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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 17 May 2019

B e f o r e:

LORD JUSTICE COULSON

MR JUSTICE PICKEN

THE RECORDER OF NOTTINGHAM
HIS HONOUR JUDGE DICKINSON QC
(Sitting as a Judge of the CACD)

R E G I N A
v
KUANY ELJACK
KHALID LATIF

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(Official Shorthand Writers to the Court)

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Mr Michael Newport appeared on behalf of the **Applicants**

J U D G M E N T

(Approved)

LORD JUSTICE COULSON:

1. Kuany Eljack is now 24. Khalid Latif is now 19. On 25 April 2018 at the Crown Court at Blackfriars they were convicted of one count of wounding with intent, one count of unlawful wounding and one count of robbery. They were each sentenced to a total of eight years' detention at a young offender institution. Eljack's application for permission to appeal against conviction was refused by the single judge. He now renews that application to the full court. Latif's appeal against conviction is based on the same single ground as that of Eljack and has therefore been referred to the full court by the Registrar for administrative convenience.

2. We note at the outset that Latif requires a short extension of time to bring this application for permission to appeal. It had been incorrectly thought by his advisers that his position would be automatically protected by Eljack's application which was made in time. Although that was an error, we consider it to have been a genuine mistake. It appears that Mr Newport was always going to have the burden of this particular application on behalf of both applicants. For those reasons therefore we grant the short extension of time necessary to allow Mr Latif's application to be considered.

3. On 6 January 2017 the main complainant, John Furman called the ambulance service and told them that he and his friend Mr Ginova had been stabbed by two people. When the police attended the address they found that both men had knife wounds. Mr Furman told police that he had been attacked in his flat by two men. He said that Mr Ginova had been the principal target for the attack, but that when he endeavoured to intervene he himself was also cut. He told the young men that he would give them money if they stopped attacking Mr Ginova. The men escorted Mr Furman to a local cash machine outside a branch of Costcutters, although he said that on the way they assaulted him and punched him several times. He gave them money, he said, because he was scared for his safety.

4. The evidence against the applicants included the following:

   a) The statements from Mr Furman setting out details of the attack.

   b) The positive identification by Mr Furman of Latif as the man who "stabbed my friend in numerous places and he also cut my hand and my neck" and Eljack as the man who "beat and attacked my friend and forced me to give him money, the only way he would stop".

   c) CCTV footage from outside the Costcutters from which the police identified Eljack and Latif. That CCTV footage showed Mr Furman at the cash machine with both men.

5. In consequence of his mental health issues, the Crown applied to adduce Mr Furman's statements as hearsay evidence pursuant to section 116 of the Criminal Justice Act 2003. The relevant parts of that Act provide as follows:

"(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in subsection (2) is satisfied.

(2) The conditions are—

...

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition..."

6. We should say at the outset that the Crown's application to rely on section 116 and to put in Mr Furman's statements by way of that hearsay provision was made very late. It plainly should have been made much earlier, particularly given the seriousness of Mr Furman's mental health issues. We are entirely sympathetic to Mr Newport's complaint, that because this issue arose so late, the defence had much less time than they should have had to deal with the matters that then arose. However, as we have explained to Mr Newport, the matter was addressed fully by the judge and the question for us is ultimately whether there was any error of law in the way in which the judge addressed the issue.

7. There was a *voir dire* at which medical evidence was adduced by the Crown which was then the subject of cross-examination and submissions. In consequence of the *voir dire* the judge was satisfied that Mr Furman was unfit to be a witness because of his mental condition and that his statements were admissible under section 116(2)(b).

8. We also note that at the same time the Crown also sought to rely on the written statements of Mr Ginova as hearsay, this time on the ground that Mr Ginova could not be found. However, following the *voir dire* that application was refused. The judge, His Honour Judge Simon, was not satisfied that the Crown had established that all reasonably practicable steps had been taken to find Mr Ginova.

