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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 284



No. 202101561 B4

Royal Courts of Justice

Tuesday, 15 February 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE HILLIARD
HIS HONOUR JUDGE CONRAD QC

REGINA

V

JUNIOR HENRY

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Mr. P. Bown appeared on behalf of the applicant.
The Crown were not represented.

J U D G M E N T

LORD JUSTICE STUART-SMITH:

- 1 On 28 April 2021 in the Crown Court at Nottingham before Mr Recorder Crowe and a jury, the applicant, who was then aged 36, was convicted of the two offences to which we refer below. On 15 June 2021 the applicant was sentenced as follows: on count 1 of the indictment, which was an offence of attempted robbery, contrary to s.1(1) of the Criminal Attempts Act 1981 and s.8(1) of the Theft Act 1968, upon his conviction he was sentenced to five years' imprisonment. On count 2, which was a count of robbery, contrary to s.8(1) of the Theft Act 1968, upon his conviction he was sentenced to five years, concurrent. The total sentence was therefore five years' imprisonment.
- 2 He now renews his application to appeal against those convictions, permission having been refused on the papers by the single judge. The single issue in the application and proposed appeal is whether the recorder should have excluded a hearsay statement by one of the victims of the offences, Mr Sisson, in which he identified the applicant as one of three men who had committed the offences when they broke into his house on 2 July 2018. Mr Sisson had died between July 2018 and trial. His statement was therefore admissible pursuant to s.116(2)(a) of the Criminal Justice Act 2003.
- 3 In a carefully structured ruling the recorder said that it was agreed before him that the ultimate question for him to answer was whether the principle of fairness permitted the evidence to be introduced, bearing in mind s.78 of the Police and Criminal Evidence Act. He addressed the issues before him under three questions which he derived from the cases to which he had been referred, namely *R v Horncastle*, *R v Al-Khawaja* and *R v Ibrahim*.
- 4 The three questions were: (1) whether the hearsay evidence was the sole or decisive evidence against the applicant; (2) whether the evidence could be shown to be unreliable, and (3) to what extent could counter-balancing measures be applied to ensure fairness.
- 5 It is not submitted that the recorder erred in law in formulating these questions. The issue before us is whether he reached the wrong conclusion when answering the questions and applying the principles which they embodied. Put shortly, it is the applicant's case that the discrepancies in the evidence, most particularly about whether all three men were wearing balaclavas or only two, and the difficulties facing the applicant in defending himself, mean that the recorder's decision was not merely wrong but *Wednesbury* irrational.
- 6 In order to consider that issue it is necessary to look at the facts, many of which were agreed, in a little detail. The robbery occurred at Haggnook Lodge, Kirkby Road in Ravenshead. The large grounds of the property were fully enclosed and secured from the road by two electronic gates. Just after 10.00 p.m. Mr and Mrs Sisson were in their living room. An unlocked side door was thrown open and three men, referred to as male one, male two and male three by Mr Sisson, dressed in black, stormed in shouting that they were the police. The men assaulted the residents. They asked for the location of the safe and the money, but were told there was no safe, that forming the basis for count 1. One man, described by Mr Sisson as male one, whilst holding a knife, threatened to cut off Mrs Sisson's head. When none of the men were watching her, Mrs Sisson managed to escape and ran to a nearby supermarket from where she called the police. The three men left, taking two iPhones, phone cases, a landline handset and Range Rover car keys, that forming the basis for count 2.
- 7 It was the prosecution case that the applicant was one of the three men who entered the house. When the recorder ruled on the admission of hearsay, there was ample evidence to place the applicant in close proximity to the Sisson's home. Cell site evidence from his

mobile phone and CCTV evidence showed that on the evening in question the applicant's mother's Mercedes car was driven from his home address in Nottingham to a lane close to the scene of the offences. It was in the lane from some minutes before the time of the offences until shortly after they had been committed, when Mr and Mrs Sisson separately called 999. It was then driven back to Nottingham.

- 8 A police tracker dog followed the trail from the Sisson's home to where the Mercedes had been located. There was also significant and detailed evidence from two independent witnesses about the presence of the Mercedes. A Mr Caunt was driving a vehicle with his friend David Loveridge and his partner as passengers. Ahead of him on his side of the road he saw a white Mercedes stopped with its hazard lights on. Its near-side door was open. As he overtook, he was unable to see who was inside but noticed three males on the pavement walking towards the junction in a line behind each other, like, as he described it, the cover of the Beatles' Abbey Road album. He believed the three people were linked to the car, as no one else was around. They were close to the Mercedes and the vehicle door was open. He asked Mr Loveridge to note the vehicle's licence plate and the time in his phone, as it seemed odd for the car to be stopped there and for three people to be walking in that manner. The Mercedes drove behind his car before turning off. At no point did he see anyone tap on the driver's window or the driver put down their window. He said that any person approaching the vehicle would have been in the middle of the road.
- 9 Mr Loveridge said that at 10.00 p.m. he saw a Mercedes stopped in the carriageway with its hazard lights on. The rear passenger door towards the kerb was wide open. He saw the last of three people who were walking on the pavement leave the Mercedes. He also saw the driver. He found it difficult to identify them other than describing them as Asian or black. He looked out of the rear window of Mr Caunt's vehicle and entered the registration of the Mercedes into Mr Caunt's phone. The Mercedes then drove behind them before turning right. He too said that he did not see anyone go to the driver's door and knock on the window.
- 10 At trial, giving evidence after the recorder had ruled on the admission of the hearsay that is the subject of this appeal, the applicant admitted being in the Mercedes and in the location at the relevant time. His explanation, which he did not give when initially interviewed by the police, was that he had gone there to meet a girl called Shelly with whom he had been in contact on Snapchat, but that when she failed to respond to his messages he gave up and drove home again. According to him, he was alone in his vehicle, no-one got in or out of it, the door on the passenger side to which Mr Loveridge and Mr Caunt referred was never opened. The most that had happened was that while he was stationary in the car a person had come up to the car and asked him for directions, but he had been unable to assist and had driven off. He said that he had not given this explanation when interviewed because he had been following his solicitor's advice to go, "No comment".
- 11 We therefore turn to consider the critical evidence in the case about what happened in the house, which came from Mr and Mrs Sisson. As we have said, each of them separately called 999. This was because Mrs Sisson had escaped from their home and made her way to the nearby supermarket from which her 999 call was made, initially by someone from the supermarket who then handed over to Mrs Sisson, while Mr Sisson remained at home, and made his call from there, thinking initially that his wife had been abducted. Their 999 calls, therefore, represented their first and most contemporaneous account.
- 12 In answer to a question from the operator, Mr Sisson said, "[...] three black lads. They've got balaclavas on". Early on in Mrs Sisson's call the person who was initially assisting her said, "She cannot really speak. There's [...] three masked men and her husband's in the

house." Later, when Mrs Sisson came on the phone, she was asked if she recognised any of the men, to which she replied, "No, I didn't. They'd got masks on", and when asked, "Right, so were their balaclavas all black?", she said, "Yes".

- 13 Both Mr and Mrs Sisson provided witness statements dated 2 July, the date of the offences. Mrs Sisson's 2 July 2018 statement was read by agreement. Her evidence was that three men burst into their home, "dressed all in black and wearing balaclavas". One of them had dragged her to the kitchen, where he had picked up a knife and threatened to cut her head off. She saw another of the men hit her husband. Whilst the men were looking for mobile phones to take, she managed to slip away and escape to the nearby supermarket.
- 14 The admission of Mr Sisson's 2 July 2018 statement was not opposed. He too described three men bursting into his home. He said, "I saw instantly that two had balaclavas on. The third was covering his face with his hand." He described the man who he said did not have a balaclava as male three. He said that it was male three who dragged his wife to the kitchen but that he had come back shortly after to where Mr Sisson was being held by the man he described as male one. At that point Mr Sisson thought he recognised male three, perhaps through ownership of one or more of his shops and he said, "Don't I know you?" Male three then moved out of his sight. The men all left. He found that his wife was missing and he called 999. In his witness statement he gave a detailed description of male three as being black and having a Caribbean style colouring. He was clean-shaven and had a full head of hair cut very short, just long enough to start to curl. He was perhaps six feet tall and of athletic build. Mr Sisson said, "I don't know that I would be able to recognise him again, but I would be willing to take part in an identification procedure as I would not rule out being able to recall him."
- 15 Mr Sisson's second statement provided evidence of a police identification procedure where he had identified the applicant as being male three. We shall refer to this as "the identification evidence". The applicant objected to its admission, which led to the ruling which is now subject to criticism.
- 16 We have already outlined the principles that the recorder set out for himself to apply. Dealing with the first question, he held that the identification evidence was not the sole evidence against the applicant and that this was conceded. He referred to the circumstantial evidence, which we have summarised above, which he held was capable of supporting the identification evidence. He rejected the applicant's submission that the identification evidence was decisive, holding that "[i]t forms part of a number of pieces of evidence that when pieced together formed the prosecution case." Elsewhere, he referred to the identification evidence as being "key".
- 17 Turning to the second question, he rejected the submission that the contents of the 999 calls about the wearing of masks and Mrs Sisson's evidence that all three were masked rendered Mr Sisson's evidence inherently unreliable. In doing so, he referred to the fact that Mr Sisson's 2 June 2018 statement contained a reasonable description of male three and that there was nothing to suggest that Mr Sisson was incapable of making an identification. Any inconsistencies, in his view, could and would be matters for the jury to weigh up.
- 18 In answering the third question, the recorder was satisfied that there were a number of counter-balancing measures that could be taken. They included: first, highlighting the inconsistencies upon which the applicant relied. Second, the corroborating evidence that formed part of the jigsaw of the prosecution case which was to be given by live witnesses and could be challenged in the normal way. Third, that it was open to the defendant to give evidence as, in the event, he chose to do. And, fourth, clear and concise directions on the

law of hearsay, the need to take care, the fact that the evidence of Mr Sisson had not been challenged, the inconsistencies in the evidence and the need for a Turnbull direction would all serve as counter-balancing measures. We interpose here that we are unable to accept Mr Bown's submission today that these are not to be regarded as counter-balancing measures. In our judgment, they are properly to be regarded as matters that act as a counter-balance to the difficulties caused by the inability to cross-examine Mr Sisson.

