

Neutral Citation Number: [2020] EWCA Crim 411

Case No: 2019/02300/C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SHEFFIELD
HER HONOUR JUDGE WRIGHT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2020

Before :

LORD JUSTICE SIMON
MR JUSTICE FRASER
MR JUSTICE HILLIARD

Between :

Regina
- and -
James Paul Jackson

MR JUSTICE FRASER:

1. This is the judgment of the Court. On 24th April 2019, in the Crown Court at Sheffield after a trial conducted by Her Honour Judge Wright, the applicant was convicted of two offences. The first was one count of robbery contrary to s. 8 of the Theft Act 1968 (this was count 1 on the indictment). The second count was possession of an imitation firearm at the time of committing an indictable offence contrary to s. 17(2) Firearms Act 1968. Both of the offences occurred on the same occasion, namely 22 October 2018.

2. On 7th June 2019, he was sentenced by Her Honour Judge Wright – who had conducted the six day trial - to an extended sentence of 25 years pursuant to s. 226A Criminal Justice Act 2003, comprising a custodial term of 20 years and an extension period (what is also sometimes called an extended licence) of 5 years, on each count concurrently. The Judge used the Sentencing Guidelines for a Professionally Planned Commercial Robbery. The applicant issued an application seeking permission to appeal both his sentence and his conviction. These were both refused by the Single Judge. He renews his application today, seeking permission to appeal his conviction only, although he requires an extension of time to do so, namely 27 days. This is a matter to which we will return having dealt with the application on its merits.

3. On the day in question in October 2018 at about 1.30pm, two men pulled up on a lime green motorcycle outside a post office in Doncaster in Yorkshire. They were wearing balaclavas under their crash helmets, which they did not remove. They both entered the post office. One remained by the door, holding a machete with black tape around the handle. The other was carrying a cardboard box from which he produced what appeared to be a sawn off shotgun. That was never recovered and so was charged as an imitation firearm. The raid was short in duration but no doubt terrifying for the staff, customers and other members of the public involved, and it was captured on CCTV. The manager was forced to kneel. The staff were told to hand over the money, and open the safe and at one point the raider with the gun shouted “get the money or I’ll blow your head off”. £70,000 in currency, cash and stamps was taken and the men made their escape on the motorcycle, which was said to be a Kawasaki. The registration of it was noted by at least two eye witnesses. It was either GV15 OPC or GU14 OPC.

4. The police investigated and the applicant was arrested. The manager said he had recognised the applicant's voice as a customer who came to the post office regularly, sometimes with his wife who had a baby clothes shop in Bentley. The applicant was shown on CCTV from the post office earlier on the day of the raid where he had gone with his wife to post some parcels. Receipts for these, from both him and his wife, were recovered from a car outside his house. His home was searched and a number of machetes were recovered, a large quantity of cash, a balaclava and a hat with eyeholes init. One of the machetes had black tape around the handle. A green motorbike was found burned out nearby. His DNA was found on the box that had contained the gun.
5. A neighbour gave evidence that he had seen the applicant on a few occasions driving a lime green Kawasaki motorcycle, and parking it in his garage. One Mr Evans, who was the manager of a local garage, said he knew the applicant well, had carried out work on both his motorbike and some cars and had also supplied him with the Registration plate GV14 OPC. Mr Evans was visited because the police found some invoices from his garage at the applicant's home.
6. The defence case was that the applicant was not involved. He did not give evidence at the trial. The issue for the jury was whether the applicant was one of the two men involved in the robbery (for count 1) and the one with the gun (count 2).
7. The grounds of appeal relate to the evidence of Mr Evans, the manager of the garage. Although in his statement to the police he had said that he knew the applicant well, and had made the registration plate for the motorbike (when it had been brought in for repair with a smashed rear light and broken number plate) at trial his evidence was somewhat different. Mr Steven Evans was called as a witness for the Crown, but a witness summons was required to secure his attendance, as he did not wish to attend court. He denied in his oral evidence that he had made a statement to the effect that he made a Registration plate GV14 OPC for the applicant's green motorbike. He insisted in evidence that this registration plate was made for another person unconnected to the applicant. He also denied that he knew the applicant. He was invited to refresh his memory from his statement, and he agreed he had signed it, but denied he had read it before he did so, and he positively asserted that the passage in it that stated that he had

made the number plate was untrue. This was on the afternoon of Wednesday 17 April 2019. The Crown indicated an intention to make an application to treat Mr Evans as a hostile witness, but following observations from the Judge did not pursue it, and indeed withdrew it.

