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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 25 October 2018

B e f o r e:

LORD JUSTICE GREEN
MR JUSTICE NICOL
THE RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR
(Sitting as a Judge of the CACD)

R E G I N A
v
HOWARD FENDER

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Miss A Power appeared on behalf of the **Appellant**
Mr J Dawes QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE GREEN:

2. A THE ISSUE: BAD CHARACTER EVIDENCE TO REFUTE AN ALLEGED FALSE IMPRESSION

3. On 12 September 2017 in the Crown Court at Harrow, the appellant was convicted on two counts of conspiracy to sell or transfer prohibited weapons contrary to the Criminal Law Act 1977 (count 1), and conspiracy to possess ammunition (count 2). He was sentenced to a term of imprisonment of 11 years on count 1 and to a term of imprisonment of three years concurrent on count 2.

4. This appeal concerns the admissibility of bad character evidence under section 101(1)(f) of the Criminal Justice Act 2003 ("CJA 2003") to correct a false impression given by a defendant. Pursuant to section 105(1) a false impression is defined as the "making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant." Such evidence may be adduced by the prosecution in order to correct a false impression provided it has probative value in correcting the impression. Further, pursuant to section 105(6) such evidence is admissible "only if it goes no further than is necessary to correct the false impression."

5. In R v D and others [2012] 1 Cr.App.R 8 the Court of Appeal emphasised that a defendant who upon proper analysis had done no more than deny the offence was not to be classified as having conveyed a false impression. The court stated that were this not to be true then virtually every defendant would fall within the relevant gateway permitting the bad charater evidence in. The court in addition highlighted that in summing-up a judge had to be careful to warn the jury that such evidence was not capable of being used as evidence of propensity.

6. B the facts

7. We turn to the facts of the case. On 28 February 2017 a number of co-conspirators had been tried upon the same counts as the appellant. Ahmed Mudhir pleaded guilty after the jury were sworn and was sentenced to a term of imprisonment of 22 years. Following trial, Mindaugas Vasuaskas was sentenced to a total of 18 years' imprisonment. Ahmed Adam was sentenced to 12 years' imprisonment. James Radford was sentenced to 10 years' imprisonment.

8. On 21 May 2016 at approximately 11 pm, police executed a search warrant at a flat in Ferrier Point, Canning Town, London. The flat was on the 23rd floor of a tower block. Inside police found 11 handguns with ammunition, 11 silencers, one assault rifle with ammunition and £15,500 in cash. Shortly prior to the arrival of the police the flat was occupied by nine men and one woman. They were tipped off that the police were in the building and seemingly about to conduct a raid. CCTV showed seven of the occupants seeking to escape the premises in various directions. The appellant was one of those recorded seeking to flee.

9. The prosecution case was that Mudhir had organised a weapons sale at the flat. He arranged for buyers and sellers to meet at 11 pm. The buyers were to bring money and

the sellers were to bring guns and ammunition. The appellant had known Mudhir since at least 2011 and he was aware that he had been sentenced to a term of imprisonment in 2011 in relation to the supply of firearms. The appellant was in contact with Mudhir shortly prior to the weapons sale via phone. The appellant was at the meeting at the invitation of Mudhir and he intended to purchase weapons for himself or for onward distribution to other criminals.

