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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **30/06/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

LARRY TORLEY

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Before: Morgan LCJ and Keegan J

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MORGAN LCJ (giving the judgment of the court)

[1] The appellant appeals against his conviction at Newry Crown Court on 11 June 2015 on one count of robbing Ellen Wilson on 19 September 2013 of her handbag and contents including a cheque-book and one count of inflicting grievous bodily harm on the said Ellen Wilson contrary to section 20 of the Offences Against the Person Act 1861. Mr Magill appeared on behalf of the appellant and Ms McCullagh for the PPS. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] The case against the appellant was a circumstantial case. On Thursday, 19 September 2013 Ellen Wilson, then aged 82, was robbed of her handbag and its contents as she was entering Dineen Office Supplies in Newry. She sustained comminuted fractures of the neck of her left humerus and severe facial and forehead bruising. Kieran Dineen saw the incident and described the assailant as pale in complexion with a long thin nose and approximately 5'10'' or 5'11'' tall. He was dressed in a grey hoody with the hood pulled up over his head. Mr Dineen was unable to identify him.

[3] Stephen Dineen came out of his father's shop and ran after the male who was running towards Abbey Way. He described him as wearing a full grey tracksuit made of a towelling cotton type material. The assailant ran on towards High Street. The male turned round and Stephen Dineen saw that he had a black scarf covering

his nose and mouth and he still had his hoody up. He appeared to be carrying a brown handbag close to his chest.

[4] Patrick Hughes was parked on John Mitchell Place on 19 September 2013. He noticed a male in a full-length grey tracksuit, cotton type material, with the hood up and an item like a scarf around his neck. Mr Hughes noticed him because he was acting suspiciously. He walked out of the market, looked around and went back into the market about four times. Mr Hughes observed this male from approximately 1:30 PM to 2:15 PM. On 23 November 2013 Mr Hughes attended a VIPER ID procedure and was shown a DVD of a compilation of males to see if he could identify the male whom he had seen acting suspiciously on that date. He picked out the appellant.

[5] John O'Hare owned and worked in a unit in Newry Market. On 19 September 2013 around midday he noticed a male in a grey tracksuit with a cotton type material, the hood up and a dark scarf up to the middle of his nose. He recognised him as a local youth from the area who had been in his shop before. He knew that the youth drove a silver Peugeot 106 and that he worked at the car wash at Belfast Road opposite the PSNI station. The youth was in the area for about two hours acting strangely. During police interviews the appellant confirmed that he had worked at that car wash and that he drove a Peugeot 106 motor vehicle.

[6] On Friday 20 September 2013 Patricia Russell was at work in Danske Bank, Hill Street, Newry. A male came in with a cheque he presented for cash. Mrs Russell ascertained that the cheque had been stopped because of the suspicion that it was stolen as a result of the incident with Mrs Wilson the previous day. When Ms Russell left the cashier's desk to go to speak to her manager about the cheque the male who presented it left. The bank confirmed that the cheque was from an account in the name of Mrs Wilson. It was given to police. The cheque was made payable to the appellant, Larry Torley, for £325 and signed: E Wilson. Mrs Wilson confirmed that it was from her account but that she had not made it out and did not know the appellant.

[7] At his police interview the appellant denied that he had been in the market area of Newry and denied presentation of the cheque at the Danske Bank. He said that he had been at the dole office on the day in question but there was no evidence to corroborate or disprove that. On 20 January 2015 he pleaded guilty to fraud by false representation in that he dishonestly made a false representation that a cheque he knew to be stolen was a genuine cheque when he presented it to the bank on 20 September 2013.

[8] The prosecution called Paul Mathers who was collecting his granddaughter from school on the afternoon in question. In his evidence in chief he described a person in grey tracksuit bottoms with the hood up and a scarf around his neck running along the carriageway towards High Street. He noticed this person had a brown handbag. He was looking back in the direction that he came from. A man was running behind him shouting that this boy had just mugged an old woman. Mr Mathers said that he had not seen this man before.

[9] In cross-examination Mr Mathers indicated that he saw this person running between two lanes on the opposite side of the road. He did not see his face until he was actually across the southbound lane. He attended a VIPER identification procedure on 4 November 2013. He said that he did not see the person who was running up the street with the handbag in the compilation. He was not there. He said that he had subsequently got to know the appellant as he was working in the car wash. Having initially said that he had not seen him before 19 September 2013, he then said that he would have recognised him before that date. When he was asked whether he would have expected to have been able to have identified him he referred to the mask and said maybe. He then indicated that he was friends on Facebook with the appellant from early 2014. He was unsure about how much of the face was covered by the mask.

Issues in the appeal

[10] Mr Magill submitted that the actus reus of the section 20 count was a single act of violence which was also a necessary element in the charge of robbery. He submitted that in those circumstances the indictment was overloaded and that the section 20 count should not have been included. We do not accept that submission. The actus reus of the section 20 count was indeed the violent act of the assailant but the offence was not made out unless that violent act caused grievous bodily harm. The causation of that harm was not part or parcel of the robbery offence. That required not alone the act of violence but the taking of the handbag. These were two serious offences and the counts were appropriately included in order to establish the extent of the assailant's culpability.

