NCN: [2019] EWCA (Crim) 146
No: 2018 00908 C4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 31 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE ELISABETH LAING DBE

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a Judge of the CACD)

R E G I N A
v
JAHANGIR ALAM

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Mr DP Armstrong QC appeared on behalf of the **Appellant**
Mr J Dickinson appeared on behalf of the **Crown**

J U D G M E N T

LORD JUSTICE SIMON:

1. On 29th January 2018, in the Crown Court at Stafford before Miss Recorder Herbert, the appellant was convicted on a single count of robbery and was sentenced to a term of fourteen years and six months' imprisonment.

2. There were two co-accused: Shamim Hussain and Adil Hakim. A submission of no case to answer succeeded against the former, and no evidence was offered and a 'not guilty' verdict entered in respect of the latter.

3. The appellant appeals with the leave of the Single Judge. Mr Armstrong QC, who was not trial counsel, appears on the appeal. Mr Dickinson appears for the respondent.

4. In the morning of 3rd March 2015, at some time between 9.20 and 9.50 am, Heather Milner was robbed in her home in Drayton Bassett by three men, who took cash (£6-7,000) and jewellery. By the time the police arrived at 10.02 am the robbers had gone, but Mrs Milner gave a description of the men in a recorded interview.

5. Some four months later, on 9th July 2015, a group of four men including the appellant were spotted in an Audi on a road behind Mrs Milner's home. Her husband, sons and a family friend confronted the men, who said they had stopped on a quiet road to smoke cannabis. They agreed to let Mrs Milner's son take their photograph, and, on being told the police had been called because of their suspicious behaviour, they waited almost an hour for the police to arrive. Since the police did not arrive, the men then left. About a month later, in August, Mrs Milner saw those photographs attached to an email.

6. On 17th September 2015 (some nine months after the robbery and four months after she had seen the images) Mrs Milner attended a VIPER procedure and positively identified the appellant as one of the robbers.

7. The prosecution case was that the appellant was one of three men who had robbed Mrs Milner. The police had arrived at the scene at 10.03 am on 3rd March shortly after the robbers had left the house, and there would have been sufficient time for the appellant to have participated in the robbery and return to Birmingham to attend college at 11.15 the same morning.

8. The prosecution relied on various elements in the evidence: First, Mrs Milner's identification of the appellant as one of the robbers. Second, the appellant's DNA recovered from a cigarette filter found in a room in the Milners' house. Third, a BB gun, similar to a gun sketched by Mrs Milner, that was recovered from the garage of the appellant's home and bore DNA consistent with him having handled it. Fourth, the similarity of the appellant's hair, colouring and positioning of his eyebrows to an image of one of the robbers captured on CCTV footage. Fifth, a black-and-white patterned scarf found in the appellant's possession, and the similarities between this item and CCTV images of a scarf worn by one of the robbers. Sixth, evidence from witnesses about the appellant's presence close to the Milners' home on 9th July 2015 without legitimate reason for being there.

9. The defence case was one of alibi. It was said that the appellant was at college when the robbery was committed. Electronic records from his college showed that he was present

on the relevant day at 11.15 am.

10. The defence also claimed that Mrs Milner's identification of the appellant as the robber was flawed. She had not been in a position to see the robbers properly and was unable to describe them in any detail to the police. Furthermore, her identification had been contaminated by seeing the photographs of the appellant in August.

11. The defence pointed out that there was no cell-site evidence to show that the appellant had been in the vicinity of the Milner house at the time of the robbery. He had been in the vicinity of the house in July as he was on his way to Drayton Manor Park and had got lost. Had he been involved in the robbery that had taken place only three months earlier, he would not have been content to wait for the police to arrive or behave as he did when approached by members of Mrs Milner's family. There was no evidence to show that the BB gun recovered from his address was used in the robbery. The sketch produced by Mrs Milner was a basic sketch of a gun; and she had described features of the gun used that were not apparent on the BB gun found at the appellant's address. So far as the DNA found on the cigarette filter recovered from the scene was concerned, the scientific evidence indicated the presence of DNA from more than one individual; and, although the most likely explanation was that the appellant had had direct contact with the cigarette filter, the evidence could not show when or how his DNA was deposited and could not exclude the possibility of transference from another medium. The facial mapping evidence, said the defence, and the comparison of the scarf and jacket did not assist the prosecution case as the experts conceded the limitation of the evidence given.

