No: 9502720/X2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Monday 18th November 1996

B E F O R E :

LORD JUSTICE ROSE

MR JUSTICE LATHAM

and

MR JUSTICE HOOPER

- - - - - - - - - - - - -

R E G I N A

- v -

DEREK JOHN TREADAWAY

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MR P O'CONNOR QC and MR STARMER appeared on behalf of the Appellan
MR A GOLDRING QC and MR THOMPSON appeared on behalf of the Crown

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JUDGMENT
(As Approved by the Court)

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Monday 18th November 1996

LORD JUSTICE ROSE: On 10th March 1983, at Leicester Crown Court, this appellant was convicted by the jury, after a trial before McCowan J., as he then was, and by majority verdicts of 11 to 1, on two counts of robbery and two of conspiracy to rob. They were counts 4 to 7 in the indictment. He was sentenced concurrently to 15 years' imprisonment on each count, which sentence he has now served.

He was tried with three co-accused, all of whom were convicted on a variety of counts, a man called Dunne on another count of robbery, as well as counts 4 to 7, a man called Langdell, on count 5, and another count of robbery, and a man called Gaughan, on counts of aggravated vehicle taking, burglary and kidnapping, which were the first two counts in the indictment.

On 12th April 1984, following refusal of leave by the Single Judge, he renewed to the Court of Appeal (Criminal Division) an application for leave to appeal against conviction, and leave was refused. On 28th July 1994, in a civil action, McKinnon J. found in favour of the appellant and awarded him £10,000, compensatory damages, and £40,000, exemplary damages, for assault by five officers of the West Midlands Serious Crime Squad. The activity of the officers complained of in those

civil proceedings, and which resulted in him recovering those damages, was precisely that about which he had complained in the course of his criminal trial, namely that he had been the subject of a serious assault by four police officers whom he named, and a fifth who was unnamed.

By reason of McKinnon J.'s judgment, on 25th April 1995, the appellant's convictions in 1983 were referred again to this Court by the Home Secretary under section 17 of the Criminal Appeal Act 1968.

It is unnecessary to rehearse the detail of the offences of which the appellant was convicted by the jury. It suffices to say that count 4 related to the robbery of a delivery van, at Gates Street post office, Saltley, on 5th November 1979; count 5, to a robbery at Erdington post office, in late November 1979; count 6, to conspiracy to rob a van delivering to Kingshurst post office, Birmingham, in August 1979, and count 7, to conspiracy to rob Sedgley post office in September 1979.

The evidence against the appellant consisted, first, of the evidence of two supergrass accomplices, Morgan and McKay, who said that they had taken part in all four offences, and gave evidence that so had the appellant. Secondly, there was a written confession, said to have been voluntarily made to the police, in the

course of the appellant's fifth interview, on 8th April 1982, following his arrest early that day, and four earlier interviews in which he had denied involvement. Thirdly, there was evidence of some expenditure of cash by him in early December 1979, which the learned judge directed the jury was capable of amounting to corroboration on the fifth count in the indictment.

There was certain evidence given in relation to an alibi or alibis on the part of the appellant, which was not treated as corroboration, but to which later we shall, so far as it is material, return.

At his trial the appellant gave evidence challenging that of the supergrasses, and alleging that his confession was the false product of police impropriety in handcuffing him, placing a series of plastic bags over his head, so as to suffocate him, and forcing him in his resultant condition to sign the written confession which had already been prepared for signature by police officers. There was evidence in the criminal trial that he had, by reason of this conduct, sustained petechial haemorrhages on his breast bone, about which a doctor gave evidence for the defence. He also complained in the course of the criminal trial that he had been deliberately denied access to a solicitor.

He identified the officers involved at the

criminal trial as being Detective Inspector Brown, Detective Sergeant Pickering, Detective Sergeant Russell Detective Sergeant Price, and a fifth officer. He complained of his treatment at the hands of the officers, when he saw his solicitor about three hours after the assault was alleged to have taken place, and indeed, that same evening, by reason of that complaint, he was examined by a police surgeon.

