

Neutral Citation Number: [2021] EWCA Crim 381

Case No: 202002497 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT BOLTON
Recorder Geoffrey Payne
T20197314

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2021

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)

LORD JUSTICE FULFORD
MR JUSTICE JEREMY BAKER
and
MR JUSTICE GRIFFITHS

Between :

Jake MULDOON
- and -
REGINA

Appellant

Respondent

(Transcript of the Handed Down Judgment.
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Mr Oliver Cook (instructed by **Mark Jones & Partners Solicitors**) for the **Appellant**
Mr Mark Rhind (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing dates : 9th March 2021

Judgment
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Lord Justice Fulford V.P. :

Introduction

1. On 14 September 2020, in the Crown Court at Bolton (Mr Recorder Payne and a jury), the appellant, who is now aged 22, was convicted of causing grievous bodily harm contrary to section 18 Offences Against the Person Act 1861 (count 1), having an article with a blade or point, contrary to section 139(1) Criminal Justice Act 1988 (count 2) and damaging property contrary to section 1(1) Criminal Damage Act 1971 (count 3). On 17 September 2020 he was sentenced to 9 years' imprisonment on count 1, four months' imprisonment concurrent on count 2, and two months' imprisonment on count 3. The judge made a surcharge order.
2. The appellant was acquitted of threatening to destroy or damage property and a count of threatening another with an article with a blade or a point was ordered to lie on the file.
3. The appellant has the leave of the single judge to appeal against conviction.

The Facts

4. On 21 November 2019 Declan Prescott attended Leigh Infirmary, and was later transferred to Salford Hospital. He had a bleeding, gaping head wound to his right temporal region. It was a large 7 cm Z-shaped wound. There were indications that he had sustained underlying nerve damage which may mean he has lost the ability to move his right eyebrow. He was further transferred to Manchester Royal Infirmary where the wound was closed with sutures and he was discharged on 24 November 2019.
5. Prescott was spoken to by police whilst at Leigh Infirmary on 21 November 2019. He initially said that he did not know where he had been attacked or by whom. He then said to officers, "*You know that I know, but I am not telling you and that is the end of it*". He signed a record in the officer's notebook to this effect.
6. Later that same day at Manchester Royal Infirmary, Declan Prescott provided a written statement to PC Ridley containing the usual statement as to its truth. In the statement he named the appellant as having been responsible for his injuries, having attacked him with a knife. By way of detail, Declan Prescott stated that about 12 – 18 months previously he had met a man he knew as 'Scouse Joe'. He had been told that his real name was Jake Muldoon or something similar. He

provided a description of the man who, he said, lived in the Liverpool area. He had first met him through someone involved in the supply of Class A drugs. Declan Prescott had initially simply been asked to drive a car but he thereafter he participated in the supply of drugs. After a few months, he was stopped by police and the car he was driving and the drugs in his possession were seized. As a consequence, the appellant expected him to pay £5,000 to cover the loss of these items and threatened him with serious harm if this did not happen. Thereafter Declan Prescott paid the appellant in instalments, to a total value of £1,100, but with continued threats being made to him.

7. On 21 November 2019, he met up by arrangement with the appellant on Bow Road in Leigh in order to give him £200 cash which he had borrowed from his partner, Stacey Round. The appellant was driving a new, gold-coloured Ford Mondeo and his girlfriend, Kirsty Blaney, was sitting in the front passenger seat. Declan Prescott got into the car. The appellant was wearing a black bob hat. When the appellant demanded money, Declan Prescott handed over the £200. The appellant then took a flick-type knife from his jacket pocket and stabbed Declan Prescott's head at least twice, causing him to start bleeding heavily. He got out of the car as quickly as he could and the appellant drove away.
8. As Prescott was walking to the hospital the appellant contacted Declan Prescott by telephone, asking where he was but he refused to say. When the appellant told Declan Prescott that he still worked for him, the victim responded that he would not be doing anything for him after what had just happened.
9. He attended at Leigh Infirmary, where he told staff what had happened. Stacey Round met him at the hospital. She told him that the appellant had been bragging via the telephone that he had stabbed Declan Prescott and he had said that he had smashed the windows at their house and was going to burn it down.
10. Declan Prescott indicated in his statement that he knew the appellant quite well and would identify him with ease. He was worried, however, as to what the appellant might do to him or his family. As a consequence, he would support any action taken by the police in respect of the incident. He was seriously worried for the safety of his children as the appellant was extremely dangerous and needed to be stopped before innocent people got hurt.
11. On the same day, Stacey Round made a written statement in which she set out that on 21 November 2019 she was in a beauty salon when she received a call on her mobile telephone, and the voice she heard she instantly recognised as being "*Scouse Joe*". She thought that his real name was Jake Muldoon. She had known him, through Declan Prescott, for about 12 months. Declan Prescott worked for him and owed him money, although she was unaware of the detailed circumstances. He said that he had stabbed Declan Prescott down the side of his

