WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making are that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 1408

Case No: 2022/03698/B5

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 9th November 2023

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE SAINI

MRS JUSTICE STEYN DBE

R E X

- v -

DARREN DAWSON

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr J Dunning appeared on behalf of the Appellant

Miss K White appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 9th November 2023

LORD JUSTICE MALES:

Introduction

1. On 1st December 2022, following a trial in the Crown Court at Great Grimsby before His Honour Judge Thackray KC and a jury, the appellant, Darren Dawson (then aged 33) was convicted of robbery. On the following day he was sentenced to seven years' imprisonment.

2. There were two co-accused, Zack Tingle and Thomas Mobbs, both of whom were also convicted.

3. The appellant now appeals against conviction by leave of the single judge.

The Facts

4. On 19th July 2021, at around 8 pm, Ian Clementson was subject to a violent attack by three men. He was caused significant injuries, and £40 in cash was taken from him.

5. Mr Clementson had been walking back to his accommodation from a local pub where he had had dinner, when he was hit from behind without warning. Two of the attackers punched him while the third pulled his bag from him. He was then escorted by the attackers to a nearby cash machine, where he was made to withdraw £40 in cash in exchange for the return of his belongings.

6. As part of the investigation, CCTV was recovered from the convenience store, Booze Master, where the cash machine was located and from a residential address on Teale Street, where the attack had occurred.

7. The CCTV footage from the cash machine showed the victim initially attending with a single male, who was wearing a blue puffer coat. The prosecution case was that this was the appellant, Darren Dawson. Two further males attended shortly afterwards. The CCTV showed the victim withdrawing cash which was handed to the first male, before all three males left together.

8. One of these men was the co-accused Zack Tingle. He was wearing a pale blue T-shirt with a design on the front, white shorts and black trainers. Similar clothing was recovered from a search of his address on 22nd July 2021. During his police interview on 23rd July, Tingle accepted that an incident had occurred at which he had been present but denied that he was involved.

9. The appellant was later identified as a suspect. During his police interview he denied being involved in the robbery and subsequently answered "No comment" to all questions asked.

10. On 3rd August 2021, the co-accused Thomas Mobbs was identified from a still image by Detective Constable Wressell. He was arrested on 5th September 2021. At the outset of his police interview he denied that he was involved and thereafter answered "No comment" to all questions asked.

11. CCTV footage was later obtained from Sheffield Street. It showed males, similarly dressed as the robbers, both before and after the robbery. The appellant lived at 42 Sheffield Street.

12. The footage from before the robbery begins at 7.20 pm and continues up to 7.50 pm. The CCTV footage at the cash machine was at 8.02 pm, and the CCTV footage from

Sheffield Street after the robbery was at 8.20 pm, when the three men are seen returning, a minute after the victim is also seen on the same footage. The evidence was that it would take four or five minutes to walk from Sheffield Street to the location of the robbery.

13. The prosecution case was that the appellant and the two co-accused were the three males who jointly participated in the robbery. Their case was that CCTV footage from Sheffield Street showed the appellant leave his address with the co-accused Tingle a few minutes before the robbery and that all three co-defendants returned to the vicinity of the appellant's address within a few minutes after the robbery. In particular, the prosecution said that it was the appellant who was seen to leave the address on Sheffield Street where he lived.

The Issues at the Trial

14. So far as the appellant was concerned, the issue was whether he was the person seen on the CCTV wearing the blue puffer jacket, who had taken a leading part in the robbery. To prove the case against him, the prosecution relied on the following matters:

> (1) The evidence of the victim, Ian Clementson. He described the force of the initial punch to his left temple and the subsequent punches by the attackers, one of which caused a fracture to his skull. He said that there were three attackers. Two of them were punching him and the third, the tallest of the three, tried to take his bag off his shoulder. He gave descriptions of all three attackers. The tallest was about six foot, slim with short dark hair and in his mid-30s. He described one of the other males as the youngest, around 25 years old, with short, light brown hair, five foot five or six inches tall and slim. The third male was five foot ten, with dark, cropped hair and slim. He was wearing a blue puffer coat. This man seemed to be the ringleader. The "tall guy" had handed his bag to the male in the blue puffer and the shorter male

had wandered off. Mr Clementson confirmed that the three males shown on the CCTV near the cash machine were the three people involved.

(2) The evidence of identification of DC Curry. She was the officer who arrested the appellant. She viewed the CCTV footage three times and identified the male in the footage as the appellant.

(3) The CCTV footage from the cashpoint.

(4) The CCTV footage from Sheffield Street, where the appellant lived.

(5) The seizure of the distinctive clothing worn by the robber, namely a pair of blue jogging bottoms with a white stripe down the leg and a distinctive blue baseball cap with a logo on the front, both of which were seized from the appellant's address. This occurred some time after the robbery, when the appellant had been identified as a suspect. However, no puffer jacket was found at his address.

(6) The fact that the appellant had a tattoo on his neck, similar to that seen on the male in the CCTV footage of Sheffield Street.

(7) Evidence of the appellant's bad character as evidence of propensity.

