Neutral Citation Number: [2019] EWCA Crim 1151

Case Numbers: 201801837/01838/018392019/00677/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WINCHESTER CROWN COURT
Mr Justice Langstaff
T20177121

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 27 June 2019

Before:

LORD JUSTICE LEGGATT
MR JUSTICE NICOL
and
MR JUSTICE BUTCHER

- -

Between:

REGINA	**Respondent**
- and -	
(1) JORDAN RAY SMITH	**Appellants**
(2) RICARDO LIVINGSTONE-WRIGHT	
(3) JORDAN PERRY	
(4) SARA HODGKINSON	

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Mr Greg Unwin appeared on behalf of the **Appellant Smith**
Mr Michael Mansfield QC appeared on behalf of the **Appellant Livingstone-Wright**
Mr Michael Borrelli QC appeared on behalf of the **Appellant Perry**
Mr Hugh French appeared on behalf of the **Applicant Hodgkinson**
Mr Adam Feest QC appeared on behalf of the **Crown**

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Approved Judgment

Lord Justice Leggatt:

1. On 4 April 2018 in Winchester Crown Court, following a trial before Langstaff J and a jury, the three appellants, Jordan Smith, Ricardo Livingstone-Wright and Jordan Perry, were convicted of attempted murder. Their co-defendant, Sara Hodgkinson, was convicted of encouraging or assisting the commission of an offence contrary to section 45 of the Serious Crime Act 2007. They were sentenced as follows: Smith was sentenced to 31 years' imprisonment; Livingstone-Wright and Perry were each sentenced to 30 years' imprisonment; and Hodgkinson was sentenced to 4 years' imprisonment.

2. Smith, Livingstone-Wright and Perry appeal against their convictions. Hodgkinson has applied for leave to appeal. Her application is contingent on the success of the appeals. It is common ground that, if the three appellants succeed on their appeals and their convictions are quashed, Hodgkinson must also be entitled successfully to appeal against her conviction because there would in that event be no offence proved which she could be said to have encouraged or assisted. If, on the other hand, the appeals of the three appellants fail (and the reality is that their appeals stand or fall together) it is accepted on behalf of Hodgkinson that there is no other ground on which she can pursue an appeal against her conviction

The background

3. The person whom the appellants were accused of attempting to murder was a man called Jay Sibley. In February 2017 Sibley was staying with his girlfriend Natasha Chamberlain at the flat of his friend Richard Stanhope at 81 Athena Avenue, Waterlooville in Hampshire. At about 12.45am, in the early hours of 13 February, Sibley and Stanhope left the flats to supply some drugs to Hodgkinson. No sooner had they stepped outside the communal entrance to the flats than two men ran out from behind some bushes. One of them shot Sibley in the face with a sawn-off shotgun. The attackers immediately ran off and Hodgkinson also left the scene.

4. The prosecution case was that the attack was carried out by the appellants, who ran a rival drug dealing network, in revenge for an incident that occurred earlier that evening. Only a short distance away from Athena Avenue is a house at 2 Tor Close, which the appellants were using as a base for their drug dealing operations. The house belonged to a man called Steve Antrim (known as 'Mince'). Also living there were a woman called Marie Moore, and a young man known as 'Ox' who worked for the appellants. Marie Moore gave evidence that on the evening of 12 February three men forced their way into the house and stole drugs and money belonging to the appellants' drug dealing network. Marie Moore said she recognised one of the men as a runner for a rival drugs network known as the 'Adam and Sticky' network. It seems that the Adam and Sticky network had previously been operating out of 2 Tor Close, before Mince kicked them out and agreed instead to host the appellants' network at his property.

5. Marie Moore gave evidence – and this is the subject of one of the grounds of appeal – that Mince had told her that, after he kicked them out, the Adam and Sticky network had relocated to Stanhope's address and also that he had seen Sibley selling drugs for that network in a nearby alleyway. In fact, according to the prosecution, that

information was incorrect in so far as Stanhope and Sibley were actually working for a different drugs network again, referred to as the 'Aaron and Tony' network.

