



Neutral Citation Number: [2021] EWCA Crim 603

Case No: 201903811B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MANCHESTER CROWN COURT
His Honour Judge T Smith
T20197033

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2021

Before :

LORD JUSTICE EDIS
MR JUSTICE HOLGATE
and
HER HONOUR JUDGE TAYTON, Q.C.
Sitting as a judge of the Court of Appeal Criminal Division

Between :

THE QUEEN

- and -

MARCUS BARKER

Appellant

Mark Connor (assigned by the Registrar of Criminal Appeals) for the **Appellant**
Paul Jarvis (instructed by **The Appeals Unit, Crown Prosecution Service**) for the **Crown**

Hearing dates : 26 March 2021

**Judgment Approved by the court
for handing down**

Lord Justice Edis :

Introduction

1. This is an application by Marcus Barker for leave to appeal against conviction which relies on fresh evidence. It has been referred to the full court. He needs a short extension of time in order to pursue his appeal, which we grant.
2. On 6 September 2019, in the Crown Court at Manchester, before His Honour Judge Smith, the Applicant was convicted of Robbery, contrary to s.8(1) of the Theft Act 1968. On the same day (before the same Court) he was sentenced to a term of imprisonment of 7 years.
3. The robbery, it is agreed, began at 21:47:27hrs on the 6 April 2018. The timing is precise because it was captured on CCTV. That was the time at which the robber entered the victim's car. The victim got out of the car about 16 seconds later, and the robber drove away in her car. After the conviction, a video clip was produced from the Applicant's SnapChat account by his partner, Hayley Randles. This is timed at 21:48 on the 6 April 2018. Its provenance has been checked by the police and it is agreed that because of the time when, and the place where it was taken, the person who took it cannot have been the robber. The clip does not show the person who took the video, but there is a very short piece of audio recording of a male voice which is presumed to be that of the person creating the film. The video shows Hayley Randles driving a car, presumably hers, past a particular location which can be identified. The evidence that it was the Applicant who took this film is the fresh evidence which is the subject of this application. It is:-
 - i) The fact that it was found on the Applicant's SnapChat account to which he has access by using login details. There is no evidence about how it got there, but we approach this on the basis that it got there because it was taken using a phone which was generally in use at the time by the Applicant. We heard evidence from Donna Allright who told us that she had lent it to him for a lengthy period of time.
 - ii) The Applicant gave evidence on oath before us that he took the video clip.
 - iii) Hayley Randles now says that she was with the Applicant in her car at 21:48 on 6 April 2018 driving from his sister's to her home. She was not aware that he was taking a video film on the journey, but confirms that he was there in her passenger seat at that time and that he was therefore the only person in a position to do so. She also told us how she had found it on the SnapChat account very soon after the conviction.
 - iv) Both the Applicant and Hayley Randles have also given further fresh evidence to explain why at the trial they told the jury that they had been at home for a substantial period of time when the police arrived at 22:15, with Ms. Randles' brother who gave evidence to the same effect. In fact, it is now clear that Ms. Randles and the front seat passenger who took the video clip cannot have been home for much more than 15 minutes when the police arrived. They both say that their recollection of times has been improved by the discovery of the video and they are now able to give a more accurate, and very different account of their movements that night. They deny that they lied at trial about this.
4. We are required to decide whether to receive this fresh evidence under section 23 of the Criminal Appeal Act 1968 and, if so, whether to allow the appeal.

The Facts

- 5. Michelle Boswell parked her white Vauxhall Corsa in Millwright Street in Newton Heath, close to the Lloyds Bank. She made a cash withdrawal of £20 and got back into her car. A male holding a knife got into her car and demanded money from her. She handed over the money and got out of her car at 21:47:43 as requested. The male immediately drove off in her car. At about 22:06, PC Haxby was informed that a robbery had taken place. He undertook a local search, and at about 22:15 he found the victim’s car parked in Langcroft Drive, Newton Heath, which is about a three minute drive from where the robbery took place. The car was parked very close to number 14, which was the home address of the Applicant’s girlfriend, Hayley Randles. At this time the Applicant was living there with her. The route from the Bank to this place requires the vehicle to move off the main roads and drive to a small residential street, which does not appear to be an obvious route to anywhere else. The jury saw body worn camera footage of the area and it appeared that the car had stopped against some bollards which restricted its further progress. It was a residential area with places where cars could park, rather than a thoroughfare. The robber had, it would seem, chosen to leave the victim’s car at the place where it was recovered, about fifty feet or less from the door to the Applicant’s home. The police had arrived on the scene within 27 minutes of the robbery. There had been no chase following the robber from the scene of the crime, and the robber cannot have expected them to be there so soon.