[11] We accept that the learned trial judge was anxious that the jury should not treat these offences as a job lot and that each required individual consideration. In doing so he was, if anything, overly generous to the accused. If they were satisfied beyond reasonable doubt that the single act of violence had occurred in relation to either of the offences the only remaining issues were firstly whether the assailant took the handbag and secondly whether the single act of violence caused the injuries. The appellant could have no complaint about the approach taken by the learned trial judge.

[12] The appellant also complained about the manner in which the learned trial judge approached the evidence of Mr Mathers. The learned trial judge made it plain that the appellant was relying on his evidence and in particular on the evidence that the person he saw on the day in question was not the appellant. He also reminded the jury that the prosecution were not challenging the honesty of the witness and he himself was not inviting the jury to challenge his honesty either.

[13] The learned trial judge did, however, invite the jury to assess the weight that they should give to his evidence and if they thought it unreliable to reject it. There was plainly material upon which they would have been entitled to do so. Mr Mathers contradicted himself in relation to when he knew the appellant and how much of the face of the person he saw running was covered. At times he expressed uncertainty as to whether he could have identified the appellant. It did not follow that because the prosecution put forward a witness as a witness of truth the jury were bound to accept that and therefore bound to have a reasonable doubt (see R v Oliva [1965] 1 WLR 1028). The learned trial judge was entitled to direct them on this issue as he did and it was for the jury to make their assessment about the weight that they should give to his evidence. The learned trial judge properly reminded the jury that if they thought it possible that Mr Mathers was correct in asserting that the man seen running was not the appellant they should acquit.

[14] The principal argument advanced by Mr Magill concerned the learned trial judge's treatment of the evidence that the appellant had tried to cash the cheque belonging to Mrs Wilson the afternoon after the robbery. It was common case that by virtue of Article 3 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 the evidence was admissible as evidence that had to do with the alleged facts of the offence with which the appellant was charged. This was part of the circumstantial case upon which the prosecution relied.

[15] It followed, therefore, that the learned trial judge had to direct the jury as to how they should deal with that evidence. First, there was evidence that when interviewed by police the appellant denied that he was the person who tried to cash the cheque the following day. His subsequent plea of guilty indicated that he had lied to the police in respect of that matter at interview and the learned trial judge properly gave a Lucas direction in respect of that matter.

[16] Secondly, the learned trial judge properly directed the jury that it was an important part of the circumstantial case against the appellant that the man who had been identified by Mr Hughes as the man acting suspiciously in the market around the time of the offence just happened to be the person who subsequently tried to cash the victim's cheque the following afternoon in the bank. Mr Magill accepted that these were weighty matters upon which the learned trial judge was entitled to

direct the jury and in addition to that the jury was entitled to draw an adverse inference having regard to the fact that the appellant declined to give evidence.

[17] The learned trial judge went further. In his charge to the jury he indicated to them that the attempt by the appellant to cash the cheque showed that he was prepared to break the law to benefit financially and raised the question of whether that pointed towards a propensity to break the law to gain financially. He referred to this as bad character and repeated that description twice in a later part of his charge. He did, however, tell the jury that there was a very big difference between the offence of robbery which was intrinsically violent and trying to pass a cheque, which was a non-violent offence.

[18] There had been no discussion between counsel and the judge about the way in which the jury would be directed in respect of the cheque incident. There was no application by the prosecution to introduce that evidence as propensity evidence and the case was not closed by the prosecution on that basis. We accept the submission that if the judge was going to raise the issue of propensity he should have discussed that with the parties and in our view might well have been persuaded that he should not describe it as propensity evidence.

[19] It was, however, clear evidence of the commission by this appellant of a serious offence of dishonesty. There could be no objection to this being described as an indication of bad character but the real danger in this case was that the jury might have made the leap to the proposition that because he had committed the cheque offence he must have committed the robbery. The learned trial judge was clearly astute to that danger and plainly warned the jury that the cheque incident did not in any way indicate that the appellant was more likely to have committed a violent offence.

[20] The final point advanced on behalf of the appellant was that the judge pointed out to the jury that in the VIPER identification procedure the photographs were cropped to cut out each participant's hair. We can see no objection to that observation having been made by the learned trial judge.

Conclusion

[21] We accept that the learned trial judge should not have referred to the cheque incident as propensity evidence in the absence of any discussion with counsel prior to closing speeches. We consider, however, that he had an obligation to address the evidence principally to prevent the jury coming to the conclusion that because he had committed the cheque incident he had also committed the robbery. We consider that the learned trial judge properly addressed that issue.

[22] Despite the evidence of Mr Mathers this was a strong prosecution case based on the evidence of identification by Mr Hughes, the supporting observations of Mr O'Hare, the attempt by the appellant to cash the cheque the following day, his lies at interview and the adverse inference the jury were entitled to draw as a result of his failure to give evidence. We are satisfied that this conviction is safe and accordingly the appeal is dismissed.