



Neutral Citation Number: [2024] EWCA Crim 816

Case No: 2023/01872 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE
His Honour Judge Bindloss
11SS0217520

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2024

Before :

LADY JUSTICE MACUR
MR JUSTICE BRYAN
and
MR JUSTICE FREEDMAN

Between :

AARON MADDISON

Applicant

- and -

REX

Respondent

Daniel Penman (instructed by **DMA Law**) for the **Applicant**

Hearing dates : 12 July 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 17 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE FREEDMAN :

Introduction

1. The Applicant renews his application for leave to appeal against conviction and a representation order following the refusal of the single judge. On 19 May 2023, in the Crown Court at Durham (His Honour Judge Bindloss), the Applicant (then aged 30) was convicted (unanimously) of a single count of Robbery, contrary to section 8(1) of the Theft Act 1968. On 18 October 2023, in the Crown Court at Durham (Her Honour Judge Kidd), the Applicant (then aged 31) was sentenced to 48 months' imprisonment. The Applicant was made the subject of a Restraining Order pursuant to s.360 of the Sentencing Act 2020 for a period of 10 years.
2. The issue is whether there is an arguable case that the Judge erred in failing to accede to a submission of no case to answer at the conclusion of the prosecution case.

The facts

3. Just before 10pm on 26 August 2020, a robbery took place at the Fish and Chip Shop in Trimdon, County Durham, which was carried out by two masked and gloved men. At all material times, Vikram Bharti was the owner and manager of the Trimdon Fish and Chip shop ("the shop") and on 26 August 2020, Vikram Bharti was working in the shop with Angela Dodsworth and Tyrin Brown.
4. During the early evening of 26 August 2020, it was accepted that the Applicant was in the company of Kenneth Flint and the co-accused Jack Bruce. The Applicant was driving Kenneth Flint's car and had driven to the shop to enable Kenneth Flint to collect some money from his ex-partner, Angela Dodsworth.
5. At around 5.30pm, the co-accused entered the shop and spoke to Angela Dodsworth whilst the Applicant stood in the doorway. Between 7.00pm and 7.30pm, the co-accused entered the shop for a second time and asked Angela Dodsworth for a pen and paper whilst the Applicant waited outside. Between 8.00pm and 8.15pm, the co-accused returned to the shop, handed some paper back to Angela Dodsworth and ordered a small sausage.
6. Just before 10pm, Angela Dodsworth was in the front of the shop by the till, Vikram Bharti was in the back of the shop with Tyrin Brown and three children (Tyrin's two daughters and niece). Vikram Bharti was cashing up the week's takings when two masked and gloved men entered the shop via the open back door.
7. One of the men was holding a metal bar and, whilst walking forward, said to Vikram Bharti "give me your money." The man with the metal bar knocked the bar against a carrier bag containing around £4,800 in cash. He then grabbed the carrier bag and the two men left the shop via the rear door. Angela Dodsworth called the police at the request of Vikram Bharti. The robbery was captured on CCTV.
8. The co-accused was arrested on 28 August 2020 and the Applicant attended Peterlee Police Station on 8 September 2020 where he was arrested and interviewed. The Applicant gave a prepared statement accepting that he had been to the shop

previously but denying that he was one of the males responsible for the robbery. The Applicant answered no comment to the police questions put to him.

9. On 30 August 2020, Vikram Bharti attended a video identification parade electronic recording (VIPER) procedure and was told that he had been *“asked here today to see if you can identify the person you saw on 26 August 2020. A male entered your shop for [sic] different times with another male you name in your statement as Aaron Harrison.”* Vikram Bharti identified Jack Bruce as *“the other person stood behind with a crowbar in his pants”*.
10. On 14 September 2020 Vikram Bharti attended a VIPER procedure where he was informed that he had *“been asked here today to see if you can identify the person you saw on 26 August 2020. The male you refer to as Aaron Harrison in your statement, who, along with another male, kept entering your shop in Trimdon, County Durham, asking for things.”* Vikram Bharti identified the Applicant.

