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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 1st November 2012

B e f o r e:
PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE IRWIN

MR JUSTICE KENNETH PARKER

R E G I N A

v

GORDON JOHN ALEXANDER
DANIEL MCGILL

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Mr M Towers appeared on behalf of the **Appellant Alexander**
Mr D Cordey appeared on behalf of the **Appellant McGill**

Mr P Sabiston appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

1. PRESIDENT OF THE QUEEN'S BENCH DIVISION:

2. Introduction

3. On 19th December 2011 the appellants, Alexander and McGill, were convicted in the Crown Court at Middlesbrough before HH Judge Fox QC, the then Recorder of Middlesbrough, and a jury of robbery on one count of attempted robbery. The conviction of Alexander related to two incidents, that of McGill to one. They were subsequently sentenced to 12 and 7 years imprisonment respectively. There is an appeal on the first incident where they were both parties to a robbery. The single judge refused leave in respect of the second robbery, but that application is renewed.

4. It is necessary and appropriate to deal with both robberies separately as the points are completely separate. We therefore deal first with the count where Alexander and McGill were charged together.

The facts of the robbery where they were jointly charged: 15 July 2011

5. There was little dispute as to the circumstances of the robbery on 15 July 2011. Daniel Kaye had stopped his car to answer a phone call. He was approached and moved the car on. He was then approached again. On the second occasion when he stopped, three men approached him. One produced a knife. They threatened him verbally. He then handed over some money, his mobile phone and a pizza.

6. The first male, subsequently identified in circumstances we shall describe as Alexander, opened the door. The second male, subsequently identified as McGill, held a knife close to his chin. They removed the phone and the money. The third person, who has never been identified, opened the passenger door and took the pizza.

7. Mr Kaye's evidence was that this all occurred at about 10.30 pm on the night of 15th July, that it lasted about eight minutes, that it was dark by that time but the street lights provided sufficient for him to see the people. The interior light of the car was on and he said he could see their faces clearly. He gave a description of what they were wearing and he also referred to the third male as being hooded. The third male is not important because he was never found and charged.

8. The sole issue in the trial was whether the two persons identified were the robbers. It is in relation to that issue that this appeal arises.

9. Both the appellants said they could not recall where they were on the night in question. They ran no defence other than that.

The circumstances of the identification through Facebook on the following day (16 July)

10. It is necessary to set out what happened when the initial identification was made. On 16th July, the day after the robbery, Mr Kaye visited his sister and told her what had happened. They then looked at Facebook. His sister brought up two friends of hers who lived in the area where the car had been stopped and the robbery had occurred.

That was the Redhill estate in Darlington, County Durham. Mr Kaye's evidence was that he recognised one of the robbers after looking at some photographs; he identified the person he saw as Alexander. On the Facebook page Alexander was tagged within the photographs allowing them to see his name. They then searched and brought up his Facebook profile. Mr Kaye then looked at the profile and said that he was sure that the first male who had robbed him was Alexander. He was the person who had taken the money and the phone.

11. Then he, with his sister, looked at another of her friend's accounts on Facebook and eventually saw a picture of the second robber. He said he told his sister that was the other male. His sister told him that that was McGill. He then clicked on McGill's profile and saw further pictures of him. His evidence was that he could definitely say it was McGill who was the person who had threatened him and who had taken his phone and the money. He said he did not know who the third person was. He was never identified.

12. It is, we think, clear from his evidence and from what was said in the course of cross-examination that apart from his sister providing the name "McGill", this was not a case where he had sat with his sister and discussed features of the faces or other distinguishing features of either. He had made the identification simply by looking at photographs on Facebook.

The reference to the police

13. For various reasons he made no complaint to the police until 18th August. On that occasion he gave the names which he had derived in the manner we have described to the police who that day, 18th August, arrested McGill.