head and he was going to do it again. He also threatened to “*torch*” their house. They exchanged insults and he hung up.

12. About 20 minutes later the appellant called again from a different number. He started laughing and said that all her windows had been “*put through*”. In a third and final call from yet another number he again said that he had put her windows through so as to make the house easier to torch and he said that he wanted his money.
13. Stacey Round indicated that she would support the police in any further action that they might take and in a further statement she detailed the circumstances in which she discovered the damage to her windows.
14. Interrupting the narrative and addressing future events as regards Stacey Round, in a statement taken on 21 April 2020 she reiterated her undertaking that her earlier statements were true. However, she indicated that she was no longer in a relationship with Declan Prescott and that as far as she was concerned these events were his affair and did not relate to her. The matter had been hanging over her head and she suffered from depression (for which she received medication), along with anxiety which was being exacerbated by the proceedings. She had three children to look after, and her life was difficult. She considered that if she avoided giving evidence she would not have to move house and her life could return to normal. She had not received any threats and was not under duress to withdraw her support for the prosecution. She said that special measures would not make any difference. She would not say anything if summonsed to court.
15. Returning to the narrative, on 22 November 2019, police attended the home address of the appellant’s partner, Kirsty Blaney, from where they seized a black Montane hat and two mobile telephones. One of the telephones (8153) was found in a jacket pocket and the other (4164) was found inside a bag of dog food. Although the circumstantial link was strong, there was nothing that forensically linked the appellant to the telephones. The appellant was discovered hiding in the loft at the address.
16. The 4164 telephone was a “*tumbler*” or “*spoofing*” phone, meaning that the SIM card was capable of generating different numbers from which calls would be made. There was unchallenged prosecution expert evidence at trial to the effect that, in the expert’s opinion, the telephone was used to make all of the calls to Stacey Round’s telephone described above. The numbers stored in the telephone included the numbers of Declan Prescott and Stacey Round, who were the individuals most frequently contacted. This clearly linked the telephone to the appellant. The cell site evidence was consistent with the telephone being most commonly used at the address where the appellant was arrested and otherwise it was frequently in the vicinity of his mother’s home address. The prosecution also

attributed the 8153 number to the appellant and the two phones were frequently co-located over a 14-day period. The prosecution expert, in cross-examination, conceded that he could not say whether the same person had been using both telephones.

17. At 2.12 pm on 21 November 2019, the 4164 number contacted Declan Prescott's telephone. At this point the two telephones were in different locations. At 2.13 pm the 8153 number, which was seemingly at the same location as the 4164 telephone, received a call from the number attributed to the appellant's mother. At 2.16 pm the 4164 number again called Prescott's number. At 2:20 pm CCTV footage showed a Ford Mondeo turning into Bow Road, where Declan Prescott's phone was located. The car could be seen leaving the area again at 2.24 pm at around which time Declan Prescott telephoned the emergency services. Two further calls were made from the 4164 number to Prescott at 2.24 pm and 2.33 pm. Between 2.20 pm and 2.30 pm the 4164 number was using a cell consistent with it being in Bow Road. It was conceded by the prosecution expert in cross-examination that two telephones could be far apart whilst using proximate cell sites.
18. The black Montane hat was examined, and two glass fragments were found that were indistinguishable from the glass in the smashed windows at Stacey Round's address. This provided limited support for the proposition that the hat had been worn by someone who was close to the windows of the address when they were broken. Samples taken from the hat also yielded a mixed DNA result from four individuals within which the appellant's DNA profile was fully represented. It was conceded by the relevant prosecution witness that it was not known who had last worn the hat and that DNA could be transferred through secondary contact. It was likely, although not definite, that the appellant had worn the hat at some point.
19. On 5 December 2019, Declan Prescott attended a video identification parade and unequivocally identified the appellant as the person who had assaulted him with a knife. Stacey Round similarly identified the appellant, who she said she knew as 'Scouse Joe' or Jake Muldoon, the person who had told her that he had stabbed Prescott and made threats towards her.
20. In interview the appellant declined to answer many of the questions put to him. He denied, however, possession or ownership of a Ford Mondeo, and instead he drove a Ford Focus that was at his house in Liverpool. He stated that the allegations were untrue, and he did not know how Declan Prescott came by his injuries. He denied having a telephone, including the 4164 telephone. Although he did not know where he had been on 21 November 2019, he surmised he was probably either at his partner's house or out shopping. He did not give evidence.

