

In the Central Criminal Court

15 October 2012

Before: The Hon. Mr Justice Fulford

Between:

Regina

-v-

Michael Ennis-Simpson
Shaun Sutton
Leon Russell

and

Lee Russell

Decision on the application to exclude identification evidence

History

1. I delivered an abbreviated version of this decision orally in open court for the benefit of the prosecution, the defendants and the public. This manuscript version is the authoritative version.
2. For a summary of the evidence available to the Crown in support of this case, I refer back to my Decision on the applications to dismiss, dated 29 June 2012 (handed down in writing).
3. On 2 June 2011, Inspector Dallimore held a video identification parade at Lewisham Police Station in which two suspects, the “indistinguishable” identical twins Lee and Leon Russell (as Mr Dallimore described them during the *voir dire* on 5 October 2012), were placed on the same “line-up” relating to an incident that occurred five years earlier, namely at 6.00 am on 7 March 2006. The witness, Kieran Jackson, was asked if he could identify the taller of two men who

forced their way into his flat when he was shot along with his brother Jordan and Leyla Djemal-Northcott. Jordan and Leyla were killed, whilst Kieran survived despite being hit by bullets several times, fired at close range. It follows that the prosecution suggested only one of the Russell brothers was in the flat at the relevant time, and therefore a choice needed to be made between them. Mr Dallimore accepted that the prosecution needed to ensure that Kieran Jackson could tell the two brothers apart – that, he said, was an objective of the parade. The taller man had been wearing a balaclava or similar piece of clothing which covered his face, save for the eyes and the skin of the face immediately surrounding them.

4. The film prepared for the identification parade seemingly contained 14 people. In fact, there was a single photograph of each of the two brothers along with six other people (the latter having been photographed twice, in slightly different poses, presumably in an attempt to mimic identical twins). All of the photographs had been taken when the individual concerned came into custody. The participants were variously arranged on a choice of four parades, with the Russell brothers appearing as follows:

1st. Lee Russell at number 3 and Leon Russell at number 8.

2nd Lee Russell at number 11 and Leon Russell at number 4.

3rd Lee Russell at number 12 and Leon Russell at number 7.

4th Lee Russell at number 5 and Leon Russell at number 9.

5. No objections were taken as to the arrangements for the parade (in advance, on 8 April 2011, by Mr Ismail and on the day of the parade, by Jack O'Keefe, both from Dexter Henry & Co). On 2 June 2011 Leon Russell's representative was given the choice of which of the versions was to be shown to Kieran Jackson and he selected the second, as indicated above.
6. Having twice seen the members of the line-up brought up on the screen one by one, Kieran Jackson asked – in the following order – to see:
 - four times, all the images together; then number 4 (Leon Russell);
 - all of them together;
 - number 4 (Leon);

- number 8;
 - number 11 (Lee); and
 - number 13.
7. Thereafter, following a period of reflection but without qualification, he identified number 4 (Leon Russell).
 8. He said he had not seen any image, nor had he been provided with a description, of the suspect in advance of the identification parade.
 9. In the dismissal decision, I dealt with the identification issues – as they were then presented – as follows:

12. [...] three men who broadly (although not necessarily always exactly) match Leon Russell, Shaun Sutton and Lee Russell were seen at the block of flats shortly before the murders and attempted murder and they left quickly after the shots were fired. However, central to the prosecution case on this application is the identification by Kieran Jackson of Leon Russell (whom he did not know before the shooting) as the taller gunman, during an identification procedure on 2 June 2011. The prosecution concedes that if I conclude that this identification procedure could not be relied on by the jury, having received proper directions, the four dismissal applications would inevitably succeed. The Crown aver that this critical piece of evidence links all the accused, along with the remainder of the evidence, with the three offences. Issue is taken by Ms Khan Q.C., supported by counsel for the other accused, as to the reliability and probative value of this identification, which undoubtedly has some markedly distinctive features. The offence occurred on 7 March 2006 but Kieran Jackson did not make the identification until 2 June 2011. The man he identified had been wearing a balaclava or some other piece of clothing or material which left only the area around his eyes visible. Lee and Leon Russell are identical twins and both of their photographs were included in the "line up". It is accepted that Annex A (a)(2) of Code D of the PACE, which addresses the situation when two suspects of very similar appearance need to participate in a procedure, was properly applied.

13. As it seems to me, notwithstanding the limited area of the face of the gunman that was exposed, a jury would be entitled to conclude that during the intense moments before the shots were fired, Kieran Jackson had every reason to study and recall those parts of his face which were visible. He took great care during the identification procedure, asking to see selected images and narrowing them down until he finally chose Leon Russell (a man he had not seen before) as the taller gunman. I entirely accept that the jury will need the most careful directions as to all the elements surrounding this evidence, and particularly the features I have summarised above, but this is an issue for the jury and I would be usurping their role if I purported to conclude that it is not open to them to decide that Kieran Jackson correctly identified Leon

Russell from his overall appearance, and particularly around the upper part of his face, 5 years after the event. It is for a jury and not the judge to assess whether the matters summarised by Ms Khan render this evidence insufficiently reliable. There is no rule of law – or, for that matter, common sense – that determines the precise extent of a human face that must be revealed before a witness can make a safe identification; nor is there a legal principle that a witness can never safely distinguish between twins. These are usually matters for juries to resolve.

14. In reaching this conclusion I have taken into account all the matters urged by Ms Khan, and including the period Kieran Jackson spent on the floor, the lack of any identification of Shaun Sutton and the smoke in the room after the gunshots.

Submissions

10. There are essentially five strands to the argument that Miss Khan QC has deployed in support of this application on behalf of Leon Russell.

I. The Russell brothers are identical

11. The Crown does not dispute the defence assertion that the brothers are so-called identical twins, and it has not advanced any particular aspects of their appearance that would have enabled the witness to distinguish between them, particularly given he could only see the perpetrator's eyes and the skin immediately surrounding them. Ms Khan's submission was that Leon and Lee Russell "*are, to all intents and purposes, indistinguishable, particularly to those who are not close friends or family members. The impossibility of distinguishing between them is aggravated in the instant case when the witness's ability to identify was based on the suspect's eyes alone*".

II. Breaches of the Police and Criminal Evidence Act 1984, Code D Annex A D:

12. It is argued by Ms Khan that placing both Russell twins on the same identification parade and the use of only six other people constituted breaches of PACE: Code D Annex A D:2. The Code sets out the following:

The set of images must include the suspect and at least eight other people who, so far as possible, resemble the suspect in age, general appearance and position in life. Only one suspect shall appear in any set unless there are two suspects of roughly similar appearance, in which case they may be shown together with at least twelve other people.

13. It is submitted that the two brothers should not have been shown on the same identification parade because identical twins do not meet the requirements of "suspects of roughly similar appearance". Instead, it is

contended that there should have been separate parades, although it would have been permissible for the witness to see the two “line-ups” at the same time.

14. Moreover, it is said that “[t]he prejudice of including only six volunteers on the parade cannot be overstated. Examination of the pictures makes it clear that there are seven pairings, within each of which it is impossible to distinguish individuals. Thus, Kieran Jackson had a choice of seven sets of ‘twins’ from whom to select. This greatly and unfairly increased the probability of the Russell twins, as a pair, being selected, as compared to the eight or twelve volunteers that the Code provides they should have been considered against (as individuals or as a pair, respectively). This is a significant and substantial breach, which, it is submitted, in and of itself, should give rise to exclusion of the identification evidence” [29].
15. The prosecution argues that it is permissible to place identical twins on the same parade, and it is suggested that there may not have been a breach of the Codes with regard to the number of volunteers who should make up a video identification. In any event it is argued that “[e]ven if there has been a technical breach, it was done to provide the suspects with greater rather than fewer safeguards against being selected by the witness in this unusual case and no unfairness resulted to Leon Russell such that the evidence ought to be excluded” [2 (b)].

III. Breach of Police and Criminal Evidence Act 1984, Code D Annex A D:3

16. Ms Khan suggests that the overall appearance of the Russell brothers in the two photographs of them was dissimilar, and particularly it is argued that the photograph of Lee Russell was very poorly lit, and it was more difficult to make out his features. The defence stresses “*the outline of Lee’s eyes are not as clearly visible as those of his twin brother*” [11]. It is noted that Lee Russell was “*looking very far to his left*” whilst Leon Russell’s eyes are “*slightly averted from the camera*” [31]. It is contended that “*[t]he visibility of the eyes was of fundamental importance in this case, as the purported identification purports to be based upon a view of the eyes alone. In the photographs used in the procedure, Leon’s eyes are much more clearly visible*”.
17. The Code sets out the following:

The images used to conduct a video identification shall, as far as possible, show the suspect and other people in the same positions or carrying out the same sequence of movements. They shall also show the suspect and other

people under identical conditions unless the identification officer reasonably believes:

- a) because of the suspect's failure or refusal to co-operate or other reasons, it is not practicable for the conditions to be identical; and
- b) any difference in the conditions would not direct a witness's attention to any individual image.

18. On this basis it is argued by Ms Khan that "*Annex A D.3 makes clear that the images used in the procedure must show suspects under 'identical conditions'. The only exception to this is where a defendant is not cooperative, whereas Leon Russell fully cooperated with this procedure*" [30].

19. The prosecution suggests "*when looked at overall, the set of 14 images shown to the witness sufficiently resembled Leon Russell 'in age, general appearance and position in life' so that his image did not stand out at all, nor did it stand out to a degree which would make the procedure so unfair such that the evidence ought to be excluded*" [2 (c)].

20. Mr Kelly QC develops this as follows:

26. The Crown submit that it is a matter for the Court whether, when viewing all 14 images together, the photograph of Leon Russell stands out as being not 'in the same position' or not 'under identical conditions' as the other 13 images.

27. It is submitted that the comparison is not whether Leon Russell's picture stands out when compared only to his brother's image because there is no evidence that Keiran Jackson knew anything about the suspect having a twin brother therefore there is no reason for him to focus only on Lee and Leon.

28. The Crown further submits that the eyes can be properly compared as between all 14 images. They were a carefully selected set of images which meet the test of resembling Leon Russell 'so far as possible' in age, general appearance and position in life. Such discernible features as there were between them might be said to be more apparent to a witness who is himself a young black male, as Keiran Jackson is, than to a middle aged Chinese woman or an elderly white male.

IV. The witness was shown "full face" photographs

21. I am reminded that although the witness was only able to see the suspect's eyes at the time of the offence, full-face photographs of the Russell brothers were shown on the parade.

V. The Crown suggest this was an instance of identification rather than recognition

22. The defence observes that the Crown's case is that the witness was identifying a stranger, although Leon Russell maintains that he has known Kieran Russell since childhood.
23. It is submitted that in all the circumstances admitting the identification evidence would have such an adverse effect upon the fairness of the trial that it should not be admitted.
24. The defence submissions include the following final remarks:

33. It is submitted that the cumulative effect of these breaches of the Code resulted in an identification procedure which was as dangerous and unfair as could sensibly be conceived. When consideration is given to the additional 'distinctive features' of the case, this position becomes even more stark. The parade was conducted five years after Kieran Jackson had sight of the individual who entered his flat. His opportunity to view that taller man was impeded by the circumstances; he was forced to look down whilst in the man's presence, and the individual had his face covered so that only his eyes were visible. Even in a recognition case, the limited view remains highly relevant; if Kieran knew the Russell twins, an identification founded upon brief glimpses of the taller man's eyes could not reasonably be said to enable anyone to distinguish between them.

34. Furthermore, the identification procedure failed to place the witness in a comparable position, in that, the images on the parade depicted full faces. Both witnesses made it clear that the suspect's face was covered from the nose down. It would have been possible to pixellate or otherwise obscure the lower half of the faces of the images, so that Kieran Jackson's ability to recognise the eyes of the suspect was properly tested.

Decision

25. Neither the Code of Guidance nor any of the jurisprudence concerning identification parades addresses the position of identical twins in the present context. However, in *R v Carl Darren Chapman* (No. 2000/0876/Z3, 24 November 2000), the Court of Appeal dealt with a case concerning two identical brothers in which it had been argued that given the identification of one of them as a perpetrator was disputed, a parade should have been held [7]. In the judgment, the Court addressed certain issues relevant to this case, as follows:

19. During submissions before us, some reference was made to the fact that the appellant had a twin. The thrust of the defence case at trial appears to have been that the two twins were in looks effectively identical, or that any difference lay in fullness of face and changed from time to time. Assuming their looks to have been effectively identical, an identification parade could not have assisted. If both twins were on the same parade, the police officers would have been able to do no more than say that the man seen in Halstead was one or other of the two. If only one or other twin was on a parade, the officers would presumably have identified whichever was on the parade,

since he would have appeared identical to the man in the photograph. A choice between twins of identical appearance must always have depended on other considerations – such as ownership of the car and the injuries sustained by this appellant. Assuming that there were minor (though perhaps changing) features, such as fullness of face, which might have led to some differentiation between the twins, the police do not appear to have had any notice, or reason to think, at the time that it might have been the appellant's twin [...].

26. Although those conclusions were no doubt apposite in the context of the particular facts of that case, so long as the identification procedure is conducted in an entirely fair manner, this is essentially a matter for the jury. It is undoubtedly the case that some “identical twins” can be distinguished from each other, and in my judgment this is an issue that ordinarily ought to be explored in evidence during the trial. Although the judge may be asked to rule on the sufficiency or reliability of evidence of this kind before the jury retires (*e.g.* at the close of the prosecution case or before speeches), it would be wrong to suggest, as a matter of usual or invariable practice, that it is pointless to hold an identification parade when the suspect has a relevant identical twin. Instead, in my view, this issue should be approached by way of an assessment of the weight of the evidence rather than applying an inflexible principle that an identification parade should never be held.
27. The purpose of an identification procedure is to provide the witness with a fair opportunity to identify the suspect, and in order to secure this result the latter should be viewed along with others who resemble him in general appearance. The prosecution is correct in its suggestion that it is permitted for individuals who look roughly alike to be shown together in order to avoid the confusion or difficulties that may arise if they are viewed on separate parades (*R v Wayne Van Der Spuy* [2005] EWCA Crim 2976; *R v Coddington* [2005] EWCA Crim 197) and in my judgment this requirement applies with greater force to identical twins. The stronger the similarity, potentially the more powerful the need to hold one rather than two parades in order to establish whether the witness is able to distinguish between two individuals who are said closely to resemble each other (although I stress that the Code makes clear this is not obligatory). Viewing the two people concerned together as part of the same process will usually give the witness the best opportunity to decide if the perpetrator is one of these two similar (or “identical”) members of the line-up. Otherwise, the witness ought to be told to delay making any identification until he has seen both parades – “the whole set” – at least twice (*Coddington* [37]).

28. Furthermore, I accept the prosecution's submission that if there has been a breach of Code D Annex A D:2 in this case, it was not significant or substantial, given Inspector Dallimore created a parade which was designed to appear as if it comprised 7 pairs of brothers (therefore 14 people). He clearly attempted to cater for two difficulties: first, the need to avoid the risk that the two Russells would stand out as a result of their identical appearance; second, by inserting two different photographs of the other 6 men it seemed as if there 12 additional members of the line-up. In the result, he created a credible impression of a line up of 14 people, composed of 7 pairs of twins. Although there were, in fact, only six others (not eight), I have applied the approach of the Court of Appeal in *R v Maughan (Anthony Paul)* [2006] EWCA Crim 3301 on this issue (see [21]). In the event, there were sufficient members of the parade who were, generally speaking, of the same age and general appearance as the Russells. However, for reasons set out below, I consider it would be safer when "artificial" twins are created in this way for the parade to be doubled in size so there are 26 photographs with (in fact) 14 people (including the suspect and his twin) in the line-up. It is not necessary for me to resolve the issue raised in *Van Der Spuy* [12] as to whether it is necessary to have a pool of 14 when the witness is being asked to choose between two similar suspects.
29. In my judgment, the central issue on this application is whether "the images used to conduct [the] video identification [...], as far as possible, show the suspect and other people in the same positions or carrying out the same sequence of movements [...] under identical conditions" (Code D Annex A D:3). Putting the factors concerning Lee Russell to one side for a moment, the other members of the line-up bore sufficiently strong similarity to Leon Russell by virtue of age, general skin colour, expression and hair (*R v Mercedes Nolan* [2005] EWCA Crim 3661, paragraph 30), and no complaint in this regard has been raised.
30. The determinative consideration is whether Leon Russell was treated appropriately and fairly vis-à-vis his identical twin. As already described, this is not a case in which two suspects of "roughly similar appearance" were put on the line-up, both of whom had potentially been seen by the witness as perpetrators. Although it is argued Lee Russell played a role in these terrible events, it is not suggested he entered the flat. It was critical, therefore, that the witness was placed in a position in which he was able to assess whether he could distinguish between the two Russells if he selected one of them as the taller of the

