Neutral Citation Number:[2019] EWCA Crim 58

Case No: 2018 04796 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT IN BASILDON
Her Honour Judge Leigh
T2018 7149

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2019

Before:

LORD JUSTICE SIMON
MRS JUSTICE MCGOWAN DBE
and
HIS HONOUR JUDGE BURBIDGE QC

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Between:

Regina	**Applicant**
and	
LT	**Respondent**

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Mr Dan Taylor for the prosecution
Ms Lucy Sweetland for the respondent

Hearing date: 22 January 2019

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Approved Judgment

The provisions of s.71 of the Criminal Justice Act 2003 apply to these proceedings. No publication may report these proceedings, save for specified basic facts, until the conclusion of the trial unless the Court orders that the provisions are not to apply.
Since an issue of law arises we will direct that the restrictions be lifted so that the case may be reported anonymously, and with the material personnel anonymised.

Lord Justice Simon:

Introduction

1. This is a prosecution application under Part 9 of the Criminal Justice Act 2003 ('CJA 2003') for leave to appeal a ruling of Her Honour Judge Leigh, in which she excluded identification evidence relied on by the prosecution, following an application by the defence under s.78 of the Police and Criminal Evidence Act 1984.

2. The respondent, whom we will refer to as the defendant, had pleaded not guilty to a single count of Possessing an Imitation Firearm with Intent to Cause Fear of Violence.

3. The trial was listed to begin at Basildon Crown Court on 14 November 2018; and that day was taken up with a defence application to exclude the evidence of the complainant (PJ). Having heard the evidence of PJ on a *voir dire*, and argument from prosecution and defence, the Judge gave her ruling on 15 November.

4. The prosecution argued that the ruling amounted to a terminating ruling; and having been granted an adjournment to consider the position, indicated its intention to appeal and gave the necessary undertaking. We proceed on the basis that an evidentiary ruling which results in the termination of proceedings (as here) constitutes a terminating ruling for the purposes of s.58 of the Criminal Justice Act 2003.

5. The Registrar of Criminal Appeals referred the application for leave to appeal to the Full Court; and we grant leave.

The facts

6. The facts on which the prosecution relied were as follows. On 4 June 2018, PJ, was reversing his car in a private car park in Basildon, when he became aware of a man who seemed reluctant to move out of the way. The man stood staring at PJ through the window as the car passed him. PJ got out of the car and a verbal altercation ensued, during which the man pulled from his backpack, a dark-coloured handgun and pointed it at PJ.

7. At some point, a second man, driving a moped, turned up. PJ felt in fear of his life and drove off at once to report the matter to the police.

8. He told the police that the man with the gun was a white male, around 5 foot 9 inches tall, with a round face, of medium build and of Mediterranean appearance. He added that he was wearing a top, with a hood pulled fairly tightly around his face. At the closest point the man was approximately 8 feet away. It was daylight and there was nothing obstructing his view.

9. He concluded his statement by stating that he believed he would be able to identify the man again, although the opening words of the statement were: 'I had a handgun pointing at me by a male that I cannot identify'. In its context, it is clear that he meant that he did not know the man's identity and not that he would be incapable of identifying him. He described the second man as wearing a motorcycle helmet with an open visor. He was slimmer than the man with the gun and had distinctive facial features, including a moustache.

10. PJ said that the incident had also been witnessed by a neighbour; and he had formed the impression, although it was no more than that, that the neighbour knew the people involved.

11. On the next day (5 June) PJ received a message from someone, whom he eventually disclosed as being a man named AH, the ex-husband of a woman to whom PJ had spoken about the incident. AH's identity was only disclosed to the defence on the first day of trial; and he declined to provide a statement to the police. According to information disclosed verbally to the defence, AH was unwilling to co-operate with the prosecution for fear of repercussions.

The voir dire

12. PJ's evidence was that, insofar as he could recall, the message from AH had asked him to come over and see him. He had suspected, although he could not be sure, that the request related to the incident the previous day.

13. He went to AH's house, where he also found AH's ex-wife. The first thing that AH did was to show him a single Facebook image on a large-screen smart phone. AH asked, 'Is this him?' The image was of two men and PJ immediately recognised the man on the right as the person who had threatened him with the gun. He said he was '100 per cent sure' that this was the man. There was no issue before the Judge or before us that PJ had identified the defendant.

14. AH and his ex-wife then told him that they had been, 'doing some digging on Facebook', and had found the person they thought might be responsible. PJ initially provided an uncertain account as to what AH had meant by the phrase, 'doing some digging'; but he clarified this by saying that he did not know, or could not be certain, what AH had been meant by the word 'digging', and he had in fact taken a guess as to what 'digging' had been done. AH had sent the image to PJ's phone tagged with LT's name.

