*538 R. v Kenneth Russell-Jones

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Criminal Division)

Judgment Date
21 October 1994

Report Citation
[1995] 1 Cr. App. R. 538

Court of Appeal

(Lord Justice Kennedy , Mr Justice Owen and Mr Justice Laws):

October 11, 21, 1994

PROCEDURE

Trial

Re-trial—Prosecution witness—Discretion of prosecution to call witness at re-trial—Principles to be applied.

The following principles apply relating to prosecution witnesses at the trial of a defendant: (1) Witnesses who are on the back of the indictment ought to be at court, if the defence want those witnesses to attend. (2) The prosecutor has a discretion whether or not to call them to testify, depending on the particular circumstances of the case. (3) The discretion is not unfettered, and must be exercised in the interests of justice. (4) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case, although normally all such witnesses should be called or offered to be called. (5) The prosecutor is the primary judge of whether or not a witness to the material events is credible, or unworthy of belief. Thus, a prosecutor properly exercising his discretion will not be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies.

Oliva (1965) 49 Cr.App.R. 298, [1965] 3 All E.R. 116 , dicta of Lord Roche in *Seneviratne v. R. [1936] 3 All E.R. 36* , 49 and of Fullagar, J. in *Ziems v. Prothonotary of the Supreme Court of New South Wales (1957) 97 C.L.R. 279, 292 applied* .

[For extent of prosecution obligation to call witnesses, see Archbold (1995) paras. 4-289 to 293 .]

Appeal against conviction.

Kenneth Russell-Jones appealed against his conviction on October 26, 1993 in the Crown Court at Swansea (Mr Recorder Querelle) and a jury of arson (count one) and attempting to obtain property by deception (count two). On November 26, 1993 he was sentenced to concurrent terms of two years' imprisonment. The facts are set out in the judgment of the court. The appeal was argued on October 11, 1994.

Peter Jacobs (assigned by the Registrar of Criminal Appeals) for the appellant.

Trevor Davies for the Crown.

Cur. adv. vult.

October 21. KENNEDY L.J.

read the judgment of the Court. On October *539 26, 1993 in the Crown Court at Swansea, on a retrial, this appellant was convicted of arson and of attempting to obtain property by deception. On November 26, 1993, he was sentenced to two years' imprisonment on each count concurrent. He now appeals against conviction by leave of the single judge. The sole ground of appeal is that on October 18, 1993, at the start of the retrial, the trial judge, Mr Recorder Querelle, wrongly rejected the defence submission that the prosecution should either call or tender P.C. Parsons, a witness who had given evidence in the first trial. In order to decide whether that ground of appeal is substantiated it is necessary to say something about the facts, as they were known to the recorder on October 18, 1993.

The appellant is about 53 years of age, and in 1992 he and his wife owned a house at Tregarron called "Dolawel". Their marriage had foundered and Mrs Russell-Jones was no longer living in the house on July 18, 1992, when, towards midnight, the house caught fire. At about the same time the appellant called at the police station at Shrewsbury, 92 miles and approximately two and a quarter hours driving time away. He asked P.C. Parsons of West Mercia Constabulary, who happened to be on duty, for help in finding accommodation. He also told the officer that he was trying to get away from everything and that he believed Welsh Nationalists were trying to kill him, he having received a catalogue referring to tombstones. The prosecution case was that in calling at the police station the appellant was establishing an alibi, having arranged for the fire to start by means of a timing device. He had left home at about 7 p.m., and then dined with a friend at a restaurant, before going to Shrewsbury. The dinner at the restaurant, the prosecution contended, was also part of the alibi. The house had been insured about a year before, and after the fire he claimed under the insurance policy, hence count two in the indictment.