two men who forced their way into the flat (remembering that man was described as wearing a balaclava or similar piece of clothing which covered his face save for the eyes and the skin of the face immediately surrounding them). Thus, the central question in judging whether this was a fair parade is whether Kieran Jackson was properly able to decide whether he could tell Leon and Lee Russell apart. In the context of this case, unless the witness was in a position appropriately to make this assessment, the parade was inevitably and fatally flawed.

31. Bearing in mind this identification was made 5 years after the event, when the witness was only able to see the eyes of the perpetrator, I am unhesitatingly of the view that the line-up, as regards the photographs of Leon and Lee Russell, was unfair. The two photographs differ significantly: it is by no means clear that the two men are brothers – let alone identical twins – and their appearance is notably dissimilar. Leon Russell's eyes are more clearly revealed than those of his brother (he essentially faces the camera rather than looking sideways), and the skin colour of Leon is markedly darker. The parade, as constituted, demonstrably failed to provide Kieran Jackson with the necessary opportunity to decide whether he could distinguish between these two identical brothers. In the circumstances of this case, it was critical that the images showed the twins under identical conditions: the lighting, background, pose, expression and position of the two men should have been the same. I repeat, only the eyes were visible when these offences were committed and this part of the two men's bodies should have been displayed in the same way, under the same circumstances. Additionally, in order for this parade to have been fair, it was necessary for the photographs of each of the "sets" of "twins" to have been essentially identical (thereby ensuring the Russells did not "stand out") thus enabling the witness to assess whether he was able to distinguish between the suspect and his twin.
32. I am acutely aware of the seriousness of this case, and its importance for the families of those who were killed and injured, to say nothing of our society as a whole. As I made clear in the dismissal decision, I have ensured that factual matters that should be determined by the jury are not withdrawn from them. However, as the prosecution submits, on this issue I am required to make a decision on an aspect of the relevant facts. If in my judgment the parade failed to provide the witness with a fair opportunity i) to select the suspect as the taller man at the flat and ii) to ensure that the witness was properly able to distinguish Leon from Lee Russell, the identification evidence would be unfair and it would necessarily fall to be excluded under section 78 Police and

Criminal Evidence Act 1984. As regards ii), that is the conclusion I have reached, for the reasons set out above.

33. I wish to make it clear that I do not in any sense hold Mr Dallimore or anyone else from the prosecution responsible for this conclusion. As already highlighted, the Code and the relevant jurisprudence do not provide sufficient assistance to the police as to how identification parades in these circumstances should be arranged. The officers concerned took substantial steps to address the problems confronting them, and their failure to cover all the complex difficulties that have been revealed is understandable. The measures they implemented were intelligent and imaginative, if ultimately deficient.
34. The entirety of the case against the four accused depends on the *prima facie* reliability of the identification of Leon Russell by Kieran Jackson. Given the conclusion I have just expressed, it follows that this decision constitutes a terminating ruling for the purposes of section 58 Criminal Justice Act 2003. It is now for the prosecution to decide whether or not there is to be an appeal, applying the provisions of section 58 (4).