- 6. Whilst PC Haxby was searching the victim’s car, the Applicant came out of the address, he first headed towards the victim’s car. The officer gave evidence that he had looked up, seen the police and “about turned” and went back towards the house. He then went back into the house. The officer said that he came out again, went to Hayley Randles’ car and was seen to be fumbling at its door. The officer did not see him take anything out of the car, but accepted that he may have done. He went back to the house.

- 7. The police went to the front door and asked who was at the address. We have a transcript of that conversation and have also viewed the body worn camera footage of it (as did the jury). The officer first spoke to Hayley Randles alone, and the Applicant then joined them. This is important evidence and we will set out the transcript. We have underlined certain answers which are of significance. We also emphasise the questions which the police asked. They did not make any allegation of robbery, and said only that someone had run away from a car and they were checking to see if anyone had seen anything. If the answers given by either or both of Ms. Randles or the Applicant were not true (they both gave alibi evidence at trial consistent with their having been at home for the time given to the police) this would raise a question about why, when asked such open questions, they would lie. They were not then in the position of a person making up a false alibi defence to bolster a true defence. They had no idea, on their account, that any defence to anything would ever be required. The Applicant’s remark that something must have happened when they had nipped out does not fit with what the police had said they were asking about. The conversation was as follows:-

PC 15661	Hello. Are you OK?
RANDLES	Yes
PC15661	Is there anyone else in the house?
RANDLES	YEAH

PC15661	Who's in?
RANDLES	My brother, and my partner
PC15661	Have any of them come in recently?
RANDLES	<u>No we've all came in at same time</u>
PC15661	Right ok, we've just had a erm, there's been an incident , where someone's run off from a vehicle up here,
RANDLES	With what?
PC15661	Run off from a vehicle
RANDLES	Run off from a vehicle?
PC15661	Yeah I don't know if you've seen anything?
RANDLES	<u>No Nothing, we've been in about an hour</u>
PC15661	About an hour?
RANDLES	Yeah
PC15661	Coz, Aright mate? (Barker arrives at this point)
BARKER	Alright
PC15661	Erm yeah, basically someone's been seen in the area running around we're just checking if anyone's seen anything that's all
RANDLES	Have you seen anything?
(To BARKER)	
BARKER	No. Literally, I've been in and out as well
PC15661	When have you got in?
BARKER	<u>We nipped out before though so it must have happened when we nipped out</u>
PC15661	Must have happened when what?
BARKER	<u>When we nipped out when we went Gorton, before me and her so I don't know</u>
PC15661	Right, when have you got back?
RANDLES	<u>It was about forty five minutes ago, an hour.</u>
PC15661	Right,
BARKER	<u>Yeah about forty five minutes ago or summat</u>
PC15661	OK no worries

Voice from inside	Mummy
RANDLES	I'm coming
PC15661	Thanks a lot
BARKER	I've not seen nothing anyway
PC15661	OK
BARKER	Alright, no worries

8. The judge in summing up said this about that evidence:-

“So when you are looking at the alibi, you know you will have the bodycam footage and the record of the transcript of what was said at the time. As you know, when Hayley Randles answers the door, saying that they had been in for about an hour, and Mr Barker saying that they had nipped out and it must have happened when they had nipped out. “When you’ve what?”, “When we’ve nipped out before, me and her”. “What time have you got back?”, and Miss Randall saying, “Forty-five minutes ago”, and he saying, “Yes, about forty-five minutes ago or something”.

“Now, on that, you are going to have to see whether you agree or do not agree with the suggestion from the prosecution that that was Miss Randles anticipating and preventing Mr Barker coming up with anything else that might in other words put him in it, that she was volunteering that first, or effectively was that an officer in a small doorway talking to two people making a general enquiry and she happened to answer first, innocently and not falsely or with the reasons that the prosecution suggest.”

