Neutral Citation Number: [2020] EWCA Crim 1661

Case No: 20190163 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT BIRMINGHAM
Mr Justice Roderick Evans
T20127465

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2020

Before

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE EDIS
and
MR JUSTICE SAINI

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Between :

Darryl DICKENS	**Appellant**
- and -	
REGINA	**Respondent**

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- -

Mr D Bentley QC & Ms F Arshad (instructed by **Mr Fisher and Birds Solicitors**) for the **Appellant**
Mr M Burrows QC &Mr M Brook (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing dates : 4th & 5th November 2020

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Approved Judgment

Lord Justice Fulford V.P. :

Background

1. On 21 December 2012, in the Birmingham Crown Court (Roderick Evans J), the appellant was convicted of murder and sentenced to life imprisonment with a minimum term of 30 years' imprisonment.

2. David Harrison (also known as David Anslow) was also convicted of murder and sentenced to life imprisonment with a minimum term of 37 years imprisonment. Harrison's renewed application for leave to appeal against conviction and his appeal against sentence were dismissed by the full Court on 11 April 2014.

3. John Anslow was also indicted for this murder, but on 23 January 2012, he escaped from a prison van en route to a preliminary hearing. In 2013 he was deported back to the UK and stood trial for murder at Woolwich Crown Court. He was acquitted on 26 March 2014.

4. The appellant appeals against his conviction by leave of the full Court, granted on 12 March 2020 along with an extension of time of 6 years and 4 months. The appellant was granted leave to call fresh evidence pursuant to Section 23 of the Criminal Appeal Act 1968.

5. On 12 March 2020 the Court held a Public Interest Immunity hearing. There were no consequential orders for disclosure.

The Facts

6. In July 2010, Richard and Megan Deakin were living at 2 Meadway Road, Chasetown, Staffordshire with their two young daughters, Ellie (aged 4) and Jessica (aged 2). CCTV had been installed in the property as a security measure, due to a break-in in 2008.

7. On 5 July 2010, Megan Deakin rose early, and CCTV footage shows her dealing with the rubbish and putting her daughters into a motorcar (which was parked on the drive opposite the garage) in order to take them to school. She left the backdoor to the property shut but unlocked. While helping her youngest daughter into the car, she became aware of a black Corsa motorcar pulling up at the kerb. It was moving quite slowly, and it made a noise as it drove over a drain cover. She saw a man in the driving seat who appeared to be talking to someone, but she could not tell whether there was another person in the motorcar or if he was speaking on the telephone (however, she did not see a telephone). She had the man in view for a very few seconds (although it seemed to her to have been more in the order of 30 seconds). Her line of sight was through the rear side window of the Corsa. She first saw the side of his face and then he turned to look directly at her. She said she would never forget his face. On 6 July 2011 she described him during a video interview in the following way:

> "The driver I saw the side of his face, he had darkish hair, I'm struggling with the sort of Asian, he wasn't white, he wasn't black, he wasn't Indian, aged 20, hair was quite short, dark brown eyes."

8. She also noticed he had bushy eyebrows, although she did not mention this feature to the police when providing her initial description.

9. Following the incident, she did not immediately indicate to the police that she had noticed the black Corsa; indeed, when questioned early on she said she had not seen a car of this description. She first recalled sighting the Corsa between 9 and 10 pm on 5 July 2010, and she made a written note to this effect.

10. She viewed the relevant CCTV footage on 21 October 2010. On 7 June 2011, she attended Rugeley Police station to participate in a video identification procedure during which she was shown images of a number of men. She picked out the person at number 4 (the appellant) as the driver of the black Corsa.

11. Returning to the narrative, after Ms Deakin saw the Corsa and the driver, it drove off and Ms Deakin departed to take the children to school.

12. The Corsa (which had been circling the area), returned to the address shortly afterwards. The prosecution's case was that the appellant waited in the car while the passenger, Harrison, pulled a balaclava onto his face and walked through the gate to the property and across the garden. A neighbour, Mary Gordon, who witnessed Harrison concealing his face, rang the police at 8.33 am. She saw both the appellant and Harrison and she thought they were Asian.

13. At 8.28 am Harrison entered the house through the unlocked backdoor, walked upstairs and shot Richard Deakin twice while he was lying in bed, using a double-barrelled sawn-off shotgun. One discharge hit Mr Deakin's leg and the other hit his chest. Harrison left the property via the same route. The emergency services arrived on the scene at 8.41 am and Richard Deakin was pronounced dead at 8.53 am.

14. The stolen Corsa was later recovered at 6 pm in a field off Coppy Nook Lane where it had been abandoned. An eyewitness, Elizabeth Miller, saw the car arrive with two male occupants. She spoke to one of them and gave their descriptions to the police.

15. The prosecution's case was that this was a "contract killing" organised by John Anslow, who, as set out above, had absconded. The killing was said, therefore, to have been a joint enterprise attack. Harrison carried out the shooting and the appellant acted as the getaway driver. The appellant was connected to Harrison and John Anslow by virtue of their familial relationship with his then partner, Cheryl Thomas. Furthermore, he had employed Harrison at his business, A&D Skip Yard in Bilston. The prosecution accepted others were likely to have been involved but the precise motive for the killing remained unclear.