6. Immediately after the robbery at 2 Tor Close, at about 9pm, Marie Moore and Ox made telephone calls to the appellant Smith and told him what had happened. Smith contacted the other two appellants, who were in different parts of South West London. By 11pm they had all met up, and at around 11.30pm they set off in two cars and drove down the A3 to the Portsmouth area. They were heading for Waterlooville.

7. CCTV footage from a camera at South Downs College (which is very near to Athena Avenue and also to Tor Close) showed what the prosecution asserted were the appellants' two cars passing the camera at 00:38 and 00:43. The second car was shown passing the camera again, travelling in the opposite direction, almost exactly five minutes later at 00:48, followed within 40 seconds by the other car. Also at 00:48 Stanhope made a 999 call, which must have been made almost immediately after the shooting.

8. Apart from this extraordinary coincidence of timing, the prosecution relied on the involvement of Hodgkinson whose role on their case was to lure Sibley out of the flats. The prosecution adduced evidence of previous association between Hodgkinson and Livingstone-Wright and Smith, and of communications between them shortly before the shooting.

9. At 22:37 on the evening of 12 February Smith texted Hodgkinson's number to Perry, who was with Livingstone-Wright at the time. Shortly afterwards, Livingstone-Wright called Hodgkinson. Shortly after that, Hodgkinson made arrangements with the owner of the house she was living in for him to take her in his van to a cash machine to get money out, as her benefit money was due at midnight, and then to buy some drugs.

10. At 23:56 there was another short call from Livingstone-Wright to Hodgkinson. At 00:10 Hodgkinson withdrew £100 from her account. At 00:19 she called the Aaron and Tony drugs line. Within two minutes there was a call from that line to Stanhope. There were further short calls from Livingstone-Wright to Hodgkinson at 00:25 and 00:39. At 00:43 there was another call from Hodgkinson to the Aaron and Tony line, followed by a call from that line to Stanhope. Those last phone calls immediately preceded the shooting.

11. An allied feature of the evidence on which the prosecution also relied was that, in these communications, Hodgkinson arranged to meet Stanhope and Sibley twice. Stanhope and Sibley gave evidence that, as a result of her first request for drugs, she met them on the opposite side of the green from Athena Avenue and bought a few wraps of cocaine. She told them that she wanted to buy some more wraps but needed first to get some more money. She said this despite the fact that (unknown to them) she had already taken the necessary funds out of the cash machine. She told a different story to the man who had given her a lift in his van. According to his evidence she said to him that the dealer had only given her half the drugs and that she had to go back for the rest when he had sorted them out. On the prosecution case Hodgkinson was, on this evidence, playing for time until the appellants arrived and was setting things up to lure Stanhope and Sibley out of the flats again as soon as the

appellants had arrived, which explains why she made the second call to the drug dealing line at 00:43.

12. Two of the appellants, Smith and Livingstone-Wright, gave evidence at the trial. Their case was that they had indeed travelled to Waterlooville after the robbery at 2 Tor Close, but the purpose of their trip was to collect money, deliver more drugs and move their operation to a new location now that it had been compromised.

13. An unusual feature of this case, which lies at the heart of these appeals, is that evidence was given by the victim of the shooting (Sibley) and his friend (Stanhope), who were called as witnesses by the prosecution, on which the defence strongly relied. Each of these witnesses gave evidence that he recognised someone who took part in the attack, and in each case the person identified was not one of the appellants. The person identified by Sibley was a man called Barry Baker and the person identified by Stanhope was a man called Chrissy Fagan. Furthermore, Baker and Fagan are both white in skin colour, whereas the appellants are black. The appellants relied on this evidence as positively showing that they did not carry out the shooting.