12. The jury heard evidence from a number of witnesses. Mrs Milner described being at home alone on 3rd March 2015 when just after 9.30 am she heard a voice outside her house and looked out of an upstairs window. She saw a man in a luminous jacket, black trousers and a cap. He had a box under his arm and was talking into his phone. She had been expecting a parcel and thought he was a delivery driver. When she answered the knock on the front door the man asked her if she was 'Mrs Smith', and when she said 'No', he pushed through the doorway into the house. She tried to activate a panic button but was unable to do so. The man pushed her to the floor. He told her to 'shut up' and put a gun to her right temple. She was then told to go and open the back door. When she did so, two other men entered the house. She was ordered to get on to her knees. The gun was put to her head and a large serrated knife to her throat. The three men repeatedly asked her where the safe was. When she denied that there was one, the men became increasingly angry. She was taken upstairs and eventually gave the men the cash - some £6-7,000 from her daughter's savings. A gun was again held to her head, and they continued to ask her where the safe and the jewellery were. She was tied up and made to get on to a bed as they searched her bedroom and eventually found some jewellery.

13. After some fifteen to twenty minutes they sat her on the bed. One of the men put a knife across her throat and the other two each pointed a gun at her head. She described one of the two guns as black, metal-looking and with a pattern or texture along the sides. Shortly after this, the men left the house.

14. She recalled one of the three men wore glasses; one (alleged by the prosecution to be the

appellant) had a scarf across his mouth and nose; and the other (the deliveryman) wore a cap. She estimated the man with the scarf to be about 5'8" and taller than the others.

15. In cross-examination, she said that she had not given a description of the men when the police first arrived as she had been frightened and stressed. She agreed that the description she had given in her police interview did not suggest any particular distinguishing features.

16. She knew that her son had taken photographs on 9th July 2015 of the man who had been in the car that day. She said that she had seen the photographs some four weeks after they were taken and before the VIPER procedure took place. She accepted that, when asked at the VIPER procedure whether she had been any photographs prior to the procedure, she had replied, "Only on Crimewatch". She could not recall why she had not told the police officers that she had seen the photographs in August. When asked what she could really see of the people involved during the offence she said, "I could see bits". She agreed that in a statement she had provided a week before the trial she had said:

> "I picked the people out because they might be the people involved."

17. We can deal with the rest of the evidence more shortly. Robert Milner (her son) had been at home on 9th July when a neighbour came to the house to say that she had seen a group of men acting suspiciously outside the Milners' house and pointing towards it. He and his brother went out and saw four men in an Audi. He told them they were on private land. They said they did not know and would leave. He took photographs of

them. In cross-examination he agreed that he had told the men that he was suspicious of them and that armed police had been called. He accepted that the men did not try to get away and had cooperated. He also agreed that they had got out of the Audi so that he could take a photograph of them and that they had posed for the photographs. They had waited some 45 minutes to an hour for the police, but the police had not arrived and so they had left. He had put the photographs on to his computer and a memory stick, but he did not recall showing them to his mother.

18. Nicholas Evans had been involved in stopping the four men in the Audi on 9th July. He spoke to the men, and they denied involvement in the robbery. They knew the police had been called and were cooperative in waiting for the police to arrive and having their pictures taken. One of the men mentioned they had been meeting a girl in Drayton Manor.

19. Ashley Davis was another family friend present on 9th July when the photographs were taken. He asked the men why they were there at the back of the Milners' house and they told him they wanted to smoke cannabis and the road was tucked out of the way. When they had been asked to show their ID, it became apparent that one of them had a large amount of cash. When asked about the money, he said he had been gambling.

20. Sonia Wiseman was a police identification officer. She gave evidence as to the identification procedures generally and specifically in relation to Mrs Milner's identification on 17th December 2015. She had positively identified the appellant. She confirmed that witnesses were asked if they had seen any photographs prior to the

identification procedure, and that question was asked at the end of the procedure.

21. John Joyce was a forensic imaging witness. He gave evidence about the CCTV images adduced. He accepted that the poor quality of the CCTV footage meant only superficial analysis could be conducted.

22. Shaleena Jhilani, a forensic facial mapping expert, gave evidence that the mapping undertaken from the CCTV images lent support to the contention that one of the men was the appellant. In cross-examination she agreed that there were limitations in the material and the conclusions that could be drawn from it.

23. There was also an agreed joint statement from Kerry Allen and Leanne Spencer about the DNA evidence. This was read to the jury. The defence accepted that the appellant's DNA was present on the cigarette filter found in the house, but neither expert could say how the DNA was deposited and there were multiple DNA contributions on the filter.

24. In the light of the points made on the appeal by Mr Armstrong, it may be necessary to refer specifically to this agreed statement since the jury asked for it to be repeated and the judge read it out to them:

> "1. The outer surface of the filter was swabbed and the swabbings were submitted for DNA profiling analysis. The result obtained was weak and indicated the presence of DNA from at least three and possibly as many as five individuals. The referenced DNA profile of [the appellant] was fully represented within this result and he could have contributed DNA to it."

