Neutral Citation Number: [2021] EWCA Crim 760

Case No: 2020/01314/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ HILLEN
T.20197256

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2021

Before:

LADY JUSTICE MACUR
MR JUSTICE GOSS
and
MRS JUSTICE FOSTER

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Between:

REGINA	**Respondent**
- and -	
SHEMAR DAWES	**Applicant**

- -
- -

Mr Jonathan Higgs QC and Mr Paul Jackson (instructed by **EHB Solicitors**) for the **Applicant**
Mr Alan Kent QC and Ms Louise Oakley (instructed by **the CPS**) for the **Respondent**

Hearing date: 12 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 9am on Friday, 21 May 2021.

Macur LJ:

1. This application for permission to appeal conviction following a retrial has been referred to the full Court by the single judge.

The facts in summary

2. On 14 February 2018, 17-year Lord Promise Nkenda was purposely run down by a stolen black BMW motorcar, occupied by five males aged between 14-17 years. He managed to get up and ran into an alleyway. The BMW continued to pursue him, and he was then then chased on foot by the four passengers. Lord Promise Nkenda was caught and stabbed multiple times to his face, head, chest, arm and thigh. He died from his extensive injuries at the scene.

3. After the stabbing, the four males got back into the BMW, which was driven away, but the driver lost control. Five occupants were seen to exit the car. The prosecution case was that the applicant was the driver of the BMW.

4. The applicant and four co-defendants were convicted of Lord Promise Nkenda's murder after trial in 2018. The applicant successfully appealed his conviction. His retrial took place in March 2020 before HHJ Hillen.

The nature of the pertinent evidence at retrial subject to this application

5. The theft of the BMW shortly before the murder was captured on CCTV. The applicant was said to be one of the two robbers. There was also CCTV evidence of the five occupants exiting the car. The applicant was identified, along with his co-accused, by DC Carter, who compared a still from the CCTV footage with a recent photograph of the applicant taken in December 2017. The jury were invited to perform a similar exercise. The applicant was not previously known to DC Carter, but was known to other officers, who took part in a process of identification on 2 May 2018. Another officer, PC Marsh, made an identification on 12 June 2018. Yet another, PC Grix, effected to positively identify the applicant during cross-examination, despite previously expressed uncertainty.

6. The CCTV footage and eyewitness accounts suggested that the murderers had been wearing latex gloves at the time they abandoned the BMW. A pair of latex gloves and a blood-stained knife were subsequently found nearby. Analysis of the gloves identified DNA which included components of more than one individual but including some of those of the applicant in very small amount. The knife was stained with the blood of Lord Promise Nkenda.

7. The applicant denied any involvement in the murder and claims mistaken identity. His application for permission to appeal specifically challenges the admissibility of the evidence referred to in [5] and [6] above, as we shall detail below.

8. The Prosecution resist the application in its particulars, addressing the proposed grounds of appeal specifically and also by reference to other circumstantial evidence, the sum total of which, they argue, supports the identification of the applicant as the fifth man and

unequivocally establishes the conviction as safe. That is, the Prosecution also rely upon the applicant's long standing 'association' with the convicted murderers, cell site evidence, and his sudden recollection of the detail of his movements on the relevant day which provided the alibi he had failed to disclose in interview. The Prosecution unequivocally endorse the rulings of HHJ Hillen as not only within his discretion, but also as correct.

The proposed grounds of appeal.

9. Mr Higgs QC together with Mr Jackson represent the applicant, as they did in the retrial in the court below. Mr Higgs QC makes clear that there is no issue but that the driver of the BMW is guilty of the murder of Lord Promise Nkenda; as indicated in [7] above, the present application is based upon the asserted wrongful admission of identification evidence which, it is submitted, lacks integrity and is consequently unreliable and should have been ruled inadmissible.