14. At the end of their case the prosecution adduced evidence of enquiries they had made into mobile telephone activity and CCTV footage with the aim of trying to establish whether Baker or Fagan could have participated in the shooting. There was a CCTV camera outside the front entrance of Fagan's flat, and this showed him entering the flat well before the shooting. He was arrested at his flat after the shooting occurred later that night and when he answered door to the police he was wearing the same clothes as he was seen to be wearing when he had entered the flat earlier in the evening. The CCTV footage also confirmed that he had not left the flat through the front door in between those sightings. He could have got out at the back down a ladder, but there was further evidence that on any of the three main routes he might have taken to get to Athena Avenue there were CCTV cameras and he did not appear on any of the relevant CCTV footage.

15. Baker lived much closer to Athena Avenue. There was no CCTV camera directly outside his home and the prosecution accepted that it would have been perfectly possible for him to get to Athena Avenue without being recorded on CCTV.

16. The mobile phone evidence was relied on by the prosecution for the absence of any communication between Baker or Fagan and any other relevant person during the relevant period: in particular there was no evidence of any communication between either of them and Hodgkinson.

17. The defence made an application under section 78 of the Police and Criminal Evidence Act 1984 to exclude this evidence, but the judge rejected the application and allowed the evidence to be adduced.

Ground 1: the handling of the identification evidence

18. The first ground of appeal is that the trial was unfair because of the way in which the evidence relating to the identification by Sibley and Stanhope of the people who carried out the attack was dealt with. Leading counsel for Livingstone-Wright, Mr Mansfield QC, whose strongly argued submissions have been adopted by the other

appellants, makes two principal criticisms: one relating to the exercise of discretion by the prosecution and the other relating to the exercise of discretion by the judge.

19. First and foremost he has submitted that the prosecution ought to have challenged the identifications made by their witnesses Sibley and Stanhope when they gave evidence and tested the accuracy of their evidence on what was the core issue in the case. The prosecution could and should have done this, he submitted, without cross-examining the witnesses and asking them leading questions which the prosecution was not entitled to do, but by nevertheless giving them the opportunity to confirm or qualify their evidence when asked to consider possible reasons why they might have been mistaken in their identifications. The failure to do this, he submitted, was unfair, both to the witnesses, who were not given an opportunity to deal with criticisms made by the prosecution of the reliability of their evidence, and to the defence, who were put in the invidious position of not knowing what the witnesses would say if their evidence was probed in this way and who for proper and understandable reasons took the decision not to ask such questions themselves. The jury, he argued, was therefore deprived of the opportunity to see the identification evidence tested in the way that it ought to have been in the interests of justice and which might have strengthened the defence case.

20. Mr Borrelli QC on behalf of Mr Perry, whilst adopting these submissions, also advanced an alternative argument. He submitted that the prosecution could have approached the matter by probing the reliability of the identifications made by Sibley and Stanhope before the trial in an additional interview, of which a transcript or recording could then have been made available to the defence. This would have enabled the defence to take an informed decision about whether they wished to ask any further questions.

21. Mr Borrelli relied in this regard on a passage in the guidelines published by the Ministry of Justice for "Achieving Best Evidence in Criminal Proceedings" in relation to interviewing victims and witnesses, where at paragraph 2.163 it is said:

> "Whatever the reason for the significant evidential inconsistency, occasions may arise where it is necessary to ask the witness to explain it."

Principles are then set out which should be taken into account in deciding what course to follow. These include guidance that:

> "● Explanations for evidential inconsistencies should only be sought where the inconsistency is a significant one;
>
> ● Such explanations should only be sought after careful consideration has concluded that there is no obvious explanation for them;
>
> ● Explanations for evidential inconsistencies should only be sought after the witness's account has been fully explored, either at the end of the interview or in a further interview, as appropriate;

> ● Interviewers should always be aware that the purpose of asking a witness to explain an evidential inconsistency is to pursue the truth in respect of the matter under investigation; it is not to put pressure on a witness to alter their account;…"

22. Mr Borrelli submitted that, applying those principles, the prosecution ought to have formed the view that it was necessary to ask these witnesses to give explanations, if they could, for inconsistencies between their evidence and the prosecution case, which asserted that their evidence was mistaken.

