IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2020/00954/B3
NCN No: [2021] EWCA Crim 1545

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 12th October 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE CHEEMA-GRUBB DBE

THE RECORDER OF LIVERPOOL
(His Honour Judge Menary QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v –

JASON RICHARD INGLIS

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Mr P Jarvis appeared on behalf of the Appellant

Mr H Hewitt appeared on behalf of the Crown

J U D G M E N T

Tuesday 12th October 2021

LORD JUSTICE HOLROYDE:

1. On 25th April 2018, following a trial in the Crown Court at Maidstone before His Honour Judge Macdonald QC and a jury, the appellant was convicted of attempting to intimidate a witness. He now appeals against that conviction by limited leave of the Full Court.

2. We can summarise the facts briefly. For convenience, and intending no disrespect, we shall for the most part refer to persons by their surnames alone.

3. The appellant was previously employed by Samuel Balcombe, a builder whose business is based in Kent. Issues arose between the two men, and in April 2017 the appellant left Balcombe's employment. The appellant was aggrieved by what he regarded as Balcombe's failure to pay him his outstanding wages. As a result of that grievance he admittedly committed two offences: criminal damage on 9th May 2017, when he went to a site at which Balcombe's men were working and used a sledgehammer to damage a door frame; and fraud on 10th May 2017, when he dishonestly obtained a Saniflow device costing £460 from a builders' merchant by pretending that he was entitled to sign for it on Balcombe's account.

4. It is the respondent's case that the appellant, having on 8th June 2017 been charged with those two offences and released on bail, went on to try to intimidate Balcombe so that he would not pursue the two charges. It is alleged that between 8th June and 12th July 2017 he made threats to contact the authorities to report Balcombe for tax evasion unless the charges were dropped.

5. The appellant was arrested in relation to that allegation on 30th July 2017. He was interviewed in the presence of a duty solicitor. For the most part, he said nothing in reply to the questions he was asked. He was subsequently charged.

6. The appellant ultimately pleaded guilty to the first two offences. He therefore stood trial only on the charge of attempting to intimidate a witness.

7. Balcombe gave evidence for the prosecution. He said that he had blocked phone calls from the appellant to his mobile telephone, but had received messages from the appellant via two intermediaries: an employee, Mitchell McLauchlan, and Balcombe's cousin, Joshua Crush, then aged only 18.

8. The jury heard about four text messages, one of which was the subject of a hearsay application to which we shall return shortly. For convenience, we shall refer to them by letters of the alphabet. The appellant gave evidence to the jury and gave his account of these messages. They read as follows:

> Text A: a message which the appellant admitted he sent to McLauchlan on 9th June 2017: "You can tell Sam it's war now … day off on Monday to get the address of the Uckfield job before I call the tax office and VAT office to explain the cash jobs including Paul's."

McLauchlan forwarded this message to Balcombe.

> Text B: a message which Crush sent to Balcombe on 13th June 2017: "I hate this, I'm not getting involved any more than this ... he has told me that he won't say anything to tax man unless he gets the charges dropped and gets this difference between £700 (owed) minus £460 (Saniflow) = £240 as well 1 x day's

> lost money, £120, so £360. I don't know how much cash jobs you have done so wouldn't know if that was a good deal or not, sorry I had no choice in the matter my dad went against me and employed him."

It should be noted that the appellant, when interviewed under caution, was asked a number of questions about this message. He broke his silence by replying to one of them. In answer to a question: "He said that you won't say anything to the tax man unless Samuel drops the charges. Is that correct?", the appellant replied: "I don't know where he got that from. I don't know".

> Text C: a message which the appellant admitted he sent to McLauchlan on 14th June 2017: "What with Uckfield I reckon he's got about 45,000 extra to declare that surely should mean he should be VAT registered. But he's charging VAT at Crowborough fraud ... will take tax office advice on that".
>
> Text D: a message which the appellant admitted he sent to Crush on 11th July 2017: "OK, Sam's last chance in court on the 28th at Maidstone need to go whatever he decides only giving him one last chance cos he's your cousin. I've recorded his conversation with me about his subuent [sic] texts which I will show the court … Tomorrow I will ring the tax office and VAT".

Crush forwarded this message to Balcombe, adding the comment: "from Jason just to let you know". It should be noted that on 28th July 2017 the appellant was due to appear before the Maidstone magistrates' court in connection with the initial two charges.