The position of Declan Prescott and Stacey Round at trial

21. During the trial, Declan Prescott and Stacey Round declined to answer any questions when in the witness box other than as regards certain preliminary matters. Declan Prescott accepted he had provided a written statement to the police. However, he refused to answer any questions as regards its contents. In cross-examination, he similarly refused to answer any questions other than seeming to shake his head when it was suggested to him that he had framed an innocent person. Stacey Round also refused to answer most questions from the witness box. She said that she had retracted her statements weeks before and it was her decision that she did not want to answer questions.
22. In the circumstances, the judge allowed the prosecution's application to treat them as hostile. He assessed that by their demeanour and the answers they had given that they were adverse to the prosecution, in that they did not want to tell the truth. He permitted the prosecution to put their statements to them under section 3 Criminal Procedure Act 1865. We note in passing that there is no challenge to the decision by the judge to allow the statements to be put under section 3.
23. The prosecution additionally sought leave to adduce the Criminal Justice Act witness statements from Declan Prescott and Stacey Round under section 119(1) Criminal Justice Act 2003, on the basis that their evidence was "*clearly at odds*" with their witness statements and therefore the latter were admissible "*as evidence of any matter stated of which oral evidence by him would be admissible*" (section 119 (1)(b)). The appellant submitted to the judge that the requirements of the section were not met as neither witness had given an account inconsistent with their statements; indeed, they had not given any substantive account at all. The section is in the following terms:

Section 119 Inconsistent statements

"(1) If in criminal proceedings a person gives oral evidence and —

- (a) he admits making a previous inconsistent statement, or
- (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),

the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible.

(2) If in criminal proceedings evidence of an inconsistent statement by any person is given under section 124(2)(c), the statement is admissible as

evidence of any matter stated in it of which oral evidence by that person would be admissible.”

24. The judge determined that the accounts were inconsistent. The witnesses had been clearly hostile, both in the way they answered some of the questions and by their refusal, in the main, to give any answers. The judge observed that their uncooperative stance was to be contrasted with what they had said to the police in their statements. Declan Prescott had asked for special measures if he gave evidence and he indicated that the appellant needed to be stopped. Stacey Round had said that she would support the police.
25. The judge expressed the view that it cannot have been intended for there to be a distinction between a person who accepts he or she made a previous statement but who otherwise gives no evidence and a person who accepts they made a previous statement and states that it was untrue. The judge suggested that the purpose of section 119 (1) (b) was to change the law so that previous statements from hostile witnesses could become evidence of the matters set out therein. The intention of Parliament would not have been to create two categories of hostile witnesses: one for which previous statements could be admitted and one for which they could not.
26. The judge then applied the approach set out in *R v Riat and others* [2012] EWCA Crim 1509; [2013] 1 Crim App R 2 and considered whether the statements should be excluded under section 78 Police and Criminal Evidence Act 1984, having regard to the non-exhaustive list of factors in section 114(2) Criminal Justice Act 2003 as to whether it is in the interests of justice for the statement to be admissible (section 114(1)(d)). Section 114 provides:

“Admissibility of hearsay evidence

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
 - (a) any provision of this Chapter or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 118 makes it admissible,
 - (c) all parties to the proceedings agree to it being admissible, or
 - (d) the court is satisfied that it is in the interests of justice for it to be admissible.

- (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant) —
- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
 - (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
 - (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
 - (d) the circumstances in which the statement was made;
 - (e) how reliable the maker of the statement appears to be;
 - (f) how reliable the evidence of the making of the statement appears to be;
 - (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
 - (h) the amount of difficulty involved in challenging the statement;
 - (i) the extent to which that difficulty would be likely to prejudice the party facing it.
- (3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.”

27. Addressing the various factors, the judge concluded the statements had considerable probative value, in that they are directly relevant to each of the counts in the indictment (the attack, the telephone calls, the criminal damage and the threats). There was no alternative or substitute evidence. This evidence was of considerable importance. The statements were given to the police, they were signed and were formal in nature. The judge reminded himself that in circumstances such as the present, reliability will ultimately be a matter for the jury. However, the judge needed to make an assessment of reliability himself and he considered the independent evidence that supported the accounts of both

witnesses. Declan Prescott had suffered a serious injury. His mobile telephone had been in the area where he claimed to have been attacked. The Ford Mondeo drove to and away from the same area. Declan Prescott claimed the appellant had been the driver, and two mobile telephones associated with the appellant were using cell sites that serve the relevant location. One of the telephones was used to call the appellant's mother and the other to call Declan Prescott almost immediately after the attack.

28. There was a still image from CCTV of Declan Prescott with his arm up to his head after the attack, at approximately the time that his telephone was in contact with the emergency services. This coincided with an attempt by one of the telephones attributed to the appellant trying to make contact with Declan Prescott's telephone. The later call that did make contact supports the account in Declan Prescott's statement that the appellant told him to clean himself up.
29. The judge took into account the glass found in the hat which matched the glass from Stacey Round's window, the DNA evidence from the hat which matched Declan Prescott and the latter's identification of the appellant.
30. Stacey Round identified the appellant at an identification parade; there were telephone calls to her from a telephone attributed to the appellant; and at least one window at her home was broken.
31. In the circumstances, the judge concluded that there was significant independent support for the accounts in the statements of both witnesses.
32. The circumstances of the making of the statement were essentially unimpeachable in the view of the judge, and oral evidence could have been given of all the matters set out in the witness statements. The jury had had the advantage of seeing the witness in the witness box (see *R v Y* [2008] EWCA Crim 10; [2008] 1 Cr App R 34, paragraph 60). As to the ability to challenge the evidence, the judge referred to the investigation of the independent supporting evidence, including as regards the use of telephones and the DNA findings. Furthermore, the appellant was able to rely on the bad character of both witnesses. This was not a case in which the jury were assessing the evidence without having seen the relevant witnesses, given they had both testified. The judge set out:

"33. Therefore, although there is difficulty in challenging the statements, I conclude that challenge remains possible in the ways I have set out. That reduces the level of prejudice. The prejudice will be reduced further by the directions that will be given to the jury. They will include the need to approach the evidence of both witnesses with caution. I add, although I do not place undue reliance upon it, that Mr Muldoon can, of course, give evidence if he wishes and challenge the statements directly.

[...]

35. The allegations in this case are very serious indeed and it is clearly in the interests of justice that they be fairly considered by a jury, full apprised of all relevant evidence, if that is at all possible. Applying the factors in section 114(2), and after having given consideration to the authorities to which I have been referred, my judgment is that the balance falls squarely in favour of the admission of the evidence of the statements.”

33. The judge had reminded himself of the decision in *Horncastle and others* [2009] UKSC 14; [2010] 2 AC 373 which we address briefly below at [33].

34. In summing up, which is not the subject of any criticism, the judge directed the jury:

“Now a direction on what we lawyers call hearsay from Declan Prescott and Stacey Round. Hearsay is simply a statement that is given outside of court. You will remember I said to you that evidence comes from within this room. There are some exceptions. Hearsay evidence are statements that were made outside court, but repeated here. Although the prosecution called Declan Prescott and Stacey Round to give evidence, the evidence that they gave did not support the prosecution case. In fact, bar answering some very basic questions, neither of them said anything at all and made it clear they were not prepared to answer questions. Now because of that the prosecution was allowed to cross-examine them both and put to them what they had said in their witness statements that were taken by the police. You should look very carefully at everything that they said, both in their police statements and in the witness box. You should also look at how they reacted when they were reminded of what they said originally; that is all evidence for you to consider. It is up to you to decide what, if anything, of their evidence you accept. Now you do not have their police statements in writing. Juries are not normally given witness statements, because they might unwittingly give them undue prominence, as against the rest of the evidence. There is nothing abnormal there, remembering always that the prosecution must prove the case. If you are sure that the contents of one or more of the police statements that either or both of them gave is true then you can act on it. So you have

to be sure that the contents of one or more of those police statements is true and then you can act on it.”