16. Detective Constable Weatherly testified that following post-arrest interviews with the appellant, the latter made a comment in a police car on 7 June 2011 en route to prison: "*I could never give evidence because they would find me and kill me*". The

officer did not regard this as significant at the time (hence he did not make a contemporaneous record). The first time he made a note of this utterance was in an information intelligence report dated 13 September 2011, because it occurred to him that the statement may relate to the Anslow family. The comment was also noted by DC Weatherly in his witness statement dated 2 October 2012, which the officer accepted differed in certain respects from the intelligence report. Corroborative evidence was given by another officer in the car. At trial it was suggested this statement supported the identification of the appellant by Ms Deakin.

17. The prosecution relied on the absence of any use of the appellant's mobile telephone (the "583" number) to make outgoing calls while the murder was being committed and the coincidence that there was a similar period of inactivity for Harrison's mobile telephone. It is suggested this supported the prosecution's case that the appellant had lied about the number of telephones he was using at the time. It was additionally contended that he underplayed the extent of his contact with Harrison.

18. It was the Crown's case that his bad character (*viz.* that while he worked at A &D Skip Hire he was involved in the theft of skips) meant that his testimony undermined his credibility.

19. The identification, first, of Harrison by a criminal associate called Alan Cash and, second, of the appellant by Ms Deakin were said to be cross-admissible, supporting the prosecution's case that they had both been correctly identified.

20. The appellant admitted he had been involved in the theft of skips. The appellant maintained at trial that he was at his place of work, the A&D Skip Yard at Bilston, at the time of the murder, and accordingly he was not the getaway driver. In an alibi notice dated 12 April 2012 the appellant set out that, "*he left his home at approximately 7.30am before collecting 2 work colleagues, Jamie or Jimmy Anslow and Derek Mason, and driving to his skip hire premises* [...]". Similarly, in his defence statement dated 22 June 2012 the appellant indicated he was working at the skip yard at the time of the murder and named Jamie Anslow as a potential alibi witness.

21. He suggested that the identification of him by Ms Deakin was mistaken and inherently unreliable, coming nearly a year after the shooting. He relied on cell site evidence that demonstrated his mobile telephone was at the Skip Yard at the time of the murder and he denied having had a second mobile telephone. He underlined that a telephone call was made on his mobile telephone from the Skip Yard at 9.26 am. He travelled to West Bromwich Magistrates' Court (for a traffic offence), and having taken some time to get through security, he met his solicitor at 10.00 am. This was confirmed by his lawyer. He relied on the lack of any forensic evidence linking him to the car and the other potential eyewitnesses who failed to identify him at the identification procedures conducted on the 8 and 13 June 2011.

22. Against Harrison, £26,000 in banknotes was recovered from his home in Folkestone which could be linked to the date and location of the killing. He was in possession of a wig and masks, and a box of blue latex gloves was found in his van. There was probe evidence of i) a conversation between Harrison and the appellant's brother, Scott Dickens, which tended to support the inference that the murder was a contract

killing; ii) a conversation which the prosecution suggested was an admission of guilt by Harrison; and iii) steps taken by Harrison to keep himself informed of any updates in the appellant's case.

23. As already referred to above, Harrison was identified from the CCTV footage by Alan Cash, who previously had police protection and who had watched a relevant "Crimewatch" television programme, originally aired in December 2010. Cash was aware of the £20,000 reward being offered for relevant information leading to a conviction. He recognised Harrison because he had known him since 2008 and they had been involved in considerable criminal activity together. The features which particularly enabled Cash to identify him from the CCTV footage were the particular style of balaclava, his size, his clothing, the distinctive blue latex gloves he was wearing and his gait.

24. The Crown relied on telephone cell site evidence which indicated Harrison had carried out three reconnaissance trips to the area on the mornings of 4, 8 and 18 June 2010 before the murder, as well as his contact with telephones attributable to John Anslow during those trips. John Anslow was linked to Colin Flute and Alex Gelder, both of whose fingerprints were found in the Corsa.

25. Cell site and telephone evidence on the day of the murder tended to show, first, that his mobile telephone made a call en route between the scene of murder and the Skip Yard at Bilston and, second, no calls were made during the murder.

26. Both Harrison and John Anslow changed their telephones on 5 or 6 July.

27. There was bad character evidence that the Crown suggested supported Alan Cash's identification of Harrison. The latter had a relevant history of violence, including armed robbery. He had a propensity to use firearms and he committed offences in a way that attempted to reduce the risk of detection.

28. A newspaper clipping about the murder was found during a search of Harrison's home, following his re-arrest on 14 September 2011. Furthermore, Ms Deakin had identified Dickens, which was alleged to provide evidence of a close association between them.

29. Finally, Harrison failed to mention various matters to the police that he relied on as part of his defence at trial, leading to a direction by the judge that the jury could draw consequential adverse inferences.