19 Returning to the central question of fairness, the recorder said:

"I have, as I must, had regard to s.114(2) and the interests of justice consideration set out therein in considering whether fairness can be maintained, and in my judgment it can. The statement (containing the identification evidence) has clear probative value, assuming it is to be true. Other evidence can be given, including from the defendant, on the matter. The evidence remains important in the case and in the context of the case as a whole, and the circumstances in which the statement was made can be evidenced fully before the jury. I have already mentioned the reliability of the maker of the statement, how that can be dealt with and the evidence of the making of the statement. Alternative oral evidence can be given in relation to the corroborating evidence, and although there obviously is an impossibility in cross-examining Mr Sisson, the reliability of his statement can be challenged through all of the mechanisms that I have already outlined.

Accordingly, bearing all matters in mind, I accede to the prosecution application. The evidence is admissible under s.116(2)(a), and I reject the defence application under s.78 to exclude the evidence as having such an adverse effect on the fairness of the proceedings that it ought not to be admitted."

20 In due course, the recorder gave a balanced and fair summing-up which highlighted the necessary points in the applicant's favour, as he had foreshadowed on his ruling on hearsay. There is no criticism of the summing-up, nor could there be. The challenge in this proposed appeal is to the hearsay ruling.

21 In his written grounds of appeal Mr Bown, who was trial counsel and who now acts pro bono on Mr Henry's behalf, listed eight separate grounds. We mean no disrespect to him in saying that the main thrust of his submissions, both written and oral, was that the recorder failed to have due regard to the inconsistencies in the evidence, the asserted unreliability of the identification evidence and the difficulties that the applicant would face; and that these features of the case rendered the trial and the conviction unsafe.

22 We accept that the identification evidence could reasonably be regarded as "key", but it was not the sole evidence against the applicant. At the time of the hearsay ruling there was significant circumstantial evidence to support the prosecution case that the applicant was one of the men who entered the house, even though there was no other evidence directly placing him inside the home. Even if the identification evidence is regarded as decisive, this would not automatically require its exclusion.

"Where a conviction is based solely or decisively on the evidence of absent witnesses, the court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence it would constitute a very important factor to balance in the scales, to use the words

of Lord Mance in *R v Davis*, and one which would require sufficient counter-balancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counter-balancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable, given its importance in the case." (See *Al-Khawaja v United Kingdom* [2012] 54 EHRR 23 at paragraph 147, and see *R v Horncastle* [2004] EWCA Crim 964.)

- 23 It is plain from the recorder's formulation of the questions he had to answer that he had these principles well in mind. Specifically, he considered and listed the counter-balancing factors, which included the strong procedural safeguards provided by clear and concise legal directions to the jury, both written and oral, which he duly provided.
- 24 Furthermore, in our judgment he was both entitled and correct to conclude that a fair assessment of the reliability of the identification evidence could be made by a jury having regard to all the points that would be made about it. Those points included points that favoured the applicant, such as at that Mr Sisson could not be cross-examined on his evidence and the discrepancy about whether two of the men or three were masked, but they were not all one way. There is nothing inherently unreliable about the identification procedure that was adopted, though the jury were properly directed on the caution that was required, as in any identification case, and it is to be remembered that the identification procedure took place in the light of Mr Sisson having said on the date of the offence in the statement that was admitted by agreement: (a) that one of the men was not masked; (b) that he thought at the time that he recognised him, and (c) that he thought he may be able to identify him again.
- 25 It may also be put into the balance that if the third male was wearing a balaclava throughout, Mr Sisson's evidence in giving a description including the length of the hair would appear to have been knowingly false. There is no obvious reason why Mr Sisson should have chosen to embellish his evidence in this way very soon after the happening of the traumatic events in his home.
- 26 In our judgment, the applicant's submission places too much weight on the discrepancies that can be identified between the evidence of Mr and Mrs Sisson. We accept that it would have been more sensible for all three robbers to hide their identities by wearing masks, but we consider that neither the contents of the 999 calls, nor the fact that Mrs Sisson's witness statement said that all three men were masked, nor any inherent unlikelihood of one robber failing to mask himself are arguably sufficient to justify the exclusion of the identification evidence.
- 27 Turning to the interests of justice test and the provisions of s.114(2) of the Criminal Justice Act 2003, the recorder expressly considered the relevant factors in the passage we have set out above. We are not persuaded that it is reasonably arguable that the recorder's conclusion was wrong.
- 28 Before reaching our conclusion on this renewed application, and in the light of Mr Bown's trenchant oral submissions, we have also stood back and considered whether there is reason to consider that this conviction was or may have been unsafe. We do not consider it to be arguable that it was. The jury ultimately convicted the applicant on evidence that was cogent and strong and with the benefit of clear, thorough and concise directions from the recorder.

29 For these reasons this renewed application is dismissed.

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