Neutral Citation Number: [2020] EWCA Crim 785
2020/00020/B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 11th June 2020

LORD JUSTICE HOLROYDE

MRS JUSTICE CHEEMA-GRUBB DBE

and

THE RECORDER OF LONDON
(His Honour Judge Lucraft)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

SHANE KILLICK

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Mr C Evans appeared on behalf of the Applicant

Mr E Body appeared on behalf of the Respondent

J U D G M E N T

Thursday 11th June 2020

LORD JUSTICE HOLROYDE:

1. Section 58 of the Criminal Justice Act 2003 gives the prosecution a right of appeal against rulings made by a trial judge. By subsection (7), where notice of appeal is given against a ruling that a defendant has no case to answer, and the prosecution nominate another ruling made by the trial judge, that ruling is also treated as the subject of the appeal.

2. In this case, a recorder who was presiding over a trial of the respondent on a charge of burglary gave a ruling excluding evidence on which the prosecution sought to rely, and subsequently allowed a defence submission of no case to answer. The Registrar has referred to the full court an application by the prosecution for leave to appeal against those rulings. The prosecution have given the "acquittal undertaking" required by subsection (8), and have complied with all necessary formalities.

3. The provisions of section 71 of the 2003 Act, which imposes automatic restrictions on reporting, apply to this application. We shall return to this topic later in this judgment.

4. In the early hours of 15th July 2019, someone broke into the premises of a hairdressing salon in Hawkhurst in Kent and stole items of equipment valued at over £1,000. Whoever it was arrived as a passenger on a moped. Both he and the rider of the moped wore crash helmets which obscured their faces. CCTV footage recorded inside the salon showed that the burglar stumbled as he left, and then appeared to search, unsuccessfully, for something he had dropped. When the proprietor of the salon later viewed the footage, and checked the area where the burglar had searched, he found a screwdriver which had not been there the previous day. Scientific examination of the screwdriver found a full DNA profile which matched the DNA of the respondent. The unchallenged scientific evidence was that that finding was 1 billion times more likely if the source of the DNA was the respondent than if it was someone other than and unrelated to him.

5. The respondent was arrested. In interview under caution, he denied any knowledge of or involvement in the burglary and said that he thought he had been at his home in Hastings, with his partner, on the night of 14th/15th July. He did not think that he had ever been to Hawkhurst. He had previously worked as a roofer, until ill health caused him to cease work about six years ago. He had always used tools provided by his employer and did not own a tool set. He could not say how his DNA had come to be on the screwdriver. He commented in interview that the police had shown him neither the screwdriver, nor a photograph of it, and that he was therefore in difficulty trying to talk about something he had never seen.

6. Mr Body and Mr Evans, for whose submissions we are grateful, represented the respondent and the prosecution respectively at the trial. They sensibly edited the record of the interview under caution. There was, however, an issue between them as to the admissibility of a passage in which the respondent said that he was a drug user who had a drug debt, and that because of his drug use, one day tended to "blur into the next". He added that the drug debt was "nothing major" and that he did not lose any sleep over it. The prosecution applied to adduce that passage. They put their application first on the basis that this was evidence which had to do with the alleged facts of the offence, in that it explained the respondent's motive for committing the burglary, and that it thus fell outside the definition of "bad character" in section 98 of the Criminal Justice Act 2003. In the alternative, if it was bad character evidence and therefore only admissible through one of the gateways in section 101(1) of the Act, the prosecution

argued that it was admissible through gateway (c), on the basis that it was important explanatory evidence, or through gateway (d), on the basis that it was relevant to an important issue in the case, namely whether the respondent was correctly identified as the burglar.

7. The recorder rejected the submission that this was evidence which had to do with the alleged facts of the offence. He also rejected the submission that it could be admissible as bad character evidence on the basis that it was important explanatory evidence. He held that the evidence was in principle admissible through gateway (d), but he accepted a defence submission that it was evidence with which the prosecution were seeking to bolster a weak case. For that reason, he held, 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, and he accordingly excluded it pursuant to section 101(3). He added that for the same reason, even if he had been persuaded that no application to adduce bad character evidence was necessary, and the evidence was admissible as evidence of motive, he would have exercised his discretion to exclude it pursuant to section 78 of the Police and Criminal Evidence Act 1984.

8. The trial proceeded. The scientific evidence was read. The scientist who analysed the DNA findings said that they were what she would expect if the respondent had had contact with the handle of the screwdriver; but she was unable to comment on when he might have done so or whether he was the most recent person to have done so. She had found traces of a minor DNA profile, but these were insufficient for any meaningful comparison to be made.

9. The prosecution called as a witness the respondent's partner. She had made a witness statement to the effect that she could not vouch for the respondent's whereabouts at the time of the burglary. In her oral evidence, however, she said that she did not specifically recall the night concerned but believed that she was asleep in bed between about 11pm and about 5 or 6am, that she took medication which made her sleep heavily, and that she believed the respondent was with her at the time of the offence.