9. The trial therefore went on ahead but without Mr Ginova's statements. Mr Furman's witness statements were read to the jury, accompanied by the usual warnings from the judge. A police officer was cross-examined as to how the statements had been taken.

10. In addition, there were extensive admissions agreed between the Crown and the defence as to Mr Furman's mental health. It is appropriate to set out those further admissions in full. Under the heading of "John Furman's mental health" they read as follows:

"1. The complainant John Furman has been under the care of Dr Nadia Davies (Consultant Psychiatrist) for the past 10 years.

2. Dr Davies has made the following observations about John Furman:

(a) Mr Furman is a 55-year-old gentleman who suffers from paranoid schizophrenia and although he has never been formally admitted to a mental health unit in the UK he constantly struggles to manage his paranoid delusions.

(b) Whilst his anti-psychotic medication partially controls his symptoms, Mr Furman experiences voices telling him that his phone is bugged and that people intend to harm him in some way.

(c) Mr Furman's paranoid symptoms are exacerbated by non-compliance with prescribed medication and his periodic use of drugs, namely crack cocaine and heroin.

(d) Recently Mr Furman and a friend who was visiting were physically attacked by two local drug dealers who demanded money from his friend. While trying to defend his friend from a beating Mr Furman's hand and neck were slashed by a knife. Mr Furman was then forced to go to a local cash point to withdraw some money to pay his friend's debts.

(e) Mr Furman understands the nature of the charges against the accused, he understands the purpose of the court proceedings and the role of professionals in the proceedings. He does however have difficulty expressing himself particularly when under stress as he is agitated, fearful of strangers, is distracted by auditory hallucinations and at times has disorganised thinking.

(f) I would consider that although he had the capacity to give a witness statement that he is not fit to give evidence and am concerned that being compelled to give evidence would be detrimental to his mental health.

(g) His symptoms and ability to communicate facts (or his reality as opposed to any paranoid delusions) are greatly assisted when he is accompanied by mental health professionals he knows and trusts.

(h) The difference between when Mr Furman is referring to a real occurrence and when he is being affected by paranoid hallucinations would be obvious to anyone but especially those who know Mr Furman and are responsible for supporting him with his mental health problems."

11. The applicants did not give evidence. The case was fully and fairly summed up by the judge and the applicants were unanimously convicted.

12. The application for permission to appeal made by both applicants is based on the proposition that the judge had been wrong to allow into evidence as hearsay the statements of Mr Furman. The single judge rejected that submission. The single judge said this:

> "It is important not to elide different situations which require difference tests and about which there was different evidence. For example, the question of whether John Furman was fit to stand trial is different from whether he is unfit to be a witness due to his mental condition and both are different from the question of whether he was capable of making a reliable witness statement in circumstances very different from a court hearing. The prosecution's application to read the statement of John Furman under the hearsay provisions did not defy all logic as is submitted in your grounds of appeal.
>
> On the contrary, it was consistent with the medical evidence given to the judge by Dr Davies that in January 2017 Mr Furman had the capacity to make a witness statement but in April 2018 he was unfit to give live evidence in a Crown Court trial.
>
> Nor is your submission that the jury was left in the dark about the circumstances of the taking of John Furman's statement correct. You were allowed to cross-examine on the circumstances, there were further admissions prepared and agreed by counsel about Mr Furman's condition based on the medical evidence and the judge referred in his summing-up to these and other matters which the jury should have in mind when assessing Mr Furman's evidence.
>
> The judge gave careful consideration to all the defence arguments as is clear from his ruling and his conclusion that the evidence of John Furman should be admitted was justified by the evidence he had heard."

13. We have considered the arguments put forward by Mr Newport in his clear oral submissions this morning. Ultimately, however, we agree with the single judge. There are a number of reasons for that conclusion.

