

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202304257/B3
[2024] EWCA Crim 741

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 18 June 2024

Before:

LORD JUSTICE WARBY
MR JUSTICE HOLGATE
MR JUSTICE MURRAY

REX
V
JOEL WILKIE

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR S TUPPEN appeared on behalf of the Appellant
MR P ANDREWS appeared on behalf of the Crown

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. Joel Wilkie is now aged 39. In November 2023 he stood trial in the Crown Court at Isleworth on an indictment containing one count of wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861, and a second alternative count of unlawful wounding, contrary to section 20 of the 1861 Act. On 22 November 2023 the jury acquitted him of the section 18 offence but convicted him of the section 20 offence. Two days later he was sentenced by the trial judge, His Honour Judge Curtis-Raleigh to two years and six months' imprisonment. He now appeals against conviction by leave of the single judge.

The Crown Court proceedings

2. The case against the appellant was that on the evening of 19 October 2020 at an address in Hayes, Middlesex, he attacked and wounded Paige Turner. The prosecution relied principally on the evidence of the complainant. Her account of the attack and its consequences was this.
3. She had been at home when a call from a family member was received about an argument occurring at that person's home. She went there where she became involved in a fight with a woman who was not previously known to her. That was at about 6.00 pm. Everything then calmed down. It was a couple of hours later that the complainant was attacked. At about 8.15 pm she went outside for a cigarette. Before doing so she saw a male go past on a push bike. She thought nothing of it but when she got outside the same male approached her. When she asked him if he was all right, he then assaulted her. She had been standing behind a fence with some railings. The man had put his hand through the railings and grabbed her. When she tried to push him off she fell to the ground where she was punched or hit. The male then rode off. She went inside and the police were

called. Miss Turner sustained wounds to the forehead and cheek and abrasions behind the ear. She was taken to Hillingdon Hospital where her wounds were closed with Steri-Strips and glue.

4. It was Miss Turner who identified the appellant as the assailant. She first did so on 19 October 2020 when she was on the way to hospital in the ambulance. She and her sister had a conversation on the phone about the situation. Her sister sent her pictures of a woman called Kelly Egan and her male partner and asked, "Is that him?" Miss Turner told the jury that she had recognised Kelly Egan as the woman she had had a fight with earlier and she recognised the man "straightaway" as the man who had assaulted her.
5. On 18 December 2020 Miss Turner attended a video identification procedure where she viewed a parade of nine people. She identified the appellant as the person who had assaulted her. Details of this procedure and what Miss Turner had said were before the jury in the form of agreed facts. The agreed facts also contained details of cell site analysis on which the prosecution relied as suggesting that the appellant's phone had been in the vicinity of the incident at relevant times. The prosecution relied in addition on the fact that in his first police interview the appellant had falsely stated that he was not in the area at the relevant time.
6. The prosecution case was that having heard from his ex- girlfriend Kelly Egan about the argument, the appellant had travelled to the area with the intention of assaulting the complainant. He had carried out the assault described by Miss Turner who had correctly identified him. He had lied about his whereabouts in an attempt to cover up his guilt.
7. The defence case was mistaken identity. Accordingly, details going to the reliability of Miss Turner's identification were explored in the course of her evidence, by the prosecution and the defence and, we have been told today, by questions from the judge.

8. The appellant gave evidence. He accepted that he was the male in the Facebook profile pictures of Kelly Egan which Miss Turner had been sent. He had been in a relationship with Kelly Egan and they had a child together. But he denied being the attacker or being present at the location of the attack. He said that he did not have a bicycle and had not had one since he was a child. He said that he been to Kelly Egan's house that evening and then got on the 278 bus to go and visit another woman. After the incident he had learned about it from Kelly Egan. The reason he had lied in interview, he said, was that he did not want to reveal to the police that he had been seeing someone else in case that got back to Kelly Egan.
9. The defence suggested that Miss Turner had not had a good opportunity to observe her attacker. Her identification of the appellant was unreliable and mistaken. She had identified him because he was the man in the photos that had been sent to her very shortly afterwards.
10. In his legal directions the judge reminded the jury that the case against the appellant "depends mainly on the correctness of the identification of him by Paige Turner which he says is mistaken". The judge then gave the warning required by Turnbull [1976] 63 Cr.App.R 132 that there is a special need for caution before convicting someone in reliance on evidence of identification. He went on to explain that a witness may be convinced in their own mind and hence convincing but nevertheless mistaken. He said that people can be mistaken even in the identification of people they know well. He directed the jury to examine closely the circumstances in which the identification by Paige Turner was made, specifying factors that should be borne in mind such as the light conditions, the length of time she had the attacker under observation, and the time that passed between the observation and the identification. He then reminded the jury of

specific weaknesses in the evidence, saying this:

"It was after dark. It was a relatively quick unexpected incident. Miss Turner had seen a picture of Mr Wilkie on social media before making the formal identification at the police procedure."