30. It is notable that in his defence statement, Harrison said that he called in at the Skip Yard on the morning of the murder and he named the appellant as one of those who was there at the same time.

31. In his evidence during the course of the hearing of this appeal, Harrison admitted that he had shot and killed Richard Deakin.

The Ground of Appeal

32. There are six grounds of appeal:

Ground 1: the identity of the driver (non-disclosure at trial)

i) It is submitted that post-trial disclosure by the Crown of material which should have been provided at the time of the trial tends to suggest that someone other than the appellant was the driver of the Corsa.

Ground 2: the identity of the driver (fresh evidence received following the trial, including from Harrison)

ii) Post-trial disclosure by the Crown of material unavailable at the time of the trial (including interviews with the Harrison along with his evidence during the appeal) similarly suggests that someone other than the appellant was the driver of the Corsa.

Ground 3: the safety of the identification evidence

iii) The video identification procedure is said to have been flawed on account of the conduct of the identification officer in acting in breach of Annex A of Code D Police and Criminal Evidence Act 1984; additionally, it is submitted that the evidence of Ms Deakin was undermined by the poor quality and intermittent nature of the live video link.

Ground 4: the suggested mutual support provided by the identifications of the appellant and Harrison (the "awful coincidence")

iv) It is argued the judge erred in directing the jury that the identification of the appellant and the identification of Harrison by two different witnesses was mutually supportive evidence.

Ground 5: the comment to DC Weatherly

v) Trial counsel should have applied to exclude, and the judge should have excluded, the comment in the motor car to DC Weatherly.

Ground 6: the cumulative effect of the grounds of appeal

vi) Although grounds 1 – 5 are relied on as free-standing grounds of appeal, it is submitted that the conviction is in any event unsafe given the cumulative effect of the grounds of appeal.

Grounds 1: the identity of the driver (non-disclosure at trial)

Submissions

33. It is suggested that the Crown failed to disclose, prior to the trial, material that tends to suggest that Jamie Anslow (to be distinguished from John Anslow) was the driver of the Corsa.

34. It is necessary to summarise this material:

(D1063)

i) In an intelligence report dated 11 April 2011, it was rehearsed that Jamie and John Anslow were "looking for business" that was criminal in nature and that they have a price list *i.e.* £30,000 for a murder. The police had a custody photograph of Jamie Anslow dated May 2011. We have been shown that photograph and a relevant photograph of the appellant. Although they bear some similarity, for instance by way of age and having dark hair and beard, we consider that the two men are clearly and readily distinguishable from each other.

(D1348)

ii) The police had conducted analysis of Jamie Anslow's mobile telephone between 1 June 2010 to 31 July 2010. He had been very regularly in contact with the appellant (316 times during this period), presumably in part because they were business partners in A&D Skiphire. He was significantly less frequently in contact with Harrison, albeit they were in daily contact in the period leading up to and including the day of the murder. On 5 July 2010, Jamie Anslow's mobile telephone is recorded by various cell sites as being in the West Midlands. However, at 9.25 am, when there is the first cell site evidence for this telephone on the day of the murder, he was not in the vicinity of Meadow Road and instead he was some 5.7 miles away from Harrison who was travelling south from Staffordshire to the West Midlands.

(D1469)

iii) On 27 June 2011 the police received intelligence that Jamie Anslow had been boasting he was involved in the murder, but this was reported as being, in the view of the informant, "not actually the case".

(D1142)

iv) Following receipt of Harrison's defence statement, the police analysed whether the appellant had used another telephone at the time of these events. They concluded that "it was unlikely that he had another mobile number". No other mobile number was uncovered and given the spread of the calls on the 583 number, it indicated the mobile was not used simply as a business telephone.

(D1220)

v) An intelligence report dated 6 January 2011 set out that the appellant had been involved in stealing high value loads of metal with Jamie Anslow and David Anslow/David Harrison.

Discussion

35. Although there was no suggestion, on the information in the possession of the prosecution prior to the trial, that Jamie Anslow was the driver of the Corsa, in our judgment there was an obligation on the Crown to disclose the pre-trial material relating to Jamie Anslow's potential involvement in this offence. The identity of others who possibly participated in this murder was capable either of assisting the appellant's case or undermining that of the prosecution. Notwithstanding that they

were said to be incorrect by the informant, Jamie Anslow's protestations that he was concerned in these events could have assisted the position of the appellant, in the sense of pointing him towards a potential and credible line of defence. The identity of another individual or other individuals who were responsible for the death of Mr Deakin could logically have assisted the appellant in establishing that Ms Deakin was incorrect in her identification of him.

