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IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 201600958/C4

NCN [2021] EWCA Crim 617

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 23 April 2021

LADY JUSTICE CARR DBE
MRS JUSTICE McGOWAN DBE
THE RECORDER OF NEWCASTLE
HIS HONOUR JUDGE SLOAN QC
(Sitting as a Judge of the CACD)

REGINA
V
COLIN JOHN CROW

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MR O RENTON appeared on behalf of the Applicant

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. This is a renewed application for leave to appeal against conviction, together with an associated renewed application an extension of time in which to apply for leave to renew (of almost four years).
2. In January 2016 the applicant, who is now 60 years old, was convicted following trial in the Crown Court at Cardiff of two offences, namely aggravated burglary contrary to section 10(1) of the Theft Act 1968 and wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. He was sentenced to an overall term of 12 years' imprisonment.
3. He seeks to rely on fresh grounds that were not before the Single Judge who dismissed the application for leave as long ago as 11 July 2016.
4. We are grateful to Mr Renton who has appeared pro bono on the applicant's behalf and acknowledge his effective submissions.

The facts

5. In the early hours of 18 September 2015 an intruder entered the house of Mr Brian Hopkins ("Mr Hopkins") in Picton Street, Natyfuyllon. Mr Hopkins was asleep in bed but was awoken by the sound of the intrusion. The intruder came upstairs. He was wearing dark clothing and had a mask of some sort across his face. He shouted in a loud voice: "Where are you, you cunt?" Mr Hopkins' evidence was that he recognised the voice instantly to be that of the applicant. The intruder attacked him with a hammer. Mr Hopkins fended him off initially but the intruder came back at him and repeatedly struck him with the hammer, causing serious wounds and injuries. The assault only came to an end when Mr Hopkins managed to push the intruder back down the stairs.
6. Mr Hopkins suffered a deep laceration to the left temple, a wound to the right ear, two wounds behind his left ear, a puncture wound to the rear of his head, grazing to his lower back, a wound to his upper back, large areas of swelling to his back, a puncture wound to his left arm, a wound to his right shin and two wounds to his right arm.
7. Mr Hopkins immediately informed police that he had recognised the intruder as the applicant instantly from his voice alone. The applicant and Mr Hopkins had known each other since secondary school and had socialised together on and off since then, although less so since the applicant had moved premises. They had been in prison together for about five weeks in February and March 2014. The applicant had visited Mr Hopkins' home at least once during the summer of 2015.
8. The applicant was arrested at his son's house within a very short period of time after the assault. There was no forensic evidence to link him to the house or the assault. The applicant was not injured and no hammer was recovered from him.
9. The prosecution case was that it was the applicant who was the attacker. He had a motive because of Mr Hopkins' relationship with the applicant's wife. Mr Hopkins had

provided instant and accurate voice identification. The prosecution also relied on evidence of a previous threat to Mr Hopkins by the applicant and also the applicant's previous convictions of burglary, forgery, assault, harassment on his wife and possession of an offensive weapon, which convictions were placed in evidence before the jury.

10. The defence case was that this was a case of mistaken identification. There were insufficient words spoken by the intruder for a reliable identification to have been made. The opportunities for Mr Hopkins to have been familiar with the applicant's voice had been overstated. The previous convictions were simply prejudicial and did not assist in resolving the issue of identification. The applicant also relied on an alibi from the applicant's son.
11. In police interview the applicant accepted that he had a raspy voice but that was something from which he resiled in his evidence at trial.

Grounds of appeal

12. The original grounds of appeal relied on the lack of any forensic links to the applicant, the total absence of any corroborating evidence and on the limited identification, coupled with the caution to be exercised in voice recognition cases, especially when only five words are uttered. The respondent's position was that the directions to the jury were appropriate and the trial conducted fairly. The evidence was admissible and the jury was directed to proceed with caution.
13. The Single Judge ruled as follows:
 - "1. As your counsel accepts the Judge gave all appropriate directions to the jury. Identification by voice is permitted. It is not suggested that the Judge should have stopped the case at the conclusion of the prosecution evidence. The jury heard the evidence and in those circumstances it was for them to reach the appropriate verdict.
 2. There was evidence before the jury from the complainant which was capable of supporting his identification of your voice. If the jury accepted that you had threatened him because he thought you had had a relationship with your wife, then that was some supporting evidence.
 3. It is not arguable that the conviction is unsafe. Juries make decisions in criminal trials having heard all the evidence and received appropriate directions from the Judge. That is what happened in this case."
14. Mr Renton seeks to renew the application for leave to pursue the ground of appeal relating to the admission of the voice recognition evidence. But he couples that ground with a second ground under which he seeks to adduce fresh evidence from three new witnesses.
15. By way of background, Mr Renton emphasises what he describes as the "scant auditory information" and the surprising lack of forensic evidence pointing in any way to the

applicant's involvement. In the context of the trial background and that background in particular, he submits that this court should be prepared to look more closely at the fresh evidence which we will outline in a moment.

