Neutral Citation Number: [2020] EWCA Crim 155

Case No: 201902914 AND 201902921 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CARLISLE
His Honour Judge Adkin
T20197038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2020

Before :

LORD JUSTICE DINGEMANS
MRS JUSTICE ELISABETH LAING
and
HIS HONOUR JUDGE WALL QC

- -

Between :

(1) RT	**Appellants**
(2) Paul Stuchfield	
- and -	
Regina	**Respondent**

- -
- -

Ms Kim Whittlestone (instructed by **The Registrar of Criminal Appeals**) for the **First Appellant**
Ms Rachel Faux (instructed by **The Registrar of Criminal Appeals**) for the **Second Appellant**
Mr Alaric Walmsley (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates : 7 February 2020

- -

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This appeal raises an issue about whether the trial judge was entitled to continue a trial in circumstances where a prosecution witness, aged 16 years who had been diagnosed with ADHD, who had given evidence in chief and who had been cross-examined in part on behalf of one appellant, became distressed and refused to continue to give evidence.

2. This is an appeal against conviction brought by the First Appellant RT, a 15 year old child who was 14 years old at the time of the trial, and the Second Appellant Paul Stuchfield, a 20 year old man who was 19 years old at the time of the trial. On 11th July 2019 in the Crown Court at Carlisle, following a trial before His Honour Judge Adkin and a jury, RT and Mr Stuchfield were convicted of conspiracy to commit robbery contrary to section 1(1) of the Criminal Law Act 1977.

3. On 30th July 2019 RT was sentenced to an 18 month Youth Rehabilitation Order with Intensive Supervision and Surveillance. On 2nd September 2019 Mr Stuchfield was sentenced to 9 years detention in a Young Offenders Institution.

Reporting restrictions because of age

4. The provisions of s.45 of the Youth Justice and Criminal Evidence Act 1999 are engaged in this case because RT is under 18 and orders were made by the Crown Court. This also applies to a co-accused who had earlier pleaded guilty known as KL, and the relevant 16 year old prosecution witness, whom we will refer to as Ms F.

The respective cases

The case for the prosecution

5. On Wednesday 16th January 2019 at around 6pm, police officers were called to attend the Barclay's bank cashpoint in Penrith town centre following a report from Ms Terri Longson that she had been robbed at knifepoint. When the police arrived, they recovered a knife which had been left at the scene by KL, the person who had carried out the robbery.

6. Subsequent inquiries revealed that earlier that day RT and Mr Stuchfield were in a McDonald's restaurant in Penrith and not far from the scene of the robbery. It was alleged that during this meeting, with at least one other person called Declan, they discussed and agreed to carry out a robbery. Ms F was in McDonald's during part of this time and gave evidence about this conversation.

7. The prosecution case was that although KL had actually committed the robbery, RT and Mr Stuchfield had conspired to commit the offence earlier that day. Further, they had accompanied him to the churchyard which was close to the location where the robbery took place, and RT had gone home to get the knife which was used in the robbery.

8. The prosecution relied on evidence from Ms F in relation to the appellants' conversation in McDonalds and the fact that they were discussing their plan to

commit a robbery. There was other prosecution evidence including evidence from the victim of the robbery; CCTV evidence showing some of the movements of RT and Mr Stuchfield around Penrith town centre on the 16th January 2019; and agreed evidence from Ms F in relation to a letter that she had received from Stuchfield whilst he was in prison which the prosecution contended amounted to an admission of the offence. There was forensic evidence showing that the partial DNA profile obtained from the handle of the knife used in the robbery matched the DNA profile of RT. The prosecution also relied on RT's admission that he had returned home on the afternoon of the 16th January 2019, although RT's case was that he had returned to change his jacket and not to collect a knife.

9. There was also evidence of bad character for Stuchfield namely that he had pleaded guilty on 15th February 2019 to an offence of robbery committed in October 2018. He had committed the offence with a younger male, covered his face and used a knife to threaten a cashier in order to steal money.

10. Both RT and Mr Stuchfield denied the offence, but in police interviews and evidence at trial blamed each and KL for the offence.

The case for RT

11. RT gave evidence in which he described being in McDonald's and speaking with Ms F. He said that he did not know her particularly well. He remembered her talking about MCAT (a drug) and taking out a tin containing the drug. He also recalled Mr Stuchfield talking about breaking up with Ms F and the fact that he had not answered bail for his robbery offence so he would be going to prison.