The Submissions on the Appeal

35. This appeal is essentially advanced by Mr Cook on the basis of the two submissions made to the trial judge. First, it is suggested that given the two witnesses refused to answer any substantive questions in the witness box the central requirement for admitting statements under section 119 had not been satisfied, in that they had not given inconsistent oral evidence. He argues that “*hostile silence*” does not meet the requirements of section 119, given they had not given inconsistent evidence. In the alternative, the evidence should have been excluded under section 78 Police and Criminal Evidence Act 1984, although Mr Cook accepts that the judge engaged in a careful analysis of the section 114 factors. He argues that the judge fell into particular error as regards the factor at section 114(2)(g) (*viz.* whether oral evidence can be given and, if not, why it cannot). He submits that if the witnesses are available and are not in fear, then the court should be markedly slow to admit hearsay evidence from witnesses who simply decline or are unwilling to assist.
36. The Crown submits that the judge sustainably approached the question of admissibility of the evidence. In his detailed written ruling, he correctly analysed the relevant authorities and applied them to the facts of the case. It is suggested he gave appropriate directions to the jury. There was significant evidence in the case, above and beyond the statements, which provided compelling support for every aspect of the prosecution case. It is suggested that the grounds of appeal simply rehearse the arguments advanced at trial without identifying how the judge erred, save by asserting the matters set out above. It is contended that the judge could have admitted this evidence under either section 119 or section 114(1)(d).

Discussion

37. In our judgment, it is critical to recall the precise requirements of section 119. First the witness must have given some oral evidence (“*if in criminal proceedings a person gives oral evidence*”) and **either** admits making a previous inconsistent statement **or** a previous inconsistent statement is proved by virtue of sections 3, 4 or 5 of the Criminal Procedure Act 1865. In this case, both witnesses gave only slight oral evidence. As set out above, Declan Prescott accepted he had provided a written statement to the police. However, he refused to answer any questions as regards its contents. In cross-examination, he similarly refused to answer any questions other than seeming to shake his head when it was suggested to him that he had

framed an innocent person. That response was *prima facie* consistent with his statement to the police. Stacey Round similarly refused to answer most questions from the witness box. She said that she had retracted her statements weeks before and it was her decision that she did not want to answer questions. She did not say her statements were untrue. The two witnesses, therefore, remained completely silent save for the briefest preliminary testimony. Neither of them answered any questions as regards the contents of their statements, save for the brief shake of the head by Declan Prescott.

38. The court needs to focus on the two alternative scenarios in section 119(1) (a) and (b): either the witness admits making a previous inconsistent statement (which is not the present case) or the previous inconsistent statement is proved by virtue of sections 3, 4 or 5 of the Criminal Procedure Act 1865 (which is the present case). As relevant, therefore, to the present appeal, the second scenario in subsection (b) involves a direct reference to the various rules created in section 3 of the Criminal Procedure Act 1865, one of which is that if the judge considers the witness to be hostile, leave can be given to prove that the witness has made at other times a statement inconsistent with the present testimony. Section 3 provides:

“3. How far witness may be discredited by the party producing.

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.”

39. In considering the provisions of section 3 of the 1865 Act, the editors of Phipson on Evidence, nineteenth edition, paragraph 12-61 suggest, “*a witness who retracts evidence supportive of the Crown’s case or purports to have no recollection, but does not change sides in the sense of giving evidence that is actually damaging to the Crown’s case, may be treated as hostile, and the Crown is entitled to call such a witness to explore the possibility that the witness will return to his original witness statement*”. This statement of the law is founded, at least in part, on *R v Honeyghon and Sayles* Criminal Law Review 1999, page 221 (see Phipson at page 395). It was explained in *Honeyghon* that the judge has a discretion to allow a witness to be cross-examined about a previous statement when the adverse witness, first, professed to have no recollection; second, departed from his proof in favour of the other side or the defendant; or, third, stated on oath he was reluctant to give evidence (in the latter

case, he or she by implication indicated that he may have evidence to give, but declined to do so). However, the court went on to say that a witness who, beyond the formalities of providing his or her name, address and other particulars, simply refused to speak at all presented a different problem which might in an appropriate case be dealt with as contempt of court. Although the judgment is not entirely clear on the point, the court appeared not to envisage cross-examination on a previous statement being allowed under section 3 of the 1865 Act with “silent” witnesses in this latter category (transcript 31 July 1998, case numbers 97/4136/X4 and 97/4460/X4)).