9. The prosecution suggestion there recorded appears to be based on the terms of the conversation, and the perception which the jury may have formed during the trial that Ms. Randles is significantly more sharp-witted than the Applicant. At all events, at trial both gave evidence that at the time of the robbery they were both at home and had been for some time before the police arrived at about 22:15. Mr. Jamie Sykes, the brother of Ms. Randles, also gave evidence to the same effect.
10. The police arrested the Applicant on suspicion of robbery. They suspected him because he fitted the victim’s description of the robber, and because he lived at the house very near the point where her car had come to rest. A search of the house was carried out and nothing connected to the robbery was found. The car keys of the stolen car were not recovered.
11. On 7 April 2018, the Applicant was interviewed by the police. He denied being involved in any robbery and said that he had been at his girlfriend’s house that evening. This was his defence at trial, and in view of the fresh evidence which is the subject of this appeal, his first full account of his whereabouts at the time of the robbery is important. He was asked for an account of his movements, and described two journeys by car from Hayley’s address in Newton Heath:-

The first journey: “Early evening five o’clock should I say. I’d say at five o’clock I had just got to Hayley’s mum’s or just finished gym and I had tea at Hayley’s mum’s. I had Lexi with me at this point as well cos I had just picked her up. Lexi’s my daughter. Where did we go from here? Hayley’s mum’s. We went to the park in Openshaw to pick Lyla up and take Holly home, which was Hayley’s little sister and Lyla’s Hayley’s

daughter. Then we've took Holly home and from there we've gone straight back to Newton Heath.

The second journey: "Jamie, which is Hayley's brother, has watched the kids while me and Hayley go back down to Gorton. At the night-time I got Tesco garage to say that I was at Tesco garage at the cash machine. It was dark, the times I don't know, and then from Tesco garage I've gone to, was it my sister's first? No. I went to Levenshulme Road - I didn't go there but I went past there. There are cameras again in the shop went I and picked butter up. From there I've gone my sister's in Longsight. At the top of the street there's a camera which is the Post Office. Gone and picked sommert up that I've left there and that's when I've gone straight back to Hayley's. And that was it. When I pulled up at Hayley's, though, I didn't see, I weren't looking out for anything to be fair, but I didn't see anything or anyone there weren't no white car there. Gone in Hayley's, come back out to Hayley's car to get something out, and that's when I've seen police there. I didn't have a clue what was going on like. Gone back in Hayley's, heard a knock at the door, asked me my name and that was it, and there was a knock again and I get arrested."

12. The interview then went over this account again, and some further detail was established. The Applicant said that he travelled on these journeys with Hayley, who was driving them in her car. He explained which of the children were with them at different times, not always consistently. His position now is that during the second journey, Jamie was looking after only Riley, Hayley's son, who was asleep in bed. At one point in the interview he said that they had Riley with them while Jamie was looking after Lyla and Lexi. This inconsistency about detail may be important, because one possibility is that the Applicant was not present in Ms. Randles' car during some or all of the journeys he was describing. When cross-examined about this, the Applicant said that he had been confused in the interview. One problem which he did mention was the fact that there was no room in Ms. Randles' car for all the people who were present in her home when the police arrived: three adults and three children.
13. The Applicant did not say how long had elapsed between the end of the second journey and the arrival of the police. His account in interview is not, therefore directly in conflict with his evidence to us, and the evidence he gave to the jury.
14. On 23 April 2018 the victim attended an identification procedure and positively identified the Applicant as being the male who had robbed her. The jury was able to see the video film of the procedure and to assess the significance of the fact that she asked to see two images again, before pointing to the Applicant's image saying "I'm not sure between four and eight. I think it's eight". Eight was the Applicant's image. On 11 June 2018, the Applicant was further interviewed by the police and made 'no comment' to all questions.

15. The defence case was supported by evidence from the Applicant, Ms. Randles and Jamie Sykes. Their evidence was inconsistent in some respects about the earlier journeys of which the Applicant had spoken in interview, but was consistent in that they described two lengthy events which had taken place after their final return to her home. First, the Applicant and Jamie Sykes had spent something like ten or fifteen minutes smoking in her car. The Applicant shouted to Mr. Sykes when he got back asking him if he would like a smoke and they both went and did that. The Applicant was clear that at this time there was no white car in the position where he later saw the victim's car. The car must have arrived, and the robber must have fled, after they went into the house after their smoke. Both Mr. Sykes and the Applicant gave evidence that they had then played Call of Duty for about half an hour. They both said that they had got to a high level, level 23, in the game and this takes about that long. In his evidence, the Applicant said that he had stayed at his sister's for about five minutes before setting off home and arriving by about 21:15. When he was asked during his cross examination how it was that Jamie had got in the car to have a cigarette with him, he said:-

A: I don't know and to be honest I don't know if the car's been overcrowded and he's come with us but I'm not too sure.

Q: So it may be that Jamie actually came with you.

A: The car was overcrowded, and I don't want to get Hayley in trouble for the car being overcrowded.

16. In his evidence the Applicant had told the jury that he had never driven a car in his life, and that he did not drive because he has keratoconus which means he is not permitted to drive. The judge admitted convictions which involved him driving a vehicle on 5 May 2009. He had pleaded guilty to aggravated vehicle taking, and driving without a licence or insurance. The judge gave a firm direction as to how the jury could and must not treat them. They could treat them as relevant to credibility but they must not use them to show that it was any more likely than otherwise would be the case that the Applicant committed the robbery. It is hard to see how a fair minded jury could take the view that these convictions, at the age of 16, could support the prosecution's case on robbery. However, they might cast light on whether the inconsistencies in his account of his movements on 6 April 2018 were the result of muddle, or whether they might reveal a witness who was concerned to mislead the jury.
17. The prosecution case therefore rested principally on the following pieces of evidence:-
- i) The identification by the witness. She had picked out the Applicant, although she did so in the terms identified above, and there were some discrepancies between her description of the robber and that of the Applicant of which the jury was aware. As part of his summing-up the Judge reminded the jury clearly of the need for special caution when evaluating identification evidence. He drew particular attention to the conditions under which Ms Boswell saw the robber, the discrepancies in her descriptions of the robber and the things said by her at the time of the identification procedure that, according to the

defence, made her identification of the Applicant as the robber less than certain.

- ii) The location of the victim's car when it was recovered. If the identification was mistaken, it was a significant coincidence that the car was recovered near to the front door of the person who had been wrongly picked out.
- iii) The behaviour of the Applicant as observed by the first police officer at the scene.
- iv) The inconsistencies in the account given by the Applicant of his movements during that evening. These included inconsistencies about the order in which they had gone to three different places during what was said to be the second journey.

The fresh evidence

18. As we have said, the fresh evidence comprises the video clip and oral evidence from the Applicant and Ms. Randles which identifies him as the person who took it, and whose voice can be heard on it. It includes the admission by the Crown that if he did take the video, he was not the robber. This is set out in the Form RN supplied by the prosecution in January 2021. This says

“27. The Respondent has been supplied with (i) the access codes to a Snapchat account related to the email address ‘marcusbarker1993@gmail.com’ and (ii) an iPhone, which, it is said, belonged to the Applicant at the relevant time. From an examination of the Snapchat account and the iPhone, the Respondent has been able to locate the relevant video.

28. The video has a time stamp on it of 9.48 pm. A forensic examination of the iPhone shows that the video was recorded at 21:47:53 on 6 April 2018 at the junction of Alan Turing Way and Ashton Old Road in Manchester. It was taken by the front seat passenger in a car. The driver is accepted to be Hayley Randles.

29. In the background of the video an ambulance can be seen attending what appears to have been a road traffic accident. The officer-in-the-case, DC McHugh, has confirmed that a road traffic collision took place at that junction on 6 April at around 20:48. Emergency service vehicles attended the scene and departed by 21:54.

30. That evidence is consistent with the video having been taken at that time and at that location. That is significant because from the CCTV of the robbery the robber first appears on the footage at 21:47. That was Agreed Fact no.2 at the trial.

31. The distance between the junction where the road traffic accident took place and the scene of the robbery is such that Ms

Randles would not have been able to drive from the junction to the robbery scene in a matter of seconds.

