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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 2021 03362 B5

[2022] EWCA Crim 444

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 24 March 2022

Before:

THE VICE PRESIDENT OF COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD

MR JUSTICE GRIFFITHS

HER HONOUR JUDGE WALDEN-SMITH

REGINA

v

JAMES LONG

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MR DAVID ILES appeared on behalf of the Appellant
MS AMRISHA PARATHALINGHAM appeared on behalf of the Crown

J U D G M E N T

1. **THE VICE PRESIDENT:** On 30 September 2021 in the Crown Court at Wolverhampton before Judge Campbell and a jury the appellant (then aged 25) was convicted of robbery, which was count 1 on the trial indictment (count 2 on the original indictment).
2. On 20 January 2022 he was sentenced to 5 years 6 months' imprisonment. The court directed that 56 days would count towards the sentence in accordance with section 325 of the Sentencing Act 2020. He was also ordered to pay a victim surcharge of £170.
3. As to his two co-accused, Peter Tomkinson stood trial with the appellant and was acquitted of robbery; Wesley Hughes pleaded guilty on the day of the trial to dangerous driving and robbery and was sentenced to a total of 5 years 4 months' imprisonment. He also pleaded guilty to and was sentenced for a number of summary only offences.
4. The appellant appeals against conviction with the leave of the single judge on two grounds: first, that his submission of no case to answer should have been upheld; and second, that he should not have been identified by way of an equivalent of a dock identification.
5. On 7 July 2018 the complainant, Sean Rhodes, visited an off-licence in Cradley Heath at approximately 3 am. He was wearing a bracelet and some necklaces with an approximate value of £3,000. Whilst in the premises he spoke to various people, one of whom was Hughes, who was wearing a white T-shirt and a cap. There was a dispute as to whether Mr Rhodes could take his dog inside the off-licence and Hughes offered to hold the dog for the complainant. One of the men, who it is accepted was the appellant (who had blond hair and was wearing a white T-shirt) said, "We should be coming with you". Mr Rhodes thought this was a joke because he was holding a crate of beer and the atmosphere was jokey.
6. As he left the shop and walked down the road, he heard a revving sound, and then a car coming from behind him mounted the kerb and hit him. Hughes shouted, "I'll fucking kill you". Mr Rhodes let go of his dog and told it to run home. He threw the crate of beer at the windscreen of the car and ran down the road. The appellant can be seen in the clear CCTV footage leaving the motorcar at this point and running down the road in the same direction as Mr Rhodes and his dog. Although it was the prosecution's allegation that the appellant was chasing Mr Rhodes at this stage, save for the evidence of Mr Rhodes there is no evidence of participation by the appellant in any of the crucial events that followed.
7. These included the car mounting the pavement a second time some way down the road and hitting Mr Rhodes. The latter was propelled through the window of a shop on impact. Someone, who he described as the "big tall chap" wearing a dark grey jumper, got out of the car from the passenger side. This individual was said by the Crown to be Tomkinson. The driver (Hughes) also got out. As we have already indicated, he was wearing a cap and a white T-shirt.
8. As Mr Rhodes described events, a smaller man ("a smaller lad" as the judge put it) with dark hair and wearing a dark top got out of the boot carrying a hammer. We refer to this individual as the third attacker. Hughes yanked at Mr Rhodes's bracelet, whilst the third attacker, who had moved to a position to the left of Mr Rhodes, hit him over the head with the hammer.
9. We pause at this stage of the narrative to note that Mr Rhodes's evidence as regards this individual with the hammer who emerged from the boot of the motorcar had various important features. Mr Rhodes suggested that he was the same person as the man who, wearing a light top in the off-licence, had said, "We should be coming with you". As indicated above, it was accepted that this latter individual was the appellant. However, the prosecution concedes, first, that the appellant did not get out of the boot of the car; second, he did not have dark hair; and third, he was not wearing a dark top. The individual who emerged from the boot was another man entirely, as seen on the film or video footage of the incident.
10. Mr Rhodes initially said in evidence that he had seen the person who said, "We should be coming with you" (namely the appellant) getting into the boot of the car. However, when he was shown the relevant CCTV footage, he accepted that he had not witnessed the appellant

leave the shop and therefore could not have seen where he was positioned in the vehicle. He was, nonetheless, unequivocal that the man who alighted from the boot and who hit him on the head with the hammer was the same person who had said in the shop "We should be coming with you". This was impossible.