14. First, the submissions advanced on behalf of the applicants are really no more than a rerun of the points that were originally argued before Judge Simon and which were rejected by him. They have of course also been rejected by the single judge. We do not consider that that is a sound basis for any application to appeal against conviction. This court can only intervene if there is a clear error of law. In our view, no such error has been identified or substantiated.
15. Secondly, we consider that Judge Simon dealt carefully with these hearsay applications. He heard the evidence. We did not. The judge accepted the evidence of Dr Davies, Mr Furman's treating psychiatrist, to the effect that Mr Furman was a paranoid schizophrenic with a high level of hallucinatory experience who was not fit to attend court to give evidence.

16. The judge referred extensively to the evidence of Dr Davies in his ruling. It is unnecessary to set out the whole of the ruling, but we do set out what we consider to be the key passages:

> "Dr Davies' evidence seems to me in my judgment to be actually fairly straight forward. There is nothing that could reasonably and properly be done to alleviate the level of stress that would be developed by Mr Furman were he required to come to court to give evidence. His attendance at court for other hearings last year in relation to himself as a defendant [was referred to but] it has not been demonstrated to me at all that he was asked any questions, or that there was any difficulties in relation to that, but I put that to one side, because Dr Davies' evidence is, as I say, clear that this is not an expert who has been brought into the proceedings for the purposes of undertaking an assessment to assist the court: this is the written and oral evidence of a longstanding consultant psychiatrist who has had a professional relationship with Mr Furman for 10 years. Her evidence must carry very significant weight. It would be difficult for any court to dismiss the strength of evidence given by such an expert, informed as it is by all of the ups and downs of Mr Furman's mental health over a very extended period, and I find myself in the position of accepting without reservation that which she told me.
>
> I also accept that although she had given consideration to some special measures, though not mentioned in her report, and though she had given consideration to intermediaries, although she is not so well-versed in those, from the court's perspective what she describes is somebody with whom it is not a question of being introduced to an intermediary enough months in advance and developing a rapport: this is a gentleman who because of his illness may or may not take to an individual.
>
> Dr Davies told me that he appears not to have taken to the replacement care worker who came in more recently when the care worker with whom he had a positive relationship left the team, so far as I am concerned, the suggestion of an intermediary, whilst superficially attractive, is on the basis of Dr Davies' evidence not an answer or not a sufficient challenge to ensure that I keep the burden on the Crown; not a sufficient challenge to the Crown's evidence of his unfitness to be a witness in these proceedings; nor is the suggestion of any other type of special measures.
>
> The evidence of Dr Davies -- which I have already indicated I accept unreservedly -- is that there simply could be nothing done to alleviate the impact on Mr Furman of his having to come to court to try to answer questions, and that the coming to court and the circumstances -- even if it were by live link rather than presence in the court -- that the stress of having to answer questions would be such that his hallucinatory experiences and the manifestation of his chronic paranoid treatment resistant schizophrenia would

> increase to the point where he simply would not be coherent, would not be able to answer the questions put to him.
>
> I am therefore satisfied on the medical evidence that has been produced to me that Mr Furman is indeed in the words of section 116(2)(b) 'unfit to be a witness because of his mental condition', and I say that exceptionally, because we have moved on significantly in the facilities that can be made, but notwithstanding special measures of all types, and notwithstanding even the most skilled intermediaries, I am satisfied exceptionally, I say, that he is unfit to be a witness because of his mental condition, and that his statements therefore are admissible under section 116(2)(b)."

17. In our view, there was no error of law. Although Mr Newport seeks in his written advice and his oral submissions to argue that the medical evidence was capable of different interpretations and should not be taken to mean that Dr Davies was saying that Mr Furman was incapable of giving oral evidence, Mr Newport cannot say that the judge reached a view that was not open to him on the evidence; indeed he fairly conceded that it was a view to which the judge was entitled to come.

18. As to the detail, we make the following short observations. First, the evidence from Mr Furman's treating psychiatrist was unambiguous. It confirmed that Mr Furman was not fit to give oral evidence and we do not consider that any other interpretation was possible.