23. The second exercise of discretion challenged by the appellants is the judge's exercise of discretion in rejecting the application to exclude the evidence relating to the whereabouts and possible involvement of Baker and Fagan. Mr Mansfield submitted that, in allowing this evidence to be adduced, the judge permitted the prosecution to undermine their own witnesses and to do so in circumstances where the reasons for suggesting that their evidence was unreliable had not been put to them or explored with them. That, he submitted, compounded the unfairness. That unfairness, Mr Mansfield further argued, was in addition compounded by observations that the judge made about the evidence of these witnesses in summing up and, in particular, by directions that he gave to the jury about the need for caution in considering evidence of identification. Such directions, Mr Mansfield submitted, are appropriate where identification of a defendant is in issue in order to protect the interests of the defence, but they are not appropriate in a case such as this, where it is the prosecution witness whose identification is relied on by the defence but which it is suggested may be mistaken.

The applicable principles

24. Before addressing these arguments, we think it important first of all to be clear about the legal principles which govern the situation in which the prosecution form the view that part of the evidence of a witness whom they intend to call is reliable but that part of the witness's evidence is not reliable or even untruthful. A submission was made at the trial and was repeated certainly in Smith's grounds of appeal, although it has not been developed in the oral argument this morning, that for the prosecution to adduce evidence which contradicts evidence given by their own witness without seeking to treat the witness as hostile is contrary to section 3 of the Criminal Procedure Act 1865. Section 3 of that Act, which is still in force, provides:

> "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

25. It is clearly established that the term "adverse" in this provision means "hostile". The section could be read as indicating that it is only when a witness has been designated

by the judge as hostile that the party who has called the witness may be allowed to adduce other evidence to contradict evidence which the witness has given. However, very soon after this statutory provision (originally contained in the Common Law Procedure Act 1854) was enacted it was held in Greenough v Eccles (1859) 5 CB (NS) 786 – an authority which has never since been doubted – that this is not the effect of the section. In rejecting such an interpretation, Williams J said (at 803) that:

> "it is impossible to suppose the legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue,-- a right not only fully established by authority, but founded on the plainest good sense."

He concluded (at 804) that the preferable interpretation of the section was that:

> "... in case the witness shall, in the opinion of the judge, prove 'hostile', the party producing him may not only contradict him by other witnesses, as he might heretofore have done, and may still do, if the witness is unfavourable, but may also, by leave of the judge, prove that he has made inconsistent statements."

Willes J and Lord Cockburn CJ agreed – Lord Cockburn suggesting that the better course was to consider the second branch of the section, by which he meant the part which allows the witness to be contradicted by other evidence, as "altogether superfluous and useless".

26. Much more recently, in R v Cairns [2002] EWCA Crim 2838; [2003] 1 WLR 796, this court confirmed that the prosecution may properly call a witness and rely on only part of the evidence given by the witness while at the same time calling other evidence to contradict such part of the evidence given by the witness as the prosecution does not rely on. Keene LJ, who gave the judgment of the court, said at para 36:

> "We know of no principle of law or justice which requires the prosecution to regard the whole of a witness's evidence to be reliable before he can be called as a prosecution witness. If it is open to the prosecutor to form the view that part of a witness's evidence is capable of belief, even though the prosecutor does not rely on another part of his evidence, then the prosecutor is entitled to exercise its discretion so as to call that witness. That must be so, since part of the witness's evidence could be of assistance to the jury in performing its tasks, and it would therefore be contrary to the interests of justice to deprive them of that assistance."

27. That case was in some ways a stronger case than this, since the position of the prosecution in the Cairns' case was not, as it is here, that part of the evidence given by a witness whom they proposed to call was honestly mistaken: their case was that the evidence was deliberately false and given with the aim of seeking to exculpate one of the defendants who was the witness's wife.

28. The relevant principles can, we think, be summarised as follows:

(1) Subject to the overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.

