Neutral Citation Number: [2023] EWCA Crim 455

Case No: 202201313 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES
HHJ ANNE BROWN
T20207045

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2023

Before:

LADY JUSTICE THIRLWALL
MR JUSTICE HOLGATE
and
MR JUSTICE PICKEN

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Between:

IHAB ASHAOUI	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Piers Mostyn (instructed by **Birds Solicitors**) for the **Appellant**
Allister Walker (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 29.03.2023

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Approved Judgment

This judgment was handed down remotely at 11am on Thursday, 27 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lady Justice Thirlwall :

1. The appellant is 31. On 11 April 2022 at the Crown Court in Kingston he was convicted after a trial as follows:

   Count 1, conspiracy to commit robbery between 13 May 2018 and 14 November 2019.

   Count 3, Conspiracy to handle stolen goods – motor vehicles - between 20 May 2018 and 14 November 2019.

2. He was acquitted of conspiracy to possess a firearm with intent (Count 2).

3. This is his appeal against conviction. It is his case that he had already been tried twice for what was, he argues, essentially the same offence; the trial therefore was a second retrial which should have been stayed as an abuse of the process of the court.

4. Leave to appeal was granted by the single judge on that ground. Leave was refused on two other grounds and there were no renewed applications.

History

5. On 19 December 2018 the appellant and his co-defendant Tesfaalem were in New Malden, travelling in a Nissan Qashqai. Tesfaalem was driving. The appellant was in the rear seat, having driven to a location nearby in a stolen Skoda on cloned number plates. In the Qashqai they drove past the Nationwide Bank. They were unaware that they were under police surveillance. The evidence of police officers was that the driver turned his head towards a cash-in-transit van. Three police vehicles attempted to block the Qashqai's path. Tesfaalem continued to drive, passed the police cars and drove off dangerously. There was a chase during which a bag of tools was thrown from the car. It contained a lump hammer and other tools to be used for opening cash boxes. The car crashed into a bus. The appellant and Tesfaalem ran off but were caught. There was a large knife in the footwell of the car. On arrest the appellant was wearing a ballistic vest under his jacket.

6. The two men were charged with conspiracy to commit robbery. In due course the Crown preferred an indictment with 7 counts:

   Count 1: conspiracy with each other and others unknown to rob, on or before 19 December 2018. This count went to trial. By the time the jury were sent out the count had been amended to make it clear that the only parties to the conspiracy were Ashaoui and Tesfaalem and the only target of the conspiracy was the Nationwide Bank in New Malden.

   Count 2: having a bladed article (the kitchen knife found in the car) on 19 December 2018.

   Count 3: Possessing an offensive weapon (the lump hammer) on 19 December 2018.

   Count 4: Handling stolen goods (Tesfaalem) the Qahsqai.

   Count 5: Handling stolen goods (Ashaoui) the Skoda.

Count 6: Dangerous driving (Tesfaalem only).

Count 7: Converting criminal property (Ashaoui).

7. The appellant pleaded guilty to handling the Skoda and to converting criminal property. Tesfaalem pleaded guilty to handling the Qashqai and dangerous driving.

8. The first trial therefore concerned Counts 1 – 3 only. It took place in July 2019. Both men were convicted on Count 2. Tesfaalem was convicted on Count 3 (the lump hammer). The jury could not agree about either defendant on Count 1 or about the appellant on Count 3. The case was fixed for a retrial.

9. The conviction for converting criminal property (Count 7) was before the jury at the first trial. It concerned three incidents of laundering the proceeds of robberies.

10. At the time that they foiled the robbery in New Malden in December 2018 the police had several other people under surveillance too, including Basil Abdul Latif, Adam Salman, Ibrahim Lyazi, Ola Orulebaja and a man called Semri. The four co-conspirators (not including Semri) were arrested in November 2019. It was not in dispute that all the evidence which was used in the second and third trials was available to the police at the time of the first trial, but they chose not to use it. They were keeping the other defendants under surveillance, anticipating a further robbery which might generate more evidence, and did not want to tip them off.

11. The four co-conspirators were charged with the offences we set out below. The appellant and Tesfaalem received postal requisitions and in due course were joined to the same indictment:

Count 1, Conspiracy to rob between 13 May 2018 and 14 November 2019.

Count 2, Conspiracy to possess a firearm with intent to cause fear of violence between 13 May 2018 and 14 November 2018.

Count 3, Conspiracy to handle stolen vehicles between 13 May 2018 and 14 November 2019.

12. The intention was that all the defendants would be tried together but Covid restrictions required the reduction of the number of people tried in the same trial. The result was that the appellant and Tesfaalem were tried together in January and February 2021. Tesfaalem was convicted on all three counts. The jury could not reach verdicts on the appellant. The prosecution indicated that they sought a retrial of the appellant. An application was made on behalf of the appellant to stay a further trial as an abuse of the process of the court. In March 2021 the trial judge heard argument and ruled that the third trial would not be a second retrial, was not an abuse of the process of the court and could proceed.

13. In the meantime, Abdul Latif, Lyazi, Salman and Orulebaja were tried on the same three counts. All four were convicted on Counts 1 and 3 (conspiracy to rob and conspiracy to handle stolen goods). Latif and Lyazi were convicted on Count 2 (possession of a firearm with intent). The jury could not agree about Salman on Count 2 and so he was joined to the appellant on his third trial. Salman was tried on Count 2

only and was acquitted. The appellant was convicted of the offences we set out in paragraph 1.

FACTS

14. The second and third trials concerned a conspiracy to rob cash-in-transit vans en route to/from banks over a period from May 2018 to November 2019. In addition to the evidence in respect of the thwarted robbery on 19 December 2018, there was evidence of a series of robberies, aborted robberies, reconnaissance trips and handling stolen vehicles over the whole of the conspiracy period. There were no completed robberies after the incident on the 19 December 2018. Thereafter the evidence revealed further reconnaissance trips but nothing more.

15. Seven robberies were committed between 26 May 2018 and 19 December 2018 in the west and south west London area. The number of people involved varied as did the weapons used and the modus operandi. They all involved an attack upon the custodians of cash-in-transit vans as they loaded ATMs located at banks and supermarkets. In some cases, there was prior reconnaissance of the venue or the vans. Sometimes the vans were followed from their depots. One robbery did not involve the use of a weapon, whilst three involved the production of a firearm which was not discharged. The remainder involved a variety of weapons. The number of participants varied from one to four. The total cash stolen in the robberies committed in furtherance of the conspiracy on the second indictment was over £500,000.

16. Generally, the robbers would drive a stolen car, on cloned number plates, to a location near the proposed attack. Another stolen car would be parked near the location of the attack and was the getaway vehicle. On occasion, instead of stolen vehicles, the robbers used hired Mercedes. This was the case for the robbery on 3 September 2018 of a Nationwide bank at Uxbridge Road in Hayes, the car having already been used for reconnaissance. The same vehicle was used on 11 September 2018 for a robbery and prior reconnaissance at Tesco in Brackley and on 15 September 2018 during a robbery at Sainsbury's in Shepperton. The prosecution could not always prove who was driving the car, but the appellant had hired the vehicle. As a minimum he allowed a co-conspirator or conspirators to drive it. The appellant hired a number of vehicles for use between 23 August to 15 September 2018.

17. As we have said, the appellant pleaded guilty to converting the proceeds of criminal conduct before the first trial began. The facts were that on three separate days he had put cash through fixed odds betting terminals in betting shops. The cash was in the form of bank notes which had been dyed for the purposes of tracing them in the event of theft. On 15 August 2018 the appellant had laundered £120 and on 13 September, £1400. The cash on those days was part of the proceeds of a robbery in Croydon. On 16 September 2018 he laundered £1900. This cash came from the £112,000 taken in the robbery at Sainsbury's on 15 September 2018.

18. During the first trial the evidence of laundering the cash was adduced as evidence of bad character. In the second and third trials it was adduced as part of the facts of the case on the wider conspiracy.

19. The evidence about the appellant's hiring and use of the Mercedes was not presented at the first trial. It was before the jury on the second and third trials.

Defence Case

20. The appellant gave evidence at all three trials. He said that he was not involved in any conspiracy to commit robbery. On 18 December he and Tesfaalem were not about to commit a robbery. He was simply helping Tesfaalem move stolen vehicles around. He was not involved in any conspiracy in respect of a firearm (he was acquitted of that offence). As to the stolen cars, he admitted his involvement in handling the Skoda on 19 December 2018. In the second trial he admitted hiring the Mercedes vehicles. He allowed others to borrow them but had no idea that they might be used in connection with the conspiracy to rob and, had he known that, he would not have allowed it. As to the money laundering, he had no idea where the money had come from. He pointed out that on two of the three occasions it involved cash which was not connected to this conspiracy and even on the third occasion it was only a tiny proportion of the money stolen. On 19 December Tesfaalem had asked him to help him move a stolen vehicle and pick up a motorbike.

Appeal

21. The single judge gave leave on a single ground:

> The trial was an abuse of process, being a second retrial in circumstances where the jury in each of the two previous trials had failed to agree verdicts. The limited exceptions to any more than one retrial did not apply.

22. The third trial was a retrial of the second. The question for the judge before the third trial was whether or not the second trial was a retrial of the first. The parties and the judge were agreed "that if this amounts to a second retrial it would not meet the test as set out in a number of authorities, including **R v Bell [2010]** 1 Cr. App Rep 27 and would therefore be an abuse of the process". There was no argument that it was an abuse of the process for any other reason.

23. In **Bell,** the appellant had been tried twice for the murder of a woman. The jury did not agree in either trial. It was the appellant's argument after the trial at which he was convicted, as it was before the third trial started, that the trial should have been stayed as an abuse of the process of the court. In that case, as in this one, it was accepted that a third trial was not prohibited as a matter of law. Lord Judge CJ summarised the argument thus:

> "The essential argument is that, notwithstanding the absence of any express prohibition, this third trial constituted an abuse of process or an unfair trial, not simply because it was the third trial, but because of a number of specific additional features in the forensic process."

There is no need to consider the details of the differences in approach by the Crown to the three trials. It is enough to say that the third trial was much more focussed, with less reliance on expert evidence and greater clarity. It was undoubtedly a second retrial of the same defendant on the same offence. This court was satisfied that there was no unfairness or oppression in the approach taken and dismissed the appeal.

24. As to the approach to be taken generally, the court doubted "the value of offering further guidance on the circumstances in which a second re-trial may be appropriate", adding this:

> "We shall confine ourselves to reminding the Crown that the jurisdiction which permits a second re-trial after two jury disagreements in circumstances like the present must be exercised with extreme caution. The broad public interest in the administration of criminal justice leads us to the clear view that a second re-trial should be confined to the very small number of cases in which the jury is being invited to address a crime of extreme gravity which has undoubtedly occurred (as here) and in which the evidence that the defendant committed the crime (again, as here) on any fair minded objective judgment remains very powerful."

25. Mr Mostyn submitted that the inhibition on the ordering of a second retrial is rooted in the prosecutorial code which reflects the well-established convention that, once a person has been tried twice on the same offence and the juries cannot agree, the Crown do not, generally, seek a retrial. Part of that approach arises out of pragmatism: if two juries have not agreed on a verdict it is likely that a third will not do so either. We agree with that analysis but, when a court is considering whether or not to permit the Crown to pursue a second retrial or stay it as an abuse of the process of the court, there is more than pragmatism in play. In **R v Bowe**, a judgment of the Privy Council in April 2001 to which Lord Judge referred in **Bell,** Lord Bingham of Cornhill said this in the context of a retrial for murder:

> "It is in the first instance for the prosecutor to judge whether, taking account of all relevant considerations, the public interest is better served by offering no evidence or by seeking a further re-trial. There is plainly no rule of law in this country which forbids a prosecutor from seeking a second re-trial ... there may of course be cases in which, on their particular facts, a second re-trial may be oppressive and unjust ... whether a second re-trial should be permitted depends on an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. Full account must be taken of the defendant's interests ... account must also be taken of the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system ... ."

26. The assessment described by Lord Bingham was part of the court's consideration in ***Bell*** with the outcome we have described.

27. The parties to this appeal agreed, correctly in our view, that the decision whether the second trial was a retrial was a question of fact.

The judge had presided over the first and second trials. On the application for a stay, having reviewed all the evidence in the second trial together with the submissions of the parties, she concluded that it was not a retrial of the first. She took as her starting point, without objection, the fact that a retrial must be a further trial on the same key issues and with the same parties. She said that, having heard both trials and considered the new case against the appellant, "I am of the clear opinion that this was not a retrial but a fresh trial on much wider allegations. The event of 19 December 2018 undoubtedly was a significant event in the case against Mr Ashaoui but was not the only evidence against him. And … if one excludes from consideration his involvement on that night, there would remain a case to answer in respect of the new indictment" based upon the evidence that she had heard.

28. Mr Mostyn submitted, as he did before the trial judge, that, after the first trial, the prosecution sought a retrial, and that is what the court granted. This, he submitted, was not just a question of form, but of substance, as the jury were concerned with the same issues in both cases. There was nothing unusual, he observed, about more or different evidence being called on a retrial. The prosecution case is often improved and refined the second time around. Sometimes additional charges are included on the indictment. That does not change the fact, however, Mr Mostyn submitted, that the trial remains in substance a retrial, i.e. a further trial of the same defendant on the same key issues.

29. Notwithstanding that there were more defendants and a wider conspiracy on the indictment in the second trial, Mr Mostyn submitted that it remained a retrial of the appellant because the evidence against him was almost identical in the first and second trials, namely:

i) evidence of the events on 18 December, which were, he argued, at the centre of the case against him;

ii) the money laundering; and

iii) the handling of the Skoda.

30. In the second trial the only additional evidence against the appellant directly was in respect of the hiring of the Mercedes cars over a 6 week period. This did not change the substance of the trial, he submitted.

31. Mr Mostyn made no complaint before us that the prosecution did not call all the available evidence at the time of the first trial. The judge accepted the prosecution submission that this had been done for sound tactical reasons and was not done in bad faith. Mr Mostyn did not seek to go behind that. He did however submit that in acknowledging that they had held back evidence which could otherwise have been called in the first trial, the prosecution were effectively conceding that the two trials were, in essence, the same.

32. Mr Walker, on behalf of the prosecution, relied on the fact that the second trial concerned a much wider conspiracy over a prolonged period, involving more people and many more robberies, than the first trial had done. The appellant was involved over

a long period, dealing directly with other conspirators, and carrying out, for a period of six weeks, an important logistical task, by obtaining hire cars.

33. Mr Walker submitted that, as the judge found, the first trial was about a closed two person single target conspiracy to rob the Nationwide Bank in New Malden. The robbery did not even reach the status of an attempt as it was foiled by the police. As soon as the second indictment was lodged with the court, it was clear that this was a case of a wholly different scope. The foiled robbery was a small part of a much bigger enterprise in which the appellant was directly involved for a prolonged period. Had the appellant been convicted (or acquitted) of conspiracy to rob at the first trial, there would have been no unfairness in including him in the second trial on the wider conspiracy. An argument based on autrefois acquit or convict would have failed.

34. We accept that the evidence of his involvement in the foiled robbery was the most eye catching evidence against the appellant but this crime did not begin to reflect the whole of the criminal conduct in which the appellant was involved, as presented to the jury during the second trial and as the jury in the third trial accepted.

35. The evidence of the car hires, together with telephone evidence, linked him directly and indirectly to a number of robberies. On at least one occasion he hired the car in the name of the defendant Latif. On at least one occasion there was evidence that he was communicating from his prison cell with other conspirators (one of whom was also in prison, the rest in a car looking for a potential target premises). It is accepted that information as to the precise location came from one of the co-conspirators, but it is inescapable that the appellant was in communication with the men in the car at the very time that they were carrying out their reconnaissance.

36. The evidence of the car hire was also significant because it extended the number of people with whom the appellant could be proved to have conspired, and it showed him actively and directly assisting in essential arrangements in a large conspiracy. This was different from his involvement in the single incident on 18 December.

37. Furthermore, the evidence of money laundering as being to do with the facts of the offence linked him directly to another robbery. This was different from evidence of bad character, which was how the matter was approached in the first trial.

38. The judge's finding that the second trial was not a retrial was plainly open to her on the evidence that she had heard during the first and second trials and which were not undermined by what occurred during the third trial. We are satisfied that she was right to decide that the second trial was not a retrial of the first. She was better placed than anybody to reach that finding. It follows that the third trial was not a second retrial and that the judge was right not to stay it as an abuse of the process.

39. We have also asked ourselves the broader question: were the interests of justice best served by this third trial? We are satisfied that they were. These were serious offences; it was in the public interest that those responsible be convicted. It was not oppressive of the defendant to allow a second trial of the wider conspiracy. The trial was not an abuse of the process of the court. The appeal is dismissed.