11. To return to the narrative, the "big tall chap" (Mr Tomkinson, as alleged) then punched Mr Rhodes in the face whilst Hughes pulled his necklaces off. A woman shouted from the car, "Let's go" and one of the men said, "We'll kill you. Give us the jewellery". They made off and Mr Rhodes never recovered his bracelet or necklaces.
12. Mr Rhodes went home and the police were called. He had shared half a bottle of vodka and had had a couple of cans of beer prior to the incident, but his evidence was that he felt fine because he can handle his drink. He attended an identification parade a few months after the incident and he failed to identify either the appellant or Tomkinson. Instead, on the appellant's procedure he identified one of the uninvolved volunteers. Although we are unaware of the reasons for the delay, it would have been preferable for the identification procedure to have taken place far closer to the date of the incident.
13. During the trial prosecuting counsel, Ms Parathalingham, asked Mr Rhodes if the image of the appellant as seen on the CCTV from the shop was the man who had come from the boot of the car. Mr Rhodes agreed. This is a critical issue to which we will return later in this judgment.
14. The CCTV footage revealed that there were at least five people in the car: the appellant, Tomkinson, Hughes (who was driving), a woman in yellow and the male in the boot wearing a dark T-shirt. The defence suggested there was a sixth person positioned in the rear offside seat.
15. On 18 July 2018 the appellant, having heard that the police wished to speak with him, attended at West Bromich Police Station and was arrested. The appellant's case was that he was not the man who got out of the boot of the car. Although he had been present in the shop and had run along the pavement after the first collision, he was not involved in the robbery. He did not give evidence in his defence, although in interview he said his memory of what occurred had been impaired by alcohol. He remembered going into the shop, getting out of the car to chase the dog and thereafter returning to the car, where he fell asleep.
16. Turning to the first ground of appeal, at the close of the prosecution's case the appellant submitted that there was no case for him to answer. The prosecution's central contentions as conveniently summarised by the judge at the end of the trial were that Hughes knocked Mr Rhodes to the ground having followed him in the motorcar, whereon the latter "was then subjected to violence by three men who attacked him and grabbed his jewellery forcibly from him". The case therefore against Tomkinson and the appellant was that they, along with Hughes, were the three attackers. Indeed, as the judge later put the matter to the jury:

"... the defendant that you're considering would be guilty of robbery if you're sure that either he was one of the people who physically pulled Mr Rhodes's jewellery off by force intending to steal it or he deliberately helped or encouraged another to do so by using violence upon Mr Rhodes when the bracelet and necklace were taken. Merely being present at the scene of a crime is not enough to make a defendant guilty of that crime."

It was not alleged, therefore, that all of those in the motorcar were necessarily involved in the robbery and we note that the jury were directed to that effect.

17. In her ruling on the submission the judge concluded:

"It is my decision, on reflection, that it is appropriate that Mr Long's case should continue forward and go towards the jury. As far as the identification that was made of the person in the shop, who's accepted

to be Mr Long, as being one of the three attackers to Mr Rhodes, there is that identification. It is weakened and it is quite right that the jury should be directed in relation to it by a number of factors: what must be an error about the boot location; about the timing and length of the identification itself; the fact that they were not known to each other; the fact that Mr Rhodes accepts having consumed some alcohol at the time.

However, it would be wrong to focus simply on those elements of the evidence without taking into account what the jury could, in my judgment, properly regard as an appropriately supporting element of the evidence, and that is that Mr Long accepts that he is the person who is shown to be on the CCTV footage out of the vehicle. So, he accepts that he is one of the people who leaves the car right in the moments prior to the robbery and it is plain from his demeanour that the jury could properly draw the inference that his demeanour at that point in time is to exhibit a degree of aggression by the means in which he transports himself and that that is not focused at the animal, Mr Rhodes's dog, but that that is focused at the complainant.

Therefore, on balance and on reflection, whilst acknowledging that there are weaknesses, of course, those are weakness which, with the potential for supporting evidence that there is in the case, is one that the jury should, in my judgment, properly assess."