The evidence of the police officers, so far as it is presently material, from Brown, was that at the time of the fifth interview he, with Price, was elsewhere interviewing another suspect, a man called Pender. Russell said that he and Pickering had interviewed the appellant on this fifth occasion, but there was no truth whatever in the allegations of violence. Pickering's evidence was to similar effect, and he said that there was nothing unusual about the fifth interview. Price, like Brown, said that he had been interviewing Pender at the material time, and had had no dealings with the appellant at that time.

McKinnon J. concluded, among other things, that the appellant had been cynically denied access to a solicitor, when it was plain that he wanted one. He rejected the police suggestion that the appellant had been handcuffed at his house. He described Brown as "a

most unsatisfactory witness" and said his "stock in trade was ambiguity and he simply did not tell the truth." The judge was impressed by the way in which the appellant gave his evidence, and found compelling what he described as the "core consistency" of the appellant's evidence before him.

He found that two of the officers had gone into the appellant's cell and handcuffed him behind his back, prior to the placing over his head of the plastic bags to which we have referred.

McKinnon J. was satisfied to a high degree of probability that the appellant was assaulted by five officers of the West Midlands Serious Crime Squad and he found in terms that he did not believe the evidence of the four identified officers, Brown, Pickering, Russell and Price, who had given evidence before him.

Prior to the hearing before this Court today, witness summonses were served on Brown and Russell. Neither of them has attended this Court today. We are told that within the last 72 hours, and that must be after the witness summons was served upon him, Brown has gone to Egypt. We are told that so far as Russell is concerned, although he too appears to have had a witness summons served upon him, there is in existence a note from his general practitioner, dated 14th November,

which states no more and no less than that Russell is not fit to attend court.

Mr. Goldring QC, for the prosecution, is in the difficult and embarrassing position of being wholly unable to provide any satisfactory explanation as to why the summons from this Court to those two witnesses has not properly been complied with.

Mr. O'Connor QC, for the appellant, was content to proceed, notwithstanding the absence of those witnesses. Save to say that their nonappearance is deplorable, we say no more about that.

Mr. O'Connor submits that the judgment of McKinnon J. is of itself fatal to the safety of the convictions of this appellant. He has referred the Court to a number of authorities. They include R v. Edwards (1991) 93 Cr.App.R. 48. In that case admissions said to have been made by the appellant were discredited by scientific evidence. There had been nondisclosure to the defence of disciplinary proceedings against the same officer, Brown, to whom we have already referred, and in the judgment of the Court, given by the then Lord Chief Justice, Lord Lane, the convictions of that appellant were quashed, notwithstanding that there was accomplice evidence. In R v. Cheetham (unreported, Court of Appeal transcript of 30th July 1991) where, again, admissions

to the police had been scientifically discredited, and there was accomplice evidence, albeit that that evidence had subsequently been retracted, Lord Lane C.J. said this at page 7B:

> "The only corroboration provided was that of the police evidence. Therefore the reliability of that police evidence is fundamental to the whole appeal. If it is judged not to be reliable, then the conviction, it follows almost inevitably, will be deemed unsafe and unsatisfactory."

In R v. Parchment (unreported, Court of Appeal transcript, 17th July 1989) Mustill L.J. gave the judgment of the Court in a case in which an interview record had been fabricated. There was no accomplice evidence in that case. Mustill L.J. at page 4A said this:

> "But given that the jury had been directed that the central issue in the case concerned the reliability of the police records of the interview, it must, at the very least, be a distinct possibility that the jury would have arrived at a conclusion different from that expressed in their verdict."

In Horobin and Wilcox (unreported, Court of Appeal judgment, 7th April 1993) Lord Taylor C.J., in giving the judgment of the Court, in a case in which the interviews had been discredited, but there was accomplice evidence from a woman witness, at page 8, said this:

> "We are invited to conclude that although the jury were told there was evidence capable of amounting to very powerful corroboration, and although that evidence is now accepted as being discredited, the jury's verdict can still be regarded as safe."

At page 11, Lord Taylor said this:

> "The alleged admissions of Horobin are likely to have played or certainly may have played a large part in the jury's deliberations and in encouraging them to accept Mrs. Pattern's account, certainly against Horobin. Had the jury known the admissions were so unreliable as to be jettisoned by the Crown they may well have been anxious about the integrity of the case as a whole, in the hands of these police officers."

Mr O'Connor submits that the present appellant's position is stronger than that of the appellant in any of those cases, first, by virtue of the reasoned, damning judgment of McKinnon J., and secondly, because a signed written confession is likely to carry more weight with a jury than the alleged oral admissions said to have been noted at the time in the authorities to which we have referred.

McKinnon J.'s judgment, submits Mr. O'Connor, does not merely, as the prosecution here concede, render reliance upon the confession for the purposes of this appeal impossible, it also discredits the police investigation as a whole. He makes that submission because of the seniority and number of officers

involved. Brown was a detective inspector at the time and then subsequently was a detective superintendent. Mr. O'Connor refers also to the seriousness of the allegation of life threatening assault, found proved against the officers, and he also draws attention to what he describes as the "unique culture of law and rule breaking", in the West Midlands Serious Crime Squad, until it was disbanded by the Chief Constable in 1989.

One aspect of that culture, submits Mr. O'Connor, was the manipulation of accomplice evidence by that squad. In that regard, he invited the Court's attention to R v. Gall and Gall (unreported, Court of Appeal transcript, 21st October 1991) where convictions were quashed. An accomplice called Jarvis, who had been an impressive witness before the jury, had subsequently suffered a collapse in integrity, when it was ascertained, in particular, that he could not, because he was in prison at the time, have committed 203 of the 1510 other offences which he asked the court to take into consideration when he was himself sentenced, in relation to offences giving rise to the conviction of Gall and others.

An officer called Detective Sergeant Hornby, had, as is apparent from this Court's judgment in Gall, been involved in the suspicious disappearance of a file of

witness statements and in the manufacture of the other offences which Jarvis asked to have taken into consideration. The significance of that, in the present case, is that Detective Sergeant Hornby escorted Morgan back from Gibraltar on his extradition following his having been absconded from this country. And, as is apparent from the summing-up of the learned judge in the trial of this appellant, it was Detective Sergeant Hornby who first suggested that Morgan might give evidence for the prosecution against this appellant and others. Furthermore, Hornby signed as witness, no fewer than 53 witness statements made by Morgan in relation to the prosecution of the appellant, and he also escorted Morgan on a number of drives in a police vehicle, to identify various locations.

The sentencing of the man Jarvis also involved evidence being given by, as he became, Detective Superintendent Brown. Brown expressed total confidence in the complete reliability of Jarvis, and also, in the course of that evidence, referred to having had dealings with McKay. Those are matters about which, had Brown chosen to attend this Court today, Mr. O'Connor would have wished to cross-examine him.

So far as the supergrass, McKay, is concerned, almost all the statements which he made, and there were

many of them, were signed by Price. Price, as we have said, was one of those witnesses whose evidence McKinnon J. expressly rejected. A Detective Superintendent Speake, who did not give evidence before McKinnon J., was apparently involved in denying access to a solicitor to this appellant. He had taken a statement from Morgan and he also gave evidence helpful to Morgan when he was being sentenced. Morgan has a vast criminal record, for serious offences. So does McKay. McKay also has a psychiatric history.

So far as the evidence about cash expenditure in early December 1979 is concerned, Mr. O'Connor submits that to a significant extent, at least, the possession of that cash before it was dispersed is explicable by the appellant's receipt of a sum in excess of £700 from insurers following the theft of his motorcar.

On behalf of the prosecution, Mr. Goldring QC concedes that this is not a case of which the West Midlands Serious Crime Squad can be proud. But he submits that, if this appeal is allowed, it should be on the basis that, without the appellant's confession, the convictions cannot be regarded as safe. So far as the authorities of R v. Edwards, R v. Cheetham, R v. Parchment and R v. Horobin and Wilcox are concerned, he draws attention to the case of R v. Meads, in which the

judgment of the Court was given by Kennedy L.J.: each case has to be considered on its own circumstances and a reason for want of safety in the particular case, if reason there be, must be related to the circumstances of the particular case.

Mr. Goldring seeks to uphold these convictions, first, on the basis that the evidence of Morgan and McKay is sufficient to sustain them; secondly, so far as count 5 is concerned, on the basis of the cash payments, and the falsity of the alibi advanced by the appellant.

