IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00953/B2
[2023] EWCA Crim 1632

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 12th December 2023

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE SWIFT

MR JUSTICE HILLIARD

R E X

- v -

DAMIEN DUNSTUAN

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Mr D Cherrett appeared on behalf of the Appellant

Mr O Mgbokwere appeared on behalf of the Crown

J U D G M E N T

Tuesday 12th December 2023

LORD JUSTICE HOLROYDE:

1. This is an appeal by leave of the single judge against convictions for offences of aggravated burglary, contrary to section 10 of the Theft Act 1968, and unlawful wounding, contrary to section 20 of the Offences against the Person Act 1861.

2. The relevant facts can be briefly stated. In the early hours of 17th February 2021, a group of men broke into a house in Dagenham. CCTV footage showed that at least two of the men were carrying crowbars which were used to force open the door. One of the occupiers of the house was struck over the head with a crowbar. He suffered a wound which required stitching. It appears that the intruders had expected to find "weed and money" in the house, but they had gone to the wrong address.

3. The appellant was charged jointly with Paul Ram and Guled Abdi, both of whom were also convicted, and with three other men who were acquitted.

4. Count 1, the charge of aggravated burglary, alleged that the defendants, together with others, entered the house as trespassers with intent to steal therein "and at the time of committing the said burglary had with them weapons of offence, including a crowbar".

5. Count 2 alleged that the defendants, together with others, had unlawfully and maliciously wounded the man who was struck.

6. Following a trial in the Crown Court at Woolwich, before His Honour Judge Mann KC and a jury, none of the accused disputed that the offences charged had been committed by someone. The issues in the case were as to whether any of the accused was rightly identified

as having taken part.

7. The case against the appellant was that he was a participant in the offences; that he either lent support at the house, or was a lookout, or was a getaway driver. The prosecution adduced circumstantial evidence, which included the following features. It was alleged that the appellant had travelled to the scene in convoy with others of the accused, having been in telephone communication with some of them on the previous day. It was said that the appellant had taken part with Abdi in carrying out a reconnaissance in the area near the house, after which the appellant, Abdi and Ram were involved in further phone calls.

8. Ram and the appellant then returned to the area near the house at around 1.30 am on 17th February. Thereafter, a group of eight men were seen at the house. Abdi and Ram (but not the appellant) could be identified on the CCTV footage. It was not alleged that Ram had been one of those carrying a crowbar.

9. At the start of the trial, the prosecution applied to adduce previous convictions of a number of the accused as evidence of their bad character. These applications were made under section 101(1)(d) of the Criminal Justice Act 2003 on the basis that the previous convictions were capable of showing a relevant propensity.

10. In the appellant's case, the convictions on which the prosecution sought to rely related to offences of wounding with intent and possessing a bladed article in a public place, to which the appellant had pleaded guilty in 2013. The circumstances of those offences were that the appellant (then aged 28) had been involved with two others in a joint knife attack on their victim. The judge refused that application. He held that there was an insufficiently strong nexus between the present charges and the previous offending to outweigh the prejudice which would be suffered if the evidence were admitted. He concluded his short ruling with

the following prescient words:

> "As I have indicated already during the course of this part of the proceedings, that does not prohibit the prosecution re-applying if defendants give evidence or something occurs which makes the conviction admissible under another heading. Often defendants give evidence and say things that they should not, which makes the admission of the evidence possible [under] … section 101(1)(f) … giving a false impression, but I do not admit it at this stage."

11. The appellant gave evidence in his own defence. He denied any knowledge of or participation in the offences or in any earlier reconnaissance. He admitted that he had driven his car to the relevant area on 15th February 2021, but said that he had given a lift to a friend who lived a few roads away. He also admitted that he had been near the scene on 17th February 2021, but said that was only because Ram had asked to be dropped off there and had later called him, as he was about to leave, asking to be collected.

12. At the conclusion of the appellant's evidence in chief, there was the following exchange:

> "Q. Were you involved in an aggravated burglary?
> A. No, I wasn't involved in no aggravated burglary.
>
> Q. Did you agree to anybody taking crowbars?
> A. No. If I knew a crowbar was in my car, he would not be getting in my car. I've got kids, I've got a family, so …
>
> Q. All right, so you did not have a crowbar in your car? Is that what you say?
> A. No, no crowbar."

13. The prosecution applied, pursuant to section 101(1)(f) of the 2003 Act, to adduce evidence of the appellant's 2013 convictions. Mr Mgbokwere, then as now representing the prosecution, submitted that by his replies, the appellant had given a false or misleading impression, namely that he was not a person of violence or not a person who acted in concert

with others to use violence, or a person who subscribed to the use of a weapon in a criminal enterprise.

14. Mr Cherrett, then as now representing the appellant, opposed that application. He submitted, in summary, that the appellant had not sought to create, and had not in fact created, a false impression. He had done no more than deny the offence, and in particular had not asserted that he would never act violently or possess a weapon. It was factually correct and was already in evidence that the appellant lived with his partner and a child.

15. Mr Cherrett further submitted that the 2013 offences could have no probative value in relation to the issues in the present trial. The crowbars carried to the scene in the present case were not weapons per se (although they became weapons when one was used to wound the occupier), and the overall circumstances, he submits, were far removed from the facts of the 2013 offending. For all those reasons, Mr Cherrett submitted, evidence of those previous convictions was not admissible. In the alternative, if they were admissible, he submitted that they should be excluded, pursuant to section 78 of the Police and Criminal Evidence Act 1984, because its highly prejudicial effect outweighed any probative value.