40. It is important to remember that in the instant case neither Declan Prescott nor Stacey Round in the witness box retracted evidence supportive of the Crown’s case in the sense of giving a different account. Furthermore, they did not maintain they had no recollection or say that they were reluctant to give evidence. Instead, after some very brief preliminary matters which included affirming that they had made statements to the police, they simply indicated they were not prepared to answer any further questions. Stacey Round had earlier indicated this was to be her stance when she “retracted her statements” a week before the trial and she simply remained silent. Their stance seems broadly to have matched the example of the “silent” witness in *Honeyghon*.
41. *Thompson* (1977) 64 Cr App R 96 is authority for the continued existence of the common law approach that there is no fixed rule which binds counsel calling a witness to a particular way of examining him or her: “*There is no reason to suppose that the subsequent statutory intervention has in any way destroyed or removed the basic common law right of the judge in his discretion when a witness appears hostile*” (at page 97). The case involved a witness who did not contradict her earlier statement and instead merely refused to speak. Given section 3 potentially did not apply in these circumstances, the court considered the position at common law. Lord Widgery C.J. cited, *inter alia*, the observation of Best C.J. in *Clarke v Saffrey* (1824) Ry. & M. 126 “*if a witness by his conduct in the box, shows himself decidedly adverse it is always in the discretion of the judge to allow a cross-examination*” (see also *Bastin v Carew* (1824) Ry. & M. 127). The decision in *Thompson* clearly demonstrates that under the common law, the judge had the discretion to permit cross examination of an adverse witness who, having answered certain preliminary questions, stated he or she was not going to give evidence. This includes questions about a previous statement. Therefore, the judge under the common law can allow cross-examination on a previous statement when a witness proves hostile, for instance by simply remaining silent, as was the case in the instant appeal.
42. Summarising the position, therefore, both witnesses were clearly hostile to the Crown. However, focussing on section 3 Criminal Procedure Act 1865, save for some preliminary matters, they simply remained silent and they had not made an earlier statement which was in any way inconsistent with their essentially non-

existent testimony in court. Although we are wholly confident that the Crown would have been entitled to cross-examine them on their previous statements under the common law, applying the language of section 3 and our understanding of the decision in *R v Honeyghon and Sayles*, it is our view that for the purposes of section 119 neither witness had admitted making a previous inconsistent statement, nor could a previous inconsistent statement made by either witness be proved by virtue of section 3 the Criminal Procedure Act 1865 (sections 4 and 5, we note, have no bearing on the present issue). Furthermore, we consider that it would unduly strain the language of section 119 to suggest that either witness had given oral evidence, as required by subsection (1), in the context of a provision that is directed at inconsistent statements; they simply had not given any evidence regarding or relating to any matters in their witness statements. It follows that we do not accept the analysis of the judge as regards the availability of section 119 in these circumstances.

43. Mr Rhind for the respondent, however, relied on section 114 (1) (d), as well as section 119. There is clear authority for the need to approach section 114 (1) (d) with caution and it should not be used to circumvent other gateways “*higher up the hierarchy*” (see *D (E)* [2010] EWCA Crim 1213 [17]). In *Horncastle*, the court referred to the provision as providing a “*limited residual power*” (see [11]). Hughes LJ in *The Queen v Y* [2008] EWCA Crim 10 observed: “*But the greatest care must be taken, before admitting an out-of-court statement under section 114(1)(d), to ensure that the section 114(2) factors are fully considered and that overall it is genuinely in the interests of justice that the jury should be asked to rely on the statement without seeing its maker and without any question being addressed to him about it [62]*”. In *D (E)*, having reviewed certain earlier authorities, Pitchford LJ observed:

“21. Each of these decisions demonstrates, in our view, how limited are the circumstances in which the evidence of an available but reluctant witness may be admitted in the interest of justice. [...] Lord Phillips reminded us in *Horncastle and Others* (2009) UK SC14 at paras 15-26 and 53, it is our common law tradition that the defendant is entitled to examine the witnesses against him and only in strictly circumscribed circumstances will a hearsay statement be admitted in the interest of justice. The trial judge is the gatekeeper responsible for the fairness of the trial (see paragraph 38 of *Horncastle*), and the examination of the factors set out in section 114(2) and any other relevant factors must be performed with caution when the object is to fill a gap caused by the non-attendance of a live witness on grounds which do not fall within section 116.”

44. In a similar vein, we have borne in mind the warning in *R v Sajid Ali Sadiq* [2009] EWCA Crim 712 at [24], a case in which the witness did not attend court at all, that “[...] *this court simply cannot be seen as regarding it as normally in the interests of justice that an important witness’s evidence should be given under the hearsay provisions of the*

2003 Act when he simply refuses to testify and will not provide a good reason for his refusal when he is available and capable of giving evidence" (critical also in this regard are the decisions in *R v Ibrahim* [2010] EWCA Crim 1176 at [11] and *R v Riat* [2012] EWCA Crim 1509 at [20]) . Furthermore, in *Lawrence* [2013] EWCA Crim 708; [2014] 1 Cr App R 5 (33), this court suggested that the reasons for refusal to give evidence at a retrial would have to be considered as carefully as in fear cases under section 116. We note, however, that in *Sajid Ali Sadiq* and *Lawrence* the provisions of section 3 Criminal Procedure Act 1865 were not invoked.

45. In the present case the silent stance adopted by the witnesses meant that section 119 did not apply, and section 114 (1) (d) is the only potential gateway to admissibility. Therefore, the prosecution in relying on section 114 was not seeking to avoid or ignore restrictions on the use of hearsay in other provisions.
46. Against that background, there are two factors in the present case that persuade us that although inadmissible via section 119, the evidence could properly have been introduced under section 114 (1) (d).
47. First, viewed together, the statutory and common law provisions relating to hostile witnesses provide a clear route for admitting these statements. Although it will always depend on the individual circumstances, witnesses considered to be hostile can potentially be cross examined on their previous statements, either under section 3 or under the common law. The judge was correct, therefore, when he observed that it would be anomalous for there to be a distinction between a witness who accepts he or she made a previous statement but who otherwise gives no evidence and a witness who accepts he or she made a previous statement and suggests that it was untrue. It would be against the interests of justice for the prosecution to be able to introduce into evidence the statement of a hostile witness via section 119 who had been cross examined under section 3 but for the prosecution to be unable to introduce into evidence the statement of a hostile witness under section 114 (1) (d) who had been cross examined under the common law. In both cases the jury will have heard the contents of the statement and the distinction between the bases for the cross-examination – section 3, on the one hand, and the common law, on the other – would fail to justify a difference as regards the admissibility of the hearsay evidence as set out in the statement or statements.
48. Second, the judge's approach to the various factors in 114(2) was exemplary. We have set out a substantial summary of his ruling above ([27] – [33]) and we commend the care that the judge took in his analysis. We consider that his assessment of, and his approach to, the matters that fell for consideration cannot be faulted. Mr Cook's sole complaint in this regard is that the judge erred in his approach to section 114(2)(g) (*viz.* whether oral evidence can be given and, if not, why it cannot be given). As set out above, he submits that if the position is that

the relevant witnesses are available and are not in fear, then the court should be slow to admit hearsay evidence if they simply decline or are unwilling to assist. Although he does not contend that there is an absolute bar to introducing hearsay evidence from uncooperative witnesses, he argues the court should be markedly hesitant in taking this course. Whilst undoubted care needs to be taken, as set out above, to ensure that section 114 is not used to subvert the protections that otherwise exist as regards hearsay evidence (*e.g.* section 116) and the court needs to approach with great care any request to introduce the hearsay statement of a witness who is simply unwilling to testify, the circumstances of individual cases are infinitely various and will need to be considered on their own merits. As Burton LJ stated in *R v Z* [200] EWCA Crim 20; [2009] 1 Cr App R 34 “*section 114(1)(d) should not be so narrowly applied that it has no effect*” (see [20]). The present case demonstrates the need not to create inflexible rules in this context. This was not a case in which the restrictions on hearsay in section 116 were being circumvented and the particular statutory and common law provisions relating to these two hostile witnesses rendered it in the interests of justice for their hearsay statements to be introduced into evidence under section 114(1)(d).

49. It follows we dismiss this appeal against conviction.