36. However, in the context of the case advanced on the appellant's behalf at trial, we are equally confident that no prejudice to the appellant resulted from this failure in disclosure. Contrary to the particular contention advanced on this appeal (*viz.* that the appellant has been mistaken for Jamie Anslow), his case in the Crown Court meant that Jamie Anslow was highly unlikely to have been the driver of the Corsa. As already rehearsed (at [20]), he named Jamie Anslow as a potential alibi witness. In his notice of alibi, he suggested he left his home at approximately 7.30am before collecting two work colleagues, Jamie or Jimmy Anslow and Derek Mason, and driving to his skip hire premises. Similarly, in his defence statement the appellant stated he was working at the skip yard at the time of the murder and he named Jamie Anslow as a potential alibi witness. Therefore, any assertion that Jamie Anslow was the driver when the murder was carried out had a strong tendency to contradict the appellant's own case.

37. The same reasoning applies to the photographs of the appellant and Jamie Anslow, in that they could only have related to a line of defence which the appellant's alibi/defence statement tended to contradict. The appellant, furthermore, knew Jamie Anslow extremely well and it would not have materially advantaged the appellant for the prosecution to disclose a photograph of him. If the appellant had reasons for suggesting that Jamie Anslow was the driver, it was entirely open to him to do so being fully aware of his appearance.

38. The analysis of the appellant's telephone (D1142) should additionally have been disclosed. One of the prosecution's contentions was that the appellant had lied on this issue. As the judge summarised the position to the jury in the summing up, the appellant during part of his evidence stated that from July/August 2009 to September 2010 he only used the 583 telephone. The prosecution suggested that this contention was untrue given that in interview he had said he had a personal telephone and a business telephone. He accepted that during a period when there were no calls relating to the 583 number, he must have been using another telephone. However, he emphasised that at the time of this offence he was using the 583 telephone and accordingly he would not have been using another telephone. As set out above, the police analysis of the appellant's use of the 583 number resulted in the conclusion that he was unlikely to have had or to have been using another telephone. The appellant could have cross-examined the relevant officer on this issue using the analysis at D1142 to rebut the suggestion that he was lying when he said he only had or was using one telephone at the relevant time.

39. However, notwithstanding this clear failure by the prosecution, the underlying material could have been researched by the appellant, particularly given his personal knowledge of the use he had made of the 583 telephone number. The defence at trial were in possession of all the billing records and the appellant would have been able to undertake the same analysis as the police, reaching the same conclusions. Therefore, the telephone records, which formed the basis of the view expressed in D1142, could have been investigated and deployed by him to forensic advantage whether or not he was in possession of D1142.

40. Accordingly, although we deprecate what in our view was a clear failure by the prosecution as regards their disclosure obligations, we do not consider that it resulted in any material unfairness and the conviction is not rendered unsafe on this basis.

Ground 2: the identity of the driver (fresh evidence received following the trial, including from Harrison)

Submissions

41. It is argued that post-trial disclosure by the Crown of material unavailable at the time of the trial, including interviews with Harrison, along with his evidence during this appeal, suggests that someone other than the appellant was the driver of the Corsa. It is argued that Harrison's evidence during the appeal supports this contention.

42. After the conclusion of the trial, in August 2013, Matthew Brook (junior prosecution counsel) sent Stephen Blower (junior defence advocate) a Disclosure Note, drafted by Mr. Brook and dated 10 July 2013, stating shortly that rumours had circulated in the Tipton area that Darryl Dickens had not been the driver of the Corsa. As rumoured, the original plan had been for the appellant to be the driver, but he withdrew at the last moment and was replaced by Jamie Anslow. The appellant had purportedly withdrawn because he discovered that Harrison planned to kill him once Deakin had been murdered. Mr. Blower requested further disclosure and in August 2014 the CPS provided a 117-page post-disclosure bundle. It is necessary to summarise this material:

(Z91)

i) In an intelligence report dated 5 February 2013, the following was set out, "*Intelligence suggests that Darryl Dickens was supposed to act as driver for the murder of Richard Deakin. David Harrison intended to killing Darryl Dickens after the murder of Deakin. The intention was that following the murder, Dickens and Harrison would return and dispose of the vehicle used. At this time Harrison would kill Dickens. This was planned in response to the previous violent assault by Dickens upon his partner who is a Anslow family member. Dickens became aware of the*

intentions and pulled out of the murder at the last minute." This came from a "mostly reliable" source, although the reliability of the information could not be judged. The assault related to an attack by the appellant on Cheryl Thomas on 16 July 2010 when he attacked her with a golf club, resulting in a broken arm, a fractured skull and broken ribs.

(Z93)

ii) In an intelligence report dated the same day (5 February 2013) it was suggested that Jamie Anslow drove the car used to transport Harrison to 2 Meadway Road, as well as driving him away after the shooting. This came from a "mostly reliable" source, although the reliability of the information could not be judged.

(Z98)

iii) In a further intelligence report, again dated the same day (5 February 2013), the following was set out, "*It is suggested that Daryl Dickens was not responsible for the murder of Richard Deakin. He is however happy to be in prison as there is £100,000 on his head following an assault on one of the Anslow sisters called Cheryl. He apparently caught her out having an affair. Daryl is said to have cut out a tattoo on her neck."* This came from a mostly reliable source, although the reliability of the information could not be judged.