12. RT accepted that in their group chat on Snapchat, their friend KL had been asking for a weapon – either a gun or a knife – but RT had refused to give this to him and subsequently left the group chat. He accepted that they went to meet KL at Sainsbury's. Thereafter they went to RT's house so that he could change his jacket and leave behind his cigarettes. They went to the graveyard and KL took out a knife. He accepted that he had touched the handle of the knife as KL handed it to him. When he realised what he had been given, he then dropped it. KL said that he was going to rob someone. RT decided to go back to Sainsbury's and stay within range of the CCTV cameras – he did not want anything to do with the offence and wanted to remain on camera so that no one could later allege that he had been involved. He denied that he had arranged to meet KL again at Sainsbury. When he subsequently saw Mr Stuchfield he was told that KL had stabbed someone. They then went back to McDonald's.

13. RT denied that KL had previously mentioned a plan to rob someone in the group chat and that he had agreed to this. He accepted that he had changed jackets but not because the new jacket had a knife in it but simply because it was warmer. He did not know why KL had handed him the knife but accepted that he had briefly touched it which accounted for his DNA being found on it. KL had been wearing gloves at the time. RT also relied on evidence of his previous good character and evidence from his mother and his sister in relation to him returning to the house on the afternoon of 16th January 2019 to counter the prosecution's suggestion that he had returned home to collect a knife.

The case for Mr Stuchfield

14. Mr Stuchfield gave evidence in which he denied being part of any conspiracy to commit robbery. He accepted that he had been to McDonald's and that he had seen Ms F. He had been in a relationship with her for around 7 months in 2018. Although they had not seen each other much during the latter part of the year, they had resumed their relationship on New Year's Eve. He had, however, decided that he would be breaking up with her and they spoke about this on the day in question, which explained why she was giving false evidence against him.

15. He could not recall what he had spoken about with RT and another in McDonald's but denied that he had discussed committing a robbery. They met KL at around 5pm at Sainsbury's, briefly went to RT**'s** house and then onto Declan's house. Whilst in a nearby alleyway, KL took out a knife and showed it to him. They went to the churchyard and KL was talking about going to a cashpoint and committing a robbery. He said that in their group chat on 15th January 2019, RT and KL had been discussing committing a robbery. He however had not contributed to the discussion. They soon left the churchyard but he decided to leave via a different exit. Shortly afterwards, he heard screaming and started to walk back to where KL had gone. He saw the victim and asked if she was alright. He told her to call the police. He walked back to RT and Declan who were at Sainsbury's. He told them about the robbery and went back to McDonald's. He was subsequently arrested in the town centre.

16. He accepted that he had sent a letter to Ms F from prison but denied that he was apologising for the new offence. He stated that this was in fact referring to the robbery from October 2018. In cross examination, he maintained that he had not planned to commit a robbery with the others. He accepted that he had told some lies in his police interviews. He knew that KL was going to commit a robbery but he did not play any part in this. Mr Stuchfield also relied upon evidence from Matthew Bruce Newton in relation to Ms F's assertion in McDonalds's that she wanted to get Stuchfield into trouble.

The evidence of Ms F at trial

17. It is apparent from the submissions before us that there was a late application for special measures for Ms F. This was because she was aged 16 years at the time of the trial and had been diagnosed with ADHD, although there was no medical evidence available at the start of the trial, and there were ongoing investigations into whether she had autism. There was a short ground rules hearing in relation to the manner in which Ms F would be questioned, but the papers for the appeal did not contain a transcript of that short ground rules hearing. It was apparent that counsel were directed to moderate their questioning for this witness, they were told to ask simple questions containing only one proposition, not to use tagged questions and not to ask questions which were essentially statements. Counsel were reminded of the Advocates' Gateway toolkit for dealing with vulnerable witnesses. It was apparent that the expected directions were given about the format of the questioning to ensure that Ms F was able to give the best evidence that she could. It was agreed that Ms F would give evidence by video link.

18. We have a transcript of Ms F's evidence. Ms F gave her evidence in chief. Her evidence in chief lasted from 1158 to 1210 hours. The judge said that the evidence had been given rather tersely.