10. There are eight drafted grounds of appeal which cover the two topics of evidence. Significantly, there is no complaint as to how the trial judge summed up either aspect of this evidence but, we summarise, it is submitted that the damage had been done by that stage and the jury's consideration of the evidence would necessarily be tainted by the 'confirmation' bias that had been created. Furthermore, Mr Higgs QC claims the defence were obliged to embark upon an investigation before the jury which carried inherent risks as we describe below.

11. The proposed grounds 1 to 5 essentially relate to the evidence of facial recognition purported to be made by DC Carter and the identification of the applicant by PC's Marsh and Grix. Other officers gave qualified evidence of identification which the judge directed the jury could provide some support for the former, to which proposed ground 6 relates. Proposed grounds 7 and 8 refer to DNA evidence, called by the Prosecution to support the facial recognitions made and which, Mr Higgs QC argues, is so tenuous and unreliable that it should have been excluded.

The application

12. The first and overarching ground of appeal so far as the proposed grounds 2–6 are concerned is that the HHJ Hillen should have conducted a voir dire to appraise the integrity and consequent reliability of the identification evidence. Implicitly, it is suggested that if he had done so the evidence would, or should, have been excluded.

13. In support of these grounds of appeal, Mr Higgs QC laid out the chronology of the identification procedures that had preceded that of the positive and unqualified identification of the applicant made by the three officers and the qualified identification by three others whose evidence had been admitted before the jury. He described the way one other officer's purported identification had been made, albeit it was excluded by HHJ Hillen. To provide context, he referred to other officers who had failed to make a positive identification from the still taken from the CCTV footage saying it was too 'grainy' to do so, and yet two more officers who identified the still as being another named individual.

14. Without doing any disservice to Mr Higgs QC skilful and focussed submissions made by reference to Identification Booklets and witness statements, some of which had been prepared four months after the event, we need merely record that we are satisfied that he demonstrates DC Carter's obvious disregard of practice and procedure when acting as one of the two officers arranging the viewing process for officers on 2 May 2018. Despite the "Record of CCTV Viewing for Recognition Purposes", which was completed in a fashion for each witness, bearing a front sheet referring prominently to "Code D, Sec 3.34 – 3.37", it is entirely unlikely that either of them had read it in recent times. This process was described, politely, by HHJ Hillen as "a complete shambles".

15. Mr Kent QC, who appeared with Ms Oakley, for the prosecution at trial, and who both appear to respond to the application before us, had obviously come to a similar conclusion. Mr Kent QC does not resile from the judge's description.

16. The prosecution had made full disclosure of the records of identification, such as they were, and associated witness statements, which included reference to the name of other individuals who had been named as possible suspects. However, the prosecution did not intend to rely upon any of the officers other than DC Carter and PC Marsh but, at the request of the defence, tendered the others for cross-examination, including PC Grix, with the outcome we describe in [5] above.

17. Returning to the chronology, on 16 May 2018, and so after the significantly flawed process that had ensued on the 2 May 2018, DC Carter, as designated CCTV officer, asserted that he had made a positive identification of the applicant as the fifth man, having compared CCTV images with a photograph of the applicant taken in December 2017. He was to say in evidence that he had met Dawes once but that his evidence of identification was based on the comparison of the images and not recognition. He had obtained the 2017 photograph of the applicant after his name had been suggested on 2 May 2018. He had no specialist training in facial mapping or similar techniques but had spent over 100 hours viewing the CCTV footage and had successfully identified, as their convictions justify, the four car passengers. He said that at the time of his identification of the applicant on 16 May 2018 he was not aware of the DNA evidence that had been obtained from the latex gloves.

18. As to this, the defence were to serve a report from a facial-mapping expert to the effect, and who subsequently gave evidence that, the CCTV image of the individual identified as the applicant was of too poor quality and resolution to be properly examined for facial mapping purposes. Consequently, in that expert's opinion, it was not safe for any of the police officers to make a positive identification on the strength of it; nor it follows, would it be safe for the jury to do so.