19. Second, we note that a submission that was made on a number of occasions in the written advice was to the effect that, because Mr Furman had been found fit to plead in charges brought against him the previous year, it was illogical to conclude that he could not give evidence in this trial. We consider that that point was fully dealt with by the single judge. They are different tests which can self-evidently lead to different results. Moreover that point was argued before Judge Simon and he dealt with it.

20. Another submission made on behalf of the applicants was that if he was unfit to attend court, Mr Furman must not have been fit enough to make a proper statement or that in any event there must be a question mark about whether or not his witness statements were reliable. That was a matter that was first addressed in the *voir dire*. Dr Davies did not agree with that proposition and the evidence was that when he attended the police station Mr Furman was accompanied by his then permanent care worker. Dr Davies indicated that the care worker would have known if Mr Furman was suffering from hallucinations at any given time during the interviews. In addition, there was evidence that Mr Furman had not been put under any time pressure and had taken all the breaks that he had sought. Accordingly, there was nothing to suggest that Mr Furman lacked the capacity to make those statements.

21. Another submission encapsulated by paragraph 22 of Mr Newport's written advice, and which he repeated orally today, was to the effect that "the jury was very much left in the dark on the issue of the reliability of the complainant". In those terms, as we put to Mr Newport during the hearing, that argument is simply wrong. That was something that the

single judge also noted. The further admissions made plain that the reliability of Mr Furman was a critical issue for the jury to consider and we note that during his summing-up the judge expressly referred to those further admissions on the particular topic of the reliability of Mr Furman's statements.

22. On analysis, what Mr Newport intended to convey by that part of his written advice was that the jury were deprived of the opportunity of seeing the witness in person. That of course we accept. There are always disadvantages if an important witness is not going to come to court. That was part of the balancing exercise which the judge had to do. On the one hand, the need to treat Mr Furman fairly and appropriately; on the other the need to treat the applicants fairly and appropriately as well. In our view the judge struck the right balance.

23. The last point taken on behalf of the applicants (and again repeated by Mr Newport today) was to the effect that it would and should have been possible for Mr Furman to give evidence with the use of special measures, such as intermediaries and the like. Again, that was something that the judge addressed and he gave clear reasons in that part of the ruling to which we have already referred for rejecting that submission. Again, it seems to us that was part of the balancing exercise which the judge was obliged to undertake.

24. In the written advice, there was a submission about whether the judge should have excluded the statement because it made the proceedings unfair to the applicants. As we have said, the judge dealt fully with the submissions about the circumstances in which the statements were taken. He concluded that under section 78 there was no basis on which those statements should be excluded. His summary is at page 10E-G of the transcript, and we do not need to set that out in our judgment now; it seems to us that he dealt fully with the point. Moreover, at the trial the judge permitted cross-examination of the officers as to the circumstances in which the statements were taken and that evidence too was the subject of a clear reminder and summary in the summing-up.
25. Accordingly, we conclude that it has not been shown that the judge erred in principle in ruling that Mr Furman's statements were admissible as hearsay evidence under section 116. The judge reached that conclusion based on clear and persuasive evidence which he heard and assessed. He ensured that the applicants were properly protected by way of the admissions about Mr Furman's mental condition, which we have already set out, and the cross-examination he permitted about the circumstances in which the statements were taken.

26. Finally, of course, we need to take a step back from the argument about the hearsay statements and to consider whether, in the round, we consider that these convictions were safe. We note that there was other evidence against the applicants, including of course the CCTV footage. There was never an explanation from the applicants as to how or why they were outside Costcutters with Mr Furman. As we have said, the applicants chose not to give evidence at their trial.

27. We do not consider there is any reason for concluding that the convictions of Eljack or Latif are in any way unsafe. Therefore, although we grant the necessary extension of time to Latif, beyond that these applications for permission to appeal against conviction,

one renewed, one made to the full court for the first time, are both refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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