15. PJ told the Judge that he had not been influenced, either consciously or subconsciously, by anything he had been told. He did not need to look at any other photographs to know that he had identified the man with the gun. He had taken a screenshot of the image on AH's phone and provided this to the police on the same day.

16. He had told the police that he had also recognised the second man in the photo as the driver of the moped. However, in his *voir dire* evidence, he qualified this by saying that he could not be 100% sure that it was the same man, as he had been wearing a helmet, but his best guess was that it was.

Later events

17. On 7 June, the defendant was arrested and interviewed. In a full comment interview, he denied that he was the man who had threatened PJ. He told the police that on the afternoon of 4 June he was with his brother who lived approximately 1½ miles away from where the incident occurred. Later on that day, PJ participated in VIPER identification process and positively identified the defendant as the man responsible, stating that he was '100% sure' of his identification.

18. The defendant had three previous convictions for possessing offensive weapons in 2017 and 2018. The prosecution had intended to make a bad character application to adduce these convictions in evidence.

19. In the Defence Statement dated 29 September 2018 and in subsequent correspondence, the defence gave notice of a proposed application to exclude the identification evidence once secondary disclosure was complete. It was contended that the prosecution disclosure obligations were not complete until the disclosure of AH's identity on the first day of trial.

20. In any event, on the first day of trial, a skeleton argument was submitted by the defence in support of the application to exclude JP's identification evidence.

The Ruling

21. The Judge recorded the submissions on each side.

22. The defence had applied under s.78 PACE to exclude PJ's identification of the defendant both at AH's house on 5 June, and at the subsequent identification parade. Ms Sweetland (then as now counsel for the defence) had submitted that there was a very significant risk that PJ's identification was influenced by AH. It was entirely unknown on what information AH had acted when he had done his researches, and this could not be investigated at trial. PJ was shown only a single photograph. The circumstances in which he came to be shown the image of the defendant amounted to inadmissible hearsay. There were real difficulties with the evidence being placed before the jury, since the defence was unable to challenge it properly. At the subsequent identification procedure, PJ was simply identifying the man he had seen in the Facebook image rather than the gunman.

23. Mr Taylor for the prosecution, had relied on two decisions of this court: in *McCullough* [2011] EWCA Crim 1413 and *Alexander & McGill* [2012] EWCA Crim 2768; [2013] 1 Cr App R 26. These, he submitted, provided clear guidance on how the court should approach the application; and the present case was a stronger case for the admission of the identification evidence than was the position in those cases. The identification should be left to the jury since the issue raised went to the reliability of the evidence rather than its admissibility; and the defence had identified no relevant matters that could not be explored during the trial process. The evidence of AH's involvement was limited to explaining how PJ came to see the image. It was not sought to place any reliance on the truth of any matter stated to him by AH. In these circumstances (submitted Mr Taylor) it was questionable whether a hearsay issue arose at all. The identification evidence was supported by the defendant's admission that he was in the vicinity and by evidence of his previous convictions for possession

of an offensive weapon. Section 78 should be used sparingly, and PJ's identification was very far from being so prejudicial that it ought to be excluded as a matter of fairness.

24. Having recorded the arguments the Judge noted that the basis of the defence application was that the initial identification of the LT by AH could not be challenged, since AH had not provided a statement, and 'there was a very … significant risk that [PJ's] identification was influenced by [AH]'.

25. She then set out the evidence on the *voir dire*, as summarised above, and observed that it was well known that, when a person was presented with only one photograph, there were real risks in any identification that flowed from it. She acknowledged that it was now common for witnesses to seek out offenders using social media, with Facebook being the main source of information. She had been referred to two cases dealing with Facebook identification: *Alexander & McGill* and *McCullough*; and no one had submitted that identifications made from Facebook were inadmissible. However, each was case specific.

26. The Judge noted that in *McCullough* an unidentified third person had told the complainant that the criminal conduct in question sounded like something that McCullough would do, rather than asserting that he had done some 'digging'. When someone said that they had done some 'digging' then an inference could properly be drawn that they had specific information of some sort. She concluded that *Alexander & McGill* was different to the present case since PJ had been presented with a single photograph by someone who was implicitly claiming to have knowledge of the defendant. In any event, she noted that in *Alexander & McGill* there had been significant supporting evidence.

27. The Judge acknowledged that flawed identification procedures did not in themselves automatically render identifications inadmissible. When, however, the only evidence against a defendant was 'a flawed identification' then it ought to be excluded. It was not just a question of weight for the jury to assess with robust directions as contended for by the prosecution. The present case was not the same as cases in which there was other available material. In the present case there was nothing else.