So far as the supergrass accomplices are concerned, Mr. Goldring's central submission is that there is simply no reason why they should falsely implicate the appellant and place him as the additional man who was undoubtedly involved in these offences. Both of them, says Mr. Goldring, supplied precise and detailed accounts of this appellant's part. He stresses that the first written statement about these matters, implicating the appellant, was made by Morgan, not to the West Midlands Serious Crime Squad, but to the Regional Crime Squad on 6th August 1980. At that time he was not enjoying, if that is the right word, supergrass status, but he made a statement implicating the appellant in the Erdington robbery.

Furthermore, both Morgan and McKay implicated the

co-defendant, Dunne, in counts 3 to 7. However, although there was evidence from the victim of kidnapping to which count 1, and related activity to which counts 1 and 2 referred, neither Morgan, nor McKay, identified Dunne as having been involved in that matter. On the contrary, Morgan said, in terms, that Dunne was not there, the victim must have been mistaken, and he, Morgan, would not implicate someone who was not there. McKay, likewise, implicitly at least, gave evidence indicating that Dunne was not there.

Accordingly, submits Mr. Goldring, Morgan and McKay should be relied on as being the sort of witnesses who would not falsely identify, as participating in criminal activity, someone who was not.

There was, said Mr. Goldring, abundant material before the jury, dealt with at length in the summing-up, about the grave criminal records of both of the supergrasses, and of McKay's psychiatric history. The judge's direction in relation to corroboration was in accordance with the then law, namely that the jury must first be sure that they could rely on the evidence of the individual accomplices, before they sought for corroboration. Further, says Mr. Goldring, the jury convicted the co-accused, Langdell, on the evidence of Morgan and McKay, which was uncorroborated, suggesting

thereby that the jury accepted their evidence.

Count 5, submits Mr. Goldring, is the strongest count at this stage, so far as the prosecution are concerned. McKay and Morgan both implicated the appellant, but there was in addition, as Mr. Goldring called it, 'a wealth of evidence to sustain the conviction on that count'. In particular, the appellant gave an alibi which was shown to be false. He claimed that he was in the Navigation public house at the time of the robbery and a police officer called Ollerenshaw was there. In fact, as it turned out, Ollerenshaw, by reference to his CID diary, was able to prove that he was not there. The licensee of the public house, a Mr. Wilson, was called to support the alibi. But he had earlier made a statement to the police which was significantly at variance with the evidence which he gave before the jury as to the time at which the appellant was in that public house.

Mr. Goldring accepts that the falsity of the alibi was not left to the jury as potential corroboration. But they were entitled to have regard to it as evidence in the case, taken in conjunction with the appellant's dispersal of cash at the beginning of December: £1,000 for a Jaguar motorcar; £230 for four dining chairs and £80 for a bicycle. There were other items on which the

prosecution relied. The appellant's explanation was that he had won the money gambling. The manager of a club where he claimed to have gambled was called. He was not apparently a member of that club and no record was produced of him or his winnings. For the first time in re-examination the appellant claimed that his unexpected wealth was attributable to the receipt of £750 from an insurance claim following, as we said earlier, the theft of his car. There was no documentary evidence in support of that.

The sudden apparent wealth was, as we have said, left to the jury by the judge in the criminal trial as potential corroboration.

As for count 5 the Erdington robbery, Mr. Goldring also referred to evidence of a conversation about which the appellant spoke, which had taken place when he had shared a cell with McKay while on remand. Although McKay admitted his and Morgan's participation in these robberies, the appellant never asked who the others were. He said that he was not interested. The judge in summing-up the matter to the jury invited them to view that approach with significant scepticisms, as one might have expected the appellant to enquire who the others were, so that he, the appellant, would be able to name them. That, Mr. Goldring accepts, was not treated by the

judge as corroboration. But it was evidence of significance which the jury were entitled to consider.