25. Then paragraph 4:

> "The most likely explanation for the finding is that [the appellant] had some form of direct contact with the cigarette filter at some time. Although the findings could be explained by the cigarette filter having been in contact with a surface bearing significant amounts of [his] DNA: 'We are unable to eliminate the possibility that the DNA matching [the appellant] was transferred to the cigarette filter via an intermediate surface.'"

26. The appellant did not give evidence in his defence.

27. In the course of the trial the Recorder gave two rulings which formed the basis of the present appeal. On 22nd January 2018 (on the third day of the trial) she heard a renewed application under section 78 of PACE 1984 to exclude Mrs Milner's VIPER identification of the appellant on the basis that, in the light of the circumstances in which it had been made, its admission would have such an adverse effect on the fairness of the proceedings that it should not be admitted. Among other points, his trial counsel submitted that Mrs Milner's evidence was that when in August 2015 she looked on her iPad at the photographs of the four men taken in July she was uncertain because they were all smiling. When she attended the VIPER procedure on 17th December 2015 she identified the appellant and Hakim, and said that she believed that they "might be the people who attacked me". The Recorder refused the application and said that she would give her reasons later.

28. Those reasons were given on 29th January. She recorded that the defence had submitted that she should exercise her discretion and exclude the identification evidence under section 78 PACE 1984 as the initial descriptions in Mrs Milner's ABE interview were not

properly recorded and served, and the subsequent identification of the appellant at the VIPER procedure was contaminated by the fact that she had seen the appellant's photograph beforehand. All the other evidence in the case was wholly circumstantial. The Recorder acknowledged that there had been breaches of Code D as the descriptions from the victim's ABE were not served upon the defence. However, she considered that this was not a case where the breaches were such that they tainted the evidence so that it should be excluded. Her descriptions were in the ABE interview and were available to the defence and the jury. The contamination of the identification by Mrs Milner looking at the photographs in August was not a breach of Code D. She was not shown the photographs of the appellant by the police, she had looked at them independently after the investigation. A later statement indicated that she had only spent seconds looking at the photographs, and she did not say she had recognised any of the defendants. She could be cross-examined on the reliability of her identification, and the jury would plainly have to be carefully directed.

29. On 25th January the Recorder heard a submission of no case to answer on behalf of the appellant and Hussain. The appellant's counsel submitted that the identification was not sufficient to leave to the jury on the basis set out in *Galbraith* (1981) 73 Cr App R 124. Although it was common ground that the major part of the DNA found on the cigarette filter was the appellant's, the experts could not exclude the possibility that the DNA had been transferred from contact with another person or object.

30. The Recorder ruled that Hussain's application should be allowed, but that the appellant's application should be refused. She set out the basis of the appellant's application: that

the evidence against him was weak and tenuous and did not satisfy the second limb of *Galbraith*; that the state of the prosecution evidence taken as a whole was unsatisfactory, contradictory or so transparently unreliable that no jury properly directed could convict.

31. Dealing first with Mrs Milner's identification evidence, the Recorder accepted that it was "undoubtedly not of the best quality". The victim had limited opportunity to see the attackers' faces. Although they were in the house for twenty minutes in daylight, two of them had their faces covered. She had been terrified and under great stress at the time, and was unable to provide the police with in any meaningful description, saying that there was nothing distinctive about any of them. Although she picked out the appellant at a VIPER procedure, it was many months after the robbery and she had seen photographs of him before in circumstances that were uncontrolled and not subject to the safeguards contained in Code D of PACE. Moreover, the fact that the victim had seen the photographs created "a real risk of contamination of the identification procedure itself". The Recorder noted that it was on this basis that she had been asked to exclude the evidence under section 78 of PACE. She had declined to exclude the evidence, although it was clear that the jury would have to be given substantial directions about the potential difficulties of Mrs Milner's identification evidence.

32. If the only evidence had been the identification evidence, the half-time submissions would have force. However, there was other evidence that was plainly capable of supporting the identification evidence and could stand alone. This included "the important evidence" of DNA matching the appellant's DNA being found on a filter paper in the house immediately following the robbery. That was potentially strong evidence of

his having been there on 3rd March. There was also evidence of the BB gun at the house. There had been similarities in the appearance of the gun and the description of the gun in the robbery. He had been in the car on 9th July and was one of the two men seen pointing over to the rear of the property. There was also the evidence of the facial mapping and the scarf. These provided only limited support for the contention that the appellant was one of the robbers, but was nonetheless evidence that was properly for the jury to consider. On this basis, the Recorder refused the appellant's application.