9. McLauchlan had made a statement about his receipt of two of those messages, and gave evidence for the prosecution. Crush, however, had not made a statement and was not a witness in the case.

10. The trial began on 23rd April 2018. The appellant was not legally represented. He had not served a Defence Statement as he was required to do. The judge made commendable efforts to assist the appellant to understand the proceedings and to conduct his case. Unfortunately, he was not helped by the appellant, who repeatedly interrupted when others were speaking and was at times aggressive in his manner.

11. It appears that Crush had told the police that he did not want to be involved in the proceedings, and that the respondent had decided not to seek to compel his attendance. The appellant, however, had applied for a witness summons against Crush. It is not clear whether the appellant had reason to believe that Crush would give evidence which was helpful to the defence case, or whether he was under the misapprehension that he could both call Crush as a witness and cross-examine him to dispute his evidence. Be that as it may, the summons was issued on 18th April 2018 and sent to the appellant under cover of a letter which told the appellant that it was "for service by you". The appellant seems to have taken no steps to serve it until after the trial had begun.

12. By that time, the respondent had on 17th April 2018 issued an application to adduce text message B as hearsay evidence pursuant to section 114(1)(d) of the Criminal Justice Act 2003. The judge heard submissions about that application on the first day of the trial. Counsel then representing the prosecution (not Mr Hewitt, who appears for the respondent on this appeal) submitted that the text message went to the heart of the issue which the jury would have to decide and had a high probative value. When the judge pointed out that the prosecution could have compelled Crush's appearance, counsel referred to the practical difficulties that he would face if he called a witness who had not made a witness statement. He made submissions about the factors which the judge was required by section 114(2) of the Act to consider. He told the

judge that the appellant was likely to serve Crush with the witness summons that evening, and that there would be no bar to his cross-examining about the text message if Crush gave oral evidence. He submitted that the fact that both parties wished Crush to give evidence indicated that it would be in the interests of justice to admit the text message as hearsay evidence.

13. The judge, very fairly, asked counsel to make the submissions which he would have expected to be made by a lawyer instructed on the appellant's behalf. Counsel gave a guarded reply, on the basis that he did not know what the appellant's case was about the text message. The judge then asked whether the appellant objected to the admissibility of the text message. The appellant first said that he thought not, but then added that he did not understand. The judge, again very fairly, treated the appellant as having objected to the admission of the text. The appellant explained that his case was that the contents of the text had not come from anything he had said and that Crush had acted on his own initiative.

14. The judge gave a short ruling admitting the evidence. He said:

> "The material does have high probative value, for the reasons given by the Crown. The attendance of Crush as a witness is possible but uncertain. The content of the messages are apparently reliable and the defendant is able to challenge it by his own evidence, if he chooses to give it, by cross-examining Balcombe through a court-appointed representative, and by getting Joshua Crush to court for whose attendance he holds a summons, or some one or all of these, so I conclude that it is in the interests of justice to admit the message."

15. The appellant's evidence was that he only ever wanted to recover the money which Balcombe owed him. He was not concerned about the two criminal charges, which he regarded as trivial matters of no significance, and he had not done anything to try to intimidate Balcombe or to persuade him to drop the charges. Text messages A, C and D, which he admitted he had sent, were only about recovering his money. Message A, for example, meant that he would "grass Balcombe up" to the taxman if he did not get his money back. As to message B, he said that he had not encouraged Crush to send any message. He gave a detailed account of a conversation with Crush and another employee about the dispute between himself and Balcombe. He asserted that Crush had said that the whole thing was crazy and had asked the appellant "What would it take for you just to end it?". He also asserted that it had been the other employee who pointed out that the appellant was entitled to one day's wages more than he had thus far claimed.

16. At the conclusion of the appellant's evidence in chief the judge sent the jury out, and addressed the appellant about the implications of his "no comment" interview. The appellant said that he had spoken to the duty solicitor and been advised by him to make no comment, but that he had made a statement to the solicitor explaining everything. The judge told the appellant that he was perfectly entitled to tell the jury that he had received and followed legal advice to make no comment, but said that the appellant "shouldn't go beyond that" because it may open up private matters which he did not want the jury to hear. The judge confirmed with prosecuting counsel that he intended to cross-examine about the failure to mention matters now relied upon in the appellant's defence, and reiterated to the appellant that reference to making a statement to the duty solicitor was "the sort of thing that you do not want to go into". He explained that this was all about something called legal professional privilege and said to the appellant:

> "Just take it from me, do not go there, just stick to 'I was advised to make no comment and that's why I made no comment'. I am not saying you will not be cross-examined about it, but it would be dangerous to go beyond those answers."