The argument on the application

28. Mr Taylor argued that the Judge erred in excluding the identification evidence. The decision was inconsistent with *McCullough* and *Alexander and McGill*, which both supported the admission of the identification in in this case. Those authorities made clear that the inherent flaws of any social media identification were matters which went to the reliability of an identification rather than its admissibility. In the present case flaws in the identification process, to the extent they existed, were capable of being dealt with through the trial process.

29. The crucial point in the present case was that PJ had recognised the man on the screen the moment he was shown it, and before anything had been said by AH; and there was nothing in his evidence on the *voir dire* to render the admission of the evidence so unfair that it ought not to be admitted. On the contrary, it was a good identification that was subsequently confirmed at a formal identification procedure.

30. The Judge had been wrong to accept the defence submission that the proper focus should be on how AH came to light on the image of the defendant and what AH had known about him. PJ had made it clear in evidence that he did not know the answers to these questions; but it was not AH who was making the identification. There was no proper basis for concluding that PJ had been influenced by anything AH may or may not have been discovered so as to contaminate his subsequent identification of the defendant. PJ was available to be cross-examined on both the conditions and circumstances in which the identification was made and his dealings with AH.

31. In all the circumstances, the decision to exclude the evidence was one that was wholly unreasonable.

32. Ms Sweetland submitted that the ruling was a reasonable exercise of the Judge's wide discretion under s.78. The Judge had directed herself correctly in law, taken account of the relevant matters, and had come to a conclusion that was not unreasonable.

33. The prosecution's submissions failed to recognise the essential fact-specific nature of the Judge's ruling. She had made clear that she was not applying any general principle of law; but had rightly had regard to all the circumstances in which the identification evidence had been obtained. She could not be said to have erred in placing emphasis on what had been said by AH to PJ, the method of showing the image to PJ and the fact that only one image had been shown to him.

34. She repeated the submission that she had made before the Judge that the admission of the identification evidence was unfair because a jury would need to understand and evaluate what 'digging' AH and his partner had done and the basis on which they had proffered the image to PJ. Without that evidence the jury would not be able to evaluate the quality of PJ's identification of the defendant.

Conclusion

35. Section 78 of the Police and Criminal Evidence Act 1984 is headed, 'Exclusion of unfair evidence and provides:

> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given, if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

36. Whether the court hearing an application under s.78 is exercising a discretion or a judgement, is a matter of debate. However, it is not a matter that needs to be resolved in this case. If it is a discretion it is a broad discretion, and if it is a judgement it is the judgement which the Court of Appeal recognises is primarily a matter for the judge in the Crown Court. In either case, this Court is reluctant to interfere with such decisions in relation to these matters. For a discussion of the law, see for example, Blackstone Criminal Practice 2019 §F2.7.

37. The issue of whether PJ's identification of the defendant had been influenced by AH or contaminated by AH's knowledge had been fully canvassed in the *voir dire* and there was no proper basis for the Judge's conclusion that there was a 'very significant risk' that it had been. The crucial evidence was that PJ made the identification before AH had said anything to him. PJ had been shown the image on AH's mobile phone and as soon as he saw it he was 100 per cent sure that it was the image of the man who had accosted him with the gun on the previous day. It was only after this that he was told that AH had done some 'digging.' There had been no discussion about how AH had found the image; and we do not accept that the question of how AH came to present the photo of the defendant and what AH may have discovered about him bears on the admissibility of PJ's identification, or that it amounted to hearsay. AH never told PJ what had led him to the image of the defendant. The position was effectively the same as if he had come across the image adventitiously.

38. The cases of *McCullough* and *Alexander & McGill* provided assistance on the issues facing the Judge.

39. In *McCullough*, two men (Marsland and Beattie) were robbed of their off-road motor cycles. One of the defendants, Roberts, admitted theft, but denied robbery. The issue on the appeal was whether the trial judge erred in allowing certain identification evidence to be adduced against the other defendant, McCullough. There were stills of McCullough in the company of Roberts before the robbery; but McCullough did not give evidence at trial and Roberts told the jury that McCullough was not involved later when the motorcycles were taken. The identification of McCullough as one of those involved in the robbery depended entirely on the identification of him by Marsland. That identification had come about in the circumstances set out in [6] of the judgment of the Court. Marsland was told by a friend of his brother, in effect, that what had happened 'sounded like the sort of thing' that McCullough would do. This prompted Marsland, his brother and the brother's friend to go on Facebook. Marsland had looked at a number of photographs which included a photograph of McCullough. He was satisfied from seeing this photograph that McCullough had been present at the time of the robbery and had driven his motorcycle away. He subsequently identified him in a video identification process.