(Police interviews with Harrison)

iv) By letter dated 10 March 2016, the CPS Complex Crime Unit disclosed two post-conviction police interviews with Harrison, which had been conducted in prison on 24 and 25 August 2015 at his request, together with an accompanying cover note. Harrison stated that he carried out the shooting with an accomplice who was not the appellant. He maintained the appellant was innocent and was not the driver of the Vauxhall Corsa on 5 July 2010. He refused to name the person who accompanied him.

43. In November 2016, Martyn Fisher, the appellant's present solicitor, attended HMP Full Sutton and interviewed Harrison in which he confirmed the contents of the interviews on 24 and 25 August 2015.

44. In a letter dated 26 March 2018 the prosecution disclosed that, *"In 2014, the police received information that Darryl Dickens was not the getaway driver when Richard Deakin was murdered. It was an Anslow family member who is identical to him. This family member has just come out of prison after a two and half year sentence for burglary."* (We note that the appellant himself is said to be the source of this information, albeit he refutes this suggestion.)

45. On 4 March 2020, the prosecution disclosed that, "*In 2016 the police received information that Darryl Dickens was not the driver of the vehicle that Harrison made off in, it was in fact his brother Scott Dickens who was the driver."*

46. On 4 November 2020, Harrison gave evidence as part of this appeal. He repeated what he had said in August 2015 that he had shot and killed Richard Deakin and that the appellant had not accompanied him to 2 Meadway Road and was not involved. He said that after the killing he went to the premises of A&D Skiphire about mid-morning when he did not see the appellant.

47. Mr Blower, his solicitor at trial, gave evidence concerning some of the background issues and his contact with Harrison in April 2013.

Discussion

48. We unhesitatingly reject the evidence of Harrison, who, by his own admission, is a convicted contract killer. He lied comprehensively at his trial. Thereafter, whilst trying to persuade this court to grant him leave to appeal on the basis that his conviction was unsafe ([2014] EWCA Crim 1094), he was in the process of seeking to secure the release of the present appellant on the basis that he (Harrison) was guilty of murder. It is entirely clear that Harrison has not the slightest regard for the truth or the integrity of the criminal justice process. He had every opportunity of giving his present account during the course of the trial and he chose not to do so, no doubt in the hope of securing his acquittal notwithstanding his (now) admitted guilt. His present rehearsal of the facts is, in our judgment, deliberately lacking in any detail that would enable the prosecution to verify or disprove his account, and most particularly by giving the names of the driver of the Corsa and those who hired him to undertake this killing. He refused consistently to answer these questions, during the police interviews and in evidence in this court.

49. Harrison's account is significantly contradicted by Elizabeth Miller, who saw the black car in the vicinity of Coppy Nook Lane where it was abandoned at about 8.50 or 8.55 am. She spoke with the driver, after the two men had got out of the car and had removed balaclavas or other face coverings. Harrison in evidence denied that Ms Miller came over to the car and spoke to them. He said he had not seen her.

50. The approach to be followed to the assessment of fresh evidence in these circumstances was usefully summarised by Leveson LJ in *Burridge v The Queen* [2010] EWCA Crim 2847:

> "99. That brings the court to define the grounds for allowing an appeal on this basis, the principles of which are set out in a number of authorities at the forefront of which is *R v Pendleton* [2001] UKHL 66; [2002] 1 Cr. App. R. 34; [2002] 1 WLR 72 (per Lord Bingham of Cornhill, at page 83, paras. 18 and 19) which was followed by this court in *R v Hakala* [2002] EWCA Crim 730 and *R v Hanratty* [2002] EWCA Crim 1141, [2002] 2 Cr App R 30. This line of cases was cited in *Dial & anor v. State of Trinidad and Tobago* [2005] UKBC 4; [2005] 1 WLR 1660 by Lord Brown of Eaton-under-Heywood who gave the judgment of the majority (the others being Lord Bingham of Cornhill and Lord Carswell) and put the matter in this way:
>
> > "[31] In the board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict: *R v Pendleton* [2002] 1 All ER 524 at [19]. The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford v DPP* [1973] 3 All ER 762, [1974] AC 878 at 906, and affirmed by the House in *R v Pendleton*:
> >
> > > "While the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe]"
> >
> > [32] That is the principle correctly and consistently applied nowadays by the Criminal Division of the Court of Appeal in England – see, for example, *R v Hakala* [2002] EWCA Crim 730, *R v. Hanratty*, decd. [2002] 3 All ER 534 and *R v Ishtiaq Ahmed* [2002] EWCA Crim 2781. It was neatly expressed by Judge LJ in *R v Hakala*, at para.11, thus:
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> > > "However the safety of the appellant's conviction is examined, the essential question, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are unsafe"

51. It has been unnecessary to follow authorities such as *R v Victor Nealon* [2014] EWCA Crim 57 in which, in the context of factually difficult cases, "the jury impact test" has been utilised, when considered helpful by the court, as a mechanism to test whether the conviction is safe. We have no doubt that this evidence does not throw any doubt

on the safety of the conviction because Harrison is simply unworthy of belief, for the reasons we have set out above.