11. The judge went on to give the jury a Lucas direction about the appellant's lie in interview that he had not been in the area at the time.

The appeal

12. On this appeal, Mr Tuppen, who appeared at the trial, challenges the safety of the jury's verdict on the basis that the Turnbull direction on the weaknesses of the evidence was insufficient. Two points were made in the written grounds.
13. First it was submitted that the jury should have been reminded of something that happened in the course of the complainant's evidence. When she gave evidence, which we understand was on Friday 17 November 2023, Miss Turner "interrupted her own evidence" to state that she believed she knew one of the jurors. She was questioned about this by the judge. The juror was also questioned and stated that she did not know Paige Turner. The witness accepted this and the trial continued. The grounds of appeal submitted that Miss Turner's mistaken identification of a juror was a matter that should have been specifically mentioned in the legal directions. The jury should, it was said, have been directed to consider whether the mistaken identification in court meant that Miss Turner was more likely to have been mistaken in her identification of the appellant.
14. Secondly, it was submitted that it was not enough for the judge to mention the fact that Miss Turner had seen the appellant's picture on social media. He should have gone on to explain the significance of the point. The jury should have been directed to consider (1) whether the intervening events, namely the viewing of the Facebook photos and the

conversations, might have tainted the eventual identification and (2) whether Miss Turner had picked out the person she believed she had seen as a result of having been shown the photographs. Mr Tuppen has submitted that if that had been done the jury might have concluded that the identification was unreliable.

15. In support of these submissions, Mr Tuppen has drawn our attention to passages in Turnbull itself and in later authorities that emphasise the importance of a judge giving directions not only on the potential weaknesses of identification evidence generally but also on the specific weaknesses of the evidence in the circumstances of the particular case. He has referred us to R v Keane [1977] 65 Cr.App.R (S) 247, R v Pattinson and Oxley (1996) 1 Cr.App.R 51, R v Servis [2015] EWCA Crim 2291, R v I [2007] EWCA Crim 923 and R v Phillips [2020] EWCA Crim. 126 at paragraph 30.

16. Particular reliance is placed on paragraph 17 of R v I where the court observed:

"... it is never enough in this topic merely to identify weaknesses in the identification evidence without also explaining clearly to the jury why they are weaknesses."

17. In addition to these cases we have also considered the more recent decision in R v Sabir (Imran) [2023] EWCA Crim 804 in which this court reviewed and applied three further decisions on the need to direct the jury about specific weaknesses in identification evidence.

The law

18. It is an essential ingredient of a Turnbull direction that a judge should identify specific aspects of the evidence that may undermine the evidence of identification. The case of R v I makes the point that the jury needs to understand not only what matters amount to weaknesses but also why. In Sabir at 43 the court observed that "the authorities indicate

that the absence of an adequate Turnbull direction tailored to the facts of the case is likely to require a conviction to be quashed as unsafe."

19. That said, the task of identifying the relevant weaknesses and framing directions that are appropriate to the circumstances of that case is one for the trial judge in the first instance. The trial judge has some advantages over this court. Ordinarily the judge will undertake that task in discussion with trial counsel. Typically counsel will provide a list of candidate points for the judge's consideration or the judge will provide draft directions for counsel to comment upon. Invariably counsel is given an opportunity during or at the end of the summing-up to raise with the judge any omissions or imperfections. If a defendant complains on appeal of a failure to give a particular direction, this court may inquire into the way in which the matter was dealt with at trial. If the point was not raised at the time that may be considered a matter of some weight.
20. We note further that in Sabir the court went on to emphasise that the significance of any gaps in a Turnbull direction will "vary from case to case depending on the circumstances". The court set out at paragraphs 44 to 45 a non-exhaustive list of circumstances that could be relevant for this purpose:

"... the nature and complexity of the case, including whether it involved multiple defendants and multiple counts; the significance of the issue of identification to the case against and for the defendant; the strength of the identification and the supporting factors; and the number, nature, complexity and force of the points that are capable of undermining the reliability of the identification ... [and] any gap in time between the legal direction and any summary of the relevant evidence."

This case

21. The present case was a simple one in which a single defendant faced a single allegation

of wounding. It was for the prosecution to prove the case so that the jury were sure of the appellant's guilt. But the complainant's account of the attack was not in dispute. There were therefore in substance only two issues for the jury to decide. First and foremost was the appellant the attacker? Secondly, if so, did he intend to cause really serious harm? We have no doubt that all of this was perfectly clear to the jury.