19. Thereafter a point about bad character was raised. We do not have a transcript of the argument, but it is apparent that it related to questioning about whether Ms F had mentioned taking MCAT at McDonald's and her use of MCAT. This argument lasted until the lunch break. The video link room from which Ms F gave her evidence was situated in the Court, and this delay meant that Ms F, a vulnerable 16 year old girl, was waiting around the court having started her evidence for just under two hours before her evidence recommenced. It is apparent from the submissions before us on the appeal that there was no reason why this issue of bad character could not have been dealt with at an earlier stage of the proceedings, and it would have been much fairer to Ms F, and better for all, to have had her evidence in one go so that she could have left before the lunch adjournment.

20. Given the nature of the appeal it is necessary to say a bit more about the evidence given by Ms F. Ms F gave evidence in chief that she had been in a relationship with Mr Stuchfield for around 6 months and that they had broken up in July 2018. It might be noted that it was common ground with Mr Stuchfield that the relationship had come to an end in 2018, but Mr Stuchfield contended that it had started again in the New Year and that he had ended the relationship on the relevant day, which was why Ms F was giving false evidence against him.

21. Ms F accepted that after the breakup of the relationship they had sent messages to each other via Facebook but had not seen each other. She also knew RT as he was a friend, and she had known him for around a year and a half.

22. Ms F said that on the afternoon of 16th January 2019, she had gone to McDonald's to meet some friends. As her friends were not there she sat with RT, Mr Stuchfield and their friend Declan. They asked if they could borrow some money but she said no. Mr Stuchfield then showed her a blue bandana, said that he was going to cover his face and that they were going to commit a robbery. He said that he was going to commit a knifepoint robbery against a female and with another male called KL. RT was part of the conversation and it was stated that after the robbery had taken place, both RT and Stuchfield would then take the purse from KL. Ms F said that the boys left and she stayed in McDonald's with her friends. She saw them again later that day and Declan told her that KL had robbed a woman.

23. There was then the break for legal argument and the lunch adjournment. After lunch Ms F was cross examined by counsel for Mr Stuchfield. In cross examination Ms F maintained that she had broken up with Mr Stuchfield in July 2018 and they had not got back together again. Ms F was asked about Facebook messages and said that she could not remember sending him romantic messages and did not remember any of the conversations that she had had with him other than the incident in McDonald's saying she blocked out things she did not want to know. Ms F was asked about further Facebook messages.

24. It became common ground at the appeal that the form of some of the questions to Ms F did not comply with the best practice for questioning a vulnerable witness, for example the question "Okay. Did you send him any messages which might be

interpreted or misinterpreted as being romantic messages?" was too long and required the witness to process whether the messages were being interpreted or misinterpreted. It is not particularly surprising that the answer began "I don't know". Another question which would be difficult for any witness, let alone a vulnerable 16 year old witness was "Is that something that you would not just remember?" because the question required processing of what someone would remember, rather than a simple question about whether the witness remembered something.

25. Counsel for Mr Stuchfield pressed the witness about further Facebook messages exchanged between Ms F and Mr Stuchfield, but each time got the answer she didn't remember them. The Judge then said "I think we have done this point …". Counsel then turned to a message on 3 January and the judge said "No, no, I think we have done this point". Counsel did not stop there and wanted to continue with some of the other Facebook material which was available saying "I will just see if there is anything specific". The judge said "That Facebook material can be in admitted facts in due course if necessary". Counsel continued "This is a separate point which I should put. Do you recall sending two videos of you singing love songs to Mr Stuchfield to Paul?". It is not apparent to us why this needed to be specifically put to Ms F, and no good reason was suggested at the hearing of the appeal. Ms F had made it clear that her evidence was that she did not remember the Facebook messages and there was already sufficient material for the jury to make a fair assessment of the reliability of that answer and, as the judge said, admissions could be made about the contents of other Facebook messages.

26. In the event Ms F replied that she could not remember, but confirmed that she could remember the conversation in McDonald's because it was in person and it was written down and she had read it, which must have been a reference to reading her witness statement. Ms F accepted that she had been asked by the police about whether she had been in a relationship with Mr Stuchfield in January 2019 and said she was not and said she did not want to change her statement about that. She was then asked "you do not? Are you going to continue to lie whilst giving your evidence to the court?" The judge intervened saying that was not an appropriate question and the witness said "I wanna go home".

27. Thereafter every effort was made to persuade Ms F to continue with her evidence but she refused to continue her evidence. The efforts continued and Ms F was given time to consider her position but she refused to return to Court. This meant that the cross examination on behalf of Mr Stuchfield had not been completed and the cross examination on behalf of RT could be carried out.