17. In cross-examination the appellant admitted that it was he who had given Crush the figures which are mentioned in message B. As to the remainder of that message, he said that Crush had either misunderstood or had made it up. As to the failure to mention matters in interview, the appellant said that he had followed the solicitor's advice.

18. The judge gave directions in his summing-up about the hearsay evidence of Crush and about the possible inference which the jury might draw from the appellant's failure to mention matters in interview.

19. The jury returned a guilty verdict. On 31st May 2018 the judge sentenced the appellant to 12 months' imprisonment on that charge, and imposed no separate penalty on the other two offences.

20. Nearly two years later the appellant applied for a very long extension of time in which to make an application for leave to appeal against conviction. He raised a number of grounds to the general effect that he had not had a fair trial, and made unfounded allegations of collusion between the judge and prosecution counsel.

21. The application was refused by the single judge. On 5th March 2021, however, the Full Court granted the extension of time and leave to appeal on two grounds. The Full Court also issued a representation order, as a result of which this court has had the benefit of written and oral submissions by Mr Jarvis.

22. The first ground of appeal is that the judge was wrong to admit text message B as hearsay. Mr Jarvis submits that there was an important issue at trial as to the credibility and reliability of Crush's assertion in message B that he was reporting to Balcombe what the appellant had said. He complains that the prosecution's application was made very late, with no good reason for the delay, thus making it particularly difficult for the unrepresented appellant to deal with it. He submits that the prosecution could have summonsed Crush to attend court, and should have done so if they wished the jury to hear evidence which they asserted was of high probative value. He further submits that, as the judge suggested at one point during the submissions, the determination of the application to admit the message as hearsay should have been deferred until Crush either was or was not called as a witness by the appellant. The judge's decision to grant the application when he did gave rise to unfair prejudice which could not be cured by leaving it to the appellant to call Crush, because that would require the appellant to call a witness whose evidence he disputed.

23. Mr Jarvis relies on the principle, stated in *R v Riat* [2012] EWCA Crim 1509 at [20] and in other cases, that section 114(1)(d) should not be used to circumvent the statutory conditions of admissibility which fall to be considered under sections 116 to 118 of the Act. He submits that where, as here, the circumstances of a witness' absence cannot be brought within section 116, there should not be a routine admission of a hearsay statement under section 114(1)(d). He further submits that the text message was double hearsay, and that the judge should therefore have considered the additional requirements under section 121 of the Act. For those reasons, he argues that the admission of the hearsay evidence renders the conviction unsafe.

24. In reply to this first ground, Mr Hewitt submits that the lateness of the application was only one of the factors which the judge had to consider. The judge properly addressed, during submissions, all the other relevant considerations, and was entitled to rule that the text message was admissible as single hearsay. He submits that this court should not interfere with the trial judge's exercise of judgement on those considerations unless he either proceeded on wrong principles or reached a wholly unreasonable decision, which, he says, is not the position here. The appellant had not objected to the application, and it was open to him to call Crush if he wished. Moreover, the appellant was able to and did give evidence denying that he had said what Crush reported. Mr Hewitt points to the fact that the sequence of the four text messages began the very day after the appellant was charged, and that text message D, which the appellant admitted that he had sent to Crush, clearly conveyed a threat to report Balcombe to Her Majesty's Revenue and Customs if the charges were not dropped. In the light of the messages as a whole, and in particular message D, he submits that the conviction cannot be regarded as unsafe on this first ground.

25. The second ground of appeal is that the judge, though doubtless acting with the best of intentions, wrongly prevented the appellant from putting before the jury evidence which he wanted to give to the effect that he had given a full statement of his case to the duty solicitor, and to seek thereby to rebut any inference that he had remained silent in interview because he did not then have a case to put forward. The judge did not tell the appellant that he could if he wished waive his legal professional privilege. Instead, he told the appellant not to mention the fact that he had given a full account to his solicitor before the interview began. The appellant having been deprived of the choice which he was entitled to make, and thus of the opportunity to present an aspect of his case which he seems clearly to have thought important, the conviction, submits Mr Jarvis, is unsafe.