14. Sometime on that day, either before or after the arrest of McGill, a statement was taken which set out the way in which both Alexander and McGill had been identified through the search on Facebook on 16th July. At some time also on that day, but again the timing is not clear, two police officers had gone to see Mr Kaye's sister at her house. Mr Kaye and another member of the family were also present. They sat down and viewed together the Facebook pictures. None of the police officers made a note of that and no statement was made as to what had happened. One of the police officers asked that the pictures be e-mailed to him and it appears that was done. The schedule of unused material for disclosure states at 18 the following:

> "Facebook printouts from Gordon Alexander's profile provided by IP's sister [JK], contain general chat and photos from Facebook. Includes comments dated 22/7/11..."

It sets out a quotation from Alexander's Facebook profile which it is not necessary to read out.

15. The VIPER ID parade

16. The following day, on 19th August, there was a VIPER ID parade in which was included McGill's image. Mr Kaye looked through the video and identified McGill.

There was a statement, which was agreed by all present at the trial, as to what had happened. On that occasion, after McGill had been picked out, Mr Kaye said: "Yes, without a shadow of doubt". At the conclusion the police inspector conducting the parade asked Mr Kaye if he had previously seen any photographs of the suspect. Then:

> "Daniel Kaye's reply was the day after the incident, yes, that's how I found out on Facebook and my sister had it on her laptop when or if I did ever decide to report it. I never saw it fully yesterday but I caught a glimpse of it. It looks nothing like him there, to be fair. When I say nothing like him..."

The inspector then interrupted and said:

> "It doesn't matter, there is a lot you have said there"

Mr Kaye continued:

> "But I caught a glimpse when my sister was showing different officers on her laptop that it was a different angled photo."

17. On 24th August 2011 Alexander was arrested and a VIPER parade was organised. Again Mr Kaye picked him out.

18. The requests for disclosure

19. Prior to the trial requests were made for disclosure of item 18 on the unused schedule to which we have referred. Item 18 was the Facebook entry of Alexander which was provided. Requests were also made, as we understand it, for the Facebook pages, which had been examined by Mr Kaye and his sister on 16 July, so that the defence could go through the photographs and see how the identification had been made. A similar request was made on the part of McGill.

20. When the trial started, those requests had not been answered. Counsel tried, with the assistance of the officer in the case, to find out what the position was. As best we currently understand it, the only document that was provided was a Facebook page, of which the provenance is unknown, which shows three males, one of whom was Alexander. It is not clear whether this was a document sent by Mr Kaye's sister or whether it had been obtained in some other way, or whether anyone had looked at it on 16th July or subsequently on 18th August. No other material was before the trial court.

21. Application to stay the proceedings at the close of the evidence

22. The police officers gave evidence in relation to why they had not retained any of the material that they had viewed when they sat down with Mr Kaye and his sister and why they had not sought entries from Facebook which had been looked at on 16th July.

23. At the conclusion of the evidence an application was made that the proceedings should be dismissed as an abuse of process. It was made on the ground first that the police had wholly failed to find the Facebook photographs which were essential if the

identification, which was the only real issue in the case, was to be properly and fairly tried; and second, that the identifications that followed on from the Facebook identification were unfair; third, in the light of the initial Facebook identification, it was not possible for a proper identification to be made by use of the VIPER procedure.

24. The then Recorder of Middlesbrough, in the course of his judgment on that application set out the applicable principles, to which we shall shortly refer but which are not in dispute. He concluded that the police were seriously at fault, but that the trial process could deal with the faults that had arisen and a fair and just trial could take place.

25. He was particularly critical of the police in this case and, in our judgment, rightly so. He accepted, however, that the police had not acted in bad faith. They had been negligent, but no more. No challenge is made to the finding the judge made, nor could it properly have been made, bearing in mind the judge had heard all the evidence.

26. The Crown accepts before us that there were serious failings. It is a most regrettable feature of this case that we have had no explanation from either the Chief Constable of Durham or from the Chief Crown Prosecutor of Durham as to why these serious failings occurred.

