidence Act and subsequently directed the jury as follows:

> "'She has pleaded guilty. She has admitted the matters, and so you know about her and what she has admitted. That is its sole significance. Nothing more, nothing less. It does not follow that the defendant committed these offences. Nor does it follow that her admissions are true and correct. That is for you, the jury, to decide on all the evidence in the case, and in particular of course, the evidence of [the complainant]."

30.In paragraphs 12 to 14 of the judgment this court pointed out that the evidence of the girl's pleas was evidence that she had in fact committed the offences with which she had been charged. It was not simply evidence that she had pleaded guilty but evidence that she was guilty. There are some striking resemblances to this case.

31.The court then considered a line of cases dealing with the desirability, or otherwise, of admitting such evidence, and pointed out that much will depend on the nature of the issues in the trial. If participation in an admitted offence is the only real issue admission of the guilty pleas of the co-accused may be perfectly fair, but where there is an issue whether an offence was committed at all it will often not be.

32.In that case not only did the defendant deny that he had been acting in concert with the girl, but he denied that there had been a robbery or that a gun had been produced. The co-accused's plea was evidence to the contrary. The court considered that the unfairness represented by admitting the plea was not outweighed by any countervailing reasons for admitting it and quashed the conviction.

33.In our view, as we have said, there are some similarities between that case and the present. In this case, as in that one, participation was not the only issue. There was an important issue over whether an aggravated burglary had been committed at all.

34.Furthermore, when he made his ruling the judge recognised that the co-accused's pleas were inconsistent with the arguments being advanced by the appellant, but he failed to consider the potential unfairness of allowing them to be admitted and to consider whether there were countervailing considerations of sufficient weight to justify their admission.

35.In his summing-up he said to the jury:

> "The prosecution is entitled to say that they showed an aggravated burglary had been committed."

But he then qualified that direction by saying that the co-accused's pleas could not prove anything more than that they had admitted something and that they were not evidence against the defendant in any way. That was a more favourable direction to the jury than the appellant was entitled to, but it appears to reflect unease on the part of the judge in allowing that material to go before the jury and makes us wonder why those pleas were admitted in this case.

36.Finally we turn to the complaint that by the way in which he referred to participation in a joint enterprise the judge effectively withdrew the issue of aggravated burglary from the jury. It is quite closely related to the grounds we have just been considering. Whatever might have been thought about its innate attraction the issue of aggravated burglary was a significant one for the appellant and not altogether straight forward. It was important, therefore, that the judge did not minimise it and give the jury the impression that it was not a real issue for determination. That was all the more so once the judge had allowed the pleas of the co-accused to be placed before the jury.

37.It is perhaps unfortunate, therefore, that on two occasions the judge used language that might be taken to suggest that the only real issue was that of joint enterprise. But it is also necessary to note that when he said as he began to direct the jury on that subject:

> "Defence counsel does not suggest that there was no crime committed here and concentrates her case on the issue of participation."

that that was a correct statement of the position. It was not his case that no offence of any kind had been committed. His case was that the other three had committed a simple burglary to which he had not been a party. The judge had already given the jury full directions on the issue of aggravated burglary and had made it clear what they had to decide.

38.In our view these brief passages, read in the context of the summing-up as a whole, did not amount to withdrawing the case on aggravated burglary from the jury.

39.For these reasons we do not consider that the judge's comments rendered the conviction unsafe. However, for the reasons given earlier, we are satisfied that the judge materially misdirected the jury in relation to aggravated burglary and that the appeal must therefore be allowed and the conviction quashed.

40.LORD JUSTICE MOORE-BICK: That raises the question as to whether there should be a retrial. What do you want to say about that?

41.MR BARTON: The position is this. That I am aware of the fact that the complainants in this case are reluctant to be parties to any retrial.

42.LORD JUSTICE MOORE-BICK: Sorry?

43.MR BARTON: They are reluctant to be participants in the retrial.

44.LORD JUSTICE MOORE-BICK: Is that Mr Settle and the others who were at the house?

45.MR BARTON: Yes. Having said that, it seems to me that the defendant, in any event, has admitted to a burglary. So albeit that the conviction has been quashed, that does not deal with the alternative of the burglary.

46.Furthermore, any decision the Crown make on the aggravated burglary on this defendant could potentially have an impact on the other three, albeit they pleaded guilty.

47.LORD JUSTICE MOORE-BICK: Yes.

48.MR BARTON: So, therefore, I would need to take full instructions concerning the judgment given before I could make any decision or indicate the decision that has been made concerning the Crown's position.

49.LORD JUSTICE MOORE-BICK: This is a very serious offence.

50.MR BARTON: Yes, there is no question about that.

51.LORD JUSTICE MOORE-BICK: Speaking for myself, it seems to me that the matter could have been advanced in a way that would have avoided all these problems, or likely to avoid all these problems.

52.MR BARTON: Yes, I support that.

53.LORD JUSTICE MOORE-BICK: What do you suggest we do now?

54.MR BARTON: If your Lordship is minded to say that the matter should be remitted back to the Chichester Crown Court I would be in a position in 14 days to obtain proper instructions concerning the future conduct of this and indeed the case in respect of the other three defendants.

55.LORD JUSTICE MOORE-BICK: Excuse us one moment.

(**pause while the bench conferred**)

56.Mr Barton, the view we take is that it is for this court to make an order about whether there should or should not be a retrial. We understand that you may need to consider the matter with those who instruct you, but we don't see why it should take 14 days. What we are minded to do, subject to anything else you may wish to say and anything Miss Panagiotopoulou would like to say, is to put it back for seven days and then we will hear whatever application at that stage you wish to make.

57.MR BARTON: Certainly. Yes.

58.LORD JUSTICE MOORE-BICK: I don't want to impose an unrealistic deadline on you but it seems to us that seven days ought to be enough for the Crown to decide whether it wishes to pursue this matter again.

59.MR BARTON: Yes. Certainly.

60.LORD JUSTICE MOORE-BICK: Do you have anything to say?

61.MISS PANAGIOTOPOULOU: In terms of my learned friend's submission in respect of the substitution as opposed to quashing, my learned friend alluded to inviting the court to substitute a lesser offence. I think I understood him properly. That can't be done in view of the fact that your Lordships have found that inadmissible evidence led to an unsafe conviction.

62.LORD JUSTICE MOORE-BICK: We said the judge should have not let. We are not sure that we said the judge shouldn't have let it in. We commented for the benefit of anyone else who might have to consider it, that there were these steps that had to be taken.

63.MISS PANAGIOTOPOULOU: I do not seek to dissuade you from relisting the matter in seven days. I understand my learned friend needs to take instructions.

64.LORD JUSTICE MOORE-BICK: If we adjourn this ... (**Pause**). It seems to us sensible to make no orders today. We indicate that we are minded to quash the conviction for the reasons we have given. We will put the matter back for seven days and at that point we will hear applications from either side and at that stage we will make whatever order we consider appropriate.

65.MISS PANAGIOTOPOULOU: Thank you.

66.LORD JUSTICE MOORE-BICK: Thank you very much.

67.MISS PANAGIOTOPOULOU: The appellant remains in custody?

68.LORD JUSTICE MOORE-BICK: The appellant will remain in custody for another week.