2020/00238/B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

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Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 16th June 2020

B e f o r e:

LORD JUSTICE COULSON

MRS JUSTICE WHIPPLE DBE

and

MR JUSTICE MURRAY

R E G I N A

- v -

OLIVER BARNES

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Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

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Miss A Power appeared on behalf of the Applicant

Mr A Hallworth appeared on behalf of the Crown

J U D G M E N T

Tuesday 16th June 2020

LORD JUSTICE COULSON:

1. The appellant is now aged 31. On 17th December 2019, following a trial in the Crown Court at Canterbury before His Honour Judge James and a jury, the appellant was convicted of aggravated burglary (count 1), wounding with intent (count 2), attempted burglary (count 5) and burglary (count 6). He was subsequently sentenced to a total of nine years' imprisonment. A co-accused, O'Brien, pleaded guilty on the first day of trial to counts 1, 2, 5 and 6. The appellant appeals against conviction with the leave of the single judge.

2. The facts were these. On 18th April 2019, Robert Pope and his friend Simon Gidman were at Mr Pope's home address, 10 St George's Road, Broadstairs. It was common ground that the appellant and O'Brien entered the house. There was violence involving, amongst other things, the use of a hammer. Both Mr Pope and Mr Gidman received injuries. Those events gave rise to counts 1 and 2.

3. Later that day, there was an attempted break-in at a flat in Broadstairs and a subsequent break-in in Victoria Parade (counts 4 and 5).

4. The appellant and O'Brien were arrested later that day. Property from the Victoria Parade flat was found at O'Brien's address. For the purposes of this appeal, it is unnecessary to consider counts 4 and 5 any further.

5. We turn back to counts 1 and 2. The prosecution case in relation to counts 1 and 2 was that the appellant and O'Brien had gone to Mr Pope's address with the joint intention of stealing money and drugs; that in order to do so they had used violence and had employed the use of the hammer as a weapon. In support of that case, the prosecution relied on the following evidence:

> (a) The evidence of Robert Pope. Mr Pope said that he was in his living room with Simon Gidman when two men, uninvited, entered together. One of the men, whom he knew as O'Brien, had a hammer and said, "Give us your money and your drugs". Mr Pope was struck. He left the room to go and fetch help. When he returned, he saw Mr Gidman fighting with O'Brien, who was trying to retrieve the hammer. Mr Pope sustained various injuries.
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> (b) The evidence of Simon Gidman. He said that he was with Mr Pope when two men "came in closely". The first man was O'Brien. The second man was not known to him: it was common ground that it was the appellant. Mr Gidman said that both men were aggressive. O'Brien had a hammer and charged at him. Both men made demands. O'Brien said several times "Give us your fucking drugs and money". He said that Mr Pope, who was sitting on the sofa, was struck by O'Brien with the hammer. Mr Gidman said that he fought O'Brien and took the hammer. He said he thought that he hit O'Brien with it. Both men then charged at Mr Gidman, causing him to fall to the floor, where he received a multitude of kicks and punches. Mr Gidman then said that he was restrained by the appellant with a foot which stomped on and pinned him down by the throat. He said that he let go of the hammer and continued to be restrained. He then was repeatedly struck with the hammer by O'Brien. He sustained several injuries, including seven stitches to the face.
>
> (c) The evidence of Amy Hilton. Amy Hilton was in a relationship with the appellant. She said that she had wanted to end it. On the day of the attack, the

appellant had first dropped her at her cousin Rosanna's house and was invited in. O'Brien, who was Rosanna's partner, was there. Amy Hilton said that O'Brien and the appellant then left together and returned 45 minutes later. When they returned, O'Brien had a cut to his head and the appellant had hurt his knuckle. They said that they had been in a fight. They said that the appellant had protected O'Brien "or he would have been dead". O'Brien told Rosanna to do as she was told which related to the instruction to her regarding the disposal of the hammer. DNA found on the hammer linked it to O'Brien.