8. Overnight, the Crown obtained a statement from the officer DC Caroline Thomas who had taken Mr Evans' statement. Essentially this explained that he had made the statement voluntarily after being shown the invoices from his garage seized from the applicant's home. It also explained that he had volunteered the information about the number plate, made the statement without hesitation, and had read it fully before he signed it in her presence. The trial judge invited the Crown to renew its application to treat Mr Evans as a hostile witness, and the Crown did so. The trial judge produced a ruling on the application and granted it. She accepted that her observations the day before to the Crown were made without her having had a full opportunity to consider the law on the matter of treating witnesses as hostile, and without a full review of the legal principles. We commend her frankness in accepting this. It was these observations that had led to the Crown withdrawing its application. However and in any event, on the renewed application the Crown had the benefit of the statement from DC Thomas and the situation was rather different as a result. The judge explained that she had no hesitation in concluding that Mr Evans' evidence in the witness box was adverse to the Crown and that he was a hostile witness.
9. The consequences of that ruling were as follows. Mr Evans' previous inconsistent statement, namely his witness statement given to the police, became admissible under s.119 of the Criminal Justice Act 2003. In fact, there is a typographical error in the ruling which states s.19, but it is clearly s.119 that is referred to. We are entirely confident that s.119 is the section referred to by the trial judge, and that it was that section that she properly considered in her ruling. The previous statement had become admissible under s.119(1)(a) as a result of her finding that Mr Evans was a hostile witness, as Mr Evans, the day before in the witness box, had said that the contents of his statement dealing with the number plate were not true. Her decision to treat Mr Evans as a hostile witness cannot reasonably be said to be incorrect in law or in principle, or even arguably so.

10. However, counsel for the applicant had not cross-examined Mr Evans the day before, and at that point he had not been declared to be a hostile witness. That was a forensic decision made by the applicant's counsel that may well have been justified at the time, based on the status of Mr Evans. The trial judge dealt with this fairly and correctly within the trial process by offering to have Mr Evans brought back to court to be cross-examined. That was in our judgment not only entirely sensible, but required, as the decision the applicant's counsel had made the day before had been made on the basis that Mr Evans was *not* a hostile witness. However, the invitation was not accepted and the applicant's counsel did not wish to cross-examine Mr Evans, so that did not occur. The trial judge also expressly considered under s.78 PACE 1984 whether the statement, once admissible, should be excluded as a matter of discretion given its potential prejudicial effect. She decided that it ought not to be so excluded. Her decision on that cannot arguably be said to be wrong either.
11. The judge gave careful directions to the jury in respect of the evidence of Mr Evans, including pointing out at 5F that he had given two different versions and everything he said had to be treated with caution. The directions that he gave to the jury are not capable of being challenged as being inadequate or indeed wrong in law, and the jury were, in our judgment, entirely correctly directed. To be fair to counsel who settled the grounds, the directions *per se* are not challenged, it is the decision of the trial judge to grant the Crown's application to treat Mr Evans as hostile that is criticised.
12. We are of the view that such criticism is misplaced. This is solely a matter of discretion of the trial judge, and it can be challenged on appeal only in exceptional circumstances – it is what is called in the authorities an absolute discretion. Provided correct directions are given to the jury, which they were, then no errors of law, unfairness, or risks of an unsafe conviction can have resulted, and we are satisfied there was no such here. Firstly, the applicant was given by his counsel the opportunity to cross-examine Mr Evans. She chose not to do so. Secondly, the evidence about the number plate and ownership of the Kawasaki was but one small part of the evidence against the applicant in any event. We have the benefit of a Respondent's Notice from the Crown which identifies and summarises the following evidence against him:
 - (1) The descriptions of the robbery by various witnesses inside the post office.

- (2) The evidence of the manager of the post office that he recognised the voice of the gunman.
 - (3) The recording of the Registration of the green bike leaving the scene as GU14OPV (by Mr Batty) or GV14OPC (by Mr Eastley).
 - (4) The sighting of a green Kawasaki motorbike outside the applicant's address.
 - (5) The recovery of a balaclava and a hat with eyeholes from the applicant's address as well as a machete with a handle wrapped in tape recovered from his vehicle.
 - (6) The DNA profile from tape on the discarded box which matched that of the applicant.
 - (7) Adverse inference from applicant's failure to give evidence at trial.
13. It is not reasonably arguable, in our judgment, that the ruling in respect of Mr Evans was even arguably wrong, or that the conviction is unsafe as a result. The renewed application therefore fails. In those circumstances, although an explanation of sorts has been given for the extension of time required due to the 27 days delay in lodging the necessary form in respect of the conviction appeal, there is nothing to be gained from extending time and we decline to do so. Both applications therefore fail.