19. On 12 June 2018, PC March viewed the CCTV footage in the presence of DC Carter. He indicated that he recognised the applicant as someone he had stopped on 5 June 2018 with PC Uddin but could not recall his name. He left the viewing area, unaccompanied, to consult his 'own records'. He returned subsequently and named the applicant. He was to say that he had seen the applicant three times in the last six months.

20. However, PC Uddin's professed identification of the applicant was, as HHJ Hillen found, so inconsistently expressed to be excluded.

21. Mr Higgs QC and Mr Jackson applied to exclude the direct identification evidence which the prosecution sought to rely upon and argued that the judge should hear the relevant evidence of facial identification in a voir dire. They intended that, quite apart from DC Carter, PC Marsh, and PC Uddin, the other 8 officers who had given qualified identification evidence or failed to make an identification of the applicant despite what may have been regarded as encouragement to do so, should also be called to reveal the untoward behaviour of the 'identification' officers. The basis of their argument was, it seems, deliberate malpractice. More than this, it was submitted that DC Carter's subsequent recognition on 16 May 2018 was unreliable for want of appropriate expertise and would be influenced by the naming of the applicant as a possible suspect, and that DC Carter's behaviour tainted the evidence of PC Marsh who, in any event, had not followed correct procedures.

22. HHJ Hillen refused to hear evidence but did consider the defence submissions made on admissibility in the absence of the jury, leading to him to exclude the evidence of PC Uddin as we indicate above. He gave a comprehensive ruling addressing the defence arguments in terms that:

    (i) "In relation to the category of identification into which DC Carter's evidence falls, Rose LJ in *AG Ref (No.2 of 2002) [2003] 1 Cr App R 21 (321)* said: "where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury".

    (ii) "In relation to the category of identification into which the evidence of PC March …falls, Rose LJ said "where a witness knows the defendant sufficiently well to recognise as the offender depicted in the photographic image, he can give evidence of this . . ..; and this may be so even if the photographic image is no longer available for the jury;"

    (iii) "There is clear authority (R *v Beveridge (1987) 85 Cr. App. R. 255, R v Flemming (1988) 86 Cr. App. R. 32 and R v Martin and Nicholls [1994] Crim.L.R. 218)* that a hearing on the voir dire is inappropriate where the admissibility of identification evidence is in issue, that conducting a trial-within-a-trial on such an issue would be rare and that I should make my decision upon the depositions, statements and submissions of counsel."

    (iv) "[T]his is [not] one of the rare cases where the admissibility of this evidence depends on a set of facts which I must determine in order to rule on the admissibility of the evidence. … The issues raised as to gaps in the "audit trail" identified by the defence in submissions can be dealt with by way of taking further statements and/or making further disclosure. There is sufficient information on the

statements, the disclosed material and the exhibits for me to make a determination on the issues raised."

(v) There was no evidential basis for the defence suggestion of bad faith "as opposed to a reduced level of competence…. Code D 3.35 is specifically there to guard against collusion, and I have looked into possible breaches of the Code. …So, the questions I have to ask myself are (i) in relation to PC March were there breaches of Code D? If there were, (ii) were the breaches so significant that admission of the evidence would have such an adverse effect on the fairness of the proceedings that I ought not to admit it? I find no breaches or none sufficient for the exercise of any exclusionary powers. … If, as is suggested, the defence wish to question witnesses on the basis that there is bad faith, collusion and effectively a perversion of the course of justice then they must take that course before the jury..."

23. We consider this ruling to provide a comprehensive answer to the first four grounds and to be conspicuously correct in all regards. We cannot better it. HHJ Hillen justified his decision and did so rationally. The exercise of his discretion was explained by his analysis of the documents and by reference to the relevant authorities. We find no merit in the first four grounds of appeal. This evidence was rightly ruled to be within the province of the jury. We would also have so found.

24. As HHJ Hillen predicted in his ruling, the difficult decision for the defence then became whether to proceed to raise the possibility of police collusion to 'fit up' the applicant. To do so involved some risk since the defence would need to seek to obtain evidence from those officers who had not been certain of the identity of the applicant as the individual shown in the CCTV. These officers were 'gangs' officers; some of them thought there were similarities between the individual on the CCTV and the applicant and this would become apparent.