32. Therefore, if the person who recorded the mobile telephone footage is the Applicant, Mr. Barker, then the footage provides him with an alibi for the robbery.”

19. On 21 October 2020, the Registrar granted a Representation Order to the Applicant’s solicitors for the public funding of an expert report in relation to the issue of voice recognition. The Forensic Voice Comparison Report of Elizabeth McClelland dated 23 November 2020 is being relied on by the Applicant in support of this appeal. She concluded that the voices were consistent (the Applicant could not be excluded) and there was limited support for the view that the voice in the video was that of the Applicant. This is principally because the amount of voice recording on the SnapChat clip is very small. The voice could belong to the Applicant, but it could also belong to an unknown number of other men. “Limited Support” is the lowest level of support on her verbal scale by which she expresses the weight which can be attached to her conclusions.
20. The trial solicitors and counsel have been contacted by the Registrar following a waiver of privilege. They confirm that they were not told about the video clip and that it is inconsistent with their instructions, and the alibi defence which was placed before the jury. They also say, as the Applicant accepts, that they advised him to check for any digital evidence which would support his account. They mentioned social media, and also the Xbox machine on which any game of Call of Duty was played. It is now common ground that at 21:48 on 6 April 2018 the Applicant was not playing Call of Duty with Jamie Sykes on that machine. He was either in the passenger seat of Ms. Randles’ car taking a short video clip, or robbing Michelle Boswell. The failure to produce any evidence from the Xbox machine is therefore not surprising. The failure to produce the video clip, which was accessible to the Applicant on his SnapChat account every time he accessed any device capable of accessing it, in particular his phone, is something to which we will return.
21. There were some further pieces of evidence at the trial about the phone which was then being used by the Applicant and which have now assumed rather more importance than they would have had then. Some of the fresh evidence adds to this. The iPhone was actually owned by Donna Allright, so she said in her evidence to us. She had lent it to the Applicant sometime in 2017 and got it back some time in 2019. She said she had another phone for her own use, and that this one was just lying around in a box. She also said that she got it back because the Applicant was supposed to paying for it, but had not done so. We saw no documentary evidence about the contract which might explain what those payments were, and she did not say why she allowed this arrangement to last as long as it did. Whether her account is right or not is not central to this appeal, because it is agreed that the video clip was recorded on this iPhone and that it was also accessible through the SnapChat account of the Applicant from any other device, using his login details. Of more significance is the following:-
 - i) Despite being advised to check his social media devices by his solicitors, the Applicant did not produce this clip to them. It emerged only a short time after the conviction when, so it is said, he gave his login details to Hayley Randles

so she could supply him in prison with some photographs of the children. As she was doing this, she came across the video clip and produced it to the Applicant and to his solicitors. His explanation for this failure is contained in a letter to the Registrar:-

“The reason the video wasn’t found before the trial is because, truthfully, I didn’t look into it as I should of because I’m innocent and when I did look into things I always got told it’s not up to me to prove I’m innocent but for the jury to find me guilty.”

- ii) That explanation is persisted in by him in his evidence, in which he also explains his alibi as advanced before the jury as being based on his faulty recollections as to times which, he says, he can now improve by reference to the video clip. In particular, he says that he must have spent about 20-30 minutes at his sister’s, rather than the 5 minutes which he told the jury he had spent there. He also now says that he thought at the time of his trial that he was playing Call of Duty for longer than he was. In truth, if he spent 15-20 minutes smoking with Jamie Sykes in the car after the end of the second journey, there was virtually no time for playing Call of Duty at all after his return if he was in the car at 21:48. He does not say that he concocted a false alibi to bolster his defence. He says that he was trying to help the jury, as he is now trying to help us, by telling the truth.
 - iii) The Applicant was on bail between his charge and conviction, and used the iPhone every day, including using to access SnapChat on a daily basis. There were, therefore, hundreds of occasions when he could himself have happened upon the video clip, even if he was not actually looking for evidence. Moreover, the search for evidence would not have been difficult.
 - iv) When he was arrested, the Applicant did not have the phone. He said in interview that one reason for going to Hayley Randles’ car after seeing the police was to look for his phone. It appeared from his evidence before us that he accepts he did not have it when he was arrested, because he says it was handed by Hayley Randles to the police after his arrest. It does not appear that the police were interested in it as evidence, and it seems likely that she wanted him to have it when he was released. Our viewing of the body worn footage from the door, see the transcript set out above, shows that he did have what we think is a mobile phone at that point. When he was asked whether someone else might have used it to take the video clip, he said that you need a fingerprint *and* the password to access and use it. There was no technical evidence to support this suggestion. Donna Allright, who owned the phone, said she had set the password, but you can disable it, and you can use the phone as a camera without knowing the passcode. It has been established that the clip was in the “Snaps” folder, and that it must have been placed there by someone who knew the Applicant’s login details.
22. We have summarised the evidence of the Applicant in the previous paragraph when dealing with the iPhone. Hayley Randles also gave evidence before us. She confirmed the Applicant’s account of how the video clip was discovered by her soon after the conviction. She said it had not crossed her mind to suggest to the Applicant