Inquiries made at the scene, after the fire had been extinguished, showed that it could be traced to a convector heater. The heater had a timing device, and it was attached to a timer-plug. The heater had been forced open, and a newspaper dated July 16, 1992 (probably one which the appellant subsequently admitted having bought), had been stuffed inside the heater to ignite petrol vapour, petrol having been poured upstairs and downstairs in the house. Obviously the fire had been deliberately caused. The prosecution contended that the appellant had caused it. He had a motive, being in the midst of litigation to settle financial affairs between himself and his wife, and the evidence showed that he had taken steps which he might be expected to take if he were an arsonist. In particular, he had, on Thursday July 16, 1992, two days before the fire, purchased the timer-plug from an electrical store at Llansamlet. He later said that he bought it to switch on lights when he was away. He had also packed some of his belongings before the fire, and put them into a shed, well away from the house itself. He had lent a computer to a friend, and had brought documents with him in his car to Shrewsbury. On the same day that he bought the timer-plug at Llansamlet, the Halfords Store at Llansamlet sold *540 four five-litre plastic containers of de-ionised water, with blue caps. The prosecution case was that the appellant bought these containers in order to use them to carry petrol. He denied that he was the purchaser. There were other pieces of circumstantial evidence, upon which the prosecution relied, which for the purposes of this appeal it is unnecessary to list. The property had been insured for £73,000, somewhat above the price of £62,000 at which it was being offered for sale, but that was not a significant point, because the figure for which a property is insured should relate to re-building costs.

On July 20, 1992 the appellant gave his explanation to Detective Inspector McGarrigle and Detective Sergeant Thomas of Dyfed-Powys Police, the investigating officers in the case. At that stage he was simply a witness, and the officers then began to investigate his alibi.

On July 28, 1992 the appellant was arrested and interviewed. He was asked about three plastic containers which had been removed from the scene of the fire for examination. The investigating officers told him that they had tops for the containers, but they did not have them with them at the time of the interview, at which point the appellant said "Blue". The officers asked him how he knew the tops were blue. He said that was because after the fire he had picked one up and put it in the bin in the living room. He suggested that it would still be there. So, on July 29, 1992, the appellant was sent with Police Constable King-Thomas to search for the top he said he had seen. It was not where he said it would be. At the first trial his explanation was that it had been removed by the police whilst he was under arrest. The prosecution contention was that during the interview he had inadvertently given himself away by disclosing that he knew the colour of the tops of the plastic containers. So there was a stark issue between him and the investigating police officers. He contended that they had manipulated the evidence to inculpate him. There was also an issue about whether the police had found a key on the inside of the back door when they first went to the house after the fire. There was broken glass in the back door, suggesting that entry could have been made by an intruder, other than the appellant, but the back door lock was of the Yale type, which did not require a key on the inside. That was, the appellant contended, another example of the police "improving" the evidence against him.

We return now to the evidence of P.C. Parsons. On July 23, 1992, after the appellant had given witness statements, but before he was arrested, the appellant went with the investigating officers to Shrewsbury, so that they could continue to check out his alibi.

According to the officers they called at a guest house, and then went to the police station, where they found that P.C. Parsons had gone off duty. He had already been contacted by 'phone, and subsequently sent to Wales by post the statement which he wrote out that day. The defence contention was that the call at the police station lasted about half an hour, that P.C. Parsons was there, and that Detective Sergeant Thomas spoke to him. Indeed, the suggestion was that Detective ***541** Sergeant Thomas went further: he suggested to P.C. Parsons that he might include in his statement the passage which deals with the smell of petrol. The prosecution point out that by the time the investigating police officers arrived at Shrewsbury Police Station on the evening of July 23, 1992, they already knew that the appellant did not smell of petrol on July 18, because they had already obtained information from the restaurant and the guest house, both of which he had visited that evening. But the reference to the smell of petrol does appear in P.C. Parsons's statement, and when that officer gave evidence at the first trial he did accept that the statement was made on July 23, 1992, at the police station in the presence of a Dyfed-Powys police officer. He also suggested that he referred to the police station visitor's book to assist him in relation to the visit made by the appellant on July 18. Before the first trial began, prosecuting counsel was aware, for the reasons to which we have already referred, that P.C. Parsons was almost certainly wrong when he spoke of the smell of petrol, and that part of his statement was neither opened nor adduced when he gave evidence-in-chief. It was introduced by cross-examination in an attempt to discredit both P.C. Parsons and the investigating officers from Dyfed-Powys. Defence counsel hoped to adopt the same procedure at the second trial, but prosecuting counsel made it clear long before the second trial that he did not propose to call P.C. Parsons again. By that stage, prosecuting counsel regarded the officer as not credible in relation to the smell of petrol and also in relation to the circumstances in which he came to make his witness statement. The prosecution inquiries had shown that the statement was not made in the presence of either of the Dyfed-Powys officers, that P.C. Parsons was off duty when they called, and that there was no relevant entry in the visitors' book.

The case for the defence was, of course, that the appellant was not the person who started the fire. He claimed to have bought the timer-plug for a normal purpose, and suggested that the fire was probably started by Welsh Nationalist Extremists, who had reason to dislike him because of his well publicised attacks on the Welsh language. He had, he claimed, received threatening letters, and he was not a popular man locally. On the same evening that his house caught fire another house, about 10 miles away, was set on fire by persons who were accepted to be extremists. Petrol was also used as an accelerator in relation to that fire. And, for what it is worth, he was able to show that his wife had insured their house on the day of the fire, and that her brother lived only 100 yards from that branch of Halfords at which the plastic containers had been sold.

So we return to the issue of whether the recorder was entitled to decide as he did. P.C. Parsons was at court, and was available to the defence. He was actually interviewed by the solicitor acting for the appellant, but in the event he was not called as a witness. Before us both counsel agreed that the most helpful statement as to the law in a situation such as this is to be found in *Oliva (1965) 49 Cr.App.R. 298, [1965] 3 All E.R. 116* . There, in relation to a charge of wounding with intent, the prosecution refused to call or tender ***542** two witnesses named on the back of the indictment and called at the committal proceedings, who were no longer prepared to implicate the appellant in the attack. This Court reviewed the authorities and explained how the law as to the duty of the prosecution in relation to the calling of witnesses named on the back of an indictment (or nowadays whose statements have been served as witnesses on whom the prosecution propose to rely) has evolved. It is clear from what was said in *Oliva* that it has never been the case that prosecuting counsel must call or tender every available witness named on the back of the indictment. That was the submission made on behalf of the appellant in that case, but it was rejected. Lord Parker, C.J. referred to a meeting of judges in 1847, after which Alderson B. said to counsel in *Woodhead (1847) 2 C. & K. 520, 175 E.R. 216* :

> "You are aware, I presume, of the rule which the Judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought therefore to have them in Court, but they are to be called by the party who wants their evidence. This is the only sensible rule."

Counsel asked: "Am I to understand, my Lord, that if I call them I make them my own witnesses?" Alderson B said (*ibid.*):

> "Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed."

In *Oliva's* case, Lord Parker C.J., after referring to other cases dealing with the 1847 rule, continued (at p. 307 and p. 120H):

> "It seems to this Court that once this rule of practice was laid down in 1847, it has continued in full force and remains in full force to this day."

The Court noted the observations of Lord Hewart C.J. in argument in *Harris (1928) 20 Cr.App.R. 86, [1927] 2 K.B. 587* where he said at p. 144 and p. 590:

> "In criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury."

But, as Lord Parker pointed out, the *Privy Council* in *Adel Muhammed El Dabbah v. Attorney General for Palestine [1944] A.C. 156* , 169, expressed the view that Lord Hewart "could not have intended to negative the long established right of the prosecutor to exercise his discretion to determine who the material witnesses are."

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In *Seneviratne v. R. [1936] 3 All E.R. 36* , 49, Lord Roche said that the *Privy Council* could not:

> "Approve of an idea that the prosecution must call witnesses irrespective of consideration of number and of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narratives on which the prosecution is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution."

In the *Palestine* case, Lord Thankerton, giving the opinion of the Board, said that the Court will not interfere with the exercise of the prosecution discretion "unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."

That is the background to the conclusions of this Court in *Oliva's* case which are expressed at pp. 309–310 and p. 122 of the respective reports and often quoted. There Lord Parker said:

> "… The principles are plain. The prosecution must of course have in Court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution whether they should call them either calling and examining them or calling and tendering them for cross-examination. The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness's evidence is capable of belief, then it is their duty, well recognised, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and, if they refuse, there is the ultimate sanction in the judge himself calling that witness."