(2) It is open to the prosecution - and indeed the interests of justice may require it - to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.

(3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness's evidence which the prosecution considers to be inaccurate or false, and to invite the jury to reject that part of the witness's evidence.

(4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness.

The circumstances of this case

29. In the way that the appeals have been argued this morning, we do not understand those principles to be disputed. But in our view they provide a complete answer to the criticism made of the judge's exercise of discretion in allowing the prosecution to adduce evidence which contradicted the identification evidence given by their witnesses in circumstances where the prosecution case was that those identifications were mistaken. There is no principle of law which was contravened by that approach.

30. The other criticism made – which we take to be the central criticism – concerning the prosecution decision not to probe the evidence of Sibley and Stanhope and not to explore with them, whether before the trial or at the trial, reasons why their identifications might be mistaken requires to be examined more closely. It is important to focus on what exactly the prosecution case was in relation to the evidence of identification.

31. The prosecution did not dispute the honesty of the identification evidence given by those witnesses. Nor did it dispute that the degree of confidence and certainty with which the witnesses believed their identifications to be accurate was as they had described in interview. In those circumstances there was no point in asking questions of them such as "Are you sure?", because Sibley in particular had already made it clear that he was 100%, if not "110%", sure of the accuracy of his identification of Baker and the prosecution did not seek to dispute or challenge the position that this was indeed his subjective conviction. The prosecution view, and their case, was that there were nevertheless objective reasons for concluding that the witnesses were mistaken, albeit entirely honestly mistaken.

32. Those reasons were of two kinds. In the first place, it is the experience of the legal system and has long been recognised as a result of numerous cases of mistaken identification, including cases in which evidence was given with the utmost conviction, that there are dangers of relying on identification evidence. They are reflected in the well-known guidelines laid down by the Court of Appeal in Turnbull [1977] QB 224 in response to widespread concern at that time aroused by cases of mistaken identification. These guidelines reflect the experience of the courts that mistaken identifications all too frequently occur; that mistakes may be made even when the witness believes that he recognised someone he knew; and that the degree of confidence felt by a witness that he has correctly identified someone is not a reliable indicator of the accuracy of the identification. The Turnbull guidelines also highlight the importance of carefully examining the circumstances in which the identification was made, including such matters as the length of time for which the witness had the person under observation, the distance, the light, how good a view the witness had and so forth.

33. In the present case the circumstances in which the identifications were made raised, very obviously, the potential for error. It is apparent that Sibley and Stanhope had only a fleeting glimpse of their assailants (and Stanhope was unclear whether there was more than one) under very poor conditions. It was dark. Scarcely had they come out of the door of the flats when the man who shot Sibley emerged from some bushes and ran towards them. According to Sibley, this man had a scarf around his face and he could only see the man's eyes. The man who Sibley identified was not in fact the man who shot him. But he said that he recognised a second man who was behind the shooter and that that man was Barry Baker - someone he had met on a number of occasions and who had a reputation for robbing drug dealers. Sibley (as mentioned) expressed complete confidence in that identification, saying that he was absolutely certain of it. It is worth, however, reading an answer that he gave in one of the police interviews when he was asked the neutral question "What can you see on that night?" Sibley replied:

> "I didn't really see it, that's what I'm saying, I didn't really see him. He was behind matey, so I didn't ... I see him as he was coming out the bushes. And I've clocked matey and I thought, who's that? Then him and I thought, oh Barry, and then that was it, he was behind matey. They was walking towards me, both of them, but Barry was behind him so I didn't even see him, didn't even see him."

He was then asked:

> "So if you had to put your finger on one thing that said why you know it's Barry, what would that be?"

To which Sibley replied:

> "Cause I see him as they come out the bushes. As he come out ... he was the first one that [I] clocked because I noticed him. And I know it was him without a shadow of a doubt ... The man who shot me, he came out the bushes first. Barry was

> behind him, and at the angle they was in I could see him from there."

The interviewer then went on to explore with him how he recognised Barry and other matters of that sort.