52. The conviction of the appellant is not rendered unsafe because, following the trial, the police came into possession of intelligence of the kind summarised above. This post-trial disclosure was unusable by the appellant. It would have been highly injurious to his case to introduce the suggestion that, until the last moment, he was to have been the driver of the Corsa as part of the plan to kill Richard Deakin, given the compelling coincidence that would then have arisen that he had been identified by Ms Deakin as the driver of the vehicle. This suggestion was wholly in conflict with his case, which was that he was wholly uninvolved in the arrangements for the fatal shooting of Mr Deakin. Similarly, he was unable to advance the theory that Jamie Anslow was the getaway driver because he had named him in his alibi notice as one of his potential alibi witnesses (he picked Jamie or Jimmy Anslow up at 7.30 am and they arrived at the skip hire premises at 8.00 am). In his defence statement, he suggested that Jamie Anslow was one of the individuals who could confirm he was at the skip hire premises during the period relevant to his alibi; and Jamie Anslow was in all likelihood travelling with him to court for the hearing that morning. Likewise, we consider it implausible that the appellant would have asserted that his brother had been the driver, particularly in the absence of any evidence to substantiate that proposition. As set out above, on 12 March 2020 the Court held a Public Interest Immunity hearing and determined that there was no additional material that required disclosure to the appellant in the interests of justice.

Ground 3: the safety of the identification evidence

Submissions

53. It is submitted that the video ID procedure was flawed by the conduct of the identification officer which is said to be in breach of Annex A of Code D Police and Criminal Evidence Act 1984. Furthermore, it is suggested that Ms Deakin's evidence at trial was severely compromised by the poor quality and frequent interruptions to the live video link.

54. The video identification process was filmed. It would appear that Ms Deakin watched the film twice, which took some 5 ½ minutes. Thereafter, she asked to see the whole film again and asked the officer to pause on certain images. She viewed it for a further 15 minutes, asking the officer to pause it at various images.

55. Ms Deakin positively identified the appellant, having spent a considerable period of time viewing the 9 individuals, particularly concentrating on the man at number 4 (the appellant). She was asked whether she wanted to view any part of the film again or whether she had seen enough, to which she replied she had seen enough. She confirmed it was the person at number 4. Once the identification process had finished and some 6 minutes later, whilst the officer was completing the paperwork, Ms

Deakin asked "can you play it again? Number 4". The officer replied this was not possible because she had made her identification.

56. Annex A to Code D of the Police and Criminal Evidence Act 1984 contains the following requirements:

> "11. […] The witness shall be advised that at any point, they may ask to see a particular part of the set of images or to have a particular image frozen for them to study. Furthermore, it should be pointed out to the witness that there is no limit on how many times they can view the whole set of images or any part of them. However, they should be asked not to make any decision as to whether the person they saw is on the set of images until they have seen the whole set at least twice.
>
> 12. Once the witness has seen the whole set of images at least twice and has indicated that they do not want to view the images, or any part of them, again, the witness shall be asked to say whether the individual they saw in person on a specified earlier occasion has been shown and, if so, to identify them by number of the image. The witness will then be shown that image to confirm the identification, see *paragraph 17*.
>
> […]
>
> 18. A record of the conduct of the video identification must be made on forms provided for the purpose. This shall include anything said by the witness about any identifications or the conduct of the procedure and any reasons it was not practicable to comply with any of the provisions of this Code governing the conduct of video identifications.

Discussion

57. In our judgment this was not a breach of Annex A to Code D. The procedure had been followed scrupulously and it was only after the exercise was complete – the identification had been made, and the officer was preparing the paperwork – that Ms Deakin asked to reopen the process. This was a matter for the discretion of the officer in charge of the identification exercise, and it was properly open to him to decline the request. Following a fair procedure which has been conducted in full compliance with the Code, it was entirely sustainable for the officer to decide that there needed to be finality. The witness had spent a considerable amount of time viewing the 9 participants and she had made a definite identification. The procedure had been brought to a close. As just rehearsed, the necessary paperwork was being prepared. Any remarks made by the witness were recorded and could be highlighted in evidence during the trial. Indeed, Ms Deakin was asked in cross-examination how she felt after making the identification and she replied, "*I knew that I'd picked out the person that I saw that morning*" and she added, "*I know I did feel positive because I'd seen that person that I saw on the that morning so I felt a lot more positive about it*".

58. This history does not constitute a breach of the letter or the spirit of the code; the appellant was not denied a relevant legal protection and we consider this ground of appeal is without merit.

59. There were problems with the remote link in both the examination-in-chief and the cross-examination of Ms Deakin but we agree with the Crown that the difficulties were not such as to render the conviction unsafe. The various problems would self-evidently have been apparent to the jury, who would have made appropriate allowance for them. The appellant was represented by senior leading counsel who did not at any stage submit that the proceedings should not continue or that the appellant was prejudiced. The trial judge expressed concern and indicated the circumstances were "not ideal", but he similarly did not halt the proceedings. In his observations to this Court, trial counsel states that he was "not in any way disadvantaged" by the technical problems and that the evidence was not "severely compromised".