18. For the prosecution Ms Amrisha Parathalingham supports the approach of the judge and she argues that there was a case to answer based on the acceptance by the appellant that he had been seen by Mr Rhodes inside the shop and that he decamped from the motorcar between the two incidents of ramming, running in the direction of Mr Rhodes or his dog, or both.
19. In our judgment the fundamental difficulty with this latter submission and the judge's ruling is that there were only three attackers: Hughes, the "big tall chap" said to be Tomkinson, and the man who alighted from the boot of the car with the hammer with which he hit Mr Rhodes over the head. We have already set out the detail of Mr Rhodes' evidence that is relevant in this regard, but it is instructive to repeat verbatim the judge's summary of Mr Rhodes's evidence as to the third attacker:

"Mr Rhodes said that the smaller lad got out of the boot. He had a weapon. It was a hammer he had. The little one was the one who said 'we should be coming with you' inside the shop. He had a light top on. 'I wasn't looking at his legs'. He said that the man from the boot 'came to my left-hand side' and suggested that paramedics had later confirmed that he had been hit on the head with a hammer.

... he said that the driver went straight to his bracelet and was yanking on it but it didn't snap easy. He said, 'The small chap hit me over the head with a hammer'. He accepted that he had described this person as having dark hair in the statement that he gave to the police and Mr Rhodes again repeated that this small chap with the hammer had dark hair in his evidence."

20. It is clear from the detail we have set out above that the third attacker was described as being dark haired and dark clothed. Unlike the appellant, he had emerged from the boot of the car. Furthermore, there was no suggestion that the man in the boot of the car had been inside the off-licence at any stage and Mr Rhodes's contrary contention in this regard had to

be incorrect. Mr Rhodes had self-evidently, therefore, described two people: the appellant, who had spoken to him in the off-licence, and the third attacker, who was entirely different in appearance and who had been in the boot of the car.

21. Mr Rhodes, furthermore, had failed to identify the appellant at the identification procedure. We indicated earlier that we would return to the issue of the identification of the appellant which occurred in court. Mr David Iles, on behalf of the appellant, put the matter in his grounds of appeal thus:

"Further, and wrongly, [Mr] Rhodes was permitted, before the jury, at the instance of prosecuting counsel, to conduct the equivalent of a 'dock identification' by 'identifying' (or purporting to do so) this Appellant by referring to the agreed cctv of the Appellant in the store as 'Mr Boot'."

Mr Iles has informed us today -- and this has not been contradicted by Ms Parathalingham -- that the question put by prosecuting counsel, when he was shown the video clip of the appellant inside the shop, was to the effect "Do you see the man there who was one of the attackers?"

22. This means of identification should not have been utilised. As we have just set out, it is clear there were two people in this context, not one. We repeat, the first was the appellant who had been in the off-licence before he joined others on the back seat of the car, which he then left after the first collision. He then ran down the road. The second was the small dark man who emerged from the boot of the car armed with a hammer and who hit Mr Rhodes, namely the third attacker. They could not have been the same person; and the attempt by the prosecution to merge these two individuals into the third attacker by inviting Mr Rhodes to give evidence that the appellant was the man in the boot was entirely misleading. Furthermore, bearing in mind the evident uncertainties and difficulties with this evidence, especially following the identification procedure where Mr Rhodes failed to identify the appellant, the prosecution should have avoided a step that was akin to a dock identification. By asking Mr Rhodes, when looking at the relevant CCTV footage of events inside the shop, if the man in the boot and the man in the off-licence who said "we should be coming with you" were one and the same, the prosecution effectively secured the identification of the appellant as the third attacker by way of the equivalent of a dock identification.
23. The law on this issue is clear. As set out in *Blackstone's Criminal Practice 2022* at paragraph F19.6, in 1976 the Attorney-General and the Director of Public Prosecutions undertook that in cases tried on indictment:

"The [prosecution] ... will not invite a witness to identify, who has not previously identified the accused at an identity parade, to make a dock identification unless the witness's attendance at a parade was unnecessary or impracticable, or there are exceptional circumstances."

This means of identification is regarded as highly unsatisfactory, particularly when the witness (as here) failed to pick out an accused at a previous identification procedure (see *Phipson on Evidence, 20th Edition* at 15/14).

24. Therefore, on the first ground of appeal, the link between the appellant and the third attacker was fundamentally flawed and the submission of no case to answer should have been upheld and, on the second ground of appeal, the "dock" identification (or equivalent) of the appellant as the third attacker should not have occurred because it fundamentally undermined the fairness of the appellant's trial. Although the judge gave the jury commendably full and appropriate directions on the law and the facts and clearly approached this case with careful and anxious attention, the verdict in relation to the appellant is unsafe and we quash his conviction.
(The court did not order a retrial.)

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