Succinctly and attractive though Mr. Goldring made his submissions on behalf of the prosecution, they do not, in our judgment, begin to answer the thrust of Mr. O'Connor's submissions. The prosecution case, as we have indicated at the outset, depended essentially on, first, the supergrass accomplices, second, the confession, and third, the cash dispersal. Today the prosecution no longer seek to rely on the confession. That is unsurprising in view of the clear findings of McKinnon J. and the language in which they were expressed. It is to be noted, as we have said, that not only did he find that the appellant sustained a very serious assault in which all four named officers played a part, he also found that he did not believe the evidence of those four officers.

We accept that the trial judge directed the jury to treat the confession as being capable of corroborating the supergrass evidence and he did so in the context to which we have already referred of the jury first being sure that they accepted the evidence of the supergrasses. However, we note that well over 20 pages of the summing-up were devoted to the evidence in relation to the confession. On any view, the reliability

of the police evidence formed a major plank in the prosecution case. If it was unreliable, a major question mark must in consequence, in our judgment, be raised over the safety of the convictions. There must arise, at the very lowest, in the words of Mustill L.J. in Parchment "a distinct possibility that the jury would have reached different verdicts", had the police evidence been discredited before them.

But the matter does not end there. Detective Constable Price, whose evidence McKinnon J. rejected as untrue, witnessed the majority of the statements made by McKay, including statements in relation, for example, to the Kingshurst robbery and the Erdington robbery. It is apparent that, for whatever reason, McKay was not prepared to give evidence at the civil trial before McKinnon J.

Furthermore, when Morgan, having absconded, was extradited, he was, as we have said, accompanied back to the United Kingdom by Detective Sergeant Hornby. Hornby it was who subsequently witnessed many of the witness statements made by Morgan, including, in particular, statements relating to the Kingshurst robbery and the Erdington robbery, and Sergeant Hornby also escorted Morgan when he was taken to identify various locations.

The role of Detective Sergeant Hornby, in the

disappearance of the file of witness statements and in the fabrication of the other offences taken into consideration by Jarvis, in relation to the conviction of Gall and others, is of obvious significance. Furthermore, Brown, the most senior of the officers involved, gave evidence to which we have already referred, as to the alleged total reliability of Jarvis, and he also referred to his direct dealings with McKay in giving evidence in that case. There is other material before the Court, into the detail of which it is unnecessary to go, to show that Detective Sergeant Hornby was deeply involved in the reprehensible activities of the West Midlands Serious Crime Squad prior to its abandonment.

In our judgment, the inevitable conclusion is that not only can the appellant's confession no longer be relied on by the prosecution, but the evidence of the two supergrasses is manifestly tainted, in the sense that it cannot be above suspicion, because of the close involvement of McKay with Detective Constable Price and Superintendent Brown and Morgan with Detective Sergeant Hornby.

We are unpersuaded that, that being so, there was such evidence in relation to count 5 as to justify the safety of the conviction on that count. The conclusion,

in our judgment, is that these convictions are unsafe. Accordingly the appeal is allowed and the convictions are quashed.

MR O'CONNOR: May I only have the temerity to ensure the Court is aware of the powers under section 3 of the Criminal Procedure (Attendance of Witnesses) Act 1965. I recognise my Lord most certainly almost did have that power in mind when-----

LORD JUSTICE ROSE: Are you inviting us to do something?

MR O'CONNOR: There is a power, my Lord.

LORD JUSTICE ROSE: That was not what I asked you. Are you inviting us to do something?

MR O'CONNOR: I would wish the Court fully to do something more other than express its contination at the absence of the two witnesses. It is a contempt of court to refuse a summons to any court.

LORD JUSTICE ROSE: We know that.

MR O'CONNOR: My Lord has the power to summons those witnesses to explain their absence and to find whether there was lawful excuse for their absence, if not, to punish them.

LORD JUSTICE ROSE: We know that. I repeat my question. Are you inviting us to take that course?

MR O'CONNOR: My client is not here to give instructions, my guess is he would instruct me to invite the Court to do so, yes.

LORD JUSTICE ROSE: Mr. Goldring, is there anything you want to say?

MR GOLDRING: I do not think there is.

LORD JUSTICE ROSE: What we propose to do at this stage is we make an order that Brown and Russell will each, within 28 days, swear an affidavit as to why they were

not here today. Thereafter we will consider the matter.