Neutral Citation Number: [2020] EWCA Crim 487

Case No: **201902234 C3 / 201902236 C3**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT LEICESTER
HHJ DEAN QC
T20177398 / T201807263 / T20180446

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD

MRS JUSTICE CARR DBE
and
MR JUSTICE GOSS

- -

Between :

JOSHUA HORNE — **Appellant**

- and -

The Queen — **Respondent**

- -
- -

Mr Graeme Wilson (instructed by **Paytons Solicitors**) for the **Appellant**
Miss Nicola Moore (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates : 24th March 2020

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Approved Judgment

Lord Justice Fulford:

Introduction

The Issue

1. The appeal against conviction in this case involves the admissibility of the guilty plea of one of two alleged co-conspirators in a closed conspiracy. There is, additionally, a renewed application to appeal against sentence, following refusal by the single judge.

The Facts

2. On 3 December 2018 in the Crown Court at Leicester, the appellant pleaded guilty to conveying a list B article into or out of prison and 8 counts of the unauthorised transmission of an image or sound by electronic communication from within a prison ("the telephone offences").

3. On 16 May 2019 at the same venue the appellant was convicted of an offence of conspiracy to pervert the course of justice contrary to section 1 Criminal Law Act 1977. The count was in the following terms:

> "Joshua Horne and Ryan Parry between 7 November 2017 and 1 July 2018 conspired to pervert the course of public justice by interfering with the witnesses in a case namely Liam Roberts and Barry Roberts"

4. He was acquitted of attempted murder, causing grievous bodily harm with intent and attempting to cause grievous bodily harm with intent.

5. The prosecution offered no evidence on counts of dangerous driving and using a motor vehicle without insurance.

6. On 23 May 2019, the appellant was sentenced to 3 years' imprisonment for the offence of conspiracy to pervert the course of public justice, with a consecutive term of 9 months' imprisonment for conveying a list B article and concurrent sentences for the 8 telephone offences. The overall sentence, therefore, was 3 years 9 months' imprisonment.

7. Daniel Horne pleaded guilty to doing an act tending and intended to pervert the course of public justice. On the first day of the trial, Ryan Parry pleaded guilty to conspiracy to pervert the course of public justice and was sentenced to 20 months' imprisonment.

8. Before this court, the appellant appeals against his conviction on the count of perverting the course of public justice, with the leave of the single judge. He applies for an extension of 2 days in which to renew his application for leave to appeal against sentence, following refusal by the single judge.

9. The relevant facts can be shortly described. On 7 November 2017, Naquan Powell was hit by a BMW X5 on Hillsborough Road, Leicester. Liam Roberts, a friend of Naquan Powell, saw the collision. Although not immediately, he identified the appellant as the driver and told his father, Barry Roberts, that the appellant had been driving (this latter

communication was introduced as res gestae evidence). It was the prosecution's case that the appellant had deliberately driven at Nequan Powell and that he had intended to run over Liam Roberts at the same time. Nequan Powell suffered life-changing injuries as a result of the collision. The appellant stayed at a hotel in Leicester for the night following the accident, and thereafter stayed at a variety of hotels outside Leicester. He was arrested near Southampton on 21 November 2017.

10. Liam and Barry Roberts provided witness statements to the police. However, before the date originally set for trial in May 2018, Liam Roberts received a telephone call from the appellant during which he was told to say that he had seen a black male driving the BMW. Barry Roberts was contacted by Ryan Parry who informed him that he had spoken with the appellant, and that Barry Roberts should go to a solicitor in order to change his witness statement. Thereafter, Barry Roberts was contacted by the appellant who told him to "withdraw" the witness statement he had made, stating instead that he had seen a mixed-race man driving the BMW. On the Sunday before the date when the trial was originally set down to commence, Barry Roberts was visited at his home by Daniel Horne who offered him money and a holiday in return for not attending court.