34. The identification evidence of the prosecution witnesses as it stood was very favourable to the defence. The defence could rely on the expressions of certainty to which I have referred. If the prosecution had adopted the course of probing the reliability of the evidence by drawing attention to its potential weaknesses and inviting the witnesses to comment on those, they might certainly have succeeded in undermining it. But we do not see how the failure to do this can reasonably be said to have prejudiced the defence. Nor do we think the prosecution can reasonably be criticised for not following that course in circumstances where, if they had succeeded in undermining the evidence of their own witnesses, they would undoubtedly have been open to criticism by the defence.

35. Furthermore, if the defence wished to probe the evidence themselves, they had the opportunity to question the witnesses when they gave evidence and to ask what further questions they thought fit. The fact that the defence took the decision, for the most part, to stick with what they had already does not demonstrate any unfairness: it is the kind of tactical decision that arises day in and day out in the criminal courts.

36. To illustrate the delicacy of such a decision, we mention a passage from the cross-examination of Stanhope by Mr Hossain QC, trial counsel for Smith, to which Mr Feest drew our attention this morning. Mr Hossain did ask some questions of Stanhope and, in particular, asked him about the skin colour of the man he identified as Chrissy Fagan. He asked the question, "Why white?", to which the answer given was:

> "Well, I thought he was someone but I was high on drugs and that. He wasn't wearing gloves. I can't remember seeing his hair."

It might be thought that this evidence did not advance the defence case.

37. We see no unfairness in the situation where the defence had the choice whether to rest on the favourable evidence that they already had or to seek, if they could, to elicit through cross-examination evidence that was even more helpful to their case.

38. Nor, in our view, was there any unfairness to the witnesses themselves. To say, as the prosecution in effect did, 'We do not doubt at all your honesty and veracity and the confidence with which you have made your identifications, but we contend that objectively there are reasons why we submit that you must have been mistaken' – and to adopt that position without probing or challenging the evidence given by the witnesses – is not, in our view, unfair in any way to them. It does not cast any aspersion on their character. Nor can we see what they could reasonably have said in answer to such points as might have been put to them which they had not said already. To suggest to a witness that you might, even though you honestly believe that you have identified a particular person, be mistaken for various objective reasons is not

something on which the witness can do more than express an opinion of doubtful admissibility.

39. We would add that it was clearly appropriate for the judge to direct the jury about the need for caution in approaching the evidence of identification, and the reason for it, and to invite the jury to consider carefully the circumstances in which the identifications were made. The potential dangers of identification evidence and consequent need for care are matters which may not be known to jurors in the way that they are well known to those with experience of criminal justice. Nor do they depend on which party at the trial is relying on such evidence. In this case the judge gave proper assistance to the jury in how to approach the identification evidence, whilst rightly emphasising that the burden was on the prosecution to make the jury sure that the identifications were mistaken.

40. In sum, it seems to us that the way in which the identification evidence was presented at the trial was as fair and as favourable as it could have been to these appellants. There is, in our view, in these circumstances no legitimate basis for the first ground of appeal.

Ground 2: evidence of Marie Moore

41. The second ground of appeal relates to a different part of the prosecution evidence. The appellants contend that the judge was wrong to allow the prosecution to adduce the evidence given by Marie Moore of the conversation she said she had had with Steve Antrim (known as 'Mince'), the owner of 2 Tor Place. That evidence, to recap, was that when he had kicked out the Adam and Sticky drug dealing network they had moved to Stanhope's address, and also that he had seen Sibley supplying drugs for the Adam and Sticky network in a nearby alleyway. The obvious relevance of that evidence was that it provided a potential explanation for why Sibley and Stanhope had been attacked even though they were not in fact working for the Adam and Sticky network, who were believed to be responsible for the robbery that evening at 2 Tor Place. The fact that Marie Moore believed that Sibley and Stanhope were working for the Adam and Sticky network as a result of what Mince had told her, and that Mince had evidently believed that, was capable of supporting an inference that the appellants were also told this in the communications which took place after the robbery – although Marie Moore said that she could not remember communicating this information to them. At the very least, the evidence provided an answer to the argument which it was otherwise open to the appellants to make that the appellants had no possible motive for attacking Sibley or Stanhope because they were not working for the Adam and Sticky network but for the Aaron and Tony network.