26. In reply, Mr Hewitt submits that the judge did no more than warn the appellant of the risks he would be taking if he went beyond an assertion that he had received and followed the solicitor's advice to make no comment. That, he submits, does not render the conviction unsafe. Even now, he points out, there is no evidence before the court as to what the appellant said to the solicitor. Mr Hewitt further submits that there was in reality very little scope for the jury to draw an adverse inference from silence so far as the text messages were concerned. The appellant admitted sending three of them, the contents of which spoke for themselves, and the contentious fourth message was the one topic on which the appellant had given a reply in interview.

27. We are grateful to both counsel. We have summarised their respective arguments very briefly, but we have reflected on all they have said.

28. The indictment alleged an attempt, contrary to section 1 of Criminal Attempts Act 1981, to commit an offence contrary to section 51 of Criminal Justice and Public Order Act 1994, which, so far as material, provides:

> "(1) A person commits an offence if –
>
> (a) he does an act which intimidates, and is intended to intimidate, another person ('the victim'),
>
> (b) he does the act knowing or believing that the victim is … a witness or potential witness … in proceedings for an offence, and

(c) he does it intending thereby to cause the … course of justice to be obstructed, perverted or interfered with.

…

(3) For the purposes of subsection (1) … it is immaterial that the act is or would be done, or that the threat is made –

(a) otherwise than in the presence of the victim, or

(b) to a person other than the victim.

…

(5) The intention required by subsection (1)(c) … above need not be the only or the predominating intention … with which the act is done … .

…

(7) If, in proceedings against a person for an offence under subsection (1) above, it is proved that he did an act falling within paragraph (a) with the knowledge or belief required by paragraph (b), he shall be presumed, unless the contrary is proved, to have done the act with the intention required by paragraph (c) of that subsection.

…"

29. It is clear from those provisions that the offence could in law be committed by the appellant trying to intimidate Balcombe through the intermediaries of McLauchlan and Crush, and that it was sufficient for the prosecution to prove that the appellant intended to cause Balcombe to drop the charges even if he also intended to cause Balcombe to pay what the appellant claimed was due to him.

30. If Crush had given oral evidence, it would have been admissible for him to give direct evidence that the appellant said what is reported in message B. In his absence, that message was hearsay evidence that the appellant had said what was reported. We do not accept Mr Jarvis' submission that it was double hearsay, and we therefore do not think it necessary to consider the requirements of section 121 of the 2003 Act.

31. It is, however, necessary to refer to sections 114 and 116 of the 2003 Act. Section 114 provides:

"(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –

(a) any provision of this Chapter or other statutory provision makes it admissible,

(b) any rule of law preserved by section 118 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d) the court must have regard to the following factors (and to any others it considers relevant) –

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue on the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) he circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings."

32. Section 116 sets out criteria of admissibility which must be met when application is made to adduce hearsay evidence where a witness is unavailable for one of five reasons. The reasons are that the witness is dead; or is unfit to be a witness because of his bodily or mental condition; or is outside the United Kingdom, and it is not reasonably practicable to secure his attendance; or cannot be found (although such steps as it is reasonably practicable to take to find him have been taken); or does not give evidence through fear.

33. There was no evidence that any of those situations applied in Crush's case. It is clear that the prosecution had been able to make contact with Crush at some stage. No reason has been suggested why the prosecution could not have done so again in advance of the trial if they had wished. Paragraph (g) of subsection 114(2) was therefore a particularly important factor. The reality, as it seems to us, is that the contents of message B were probative of the prosecution case, and the prosecution wanted that evidence before the jury as part of their case; but they preferred not to take the risk inherent in compelling the attendance of, and calling, a witness who had previously declined to provide a statement.

34. In the circumstances of this case, that was not in our view an appropriate basis on which to invoke section 114(1)(d). If the prosecution wanted to prove that message B was an accurate report of what the appellant had said, it was incumbent on them to take proper steps to secure Crush's attendance at court so that he could give oral evidence about it. We emphasise that that is not because fairness required that Crush be tendered as a witness for cross-examination by the appellant; it is for the more fundamental reason that the prosecution actively wanted to adduce the evidence before the jury and should therefore have taken proper steps to do so by oral testimony. Had they taken proper steps, but failed, the position may well have been different. The fact that the appellant would be able to give evidence himself about what passed between him and Crush might well have been a weightier factor in favour of admitting the hearsay. But as it was, the prosecution did not put forward, or even take steps with a view to putting forward, any good reason why a witness they regarded as important could not be called. They took what we regard as an inappropriate short cut, the effect of which was to secure the contents of message B as part of the prosecution case whilst denying the appellant any opportunity to challenge its reliability by cross-examination.