60. Notwithstanding the difficulties, Ms Deakin's evidence was given in full. Interruptions to the testimony of witnesses – for a wide variety of reasons – is a not uncommon feature of criminal trials. For an event of this kind to form the basis of a successful ground of appeal, it would be necessary to demonstrate prejudice to the defendant such that the conviction was rendered unsafe. The appellant has not provided material to support this contention.

Ground 4: the suggested mutual support provided by the identifications of the appellant and Harrison (the "awful coincidence")

Submissions

61. Under this ground of appeal, it is argued the judge erred in directing the jury that the identification of the appellant and the identification of Harrison by two different witnesses was mutually supportive evidence.

62. In summarising the case at the outset of the summing up, the judge set out:

> "And of the witnesses who saw the car and the driver, the prosecution say the one person who had cause to have the face of the driver etched in her memory was Megan Deakin. And she recalled it once the trauma of that day, 5 July, had subsided somewhat and in respect of each identification, that of Cash and Megan Deakin, the prosecution say, there is ample evidence which confirms the correctness of that identification evidence and they go further: they say there is one remarkable feature about those two separate pieces of identification evidence. Alan Cash and Megan Deakin made their identifications to the police wholly independently, yet each identified a man who was not only known to each other, as Mr Cooper said this morning, but it goes further: the two men on the morning of the murder and at the time of the

> murder say they were in the same place. That is at the A & D Skip Yard, or thereabouts, in Bilston.
>
> The prosecution ask you to consider: "Is that some awful coincidence or does it overwhelmingly confirm the accuracy of identification evidence given by Cash and Megan Deakin?" The prosecution say their evidence – Cash and Megan Deakin – is correct and these two defendants are guilty of the murder of Richard Deakin."

63. By way of general direction as to the approach to be taken to identification evidence, the judge observed:

> "Can I turn next to deal with identification evidence? As you well know, of course, against each defendant the prosecution relies on evidence which can conveniently be called identification evidence, although the nature of that evidence differs from defendant to defendant.
>
> When you consider the identification evidence relating to each defendant you need to exercise special caution. The reason for that is that experience tells us that an honest and therefore, impressive witness who is convinced of the correctness of the identification he or she has made can be mistaken and this can be the case, not only in situations where the witness claims to identify a stranger, but also situations where the witness claims to identify somebody he or she recognises from previous acquaintance.
>
> You should therefore examine carefully the circumstances in which the identification of each defendant was made."

64. Focussing on the evidence that potentially supported Cash's identification of Harrison the judge, *inter alia*, directed the jury:

> "Finally, when you consider whether Alan Cash has told you the truth when he said he recognised the gunman as David Harrison and indeed whether that recognition is correct, you should consider the other evidence in the case, which the prosecution say is capable of supporting the correctness of Cash's evidence."
>
> […]

65. The judge then listed items of potentially supporting evidence and thereafter said:

> "There is the fact that Megan Deakin, independently of Alan Cash, identified Darryl Dickens as the driver of the car used by the killers who was not only known to David Harrison, but who according to David Harrison's belief, had been at the skip yard at the same time that he had been there on 5 July […]."

66. Thereafter, the judge directed the jury:

> "Now, you have to consider those pieces of evidence and resolve any issues of fact relating to them. Having done so you will then consider whether any of them do support the evidence of identification and that, of course, is a matter for you."

67. The judge addressed the identification of the appellant by Ms Deakin as follows:

> "[…] let us look at the evidence identification relating Darryl Dickens. Against him the prosecution rely, of course, on Megan Deakin. That she identified him at the identification procedure on 7 June 2011. They say that she correctly identified him as the driver of the Corsa that she saw outside her house on 5 July 2010. Darryl Dickens's case is that Megan Deakin has made a genuine mistake. That is, this is a case of mistaken identity. Therefore, when you come to examine the evidence carefully relating to her identification and to exercise the special caution to which I have already referred, you should ask yourselves questions such as these. For how long did Megan Deakin have the driver of the car under observation on 5 July 2010? What view did she have of him? What were the circumstances of that observation? How far away was she from the driver? How good was the light? Were there any obstructions to her view? What description did she give of the driver at that time? What effect did the period of 11 months have between July 2010 and June 2011 on her ability to identify the driver? Are there any significant differences between her description of the driver and Darryl Dickens? I shall remind you of the evidence relating to those and similar questions as we review the evidence together.
>
> Finally, when you consider whether Megan Deakin's identification of Darryl Dickens as the driver is correct, you should consider the other evidence in the case, which the prosecution say is capable of supporting the correctness of her identification."
>
> […]

68. The judge the listed items of potentially supporting evidence and then said:

> "The fact that Megan Deakin, independently of Alan Cash, identified him as the driver of the car used by the killers. He being a man not only known to David Harrison, but who according to David Harrison's belief, was at the skip yard at the same time that he had been there on 5 July […]"

69. Thereafter, the judge directed the jury:

> "Again, as in the case of David Harrison, you have to consider those pieces of evidence. Resolve any issues of fact relating to them and having done so, you will then consider whether any of them do support the evidence of identification and that, just as in the case of David Harrison, is a matter for you."