42. This evidence of Marie Moore was not hearsay evidence because the prosecution were not seeking to rely on her conversation with Mince as evidence of the truth of what was said but only for the fact of what was said.

43. It is argued that because Mince was not called as a witness there was prejudice to the defence as they could not test the evidence of Marie Moore against the evidence of the person who was alleged actually to have made the statement. However, as was specifically accepted by Mr Hossain in his written grounds of appeal, Mr Antrim was not likely to be a very reliable witness. In any case, in circumstances where the truth of what he allegedly said was not in issue but only the factual question of whether or

not he said it, fairness was achieved through the opportunity to cross-examine and test the evidence of the person who testified that the statement had been made to her, namely Marie Moore.

44. Mr Unwin, who argued this part of the case skilfully on behalf of the appellants this morning, also submitted that the evidence should have been excluded because there was no reasonable basis on which a jury could properly infer that the information (accepting, for this purpose, that it was conveyed to Marie Moore) had been communicated, whether by her or by anyone else, to the appellants.

45. We do not accept that submission. For the purpose of deciding whether they could properly make that inference, the jury was entitled to consider the whole of the evidence, including the evidence which strongly tended to indicate that it was indeed the appellants who had carried out the attack on Sibley that evening.

46. It is right to say that in summing up the judge did not explain to the jury as clearly as he might how they should approach this evidence and mistakenly referred to it as a "hearsay"; but he clarified the position in response to a note sent by the jury during their deliberations in which they asked:

> "What weight should we attach to the hearsay evidence that Mince had said that Jay Sibley and Richard Stanhope worked for Adam and Sticky from Athena Avenue, especially since it is unknown whether this was communicated to Big G [Big G being the name for the appellants' drug dealing network]?"

By that question, the jury showed that they had a sound understanding of the potential relevance of the evidence and of its limitations since, as they noted, there was no direct evidence that the information had been communicated to the appellants.

47. In dealing with that jury note the judge directed the jury as follows:

> "The Crown in their submissions are saying, well everyone was talking about the move to Richard Stanhope's and you can infer that somebody would have mentioned it. That's their approach. It's a matter for you entirely what you make of it, but if you're not sure there was such communication of that, then really the first part of your question falls away, you don't really need to consider what weight you place on evidence if it wasn't communicated."

48. That direction, as it seems to us was, if anything, unduly favourable to the defence because it indicated to the jury that they should disregard the evidence unless they were sure that there was a communication of the information to the appellants. It seems to us that, on a correct legal analysis, the jury did not need to be sure of that fact in order to treat the evidence as relevant. At the end of the day all that they needed to be sure of in order to convict the appellants was that they were responsible for the shooting. Evidence indicating that information linking Stanhope and Sibley with the Adam and Sticky network may have been communicated to the appellants was relevant evidence which the jury could properly take into account in reaching their overall conclusion. But in any event no criticism can reasonably be made of the

introduction of that evidence in circumstances where the judge gave the jury the direction that he did. We accordingly reject this ground of appeal.

Ground 3: no case to answer

49. The third ground of appeal is that the judge was wrong to reject a submission made at the end of the prosecution case that there was no case to answer.

50. We do not think it necessary to lengthen this already long judgment by dealing in any detail with that argument. It is sufficient to say that, in our view, there was ample evidence adduced by the prosecution, some of which we have referred to earlier in this judgment, which justified the judge in leaving the case to the jury and on which a reasonable jury could properly convict these appellants.

Conclusion

51. In these circumstances we consider that the convictions of these appellants are safe and the appeals must therefore be dismissed. Hodgkinson's application for leave to appeal must, in consequence, also be refused.