The Applicant’s case on identification

11. The Applicant’s case is that there were inherent weaknesses in the prosecution case on identification which make this such a weak case that the case could not safely be put to a jury. Particular attention is drawn to the following weaknesses, namely:
 - (i) the robber had his face covered, so this is not a facial recognition case;
 - (ii) Mr Bharti said that the man who robbed him had brown eyes, whereas the Applicant has blue eyes;
 - (iii) Miss Brown said in her evidence that she recognised the fact it was the Applicant by the similar clothing but on closer cross-examination, she accepted that the Applicant, earlier in the evening, had been wearing a white t-shirt, whereas the man on the CCTV can clearly be shown in a jacket;
 - (iv) There were contradictions within the evidence about clothing including whether the top was black, navy or dark.
 - (v) Ms Brown says that she recognised the Applicant because of his funny walk or dopey walk but the CCTV shows that there were not many steps taken during the robbery to allow such an assessment to be made.
12. It was submitted that the features of identification were each inherently weak and non-specific. It was further submitted that the evidence about the sighting of the robber was poor. The sighting was over a period of 37 seconds and the light was artificial. The evidence as to gait was restricted because of the limited size of the space where the incident took place and the restrictions to movement caused by the nature of its layout. The counter obstructed vision of the legs of the Applicant. It was also submitted that evidence as clothing, size and shape of people is often unreliable.

13. The submission in the instant case is that the quality of the identification evidence is so weak that the case comes under the second limb in the case of *R v Galbraith* [1981] 2 All ER 160 as defined by Lord Lane who said as follows:

“(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

The prosecution case

14. The prosecution case was that the Applicant and the co-accused carried out the robbery at the Fish and Chip Shop and that the Applicant was the man with the metal crossbar who spoke to Mr Bharti, picked up and stole the bag containing the cash and the co-accused was the man standing behind him. The prosecution relied on the following evidence to prove that the robbery and that the Applicant had been correctly identified as one of the robbers, namely:

- (1) CCTV footage of the incident.
- (2) Evidence from Vikram Bharti and Tyrin Brown in relation to the events leading up to the robbery, the robbery and the identification of the Applicant.
- (3) Evidence, which was read, from Angela Dodsworth in relation to the description of the Applicant's appearance, the events leading up to the robbery and the robbery.
- (4) Identification evidence relating to the Applicant.

The Judge's ruling on submission of no case to answer

15. The Judge found that the following objective characteristics set down in Turnbull were good in this case having seen the CCTV. They were as follows:
 - (1) the two identifying witnesses Mr Bharti and Ms Brown were close to the robber with the bar said to be the defendant;
 - (2) the light was relatively good in the shop;
 - (3) the witnesses had the Applicant in view for up to a minute and their view was not impeded;
 - (4) they were in close proximity to him;
 - (5) words were exchanged;
 - (6) they had seen the Applicant before the time of the robbery namely on that very day on two or three occasions between 5:00pm and 8:00pm.

16. The Judge said that the witnesses had sought to identify the Applicant as the robber through a number of factors body shape, body language, body movement, walk, height and clothing. The Judge also said that Angela Dodsworth who worked at the fish and chip shop had seen the Applicant and the co-accused at 9:30pm nearby. Angela Dodsworth said that one of the people in the car had been asking for money.

17. The Judge summarised the weaknesses in the identification evidence. Nonetheless, he concluded that there was evidence of identification of sufficient quality to allow it to be considered by the jury. Having set out the relevant legal tests from *Turnbull* and *Galbraith* having applied those tests he considered that the weaknesses of the evidence were matters within the province of the jury's assessment. He said that on one view of the facts there was evidence from which jury properly directed could convict the Applicant. He therefore refused the application on the submission of no case to answer.

The single judge

18. The single judge refused the application for leave to appeal, finding that the Judge was right to dismiss the application of no case to answer. He said that despite the weaknesses in the identification, the prosecution evidence gave rise to a number of odd coincidences that would have allowed the jury to conclude that the witnesses had correctly recognised the Defendant. They included the following, namely:
 - (a) the robber with the bar was wearing the same Armani top as the Defendant was during the evening, albeit inside out;
 - (b) the Defendant was last seen in the vicinity of the chip shop at around 9:30pm, shortly before the robbery takes place;

- (c) the robber with the bar was the same height as the Defendant;
- (d) the robber with the bar was the same build as the Defendant.

19. The single judge said that these matters, combined with the same recognition by two separate witnesses along with the correct recognition of the second robber as [the co-accused] were sufficient evidence that a jury properly directed could convict upon it.