10. The prosecution evidence in summary amounted to the following. First, prosecution expert evidence established that all the firearms seized were prohibited weapons and the ammunition was controlled ammunition pursuant to the Firearms Act. Second, none of the occupants of the flat had the requisite certificates entitling them to possess either the firearms or the ammunition. Third, it was an agreed fact that on 21 May 2016 there was an agreement to sell or transfer firearms and ammunition and that the three defendants Mudhir, Adam and Vasuaskas were parties to the agreement. Fourth, CCTV existed to identify those present in the flat at the relevant time. Fifth, inculpatory cell phone evidence recorded the exchanges between the participants during May 2016. Sixth, inculpatory CCTV footage existed of individuals arriving and departing from the flat. Seventh, there was the evidence of a DC Dowell, the officer in the case, who gave evidence about each of the alleged conspirators. Eighth, there was agreed telephone schedules detailing the telephones and telephone numbers attributed to the individuals concerned in the alleged conspiracy and contacts between them from 11 April 2016 onwards. Ninth, inculpatory agreed cell site information showed the movements and meetings of individuals concerned in the conspiracy in the lead up to and including the night in question. Tenth, agreed but also incriminating cell site evidence showed the appellant's physical movements on the night in question. Eleventh, an agreed telephone schedule of all activity on the appellant's two phones between 8.40 pm and approximately 11.30 pm on the night in question demonstrated his connection to the flat and various of the defendants. Twelfth, bad character evidence relating to the appellant existed in the form of four images from the appellant's phone relating to reports in relation to court cases involving the supply of firearms and ammunition, and photographic images of firearms which were said by the Crown to establish that the appellant had a criminal interest in firearms. Finally, there was the evidence of non-defendant's bad character, namely the convictions of Mudhir, Vasuaskas, Redford and Adam.

11. The appellant was arrested on 28 March 2017 in a Mercedes motor vehicle which was being pursued by the police on the A3. When approached the appellant gave a false name. The police noticed a smell of cannabis. The appellant's phone was seized. When analysed it contained almost 2,700 images and video films. There were four images relating to guns. The appellant was taken to the police station where he confirmed his correct name. In interview he made no comment to all questions posed. At the culmination of the interview his solicitor handed a note to police which said: "The reason I was at Ferrier Point was to buy cannabis."

C THE EVIDENCE OF THE APPELLANT SAID TO CREATE A FALSE IMPRESSION

12. We turn now to the evidence given by the appellant in court. The appellant denied knowledge of any of the individuals present, save for Mudhir and his girlfriend. He knew Mudhir because he purchased cannabis from him. Mudhir was, he said, a close friend. They spoke several times a week following the release of Mudhir from prison in January 2016. He saw him regularly between February and April 2016. The appellant accepted that he was a buyer and seller of cannabis. He accepted that he was present at the flat but he said only to buy drugs. He accepted that he had spoken to Mudhir by phone on various dates during May and that he had spoken to him on the night in question but only to arrange to purchase drugs from him. On that night in question greeted Mudhir in the living room of the flat and was supplied with two ounces of cannabis. It was then that he happened to receive a telephone call from his friend Toren, who he had driven in convoy with him to the address and who was waiting outside. Toren called him to let him know that there were armed police in the process of entering the tower block. Mudhir panicked and several other unknown individuals appeared from the kitchen. The appellant explained that he had sought then to escape. He did not know what other drugs or cannabis Mudhir held in the flat. He just wanted to get out like everybody else. He ran down a few floors of steps, he disposed of the cannabis down a refuge shoot. He then exited the building and fled.

13. When he was asked about the images found on his phone he explained that he had no interest in guns. He denied that he had been to the flat to acquire weapons. He made his living selling cannabis. He was selective as to who he dealt with. He never needed a weapon. His relationship with Mudhir was only in relation to cannabis and he had no knowledge of the involvement by Mudhir in weapons and he did not know that he was seeking to sell weapons or ammunition at the flat on the date in issue.

14. In addition, the appellant gave evidence about his attitude to weapons and to violence. In his detailed summing-up the judge summarised the evidence given by the appellant. The accuracy of the summary has not been challenged in this appeal. In relation to the photographic images on the phone relating to guns the appellant denied having any interest in weapons. He did not even know that he had screenshot such images. They had no relevance to him. In relation to images of men holding firearms he could not explain why he had recorded the images.

15. As to his earnings from the sale of cannabis these varied but were of little economic value. He said that they: "*May be a few hundred pounds street deals*." He changed his phone regularly. He did not have a driver. He accepted that he was aware Mudhir had been in prison for nine years and had been released in January 2016 but he was not, so far as he was aware, involved in guns or gangs. He was unaware that Mudhir was selling weapons to gangs.

16. In relation to participation in or communication with gangs, he said: "*I don't like gangs. They make me quiver*." He acknowledged that at least four of the individuals in the flat were involved in the sale of guns, and he accepted that they were clearly doing something dangerous and illegal but he reiterated that he was only there for cannabis and no one had said to him "Who are you?" No one had asked him what he was doing there. In effect he explained his presence at a gun sale as coincidence.

17. On page 35 of the summing-up, the judge stated as follows:

> "He was asked about why there were so many calls. He said 'I'm not gang affiliated' and he maintained at the end of a long day of cross-examination he said 'I'm not gang affiliated. I like to look after my people. I've got morals. I've got morals. I would buy my girl a handbag. This gun could be given to a terrorist. A member of my family could be hurt with it. I'm just a cannabis dealer.' As a result of those statements you heard about his link to a number of people concerned with gangs, the Customs House gang, the Beckton gang, the Chadd Green gang, and you saw a number of photographs which you now have in your bundle at bundle number 10 and you have heard his explanation; some of these are people he knew, some of them were involved in crime. He said that he was not himself involved in any gang affiliation."

18. Following the cross-examination of the appellant, the Crown argued that the appellant had in giving this evidence deliberately set out to convey a false impression of his character and economic circumstances to the jury. In short it was argued that the appellant sought, falsely, to portray himself as a peace loving man with a profound distaste of guns whose criminal activity was limited to low level cannabis dealing. They applied to adduce evidence on three matters in order to refute and counter the evidence. First, there was the evidence of PC Akkaya from the Trident and Area Crime Command who had previously worked on the Gangs and Firearms Unit in the London Borough of Newham. PC Akkaya gave evidence in relation to a substantial number of photographs of members of gangs found on the appellant's phone and their previous convictions. The Crown argued that this could be relied upon to show, contrary to the appellant's denial of links with gangs, that he in fact had an association with gang members and that unusually the individuals whose images were on the phone were from five different gangs who would ordinarily be antagonistic towards each other. The statement of PC Akkaya is before this court. In that statement PC Akkaya names 30 individuals from five gangs. He provides a photograph of each of the individuals. He explains their affiliation with particular gangs and their previous convictions.

19. The second piece of rebuttal evidence sought to be adduced by the prosecution concerned the appellant's previous convictions for dishonesty and violence, sexual assault and causing death by dangerous driving and driving away from the scene of an accident.

20. Third, the Crown sought to adduce photographs of the appellant holding large sums of money also found upon his phone.

21. Counsel for the appellant opposed the application to adduce this evidence upon the basis that the appellant had not given a false impression within the meaning of the Criminal Justice Act 2003. It was argued that the appellant's evidence was nothing more than an over-emotional and impulsive plea of innocence to involvement with guns. It went no further than a denial of the charges and was thereby inadmissible. In

any event, the statement of PC Akkaya did not prove that either he or the others named were actual gang members.

D THE JUDGE'S RULING ON ADMISSABILITY OF REBUTTAL EVIDENCE

22. In his ruling on 7 September 2017 the judge decided to admit the preponderant part of the evidence sought to be adduced by the Crown. He accepted the prosecution submission that the evidence was relevant to rebut what the Crown contended was a false impression and went no further than that which was necessary in this connection. The judge recited the evidence that we have recorded. He concluded that the evidence given by the appellant went beyond the mere denial of the offences charged. His evidence sought to portray an impression of a person who was not interested in gang affiliation and adopted a moral and hostile position towards weapons. The appellant was not forced to make these statements in the manner that he had. He had elected to make those observations. However, the judge did conclude that he would exclude references to the sexual assault and to the offence of death by dangerous driving since these were not relevant to the charges and did not serve to rebut the impressions conveyed. He stated that the evidence of the defendant escaping the scene of an accident could be adduced. The judge also cautioned the prosecution as to the manner in which the defendant was to be cross-examined upon gang related issues. He did not wish the matter to become "*satellite litigation*". He also left open the possibility that dependent upon the answers given to questions in cross-examination that the defendant might need to call rebuttal evidence himself.

E THE APPELLANT'S SUBMISSIONS

23. In concise and helpful written submissions, and equally in the submissions advanced before us today, Miss Power for the appellant, argues that the judge erred in his conclusion that the appellant had given a false impression. As such, she contends that the bad character evidence was wrongly admitted before the jury. She accepts that the judge gave a clear direction to the jury which had been drafted and agreed by counsel but nonetheless if the admission of the evidence was wrongful then the conviction was necessarily unsafe despite these directions. The Crown's rebuttal evidence created, she argued, overwhelming prejudice to the appellant. The amount of the bad character material and its nature could not be cured by any direction.

24. Miss Power also submitted that even if a false impression had been created by the appellant's evidence, the admission of the bad character material went too far to correct that impression. This was especially so given that the evidence was not sought to be admitted pursuant to section 101(d) CJA 2003 as relevant to an important issue in the case. The jury had already been made aware of pictures of guns on the appellant's phone and they knew of Mr Mudhir's conviction in 2011. Accordingly, the admission of the evidence created an overwhelming and excessive prejudicial effect which could not be cured by any amount of otherwise proper directions being given to the jury.

25. In addition, in any event the evidence of PC Akkaya on gang affiliation did not meet the test for admission as expert evidence and should have been excluded. In her oral submissions before this court today, Miss Power, whilst not abandoning any other

argument, focused upon the evidence contained in the report of PC Akkaya on gang affiliation.

F ANALYSIS AND CONCLUSIONS

26. We turn now to our conclusions. Notwithstanding, the cogent submissions made by Miss Power we are not persuaded. We start with the argument that the appellant did not as a matter of fact convey any false impression. The central issue for the jury was whether they believed the appellant's evidence and in particular the reasons he gave for his presence at the meeting convened for the sale of weapons and ammunition. Put shortly, the defendant's case relied upon his credibility. In this regard, as already observed, he made a number of statements which, if true, would have bolstered his credibility and supported his case that he was simply not the sort of man who would be involved with guns or gangs or related violence and that this was for moral reasons.

27. This impression flowed from the following. First his assertion of non-association with gangs per se since, as he put it and as was recorded by the judge, they made him "quiver". Second, his assertion of non-association with gangs which used guns. Third, his objection to the use of guns because of their dangerousness and implicitly their connection with violence. Fourth, his reasons for so objecting being rooted in morality. Individually and collectively the appellant portrayed himself as a man with a moral objection to gun related gang activity. He portrayed himself as a mean of peace, albeit (1) had engaged in admittedly criminal activity, namely, he said, low level cannabis dealing. These observations were freely given. They were designed to create an impression which bolstered his credibility and truthfulness which in turn was relevant to the accuracy and acceptability of his explanation for his presence at the flat of the critical point in time in issue.

28. The prosecution considered that this impression was false. In our judgment in these circumstances the Crown was entitled to adduce rebuttal evidence. It might well be that no single piece of rebuttal evidence was conclusive in and of itself in refuting the impression conveyed. The admissibility of a piece of evidence as rebuttal is not however conditional upon it being capable in and of itself of amounting to a complete answer to the false impression conveyed. But the evidence was nonetheless probative to some material degree in rebutting the impression conveyed by the appellant. We therefore conclude that a false impression was conveyed and *prima facie* the prosecution was entitled to adduce rebuttal evidence.

29. We now turn to the prosecution rebuttal evidence itself. We deal first and briefly with the question of the appellant's previous convictions for dishonesty and violence. These were relevant in rebutting the impression conveyed by the appellant that he was honest and credible when he explained that he had a moral objection to gangs and gun related activity which by its very nature entails the risk of violence. The antecedents eere relevant to that particular issue and they were in a broader sense relevant to the credibility of his account and his case that he lacked a tendency or propensity to be involved in gun trades.