The Respective Cases

11. It was the prosecution's case, therefore, that the appellant had conspired with Ryan Parry to persuade Liam and Barry Roberts either to alter their evidence or to avoid testifying altogether. In addition to the account of Liam Roberts and Barry Roberts, the Crown relied on evidence from Liam Roberts' grandmother, Michelle Roberts, as to contact between the appellant, Ryan Parry and Liam Roberts. The appellant admitted communicating with Liam Roberts in advance of the trial and the prosecution relied on his previous convictions, which included growing cannabis and robbery. In relation to the latter offence, he admitted lying to the police in giving a false alibi. The prosecution suggested that this demonstrated a preparedness on his part to provide a false account of his whereabouts in order to escape the consequences of his actions. Additionally, the prosecution introduced evidence of the appellant's lies to the police as to his movements on 7 November 2017, why he had "gone on the run" and his links to the BMW motor car. The appellant abandoned his mobile telephones and replaced them with new devices, one of which he smuggled into prison following his arrest. There was evidence that the appellant had used two telephones from prison to contact Liam Roberts and Barry Roberts. It was Barry Roberts evidence that he spoke to the appellant who told him that he should go to a solicitor to retract his statement and to expect a telephone call from Ryan Parry. Finally, the Crown, with the leave of the judge, introduced (only towards the end of the trial) evidence of Ryan Parry's guilty to plea to conspiracy to pervert the course of public justice as some support for the truthfulness of Liam and Barry Roberts. This was admitted pursuant to section 74 (1) Police and Criminal Evidence Act 1984:

> *Conviction as evidence of commission of offence.*
> (1) In any proceedings the fact that a person other than the accused has been convicted of an offence […] shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

12. The charge of conveying a list B article into or out of prison and the 8 telephone offences related to the use by the appellant of mobile telephones whilst in custody to organise, as alleged by the Crown, the interference with the evidence of Liam and Barry Roberts.

13. The appellant contended at trial that he had not been the driver of the BMW motor car. He denied he had agreed with Ryan Parry to persuade Liam and Barry Robert not to give evidence. Indeed, he suggested, to the contrary, that he had been trying to encourage them to testify, particularly since he was aware Liam Roberts had initially said he was unable to identify the driver of the vehicle. He did not accept that he had asked Daniel Horne to visit Barry Roberts at his home.

The Conviction Appeal

Ryan Parry's Guilty Plea

14. The judge permitted Ryan Parry's plea to conspiring with the appellant to pervert the course of public justice by interfering with the witnesses in the case, namely Liam Roberts and Barry Roberts, to be introduced on the following basis:

> "In my judgment this is one of those rare occasions where if a formulation is not possible by way of an admission then the Crown should be permitted to adduce evidence of his guilty plea to count 5 and I will direct the jury that that guilty plea is not evidence against Mr Horne on count 5 or any other count on the indictment; that in the unusual circumstances of this case it does not have any meaning other than that it demonstrates that some, at least, of what Barry Roberts, Liam Roberts and Michelle Roberts have said is true and that that is relevant in turn to their overall credibility in this case."

The submissions

15. In essence, it is submitted by the appellant that the judge erred in admitting the evidence of Ryan Parry's guilty plea, given this was alleged to have been a "closed conspiracy" consisting solely of the appellant and Ryan Parry. In those circumstances it is submitted that it was inevitable that the jury would have concluded, however the judge directed them, that Parry's plea demonstrated the appellant's guilt.

16. The summing up on this issue was as follows:

> "What about count 5? Well now a conspiracy is no more than an agreement to do something unlawful. No formality is required, the agreement is usually tacit, that is inferred from the actions of the participants. In this case you know that Ryan Parry has pleaded guilty to count 5. You have heard about Ryan Parry's plea of guilty for one reason and one reason only, and that is because it demonstrates (that) Liam Roberts and Barry Roberts have told the truth about aspects of the case about Parry's contact with them, and his efforts to influence whether they gave evidence and what they should say in their evidence.
>
> Beyond that Parry's plea is of no significance and it is not evidence that you can take into account at all other than how it may provide some support for the truthfulness of Liam and Barry Roberts.
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> To prove count 5 the prosecution must demonstrate, make you sure, that Joshua Horne agreed with Ryan Parry that they would do acts tending, and (intended) to pervert the course of justice, namely that they would contact Liam and Barry Robert with a view to influencing them concerning whether they would testify, that is give evidence, what they would say in their evidence. […]"