27. General observations on Facebook identifications

28. It seems to us, for the future, that if, as is to be anticipated, identifications occur in the way in which this identification occurred, namely by looking through Facebook, it is incumbent upon the police and the prosecutor to take steps to obtain, in as much detail as possible, evidence in relation to the initial identification. For example, it would be prudent to obtain the available images that were looked at and a statement in relation to what happened.

29. It is not for us, we think, to set out for the future what processes should be adopted. It seems to us that this is a matter to which the Director of Public Prosecutions and ACPO could, in conjunction with the relevant Ministry, give consideration so that ***short*** and ***simple*** guidance can be given in short order, so what happened in this case does not reoccur.

30. Having said that, we turn to consider the facts of this case in the unfortunate circumstances we have described.

The identification through Facebook does not invalidate an identification

31. The first issue that arises is to make it clear that it has not been contended before us that where an identification has occurred on Facebook and that identification is not satisfactory, it is impossible to proceed with a case based on identification. Such a submission would have been wholly untenable and we are glad it has not been made.

32. However, it is, as is clear from what the then Recorder of Middlesbrough said and what we have already said, that there should have been material before the jury which would have enabled them to assess in more detail the circumstances in which the identification occurred, because there can be no doubt that the material identification that occurred in

this case occurred on 16th July, when the victim, Daniel Kaye, went through Facebook with his sister.

33. As the Recorder observed and as is accepted by the Crown, the breach of duty on the part of the CPS and police which meant that the documentation was not available did put the appellants in this case at a real disadvantage.

Was there an abuse of process?

34. The issue therefore that arises is whether in those circumstances, that breach of duty having occurred which disadvantaged these appellants, that breach was in itself sufficient for the judge to have concluded that there was an abuse of process, or whether the breach could have been cured by the trial process and whether it had in fact been so cured.

35. It is not necessary for us to set out the principles, as they are not in dispute, but they can be found in the decision of R v Feltham Magistrates' Court ex parte Ebrahim & Mouat [2001] EWHC (Admin) 130 and the decision of this court in R v Dobson [2001] EWCA Crim 1686.

36. We turn therefore to the first question. On the facts of this case (and this is now a factual matter to which other authorities are of little assistance) was the abuse such, given there was no bad faith but merely incompetence on the part of the Crown Prosecution Service and the Chief Constable of Durham and those for whom he is responsible, that the court should have concluded that the proceedings should not go any further? We are entirely satisfied that the Recorder of Middlesbrough reached the right conclusion. What happened here was incompetence of the type we have set out. It was not bad faith. It was perfectly possible for the jury, properly directed, to consider the considerable disadvantage at which these appellants had been put and carefully to consider the reliability of the identification in those circumstances. The jury had a detailed account of how the identification occurred and they knew that there were photographs from Facebook that were available but which they did not have. But, in our judgment, it was entirely proper for the trial to proceed; for the judge appropriately to sum up and for the jury to be able to reach a decision in a fair and just way.

37. The question therefore arises was: did the judge in the summing-up deal adequately with the issue of identification and the failures to which we have referred? It was eloquently suggested by counsel on behalf of Alexander that the judge should, in the circumstances of the case, have drawn to the jury's specific attention three matters. First, he should have said that an identification on Facebook was quite different to an identification through a VIPER or other identification parade. It was always possible in an informal identification that things were said or done so that the identification was not one which was unprompted by the victim but one where others had helped the victim reach the identification. Secondly, it was suggested that the judge should have warned the jury that the photographs on Facebook that Mr Kaye had seen might have displayed the appellant in a light that was unfavourable and having seen him in an unfavourable pose, that had triggered his recollection and therefore he had reached an identification on the wrong basis. Third, he should have explicitly warned the jury that

there was the enormous disadvantage that they did not know which had been the first photograph Mr Kaye had seen.

