Neutral Citation Number: [2020] EWCA Crim 1021

Case No: 201901950 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
HHJ Cummings QC
T20187630

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2020

Before:

LORD JUSTICE IRWIN
MR JUSTICE HOLGATE
and
MR JUSTICE LINDEN

- -

Between:

WILLIAM FRANCIS JONES	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Michael Scholes (instructed by **FDR Law**) for the **Appellant**
Simon Mills (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 24 July 2020

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REASONS FOR 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 10:00am on 3 August 2020.

Lord Justice Irwin:

1. On 29 April 2019 in the Crown Court at Liverpool (HHJ Cummings QC), the appellant was convicted (by a majority of 11 to 1) of Count 1 on a single-count indictment alleging conspiracy to possess explosives for an unlawful purpose, contrary to section 1(1) of the Criminal Law Act 1977. On 2 May 2019 at the same Court (HHJ Cummings QC) he was sentenced to life imprisonment with a minimum term of 6 years.

2. There were co-accused who were tried with the appellant. RM, KS and WW were jointly tried on the same indictment: each was found not guilty.

3. The appellant appeals against conviction by leave of the single judge, who also granted a representation order

4. The present constitution of this court first heard this appeal on Friday, 12 June 2020. We considered that it was necessary for us to review the transcript of the evidence given by the DNA expert for the Crown, along with some other material bearing on the DNA evidence. Accordingly, the appeal was adjourned while that material was obtained. We have now seen it and read it. On 24 July 2020, we heard and considered very short supplementary submissions from counsel on both sides. We then indicated that we were minded to quash the conviction. We now do so, and provide our reasons in writing.

FACTS

5. At 00.39 on 24 February 2018 an anonymous 999 call was made from a telephone box on Knutsford Road in Warrington to Cheshire Police, reporting that a hand grenade had been left under a vehicle outside 27 Cleveland Road in Warrington. The caller stated that he thought it had something to do with a man we shall identify as 'SS'. Officers attended the address and after a brief search, a hand grenade was located between a vehicle and the house. A cordon was put in place and the occupants of the house and its neighbours were evacuated. Explosive Ordinance Disposal and a Crime Scene Investigator attended the scene and confirmed that the hand grenade was homemade and that it was a viable explosive device. Under controlled conditions DNA swabs and photographs were taken of the hand grenade. The DNA sample taken from the hand grenade matched that of the appellant. The Prosecution case was that in 2018 an organised crime group was conspiring to supply Class A controlled drugs in Warrington, and that the appellant and his co-accused were part of that drugs-related conspiracy, whose activities included placing the hand grenade on the driveway of 27 Cleveland Road. The prosecution contended that the placing of the grenade on the driveway was part of a series of tit-for-tat incidents between SS on the one hand, and another named LC on the other hand. LC was at large from the authorities and therefore had to act through others, namely the appellant and his co-accused.

6. There were admissions to demonstrate the existence of animosity, leading to a conspiracy:

   i) A fire at SS's gym, the Muscle House Gym in Warrington, on 21 February 2018.

ii) Windows being smashed at 19 Honister Avenue, the home of LC's girlfriend, on 23 February 2018.

iii) A car being set on fire on the driveway of LC 's girlfriend, again on 23 February 2018.

7. At the time of the trial, the prosecution relied on some evidence concerning a telephone number ending with the digits 2893 which had been in contact with the telephones of the appellant's mother and sister and the appellant's co-accused, during February 2018. As we shall see this evidence was advanced before the judge and the jury. However, it is not necessary for us to dwell on this aspect of the case, since in oral submissions to us in the first hearing, Mr Mills for the Crown properly accepted that, by the conclusion of the trial, the Crown's case in relation to this evidence could not be made out to the required standard.

8. Evidence from the crime scene investigator was that the grenade was highly dangerous when it was found in situ and therefore it was impossible to recover the entire grenade intact. There was therefore a controlled explosion at a safe location elsewhere. Evidence was called from a British Army bomb disposal expert, and from a forensic scientist with expertise in explosives. Their evidence was that the footage of the controlled explosion suggested the presence of explosive substance in the grenade over and above the plastic explosive used for the purposes of the controlled explosion. The conclusion was that the grenade contained a quantity of low intensity explosive, probably of firework composition.

9. The most important area of evidence for the purpose of this appeal was the DNA evidence. Both prosecution and defence instructed DNA experts, Mr Samuel Walton for the Crown and Ms Susan Pope for the defence. They met and discussed the case before the trial and, as we shall set out later in this judgment, reached a number of agreed conclusions. There were no areas of disagreement between them. The central issue in the appeal concerns the limitations and implications of this evidence, leading to submissions by the appellant that there was no sufficient case to go to the jury and that the conviction is unsafe. Essentially, the appellant argues that the DNA evidence was insufficient to distinguish between primary deposit of his DNA on the firing pin of the grenade and a secondary transfer.

10. On 29 March 2019 the two experts recorded the agreed points between them. They noted that the DNA results showed the presence of DNA from at least three people on the firing pin and that all of the components in the profile of the appellant were observed in the mixed DNA result. The result obtained meant that it was 1 billion times more likely than otherwise that this DNA was that of the appellant. Their agreed points went on:

> "5. The statistical evaluation provided addresses only whether an individual could be a possible donor of DNA and does not address the mechanism by which any DNA was deposited, the time at which it may have been deposited, or the order in which different contributions of DNA were deposited.….
>
> 6. If it were to be accepted that the DNA from William Jones is present on the safety pin, then the DNA result alone does not

> assist in determining: (a) whether William Jones was the last person to touch the safety pin before it was recovered; (b) how long ago the DNA from William Jones was deposited on the safety pin; (c) the mechanism by which the DNA from William Jones was deposited on the safety pin, including whether it was left directly (primary transfer) or indirectly via an intermediary (secondary transfer) ….
>
> 7. There are a range of factors which affect the likelihood of the transfer of DNA via either direct or indirect mechanisms which have been discussed in both of our previous statements.
>
> 8. If William Jones has handled the safety pin at some time, without wearing gloves, then he may have transferred his DNA directly to the safety pin. Therefore, in our opinion the result obtained is with[in] the range of expectations we might have if William Jones has had direct contact with the safety pin at some stage.
>
> 9. If sufficient DNA from William Jones was present on another person or item then it may have been transferred to the safety pin indirectly.
>
> 10. Both direct and indirect (also called secondary) transfers of DNA are possible and have been demonstrated in experiments. There is little experimental data to support any expert opinion on the weight to be assigned to the route of transfer in a particular case. However, there are a range of factors which affect whether or not DNA may be transferred by indirect means, and consideration should be given to these factors when discussing indirect transfer.
>
> 11. Logically, any transfer method requiring one step will be likely to occur more often than a path requiring two steps. But it does not follow from this that the path requiring one step must have occurred in the specific instance.
>
> 12. Since the tiny traces of DNA or skin involved in such transfer are invisible to the naked eye, it is not realistic to expect anyone to be able to account for the ways in which their DNA may have been transferred by indirect methods.
>
> 13. In the absence of experimental data relevant to this case, there is no scientific basis for assigning a weight of evidence to possible direct or indirect (secondary) transfer."

11. In the course of his police interview, the appellant gave no explanation as to why his DNA might appear on the firing pin of this grenade. On the contrary, he said that it was impossible for his DNA to be present on the grenade, because he had never handled a grenade.

12. Mr Walton gave evidence and was cross examined. As indicated, we have now been able to see the transcript of what he said. In his evidence in chief he confirmed the agreements between himself and the defence expert. He confirmed that none of the other alleged co-conspirators had contributed any of the DNA found on the firing pin. He confirmed that if it were accepted that the DNA came from the appellant, then that result alone did not assist in determining whether the appellant was the last person to touch the safety pin before it was recovered or how long ago the DNA from the appellant was deposited. Nor did the evidence show the order in which the DNA from the different individuals had been deposited. He then added this:

> "MR MILLS: Were you also agreed at point eleven that logically any transfer method requiring one step will be more likely to occur - sorry, would be likely to occur more often than a path requiring two steps?
>
> A. Yes, that's correct.
>
> Q. But is it also right to say that it does not follow from that that the path requiring one step must have occurred in a specific instance?
>
> A. Yes, that's correct.

13. In cross-examination the following brief further evidence was given:

> Q. …that statistical evaluation does not assist in relation to the question of when the DNA was deposited?
>
> A. Yes, the statistical evaluation solely relates to the source of DNA, it does not relate to any mechanisms of transfer.
>
> Q. And thirdly, and perhaps a little crudely, the statistical evaluation does not assist in relation to how the DNA may have deposited itself or been deposited on the item in question?
>
> A. Yes, that is correct.

14. Ms Pope did not give evidence.

15. At the close of the prosecution case, Mr Scholes for the appellant made a submission of no case to answer to the judge. He did so very properly, having given full notice to the Crown of the nature of his submission. The ruling by the judge, which he made in a careful written form, captures the submissions and the issue with clarity.

16. The judge began by noting that the charge faced by this appellant was conspiracy to possess explosives for an unlawful purpose, contrary to section 1 (1) of the Criminal Law Act 1977. The conspiracy in question consisted of an agreement to obtain the grenade and to deposit the grenade at the location in question, by way of an intimidation or warning. All those involved in this dispute, as the judge observed, came from and were resident in Warrington, and all the relevant events took place in Warrington, including the depositing of the grenade. There was no question as to the existence of the relevant conspiracy. As the judge observed there was ample evidence

from which a jury could conclude that the co-defendants RM, KS and WW had all been in communication with each other at the relevant time. As the judge put it:

> "I am entirely satisfied that it is properly open to a jury to conclude that there was an agreement of the kind alleged by the prosecution. In particular, a jury would properly be entitled to find: (a) that there was indeed a series of tit-for-tat exchanges between the parties indicated (b) that the depositing of the hand grenade was an event in that series (c) that whoever deposited the grenade did not simply act of his/her own motion but pursuant to an agreement with one or more other persons (d) that the grenade contained an explosive substance."

17. The judge then went on to analyse the position of each of the defendants in turn. When he came to deal with the appellant his observations were as follows. He noted that there were two planks to the prosecution's case: firstly, the finding of his DNA on the firing pin of the grenade and secondly, evidence of contact at material times between the 2893 phone which the prosecution said the appellant was using at the time, and mobile phones used by other alleged conspirators.

18. The judge focused on the DNA evidence. He noted that the swabs taken from the grenade firing pin at the scene showed the presence of DNA from at least three people. All the components of the appellant's DNA profile were present in the mixed result. On statistical evaluation the conclusion was that the mixed DNA result was 1 billion times more likely if the DNA came from the appellant and two unknown and unrelated persons. The judge noted that Mr Scholes had begun his submission by conceding that there could not be a realistic challenge to the inference that the DNA sample obtained from the firing pin came from his client. The judge also observed that it was not disputed that the jury could properly come to the conclusion that the grenade was an improvised device "comprising the initiation mechanism (including fly-off lever and safety pin) from a commercially available grenade such as a paintball grenade, attached to a home-made metal canister containing a quantity of low explosive."

19. Counsel had referred the judge to authority, in particular *R* v *Tsekiri* [2017] EWCA Crim 40. The judge reminded himself that:

> "there was no evidential or legal principle that a case can never be left to a jury solely on the basis of the presence of the defendant's DNA profile on an article left at the scene of a crime, but whether it will be appropriate to do so will depend on the particular facts of the case."

20. The judge then went on to consider the non-exhaustive list of potentially relevant considerations mentioned by this court in the course of the judgment in *Tsekiri*. When considering whether there was evidence of some explanation for the presence of the DNA other than guilt, the judge observed:

> "Although there was discussion in the course of submissions, and to some extent during questioning, of theoretical scenarios which could innocently account for the presence of [the

> appellant's] DNA, there is presently no actual evidence before the jury to support any of them. The defendant himself when interviewed largely made no comment but he did say that it was impossible for his DNA to be on the grenade because he had never handled a grenade…. Thus he was not saying, for example, that he had at one time innocently handled a paintball grenade (which might then subsequently and unbeknownst to him have been converted into an explosive device) that being one of the scenarios which it was suggested the evidence could not exclude".

21. The judge went on to conclude that the article itself was plainly associated with the offence, that the article was readily movable, and then considered whether there was evidence of geographical association between the offence and the offender. On that issue he said:

> "The prosecution do not appear to be suggesting that it was necessarily William Jones himself who placed the grenade outside 27 Cleveland Rd, but in a general sense, as noted, this is a Warrington case and William Jones is from the area. It is not, for example, as though he is from some distant corner of the country with no connection to anyone else in the case."

22. As we have said, the judge went on to note that for practical purposes there was no doubt that the DNA found was from the appellant. He finally considered the question "whether it is more or less likely that the DNA profile attributable to the defendant was deposited by primary or secondary transfer". He noted the joint statement from the experts, including propositions 11 and 13 set out above. He went on to observe that the joint statement contained the agreed propositions that the DNA results do not help to determine how long ago the DNA was deposited, the order in which DNA from different individuals was deposited or, as a logical consequence, whether the appellant was the last person to touch the safety pin before it was recovered. He noted that transfer to the safety pin would be "within the range of expectations if [the appellant] had had direct contact with the safety pin at some stage"

23. The judge proceeded to his conclusions which he expressed as follows:

> "In my judgment the DNA evidence in this case, when viewed in context, is sufficient to constitute a case to answer. It would be open to a jury to conclude (a) that any grenade – be it a military combat grenade or a "harmless" paintball grenade – is a relatively unusual item, with which only a minority of the population is likely to come into contact (b) that William Jones's DNA was on the firing pin of the grenade recovered by the police (c) that it can only have got there because either William Jones himself or some other person or thing bearing his DNA has had contact with that part of the grenade (d) that William Jones is linked to one or more persons who were parties to the conspiracy. In these circumstances, and in the absence of any evidence of a contrary explanation, it would in my judgment be open to a jury to conclude that the only

> explanation for the presence of William Jones's DNA on the grenade is that he was himself a party to the conspiracy alleged. Having reached the above conclusion, it is not necessary for me to consider the cogency of the attribution evidence relied on by the prosecution in relation to the disputed 2893 phone."

24. On that basis, the judge rejected the submission.

25. To us, Mr Scholes essentially repeated the submissions made below. Given the concession by the Crown as to the telephone evidence, Mr Scholes submits there is really no confirmatory evidence supporting direct deposit of DNA as opposed to indirect transfer. The issue is not whether this was the appellant's DNA but how it came to be there. There is no physical or temporal link between the device and the appellant. The mere association with Warrington is insufficient. On the case as marshalled by the Crown, only the telephone evidence might theoretically have provided the necessary link, but that has been abandoned

26. In reply, Mr Mills for the Crown makes a number of points. Firstly, the grenade firing pin is itself "not an adapted object". The firing pin was not detached from the firing mechanism, and so it was always an object associated with and made for the purpose of a grenade. The appellant denied ever handling of grenade in the course of his interview – see admitted fact 33. There is no basis for inferring therefore that he might have handled this mechanism whilst paintballing, or in the course of any other innocent activity. There was no basis in the evidence for inferring secondary transfer. Primary deposit is inherently more probable than secondary transfer, as the experts agreed.

27. In the course of the appeal, we were referred to the two authorities, both of which were before the judge below. The first is *R v FNC* [2015] EWCA Crim 1732, [2016] 1 WLR 980. That case concerned a sexual assault on a woman on an underground train. The assault consisted of contact with her bottom. She felt a man "bumping" into her from behind and as she moved away the man followed behind her continuing to make contact. The appellant's DNA was found on the clothing which had been covering her bottom. In the course of the judgment of this court, Lord Thomas CJ considered the approach of Lord Bingham CJ in the previous case of *Adams (No 2)* [1998] 1 CAR 377. Lord Thomas dealt with the relevant point at paragraphs 27 to 30 in the following terms:

> "27. It is clear from the decision in *Sampson and Kelly*, and the approach of Lord Bingham CJ in *Adams (No2)* that where DNA is directly deposited in the course of the commission of a crime by the offender, a very high DNA match with the defendant is sufficient to raise a case the defendant to answer. There is a clear distinction as the authorities stand, between such a case and cases such as *Lashley* where the DNA was deposited on an article left at the scene.
>
> 28. In the present case, there can be no doubt that the DNA was deposited in the course of the commission of the offence…..

…

> 30. … As Lloyd Jones LJ made clear in giving the judgment of the court in *Sampson and Kelly*, it is important to bear in mind that the analysis and techniques of analysis of DNA have improved markedly in the past decade, certainly since the decision in *Lashley*. Thus the fact that the DNA was on an article left at the scene of the crime (as distinct from DNA being directly deposited in the course of the commission of the offence by the offender) may be sufficient to raise a case to answer where the match is in the order of one in a billion."

28. In *Tsekiri* the court laid down a number of questions relevant to ask, where the DNA in question was left on an article at the scene. As counsel have agreed, the principal conclusion in *Tsekiri* is that the significance of even a one in a billion DNA link must depend on the facts of the particular case. The questions suggested by the court are not intended to be exhaustive, but rather to be of assistance in determining whether the link can properly make a jury sure. Unlike in the case of *FNC*, the court in *Tsekiri* did have secondary transfer in mind. Indeed, at paragraph 20 the court observed that in the case before them "the expert evidence was that secondary transfer was an unlikely explanation for the presence of the appellant's DNA on the [car] door handle". The court went on to observe, in relation to the facts of that case:

> "22. On the facts of this case it is quite clear that there was a case for the appellant to answer. His was the major DNA profile on the door handle of the car which was used by the offender in the course of the robbery. The expert evidence was that the likely reason for the defendant's DNA profile being on the door handle was that he had touched it at the close of the prosecution case there was no explanation for this fact. The rhetorical question posed by the judge demonstrated some geographical connection between the location of the offence and the appellant albeit not sufficient to amount to supporting evidence…."

CONCLUSIONS

29. We have considered carefully the submissions of both parties. There is no doubt that there was a conspiracy, and there is no doubt that the DNA of this appellant was on the firing pin of the grenade. The firing pin was a single assembly, never disassembled, and thus if the jury could be sure that the transfer of DNA was direct, there was a very strong case indeed against the appellant. Given that the allegation was one of conspiracy to possess this explosive device, it was not in any sense essential that the appellant had placed the grenade by the house, or indeed had undertaken any other specific act to do with the grenade. The essential ingredient was that he was party to the conspiracy to obtain the grenade.

30. With great respect to the judge, we do not agree that the association between this appellant and Warrington, the centre of all the relevant events, and the home and operating area of the co-accused and of those they wished to intimidate, is capable of distinguishing between direct and indirect deposit of the DNA. In a case where the

DNA link itself was in question, such proximity might help, but that is not the issue here. Paradoxically, if this appellant lived in the north of Scotland or the west of Cornwall, the risk of innocent secondary transfer might be thought to be very much lower. If the appellant lived at a distance from Warrington it would arguably make secondary transfer less likely, through (for example) a casual handshake with a conspirator, or the vendor of the commercially available paintball grenade before adaptation.

31. There was no expert evidence before this jury, paralleling that in *Tsekiri*, to the effect that secondary transfer onto the door handle was improbable. The evidence here is that as a point of general principle direct transfer is more likely than indirect transfer, qualified by the observation that no conclusion along those lines could be reached in relation to the individual case. That is a significant distinction from the position in *Tsekiri*.

32. The position in *FNC* was farther removed from this case, since it was clear from the facts of that case that the DNA on the victim's clothing was deposited by the offender.

33. Each such case turns on its own facts. We have already indicated some of the material distinctions between the evidence in this case and those to which we have been referred.

34. The DNA evidence here was restricted by the particular circumstances. Since the grenade was a live explosive device, the sampling could not be carried out in such a way as to determine whether the DNA deposit was by way of skin, blood, or other tissue or fluid. The conspiracy was not confined to those indicted, and so the absence of DNA from the co-accused in the sample recovered was not of help, in the sense that the presence of the appellant's DNA but absence of any residue from those who might be the obvious vector for secondary transfer could support direct rather than indirect deposit. There was no observation evidence or other evidence associating this appellant with any step in the conspiracy or the acts in furtherance of the conspiracy. Given the admitted weakness of the telephone evidence, not relied on by the judge in his rejection of the submission, but left to the jury despite the Crown's concession as to its weakness, no support for the Crown's case can be derived from that evidence.

35. As we have seen, the agreed evidence here, in paragraph 12 of the joint statement and reaffirmed by Mr Walton, was that 'it is not realistic to expect anyone to be able to account for the ways in which their DNA may have been transferred by indirect methods.' This was a very broadly phrased formulation, and we are sceptical as to whether it was wise to reach an agreement in those terms. There are many circumstances where it may be reasonable to expect an individual to put forward a case in relation to the presence of their DNA, not because they can be expected to analyse the science or the detailed material on which the scientific conclusions were based. Such an expectation may arise, for example, because the presence of their DNA may be explained by some connection or contact, or because the opportunity for direct transfer can be precluded or shown to be unlikely, or because the facts mean that the presence of their DNA at least calls for explanation.

36. However, in this case that agreement was reached and reinforced in evidence by Mr Walton.

37. Set beside the straightforward denial by the appellant in interview that he had ever touched a grenade, and without more exploration or development in evidence, the evidence could not properly be supported by an adverse inference pursuant to section 34 of the Criminal Justice and Public Order Act 1994. The statute requires that the appellant 'failed to mention [a] fact … which the accused could reasonably have been expected to mention when … questioned ...'. The judge would of course have been fully entitled to rely on such a fact when addressing a submission (see s34(2)(c)), and the jury would also be so entitled, provided there was such a fact. Here, the relevant 'fact' would have been an explanation as to how indirect transfer might have taken place. In his ruling he did make express mention of the absence of any explanation, but it is not clear if he had such an inference in his mind. When he came to sum up to the jury, he did not leave that matter to the jury, although he did leave to them the possibility of drawing an adverse inference from the fact that the appellant had not given evidence.

38. It is hard to see how such an explanation 'could reasonably have been mentioned', when the experts in the case had agreed in such broad terms that 'it is not realistic to expect anyone to be able to account for' transfer by indirect means. If this point was to be made good by the prosecution, it would have required greater development in the evidence, laying the groundwork as to why such explanation was called for. We repeat that the breadth of the formulation in paragraph 12 was unwise. The expert evidence should have been confined to purely scientific questions, leaving open any issue as to the surrounding facts.

39. We bear in mind that at the time of the judge's ruling, the Crown was still seeking to rely on the telephone evidence. However, he did not rely on that in giving his reasons.

40. As matters stand, this case was encapsulated by a frank response by Mr Mills, in the course of submissions on the resumed hearing before us. He accepted that, on the facts of this case, the proposition that direct deposit of DNA was more probable than indirect 'was the height of it'. Probability is insufficient for conviction of guilt. In the absence of at least some further evidence, we are of the view that neither the judge nor the jury had the basis for a safe conviction.

41. We emphasise that this case turns upon its own facts. Save in respect of our remarks about the breadth of paragraph 12 of the Joint Witness Statement of the experts, it does not represent guidance for other cases.