16. The judge granted the prosecution's application. He held that the appellant had created a false impression which needed to be corrected. The answer which the appellant had given to his own counsel created the impression that he was a family man who would not involve himself in offending of this type. Why else would he mention his children and say that his vehicle was a family car? The judge further held that the previous convictions of the appellant were probative of the prosecution case and that it was reasonable and proportionate to admit them. He observed that the appellant's counsel would be able to deal with the matter in re-examination if he wished.

17. The trial then proceeded. There was some cross-examination of the appellant about the 2013 convictions, and the relevant facts were later placed before the jury as written agreed facts. Mr Cherrett was, indeed, able in due course to address the jury and make the submissions he wished to make about why the 2013 convictions should carry no weight.

18. In his legal directions, the judge explained why the evidence of the previous convictions had been admitted. He directed the jury that that evidence was

> "… just one part of the evidence and it is a matter for you how, if at all you use it to assess him and the credibility of his account. What you must not do is assume that because he committed this offence in the past, he is therefore guilty of the charges he currently faces or that, by definition, he is more likely to be guilty of them. It is just one part of the evidence that you are entitled to consider if you choose to do so."

19. No criticism is made of those directions. The grounds of appeal challenge the judge's decision to admit the evidence of bad character. In his written and oral submissions, Mr Cherrett again advances and amplifies the points which he made to the judge. He submits that the judge was wrong to find that the appellant had created a false impression; that the judge was wrong to admit the previous convictions, having regard to their age and their nature; and that, in the alternative, the judge should have acceded to the defence application to exclude the evidence because of its prejudicial effect.

20. The respondent opposes the appeal. Mr Mgbokwere's written and oral submissions again repeat and amplify the matters which he argued before the judge. We are grateful to both counsel for their assistance.

21. So far as is material for present purposes, section 101 of the Criminal Justice Act 2003 provides:

"(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if —

…

(f) it is evidence to correct a false impression given by the defendant …

(2) Sections 102 to 106 contain provision supplementing subsection (1).

…"

22. Section 105 of the 2003 Act, so far as is material, provides:

"(1) For the purposes of section 101(1)(f) —

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if —

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

…

…

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

…"

23. In contrast to two of the other gateways to admissibility provided by the section, section

101 itself does not contain a power to exclude evidence which is admissible through gateway (f). The court retains, however, its general power under section 78 of the Police and Criminal Evidence Act 1984 to exclude prosecution evidence if it appears to the court that, having regard to all the circumstances "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

24. Having reflected on counsel's submissions, our conclusions are as follows. The judge carefully considered each of the matters which the statutory provisions required him to consider. He was, in our view, clearly correct to find that the appellant had created the impression that he was not the sort of person to participate in crimes of the type charged involving violent offending by a group using a weapon or weapons. That was a false or misleading impression, because in 2013 he had taken part in just such offending. We agree with Mr Cherrett's submission that care must always be taken when considering admitting evidence through this gateway, if it may be said that the relevant statement by an accused is equivocal. But in the present case there was, in our judgment, nothing equivocal about the impression given. Moreover, bearing in mind the terms of the question reasonably asked by Mr Cherrett, and bearing in mind the judge's wise warning to the appellant when he rejected the earlier application by the prosecution, the judge was plainly entitled to find that the false impression had deliberately been given. As the judge rhetorically asked: why else would the appellant, when simply asked whether he had agreed to anybody taking crowbars, have chosen to reply in the terms he did, instead of simply saying "No". As Mr Mgbokwere suggested rhetorically in his submissions to us: why else would the appellant refer to his children and his car being used by his family, particularly when that same car underwent a change of registered keeper later on the very same day as the burglary?

25. This case, in our view, is far removed from the situation which sometimes arises of a defendant in the heat of the moment denying guilt in ill-chosen terms which were not

intended to secure an undeserved advantage for himself. We are unable to accept Mr Cherrett's suggestion that the relevant reply was no more than a throwaway remark.

26. True it is, as Mr Cherrett says, that the details of the two incidents differ, but the nature of the offending in 2013 did, in our view, have probative value in contradicting the assertion by the appellant in the present case that he was not the sort of man to assist in offences of aggravated burglary and unlawful wounding. It was, of course, open to Mr Cherrett to ask further questions of the appellant in re-examination if he felt he could safely do so, and to make submissions to the jury in his closing speech with a view to inviting the jury not to attach any weight to the 2013 convictions.

27. The judge was therefore entitled to find that there was a false impression which needed to be corrected and that the previous convictions had probative value in making that correction. The evidence of the previous convictions did not go further than was necessary for that purpose. The evidence was accordingly admissible.

28. The potential exclusion of the admissible evidence was a matter for the judge's discretion. We can see no basis for saying that he exercised that discretion in a way which was not properly open to him. Although a number of years had passed between the 2013 offences and the present allegations, the appellant had been a mature adult when he involved himself in serious offending in 2013. If no reference had been made to that earlier offending, the jury would have been left with a false or misleading impression, which the appellant had deliberately created, despite the warning which the judge had given to him and to other accused. In deciding whether the admission of the evidence would adversely affect the fairness of the proceedings, the judge had to consider fairness to the prosecution, as well as fairness to the defence. In those circumstances, we are unable to accept the submission that no reasonable judge could have refused to exclude the evidence. Nor do we accept that it was

the admission of this evidence which tipped the scales and led to the appellant being convicted, when others were not.

29. Having considered the competing submissions of counsel, it seems to us that there was, in any event, a strong circumstantial case against the appellant.

30. We are, therefore, satisfied that the convictions are safe. It follows that this appeal fails and must be dismissed.
