

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DAVID MERVYN

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The applicant sought leave to appeal against his conviction on 24 April 2013 for indecent exposure. He was sentenced on 23 May 2013 to a 20 month custodial sentence, with 10 months in custody and 10 months on licence. It was submitted on his behalf that the identification evidence in this case was of poor quality and there were associated breaches of Code D of the Police and Criminal Evidence (NI) Order 1989 ("PACE") as a result of which the evidence should have been excluded. In addition it was contended that the judge failed to put the applicant's case to the jury in the charge. At the end of the argument we granted leave and allowed the appeal. These are our reasons. Mr O'Donoghue QC and Mr Devine appeared for the applicant and Ms Kitson for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] The prosecution case was that sometime between 5.30pm and 5.45pm on 14 March 2011 the applicant indecently exposed himself from an alleyway on the other side of the street through a grilled gate to two children, M and E (aged 11 and 10 at the relevant time), who were playing outside M's home in Glandore Avenue, Belfast. M ran off with E to tell her father who happened to be at home. He ran out and chased the man who fled.

[3] Both children gave evidence about a man in a white car, driving down the street earlier that afternoon, looking at them. The prosecution case was that this was

the applicant. Both children described the man who exposed himself and his clothing and indicated that they would recognise him again if they saw him. On returning from work to their home at 22 Glandore Gardens around 5.30pm on the same date, Jennifer and Rory Hanratty saw a white car parked outside their house, a short distance from Glandore Avenue, and a man walking up the street who they believed might be about to move the car. Jennifer Hanratty said that she saw keys in the hands of this man. The man then ran off pursued by another man and this was consistent with the chase by M's father. Both witnesses said that they had a good look at the man and would recognise him again. They were not asked to attend an identification procedure.

[4] C, the older sister of M, let down the tyres of the white car after the man escaped. At approximately 7.35pm, C spotted the same white car at a petrol station on the Antrim Road a short distance away. She contacted her father who, on arriving at the petrol station, confronted the applicant and kept him confined in his car. The applicant said that during this time M's father punched him in the mouth prior to police arriving at the petrol station. Constable Jackson stated he noticed a minor cut and minor bleeding at the applicant's mouth and lip area. He also noted blood on the applicant's hands.

[5] Prior to the arrival of police M's father and sister asked M if the applicant was the same man who exposed himself to her and she replied, "Yes." When the police arrived they stated that four females were in close proximity to the white car, two of the females were approximately 12 years old and they were crying and in some distress. The applicant relied on that evidence as part of the circumstances surrounding the identification by M.

[6] The applicant was interviewed that evening. He stated that his white Astra car was in the Glandore area that afternoon. He explained that he had pulled into that area as his car had been overheating. There was only one key for the Astra. He said that he had intended to visit a friend but changed his mind because he remembered his friend didn't live there anymore. Instead, he decided to walk home. When he was walking home along the Shore Road, his wife saw him as she was driving home. He told the police that he and his wife returned to Glandore later that evening. His wife drove the white Astra away and he drove the other car. He said his wife started sounding the horn and flashing the lights so he pulled in to see what was wrong.

[7] She told him that the tyres were deflated so he took the white car to the garage and let her drive the other car. He explained that he went into the garage to get change to operate the tyre inflator and when he returned to the car, a man and some children walked over to him. The man shouted, "Where's your friend?". The applicant said he went to the car to look for his phone and the man asked about the other man and then punched him twice. M's father had a limited view of the man he had chased but accepted that he did not think the applicant was the same man when

he first confronted him. The applicant said M's father asked his daughter, "If this is the man, here." He stated the girl said 'yes' and that she was screaming as punches had been thrown. The applicant said he was in the car covered in blood and holding his hand over his face. He said he didn't know how the girl could have recognised him as he was holding his hand over his face and the man was standing directly in front of him. He denied indecently exposing himself earlier to M and her friend. He said that the reason why M said it was him who exposed himself was because her father had beaten him up. Neither M nor E took part in any parades or other identification procedures.

The identification evidence

[8] The prosecution relied on the identification evidence of M in support of their case that the applicant was the man in the alley. It was common case that M only had a fleeting glance of the man in the alley, that her view was restricted by the gridded gate between her and the man and that she would have been shocked by what the man did. It was further accepted that M came to the petrol station at which the applicant was detained by M's father in the company of her mother and that she was then asked if the applicant was the man in the alleyway. The situation was clearly fraught and the child was invited to confirm the identification. At that stage the applicant may well have been assaulted by M's father which would have further impaired her ability to identify. For all of these reasons it was conceded that the quality of the identification was poor.

[9] At the end of the Crown case an application for a direction was made contending that the identification evidence was of such poor quality that the case should be withdrawn from the jury. In addition it was argued that there had been a clear breach of PACE Code D by reason of the failure to hold an identification parade or similar identification procedure for M, E and the Hanrattys, all of whom indicated that they would have recognised the man seen by them. The investigating officer indicated that he had not held such a procedure because he did not believe that he was entitled to do so after the applicant was charged. That was a surprising explanation given that the officer had been in the police for 34 years. It may suggest that there is some need for on-going training in the obligations arising under Code D.

[10] The Recorder dismissed the application for the direction. He concluded that if this had been a pure identification case he would have had no difficulty in coming to the conclusion that a direction should be given. He recognised that the identification was poor having regard to the opportunity which M had to see the alleyway man initially and the circumstances in which she was asked to confirm the identification at the petrol station. He also accepted that there were breaches of Code D by reason of the failure to hold an identification procedure in respect of the four identifying witnesses. He accepted that the applicant had lost the benefit of the possible negative outcome in respect of those identification procedures. The Recorder concluded,

however, that there was evidence other than the identification evidence which tied the applicant to the offence and that appropriate directions would compensate for the disadvantages suffered by the applicant as a result of the breach of Code D.

[11] In the course of his charge the Recorder reviewed the weaknesses within the identification evidence. In light of the circumstances of the identification, the weaknesses that he had highlighted and the dangers that he had identified he indicated his view that the jury could not place much reliance on M's identification. At a later stage in the charge having reviewed the circumstantial evidence connecting the applicant to the alleyway and the car he indicated to the jury that this was essentially the crux of the prosecution case.

[12] The Recorder also specifically drew the jury's attention to the fact that the police were in breach of Code D. It was common case that there was a breach of paragraph 3.12 of that Code.

"Circumstances in which an identification procedure must be held

Whenever:

...(ii) there is a witness available, who expresses an ability to identify a suspect, or where there is a reasonable chance of the witness being able to do so, and they have not been given an opportunity to identify the suspect in any of the procedures set out in paragraphs 3.5 to 3.10, and the suspect disputes being the person the witness claims to have seen, an identification procedure shall be held unless it would not be practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence."

He explained that the purpose of the identity parade was to enable a suspected person like the applicant to put the reliability of the witness's evidence implicating him to the test. He advised the jury that the applicant had lost the benefit of that safeguard and that they should take that into account when considering the evidence of the witnesses.

[13] The mischief which the Code was designed to prevent was the introduction of identification evidence which was the product of misapprehension or error upon which the jury might rely. The failure to adhere to the Code in this case was significant. No reliance on the identification evidence was appropriate. It should have been excluded under Article 76 of PACE. The Recorder's charge to the jury encouraged the jury not to rely on any such evidence in this case. We consider that a

clear direction to ignore the identification evidence as entirely unreliable was the minimum requirement if the trial was to proceed.

The charge

[14] This was a short case in which the evidence was heard on 22 and 23 April 2013. In his introductory remarks the Recorder indicated that he did not propose to carry out a detailed review of the evidence as it had been a very short trial and the evidence was very familiar to the jury. We accept, however, that even in a short trial when the judge reviews the facts it is important to put before the jury the nature of the defence reminding them very shortly about the evidence (see R v Tillman [1962] Crim LR 261). The Recorder spent some time reviewing the identification evidence before advising the jury that they could not place much reliance on it. He then explained to them that there was other evidence dealing with the connection between the white car and the incident and between the defendant and the white car. He indicated it was for them to conclude whether that supported the prosecution case.

[15] In his review of the evidence concerning the white car he noted that the girls did not give any description of the car other than that it was white. Each of the girls said that they saw the vehicle parking in Glandore Gardens. The Recorder, however, pointed out that the girls said that they had been in the garage area of M's house so that it would have been impossible for a person standing there to see the applicant's white car being parked. Accordingly the Recorder indicated to the jury that there was no direct link between the white car that the girls said was circulating and the applicant's car. Clearly this review of the evidence carefully alerted the jury to an important aspect of the applicant's case that he was not circulating in the area at the material time and that someone else may have been doing so in another white car.

[16] He then turned to the evidence about the chase. He noted that the alleyway man had been out of the sight of M's father for a period. In his review of the evidence from the Hanrattys he reminded the jury that they were confused about who was driving. He also reminded them that Mr Hanratty said it was possible that the man he saw was not coming to the car itself but actually crossing the road diagonally. That again was important evidence on the applicant's behalf since it went to the issue of whether there was a connection between the man being chased and the applicant's car.

[17] We accept, however, that the Recorder did not rehearse for the jury the applicant's evidence that he had parked his car because it was overheating and subsequently walked onto the Shore Road where he met his wife. The applicant had given evidence and it was important that the jury were directed to his explanations when considering the issue of the connection between the applicant's car and the alleyway man. It was not in our view sufficient to indicate at the start of the charge

that the applicant's evidence had to be judged by the same fair standard as other evidence.

Conclusion

[18] For the reasons given we concluded that this conviction was unsafe. We granted leave and allowed the appeal.