Later the judge added:

> "I will deal with the cross-examination of Barry Roberts in a moment, but you will remember that I gave you a direction about the significance of Ryan Parry's guilty plea, that it did no more than confirm that both Liam and Barry Roberts had told the truth about certain aspects of what he, Barry Roberts and Liam Roberts were saying about Ryan Parry's involvement. The credibility, the truthfulness of Liam and Barry Roberts, has been very much attacked in this case, but you can take into account when deciding whether they have told the truth about what they say concerning Joshua Horne that they have told the truth about what Ryan Parry did […] That is the only relevance of the conviction of, the guilty plea of Ryan Parry, and the conviction and guilty plea of Daniel Horne."

17. The respondent submits that the law does not prohibit the introduction of evidence of this kind even in a closed conspiracy, and it is suggested that the judge admitted it on a valid basis (see [14] above), and directed the jury appropriately. Ms Moore, for the Crown, highlights that in the summing up the judge directed the jury that this evidence went no further than the truthfulness of Liam Roberts and Barry Roberts. It is suggested that the plea was admissible for the limited purpose of demonstrating that the witnesses were telling the truth about the visits and calls on the part of Ryan Parry. The prosecution relies on *R v Denham* [2016] EWCA Crim 1048; [2017] 1 Cr App R 7 as support for the proposition that the judge must ensure that the introduction of this evidence does not create unfairness. In *R v Shirt* [2018] EWCA Crim 2486; [2019] 1 Cr App R 15, this court emphasised that the issue is not whether the introduction of the evidence creates difficulties for an accused, but whether it would make the proceedings unfair (see particularly [35]).

18. In addition, Ms Moore submits that even if Ryan Parry's plea should not have been admitted, the case against the appellant was strong and his conviction on this count is safe. It is stressed that there was abundant evidence of telephone contact between Ryan Parry and the appellant during the relevant time, along with the communications with Liam Roberts and Barry Roberts. In those circumstances it is argued by Mr Moore that there was ample evidence in addition to the conviction of Parry and the evidence relating to the attempted murder and grievous bodily of the appellant's involvement in calls to Liam Roberts and Barry Roberts, and "the use of Ryan Parry as a conduit for messaging about tailoring evidence".

Discussion

19. It is material to note that the appellant's case was that he did not know what Ryan Parry had been doing or saying when he contacted Liam Roberts or Barry Roberts. He accepted that he had made telephone calls to these two witnesses but he maintained that he was trying to ensure that they told the "truth", namely that Liam Roberts had not seen the appellant driving and he was trying to ensure they were not pressurised into providing an account that falsely implicated him. Liam and Barry Roberts were cross-examined on the basis that they were lying about what they claimed he had said during the course of the telephone calls.

20. There were attempts prior to the introduction of the plea to agree an admission by the appellant and the respondent as to the actions admitted by Ryan Parry but an acceptable basis was not found.

21. Neither *Denham* nor *Shirt* (see above), relied on by the respondent, involved a closed conspiracy consisting of two individuals, as is the position in the instant case. Although

they assist on general principles, the court in those cases was not addressing circumstances of any real similarity to the present case. Of far greater relevance is *R v Derk Nathan Smith* [2007] EWCA Crim 2105. We need not rehearse the facts of that case, save to say that it involved two defendants jointly charged with a robbery and a firearm offence. One of the two accused pleaded guilty to these two offences and her pleas were admitted during the trial of the other defendant. In the course of giving judgment, Hughes LJ observed:

> "16. We have been taken to the line of cases which begins with *R v O'Connor* [1987] 85 Cr App R 298 . They are well known; we need not review all of them. We should, however, refer to the helpful distillation of many of them in *R v Kempster [1990] 90 Cr App R 14* in the judgment of Staughton LJ. That line of cases indicates that section 74 should be sparingly applied. The reason is because the evidence that a now absent co-accused has pleaded guilty may carry in the minds of the jury enormous weight, but it is nevertheless evidence which cannot properly be tested in the trial of the remaining defendant. That is particularly so where the issue is such that the absent co-defendant who has pleaded guilty could not, or scarcely could, be guilty of the offence unless the present defendant were also. In both those situations the court needs to consider with considerable care whether the evidence of the conviction would have a disproportionate and unfair effect upon the trial. With those cases can be contrasted the kind of case in which there is little or no issue that the offence was committed, and the real live issue is whether the present defendant was party to it or not. In those circumstances, commonly, the pleas of guilty of other co-defendants can properly be admitted to reinforce the evidence that the offence did occur, leaving the jury independently to consider whether the guilt of the present defendant is additionally proved.
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> 17. We accept, as did the trial judge in this case, that this line of cases was decided before the passing of the Criminal Justice Act 2003 . We agree that that new Act does proceed, as the judge in this case said, upon the basis that in some respects the ambit of evidence with which a jury can be trusted is wider than the law formally allowed. That thinking is, we do not doubt, there to be discerned in the bad character provisions of the Criminal Justice Act 2003 and also in the relaxation of the rule against hearsay. It does not, however, follow that the approach of the line of cases to which we have been referred is simply out of date. It remains extremely relevant what the issue is in the case before the trial court. It remains of considerable importance to examine whether the case is one in which the admission of the plea of guilty of a now absent co-defendant would have an unfair effect upon the instant trial by closing off much, or in some cases all, of the issues which the jury is trying.
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> 18. It remains a proper approach, we are satisfied, that if there is no real question but that the offence was committed by someone and the real issue is whether the present defendant is party to it or not, evidence of pleas of guilty is likely to be perfectly fair, though of course each case depends upon its own facts. However, it also remains true that such evidence may well be unfair if the issues are such that the evidence closes off the issues that the jury has to try. […]"

22. We have no doubt that the introduction of Ryan Parry's plea would have tended significantly to close down the central issue relevant to this count, namely whether the appellant entered into this conspiracy with Ryan Parry, which was the charge he faced. The latter could not have been guilty of this offence unless the appellant was also guilty,

and, considered with a degree of realism, Parry's involvement entirely depended on the participation – indeed, the direction – of the appellant. There would have been no sense in Parry taking these steps unless the appellant considered them necessary in order to enable him to present a false defence. Furthermore, once the conviction was admitted into evidence, it was not admitted as a mere plea of guilty but instead it included all the detail in the count. Notwithstanding the judge's directions in which he sought to limit the evidential impact of this evidence, there was a high risk that the jury would have drawn the conclusion that Ryan Parry's admission that he had conspired with the appellant meant inevitably that the appellant had conspired with him. Given the fact on which the conviction was based was that Ryan Parry and the appellant conspired together—and it takes at least two conspirators to make a conspiracy—then the conviction proved just that: Ryan Parry and the appellant were both guilty of conspiracy.

23. There are criticisms of the judge's direction to the jury, particularly that he did not direct them, first, in unequivocal terms that the evidence of the plea was not evidence against the appellant, and second, in a consistent manner that it tended to establish that only some of what was said by members of the Roberts family was true. Given our conclusions on the main issue, it is unnecessary to analyse these submissions in any great detail. It is necessary to note, however, that during the summing up the judge sought to indicate the limited relevance of the guilty plea, albeit he did not state in terms that it was not evidence against Mr Horne on any of the counts on the indictment and, at least in the second part of the direction, he indicated the direction tended to demonstrate that "certain aspects" of what was said by members of the Roberts family was accurate. There remains a fundamental logical difficulty, however, with the judge's approach. If the conviction of Ryan Parry tended to prove the truthfulness of Liam and Barry Roberts, this was directly relevant to the issue of the guilt of the appellant on this charge: if the evidence of Liam and Barry Roberts was accepted, that essentially established the appellant's involvement in the conspiracy to pervert the course of public justice. On these facts, therefore, the attempt by the judge to limit the evidential impact of the Parry's plea to a discrete and subsidiary issue in the case would necessarily have been ineffective.

24. There was undoubtedly significant other evidence against the appellant, but he was nonetheless acquitted of the other serious charges of attempted murder, causing grievous bodily harm with intent and attempting to cause grievous bodily harm with intent. We are not sufficiently persuaded that he would necessarily have been convicted of this particular charge if the jury had not heard of Parry's guilty plea, the force of which we have analysed above. This important evidence should have been excluded under section 78 Police and Criminal Evidence Act 1984 on the grounds that its admission would have such an adverse effect upon the fairness of the proceedings that it ought not to be admitted. In the result, the appeal must be allowed and the conviction should be quashed. We would finally note in this regard that it appears that the learned judge was not taken to the critical line of authority which included *Derk Nathan Smith*. If this jurisprudence had been drawn to his attention, we very much doubt he would have admitted this evidence.

The Sentence Appeal

25. There is a renewed application for leave to appeal against sentence in relation to the term of 9 months' imprisonment for conveying a list B article and for the telephone offences. The application was also made in respect of the sentence imposed for conspiracy to pervert the course of justice but in the light of our earlier conclusion that has self-

evidently fallen away. We grant leave and the necessary extension of time for the delay which was caused for administrative reasons.

26. The appellant submits that the starting point for time served for the telephone offences should have been 24 November 2017 when the applicant was arrested near Southampton and remanded in custody (which was before these nine offences were committed), on the basis that the telephone offences were "related offences" for the purpose of s. 240ZA of the Criminal Justice Act 2003 viz-a-viz the counts on which he was acquitted.

27. Section 240ZA provides materially as follows:

> "(1) This section applies where –
> (a) An offender is serving a term of imprisonment in respect of an offence, and
>
> (b) The offender has been remanded in custody […] in connection with the offence or a related offence […]
>
> (8) In this section "related offence" means an offence, other than the offence for which the sentence is imposed ("offence A"), with which the offender was charged and the charge for which was founded on the same facts or evidence as offence A."

28. The appellant submits that the telephone offences were 'related' to the attempted murder/grievous bodily harm offences. In the absence of any direct authority on the point, the appellant points to the approach of the courts to the question of joinder under s. 4 of the Indictments Act 1915 and the Criminal Procedure Rules which permit joinder where the offences charged are "founded on the same facts". Reference is made to *R v Barrell & Wilson* [1979] 69 Cr App R 250 for the proposition that the test is whether the offences have a "common factual origin". It does not mean that the facts in relation to the respective charges must be identical in substance or virtually contemporaneous.

29. The test for joinder as identified above is well-established and non-contentious. But we see no justification for its cross-application to s. 240ZA which, first, is not in identical terms and, second, addresses the technical area of when and to what extent time spend on remand in custody should count towards a sentence of imprisonment (or detention). In our judgment, in this context, the words of s. 240ZA should be interpreted literally. An offence is related to another if it is founded on the same facts or evidence. Whether an offence is founded on the same facts or evidence is then to be determined on an analysis of the facts of the case.

30. In this case, whilst the telephone offences were properly joined by reason of having a common factual origin, we do not consider that they are founded on the same facts or evidence as the attempted murder/grievous bodily harm offences for the purpose of s. 240ZA. The telephone offences did not commence until March 2018, approximately 4 months after the incident on 7 November 2017 and they were founded on evidence relating to that later period. They involved separate incidents and were not of a similar character. They could have been charged as offences without any reference to the charges of attempted murder/GBH.

31. This conclusion accords with public policy and common sense: it would be wholly counter-intuitive if time should be counted from a date before the relevant offences were even committed.

32. For these reasons, we dismiss the appeal against sentence.