(d) The evidence of Rosanna Hilton, which was read to the jury. She, as we have said, was at the time O'Brien's partner. She said that O'Brien and the appellant went out and returned together. When they returned, O'Brien was covered in blood. He said that he had been hit with a hammer. They talked about the appellant "punching that guy". Rosanna Hilton said that O'Brien had said in his recounting of the events that he had instructed the appellant to stand on the man's neck, whilst O'Brien hit him with a hammer. Rosanna Hilton said that both men appeared to be proud of what they had done. She said that O'Brien told her to get rid of the hammer and that she and Amy disposed of it in a recycling bin. She later told the police where it was and they retrieved it. It was the evidence of Rosanna Hilton which now gives rise to the appeal against conviction.

6. As we have said, O'Brien pleaded guilty on the first day of the re-arranged trial, namely, 9th December 2019. The appellant maintained his innocence. He said that Mr Gidman had started the violence; that he had punched Mr Pope in self-defence; and that he had punched Mr Gidman in order to try to disarm him of the hammer. The appellant accepted that he had stood with his foot on Mr Gidman's chest, but he said that he had done that only with sufficient pressure to restrain him, not in order to allow O'Brien to attack him. He said that he believed throughout that he and O'Brien were at risk of further attack. He said that he did not know about the hammer. He said that he had made no demand for money or drugs.

7. On 10th December 2019, the prosecution made an application to rely on the statement of Rosanna Hilton as hearsay. There were a number of different bases for this application. The first basis was that she could not be found (section 116(2)(d) of the Criminal Justice Act 2003); the second was that she was in fear (section 116(2)(e) of the 2003 Act). There was a third alternative submission that the statement was admissible in the interests of justice of justice, pursuant to section 114 of the Act.

8. The judge granted the application, although he insisted on a number of deletions from the statement. The reasons for his decision are set out in a written ruling. The appeal is based on the proposition that the judge was wrong to allow in any of the evidence of Rosanna Hilton as hearsay. The second ground of appeal is that, even if it was rightly admitted, the judge's directions to the jury were not sufficient because the legal directions were then unbalanced by the judge's summing up of the facts.

9. We deal with the first ground of appeal, namely, the admissibility of Rosanna Hilton's evidence. We start with a consideration of the application under section 116(2)(d). That allows a statement to be read if "the relevant person cannot be found, although such steps as it is reasonably practicable to take to find him have been taken …"

10. It appears that Rosanna Hilton indicated from the outset that she was frightened of O'Brien and concerned about the repercussions of giving evidence. However, it does appear (at least for

some considerable time) that she was reluctantly prepared to come to court. We note that on 22nd May 2019 she made a witness statement in support of an application for special measures, requesting that she give evidence in private or via video-link, but screened from O'Brien and the public gallery.

11. On 4th September 2019, in advance of the trial, which was listed later that month, the Crown submitted a special measures application to allow this to occur. However, before that application could be dealt with, the trial was adjourned to 9th December.

12. The officer in the case, Detective Constable Cordery, said that, in advance of the re-fixed trial, he had a text message conversation with Rosanna Hilton on 11th November 2019. On that occasion, for the first time, Rosanna Hilton said that she would not attend court. She referred to the trauma that she had suffered at the hands of O'Brien. She said that she was in a very fragile mental state, which had led to her making an attempt on her own life.

13. Subsequently, on 4th December 2019, DC Cordery telephoned Miss Hilton. He spoke to a friend of hers who stressed that Miss Hilton did not want to attend court. In consequence, on 7th December 2019, Police Constable French attended the former address of Miss Hilton to serve a witness summons which had been issued on 4th December. That required Miss Hilton to attend a remote video-link room.

14. However, it appears that Miss Hilton had moved from that former address some months previously. As a result, PC French then spoke to Miss Hilton again by way of her mobile phone. She refused to disclose her present address. She said that she would not attend court as it was affecting her mental health. As a result, the summons could not be served.