It is not the case that if, as in this case, part of the evidence is capable of belief then the prosecution has no discretion. It still has a discretion to exercise, in a manner calculated to further the interests of justice, and at the same time be fair to the defence. So in *Nugent (1977) 65 Cr.App.R. 40* , Park J. held that the prosecution was not required to call alibi witnesses. Relying on what was said by Lord Roche in *Seneviratne* , Park J. at p. 44 said that the exercise of the prosecution discretion depended upon the particular circumstances of the case.

In *Balmforth [1992] Crim.L.R. 825* , the offence charged was wounding ***544** with intent, and the prosecution was prepared to tender a witness, having decided that his evidence, although unhelpful to the prosecution case, was capable of being believed, but as a result of an intervention by the trial judge prosecuting counsel changed his mind, and the witness was not tendered. In this Court Staughton L.J. said at page seven of the transcript that prosecuting counsel has a wide discretion in deciding whether or not the witness is capable of belief, but once he has formed the view that the witness is capable of belief then the prosecution must call him, even though the evidence he is going to give is inconsistent with the case sought to be proved.

The principles which emerge from the authorities and from rules of practice appear to be:

(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.

(2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.

(3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. See *per* Lord Parker C.J. in *Oliva* (*supra*).

See also *per* Fullagar J. in *Ziems v. The Prothonotary of the Supreme Court of New South Wales (1957) 97 C.L.R. 279* , 292:

> "The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness."

The dictum of Lord Thankerton in the *Palestine* case "the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive" does not mean that the Court will only interfere if the prosecutor has acted out of malice; it means that the prosecutor must call his mind to his overall duty of

fairness, as a minister of justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task—in that sense, an oblique motive.

Clearly, however, to say merely that the prosecutor must act fairly gives little guidance as to how the discretion should be exercised in practice; and there are further limiting principles.

(4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In ***545** most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.

This limitation of the prosecution's discretion, which requires witnesses of the central facts to be called, is supported by what was said by Lord Roche in *Seneviratne* . This is also the sense in which, as it seems to us, Lord Hewart C.J.'s observation in *Harris [1927] 2 K.B. 587* , 590 should be read.

(5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.

(6) The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.

(7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

Plainly, what we have said should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations to which we have not adverted; and in every case, it is important to emphasise, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.

In the present case Mr Davies made it clear to the recorder that he did not regard P.C. Parsons as a witness capable of belief in relation to contentious matters. Much of what appeared in the officer's statement was uncontentious, but in the light of the other evidence available to the ***546** prosecution the officer's evidence about the smell of petrol coming from the appellant or his clothing on July 18 was regarded as unreliable. The defence did not accept that evidence. Those acting on behalf of the appellant only wanted it to enable them to attack the two investigating officers from the Dyfed-Powys Police, by suggesting to P.C. Parsons and to them that it was at their suggestion that P.C. Parsons had included the reference to petrol in his statement. Counsel for the prosecution knew from the first trial that P.C. Parsons was likely to say that he gave his statement in the presence of a Dyfed-Powys police officer at Shrewsbury on July 23, but, as we have already indicated, by the time of the second trial counsel also knew that to be unreliable. His instructions were that P.C. Parsons was not on duty when the Dyfed-Powys police officer called on July 23. P.C. Parsons wrote his own statement and sent it to Wales by post. P.C. Parsons had also been inaccurate in the first trial in referring to the visitors' book in the way that we have described. If P.C. Parsons was tendered as a prosecution witness the jury would be confused as to what really was the prosecution case, not least because the prosecution would not be able to call evidence, other than from the Dyfed-Powys police officers whom they would be calling in any event, to contradict the evidence given by P.C. Parsons. Prosecuting counsel was entitled, in those circumstances, to conclude that the calling of the police officer or the tendering of him as a witness would not further the interests of justice, and it was not necessary for him to be tendered, in fairness to the defence, because the defence knew what he could say. The defence solicitor would interview him further, and whether or not, in the event, the defence chose to call him as a witness, defence counsel could, if he chose, use the material from P.C. Parsons when cross-examining the Dyfed-Powys police officers. In those circumstances it seems to us that

although the reasons given by the recorder for his decision are somewhat superficial, the decision itself was correct. Prosecuting counsel was entitled to exercise his discretion as he did, and that is why, some days ago, we dismissed this appeal.

Representation

Solicitors: Crown Prosecution Service, Swansea .

Appeal dismissed.