38. We can appreciate that in a case where, if the lack of the details of the original identification having been made on Facebook occurs again (and we would hope it would not) a judge must very carefully consider the appropriate direction he should give.

39. We are entirely satisfied that the then Recorder of Middlesbrough did very carefully consider the direction that should be given. We therefore look in particular at the three specific matters raised. It seems to us that it was not necessary for the judge to have specifically pointed to the danger that the identification was prompted by some remark from Mr Kaye's sister or from others. It is clear from the evidence before the court that Mr Kaye had identified the appellants without any prompting. There was no need for that warning to be given, as it did not arise on the facts.

40. As to the light in which Alexander or McGill might have been displayed, it is evident from the document to which we have referred, namely the Facebook entry at item number 18 in the unused schedule, that there may have been unfavourable things there in relation to this appellant, Alexander. But we do think it would have been highly prejudicial for the judge to have dwelt on such points. He cannot be criticised for not so doing. Thirdly, it was perfectly obvious to the jury that they did not know what the first photograph was.

41. We have carefully looked at the Recorder's summing-up. Although it can be said that he was not quite as critical of the CPS and police as he had been in his ruling, it was clear that the jury were made fully aware of the difficult position that the appellants had been placed in and of the real disadvantage that the jury were under as a result of the failures by the police and the CPS. The Recorder was at pains to point out to them the caution under which they had to proceed.

42. We appreciate that the position of McGill is in a sense much stronger than that of Alexander. First, he was the person who was the subject of the VIPER parade, the day after the discussion with the police, and secondly, there was not a single photograph of him from Facebook available to the jury. Nonetheless, we do not consider that he was in any materially different position. It is we think important to point out that his evidence to the jury was that he did not have any pages on Facebook. However, as is clear from the evidence of Mr Kaye, who was expressly accepted to be an honest witness, that he had looked at McGill's profile on which there were pictures. No steps were taken by those defending McGill to show that he had no Facebook page. It seems to us therefore, that the evidence that he gave in relation to Facebook was evidence that the jury would have been entitled to take into account against him. So in the end he is in no different position as regards the way in which the case was dealt with by the Recorder of Middlesbrough.

43. So on this first and major ground of the appeal, we are satisfied that the learned judge properly summed the case up on this issue. Although there was a significant

disadvantage to the appellants, the jury were properly warned, they had all the relevant material. No proper criticism can be made of the summing up.

44. A further point on Turnbull

45. There is a short and distinct point. It is said that the judge, in accordance with the well-known passage in Turnbull, failed to remind the jury that an honest witness, which Mr Kaye was accepted to be, could be convincing (which no doubt he may well have been) but such a witness could well have been mistaken. Juries must guard against that possibility.

46. The judge did not use those express words. But there are a number of instances in the course of his summing-up where he warned the jury of the possibility of a mistake. Although it would have been highly desirable, had the judge used the terminology that has been used consistently for many years since Turnbull, we do not think that the omission of the warning in the terms in which it should have been given, in the light of what the learned judge actually said, is such that there was a material irregularity or material misdirection or the summing-up was not one which was looked at as a whole entirely satisfactorily. In our judgment, on that issue the point, although regrettable, does not make the conviction unsafe.

47. So as regards those counts, the first main matter in this appeal, mainly the robbery on 15th July 2011, the appeal of McGill and Alexander must fail.

The second robbery: Alexander

48. As regards the position of Alexander, he was involved in a second robbery. That occurred in the early hours of the 30th July 2011, at about 5.00 am, when it was getting light. Two individuals were going home after a night out. One of them, Mr Ripley, considered himself a bit tipsy. There was a video which showed another, Mr Upex, in a very drunken way. Their evidence was they were approached by two men and two women. One said he was robbing him and had a gun. Mr Upex refused to co-operate and he was hit by a knuckleduster. Mr Ripley then handed over some money and a gold chain. One of the four people felt sorry for these two men. He handed back the mobile phone and asked for an ambulance. At the trial evidence was given by Mr Ripley and by Mr Upex about what had happened. The Crown's case depended upon the identification by Mr Ripley who had picked Alexander out at an identification parade. He told them, on that occasion, he had seen him before and gave his name as Alexander.