33. In the perfected grounds of appeal and on this oral hearing, Mr Armstrong QC has raised two points. First, he submitted that the Recorder should have excluded Mrs Milner's VIPER identification of the appellant, and thus erred in the exercise of her discretion under section 78 of PACE. The identification was carried out before the defence had seen Mrs Milner's description of her attackers, contrary to PACE Code D. The first descriptions were incorrectly abbreviated and recorded, before being used in the VIPER procedure. Perhaps more compellingly, Mrs Milner had seen the photographs of the appellant before the VIPER procedure, rendering it flawed, if not worthless, since she would be identifying the person in the photograph and not her assailant. She had not mentioned that she had seen photographs of the appellant until after the VIPER procedure, meaning that it was carried out without full knowledge of the circumstances. The Recorder had accepted these matters and that there was a real risk of the VIPER procedure being defective and in these circumstances her refusal to accede to the defence application under section 78 was wrong: the prejudicial effect of the evidence far outweighed its probative value.

34. He referred in this context to the decision of this Court in *McCann & Others* (1991) 92 Cr App R 239 at 251, in which Beldam LJ, giving the judgment of the court, said this:

> "To reverse the judge's ruling it is not enough that members of this Court would have exercised their discretion differently. We must be clearly satisfied that the judge was wrong; but our power to review the exercise of his discretion is not limited to cases where he has erred in principle or there is shown to have been no material on which he could properly have arrived at his decision. The court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the judge's ruling may have resulted in injustice..."

35. Mr Armstrong submitted that the Recorder's ruling was wrong and resulted in unfairness and injustice. He submitted that the misidentification could not be remedied.

36. Secondly, he submitted that the Recorder should in any event have acceded to the submission of no case to answer. Once the weak identification evidence had been excluded, there was only weak circumstantial evidence. The DNA on the cigarette filter could have come from transfer and the other material was equivocal. In these circumstances, if the flawed identification evidence were not admitted, the case should have been withdrawn from a jury: see *Turnbull* (1976) 63 Cr App R 132 and *Galbraith*.

37. Although we did not call on Mr Dickinson, who appears for the prosecution, he put in a respondent's notice that, in summary, submitted that the Recorder was correct to conclude that the VIPER procedure had probative value, notwithstanding the matters of complaint. The breaches of PACE codes were neither serious nor substantial. He further submitted that the Recorder was right to find that there was a case to answer. In addition to the matters to which he referred in his interview, the appellant had provided a false

alibi, claiming to have been at college.

38. We start with the section 78 application. When considering a ruling under section 78, provided a judge or a recorder has not failed to take into account a relevant matter or included irrelevant matters, has not made an error of principle, or made a ruling which is outside the broad ambit of legitimate decisions such that it is unreasonable, this Court will not be disposed to interfere. The ultimate test, however, is the test for all appeals against conviction, the test under section 2 of the Criminal Appeal Act 1968: whether the court thinks the conviction is unsafe.

39. The passage relied on by Mr Armstrong in *McCann* did not relate to a ruling under section 78. There was an appeal on the basis that the submission of no case should have succeeded, but that failed. The passage from the judgment of the Court which we have referred to addressed a highly unusual state of affairs. The appellants were charged with a conspiracy to murder the Secretary of State for Northern Ireland. Following a half-time ruling that there was a case to answer, they elected not to give evidence. During closing speeches at the trial, the Home Secretary announced that the government intended to change the law in relation to the right to silence. Considerable publicity flowed from that, with politicians and a retired judge opining on the subject on the radio and television. An application to discharge the jury was made and was refused. The trial judge warned the jury to disregard anything they might have heard about the right to silence. That was the context of the passage to which we have referred.

40. In our judgment, the Recorder was entitled to the view she took of the VIPER

identification. There were flaws in it, as she had identified, but importantly the material flaws did not result from the actions or omissions of the police. Providing she warned the jury about the potential fallibility of the identification evidence, as she plainly and emphatically did in the summing-up, we are not persuaded that her decision was either contrary to principle nor outside the broad discretion conferred by the terms of section 78.

41. Nor are we persuaded that the Recorder erred in ruling that there was a case for the appellant to answer. There were clear links between the appellant and the crime, quite apart from the identification evidence. Importantly, there was his DNA on the cigarette filter in the victim's home. Of course it was open to the defence to suggest cross-contamination, but, taken with the identification, this was powerful evidence that the appellant had been in the house, and certainly sufficient to leave the case to the jury. The other evidence, we would accept, was not particularly compelling, but it was evidence that was capable of supporting a conclusion that the appellant had been involved in the robbery. For these reasons, we reject the complaint on ground 2 also.

42. In our view, this conviction is safe and the appeal must be dismissed.