16. As to the question of admissibility of the voice recognition, Mr Renton submits that it was unsafe and indeed dangerous to admit that evidence. The decision as to admissibility must in each case be case specific. Here the recognition was said to have been based on only five monosyllabic and shouted words covering a period of no more than two seconds. Mr Hopkins would have heard them in a state of high emotion. He was not able to listen back to any recording. He had no training in voice recognition. The risk of innocent mistake, particularly by reference to possible motive and association on the part of Mr Hopkins with the applicant, was considerable. The prejudicial effect of the admission of the evidence was as great as could possibly be since the evidence was decisive. The threshold for its exclusion under section 78 of the Police and Criminal Evidence Act 1984 was met. No direction in the summing-up could in these circumstances have remedied the position. Further, given that the case rested entirely on the poor vocal recognition, use should have been made of the provision under paragraph 1.2 of Code D of the Police and Criminal Evidence Act 1984 ("Code D") ("PACE"). Mr Renton refers to the controversial nature of voice recognition evidence, in particular by reference to an article from Jeremy Robson entitled: "A fair hearing? The use of voice identification parades in criminal investigations in England and Wales." ([2017] 1 Crim LR (at paragraphs 36 to 50).
17. Finally on ground one, if, submits Mr Renton, the voice recognition was, contrary to the applicant's submissions, admissible in principle, it was at the border of admissibility in the sense anticipated in R v Hussain (Ashiq) [2010] EWCA Crim 1327. It was now counterbalanced by the fresh evidence.
18. We then turn to the application to adduce that fresh evidence. It is said to be capable of demonstrating that the applicant's convictions are unsafe. Three witnesses have now provided evidence as to hearing a confession by a third party, namely Ashley Harris ("Ashley"), as being the true perpetrator of the offences. None of the fresh evidence could have been available to the applicant at trial. It will be for the court to assess that evidence, but if the witnesses in question are found to be credible, Mr Renton submits that it would provide a clear prima facie basis for quashing the convictions.
19. The fresh evidence is as follows: first, a statement dated 21 June 2019 from Alisha Harris. She states in summary that one night after going out drinking with her partner Ashley and his friend, when all three were very drunk, her partner and his friend changed into black clothing and said they were going to "Quim's" house. Mr Hopkins lived about 20 doors away. She assumed they were going out to cause trouble. They were away for about 20 minutes. When they came back she could see from Ashley's face that something had happened. His friend was acting panicky and paranoid, saying that they were going to get arrested. There were lots of police in the next street the next morning and people talking about the incident. She did not speak about the matter until someone told her that the applicant had been sentenced to 12 years for the incident. She thought about coming forward in October or November 2018 and sought legal advice, but was

advised that she might get into trouble for not having come forward sooner and she felt she could not take that risk since she had three children to care for. The shoes that Ashley had been wearing on the night had been boxed up when they moved to a new house and she had given one of them to the police, something which Mr Renton submits supports her credibility generally; secondly, an undated and unsigned statement from a Matthew James, a serving prisoner convicted of burglary. In that statement it is said that Mr James had known the applicant as a fellow inmate since 2016 and would consider him to be a good friend. Just after New Year he was in the company of another inmate, Darren Price when he was spoken to by another inmate called Ashley who asked him whether he knew the applicant. When Mr James said that he did, Ashley started boasting that it was in fact he who had committed the offence for which the applicant had been convicted. Mr James says that he had heard rumours about this but, upon hearing it first-hand, went "absolutely mad" and tried to go for Ashley but was restrained by Mr Price. Mr James said the incident would have been caught on CCTV; thirdly, an undated and unsigned statement from Darren Price. Mr Price says he did not know the applicant but around New Year was with Mr James and another inmate whom he now knew to be Ashley Harris. Mr Harris was talking about a case in which someone by the name of Colin had been convicted. Mr Price could not remember the exact words but remembered Mr Harris saying: "They can't do me cos they got no proof." Mr Price says he did not really know what was being discussed, but Mr James became angry and moved aggressively towards Mr Harris. Mr Price held Mr James back. Mr James explained that Mr Harris had been referring to the applicant.

20. Taking all these matters together, Mr Renton's over-arching submission for today's purposes is that the matter deserves at least to be looked further at a full appeal hearing.

Discussion and analysis

21. As identified in R v James and others [2018] EWCA Crim 285, [2018] 1 WLR 2749 at [38], fresh grounds produced after dismissal by the Single Judge must be cogent. The advocate should address the relevant factors in writing. The hurdle for an applicant to overcome is high.
22. As for ground one, we do not consider that there is any proper basis for allowing the applicant to renew his application for leave by reference to the alleged inadmissibility of the voice recognition of Mr Hopkins out of time. The grounds were advanced before the Single Judge and rejected as set out above. The ground was not renewed within time. It is now almost four years on. There is no good reason for that delay. Nothing, subject to ground two which we address shortly, has changed.
23. Further, and in any event, we would have considered the ground without merit, as did the Single Judge. The trial advocate has confirmed that active consideration was given to the question of exclusion of the voice recognition evidence at trial. The advocate considered the relevant authorities and concluded that any application to exclude would be "doomed to failure".
24. The risks of mistaken identification by voice are well-known and have been scrutinised by the courts on a number of occasions: see R v Roberts [2000] Crim LR 183 and R v

Chenia [2002] EWCA Crim 2345; [2003] 2 Cr.App.R 6 (83). In R v Flynn (Chris Ronald) [2008] EWCA Crim 970; [2008] 2 Cr.App.R 20 (266), the Court of Appeal set out a critical assessment of the problems associated with voice identification evidence. Gage LJ stated (in summary) at [16] that:

Identification of a suspect by voice recognition is more difficult than visual identification;

Identification by voice recognition is likely to be more reliable when carried out by experts rather than lay listener identification. An expert is able to draw up an overall profile of the individual's speech patterns. The lay listener's response is "fundamentally opaque";

The ability of a lay listener correctly to identify voices was subject to a number of variables, including the quality of the recording (if any) of the disputed voice or voices, the gap in time between the listener hearing the known voice and his attempt to recognise, the ability of the individual lay witness listener to identify voices in general, the nature and duration of the speech which is sought to be identified;

The greater the familiarity of the listener with a known voice the better his or her chance of accurately identifying the disputed voice.

25. There is no PACE code on voice identification. It is mentioned only briefly in Code D and no direct provision is made for cases in which the attempted identification is to be made on the basis of voice alone: see R v Gummerson and another [1999] Crim LR 680 (at 4). The risks associated with voice identification can therefore appropriately be met by providing the jury with a full Turnbull warning appropriately modified. In particular, the warning given to the jury should be more stringent than in relation to visual identification.
26. In this case no application to exclude the evidence was made under section 78 of PACE. How the jury was to be directed appears to have been a topic fully ventilated before the judge before his summing-up. Directions were given, including a full Turnbull direction. There were, as Mr Renton has helpfully identified, factors pointing against the reliability of the evidence. But equally there were factors pointing in favour of such reliability. By way of example, first, this was a case of instant recognition and secondly, there had been contact between the applicant and Mr Hopkins only hours before the assault in question. The factors pointing against reliability would have been matters of weight for the jury to consider but they did not render the evidence in principle inadmissible.
27. For these reasons and subject to our consideration of ground two, we consider there to be no arguable merit in ground one.
28. As for ground two, the over-arching test as to admissibility of fresh evidence on appeal is well-known, namely whether the interests of justice require that evidence to be admitted but paying particular consideration to the full factors identified in section 23(2) of the Criminal Appeal Act 1968. One of those considerations is of course whether or not the fresh evidence appears to the court to be capable of belief.

29. We do not consider that there are cogent grounds based on the fresh evidence justifying a conclusion that it is arguable that the applicant's convictions in this case are unsafe. At the outset we would mention the fact that at no stage did Mr Hopkins himself suggest that there was more than one person involved in the assault upon him. But more specifically, as to the evidence of Alisha Harris we have various anterior concerns. On her own case she was very drunk on the night in question. "Quim" is not a name associated with Mr Hopkins. It is odd that when the two men returned she did not enquire as to what exactly they had been up to. We have listened to a transcript of the telephone call between Alisha Harris and the applicant's son in July 2018. The contents of that call are largely uninformative but she is clearly worried about the fact that she delayed in her reporting. In 2021, when seen by the police, she was not able to provide any details of the date or time of the incident to which she was referring. Most significantly, Alisha Harris has told the police that she only came forward in 2019 after she had discovered Ashley had cheated on her. We have also seen social media posts from her indicating that around this time she was furious with Ashley for having become involved in class A drugs. The overwhelming impression is that this is someone seeking revenge on an ex-partner or someone at least motivated by ill-will towards him and in such circumstances a thoroughly unreliable witness.
30. As for the "evidence" of Mr James and Mr Price, neither has signed the statement in question and the statements are undated. Both men have substantial records of conviction, including convictions for offences of dishonesty. Further, Ashley has declined to be interviewed but has told the police that the allegation suggested now against him was "bollocks".
31. In our judgment, against this background, it is not in the interests of justice to admit this evidence so late in the day. Further, in the absence of any merit and any adequate explanation for the full period of delay of four years in question, we would refuse the application for an extension of time. We note that the applicant's new solicitor was instructed as long ago as 2018.
32. For all these reasons, and whilst again recognising the quality of Mr Renton's submissions before us, this application will be refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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