30. We turn to the evidence of gang affiliation. The core of Miss Power's arguments before us are concentrated upon the issue of gang affiliation. In relation to the evidence of PC Akkaya on this issue, in her oral submissions, Miss Power developed the argument set out in her written submissions. Her argument has three strands to it. First, she argued that the evidence of PC Akkaya did not meet the threshold test for admissibility of expert evidence set out in case law. Second, she argued that the judge allowed too much of the evidence otherwise contained in PC Akkaya's report to go before the jury and it went beyond that which was necessary to rebut the false impression. Third, and in any event, she contended that in his summing-up the judge failed to give the jury sufficient warnings about the evidence to ensure that a fair impression and set of instructions was provided to the jury so that they could properly evaluate the evidence.

31. We take each of these points in turn. We turn to the ground complaining that the evidence of PC Akkaya about gang affiliation did not meet the test for admissibility in the light of R v Myers [2015] UKPC 40. It is said that PC Akkaya did not explain what his experience was in the field of gang affiliation and that it did not prove that other persons identified in photographs in the report or on the appellant's phone were in fact gang related. In our judgment, the report (in so far as this issue is relevant - a point that we come to shortly) - was admissible. The report includes a statement that PC Akkaya had previously worked on the Gangs and Firearms Unit in Newham and that he was employed in the Trident and Area Command. He explained that he had viewed the images on the appellant's phone. He compared those images to individuals on the Police Aware System and he also had access to the Newham Gangs Matrix and to the Custody Imaging Portal to perform facial recognition of the images. He set out his conclusion on each image. He sets out the image of the phone and the image on the police system so that a comparison could be made and he set out his conclusion on each image, giving details of the individual concerned including dates of birth, police national computer reference and gang affiliation where relevant. He then gave, at least for some individuals, details of their actual gang activity and previous convictions.

32. The issue arising in Myers concerns the admissibility of expert evidence when that is put in issue by a party. In the present case, the Crown did not apply to the judge to reopen the prosecution case to permit them to call PC Akkaya. Instead, the Crown used the information in parts of the report as a basis for cross-examining the appellant on his claim that he did not have connections with gangs. The nub of the complaint therefore is not truly about the admissibility of expert evidence; it is much more about the use to which the contents of such a report can subsequently be put.

33. This brings us to the second point raised by Miss Power. This is that the judge allowed too much of the evidence in the report to be put before the jury by way of cross-examination of the appellant. It is clear that only parts of the contents of the report of PC Akkaya were actually put to the appellant. It is also clear from the judge's directions that the Crown introduced into evidence six photographs downloaded from the appellant's phone. These were copied and provided to the jury. There is no dispute that they came from the appellant's phone. His photographs show named individuals alone and in groups. These individuals were said by the prosecution to be from specific gangs and it was suggested by reference to the conduct portrayed by the individuals on the photographs that they were gang members, including the possibility

that they were making signs characteristic of different gangs. It was therefore suggested by the prosecution, as questions put to the appellant, that these were all individuals with whom he had connections and they were all engaged in serious criminality and were members of gangs.

34. In response to such questions, the appellant said that he did not know whether this was true or not. He gave this answer because it was his case that he had no gang affiliations and was not interested in gangs or weapons.

35. The extent of the material put in cross-examination was not in our view extensive. It was supplemented in due course by agreed facts on the previous convictions of those individuals who were the subject of the photographs. If the jury had accepted the prosecution's suggestion that these were gang members and it could be inferred that the appellant had connections with them because of the fact that he had images of them on his phone, then it was relevant to refute the appellant's case that he had no gang affiliations. We do not consider that this evidence went too far. It was a carefully tailored approach which accorded with the judge's desire to prevent the issue becoming satellite litigation.

36. This brings us to the third point raised by Miss Power. Because the Crown did not seek to call PC Akkaya to give expert evidence, there was in fact no actual proof that the individuals recorded on the appellant's phone were gang members. In the judge's legal directions, he accurately summarised the competing contentions. He said only that the prosecution 'suggested' that the individuals were gang members. He did not say that there was evidence showing that they in fact were. He then summarised the appellant's evidence which was to the effect that he had no gang connection himself and, as we have already observed, did not know whether the photographed individuals had any such connections.

37. Miss Power accepts that she approved the manner in which the judge formulated this part of the directions to the jury and that no objection or criticism was made at the time. But she says, quite candidly, that in effect this was in error on her part and the judge should have added a number of matters by way of caveat and clarification. Miss Power is not prevented from advancing this argument before this court simply because she conceded, as it were, the point before the judge.

38. The two matters that Miss Power says should have been included in the directions can be summarised as follows. The first is that the judge should have emphasised and explained to the jury that questions put by counsel in cross-examination to the effect that a named individual was a gang member was not evidence. Secondly, she submits that there was no evidence in existence before the court demonstrating that the individuals were gang members and this point should have been emphasised to the jury.

39. In our judgment, in an ideal world the judge would have added these provisos given that the prosecution had not called PC Akkaya to give evidence on these matters. However, we are not persuaded by the argument. First, we are bound to attach weight to the fact that experienced and plainly skilled counsel at the time did not consider that such caveats were necessary and nor did the judge or the prosecution. This court is

bound to give at least some weight to the fact that counsel and judge are best placed to make that sort of evaluative judgment during the trial and there is a real danger in attempting to second-guess what should have been put after the event.

40. Second, there is no criticism of the accuracy of what the judge actually did say. It is to be inferred from the judge's choice of language that the prosecution case on gang affiliation was nothing more than suggestion, and was not fact. We are by no means convinced that the jury would have been confused even if we conclude that it would have been better had the judge made these points clear. Ultimately we do not consider that the criticisms made about the issue of gang affiliation are justified.

41. There are a small number of additional points that we would make of a general nature about the case. First, in relation to the complaint that the appellant's evidence did no more than refute the basic charge against him, we take the view that this is an unjustified point to make. The appellant's primary defence was that he attended the flat simply to acquire cannabis and he was not a dealer in weapons or ammunition. An essential issue for the jury was whether his presence at the gun sale was pure coincidence. The main thrust of the appellant's evidence lay in providing explanations for the prima facie inculpatory evidence relating to such matters as his presence in the flat, CCTV evidence of his fleeing, cell site and call data evidence linking him to co-defendants, his arrival at the flat in a convoy, possibly with a lookout, his connection to a person able to tip him off that the police were conducting a raid and so on. The creation of the alleged false impression did not go to these core facts. The appellant did not need evidence of impression to advance his primary case. His evidence instead created a secondary defence based upon a disinclination or lack of propensity. The primary defence was that he did not do it; The secondary case was that he would not do it. In our view the judge was correct in relation to this point.

42. Next, we consider broadly whether the judge permitted more evidence than was necessary to rebut the impression. As already made clear we do not consider that the evidence went beyond that which was necessary. The judge was best placed to make a judgment call about this. This court should show a degree of reticence in the absence of a clear error in interfering with a trial judge taking plainly fact-sensitive decisions. It cannot be said in this regard that the judge failed to address himself to the issue. He expressly contemplated the limits of what he considered necessary to refute the false impression. It was for this reason that he refused to permit previous convictions relating to sexual assault or causing death by dangerous driving to be adduced and it is for this reason that he gave directions to ensure that the matter did not assume disproportionately significant when he cautioned the prosecution to avoid the issue becoming satellite litigation. He also made clear that he contemplated the possibility of the defendant having the right to call additional evidence to rebut the Crown rebuttal evidence.

43. In all of these circumstances we have concluded that this appeal must therefore fail.

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