15. On 9th December 2019, DC Cordery spoke to Miss Hilton's grandmother who said that she had been staying with her mother in Broadstairs or with friends. However, the following day, 10th December, DC Cordery received a text message from Miss Hilton's sister who said that no family member had had contact with Miss Hilton and claimed that no family member knew of her whereabouts. That, of course, was the day that the application was made to rely on Miss Hilton's statement by way of hearsay.

16. When considering those various steps, the judge concluded that such steps as were reasonably practicable to find Rosanna Hilton had been taken and that, therefore, the test under section 116(2)(d) had been made out.

17. In our view, that was the appropriate conclusion. First, as the judge noted, Rosanna Hilton's stance was not based on apathy or a disregard for the justice system. She had made it clear that she was reluctant to attend court, and that reluctance spilled over from the November time onwards into outright refusal. Secondly, the police were well aware of Miss Hilton's attitude and indeed her changing attitude. As the judge put it at paragraph 21 of his ruling:

> "It seems to me that initial efforts to secure her attendance by cajoling, reassuring and encouragement cannot be criticised as such efforts in my experience often have a higher success rate in persuading reluctant witnesses to attend court than more strong-arm tactics. Equally, since it became clear that initial approach was not bearing fruit, the obtaining of a summons and efforts made by the officer in the case to contact her both directly and through her family have exhausted all reasonable avenues."

18. Thirdly, as a number of decisions of this court have made plain, there is a limit in any given case as to what is or is not 'reasonably practicable'. The officer in the case stayed in touch with Rosanna Hilton throughout the run-up to the first and then the second trial date. He did all he reasonably could to ensure her presence at the trial. In the context of the case as a whole, we do not consider that any proper criticism can be made of DC Cordery and the steps that he took.

19. This morning, in the course of her measured submissions in support of the appeal, Miss Power said that her principal complaint was the absence of contact between September and 11th November. However, it seems to us that that criticism cannot be sustained. There was no need for any contact during that period. Once the first trial date had been adjourned, it was DC Cordery's principal obligation to do all he reasonably could to ensure that Rosanna Hilton was present at the second trial. Up to 11th November, DC Cordery had no reason to believe that Rosanna Hilton was anything other than a reluctant witness who was still prepared to attend court. On 11th November that changed, and steps were taken accordingly. There is nothing to suggest that any contact between early September and early November 2019 would have had any effect or made any difference.

20. Finally on this topic, we should deal with a point made by the single judge, to the effect that it might be arguable that since it appeared that Rosanna Hilton was not told that O'Brien had pleaded guilty, her concerns might have been lessened if she had been told and she might then have attended court.

21. We do not consider that to be a good point for a number of reasons. First, there is at least some evidence that attempts were made to pass on to Rosanna Hilton the information that O'Brien had pleaded guilty on the first day of trial. Secondly, we consider that the chronology that we have set out makes it clear that by the time O'Brien pleaded guilty, it was too late to persuade Rosanna Hilton to attend court. Thirdly, as the judge himself noted in his ruling, even with an application under section 116(2)(e), namely a witness in fear, there was no requirement to demonstrate that the fear was necessarily referable to a specific defendant. Accordingly, the same must also be true in any consideration of the test under section 116(2)(d). Finally, we consider that if Rosanna Hilton was indeed fearful in relation to O'Brien, it was unlikely to make any difference if she knew that she was going to be giving evidence against O'Brien's close friend, instead. The appellant, according to one of the witnesses in the trial, described O'Brien as being "like family". Accordingly, it seems to us that the trial judge was right to conclude that the application under section 116(2)(d) was made out.

22. We turn to the alternative basis of the original application, which was section 116(2)(e), namely, a witness in fear. The judge concluded that Rosanna Hilton was in fear. Miss Power challenges that conclusion. Miss Power argues that there was insufficient evidence to the criminal standard that Rosanna Hilton did not attend court through fear.

