Neutral Citation Number: [2016] EWCA Crim 3

Case No: 2015/05350/B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
His Honour Judge Andrew Hatton

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2016

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE OPENSHAW

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Between:

Regina	**Respondent**
- and -	
Carl McManaman	**Appellant**

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- -

Charlotte Kenny for the **Appellant**
Karl H Scholz for the **Respondent**

Hearing date: 15 December 2015

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

1. In this appeal which is brought with the leave of the trial judge, HH Judge Andrew Hatton, under s.47(2) of the Criminal Justice Act 2003 (CJA 2003), the appellant contended that the judge wrongly concluded there had been jury tampering and therefore wrongly exercised his powers, under s.46 of the CJA 2003, to order the continuation of the trial without a jury.

2. We decided at the hearing of the appeal that the judge had been correct in his decision and dismissed the appeal for reasons to be given later. It was in the interests of justice that, having reached that conclusion, the trial continued as soon as possible before the judge. We now give our reasons.

3. The factual background to the judge's decision was as follows.

Background

4. The complainant alleged that the appellant had raped her on 22 November 2014. It was her case that she had not consented to intercourse; she had no recollection of what had happened. She thought her drink had been spiked. The defence was that the sexual intercourse was consensual.

5. The trial began in the Crown Court at Liverpool before a judge of the Crown Court on 17 August 2015. The complainant gave evidence by pre-recorded interview and was cross-examined. Thereafter the prosecution served some additional evidence in relation to medical and forensic issues. In the light of the fact that there was no time for the defence to consider that evidence, and obtain their own expert opinion, the judge discharged the jury.

6. A new trial date was fixed. The retrial started on the afternoon of Wednesday, 18 November 2015 at the same Crown Court before HH Judge Andrew Hatton. On 19 November 2015, the complainant's evidence was heard by way of pre-recorded interview. She was then cross examined, screened from view of the public and the appellant, in exactly the same way as had happened at the trial in August 2015. After her evidence further evidence was called by the prosecution on that day and on Friday, 20 November 2015. In the afternoon of Friday, 20 November 2015, the appellant began his evidence and gave evidence for about one hour before the trial was adjourned until Monday, 23 November 2015.

7. On Monday, 23 November 2015, before the court was due to sit, the judge received a note from the jury which was explained to the judge in the following terms. A juror, Miss D, had spoken to the jury bailiff. Miss D had said she had received a Facebook Friend request made through a person she knew (SD) over the weekend. The man whose photograph accompanied the request was one of the people who had been sitting in the public gallery during the trial. The name provided in the Friend request was Steven Burke. Miss D was nervous and had spoken to another juror, P, and told him of what had happened and her concerns. On Thursday, 19 November 2015, one of the jurors, subsequently known to be Miss D, had expressed to the usher concern that men in the public gallery appeared to be fiddling with their mobile telephones.

8. The judge informed the police of these facts. The judge then spoke to Miss D in court; a transcript of the conversation was made. Miss D said that the request was made at 6.30 pm on Friday 20 November 2014. She was satisfied she recognised the person making the Facebook request through SD as one of those associated with the appellant in court. (There is now no dispute that that person was Steven Burke.) She had taken a screen shot on her 'phone which bore out what she said. Miss D indicated that, although she had been separated from her fellow jurors since the matter had been drawn to the attention of the court, she had told two fellow jurors of what had happened, one of whom had been P, referred to in the note from the jury bailiff. By 14:00 police investigations had shown that Steven Burke had been identified as one of those leaving court on the afternoon of Thursday, 19 November 2015.

9. The judge thereafter indicated that he was considering discharging the jury and would consider continuing the trial without a jury under the provisions of s.46 of the CJA 2003; he followed precisely the requirements of s.46 (2) in informing the parties and allowing them to make representations as described in paragraph 5 of the decision in *Gutherie* [2011] EWCA Crim 133; [2011] 2 Cr App R 20. As there were no representations from the appellant in relation to the discharge of the jury, the judge discharged the jury that afternoon. He adjourned consideration of the issue under s.46 (3) of the CJA 2003 until Tuesday, 24 November 2015.

10. Detective Constable Frame and Detective Constable Hopkins of the Merseyside Constabulary interviewed Steven Burke on the evening of Monday 23 November 2015. The judge did not have a transcript of that interview but it was reported to the judge that Burke said that he was looking through Facebook for attractive girls, saw Miss D and sent a Friend request. He had made a terrible mistake and did not take the matter any further. There had been no intention to tamper with or influence the jury in any way. His mobile phone had been seized and would be analysed.

11. After hearing submissions, the judge decided to continue the trial without a jury, giving careful and clear reasons:

    i) If there was a link between the appellant and Steven Burke, Miss D was manifestly too frightened to continue and had conveyed her fear to other jurors.

    ii) He was sure that the approach by Steven Burke to Miss D was not an innocent accident. It was a deliberate act by a man who had seen Miss D in the courtroom and had either recognised her as a friend of a friend and sought her out on Facebook or had used her name which he had learnt when the jury were sworn in to do the same. She was a tall and attractive young woman whose features were distinctive and memorable; she would be relatively easy to recognise. His motivation had been either to intimidate Miss D or to seek to develop a relationship with her to interfere with the judicial process. An innocent explanation was fanciful.

    iii) He was therefore sure that jury tampering had been carried out by Steven Burke within the description of such conduct given by Lord Bingham of Cornhill CJ in *R v Comerford* [1998] 1 WLR 191, [1998] 1 Cr App R 235.

iv) Although there was no direct evidence to link the appellant to those actions, he inferred that as Steven Burke and the appellant had been in such close contact during the trial it would be an affront to common sense to conclude that there was not some consent, acquiescence or involvement by the appellant. In his view, although there was no authority, he was not required to be sure that the appellant was directly involved. It was enough that he had reached the view on the balance of probabilities that the tampering had been done with the knowledge or acquiescence of the appellant.

v) He considered that it was fair to the defendant to continue with the trial without a jury and that therefore the condition in s.46(3) (b) was met.

vi) It was not in the interests of justice under s.46 (4) for the trial to be terminated, taking into account in particular the burden on the complainant of having to give evidence a third time. It was in the interests of justice to continue with the trial.

The submission made to us

12. It was contended on behalf of the appellant:

i) In *R v Twomey* [2009] EWCA Crim 1035, [2010] 1 WLR 630, [2009] 2 Cr App R 25 (although a case on s.44), Lord Judge had emphasised (at paragraphs 10 and 11) that trial by jury was a hallowed principle of the administration of justice and a right to be exercised unless circumscribed by legislation. Therefore a very high threshold had to be established before a defendant was deprived of his right to trial by jury.

ii) The judge should not have found jury tampering unless he was sure that there had been tampering. In the light of the explanation given by Steven Burke, the judge could not have been sure to the criminal standard of proof that the approach to Miss D was a deliberate attempt to frighten or otherwise influence her. The judge had found she was a tall and attractive woman. The nature of social networking was such that in the circumstances the judge was wrong in his finding that the explanation of Steven Burke was fanciful. It was a credible explanation. The conclusion that it was credible was reinforced first by a consideration of the transcript of his interview by the police (which was not before the judge) and second by the decision of the police to take no further action. The judge should have waited for the result of the police investigation.

iii) In the circumstances of the case, it was harsh and unfair to remove the appellant's right to a jury trial unless the involvement of the appellant was proved; this is what Lord Judge had canvassed at paragraph 29 of the decision in *Gutherie* [2011] EWCA Crim 133; [2011] 2 Cr App R 20.

iv) The case turned on the respective credibility of the appellant and the complainant. This was best determined by a jury. It was not a case therefore where, in the interests of justice, the court should have decided to proceed without a jury.

13. The prosecution submitted that the judge was correct. He was not required to await the outcome of the police investigation as he had sufficient evidence before him.

Our conclusion

(a) The finding of jury tampering by Steven Burke

14. S.46(3)(a) of the CJA 2003 requires the judge to be satisfied that jury tampering had taken place. The judge was therefore right in the light of the terms of the section and of the decisions of this court (including *Twomey*) that tampering had to be established to the criminal standard of proof.

15. The analysis by the judge of the evidence was clear. Steven Burke had been in court at the material times. On the judge's description of Miss D, she was an attractive and easily recognisable woman. Within three hours of the court session finishing on Friday 20 November 2015, Steven Burke had contacted her through Facebook. The judge was entitled on the evidence to be satisfied that the explanation given by Steven Burke was fanciful and that he had deliberately sought her out by either of the means outlined by him. There is nothing that suggests that, on the evidence before him, the judge came to the findings other than those he was fully entitled to make.

16. Although the police made an oral summary of their interview of the appellant to the judge, the judge was not provided with a transcript of the interview because the interview was not transcribed until 7 December 2013. As we have set out, it was relied upon by the appellant on the appeal as fresh evidence Although no formal application was made to us to admit the transcript as fresh evidence, we have considered it in detail.

17. In our judgment the transcript adds little to the summary of the interview as reported to the judge by the police and set out in his judgment. He said that the appellant was his uncle. He had been at the trial every day, though not all day; he had been there when the jury were sworn in, but he did not remember any of the names; he was terrible at spelling. He had taken his phone out of his pocket in court when it vibrated, but did not use it. As to his use of Facebook, he said he was looking for attractive girls to add to the 800 he had on Facebook. He saw two attractive girls together and sent a Friend request. He had not seen them properly as they were covered up by a flag. As soon as he realised one was someone on the jury, he "unfriended" her. He had no intention of intimidating her or of jeopardising his uncle's trial. The phone he had used was an iPhone; it was his Nan's; the screen was all smashed. He was prepared to provide his phone to the police and give them access to his Facebook account.

18. We were told that the police did not examine Burke's phone or Facebook account. An Inspector who reviewed the case made that decision without any reference to the Crown Prosecution Service. Given the gravity of the allegation and its significance to the administration of justice, this lack of proper attention to what had happened and why was undeniably unacceptable.

19. In our judgment the transcript contains nothing that materially changes the essential position that was before the judge. It would therefore have made no difference to the judge's reasoned decision which we are satisfied he was entitled to make.

20. There was no reason for the judge to wait for the conclusion of the police inquiry. It added nothing material, because, as is evident form the matters we have set out, the inquiry was of an unacceptably low standard. In any event, a decision has to be made very quickly. A judge, as we observe at paragraphs 31 and 32 below, is entitled to the results of an urgent and complete investigation by the police. It must then be for the judge to determine when to make the decision under s.46 (3), balancing the need for a decision in relation to the status of the trial in the interests of all concerned together with the importance of expedition if the trial is to be continued as against the state of the evidence in relation to tampering that has so far been obtained by the police and the likelihood of additional inquiries producing further material evidence.

(b) Proof of the involvement of the appellant

21. Although it was accepted in the oral argument before us that it was not necessary to prove that the appellant was involved in the jury tampering, we have considered the question as it was raised in the grounds of appeal.

22. The judge was plainly right to proceed on the basis that it did not have to be shown that a defendant had to instigate jury tampering. There are a number of reasons for this. First the provision of the legislation is clear. It only requires proof of jury tampering; it does not require proof of tampering by the defendant. Second the reason for this is evident, as the concern must be the protection of the integrity of a jury. That is also clear from the observations of Lord Bingham in *Comerford* where after setting out the function and procedures relating to a jury, he said at 195:

> But all these rules and procedures are rendered of little effect if the integrity of an individual juror, and thus of the jury as a whole, is compromised. Such a compromise occurs when any juror, whether because of intimidation, bribery or any other reason, dishonours or becomes liable to dishonour his or her oath as a juror by allowing anything to undermine or qualify the juror's duty to give a true verdict according to the evidence.
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> …. But cases do arise in which a defendant, or friends or associates of a defendant, or others with an interest in the outcome of a defendant's trial, seek to influence the jury's verdict by unlawful means. Indeed, such activities have become sufficiently familiar to earn the colloquial description of "jury nobbling" by which they are generally known.

23. Third, as in the present case, for obvious reasons, tampering will ordinarily be effected by a person other than the defendant, though connected to him; or the tampering may be effected by someone unconnected with the defendant, but who has an interest in the outcome of a trial. As in such cases, the objective of the legislation is to prevent the tampering, it matters not that the defendant is not involved or not proved to be involved.

24. Fourth, as it is the judge who makes the determination of tampering who will ordinarily continue with the trial (as we explain at paragraph 28 below), it cannot have been intended that the judge should have had to determine whether the defendant instigated or acquiesced or was otherwise involved in the tampering. The making of

that determination against the defendant might well place the judge in the position where he considered he could not fairly try the defendant (as happened in *Twoomey*: see paragraph 5 of the judgment).

25. Proof of tampering is all that the CJA 2003 requires. There are good reasons for this. The courts should not therefore qualify the provisions of the CJA 2003 by requiring any proof of the involvement of the defendant. At paragraph 29 of the decision in *Gutherie*, it was observed that it might be harsh in a case for a defendant to be deprived of trial by jury in the unlikely event it was shown that the tampering was carried out by a person unconnected with the defendant. We agree that such a case is highly unlikely ever to arise; plainly the present case is not such a case. If, however, such a case were to arise, then it is difficult to see why it should make any difference, as the terms of the CJA 2003 are clear and there are sound reasons for the maintenance of the efficacy of trial by jury why that is so.

(c) Fairness to the appellant and the interests of justice

26. Under s.43(1) (b) that judge had also to be satisfied that it would be fair to the appellant to continue without a jury, unless (under s.46(4)) it was in the interests of justice to terminate the trial.

27. In *Twoomey*, Lord Judge observed at paragraph 20:

> " …. given that one of the purposes of this legislation is to discourage jury-tampering, and given also the huge inconvenience and expense for everyone involved in a retrial, and simultaneously to reduce any possible advantage accruing to those who are responsible for jury-tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial.

28. We agree with that observation and consider it accurately expresses the intention of Parliament in relation to s.46. The description of the decision under s.44 to conduct a trial without a jury as "the decision of last resort" (see paragraph 8 of *R v J S & M* [2011] 1 Cr App R 5) is not relevant or applicable to the decision under s.46. We consider therefore that a judge should approach the question in relation to s.46 (3) and s.46(4) with the observations in *Gutherie* as to the course ordinarily to be taken firmly in mind when determining whether he/she is satisfied that it would be fair to a defendant to continue a trial without a jury.

29. We accept that the present case was a case where there was little independent evidence as to whether the complainant consented to sexual intercourse. The medical evidence was that the bruising sustained by the complainant was consistent with the use of force but also with vigorous sexual intercourse. No trace of any drug was found in her blood, but the test was carried out late. Text messages exchanged between the complainant and the appellant showed they had been on amicable terms,

30. In our view, the judge was right to be satisfied it was fair to the appellant that the trial continue without a jury and the interests of justice did not require him to terminate the trial. The assessment of credibility of witnesses is an ordinary part of a judge's duty. Furthermore, a defendant has under s.48 (5) of the CJA 2003 the additional protection of the requirement of a reasoned judgment. Thus where credibility is assessed by a judge the assessment must be justified by careful reasoning. If the decision is adverse to the appellant, this court can subject that reasoning to careful analysis and scrutiny. The position of the appellant was therefore fully protected. It was entirely fair and in the interests of justice to continue the trial without the jury.

Concluding observations in relation to police investigation of jury tampering

31. The investigation carried out by the police, as we have stated at paragraph 20, was of an unacceptably low standard. The Merseyside Constabulary should never have entrusted such a serious matter to such junior policemen, particularly given the well-known problems in relation to attempts to interfere with juries in Liverpool.

32. As jury nobbling/tampering undermines trial by jury, Parliament gave to a trial judge under the provisions of the CJA 2003 the express powers to which we have referred. It is, in our view, implicit in those powers that it is the legal duty of the police to provide all the assistance a judge reasonably requires for the exercise of those powers. When therefore a judge hearing a trial requires the police to investigate an allegation of jury tampering in that trial, the investigation must be conducted under the close supervision of a senior officer of police who must personally provide regular reports to the judge as the investigation progresses. Moreover, it is essential that the investigation be conducted with the highest priority and urgency as the judge has to make a decision on whether to continue the trial with or without the jury as soon as is reasonably practicable, that is to say within a few days. As we have explained at paragraph 20, the judge needs regular reports so that he can assess by balancing the relevant considerations when he is in the best position to make that decision.