70. On behalf of the appellant, it is submitted that "coincidence", as set out above, should not have been left to the jury as potential support for the correctness of Ms Deakin's identification of the appellant and, in consequence, there was a material misdirection. It is argued that the judge should have directed the jury that if they were sure Ms Deakin had correctly identified the appellant, this could support Cash's identification of David Harrison. It is submitted that the coincidence of Cash's identification of Harrison could not support Ms Deakin's identification of the appellant because the driver was likely to be known to or connected in some way to Harrison (the suspected gunman). In these circumstances it is said "the probability of error would remain the same".

Discussion

71. We are unable to accept that submission. Coincidences, whether or not they fall short of traditional "corroboration", can support the correctness of an identification. In the leading case on identification, *Regina v Turnbull and another* 1977 QB 224 (a five-judge court presided over by Lord Widgery C.J.), it was set out that:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. **This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification**: for example, X sees the accused snatch a woman's handbag; he gets only a fleeting glance of the thief's face as he runs off but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury; but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *Reg. v. Long* (1973) 57 Cr App R 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions but each had only a momentary opportunity for observation. Immediately after the robbery the accused had left his home and could not be found by the police. When later he was seen by them he claimed to know who had done the robbery and offered to help to find the robbers. At his trial he put forward an alibi which the jury rejected. **It was an odd coincidence that the witnesses should have identified a man who had behaved in this way**. **In our judgment odd coincidences can, if unexplained, be supporting evidence**." (our emphasis)

72. As a matter of principle, the identification of one witness can support the identification of another without the jury having decided first that they are sure of the identification of one or other of the witnesses before using it as supporting evidence. In *R. v Thomas Henry Weeder* (1980) 71 Cr App R 228 (a five-judge court presided over by Lord Lane C.J.) the position was described as follows:

> "Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, *provided* that he warns them in clear terms that even a number of honest witnesses can all be mistaken."

73. In our judgment, if two witnesses identify two different individuals who were not only known to each other, but each claimed that at the time the offence was being committed they were in the same place at some distance from the scene of the crime, this constitutes a potential unexplained "odd coincidence" within the terms of *Turnbull* that can be supporting evidence for the identification of each accused. Furthermore, by analogy with the position in *Weeder*, there is no requirement that the jury must first be sure that one of the identifications is correct before they consider whether it provides support for the identification by the other witness. Such a limitation has not been imposed in the relevant jurisprudence. *R v Jones (Terence)* [1992] Crim LR 365 confirms that association between two individuals who are separately identified is relevant to whether the identification is accurate, and it can support the identification evidence.

74. In this case, although the judge did not in terms set out that a number of witnesses can all be mistaken, he carefully explained that experience dictates that an honest and impressive witness who is convinced of the correctness of the identification he or she has made can be mistaken. For both defendants, he directed them to consider the various pieces of potentially supporting evidence and thereafter to "*resolve any issues of fact relating to them* (*viz*. the supporting evidence) *and having done so, you will then consider whether any of them do support the evidence of identification*". In our judgment, this provided a sufficient direction to the jury that they needed to be cautious when considering, first, the identification evidence from both witnesses because of the risk of mistake and, second, the support that the identification by one witness of an individual could provide for the identification by a different witness of another individual, in that they needed to resolve any issues of fact before using that piece of evidence as support.
75. It follows that in our view the judge was entitled to direct the jury that the identifications of the two accused by Cash and Ms Deakin were capable of being mutually supportive in the circumstances of this case on the basis of an unexplained odd coincidence that confirmed the accuracy of the two identifications.

Ground 5: the comment to DC Weatherly

Submissions

76. It is submitted that trial counsel should have applied to exclude, and the judge should have excluded, the comment made in the motor car by the appellant to DC Weatherly, either because it amounted to a confession that fell to be excluded under section 78 Police and Criminal Evidence Act 1984 or because it was irrelevant. It is highlighted that the comment was not recorded contemporaneously in a notebook; the appellant was not given an opportunity to confirm or challenge the accuracy of the officer's

record; and there was a gap of three months before it was first recorded. The appellant denied saying, "*I could never give evidence because they would find me and kill me*".

Discussion

77. Leading counsel for the appellant at trial has confirmed that the decision not to seek to exclude the remark was deliberate and tactical. Counsel considered that this "verbal" was a demonstrable fabrication and could be used to undermine the integrity of the investigation. Mr. Blower, the appellant's trial solicitor, has similarly set out that he considered that "it reflected worse on the police" than on the appellant.

78. This was an entirely sustainable decision taken by those representing the appellant. There is no substance in those circumstances to this ground of appeal.

Ground 6: the cumulative effect of the grounds of appeal

79. Given our conclusions above, this ground of appeal falls away.

Conclusion

80. For the reasons set out above, this appeal against conviction is dismissed.