23. We consider that Miss Power's submissions on that point seek to impose too rigid a forensic analysis on the evidence of fear. In this sort of fast-moving situation – and it was fast-moving; O'Brien pleaded guilty on 9th December and the application was made on the 10th – it is usually impossible for the court to be furnished with, say, medical evidence which analyses the witness' fear in the context of his or her general mental health. The court has to do its best on the evidence with which it has been provided, knowing that that evidence is of necessity incomplete. It seems to us, given the chronology that we have already set out, and Rosanna Hilton's repeated references to her fear, that the judge was entitled to conclude that this was a witness in fear and that, therefore, subject to the very important qualification as to the interests of justice, the

gateway under section 116(2)(e) had also been made out.

24. The interests of justice gateway under section 116(2)(e) expressly requires the judge to be satisfied that the interests of justice would be served by the admission of the evidence, having regard to "(a) the statement's contents, (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement of the relevant person if the relevant person does not give oral evidence) … (d) to any other relevant circumstances". Although this is a more general test than that which is set out under section 114 of the 2003 Act, which was also referred to in the arguments before the trial judge and in his ruling, it is important to refer to that too.

25. That section allows hearsay evidence to be adduced if it is in the interests of justice. There is authority for the proposition that a judge should use the section 114 criteria as a convenient checklist for any application under section 116(2)(e). Section 114(2) provides:

> "(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors and to any others it considers relevant ---
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been or can be given on the matter or evidence mentioned in paragraph (a);
>
> (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;
>
> (f) how reliable the evidence of the making of the statement appears to be;
>
> (g) whether oral evidence of the matter stated can be given and if not, why it cannot;
>
> (h) the amount of difficulty involved in challenging the statement;
>
> (i) the extent to which that difficulty would be likely to prejudice the party facing it."

26. For the purposes of this appeal, it is convenient to deal with the interests of justice issues together. That would also cover Miss Power's submission in respect of the application of section 78 of the Police and Criminal Evidence Act 1984.

27. The first point to make is that there can be no doubt that Rosanna Hilton's evidence had considerable probative value. That was not because it was setting out evidence which no other witness was providing. Instead, it was because in a number of significant ways it was corroborating the evidence of others. Thus, Mr Gidman had given evidence about what happened in the house, and in particular how the appellant had stood on his neck so that O'Brien could assault him with the hammer. His version of events was very similar to the version of events which Rosanna Hilton said she had heard O'Brien and the appellant discussing when they returned to the Hilton household. That is one way in which it seems to us beyond argument that the evidence given by Rosanna Hilton's statement was of probative value, because it supported the rather unusual evidence of the physical altercation that occurred in Mr Pope's house.

28. Miss Power has made a number of points to the effect that the evidence was prejudicial to the appellant's case. We accept, for the reasons that we have outlined, that the evidence was prejudicial to the appellant's case. The question is whether it was unfairly so; whether the interests of justice meant that, notwithstanding its probative value, the evidence should not have been admitted.

29. It seems to us that the interests of justice pointed irrevocably towards the admission of the evidence. We have already identified its probative value. On the other side of the scale, all the points about Miss Power's inability to cross-examine Rosanna Hilton, her motives, the unreliability of her evidence, and the potential discrepancies between her first and second statements, were all matters which were not only open to the defence to make during the trial, but they were all matters which Miss Power rightly did make to the jury.

30. However, these points cannot be taken too far. For example, the mere fact that a witness may be demonstrably wrong on one aspect of his or her evidence does not render the entirety of that witness' evidence unreliable or inadmissible. Thus, even if it could be said that there were important discrepancies between the two statements, that would not of itself be a reason for the evidence in the second statement to be excluded, particularly, as we have said, given how it chimed with the evidence of others. It is, of course though, important to ensure that the other checks and balances are in place, and in particular a proper direction to be given to the jury as to the limitations of hearsay evidence.