10. At the conclusion of the prosecution evidence a submission was made that the respondent had no case to answer. Mr Body submitted that the only evidence against the respondent was that his evidence had been found on a moveable item at the scene of the crime.

11. Mr Evans submitted that, in the absence of any explanation by the respondent as to why his DNA might be present on a screwdriver found at the scene of the crime, the evidence was sufficient for a reasonable jury, properly directed, to convict.

12. A number of cases were cited to the recorder, including, in particular, *R v Tsekiri* [2017] EWCA Crim 40. We shall return to that case shortly.

13. The recorder allowed the submission. He attached weight to the fact that the respondent's partner had given evidence that, as far as she was aware, the respondent had been in bed with her on the night of the burglary. In the view of the recorder, that left the prosecution in an inconsistent position. It was a material change in her evidence since another judge had rejected an application to dismiss the charge of burglary at an earlier stage of the proceedings. In the result, the recorder held that no jury could properly convict.

14. Thus, a not guilty verdict was to be entered. However, the prosecution applied for leave to bring the matter before this court. As we understand it, in view of the time which would be taken for that application to be heard, the jury were discharged.

15. In his submissions to this court, Mr Evans argues that both of the recorder's rulings were

wrong. Having accepted that the bad character evidence was in principle admissible, the recorder wrongly characterised the prosecution case as weak. As a result of that error, he wrongly excluded circumstantial evidence on which the prosecution should have been able to rely when responding to the submission of no case to answer. The recorder then fell into further error when he found that there had been a material reduction in the strength of the prosecution case since the earlier ruling on the dismissal application, and it was on that basis that he had wrongly allowed the submission of no case.

16. Mr Body submits that the disputed passage in the interview was not evidence which was of substantial importance in the case as a whole, and that for that reason the recorder should have refused to admit it as bad character evidence. If, however, the recorder had been right to find the evidence admissible, he was also right to exclude it on the ground that it was prejudicial bad character evidence being used to bolster a weak case. The recorder was also correct to find that the evidence given by the respondent's partner was so inconsistent with the prosecution case that no reasonable jury could properly convict. Mr Body submits that the evidence of that witness, that the respondent was with her in Hastings at the relevant time, directly contradicted the prosecution case that the respondent was burgling a salon in Hawkhurst. The recorder's ruling on the submission of no case to answer was accordingly correct.

17. We have reflected on these helpful submissions. The recorder was, in our judgment, clearly correct to exclude the evidence that the respondent was a drug user who owed money for drugs. The ruling was rightly specific to the facts and circumstances of this case. When interviewed under caution, the respondent had said, in passages which did go before the jury by agreement between the parties, that he was reliant on state benefits, having not worked for several years, that he and his partner had been rendered homeless about a year earlier, and that the house in which they were living belonged to a friend who allowed them to use parts of it. He gave no details of the cost of his drug use or of the amount of his drug debt, saying, as we have indicated, that it was not something over which he lost any sleep and also saying that his mother helped him out financially as and when she could. As Mr Evans fairly acknowledges, the prosecution had no basis for suggesting that there had been any recent pressing demand for repayment of the drug debt, although Mr Evans points out that the respondent had described himself as an addict to heroin and could therefore be expected to have a daily need for money to purchase drugs.

18. In all the circumstances of this case, the prosecution, in our judgment, could not rely on this evidence as providing anything other than a speculative motive to commit burglary, and so could not rely on it as evidence which had to do with the alleged facts of the offence. We accept Mr Evans' point that a drug debt may bring with it a fear of sanctions for non-payment which do not apply to other debts; but in the circumstances of this case, we take the view that that proposition adds little to the evidence before the jury of the respondent's general impecuniosity. What little it might be capable of adding was, in our view, plainly outweighed by the prejudicial effect of bringing the respondent's drug use into the case.

19. The alternative application by the prosecution, to adduce the relevant passages in the interview as bad character evidence, was in our view also correctly rejected. The recorder rightly dismissed the submission that it might qualify as important explanatory evidence. He was in our view wrong to find that it was in principle admissible through gateway (d). It could not be evidence of a propensity to commit burglary, and was not relied on as such by the prosecution. It could not, for the reason we have given, be evidence of motive in the circumstances of this case. It therefore could not be relevant to an important matter in issue, and the recorder should not, in our view, have found it admissible in principle. However, since he went on to exclude it on grounds of prejudice, he reached the correct result, albeit we would

say, with respect, that he did so for the wrong reason.

20. We turn to the submission of no case to answer. The oral evidence of the respondent's partner did not fatally undermine the prosecution case, but nor did it provide any positive support for it. Even on the view of her evidence most favourable to the prosecution, she did no more than allow for the possibility that the respondent had been absent from their home for part of the night.