40. The trial judge ruled that the identification evidence was admissible and that it was for the jury to decide what weight to give it. He added that the position might have been different if it had been the only evidence, but it was not, since there were the stills of McCullough in the company of Roberts before the robbery. The Judge had allowed the defence in a *voir dire* to explore with Marsland, the circumstances of the Facebook search. He was however, unwilling to divulge the name of his brother's friend or the Facebook account used to access the appellant's account or his photograph (see judgment at [8]); and there was no print-out for the jury of the photograph that Marsland said he had seen.

41. The Court (Richards LJ, Rafferty J and HHJ Paget QC) addressed the issue of the Facebook identification at [13]:

> No one doubts that the Facebook identification here was far from ideal. Plainly it was capable of having a substantial effect on the weight of Marsland's subsequent identification of the appellant in the formal identification procedure. It seems to us,

> however, that the various specific points made about weaknesses in the identification process went to weight and were not sufficient to render the identification inadmissible or to call for its exclusion in the interests of fairness. In saying that, we include within the weaknesses the fact that obvious limitations arise out of the nature of the Facebook exercise carried out here and the witness's unwillingness to provide further details about it. It meant that the precise nature of the Facebook entry looked at was not known and that neither the entry nor the particular photograph had been seen by the jury. Despite that, it seems to us that the identification evidence given by Marsland was properly placed before the jury for them to make an appropriate assessment of it. All the weaknesses or deficiencies to which we have referred could be, and no doubt were, drawn to the attention of the jury. They may indeed have worked to the advantage of the appellant, who could make considerable play of them. They did not make it unfair for the identification evidence to be adduced.

42. In *Alexander and McGill*, the Court (Sir John Thomas PQBD, Irwin J and Sir Kenneth Parker) were referred to a number of previous decisions of this Court (including the case of *McCullough*); and provided general guidance on Facebook identification.

43. In that case Daniel Kaye had been robbed in his car by three men, whose faces he had seen clearly. His evidence was that on the following day, he was looking at the Facebook profiles of his sister's friends who lived in the area and, in doing so, identified two of the men who had robbed him. The name of one of them was attached to the photograph, and his sister told him that the name of the other was McGill. A month later, he went to the police and told them the names of the men who had robbed him. Police officers viewed the Facebook pages in the company of Daniel Kaye and his sister, but no record was made of what was said and, although the police officers asked for the images to be emailed to them, none were sent. Subsequently, Daniel Kaye had identified both assailants in a video identification procedure.

44. Prior to the trial, the defence requested disclosure of the Facebook pages that had originally been examined. That request was not met. At the conclusion of the prosecution case, the defence submitted that the proceedings should be stayed as an abuse of process, since the police had wholly failed to find the Facebook images, which were essential if the identification issue, which was the only real issue in the case, was to be properly and fairly tried. The trial judge dismissed the application, while holding that the police had been seriously at fault.

45. On the appeal, the Court set out its general observations about Facebook identification.

46. First, the importance of the Police obtaining, in as much detail as possible, evidence in relation to the initial identification. For example, the images that were looked at, and a statement explaining how the identification came to be made, [22]. That was done here in the present case.

47. Second, the Court made clear that a Facebook identification was permissible; but the Jury should have as much material as possible, so as to enable them to assess the circumstances in which the identification was made, [26].

48. Third, the court should consider, and the jury be directed, as to how the identification was made. In *Alexander & McGill*, the judge had not warned the jury of the danger that a remark might have been made by the victim's sister or others. The Court found that such a warning was not necessary since it was clear that Daniel Kaye had made the identification without prompting and consequently there was no need to give a warning [33]. It was implicit that such a warning might need to be given if the circumstances had called for it; as they plainly would in the present case.

49. In our view, these two cases clearly point to the admission of PJ's identification evidence. We accept that it largely stood alone, and we reject the prosecution argument that LT's presence 1½ miles away, or his previous convictions (if admitted), would necessarily have added weight to the prosecution case. However, the identification evidence was clear: the man who had stood a short distance away from PJ with a gun was the man whose image PJ saw and recognised on AH's phone the next day.

50. Unlike the case of *Alexander & McGill*, the image that the identifying witness saw, and which led to his recognising the defendant, was available for the Jury to assess. Unlike the case of *McCullough*, the identifying witness was willing to say whose Facebook account he had used to see the photograph, he was able to explain the circumstances in which the image was handed to him and AH had not said words such as 'it sounds like the sort of thing he would do,' before presenting the image of LT, to which objection might have been taken.

51. We accept of course, that this still left open how it was that AH had come to proffer the image to PJ; but in our view that omission did not render the identification by means of the photograph or his subsequent identification of the defendant inadmissible, nor justify its exclusion as a matter of fairness.

52. It follows that in our view the Judge's ruling involved an error of principle, see s.67(b) of the CJA 2003, which resulted in a decision that was not reasonable for her to have made, see s.67(c) of the CJA 2003. In these circumstances, we will order a resumption of the proceedings in the Crown Court.