(8) Adverse inferences from the appellant’s failure to give evidence.

15. The appellant's defence was one of mistaken identification. He denied any involvement in the offence.

16. The co-accused Mobbs also denied presence. The co-accused Tingle admitted presence, but denied participation.

17. The appellant's defence relied on the following evidence to show that the identification of him was mistaken:

(1) The fact that no identification procedure took place in respect of the appellant. This was an agreed fact which formed part of the evidence before the jury.

(2) The fact that at an early stage of the investigation DC Belton had identified the man wearing the puffer jacket shown on the CCTV at the cash machine as a man called Nathan Norton. DC Belton made a witness statement in which he was firm in his identification of Nathan Norton.

(3) The blue puffer coat and red T-shirt worn by the lead robber were not found at the appellant's address.

<u>The Application to Discharge the Jury</u>

18. The jury retired to consider their verdicts at around 3 pm on 1st December 2022. While the jury were in retirement, prosecution counsel (who had just herself been made aware by the officer in the case) informed defence counsel that, contrary to the agreed fact, there had after all been an identification procedure in respect of the appellant. The identification procedure was negative, in that the victim failed to pick out the appellant.

19. While counsel were discussing how to deal with this matter, the jury indicted that they

had reached verdicts. The jury note is timed at 3.30 pm – no more than half an hour after their retirement. Before verdicts were taken, counsel raised the issue with the judge; and counsel for the appellant applied to discharge the jury.

20. The judge refused the application to discharge the jury without giving reasons at that stage, and proceeded to take verdicts. The jury returned unanimous guilty verdicts in respect of all three defendants and sentence was adjourned to the following day.

21. On 2nd December 2022, prior to sentence, and having enquired what role the appellant's legal team played in the identification procedure, the judge gave his reasons for refusing the application to discharge the jury. After expressing his surprise that the defence agreed to the formal admission that no identification procedure had taken place, and commenting that it had been inappropriate for defence counsel to have asked the jury in his closing submissions to consider why there had been no identification procedure, when no such question had been asked of the officer in the case, the judge accepted that the prosecution should have disclosed that there had been a negative identification procedure and that this would have been a point on which the defence would have relied, but concluded that the point was of no significance whatever. He said that the likelihood of the victim being able to identify anybody was extremely low. He had been hit from behind to the side of his head, with significant force. His glasses were knocked off and he received further blows to the head with such ferocity that his skull was fractured. He was undoubtedly in shock while being escorted to the cash machine without his glasses. Accordingly, the fact that he had failed to identify the appellant carried no weight. Moreover, in the judge's view, the evidence against the appellant was overwhelming. He summarised this under eight headings:

(1) The jury were able to see the CCTV footage of the man said to be the appellant at the cash machine. The judge described the footage as "of

extremely good quality", and the jury were entitled to look at it repeatedly and to compare it with the appellant in the dock.

(2) The jury were able to rely on the evidence of DC Curry, who identified the appellant from the same footage, having arrested him and transported him to the police station, where she interviewed him.

(3) It was an inevitable conclusion that the man seen on Sheffield Street, where the appellant lived, was the same man, wearing identical clothing, who had escorted the victim to the cash machine.

(4) The man seen on Sheffield Street was seen repeatedly to enter and to leave the appellant's address, as well as the house next door, which belonged to his sister.

(5) Distinctive clothing, namely a cap and jogging bottoms with a blue stripe, was recovered from the appellant upon his arrest.

(6) The man seen on Sheffield Street could be seen to have a tattoo on the back of his neck, which was red in colour and the same shape as the tattoo on the back of the appellant's neck (an Arsenal Football Club badge).

(7) The appellant had not given evidence.

(8) The appellant had previous convictions involving similar behaviour on two occasions, both involving violence.

22. The judge concluded:

> "… in view of the overwhelming mountain of evidence against the defendant, the significance of a negative identification parade by a man who was in shock, without his glasses and suffering from a fractured skull was neither here nor there and in my judgment, although of course I concede that disclosure of the negative identification parade should have taken place, whether the defence were involved or not before the trial or at the very least during the trial, its late disclosure after the jury reached their verdicts did not justify this jury being discharged."

23. In fact, the existence of the negative identification procedure was disclosed after the jury had retired, but before they reached their verdicts, although in view of the speed with which they did so, they had reached verdicts by the time the judge was notified of the position.

24. The judge added that, in reaching his conclusion, he had balanced "the interests of justice to the defence and the prosecution", taking account, among other things, of the fact that if he had discharged the jury, the victim would again have to give evidence several months in the future when a retrial could be arranged.

The Submissions

25. For the appellant, Mr Dunning submitted that the judge should have discharged the jury once it came to light that a negative identification procedure had taken place, contrary to the agreed fact which was put before the jury. By that stage, as the jury had indicated that they had reached verdicts, it was too late to do anything else. The judge's view that the existence of a negative identification procedure would have made no difference, because the likelihood of the victim being able to identify anybody was extremely low, was a matter within the province of the jury, not the judge. The judge was wrong to describe the case against the appellant as "overwhelming"; again, this was a matter for the jury.