49. At the trial, evidence was also given by the appellant, Alexander, and by one of his cousin's partners. That was evidence of an alibi. It is not necessary to set it out.

50. A submission was made that there was no case to answer, based upon the condition of the two men, Mr Ripley and Mr Upex. That submission failed and there is no appeal against that. There is an application for leave to appeal in respect of the way in which the judge summed up the matter. We have already dealt with the main point, namely

the way in which the judge gave the Turnbull direction. We need say no more about that, save that we refuse leave. The summing-up was entirely fair and adequate.

51. As regards a second point, namely that the judge failed properly to deal with inconsistencies in the evidence of Mr Ripley, it seems to us that that is a matter where the single judge was quite right. There is no basis on which the conviction can be considered unsafe.

52. Having therefore refused leave on the second matter, it follows that the first appeal must, for the reasons we have already given in the case of Alexander, fail also.

(Submissions re: sentence)

53. PRESIDENT OF THE QUEEN'S BENCH DIVISION: We have set out the facts of these offences in the judgment we have given in relation to conviction. The judge sentenced Alexander to a total term of 12 years, 5 years for the robbery on 15th July and 7 years for the robbery on the 30th July. He sentenced McGill for 7 years for the first robbery.

54. We regard these robberies as very serious. One was late at night, the other was in the very early hours of the morning. The first involved the use of a knife by McGill, and second, the infliction of serious violence by Alexander.

55. We will take Alexander first. We have had the benefit of looking at his Facebook entries. We have made it very clear that we have not taken into account what he there states as his attitude to probation and the assistance given to him.

56. We consider that we should deal with the matter on the basis of the seriousness of these offences and in the light of his record. As the judge said, the offences which he had committed previously showed an appalling record.

57. However, it seems to us that when we look at the two offences of which he has been convicted and look at the totality of the sentence, we have come to the view that the overall totality of the sentences is a little too long. We propose therefore to reduce the total sentence to one of 10 years. If we had been sentencing afresh, we would have passed a sentence of 6 years for the robbery on 15th July and one of 4 years for the robbery on 30th July. But as the judge sentenced him to 5 years for the robbery on 15th July, we will leave that sentence as it is and reduce the sentence of 7 years passed for the robbery and attempted robbery on 30th July to one of 5 years, making a total of 10 years in all, less time on remand.

58. Having read his Facebook entries, we would simply observe that, as that contains obviously what he thinks, we very much hope that he will use his time in prison so as to reform those attitudes.

59. As to McGill, the very, very serious aggravating aspect of his position is the robbery for which he was sentenced on 20th April 2007. He was there sentenced to 2 years' detention and training order, for the robbery of an 89-year-old lady whose hip he broke in the robbery. Despite that sentence and despite the benefit of the detention and

training order that he received, he then committed on 15th July this very serious offence of robbery and it was he who used the knife.

60. It seems to us that the judge may have been a little on the high side, but if he had been on his own, we might have taken the view that we would not reduce it. But in fairness, and looking at the overall position, we feel that we can reduce that sentence from one of 7 years to one of 6 years less time on remand.

61. To that extent and to that extent only are these appeals allowed.

62. PRESIDENT OF THE QUEEN'S BENCH DIVISION: There is one further observation we would like to make. We would be grateful if in due course counsel for the Crown could draw to the attention of the Chief Constable of Durham and the Chief Crown Prosecutor for the area in which Durham is the judgment of this court, so that they can investigate, if they think fit, the conduct of those concerned in failing to deal with disclosure properly.

63. Thank you very much.