22. The relevant evidence was very limited. It consisted essentially of the evidence of the complainant, the evidence of the appellant, and a few agreed facts about the injuries, the cell site evidence and the identification procedure. The trial was short. It started substantially on Friday 17 November with the evidence of the complainant. The appellant's evidence followed on the Monday, 20 November. On that same day, later in the morning, the judge gave his legal directions, orally and in writing, and counsel made short speeches. The judge then summed up the evidence and the jury were sent out to consider their verdicts. All of that was accomplished in the space of about one-and-a-half hours. The jury were sent out at 2.36 pm.
23. The judge's legal directions identified the key issue as identification and told the jury to exercise caution when considering that issue. The directions contained suitable general warnings about the perils and risks of mistaken identification and gave the jury appropriate guidance about factors to be considered when assessing Miss Turner's observations of her attacker. The judge could have identified specific features of the evidence that might lend support to the identification evidence but he did not. He did identify some specific features of the case that might undermine the reliability of the identification. Those features included the social media photograph.
24. The judge could have said more about this. The risk that arises in a case of this kind is the one identified by the court in Phillips at paragraph 30. The risk is that "at a

subsequent formal identification parade the witness will identify the person in the photograph to which the witness may have been directed and not the person who committed the relevant offence." The judge might have spelled this out.

25. Our enquiries today have however established that in the usual way the judge provided counsel with a draft of his legal directions for comment. No complaint was made at that time of any deficiency in those directions, nor was anything raised after the summing-up had been delivered. It was evidently the judgment of all the professionals involved in the trial that what the judge said was sufficient and that it was unnecessary to say more to ensure that the jury understood the point.
26. In our judgment that was a sound approach. The risk that Miss Turner might have been prompted into a false identification was plain and obvious. It was clear that the same concern applied both to her initial identification and to the formal procedure. The risk had been highlighted in the course of the evidence, in particular in the cross-examination of Miss Turner herself, in which it was put squarely to her that she had identified the wrong man and that having received three photographs of the appellant she had been "well prepared" to identify him at the formal procedure. The relevant evidence was clear. It was simple. It had been given very recently. The jury were reminded of it by the judge very soon after the legal directions were given. It was, as Mr Andrews has put it today, a narrow issue in a short trial and we are satisfied that the jury will have well understood the point without further explanation.
27. If the judge had given a more detailed explanation of the risk as part of his legal directions he would in all probability have felt bound to provide balance by reminding the jury in his legal directions of factors that might support the identification. One of those was what Miss Turner had said when questioned on the issue. She had twice rejected the

notion that she had been led into identification, stating that she was sure that she would have identified the appellant even if she had not been shown the social media photographs. We do not think this would have assisted the defence.

28. We also bear in mind another aspect of the case, namely the lie in interview about which the judge gave the jury a Lucas direction. If the jury were sure that the appellant had no innocent reason for telling that lie, then the lie was capable of supporting the identification, and that too is a matter that the judge might properly have drawn to the attention of the jury in connection with the identification evidence.
29. In all the circumstances we are not persuaded that the judge's approach to this issue casts doubt on the safety of the appellant's conviction. We do not think it was necessary for him to go further than he did and to spell out to the jury precisely how and why the social media photographs might weaken the identification evidence.
30. The witness's mistaken belief that one of the jurors might be known to her is not a matter on which the single judge commented, nor is it a matter that Mr Tuppen emphasised in his oral submissions to us today. However, it was not a ground on which leave was refused and it is therefore a matter that we have to address.
31. This point falls into a different category from the one with which we have dealt so far. The witness's error was not a fact about the process of identification of the appellant. It was a collateral matter on which the defence relied as suggesting that the witness had a tendency or propensity to mis-identify people. As such, this ground of appeal seems to us to fall outside the sphere occupied by Turnbull and the later case law that we have mentioned.
32. We are not persuaded that there is anything in it. We see no direct or close comparison between this part of the evidence and Miss Turner's swift, confident, clear, and consistent

identification of the appellant. The possibility that she knew a juror was something that Ms Turner raised conscientiously, in tentative terms, and swiftly withdrew when the juror said she was wrong. Whilst it was open to the jury to consider whether that cast doubt on the reliability of her identification evidence in the case, and legitimate for the appellant's counsel to rely upon it for that purpose, it was not in our judgment incumbent on the judge to emphasise that matter as part of his legal directions.

33. For these reasons we are satisfied that the jury directions in this case covered all the essential points and were adequate in all the circumstances. We are left in no doubt about the safety of the appellant's conviction and the appeal is therefore dismissed.

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

Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk