IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT OXFORD
(HIS HONOUR JUDGE MICHAEL GLEDHILL KC) [43SP0166819]

Case No 2024/00928/B1
NCN: [2025] EWCA Crim 150

Thursday 6 February 2025

B e f o r e:

LADY JUSTICE WHIPPLE DBE

MRS JUSTICE McGOWAN DBE

HIS HONOUR JUDGE THACKRAY KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R EX

- v -

MICHAEL WARD

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss H Myttas-Perris appeared on behalf of the Appellant

Mr N Mather appeared on behalf of the Crown

J U D G M E N T

Thursday 6 February 2025

LADY JUSTICE WHIPPLE:

1. On 19 February 2024, following a trial in the Crown Court at Oxford before His Honour Judge Gledhill KC and a jury, the appellant (who was then aged 21) was convicted of one count of conspiracy to commit burglary (count 1) and one count of theft (count 2). One co-accused, James Johnson, had pleaded guilty to both counts. Two other accused, Johnny Cash and Anthony Doran were found guilty of both counts in their absence.

2. The appellant now appeals against conviction with the leave of the single judge. He is represented on the appeal by his trial counsel, Miss Myttas-Perris. The Crown opposes the appeal and is represented by Mr Mather, who was also present at trial. We are grateful to both counsel and their respective legal teams for their helpful written and oral submissions.

The Facts

3. On the morning of 25 April 2019, David Gurteen awoke to discover that his home had been burgled during the preceding night. Two sets of car keys and two cars had been stolen: a Land Rover Discovery Sport and an Audi S3.

4. Later that day, the Audi was used to commit multiple burglaries in the Oxfordshire area, including a burglary at 79 Burford Road, Chipping Norton, which took place at 1.10 pm. Later that same day, a Polaris Ranger was stolen from a car park at Bruern Cottages.

5. Police attended 79 Burford Road in response to a report that a parked Audi at those

premises was suspicious. The police discovered signs of a break-in.

6. Meanwhile, the stolen Audi had been picked up on Automatic Numberplate Recognition in the Burford area, so that police officers went to that area to look for it.

7. Police officers saw the Audi about half a mile from the Wyck Hill House Hotel in a field off the main road. Four people were seen standing at each of the doors of the Audi, which were open. A police officer parked his car across the entrance to the field to block it. He walked towards the Audi, and at that point saw a Polaris Ranger nearby. On seeing the police officer, all four of the people in the field ran off. The officer chased them. He could see clothing being discarded as they ran. Other police officers then joined the chase.

8. In the event, three people were apprehended, namely Doran, Cash and Johnson. Items found on them and in the Audi linked them to the burglaries. The fourth person got away.

9. In December 2020, the appellant attended the police station voluntarily following information received by the police. He was by that time suspected of being the fourth man. When he was interviewed, he answered "No comment" to questions put. He refused twice to give the police details of the mobile phone that he was using on 24 and 25 April 2019.

The Trial

10. The prosecution case was that the appellant was the fourth man who had evaded arrest. He was linked via his DNA which was found on the waistband of jeans found in a lavatory at the Wyck Hill House Hotel, near to where the Audi and the Polaris

Ranger were located. Glass fragments from the broken windows at 79 Burford Road were found on the jeans, suggesting that someone wearing those jeans had been present at the burglary at 79 Burford Road.

11. To prove their case, the prosecution relied on the following exhibits:

(1) A British Heart Foundation bag (exhibit PB/03), containing a blue North Face jacket and a pair of Prada trainers, was found in the corridor of the Wyck House Hotel, which was close (walking distance) to the field where the four men were seen with the Audi and the Polaris. No DNA was found on the plastic bag or the articles inside it but glass fragments matching the broken window at 79 Burford Road were found in the bag.

(2) A pair of Next denim jeans (exhibit PB/04) found in a lavatory at the Wyck House Hotel near where the British Heart Foundation bag was found. The judge described those jeans as being "hidden" beneath the wastepipe of a lavatory in the spa of the hotel. The jeans were forensically examined and glass fragments matching the glass that was broken during the burglary at 79 Burford Road were present on them. The appellant's DNA was recovered from the inner waistband of those jeans.

12. As to that DNA on the jeans, the Crown's expert, Heather Potton, gave the following evidence which was not disputed:

> "A mixed DNA profile was obtained indicating the presence of at least six contributors. In my opinion, a complete clear major profile can be determined which matches the reference DNA profile of [the appellant] such that the major portion of DNA could have come from him… It has been estimated that the

> findings are more than one billion times more likely if the major portion of the DNA originated from [the appellant] rather than if it originated from someone else unrelated to him and that provides extremely strong support for the proposition that the major portion of DNA on the jeans came from him rather than from somebody else unrelated to him… There were indications of DNA from at least four other people in the sample taken from the waistband. It is not possible to determine how this DNA was deposited onto the waistband of the jeans. However, one explanation for this finding is that other people have worn the jeans either before or after [the appellant's] DNA was transferred onto them and deposited their DNA onto the jeans. Furthermore, it is possible for a person to have worn the jeans and to leave no detectable traces of DNA on them."

13. Miss Potton subsequently agreed that the mixed DNA profile indicated the presence of at least six, not four, contributors. Under cross-examination she agreed that the DNA could not be aged, and that she could not say when the DNA got onto the jeans. There was, she said, a possibility "limited though it might be" that it could come from a secondary transfer. But she also said that secondary transfer would require a rich source of the appellant's DNA, such as blood or bodily fluids, and was unlikely to have got there through some lesser means, for example, by simply brushing against the appellant.

14. There were agreed facts placed before the jury, amongst which was a summary of the evidence of the defence DNA expert, who was not called to give evidence in person. That expert's evidence was consistent with that of Heather Potton. His summary included these points:

(1) An alternative explanation for the presence of DNA attributable to the appellant on the waistband of the jeans was that the jeans had come into contact with a surface, or a person, harbouring the appellant's DNA – in other words, by indirect or secondary transfer.

(2) Without a clear alternative scenario to the appellant having worn the jeans, it was not possible to evaluate the DNA finding further.

(3) Even if it was accepted that the appellant had worn the jeans, it was not possible to determine when he did so.

(4) By way of conclusion, on the basis of the laboratory findings, it was not possible to determine whether the appellant was the male who wore the jeans and left them at the Wyck Hill House Hotel on 25 April 2019.

15. The defence case was that there was insufficient evidence against the appellant. His Defence Case Statement denied presence and denied involvement. The appellant did not give evidence at trial.

16. The defence did, however, rely on the evidence of the appellant's mother, Kelly Cox, about the appellant's physical and mental health conditions. She said that at the time of these offences the appellant's physical health difficulties had caused mental health problems and had also caused his weight to increase to 27 stone. There was separate medical evidence to show that shortly before trial the appellant had indeed been suffering from some mental problems, namely anxiety and depression. It seems that she was called to explain the appellant's failure to give evidence at trial.

17. The issue for the jury was whether the appellant had been party to the conspiracy to commit the burglaries and had intended that the burglaries were committed (the subject of count 1), and whether the appellant was party to the theft of the Polaris Ranger vehicle (count 2).

The Ruling on the Submission of No Case to Answer

18. At the end of the Crown's case, defence counsel submitted that the evidence against the appellant was of such a tenuous nature that it would be unsafe to leave the matter to the jury. Reliance was placed on the second limb in *R v Galbraith*.

19. On 15 February 2024, the judge ruled against the defence. He said that this was not the strongest of cases against the appellant, but that there was sufficient evidence, in his view, for it to be left to the jury to decide what they made of it.

The Jury Note

20. The jury was sent out on 16 February 2024. About an hour later, the judge received a note from a juror asking what was the size of the jeans, PB/04. After discussion, and accepting the agreed position put forward by counsel, the judge directed the jury that they were not entitled to know the size of the jeans. He said:

> "Neither the prosecution nor the defence have adduced evidence as to the size of the jeans and therefore the law does not allow me to answer that question because that would be introducing new evidence."

21. The jury's question may have been prompted by the evidence of the appellant's mother about the appellant's weight at the time of this offending.

The Ground of Appeal and Respondent's Notice

22. The appellant now advances a single ground of appeal for which he has leave. He submits, through counsel, that the judge erred in not acceding to the submission of no case to answer. On his behalf, Miss Myttas-Perris notes that the facts on which the

prosecution relied were not in dispute. The evidence against the appellant was his DNA on the waistband of a pair of jeans found in the lavatory at the Wyck Hill House Hotel. She says, however, that this was a single DNA deposit which was mixed with at least five other contributors on a single item found somewhere other than at the scene of the crime. It was possible on the evidence – and agreed – that the appellant might never have worn the jeans and that there might have been an indirect or secondary transfer of his DNA onto the jeans. It was, in any event, possible that the appellant was not wearing the jeans at the time they came into contact with the glass from 79 Burford Road.

23. The challenge on the basis of DNA is the mainstay of the appellant's case before this court. But there has also been a challenge advanced to the way in which the judge described the findings about the glass fragments which were found in the two exhibits – the plastic bag from the British Heart Foundation (exhibit PB/03) and the Next denim jeans (exhibit PB/04). It is said that he exaggerated the number of fragments which matched the broken glass from 79 Burford Road.

24. In his Respondent's Notice and oral submissions, Mr Mather stresses that DNA was found on the inner waistband of the jeans and that the appellant was established as the major contributor of that DNA, although he accepted that there were also other contributors and that this was strongly suggestive of the appellant having worn the jeans at some point. It was for the jury to come to a commonsense conclusion about whether they could be sure that the appellant was wearing the jeans at the time of the burglary at 79 Burford Road. In addressing that question, the jury could permissibly draw an adverse inference from the appellant's failure to give evidence, following the judge's directions on that issue. The jury would take into account the evidence of the appellant's mother that the appellant was suffering from physical and mental health

problems, both at the time of this offending and at the time of trial, but even she had not said that the appellant was unable to participate in the offences by reason of those problems.

25. In oral submissions, Mr Mather has maintained that this was a proper case to go to the jury; that the judge was right not to accede to the submission of no case to answer; and that the jury were entitled to use their common sense to reach the conclusions that they did leading to a safe conviction.

Discussion

The Glass Fragments

26. In our judgment, there is no defect in the judge's description of the fragments of glass found on the British Heart Foundation bag and on the jeans. The agreed evidence (at paragraphs 3.11 and 3.12 of the Agreed Facts) made it clear that glass fragments matching the broken patio door at 79 Burford Road were found on both exhibits. The precise number of matching fragments found was not material.

The Submission of No Case to Answer

27. This is the main focus of the appeal. The judge addressed the right question, which was whether, in light of the evidence adduced by the prosecution, there was a case for the appellant to answer. The judge's held that there was; and that this was not a case where the prosecution case, taken at its highest, was such that the jury could not safely convict.

28. The Crown's case was to a large extent based on circumstantial evidence, as to which the judge directed the jury in conventional terms which are not challenged. It is established that in such a case, there is a case to answer where, on a reasonable

assessment of the evidence, a reasonable jury could safely convict: see *R v Goddard* [2012] EWCA Crim 1756 at [36], and the discussion in Blackstone's Criminal Practice 2025 at C16.64.

29. The correct approach in a case involving DNA evidence has been discussed in many cases. The cogency of such evidence will depend on the facts of the case and in particular on whether there is a plausible alternative explanation for the presence of the DNA. There is no legal or evidential principle which prevents a case solely dependent on the presence of a person's DNA being left to the jury: see *R v Tsekiri* [2017] EWCA Crim 40 at [21].

30. The jeans were not found at the scene of the crime. But given the presence of glass fragments on those jeans – glass fragments which matched the broken glass at 79 Burford Road which had been burgled earlier that day – it was, in our judgment, reasonable to equate the jeans to an article found at the scene of the crime. They were logically and inferentially linked to the commission of that crime.

31. In *Tsekiri* the court listed a number of potentially relevant factors to be taken into account by a court when considering a submission of no case to answer in a DNA case: see [15] to [21]. We summarise those factors as follows (echoing the summary found in Blackstone's Criminal Practice 2025 at F19.32): (a) whether there is another explanation for the presence of the DNA; (b) whether the article on which the DNA was found was associated with the offence itself; (c) whether the article was moveable; (d) whether there was evidence of geographic association between the offence and the offender; (e) whether the defendant is a match to the major contributor; and (f) whether primary or secondary transfer of the DNA is more likely.

32. By reference to those factors, we accept that that there is a possibility of another explanation for the appellant's DNA being on the jeans. That was the unchallenged evidence of the DNA experts in this case. It could have been put there by a process of secondary transfer. Further, we accept that the jeans were moveable and are likely to have been moved to where they were found behind a lavatory at the Wyck Hill House Hotel. In addition, we accept that, jeans apart, there was no evidence to put the appellant at the scene of any of these crimes. However, the jeans were closely associated with the offence at 79 Burford Road, because they had fragments of glass, which matched glass from that address, on them. Further, the jeans were found at a hotel close to where the other three conspirators were found in a field, standing by the Audi and with the Polaris Ranger close by, both of those vehicles having been stolen. One of those men had since pleaded guilty to these offences. That raised the possibility that the jeans had been hidden at the Wyck Hill House Hotel by the fourth man as an attempt to conceal evidence connected with the offences as he escaped.

33. Further, there was evidence in this case to link the jeans to the offending. The Crown's expert evidence was that primary transfer of the appellant's DNA was more likely and that secondary transfer was a "limited" possibility. That would point to the appellant having worn the jeans. The appellant was the major contributor to the DNA found on the jeans, although the profile was mixed; and his DNA was not just anywhere on the jeans, but on the inside waistband. That too was suggestive of the appellant having worn those jeans. An alternative process, such as secondary transfer, could not be excluded as a matter of science, but the jury may reasonably have concluded that that was a theoretical or fanciful explanation, and the judge was entitled to take the possibility that they would so conclude into account in rejecting the submission of no case to answer.

34. Further, no alternative explanation had, by the stage of the ruling on the submission of no case to answer, been advanced by the appellant either in interview or in questions put to the prosecution experts. It is made clear in *R v FNC* [2015] EWCA Crim 1732 that an adverse inference from the appellant's silence cannot usually be drawn in the context of a submission of no case to answer, where the prosecution relies on DNA evidence: see [14] to [18] of that case and also *Tsekiri* at [15]. Nonetheless, at the point of his ruling, the judge had no material before him to undermine the prosecution's case about the proper inferences that the jury might draw from the presence of the appellant's DNA on the jeans.

35. In our judgment, the evidence as it stood at the end of the prosecution case plainly raised a case for the appellant to answer. How did jeans with his DNA on the inner waistband come to be found behind a lavatory in a hotel close to where at least three of the conspirators were apprehended in a field, which jeans were covered in glass fragments some of which were very likely to have come from one of the burglaries which had just taken place hours earlier?

36. The judge was right to leave the case to the jury and to reject the submission of no case to answer. This case is, if anything, stronger on its facts that *Tsekiri*, where the conviction was safe on the basis of a single DNA sample found on a car door. Here there was circumstantial evidence, beyond the mere presence of DNA, to call for an explanation: the fact that the DNA was on the inner waistband; the fact that the jeans were hidden behind a lavatory in a hotel; the fact that that hotel was close to the location where the other conspirators were apprehended with two vehicles that had been stolen; and the fact that the jeans had on them glass likely to have been from one of the burglaries. As the judge noted, this was not the strongest case; but neither was it so weak as to require it to be withdrawn from the jury.

37. By the time the jury came to consider the case against the appellant, the appellant had declined to give evidence and the judge had directed them that they could draw an adverse inference against him because of that – not as the sole basis of conviction, but as support for the prosecution if they considered it appropriate. The terms of the judge's direction are not challenged.

38. The jury had the evidence of the appellant's mother freshly in mind as a possible reason why the appellant might have declined to give evidence at trial. It was for them to decide whether they accepted that explanation.

39. In all the circumstances, we are not persuaded that this conviction is unsafe. Accordingly, this appeal is dismissed.
