Neutral Citation Number: [2019] EWCA Crim 1143

Case No: 201802898 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT HARROW
His Honour Judge Cole
T20177206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2019

Before:

LORD JUSTICE LEGGATT
MR JUSTICE NICOL
and
MR JUSTICE BUTCHER

- -

Between:

Regina	**Respondent**
- and -	
Nico Brown	**Appellant**

- -
- -

John Hulme (instructed by the **Crown Prosecution Service**) for the **Respondent**
Tasmin Malcolm (instructed by **Rustem Guardian**) for the **Appellant**

Hearing date: 25 June 2019

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Approved Judgment

Lord Justice Leggatt:

1. The issue on this appeal is whether the judge erred in admitting as hearsay evidence a statement made at the scene of a crime by a person who could not afterwards be identified or traced.

The stabbing

2. On 11 June 2017, shortly before 1pm, a man called Brian Odour was stabbed as he sat in his car waiting behind a taxi to turn from a side street onto Goldhawk Road near Shepherd's Bush Green in West London. The incident was witnessed by many members of the public. The assailant was seen to get out of a car which had stopped immediately behind Mr Odour's car, approach the driver's side of Mr Odour's car, try to pull open the door and then make repeated downward thrusts with a knife through the opening before running back to his own car and reversing away at speed. Mr Odour also drove off after the attack and went straight to Charing Cross Hospital, where he was treated for a severe wound to his right wrist.

The prosecution case

3. The appellant, Nico Brown, was charged with offences of wounding with intent to cause grievous bodily harm and possession of an offensive weapon in a public place on the basis that he was the person who had carried out the attack. He denied that he was that person.

4. The victim refused to make a statement or to assist the police in any way and none of the other eyewitnesses was able to give more than a general description of the assailant as a black male, of slim build. Two witnesses were shown images in an identity parade which included the appellant but did not identify him as the assailant. Accordingly, the prosecution case was based entirely on circumstantial evidence. In particular:

    i) A witness, Ms Ghani, made a 999 call immediately after the incident in which she gave what she said was the registration number of the car driven by the assailant. As we will explain shortly, that assertion involved hearsay evidence. The number reported by Ms Ghani ("PF06 TGZ") matched the number of a black Audi car of which the appellant was the registered keeper.

    ii) Another eyewitness made a note of the assailant's vehicle registration number, but he recorded it slightly differently as "PG03 TGZ" (which was found not to be a registered licence number).

    iii) A further eyewitness identified the assailant's car as a black Audi and remembered the registration number as beginning with the letters "PF".

    iv) Data from Automatic Number Plate Recognition cameras was consistent with the appellant's Audi car, with registration number "PF06 TGZ", being in the Shepherd's Bush Green area when the stabbing occurred.

    v) Cell site data showed that the appellant's mobile telephone was in the Shepherd's Bush Green area at the relevant time.

vi) DNA from the appellant was found on the window of the driver's door of Mr Odour's car.

The trial

5. The trial took place in the Crown Court at Harrow before HHJ Cole and a jury over five days in June 2018. The judge ruled that the hearsay evidence about the vehicle registration number given by Ms Ghani was admissible. It is that ruling which is challenged on this appeal.

6. The appellant gave evidence. He accepted that he was the owner of the black Audi car with the registration number "PF06 TGZ". But he denied that he was the person who attacked and stabbed Mr Odour. He said that he had lived all his life in the area of West Kensington – Shepherd's Bush. He also said that he knew the victim, Mr Odour, and had spoken to him from time to time, including on occasions when Mr Odour stopped in his car. The appellant said that he could not remember exactly where he was on the day in question – Sunday, 11 June 2017 – but that his normal daily routine was to visit a disabled friend called Daryl Haynes between 11am and 1pm at his house near Shepherd's Bush Green. Mr Haynes was called as an alibi witness by the defence and gave evidence that the appellant visited him between 11am and 1pm on most days, although he could not recall whether the appellant was with him on the day in question.

7. The jury (by majority verdicts of 11:1) convicted the appellant of both offences charged and he was sentenced to a total of 8 years' imprisonment. He appeals against his convictions arguing that they are unsafe because the hearsay evidence given by Ms Ghani was wrongly admitted.

Ms Ghani's evidence

8. At the time when the stabbing occurred, Ms Ghani was a passenger on a bus travelling along the Goldhawk Road. She was sitting on the top deck near the front of the bus with her mother and five year old son. The stabbing was in fact filmed by a CCTV camera which shows the view from the front of the bus but it was not possible to identify the assailant from this footage.

9. Ms Ghani gave evidence that she saw a man trying to stab someone who was sitting in the driver's seat of a car; but she then immediately rushed to her child, who was standing at the front of the bus, to cover his eyes. She had seen another black saloon car behind the victim's car but did not herself note its registration number. Within 40 seconds of the incident she made a 999 call. The call was recorded and on the recording Ms Ghani's voice can be heard reporting the stabbing and giving a car registration number which she said was that of the car driven by the assailant. Ms Ghani said in evidence that she read this number from the mobile telephone of a woman who was sitting behind her on the bus. Ms Ghani did not know this person and recalled that she had a South African accent. On the recording of the 999 call, a woman's voice can be heard in the background helping Ms Ghani with the phonetic spelling (Papa, Foxtrot etc) of the registration number.

10. On footage from a CCTV camera inside the bus showing the front of the top deck a female passenger can be seen sitting behind Ms Ghani. When the bus began to move,

which was immediately after the stabbing occurred, the passenger can be seen retrieving her phone. Then, while Ms Ghani was making what must have been the 999 call, the passenger behind her can be seen during the call holding out her phone towards Ms Ghani so that Ms Ghani could see the screen.

11. The police made extensive efforts to trace this passenger by checking Oyster card records and with a witness appeal on the bus route and in the local area. It has not been suggested that there was any further step which the police could reasonably have taken but did not take to try to find this potential witness. But their efforts were unsuccessful.

Hearsay evidence

12. The admissibility of hearsay evidence in criminal proceedings is governed by the Criminal Justice Act 2003. Section 114 of the Act provides:

> "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if —
>
> (a) any provision of this chapter or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by section 118 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible."

13. Ms Ghani was able to give first-hand evidence that the number she reported to the operator during the 999 call was a number that she read from the screen of the mobile phone shown to her by the person who was sitting behind her on the bus. But, as mentioned, she had no direct knowledge that the number recorded on that person's mobile phone was the number plate of the car to which the assailant returned after the attack. Her belief that this was so was based on what her fellow passenger had told her. That person's statement to Ms Ghani was therefore admissible as evidence of the truth of the matter stated if, but only if, this case falls within one of the limbs of section 114(1) of the 2003 Act.

Section 116: unavailable witnesses

14. Section 116 of the 2003 Act makes hearsay evidence admissible in certain specified cases where a witness is unavailable. One of these cases is where "the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken": see section 116(2)(d). Although this description would apply to the present case, it is a condition of admissibility under section 116 that the relevant person "is identified to the court's satisfaction": see section 116(1)(b). In *R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915, paras 107-109, the Court of Appeal held that this condition requires the person to be identified not just to the court but to

the defence and needs to be read alongside section 124 of the Act, which allows the admission of evidence relevant to the credibility of a witness whose evidence is admitted as hearsay. The court considered that the safeguard provided by section 124 would be rendered virtually ineffective unless section 116(1)(b) is interpreted as requiring at least the name of the witness to be provided to the defence.

15. Where, as in the present case, the name of the witness is unknown, it is obviously impossible to fulfil that requirement. It is therefore common ground that the evidence of the statement made by the unidentified passenger was not admissible under section 116.

The *res gestae* rule

16. The basis on which the prosecution contended at the trial that the statement was admissible was section 118 of the 2003 Act, which preserves certain rules of the common law. These include:

> "4. Any rule of law under which in criminal proceedings a statement is admissible as evidence of any matter stated if –
>
> > (a) the statement was made by a person so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded, …"

17. This rule is one aspect of the common law doctrine allowing hearsay evidence to be given of a statement that forms part of the "*res gestae*" – a Latin phrase which literally means "the things done". The original idea was that a statement could be relied on as evidence of its truth if the making of the statement could be regarded as part of the relevant event or transaction. In *Ratten v R* [1972] AC 378 at 391, however, the Privy Council rejected this test as too uncertain and identified the true test as being whether "the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded."

18. That approach was endorsed by the House of Lords in *R v Andrews* [1987] 1 AC 281. Lord Ackner, with whom the other law lords agreed, said (at 300-301) that, when faced with an application to admit a statement under the *res gestae* doctrine, the primary question which the judge must ask is whether the possibility of concoction or distortion can be disregarded. To answer that question, the judge must consider the circumstances in which the statement was made and whether "the event was so unusual or startling or dramatic as to dominate the thoughts" of the person who made it; whether the statement was sufficiently close to the event in time that "it can fairly be stated that the mind of the [maker] was still dominated by the event"; and whether the person who made the statement had any motive to fabricate or concoct. On the other hand, the possibility of error in the facts stated, if "only the ordinary fallibility of human recollection is relied upon" and there are no special features that give rise to such a possibility, is a matter that goes to the weight to be attached to the statement and not to its admissibility, and "is therefore a matter for the jury".

19. Lord Ackner added a warning (at 302) that the doctrine of *res gestae* should not be used in criminal prosecutions as a device to avoid calling the maker of the statement, when available. This is because:

> "Thus to deprive the defence of the opportunity to cross-examine [the maker of the statement], would not be consistent with the fundamental duty of the prosecution to place all the relevant material facts before the court, so as to ensure that justice is done."

20. In the present case the judge was satisfied that there was no possibility of concoction of the information given to Ms Ghani by the unidentified passenger, which "was recorded and relayed spontaneously as the incident was unfolding or in the immediate aftermath". He described the evidence as "classic *res gestae* material".

Section 114(d): the interests of justice

21. The judge also ruled that the evidence was admissible under section 114(1)(d) of the 2003 Act, which allows a statement not made in oral evidence to be admitted as evidence of a matter stated if "the court is satisfied that it is in the interests of justice for it to be admissible". Section 114(2) contains a list of factors to which the court must have regard in deciding whether a statement should be admitted under this gateway. These factors are, in summary: how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings; what other evidence has been or can be given on that matter; how important the matter is in the context of the case as a whole, the circumstances in which the statement was made; how reliable the maker of the statement and the evidence of the making of the statement appears to be; whether oral evidence of the matter stated can be given and, if not, why not; the amount of difficulty in challenging the statement; and the extent to which that difficulty would be likely to prejudice the party facing it. The judge went through the list of factors and concluded that the interests of justice test was satisfied. He also concluded that there was nothing so unfair about admitting the evidence as to justify excluding it under section 78 of the Police and Criminal Evidence Act 1984. We see no reasonable basis for challenging these evaluative judgments.

22. Subject to the point that we are about to discuss, we therefore consider that the judge's decision to admit the hearsay evidence given by Ms Ghani is unimpeachable.

Anonymous witness evidence

23. The point of principle raised by this appeal is whether the statements made by the female passenger were inadmissible as evidence of the matters stated because her name was not known.

24. In *R v Davis* [2008] UKHL 36; [2008] AC 1128, the House of Lords re-affirmed the long-established principle of the English common law that a defendant in a criminal trial is entitled to see and know the identity of his accusers and held that allowing witnesses who had feared for their lives if their identities became known to the defence and whose testimony was decisive to give their evidence anonymously had breached the defendant's right to a fair trial.

25. In immediate response to that decision, Parliament enacted the Criminal Evidence (Witness Anonymity) Act 2008, which provided for the making in relation to witnesses in criminal proceedings of "witness anonymity orders". Section 1(2) of the Act abolished the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant. The new statutory rules enacted in their place specified the kinds of measure that may be authorised by a witness anonymity order and the conditions which must be met before such an order may be made. The power to make orders under the 2008 Act expired on 31 December 2008, and the Act was then repealed and replaced by equivalent provisions contained in the Coroners and Justice Act 2009.

26. In *R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915, the Court of Appeal considered a case in which the prosecution had sought to adduce as hearsay evidence under the 2003 Act statements made by individuals who were too fearful to testify, without disclosing their identities. The prosecution accepted, and the court agreed, that, since it was not proposed that they should be called to give oral testimony, the makers of the statements did not fall within the definition of a "witness" in the 2008 Act as "any person called, or proposed to be called, to give evidence at the trial or hearing in question": see now section 97(1) of the 2009 Act. Accordingly, there was no power under the 2008 Act to make witness anonymity orders in relation to the individuals concerned.

27. As already discussed, the Court of Appeal held that their statements were not admissible under section 116 of the 2003 Act without disclosing their identities to the defence. The court also held that the statements could not be admitted "in the interests of justice" under section 114(1)(d) because it would be inconsistent with the 2008 Act to use that power to permit evidence to be given anonymously. Lord Judge CJ, who gave the judgment of the court, said (at para 113) that:

> "we are being invited to re-write the 2008 Act by extending anonymous witness orders to permit anonymous hearsay evidence to be read to the jury. We cannot do so. Neither the common law, nor the 2003 Act, nor the 2008 Act, permits it."

These observations were endorsed by the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, in Annexe 4 of the judgment, prepared by Lord Judge, at para 13.

28. In *R v Fox* [2010] EWCA Crim 1280 the prosecution sought to rely on a transcript of a 999 call made by a member of the public who had given personal details to the police but had requested that they not be disclosed and the police and prosecution had been faithful to that request. On the basis of the decision in the *Mayers* case, the Court of Appeal held that the judge had not been entitled to admit evidence of the 999 call under section 114(1)(d) of the 2003 Act.

29. The purpose of the 2008 Act, as we have outlined and as its long title indicates, was "to make provision for the making of orders for securing the anonymity of witnesses in criminal proceedings". In the *Mayers* case the Court of Appeal took the view that, although the 2008 Act did not apply to a person who has made a statement but who is not proposed to be called to give oral evidence at the trial, such a person nevertheless fell within the general purview of the 2008 Act such that it could be inferred that, if

Parliament had intended to allow measures to be taken to secure the anonymity of such a person, it would have done so in the Act. It is difficult to see, however, how similar reasoning could apply or how the 2008 Act (or its successor) could be considered relevant to a situation in which the prosecution is not seeking to withhold the identity of a person who has made a statement out of court but simply does not know that person's name or other personal details.

30. In *R v Ford* [2010] EWCA Crim 2250, however, the Court of Appeal (at para 18) rejected an argument that the reasoning in the *Mayers* case could be distinguished on that basis. The appellant was charged in connection with a shooting. When the police arrived at the scene, an unknown female handed one of the officers a piece of paper bearing a vehicle registration number and a note which said that the woman had "heard gunshots and saw them getting into this car but I don't want to get involved" (para 8). The trial judge allowed this evidence to be adduced under section 114(1)(d) of the 2003 Act on the ground that it was in the interests of justice for it to be admissible. But the Court of Appeal held that the evidence was not admissible under that provision. Laws LJ, who gave the court's judgment, stated the governing principle (at para 19) as being that:

> "a statement which is sought to be adduced in evidence in circumstances where the anonymity of its maker is sought to be preserved can only be so adduced if it falls within any of the provisions of the Act of 2008 which permit that to be done." (emphasis added)

As the statement of the unknown woman did not fall within the provisions of the 2008 Act, there was no power to admit it.

Unwillingness to be identified

31. The *Ford* case treats the relevance or reach of the 2008 Act as extending to a case where the anonymity of a person who made a statement "is sought to be preserved", not by the prosecutor applying for an order to secure the person's anonymity, but by the maker of the statement clearly indicating that she is not willing to be identified. Whether or not that extension of the reasoning in the *Mayers* case is justified in principle, it does not apply in this case. In the present case there is nothing to suggest that the passenger who recorded the appellant's registration number on her mobile phone was seeking to remain anonymous or would not have been willing to assist the police unless her name or other identifying details were withheld. It was simply that she could not be traced, despite the efforts made to find her.

32. As Lord Phillips, giving the judgment of the Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, said (at para 49):

> "There is a difference of principle between a witness who cannot be called to give evidence because, for instance, he is dead or untraceable, and a witness who is able and available to give evidence but not willing to do so."

It is clear that the witness anonymity provisions of the Coroners and Justice Act 2009, like those of the 2008 Act, are concerned with cases in the second of these categories:

that is, cases where a witness (or potential witness) is able and available to give evidence but is not willing to do so unless their identity is withheld. The *Ford* case indicates that the Act is also relevant to a case in which there is reason to think that a person's unavailability to give evidence is the result of unwillingness to do so. But even on the broadest view of their purpose and scope, the statutory provisions for securing the anonymity of witnesses are not concerned with cases in the first category where a potential witness has not expressed any unwillingness to be identified or to give evidence, but the name of the witness cannot be provided to the defence for the same reason that he or she cannot be called to give evidence – that reason being that the witness cannot be traced. The present case falls squarely in that category.

33. It is only the 2003 Act, therefore, which governs this case. Under the 2003 Act there is no general rule that a statement made out of court cannot be admitted as hearsay evidence unless the maker of the statement is identified. For example, in section 117 concerning business documents there is no requirement that the person who supplied the information should be identified. As already noted, there is such a requirement in section 116. But its rationale, as explained in the *Mayers* case, is the practical consideration that, if the identity of the person who made the statement is not disclosed to the defence, the defence is deprived of the opportunity that it would otherwise have under section 124 to adduce evidence bearing on that person's credibility as a witness.

34. Where the provision relied upon to admit hearsay evidence is the residual power under section 114(1)(d) to do so in the interests of justice, the fact that the protection afforded by section 124 of the Act would be ineffective because the maker of the statement cannot be identified may in many cases be a powerful or decisive reason why the court cannot be satisfied that it is in the interests of justice for the statement to be admissible. That is not a relevant consideration, however, where it is clear from the circumstances in which the statement was made that there would be no realistic scope for questioning the credibility of its maker in any event, if that person's name or personal details were known. It cannot then be said that the other party to the proceedings has been deprived of a material safeguard or caused any possible prejudice by the inability to adduce evidence under section 124. In such a case there is no principled reason to treat the question of admissibility any differently from a case where the name of the person who made the statement is known (perhaps because she gave it to someone at the time) but she cannot afterwards be found despite taking all reasonably practicable steps to do so.

35. Furthermore, the very fact that the requirements for admitting a statement as part of the *res gestae* are satisfied, as they were in this case, demonstrates that the inability to adduce evidence bearing on the credibility of the maker cannot be said to have caused prejudice because the *res gestae* doctrine only applies where the possibility of concoction or distortion by the maker of the statement can safely be disregarded.

The circumstances of this case

36. In the present case the conduct of the unidentified passenger in recording on her mobile phone the registration number of the car to which she had seen the man who had carried out a stabbing return, and in explaining what she had done to Ms Ghani, occurred immediately after and in what was obviously a spontaneous reaction to witnessing a shocking event. As the defence rightly accepted, any possibility that the

information given to Ms Ghani might have been concocted or deliberately distorted can safely be excluded.

37. Of course, it was necessary to consider the possibility that the unidentified passenger did not record the registration number of the assailant's car accurately. But that possibility of error was a matter which the jury was well able to evaluate. They had the evidence of Ms Ghani and the CCTV footage from which to assess how good a view the unidentified passenger had of the car number plate, the length of time for which it was in her sight and how soon after seeing it she entered the number on her phone. Furthermore, Ms Ghani could be, and was, cross-examined about those matters. The jury could also fairly judge the probability that the registration number, if recorded incorrectly, happened to match the number of a car which was also a black Audi, was in the vicinity of Shepherd's Bush Green at the relevant time, and belonged to an individual (the appellant) who was also in that area at the time, whose description was consistent with that of the assailant and whose DNA was found on the driver's door of the victim's car. A jury could reasonably take the view that, in the circumstances, the possibility that an error was made in recording (or transmitting) the registration number could safely be ruled out.

Conclusion

38. For these reasons, we are satisfied that the hearsay evidence given by Ms Ghani was admissible and was properly admitted by the judge. Accordingly, the appeal must be dismissed.