28. Agreed facts were produced showing a selection of screenshots of messages exchanged between Mr Stuchfield and Ms F between 2nd and 15th January 2019. An agreed fact was also set out that Ms F had refused to return to court, even though the judge had told her that the questions would be limited to 20 minutes and the type of questions would be closely monitored.

Judge's rulings that the trial could continue

29. The judge was asked to stop the trial and discharge the jury. The Judge ruled that despite the fact that the witness Ms F did not wish to continue her evidence, it would not be unfair to either appellant to continue with the trial. The judge noted that Ms F

was 16 years old and was being assessed for ADHD. It was clear from the way in which she had given her evidence that she was a troubled young woman. If the prosecution had been fully aware of her difficulties, they could have obtained medical evidence, conducted an Achieving Best Evidence interview and obtained an intermediary report.

30. The Judge indicated that he had considered the cases of *R v (S)G* [2017] EWCA Crim 617; [2017] 2 Cr App R 20 and *R v Wyatt* [1990] Crim LR 343. A break in the proceedings had made no difference to the witness, she had refused to return to court, was not at home and had only indicated that she might attend the following day. Some cross examination had taken place and the jury could assess the evidence that they had heard thus far. There were some previous inconsistent statements about the witness' relationship with Mr Stuchfield and her use of MCAT which could be reduced to admissions and placed before the jury. He would also direct the jury as to the potential disadvantages to the defence in his summing up and would direct them following the ruling as to the matters that would have been put to the witness if she had returned to continue her evidence.

31. After it became clear that Ms F would not return to give evidence even after a break, a written application was then made to stay proceedings as an abuse of process. The judge gave a ruling rejecting the application. The judge considered that the trial process was able to deal with the difficulties posed by the fact that Ms F would not continue her evidence. The judge also noted that the evidence of Ms F could be considered with the DNA evidence relating to RT and the knife, the confession letter from Mr Stuchfield, the evidence about the movement of the appellants both before and after the offence.

Relevant directions

32. The judge gave a split summing up. In written directions which he read out on how to deal with Ms F's evidence the Judge noted that Ms F had left Court and refused to return after an inappropriate question. He noted that counsel for both Mr Stuchfield and RT had not been able to put part of their case. For example that Ms F had made it up because Mr Stuchfield had broken up with her on that day, or that she had not given evidence about the real conversation at McDonald's on the day, and that RT had said that Ms F had talked about MCAT on the day. The judge said Ms F's evidence "therefore has limitations as it has not been thoroughly tested. You do not know what she would have said had her evidence been further tested nor do you know how she would have reacted to the questions about MCAT bearing in mind the content of the Facebook messages. What [Ms F] says took place in McDonald's should not be considered in isolation. It has to be looked at in the context of other evidence you have heard. It is for you to determine its value. You should take the limitations set out above … when you consider its weight".

33. After speeches when summing up her evidence the jury were reminded of his legal directions on her evidence, specifically directed that her evidence was only part of the evidence in the case, and that the jury were going to have to look at the evidence globally. The judge also said that the Facebook evidence "you may think suggests that there was still very strong affection between [Ms F] and Paul Stuchfield in January 2018".

The issue on appeal

34. Both RT and Mr Stuchfield complain that the Judge erred in refusing to exercise his discretion and stop the trial following the refusal of Ms F to continue to give evidence. The prosecution say that the judge was right to continue the trial and that the convictions are safe. We are very grateful to Ms Whittlestone, Ms Faux and Mr Walmsley for their helpful written and oral submissions.

35. In essence counsel for RT and Mr Stuchfield submit that although the question "are you going to continue to lie" was inappropriate, the fact that counsel for Mr Stuchfield was unable to complete her cross examination and that counsel for RT did not get an opportunity to question the witness at all adversely affected the fairness of the proceedings. The convictions are therefore unsafe.

36. Counsel for the prosecution submit that Ms F was a vulnerable witness and the Judge had set ground rules in relation to the manner in which she should be questioned. Nonetheless Ms F had been repeatedly asked the same questions and wrongly asked if she was going to "continue to lie." It would be entirely inappropriate if counsel were permitted to fail to observe the proper approach to questioning a vulnerable witness, cause them to refuse to continue giving evidence, and then argue that the trial should stop.

Relevant legal principles

37. The defendant has a fundamental right under the criminal law to a fair trial. The right of a legal representative to ask questions of witnesses giving evidence against the defendant is one way in which a fair trial is delivered but limitations have long been recognised to the right to question, for example the hearsay statements of dying witnesses cannot, for obvious reasons, be questioned. The hearsay exceptions have been added to by the Criminal Justice Act 2003, but the proceedings must remain fair, see *R v Horncastle* [2009] EWCA Crim 964; [2009] 2 Cr App R 15, and *Al-Khawaja v UK* (2012) 54 EHRR 23. The effect of not being able to cross examine because of the death, illness or refusal to continue for a witness is not a new problem for the law. In Blackstone's Criminal Practice at F7.7 there is reference to *Doolin* (1832) 1 Jebb CC 123 where the evidence of a witness who died before being cross examined was held to be admissible, even though little weight was attached to the evidence. In some cases the effect of not being able to cross examine a witness who has become ill and unable to continue has meant that a fair trial becomes impossible. In other cases it has proved possible to continue the trial and ensure that it is fair.

38. In *R v Stretton and McCallion* (1988) 86 Cr App R 7 a witness who had been cross examined for a period of time became ill and unable to continue. The judge permitted the trial to continue with a clear warning to the jury. It is sometimes permissible to prevent further cross examination when a witness has become distressed, see *R v Wyatt*, although it is also important to remember that not every witness showing distress will be vulnerable, see *R v G(S).*

39. When considering whether a fair trial is possible when a witness's evidence has been cut short a judge will have regard to the extent to which the defence has been put and explored with the witness, whether previous inconsistent statements can be put into

agreed facts, and whether there is other relevant evidence, see *Pipe* [2014] EWCA Crim 2570; [2015] 1 Cr App R(S) 42.

40. It is also right to record that fairness in court proceedings extends to complainants and witnesses. The law and practice in relation to the questioning of vulnerable witnesses has developed. Training in the cross examination of vulnerable witnesses is available to advocates. Practice and procedure is now governed by the Criminal Procedure Rules ("Crim PR"), see in particular Criminal Practice Direction: Division 1 (General Matters) at paragraph 3E.4 which provides that "all witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can." Thee toolkits published on the Advocates' Gateway are also available.

41. Guidance was given on the appropriate style of cross examination on vulnerable witnesses in *Wills (Practice Note)* [2011] EWCA Crim 1938; [2012] 1 Cr App R 2. In *YGM* [2018] EWCA Crim 2458; [2019] 2 Cr App R 5, Hallett LJ, VPCACD set out the need to sort out limitations on cross examination of vulnerable witnesses before cross examination started. For example where defence counsel have not already agreed a division of labour, it is permissible in multi-handed trials to divide up topics between counsel so that a witness is not asked repeated questions on the same topics by each counsel. Rule 3.11(d) of the Crim PR gives the power to the Court to "limit (i) the examination, cross-examination or re-examination of a witness …". The Court of Appeal Criminal Division will support the proper case management of the cross examination of a witness, see *E* [2011] EWCA Crim 3028; [2012] Crim LR 563 and *Lubemba* [2014] EWCA Crim 2064, [2015] 1 WLR 1579,

Permissible decision to continue in this case.

42. In our judgment the trial judge was entitled to continue the trial of RT and Mr Stuchfield even though Ms F was not available for the whole of the cross examination on behalf of Mr Stuchfield and there was no cross examination on behalf of RT. This was because the trial remained fair for both RT and Mr Stuchfield in the particular circumstances of this case. The relevant circumstances included the facts that first the jury had seen Ms F give evidence and be cross examined at least in part. Secondly there was some unfortunate questioning of Ms F which explained her refusal to stay for the whole of the cross examination, although we make it clear that the trial judge found that this questioning was not carried out deliberately to provoke the witness, and counsel for RT did not have the opportunity to carry out any questioning. Thirdly there was material which was admitted, including the Facebook messages, which enabled the jury to make a fair assessment of the credibility and reliability of Ms F's evidence. Fourthly Ms F's evidence could be assessed in the context of the other evidence which included: DNA evidence against RT; evidence about earlier social media conversations about a plan to commit a robbery; CCTV evidence showing the movements of RT and Mr Stuchfield; and Mr Stuchfield's letter sent after the offence. Fifthly the judge gave proper directions to the jury identifying the limitations of Ms F's evidence.

43. We are also satisfied that there was no abuse of process in continuing the trial in the circumstances set out above. This was because the trial process enabled the appellants to deal with the effect of the absence of Ms F. We can see no basis for saying that the conviction of either RT or Mr Stuchfield was unsafe.

Conclusion

44. For the detailed reasons given above we dismiss the appeal against conviction.