31. We think that it puts the argument much too high to submit, as Miss Power has done, that Rosanna Hilton's evidence was "decisive" evidence of the main issues against the appellant. That submission comes from paragraph 30 of her Advice and Grounds of Appeal. We disagree: it was not decisive. It was a part of the evidence. Since Miss Hilton was not an eyewitness, it was, at best, corroboratory. Contrary to Miss Power's submission, we do not consider that it was a confession by the appellant to the offences in counts 1 and 2. The appellant had always accepted that he had stood on Mr Gidman in order to restrain him. He said that was in order to protect O'Brien and himself. That was the issue for the jury. Accordingly, Miss Rosanna Hilton's hearsay account was not an account of a confession on his part.

32. In addition, Rosanna Hilton's evidence corroborated the joint enterprise alleged by the prosecution. But again, it was not the decisive evidence on that issue. Mr Hallworth rightly says that the decisive evidence on the issue of joint enterprise came from the victims, Mr Pope

and Mr Gidman. Furthermore, Rosanna Hilton's evidence was not even the only evidence about what happened to the hammer. There was evidence from Amy Hilton about that. Although Amy Hilton did not identify it as a hammer, she said that she and Rosanna went to dispose of rubbish to the re-cycling bins near the library, and it was from that very location where the police retrieved the hammer. Accordingly, there was evidence which, again, Rosanna Hilton's evidence merely corroborated as to the disposal of the hammer.

33. In short, we consider that the judge properly applied the balancing exercise when considering, on the one hand, the interests of justice and on the other all of the matters set out in the checklist in section 114. It was, therefore, a decision in accordance with the guidance given by this court in *R v Shabir* [2012] EWCA Crim 2564 at [64] and [65].

34. Accordingly, we consider that, provided the evidence of Rosanna Hilton was the subject of suitable directions by the judge to the jury, her evidence was of probative value and admissible in the interests of justice. The first ground of appeal is, therefore, rejected.

35. The second ground of appeal is a complaint about the judge's directions. It is suggested that the legal directions given to the jury were "undermined during the summing-up of the evidence". We do not set out the judge's initial legal direction to the jury about the hearsay, at pages 15C-16D of the transcript, because Miss Power properly accepts that that was an entirely appropriate direction, laced with numerous warnings about the need for the jury to be careful when considering the evidence of Rosanna Hilton because she was not available to be cross-examined. In our view, all of the necessary warnings were contained in that direction and Miss Power is quite right not to criticise that direction as given.

36. What, therefore, is the complaint that supports the second ground of appeal? It is right to say that it is not otherwise developed in the written Grounds of Appeal. However, Miss Power developed it before us this morning. Her complaint is that, on a consideration of pages 24-27 inclusive of the summing-up, the judge made a number of references to Miss Hilton's statement, without identifying those parts which differed from or were contradicted by the evidence of others. In our view, this is a rather different sort of complaint. It has nothing to do with the directions in respect of Rosanna Hilton. Instead, it is an assertion that the judge's summing-up in relation to this aspect of the case was unbalanced.

37. We have considered that submission carefully, but we do not accept it. The passage in question starts with a clear reminder by the judge at page 24H of the limitations in the statement of Rosanna Hilton. Thereafter, between those pages, the judge identifies where some part of Rosanna Hilton's evidence was consistent with the evidence of others. An example is at page 25B, where he notes that Rosanna Hilton's recollection of what O'Brien and the appellant recounted amongst themselves when they returned seemed to fit in with what Mr Gidman had said. But it also contains references by the judge to where Rosanna Hilton's evidence was different to that of other witnesses, such as at page 25D, in relation to the disposal of the hammer, and again on the same point at page 27G.

38. In our view, the summing-up was fair. It was clearly the product of considerable work on the part of the judge, tying together the various elements of the evidence, identifying where that evidence appeared to fit with other evidence, and identifying where it did not. In our view, the summing-up in relation to that part of the case cannot be criticised. It cannot be said that that part of the summing-up undermined in any way what is accepted to be an exemplary direction on the hearsay evidence of Miss Hilton.

39. We consider that this was a strong case. We consider that the evidence was rightly

admitted. We consider that the correct directions were given to the jury. Accordingly, for all those reasons, despite Miss Power's attractive submissions this morning, this appeal against conviction is dismissed.