that he should check his social media before the trial to see whether it contained any information about his whereabouts on 6 April 2018. She said she had no experience of people being arrested and trusted that he would get off, because he did not do it. She said that her account to the police of having been home for an hour, or 45 minutes, before they arrived was something she had “automatically assumed” was the case. Her evidence to the same effect at trial was based, really, on guesswork. She told us that she had in fact been home for 15-20 minutes when the police came. Her evidence at trial had been that at 21:45 or thereabouts, the Applicant had been playing on the Xbox with her brother. In fact he had been with her in her car at this time. Her evidence, she said, at trial was truthful but mistaken. She was asked in cross examination before us about a statement she had made to the police before trial. Two points emerge from it:-

- i) Her account of the journeys leading up to the return home on the final time is different from her evidence at trial, and from the account she gave us in evidence. In the statement she does not describe the return home between the first and second journeys, as the Applicant had done in his police interview, and as she now does. She describes one series of journeys and a return home at 2120pm. She does not describe her brother being with them at any point until after that time when she says he “was now at my house.” Her evidence to us was that he had been with them all through the first journey and had been left behind on the second journey to look after her child, Riley. It is also true that in her account of the last part of the journey, she does not describe the incident when they tried to get money out a cash machine at Tesco’s. This incident featured prominently in the Applicant’s account, and in her evidence both at trial and to us. There is no mention of any efforts to acquire cash during these journeys in her statement.
- ii) She says in the statement that the police arrived only about 10 minutes after their arrival home, which would mean that they arrived home at or soon after 22:00, as she now says. This is consistent with her account now, but inconsistent with what she said at the door to the police, and at trial. At trial she was unclear about timings, but she did say that at 21:45-21:50 the Applicant was playing Xbox with Jamie in her house, and that she was in the house at the time.

The Law

23. Section 23 of the Criminal Appeal Act 1968 is as follows:-

23.— Evidence.

(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—

(a)

(b) ‘’’’’’’’; and

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

.....

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

24. In an avowedly *obiter* passage in paragraph 24 of *R. v. Ahmed* [2010] EWCA Crim 2899, Hughes LJ, as he then was, explained the approach of this court in appeals based on fresh evidence:-

“The responsibility for deciding whether fresh material renders a conviction unsafe is laid inescapably on this court, which must make up its own mind. Of course it must consider the nature of the issue before the jury and such information as it can gather as to the reasoning process through which the jury will have been passing. It is likely to ask itself by way of check what impact the fresh material might have had on the jury. But in most cases of arguably relevant fresh evidence it will be impossible to be 100% sure that it might not possibly have had some impact on the jury's deliberations, since *ex hypothesi* the jury has not seen the fresh material. The question which matters is whether the fresh material causes this court to doubt the safety of the verdict of guilty. We have had the advantage of seeing the analysis of *Pendleton* [2001] UKHL 66; [2002] 1 Cr. App. R. 34 and *Dial* [2005] UKPC 4; [2005] 1 WLR 1660 made recently by this court in *Burridge* [2010] EWCA Crim 2847 (see paragraphs 99 — 101) and we entirely agree with it. Where fresh evidence is under consideration the primary question “is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury.” (*Dial*). Both in *Stafford v DPP* [1974] AC 878 at 906 and in *Pendleton* the House of Lords rejected the proposition that the jury impact test was determinative, explaining that it was only a mechanism in a difficult case for the Court of Appeal to “test its view” as to the safety of a conviction. Lord Bingham, who gave the leading speech in *Pendleton*, was a party to *Dial*.”

25. That passage has been frequently followed, see most recently *R v. Park* [2020] EWCA Crim 589 at [178]. It may once have been *obiter*. It now represents the law. The question is whether, having regard to the fresh evidence, we think that the conviction is unsafe. This is the ultimate question in all appeals against conviction, and is mandated by the terms of section 2 of the 1968 Act. In answering that question, we are required to have regard to the factors listed in section 23(2) of the 1968 Act “in particular”, but that is not an exhaustive list of relevant matters and none of them on its own answers that question.

Discussion and decision

26. The video clip constitutes fresh evidence which is capable of belief. It proves that the man who took it, when sitting in the passenger seat of Hayley Randles’ car at 21:48 on 6 April 2018 did not rob Michelle Boswell. It does not prove who that man was.
27. The evidence which is relied upon to show that it was the Applicant who took the video is circumstantial and direct. The direct evidence comes from him and from Hayley Randles. The circumstantial evidence may be summarised as follows:-
- i) It was taken in Manchester at a point which is consistent with it being taken on a journey from the Applicant’s sister’s to the place where he was living.
 - ii) It was recovered from his SnapChat account, and was taken on a phone which he was using at the material time. Whoever took it knew his SnapChat login details or, if they were stored on the phone, at least how to access the phone, using any password or fingerprint which may have been required. The only evidence as to the security features actually in use on the phone comes from the Applicant.
28. The evidence given at trial on behalf of the defence supported a defence of alibi. This required the jury to be sure that the alibi was not true before the Applicant could be convicted. On its face, it is just as exculpatory for the Applicant to have been in his partner’s house playing Xbox with her brother at the time of the robbery, as it is for him to have been with her, on his way home, in her car. The jury was sure that the evidence relied upon by the prosecution was sufficiently cogent to result in his conviction, notwithstanding the clear directions they were given about the burden and standard of proof and the dangers of placing too much weight on a finding that an alibi was false. In this case that danger was limited because the falsity of the alibi was established only by the cogency of the prosecution case proving that the Applicant committed the robbery. The alibi evidence contained inconsistencies but there was no clear evidence that it was not true, except the matters which showed that it could not be true because the Applicant was the robber.
29. The real power of the prosecution case was the identification, supported by the place from which the victim’s car was recovered. Some additional strength could be derived from the fact that the Applicant very broadly resembled the description given by the victim in his appearance and clothing, and by the behaviour of the Applicant observed by Police Constable Haxby. That additional strength was limited in force. There were problems with the identification evidence, in that the Applicant did not entirely fit the descriptions of the robber given by the victim and by another witness who did not pick him out. His clothing and colouring were certainly well described

by the victim, but there were some discrepancies as well. The odd behaviour of the Applicant in the street once he had seen Police Constable Haxby had only limited probative value.

30. It appears to us that the problems in the identification evidence were resolved in favour of the prosecution because of the finding of the car very near to the house where he was arrested. That location was strong support for the identification evidence of the victim. Whereas it is easy to see why the Applicant might drive to that location, it is much harder to accept that the identification was a mistake and the place where the car was found merely a coincidence. It would be wrong to take each of these two pieces of evidence in isolation. Taken together, they make a strong case.
31. The alibi evidence called at trial was, it is now agreed, wrong. In our judgment it was obviously dishonest, and the video clip provides further evidence in support of that conclusion. Hayley Randles was not in her house at 21:45-21:50, and she did not see the Applicant and her brother playing Xbox at that time. We reject her evidence, and that of the Applicant, that the false alibi arose by their joint inability to be precise about the times. That dishonest process started at 22:15 when she told the police that they had been home for an hour or 45 minutes. She at least, it is now certain, had been at home for about 15 minutes at that time. The Applicant agreed with her during this conversation. That is not explicable by a muddle about timing. At that point, as we have observed, unless they both knew that the Applicant had committed a crime during the 45 minutes or hour when they falsely claimed he had been in the house, there was no reason for them to lie at all. We have analysed the police questions which produced this joint false account above.
32. The alibi was then explained by the Applicant in his interview on the following day, when he did not give times. In May 2018, Ms. Randles made her statement to the police which gives a different version of events from that which he had given, and from that which she later gave in evidence to the jury. Jamie Sykes was recruited to try and support this account, although his evidence at trial seems to have been quite muddled about the events of the evening, which probably did not help. That now assumes some importance, because if the Applicant was not the one who took the video, Jamie Sykes is the only other identified candidate for that role. His participation in the false alibi, and his muddled account of what happened that night is a feature to be taken into account when assessing the fresh evidence and the safety of the conviction.
33. There is, in truth, no reasonable explanation for the failure to adduce the evidence of the video clip at the trial. The phone was in daily use by the Applicant for 18 months between his being charged and the trial. It is very difficult to accept that nobody looked at it to see what it held in relation to the date and time of the robbery until very soon after the conviction. His suggested explanation, namely that he was innocent so he did not think he needed to follow his solicitors' advice is absurd. His sense of innocence did not stop him concocting a false alibi, why would it stop him looking for evidence of a truthful one? One explanation might be the same as the real explanation for the failure to check timings on the Xbox. They were not playing Xbox at the time of the robbery, so would hardly look for evidence in it. In just the same way, if the Applicant did not have his phone at the time of the robbery it would be pointless to use it as evidence of alibi. The fact that this evidence was not deployed at trial suggests strongly that it is, in fact, irrelevant.

34. At all events, any relevance it may have is dependent upon the oral evidence given about it. This is not capable of belief for reasons we have already identified. The difficulties in the evidence are inescapable, and derived from comparisons between the different accounts, some of which were given on oath.
35. It is possible to envisage reasons why a person embarking on a robbery may not wish to have his phone with him, and may prefer to leave it with others. Such a person may encourage those others to use it while they have it, and are not close to the scene of the robbery. It can also be speculated that when the police arrived unexpectedly before the phone was properly looked at, such a person may decide to say that they have been at home for an hour or 45 minutes prior to that point and thereafter decide to stick with that account. The phone would then be potentially damaging to the defence which is to be advanced at trial and it might be thought to be unwise to produce it. A change of tack consequent upon conviction is, in these circumstances, wholly unpersuasive.
36. It is not necessary to determine exactly what happened in relation to this video clip before it was produced to the solicitors after conviction. The question for us is whether its production at that stage causes us to think that the conviction is unsafe. The answer is that it does not. The “jury impact” test is a mechanism in a difficult case for the Court of Appeal to “test its view” as to the safety of a conviction. In this case it is necessary to be clear about what this hypothetical jury would see and hear. It is probably best to check this impact by imagining a re-trial in which the jury heard the evidence which was placed before us, and then observed cross-examination about the evidence given at trial. In other words, the only useful test imagines a jury at a retrial should there be one. Testing the fresh evidence by imagining a trial at which it alone was presented as the alibi evidence, and the false alibi never mentioned, is hardly a useful way to assess the safety of this conviction. The material before any jury hearing any retrial would include the passage identified above from his evidence where the Applicant appeared to accept that Jamie Sykes might have been in the car at the time of the robbery, and Hayley Randles’ statement which suggested that there was only one journey. If that is true, Sykes must have been in the car throughout if, as was said in evidence, they all travelled from their mother’s house to Hayley Randles’ house after they had all had their tea with her. Even with the video clip, the defence case would be very unpersuasive. In truth it would probably be even less persuasive than the alibi which was run at the first trial, since it would have to involve either a belated acceptance that the witnesses had lied at that trial or an inevitable finding to that effect from the jury.
37. We are driven to the conclusion that the evidence given to us about the reasons for the false alibi at the trial is not true. That evidence not explicable by muddle about timings. We conclude that the false alibi was advanced dishonestly at trial and that this dishonesty continued before us. This finding undermines all of the fresh oral evidence.
38. For these reasons, having considered the fresh evidence we have decided that it does not cause us to think that the conviction was unsafe. It is not capable of belief and would not afford a ground for allowing an appeal. There is no reasonable explanation for failing to adduce it at the first trial. We therefore decline to receive it under section 23 of the 1968 Act and refuse leave to appeal.