25. This would undoubtedly be a quandary for any defence counsel and, for our part, we can see no reason to criticise the difficult tactical decision that was made by Mr Higgs QC and Mr Jackson to request that the prosecution, who had not intended to seek to rely upon them, tender the 'gangs' officers for cross-examination. This inevitably meant that the prosecution could re-examine them if and as necessary and would be entitled to make submissions as to how the jury should be directed regarding their evidence. However, what we do not agree is that the difficulty that this presented, and the outcome regarding the issues that form the basis of the proposed fifth and sixth grounds, establishes the unfairness or error of HHJ Hillen's decision.

26. The defence can certainly not complain at the disclosure of the witness statements which are explicit in revealing the breach in the Code of Practice. Mr Higgs QC graciously and unhesitatingly acknowledges the role played by Ms Oakley in this regard. We view these statements might have provided a potential 'gold mine' to the defence, by the same token, it was also potentially a poisoned chalice. We certainly do not see that what Mr Higgs QC described as the unseemly scene of one police officer's recollections pitted against another to have been capable of disadvantaging the defence, to the contrary it suited the case being run. Nevertheless, and unfortunately for the defence, one of the officers PC Grix, who had

participated in the identification procedure on 2 May 2018 and had hitherto not been certain of the applicant's identification gave evidence that he was now sure of it.

27. In the proposed fifth and sixth grounds of appeal, Mr Higgs QC argues that the judge wrongly ruled that the jury could consider the qualified identifications of 'gangs' officers as adding some probative weight to the case for the prosecution and that the first-time identification of the applicant by PC Grix given in the witness box under cross-examination was so unreliable that the learned judge should have directed the jury that they could not rely upon it.

28. Mr Kent QC makes clear that care was taken not to refer to the 'gangs' officers' actual deployment as such. Save for one accidental slip which was submerged by the pointed failure of anybody commenting or reacting to it, these officers were referred to by reference to the area in London in which they were based.

29. The judge gave a ruling on the question as to whether the qualified identifications that arose out of the flawed procedure were supportive evidence of the identifications by DC Carter and PC March by reference to the case *R v Barry George [2002] EWCA Crim 1923* in terms:

> "… the evidence is before the court and before the jury. It is part of the case. It is part of the evidence that the jury are going to have to consider. The Crown are entitled to use evidence which has been adduced in cross-examination, or in this case by witnesses being tendered as part of their case, and in this case the direction which I propose to give to the jury has been set out."

30. We do not find any fault in HHJ Hillen's reasoning. The officers had been called at the request of the defence. It was a strategy that could have yielded good result, but equally the evidence could not legitimately be expected to be ringfenced if untoward results followed. There is no merit in either proposed ground 5 or 6.

31. As we have previously indicated, Mr Higgs QC takes no issue with the summing up. But to be clear, the evidence of DC Carter, PC Marshall, PC Grix and the 'gangs' officers was summed up to the jury, 'warts and all'. Mr Higgs QC acknowledges, not least in light of this Court's judgment on the first appeal, that the jury were entitled to make their own assessment of the similarity between CCTV image and the 2017 photograph of the applicant. HHJ Hillen's 'Turnbull' direction repeatedly urged all due caution as regards what may be classed as 'confirmation bias', not only by the three officers who made positive identifications but the jury themselves. We can find no fault in the way the judge dealt with this part of the evidence of identification either in his ruling or in his summing up.

32. The final proposed grounds of appeal deal with the DNA evidence that was obtained from the latex gloves and described by the prosecution expert to be a 'weak, low level, mixed profile.' The defence sought to exclude this evidence as so inherently unreliable to be inadmissible. A voir dire was conducted in respect of this evidence. Daniel Beaumont, a forensic scientist, was cross-examined at length by Mr Higgs QC with the assistance, we are informed by the Respondent's Notice and skeleton argument, of an appropriately qualified defence expert, although no report had been served. HHJ Hillen also had regard to the statements of Dr Roberto Puch Solis and Dr Tim Clayton.

33. The defence argument in support of exclusion was made to the following general effect. The only finding of relevance was from a single swab which produced an extremely low volume of DNA material. The electropherogram [EPG] was produced from a sample containing approximately 23 picograms of material, which was multiplied 17.5 times so that the volume was sufficient for examination. Two EPGs were obtained and, because of the very low volume of material examined, it was not possible to distinguish between an allele being present as opposed to other artefacts nor to identify individual profiles within any of the samples. The reproducibility was poor. There were a number of contributors to the sample. In this case a calculation was done using the assumption that there were three contributors, and then four contributors, and that produced a likelihood ratio of 280,000. It was common ground that if the number of contributors was five or more, no likelihood ratio was available. There is no way of calculating with any certainty the correct number of contributors. Mr Beaumont's opinion that there were at least three contributors but not likely to be five or more was a subjective and unverifiable opinion.

34. HHJ Hillen, in his subsequent ruling, identified that part of the prosecution evidence which addressed the concerns raised by the defence, including size of sample, interpretation and scientific processes adopted. On the issue of "reproducibility", the judge referred to the Primer for Courts (November 2017) and the evidence of the forensic scientist as to method and validation of the software used and concluded that, "[a]s far as the reliability of the software used is concerned, the Primer states that 'The choice of software program and why it was used for the specific complex/mixed DNA samples being analysed should be explored with the scientist.' In this case the software is validated by the UK Forensic Science Regulator. In the absence of any report criticising this particular software or its use in this case, the court is not able to go behind that validation."

35. As to the doubt about the number of contributors to the sample, the judge noted that the computer software calculations handle a maximum of four contributors. The forensic scientist's expert evidence was that in his view it was more likely to be four or less than five or more but "it is for a jury to decide having heard the evidence and any challenge to it to decide if they can rely upon that opinion. That is the nature of expert opinion and the direction to be given to the jury deals with that."

36. In so far as the defence submitted that the likelihood ratio was too complex a mathematical concept for a jury to be able to apply it, and thus the very limited value it had was no value at all, the judge again referred to the Primer and "[a]ssuming, as I do, that that summary adequately describes the likelihood ratio, then, absent any expert evidence to the contrary, I regard the criticisms of the likelihood ratio in the skeleton argument as unmeritorious. The communication of the true meaning of the likelihood ratio for the benefit of a jury is not a matter of admissibility but a matter of presentation. It is incumbent upon counsel and trial judge to ensure that a jury has a clear grasp of what the likelihood ratio means. This court has recent experience of this particular concern, and the matter can be dealt with by an agreed form of words formulated either as an admission, or forming part of the written direction or both."

37. Overall, HHJ Hillen observed that "No expert report has been served by the defence, consequently the criticism of the scientific basis for the evidence is based upon the assertions

of counsel. Without any evidential basis for assessing the reliability of the science, the court finds itself reliant in determining admissibility upon the evidence contained in the statements, the report, the evidence of Daniel Beaumont on the voir dire and from such assistance as is available from the Primer …in the absence of any evidence to the contrary, and in the absence of specialist knowledge by the court, I accept that evidence. Many of the assertions advanced in the defence skeleton argument are, in my judgement, adequately refuted by the evidence in the statements of Dr Roberto Puch Solis, Daniel Beaumont and Dr Tim Clayton, and in Daniel Beaumont's evidence on the voir dire…."

38. Proposed ground 7 in this application re-asserts the argument in the court below that, in view of the low volume of DNA material and the poor reproducibility demonstrated by the two EPGs, the analysis should not have been admitted before the jury. The final proposed ground is to the effect that the uncertainty about the number of contributors to the sample being four or less meant that no reliance could be placed upon the DNA sample. Consequently, the DNA sample and its analysis should not have been admitted before the jury.