Submissions of the Applicant in response to the observations of the single judge

20. On behalf of the Applicant, it was submitted that none of the above overcame the weak quality of the identification evidence. The Applicant reminded the Court of the directions in *R v Turnbull* [1997] QB 224 about the dangers of poor quality identification evidence. If the quality of the identification evidence on which the prosecution case depends was poor and there is no other evidence to support it, the Judge should direct the jury to acquit. The Applicant submitted that it is the quality of the identification which is to be distinguished from the features of the identification. Even if there are a number of such features, but the quality of the identification is weak, in an appropriate case, the duty of the Judge is to remove the case from the jury. Coincidences could not be derived from disparate points of identification each of poor quality.
21. The fact that the Applicant had been seen in the company of the co-accused could have led to assumption and mistake that they would be together at the time of the robbery. It was suggested that the witnesses have transposed the Appellant being seen earlier with the co-accused onto the robber with the bar, possibly because of an association in the witnesses' minds of the Appellant with the co-accused.
22. In any event, there were not simply two persons around that evening prior to the robbery: in addition to the Applicant and the co-accused, there was also Mr Flint. There was a real danger of an assumption that the co-accused was with the Appellant at the time of the robbery, whereas it might have been Mr Flint or some other person.
23. Further, the successful recognition of the co-accused does not increase the likelihood that the recognition of the Applicant was accurate. The question was about the specific identification of the Applicant.

Discussion

24. We have been greatly helped by the written and oral submissions of Mr Daniel Penman, Counsel on behalf of the Applicant. Like the Judge on the submission of no case to answer, we look at the entirety of the evidence, that is to say the strong points and the weaknesses. We do not accept that the overall picture was one of weak quality of the identification evidence.

25. This is a case where both the witnesses Vikram Barti and Tyrin Brown had seen the Applicant enter the shop at least three times that evening. This was an important point and it was a matter for the jury to assess how probative this was or whether their familiarity with him might lead to a mistake in identification. The witnesses made their identification of the Applicant. Not only was the lighting good but the witnesses were close to the Applicant and their view was unimpeded save for the front counter. They had a view of the robber for 37 seconds and words were exchanged.
26. Points can be made about clothing and its precise colour and about the white t-shirt being worn earlier in the evening. They have to be assessed against the totality of the evidence including the evidence of the robber with the bar was wearing the same Armani top as the Applicant was during the evening, albeit inside out. This point struck the single judge, and we too conclude that this was a potentially important part of the overall picture which could be left safely to the jury.
27. The witnesses had reason to remember the Applicant and the co-accused as both had interactions with the witnesses' colleague, Angela Dodsworth, asking her questions on behalf of her ex-boyfriend, Kenneth Flint. We do not consider that the possibility of a mistake being made about the association of the Applicant and the co-accused is a point which makes the identification weak: it is simply a point which a jury was able to put into the mix of points to consider.
28. The Respondent's Notice also draws attention to a matter mentioned by the Judge in his summing up (9F and 10B-C) but not in his ruling on the submission of no case to answer. This was that both witnesses gave evidence that they were so easily able to recognise the robbers that they thought initially the robbery must have been a joke. This was a matter that was open to the jury to take into account in the identification of the Applicant.
29. There were points of weakness, but there were also points of strength. The matters referred to by the single judge were cumulatively important matters. The single judge made an incisive comment about there being a number of coincidences if the identification was wrong. This was another point indicating that the identification of the witnesses might be correct.
30. The fact that the Applicant could suggest answers and corresponding weaknesses did not mean that the overall nature of the evidence was so weak as to satisfy the test of the second limb of *Galbraith*. It is the picture of all of the points of identification which has to be considered, both strengths and weaknesses. In the course of argument, Mr Justice Bryan used the metaphor of a jigsaw: it did not follow if not every piece of the jigsaw was in the identification evidence that the case was weak. It is wrong to dismiss points in isolation or to look only at the weak points without considering the stronger points. In our judgment, the Judge adopted the correct approach by looking at the matter as a whole and applying correctly the combination of the *Turnbull* and *Galbraith* tests.

Disposal

31. We have considered each of the arguments advanced on behalf of the Applicant by Mr Penman. Despite his able submissions, we are satisfied that there was more than sufficient evidence to place the matter before the jury safely for them to assess whether the Applicant was identified as one of the two robbers. We conclude that the Judge came to the correct conclusion for the reasons which he gave to dismiss the submission of no case to answer and to leave the matter to the jury to decide.

32. We therefore reject the submission that there is an argument that the evidence as to identification was such that the Judge ought to have stopped the case on the submission. It is not arguable that the conviction was unsafe or that there was an error of principle or that there is any other compelling reason for the matter to be considered by the full court. For these reasons, we dismiss the application for leave to appeal against conviction.