35. The prospect that Crush would be called by the appellant did not in our view strengthen the prosecution's hearsay application. On the contrary, it provided at best a reason why it was premature to grant the application before it was known for sure whether Crush would give oral evidence. In those circumstances we conclude, with all respect to the judge, that he was wrong to grant the hearsay application as and when he did.

36. The second ground of appeal illustrates the difficulties which can be faced by a judge when a defendant is unrepresented. We commend the judge for the efforts he made to assist the appellant. In addressing the appellant as he did about the risks of an inadvertent waiver of legal professional privilege, we have no doubt that the judge was trying to assist him. Unfortunately, in circumstances where it was clear that the appellant did want to refer to his statement to the solicitor, whether or not it was in his own best interests to do so, the judge did not make sufficiently clear that the appellant had a choice. He did not sufficiently explain that the appellant could waive his legal professional privilege if he wished to do so. We think it is clear that the appellant understood the judge at least to have advised him in strong terms, and perhaps even to have ordered him, not to repeat to the jury his assertion that he had explained everything in a statement to the solicitor. We also think it clear that the terms of the relevant part of the cross-examination of the appellant were such that he might have wished to waive his privilege, and may well have refrained from doing so because of what the judge had said.

37. We therefore accept Mr Jarvis' submission that the judge fell into error in two respects. We turn to consider whether those errors, individually or collectively, render the conviction unsafe.

38. We see some force in Mr Hewitt's argument that the jury could safely infer an intention to cause Balcombe to drop the charges from the facts that the relevant text messages started very shortly after the appellant had been charged, and culminated in message D, which linked Balcombe's "last chance" to the appellant's forthcoming appearance before the magistrates' court. We are, however, satisfied that message B, which directly refers to the intention alleged by the prosecution, sheds a strong light on the other messages, such as to affect the way the jury would read those other messages. Without message B, the meaning even of message D may be regarded as ambiguous. We have come to the conclusion that if message B had been excluded from the evidence, as it should have been, the jury may have been uncertain as to whether the appellant was seeking to intimidate Balcombe into dropping the charges, as opposed to paying him money, and may therefore have reached a different verdict.

39. As to the second ground, we have considered carefully whether the appellant in fact suffered any real prejudice. We again see some force in Mr Hewitt's point that the appellant has not made any submission to this court as to what he would have said and done if advised of the possibility of waiving his legal professional privilege, and that no attempt has been made to put before this court the contents of any statement said to have been made to the solicitor. We are nonetheless troubled by the fact that the judge inadvertently deprived the appellant of a choice which the appellant was entitled to make, with the consequences that the appellant was cross-examined on a basis which he wished to rebut and that the jury were then directed that they might draw an adverse inference from his failure to mention matters on which he now, apparently belatedly, relied.

40. Although it has not been raised as a distinct ground of appeal, our concern is increased by noticing, in the course of today's submissions, that the judge's direction to the jury could in any event be criticised as failing to refer to the fact that the appellant, when interviewed, had at least partly stated his case in respect of message B.

41. We conclude that the combined effect of the matters to which we have referred, both of which were significant in the context of the principal issue in the trial, is such that the conviction cannot be regarded as safe. We therefore allow this appeal and quash the conviction.

42. Mr Hewitt, as we understand it, the appellant had served his sentence before even launching this appeal. Is there anything you want to say about a retrial?

43. **MR HEWITT:** I do not have instructions on that, my Lord.

44. **LORD JUSTICE HOLROYDE:** Well, you should have.

45. **MR HEWITT:** Yes.

46. **LORD JUSTICE HOLROYDE:** It is an appeal against conviction. If there was any question of the prosecution seeking a retrial, counsel should be ready to say so.

47. **MR HEWITT:** Indeed, and I apologise for that, my Lord. As I say, I do not have specific instructions on that point, so I am not saying at this moment that that is what the prosecution would seek to do.

48. **LORD JUSTICE HOLROYDE:** Mr Hewitt, thank you. It does not seem to us that it would be appropriate to order a retrial in circumstances where the appellant has served the entirety of the sentence.

49. **MR HEWITT:** Indeed.

50. **LORD JUSTICE HOLROYDE:** Thank you both.

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