Regina v Tsekiri

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Criminal Division)

Judgment Date
17 February 2017

Case No: 2016/04668/C3

Court of Appeal (Criminal Division)

[2017] EWCA Crim 40, 2017 WL 00587934

Before : The Lord Justice of England and Wales Mr Justice Dingemans Mr Justice William Davis

Date: 17/02/2017

On Appeal from Mr Recorder Clements

Kingston upon Thames Crown Court

Hearing date: 1 February 2017

Representation

Mr N Hoon (instructed by CPS Special Crime Division) for the Respondent.
Mr L Edwards (instructed by LLM Solicitors) for the Applicant.

Judgment

Mr Justice William Davis:

1. On 9 September 2016 in the Crown Court in Kingston upon Thames Jonathan Tsekiri was convicted of a single count of robbery. His application for leave to appeal against that conviction has been referred to the Full Court by the Registrar. We shall give leave.

The Offence

2. At about 10.45 p.m. on 11 June 2016 a lady named Janice Carr came out of Wimbledon Park Tube station and walked the short distance to her car which was parked on a street close to the station. She intended to drive home. She got into the driver's seat and prepared to drive away. Before she could do so a man who was outside the car opened the driver's door. The man put one hand over her mouth and the other hand at the back of her head. He held Ms Carr tight and twisted her head round. She was able to see that the man was white, of stocky build and wearing a woollen hat. Whether because she was struggling or because the man pulled her, Ms Carr ended up out of her car. She was aware of a second man who appeared to be associated with her assailant. When she screamed for help both men ran away. At some point in the struggle a gold necklace was taken from her neck. Later some segments of it were found on the road nearby.

The scientific evidence

3. Swabs were taken from the exterior driver's door handle of Ms Carr's car. A mixed DNA result was obtained from the swabs. The scientist who examined the result concluded that the profile consisted of components relating to a single major contributor and to at least one minor contributor. The DNA from the major contributor was consistent with the DNA profile of the appellant. The match probability was 1:1 billion. No conclusion could be reached in relation to the minor components due to their low level. The scientist could not say when the major components of the DNA had been deposited or what the source was of those components i.e. blood, saliva or some other bodily deposit. The scientist said that the deposit of the major contributor could have been due to the person touching the door handle or due to secondary transfer though she considered secondary transfer was unlikely given that the DNA in question was the major contributor to the profile.

Arrest and interview

4. The appellant was arrested at his home address. The postal district of that address was SW6. The robbery took place in SW19. When arresting the appellant, the police officer mistakenly identified the stolen property as a watch. The appellant's response was to say "a watch". When the police officer corrected himself and said that a necklace had been taken, the appellant made no further comment. When interviewed under caution, the appellant said nothing in response to all questions. He was the subject of an identification procedure. