Case No: CO/1509/2023

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 05/07/2023
Start Time: **13:07** Finish Time: **13:37**

Before:

MR JUSTICE GARNHAM

- -

Between:

THOMAS BRACHER

Claimant

- and -

CROWN PROSECUTION SERVICE

Defendant

- -
- -

MR JOSH RADCLIFF for the **Claimant**
MR DENIS BARRY for the **Defendant**

- -

APPROVED JUDGMENT

- -

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MR JUSTICE GARNHAM:

1. The Appellant, Thomas Bracher, appeals by way of case stated against his conviction on 19 January 2023 for assault occasioning actual bodily harm by District Judge Smith at Birmingham Magistrates' Court.

2. The questions stated for the opinion of this court were as follows:

    i) Was the court correct in holding that the evidence of the complainant as to his knowledge of his assailant's identity was not hearsay?

    ii) Should the court have excluded the complainant's identification evidence pursuant to section 78 of the Police and Criminal Evidence Act 1984 or under the common law?

3. The Grounds of Appeal are as follows:

    i) The complainant averred in oral evidence that he knew of the identity of Mr Bracher from (i) having viewed social media content ascribed to Mr Bracher including photographs, (ii) from having seen Mr Bracher queue for entering a nightclub. It was submitted during the trial that this constituted an identification dependent solely upon hearsay. The District Judge held that the evidence of the complainant was not dependent upon hearsay and was thus admissible as proving that his assailant was Mr Bracher. Had the court found that the evidence was hearsay then, absent a successful application to admit it as such, it would have been inadmissible and Mr Bracher would have been acquitted.

    ii) The court ought to have excluded the complainant's purported identification of Mr Bracher as his assailant in circumstances where no identification procedure had been carried out by the police, no identification was carried out in court and there existed no mechanism by which the defence could test the veracity of the complainant's purported identification. In this vein it is noted that the District Judge, properly it is submitted, directed herself that the CCTV evidence adduced was of insufficient quality to enable an identification to be made of the perpetrator.

4. Accordingly, the Appellant submits that the first question in the stated case should be answered in the negative and the second in the affirmative.

5. The Crown submit that in respect of question 1 the District judge was correct and in respect of question 2 it was not unfair for her to have admitted the evidence at trial.

FACTS.

6. Factually, this was a straight forward case. On the evening of 14 August 2021 the complainant, Mr Connor Knowles-Farrelly, visited The Townhouse public house in Sutton Coldfield. It was common ground that during that visit he was violently assaulted and sustained significant injury. The Appellant was arrested and charged with assault occasioning actual bodily harm.

7. At the trial before District Judge Smith on 19 January of this year the only relevant evidence was that of the victim, Mr Knowles-Farrelly. As set out in the stated case, Mr

Knowles-Farrelly told the court that at 11.30pm he was walking through the bar area when he saw Mr Bracher approach his right side. He said he heard him say, "*Do you remember me now*?". Mr Bracher then grabbed Mr Knowles-Farrelly by the scruff of the neck and head butted him to the lip area. He then felt punches and kicks. The injury to his lip required 12 stitches. Mr Knowles- Farrelly stated that he had no doubt that it was Mr Bracher who assaulted him.

8. Mr Knowles-Farrelly was cross-examined. He said that he was in the pub with his friends and that he had been drinking. He also admitted to using cocaine after he was head butted. He confirmed that the incident lasted for two to three seconds and that he was certain of what he had seen. He said he knew Mr Bracher from social media as he had seen him online on a number of occasions over the course of three years. He said that he did not know him personally to speak to. From his interactions on social media over the three years prior to the incident he had himself found out that Mr Bracher was the partner of his ex-girlfriend and that Mr Bracher was known for practising the martial art of jujitsu. He confirmed that he would not be able to identify Mr Bracher from the CCTV footage due to its quality. Mr Knowles-Farrelly also confirmed that he had seen Mr Bracher in person on one occasion whilst queuing at a nightclub but he did not engage in conversation with him.

9. On behalf of the Crown it was submitted that the evidence of Mr Farrelly was recognition evidence, he having known of Mr Bracher for a period of three years. This was due to Mr Bracher being the partner of Mr Knowles-Farrelly's ex-girlfriend, following him on social media and seeing him in person on the one occasion. The Crown submitted, therefore, that the District Judge could be sure that Mr Bracher had been correctly identified. She was also asked to draw inferences from his failure to give evidence at court. The Crown conceded that she could not draw an inference from his failure to answer questions in police interview as Mr Bracher had not given evidence in court. There was no police identification parade in the case as identification was not raised as an issue in interview.

10. For the defence, it was submitted that the identification had been made solely from identification on social media. The only reason Mr Knowles-Farrelly could identify the defendant as Mr Bracher was because that is how he was known on social media. It was submitted that that did not make it true. A person could identify with any name without it being factually correct. The identification was, therefore, based on hearsay evidence, namely social media. The fact that there was no identification parade meant that identification could not be challenged by the defence and, therefore, it should not be admitted. It would be unfair under section 78 to do so.

11. In relation to adverse inferences being drawn from failure to give evidence in court, the defence submitted this cannot on its own be relied upon to prove guilt in the case and that the District judge had to be satisfied that there was a case to answer before drawing such inferences.

THE DISTRICT JUDGE'S CONCLUSIONS.

12. At the closing of the hearing the judge made the following findings. as recorded at paragraph 19 of the stated case:

i) Mr Bracher has no previous convictions and this is relevant both to his credibility and the likelihood of committing the offence.

ii) The CCTV did not show clearly who the parties were on screen.

iii) The only evidence in relation to identification came from Mr Knowles- Farrelly.

iv) Mr Knowles-Farrelly was clear in his evidence that he was certain it was Mr Bracher who assaulted him. This was based on his knowledge of Mr Bracher over the past three years as his ex-girlfriend's new partner, following him on social media on many occasions and seeing him once in person, albeit not to have a conversation with. This was, therefore, recognition evidence. Having considered the *Turnbull* guidelines, the District judge was satisfied that Mr Bracher was correctly identified. This evidence was recognition evidence based on Mr Knowles-Farrelly's knowledge of Mr Bracher over a substantial period of time for reasons which included social media posts. It was not, therefore, based on hearsay evidence.

v) The District Judge concluded that this was not a case where an identification had been made by social media after the event; this was recognition evidence where a person had known and followed the defendant for a period of years, had specific reason to know his identity as he was now the partner of his ex-girlfriend, knew he was well known in the area due to martial arts capabilities and had seen him in person. She took the view that an identification parade in those circumstances was not necessary and, therefore, it would not be unfair to admit the evidence of Mr Knowles-Farrelly.

vi) She noted that Mr Bracher made a no comment interview. Since he did not give evidence in court she did not draw any inference in relation to his silence in interview. She said that at the end of the prosecution case she was satisfied in her own mind on the evidence of Mr Knowles-Farrelly that there was a clear case to answer. No submission of no case was made and the case proceeded.

13. Mr Radcliff, then appearing before the District Judge for the defendant, said that the defendant would not give evidence. The District Judge said she was, therefore, able to consider Mr Bracher's failure to give evidence at court and draw inferences from that. She said that having reminded herself that the Crown had the burden of satisfying the court so as to be sure of the defendant's guilt and that an inference from failure to give evidence cannot on its own prove guilt, she concluded that the silence at the trial could only sensibly be attributed to the defendant having no answer, or none that would stand up to cross-examination and she, therefore, drew an adverse inference. She reminded herself that the defendant was of previous good character and that this went to his credibility and propensity, although as he did not give evidence she was unable to assess his credibility.

14. She said that she found the evidence of Mr Knowles-Farrelly compelling regarding identification and she was satisfied so as to be sure that Mr Bracher was the person who assaulted him as described.

THE COMPETING CONTENTIONS.

15. On behalf of the Appellant Mr Radcliff argued that the identity of the Appellant by the complainant rested on hearsay, namely the social media posts he had seen which *he believed* contained a photograph of the Appellant. That belief was founded on the attribution given to the photograph by some unknown person. In effect, the assertion by the complainant that he was assaulted by the Appellant amounted to multiple hearsay. No source material had been placed before the court by the Crown so it's probative value could not have been tested.

16. There was, says Mr Radcliff, no indication from the Crown at trial of any intention to rely upon hearsay evidence. There was no notice of intention to rely on such evidence. Accordingly, it is said, the evidence should not have been admitted. In the alternative, it is argued, the court ought not to have admitted the evidence of Mr Knowles-Farrelly on the basis that it would be unfair to do so and so was excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984. There had been no form of identification procedure and no dock identification.

17. In his oral evidence, the complainant had said that he had seen the Appellant queuing to enter a nightclub but he gave no details as to the date when that occurred, the name of the club, the lighting conditions at the time, the distance from which that identification was made. In any event, that identification was vulnerable to the same criticism as was the identification offered in court. The complainant knew of the Appellant only from social media. Furthermore, Mr Radcliff asserted there was no mechanism by which the identification based on social media could be tested. Referring to *R v Lambert* [2004] EWCA (Crim) 154, Mr Radcliffe argued that it should have been apparent to the police that identification could be an issue in the case so that an identification procedure was necessary. Whilst it was conceded that the Appellant gave a no reply interview, the absence of an identification procedure meant there was no means of challenging the Crown's identification evidence. In those circumstances, the defence argues, the first of the questions stated by the District Judge should be answered in the negative and the second in the affirmative.

18. In response Mr Denis Barry for the Crown accepted that social media may potentially be hearsay. He argues, however, that the District judge had accepted Mr Knowles-Farrelly's evidence that he had followed the defendant on social media over three years, that he had learnt from social media that the defendant was now going out with his (Mr Knowles-Farrelly's) girlfriend and that he was an expert in martial arts. Mr Barry says she was right, or at least entitled, to say that this was a recognition case. Furthermore, the District judge was not working on the assumption that recognition was based solely on social media. Instead she said that social media was part of the evidential picture.

19. In any event, Mr Barry says, such parts of the evidence as were hearsay would have been admissible under section 114(1)(d) of the Criminal Justice Act 2003. It would have been in the interests of justice to admit it. Referring to the factors set out in section 114(2), he says the probative value of the material was considerable and of real importance; it could not have been adduced in any other way. He said that the defendant had identified himself on pieces of social media and the images included those of a person, namely his former girlfriend, who the complainant knew well. He said the fact that the defendant had a social media presence was not challenged and the relevant material covered a period of three years. He said it would not have been difficult to

challenge the statement by giving evidence as to his social media presence but he chose not to.

20. Mr Barry says that to fall within the provisions in the Police and Criminal Evidence Act code providing for the holding of identification procedures, the fact that there was dispute about identity had to be anticipated; there had to have been some positive assertion putting identification in issue (see *The Queen v McCartney* [2003] EWCA (Crim) 1372 at 188).

21. Mr Barry says there was no basis for excluding the evidence. Under section 78, the District Judge having determined that it was recognition, not hearsay evidence, there was no basis for doing so given that there was nothing to suggest that she regarded the evidence as unreliable.

DISCUSSION.

22. The argument on both sides in this case was of a high quality and I am grateful to Mr Radcliff and Mr Barry for their considerable assistance.

23. In my judgment, both parties are right when they submit that the point when hearsay evidence becomes recognition evidence is a matter of fact and degree. In any social situation, an individual moves from learning about another person by hearsay to a point of recognition. I do not exclude the possibility that that may be possible based purely on social media contact but care is needed in analysing the true basis of such purported recognition. Mr Barry was right to concede during argument that social media is, potentially at least, hearsay. An individual puts up a post on a social media platform that contains an assertion. When another person repeats that assertion in court he is giving hearsay evidence; it is the report of another person's words. If a person identifies a photograph on social media as the photograph of another person that identification is hearsay. It is often impossible on a social media platform to know who it is who is identifying the person in the photograph posted on the site, and so the basis for the purported identification may not be apparent.

24. In the present case, the District Judge had precious little evidence as to the basis of Mr Knowles-Farrelly's identification of the defendant. True it was that Mr Knowles-Farrelly said he had been observing reports relating to the defendant over some three years, and that he had learnt from social media something of the defendant's life, notably the identity of his girlfriend and his interest in martial arts. But the District Judge had no evidence as to the basis on which Mr Knowles-Farrelly came to be able to recognise the defendant. In particular, the Crown did not adduce any of the social media on which Mr Knowles-Farrelly had relied for this recognition. As a result, in my judgment, the District judge was not able properly to assess whether this was genuine recognition or mere repetition of hearsay. In my judgment, the District judge fell into error when she said that this was a case of recognition rather than one based on hearsay.

25. Furthermore, in my view, an application to admit the assertions of Mr Knowles-Farrelly as admissible hearsay under section 114 would have had to have been rejected. Section 114(1) is often called the hearsay "safety valve". As Mr Barry correctly submitted, it is well established in the case law that it does not serve as a supplement to other gateways under the Act for the admission of hearsay. Instead, it is the provision that applies where

no other gateway is applicable and the interests of justice nevertheless demand the admission of the evidence.

26. In deciding whether it is to be deployed the court must consider the factors referred to in subsection (2). In my judgment, a court considering the checklist would have concluded first that the statement that Mr Knowles-Farrelly recognised the defendant as his assailant, if true, had considerable probative value. Second, that it was of some importance to the case; but the circumstances in which it was made were uncertain given the lack of evidence as to the source of Mr Knowles-Farrelly's knowledge. Third, that the maker of the statement, Mr Knowles- Farrelly, appeared to be wholly reliable but the reliability of his evidence could not properly be determined on the evidence available. Fourth, that evidence of the matters stated could have been given at least to the point of producing some of the social media posts on which the witness relied. Fifth, that challenging the statement would have been, and was, extremely difficult because of the lack of the source material. And sixth, that the prejudice to the defendant from the admission of the evidence was very considerable.

27. Against that analysis, it seems to me most unlikely that section 114 would have availed the Crown had it been relied upon, which of course it was not.

28. Finally on this topic, I accept Mr Radcliff's submission that on the facts of this case fairness required that an identification procedure should have been instituted. The parties referred me to *The Queen v McCartney* and *The Queen v Lambert*, and I accept that an ID procedure is required when there is a "*reasonable anticipation that identity was in dispute*" and that there does not necessarily have to be a positive dispute raised by the suspect. Here the questioning of the defendant by the police, in particular questions such as "*Do you know the complainant?*" and "*Who is the complainant?*" demonstrate, in my view, that the police were aware that establishing whether or not the two men knew each other might be a relevant consideration. In those circumstances, in my view, the PACE codes of practice required an identification parade.

29. For all those reasons, in my judgment, it was unfair to admit the evidence and it should have been excluded under section 78 of PACE. That being so, I would answer the first question in the stated case in the negative and the second in the affirmative.

30. Accordingly this appeal succeeds.

(This Judgment has been approved by Mr Justice Garnham.)