39. Mr Higgs QC addressed this Court by reference to a document which the defence had placed before the jury during his cross examination of the forensic scientific opinion. Whilst we expressed some surprise that it was thought beneficial to descend to the detailed particulars[?] before the jury, and did wonder whether the jury may have thought that there was an attempt to 'blind' them by the science, rather than to assist them to understand the basis of the points indicated above, we were able to follow the arguments he made before us and which, it appears from the summing up, he had very clearly made to the jury. HHJ Hillen's summed up this evidence in commendable clear and straightforward terms, so demonstrating the point and fulfilling the responsibility he assumed as indicated in that part of his ruling that we refer to in [36] above.

40. We are not persuaded that any of the points Mr Higgs QC expanded upon in the document before us supported his argument that the judge should have ruled the evidence inadmissible. They did not demonstrate such inherent unreliability in methodology or interpretation as to require the exclusion of the evidence.

41. We reject any suggestion that the principle to be derived from *R v C [2010] EWCA Crim 2578* dictates that there is a particular threshold below which scientific evidence is unreliable. To the contrary, in [26] Thomas LJ (as he then was) makes the point:

"In our judgement, counsel for the appellant was wrong in his view that a "knockout blow" could be achieved if he persuaded the judge that the amount of DNA in the minor male profile was below 100-200 picograms. The sole question was whether, despite the low quantity, a reliable profile could be produced. The judge accepted the evidence of the FSS expert, uncontradicted as it was by any defence expert evidence. He reached the inevitable conclusion that the DNA results were sufficiently reliable to be admissible. It was for the jury to hear the evidence and determine the weight to be attached to it."

The commentary in [27] as to mixed profile, as was the case here, does not undermine that essential principle: that is, quantity is not necessarily an indicator of reliability.

42. Neither do we agree that Mr Beaumont's opinion evidence as to the number of contributors was inadmissible or nebulous. He gave the reasons for his conclusion as to the maximum number of contributors whilst accepting the possibility that there could be more.

43. His evidence was that the match probability of contact between the applicant and the gloves was 407,000 times more likely if the DNA originated from the applicant and two contributors, rather than three contributors none of whom was the applicant. At four contributors it was 280,000 more likely. He thought there was at least very strong support that DNA from the applicant and two or three other people was present, rather than DNA from three or four other than the applicant being present. It was a matter for the jury to determine whether they were satisfied as to the evidence he gave in support of his opinion. There was evidence upon which the jury would be able to be sure that the number of contributors to the sample was four or less.

44. If it was at all necessary to do so, we indicate that we have been able to 'quality check' the 'DNA' ruling against the summing up as indicated above. Quite apart from the assistance HHJ Hillen provided to the jury on this aspect of the evidence, the jury were left in no doubt that this evidence was not sufficient by itself to convict the applicant. It was, if anything, supportive and not determinative evidence.

45. It follows from the above that we find no merit in the final two proposed grounds of appeal. We agree with HHJ Hillen that it was a matter for the jury to determine whether they were satisfied by the evidence Dr Beaumont gave in support of his opinion that the number of contributors to the sample was four or less and that the sample was sufficient for appropriate analytical assessment. The jury were correctly directed as to 'expert' evidence.

46. We are grateful for the assistance of Mr Kent QC and Ms Oakley during the hearing of the application. Their succinct oral submissions supplemented the written arguments previously advanced and provided further context to proceedings in the court below as necessary. Particularly, however, we pay tribute to the obvious labour that has been invested by Mr Higgs QC and Mr Jackson not only in the preparation for this application but also, as appears clear from the arguments that were addressed in his rulings by the judge below, for the retrial itself. We have had regard to the skeleton arguments prepared for the applications made below and the skeleton arguments, indices and numerous schedules prepared for this Court. However, for the reasons we give above we dismiss the application for permission to appeal. HHJ Hillen's rulings are beyond criticism, as is his summing up, and revealing the conviction as demonstrably safe.