21. The submission of no case therefore turned on whether a reasonable jury, properly directed, could convict solely on the evidence that the respondent's DNA was found on the screwdriver and that the respondent had given no explanation for that finding. The question for this court is whether the recorder was wrong in law to rule that the evidence was insufficient.

22. The cases cited to the recorder, and to this court, address the issue of whether a DNA profile found on a moveable object can on its own suffice to give rise to a case to answer. The most recent of those cases is *Tsekiri*. The facts in that case were that a woman sitting in her parked car was robbed by a man who opened the driver's door and attacked her. A swab taken from the exterior handle of the driver's door revealed a DNA profile consisting of a single major contributor and at least one minor contributor. The profile of the major contributor was consistent with the defendant's DNA profile, the chance of a random match with a man unrelated to the defendant being 1 in a billion. A scientist gave evidence that she could not say when the major profile had been deposited and that it was at least possible that the deposit had been by secondary transfer. It was, however, her opinion that secondary transfer was unlikely.

23. On appeal in that case, the court considered *R v FNC* [2016] 1 WLR 980, in which it had been held that evidence showing that DNA had been directly deposited in the course of the crime, and that there was a very high DNA match with the defendant, would without more be sufficient for there to be a case to answer. Following that decision, and rejecting a submission as to the effect of earlier decisions, including *R v Bryon* [2015] 2 Cr App R 21, the court held in *Tsekiri* that the fact that DNA was on an article left at the scene of the crime can be sufficient without more to raise a case to answer where the match probability is 1 in a billion or similar. Whether it will do so depends on the facts of the particular case. The court in *Tsekiri* went on, in [15]-[20], to list some of the factors which would be relevant to a fact-specific decision as to the sufficiency of the evidence.

24. In the present case, both counsel have helpfully addressed us as to the answers which they suggest should be given to those questions in the circumstances of this case. In our view, the relevant factors are as follows:

> (1) There was an overwhelming inference that the screwdriver had been dropped by the burglar and missed when the burglar was looking for it. Given the match probability, the jury could be sure that the DNA on the screwdriver originated from the respondent. On the face of it, that evidence was clearly capable of connecting the respondent to the crime. There was, however, no other evidence which connected him.
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> (2) The respondent when interviewed put forward no explanation for the presence of his DNA on the screwdriver. To that extent, he said nothing to undermine the prosecution's scientific evidence. However, the absence of an explanation could not in itself provide additional support for the prosecution case on a submission of no case to answer. In addition, we see force in Mr Body's submission that, given that the screwdriver was not shown to the respondent in interview, he was, in effect

being asked to account for how his DNA might at any time have come on to the handle of a blue handled screwdriver.

(3) The scientific evidence, although saying that the findings were consistent with the respondent having had contact with the handle of the screwdriver, was silent as to possible methods of transfer, and/or as to whether direct or indirect transfer was more probable. It was also silent as to the date when, and/or the sequence in which, the major and minor DNA profiles may have been deposited. It was silent as to whether the burglar seen on the CCTV footage would inevitably have deposited his DNA on the screwdriver, or might have handled it without leaving any detectable trace of his having done so. In the context of an item as readily portable as a screwdriver, that seems to us a significant absence of evidence. The significance of the absence of such evidence became more marked in the course of the hearing when we were helpfully told by counsel that the CCTV footage was at the very least capable of being regarded as showing that the burglar was wearing gloves when he entered the hairdressing salon. The prosecution, in our view, could not exclude a reasonable possibility that the DNA had been deposited long before the night of the burglary, and/or by direct transfer in innocent circumstances such as the respondent having at some time handled someone else's screwdriver, or having sneezed when in proximity to someone else's screwdriver, and/or by indirect transfer.

(4) There was no prosecution evidence to contradict the respondent's assertion in interview that he had no connection with Hawkhurst, or indeed with that part of Kent. There was no evidence that he owned or had the use of a moped, or that he associated with anyone who did. There was no evidence, other than the DNA finding, to contradict his account that he was at his home at the material time.

25. On that very limited evidence, the recorder was in our view correct to withdraw the case from the jury. The circumstances were certainly suspicious, but in all the circumstances no reasonable jury could safely exclude the reasonable possibility that the respondent's DNA had been deposited on the screwdriver otherwise than in the course of or in connection with the burglary.

26. For those reasons, notwithstanding Mr Evans' commendable submissions on behalf of the prosecution, we refuse this application for leave to appeal, and we confirm the ruling of the recorder. It follows that we order, pursuant to section 61(3) of the Criminal Justice Act 2003, that the respondent be acquitted of the charge of burglary.

27. We return to the statutory reporting restrictions. The effect of our decision is that by virtue of section 71(7) of the 2003 Act, they cease to have effect and there is, therefore, no restriction on the reporting of the trial or of this application.