26. Mr Dunning submitted that the judge's reasoning may have been coloured by his implicit criticism of the defence, who should have been aware that the identification procedure had taken place. He submitted also (although he recognised that this was a subsidiary point) that weight should not have been given to the evidence of DC Curry, who had viewed the footage no more than about three times, and who had accepted in cross-examination that she was in no better position than the jury to identify the appellant from the footage.

27. For the prosecution, Miss White supports the reasons given by the judge in his ruling. Although she accepted that the fact of the negative identification procedure ought to have been disclosed and that in some cases such a failure would give rise to a successful appeal, she submitted that the conviction here was safe in view of what the judge rightly described as "overwhelming evidence" against the appellant.

Decision

28. We accept, as did the judge, that the prosecution failure to disclose the fact of the negative identification procedure was a material error. The result was that a fact which was not true was agreed, and in that respect the case was put before the jury on a false basis. Despite this, we agree that this was an overwhelming case, substantially for the reasons given by the judge, and that the conviction is safe. Nevertheless, we have some reservations about his ruling, which we should mention.

29. First, it is evident that the judge was troubled by the fact that the appellant's solicitors, as he understood it, were aware that the identification procedure had taken place. It is not clear to what extent this concern affected his reasoning. He dismissed the application to discharge the jury before ascertaining what the solicitors knew, which suggests that it played no part in his reasoning; but, on the other hand, he did express his concern in the reasons which he

subsequently gave.

30. For our part, we would not attach significance to this fact and do not regard it as a relevant consideration for the decision which the judge had to make. It was not suggested that the solicitor's knowledge of the negative identification procedure was deliberately suppressed for tactical reasons, and obviously that suggestion could not have been made, because it would have been to the appellant's advantage, at any rate to some extent, to deploy the point at the trial. In fact, what had happened was that there had been a change of representation, and the solicitors who were notified of the identification procedure had evidently failed to pass on that information to the new solicitors representing the appellant at the trial. As a result, neither the trial solicitors nor Mr Dunning, as trial counsel, was aware that the procedure had taken place. Nor was Miss White, as prosecution counsel, until after the jury had retired, when it was drawn to her attention by the officer in the case. We agree with the judge that if a point was to be made in closing submissions about the reason why no identification procedure had been carried out, the officer in the case ought to have been asked about it. If he had been, the true position would have been revealed. However, the judge dealt with this in his summing up. He warned the jury against speculation. The only question now is whether, despite the failure to disclose the negative identification procedure and the putting of a false agreed fact before the jury, the appellant's conviction is nevertheless safe.

31. Second, the judge said that the negative identification procedure carried no significance because the likelihood of the victim being able to identify anybody was extremely low. That may be so, but it has to be set against the fact that the victim was able to give descriptions of his attackers, which were borne out by the CCTV evidence, and the police evidently thought that there was some point in carrying out an identification procedure after the victim had been in the attackers' company for at any rate a few minutes. It was not, therefore, a fleeting

glance. If the existence of the negative identification had been disclosed, there were points which the appellant would have been able to make about it to the jury, whose responsibility it would have been to assess their impact. On the other hand, there was a negative identification in the case of the co-defendant Mobbs, which was part of the evidence before the jury, and the jury had no difficulty in convicting him.

32. Finally, we are not sure what the judge meant by saying that in reaching his conclusion he had "balanced the interests of justice to the defence and the prosecution, the prospect and fairness to the defendants, not just [the appellant] but Mr Mobbs and Mr Tingle, who were no doubt anxious to know their fate, and the complainant who, if I had discharged the jury, would have had to give evidence at some time in the future when a retrial could have been arranged".

33. In our judgment, these were irrelevant considerations. The only question for the judge was whether, in the light of the new information provided to him, the conviction of the appellant would have been safe. That does not require any kind of balancing exercise such as the judge described and which, on his own account, influenced his conclusion.

34. In those circumstances we have considered the safety of the conviction for ourselves. Despite our reservations with some aspects of his ruling, we agree with the judge that the evidence against the appellant was overwhelming. For this purpose, we put to one side the evidence of DC Curry, which was one of the factors on which the judge relied and about which Mr Dunning made submissions. But in particular the CCTV evidence from Sheffield Street, where the appellant lived, shows three men only a matter of minutes before and after the robbery. That footage shows a man dressed in the same way as the principal robber, at the appellant’s address and in company with the co-defendants. It is particularly damning, as is the appellant's tattoo, which corresponds to what can be seen on the CCTV footage from

Sheffield Street. So, too, is the recovery of the distinctive clothing seen on the footage from the appellant's address, despite the fact that no puffer jacket was seized on that occasion.

35. Taken in combination, this evidence leaves no room for doubt that the man in company with the co-defendants before and after the incident was indeed the appellant. The appellant gave no details of any alibi; and he elected not to give evidence. The overwhelming inference that he was indeed the robber was, therefore, effectively unchallenged.

37. Accordingly, the appeal against conviction is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk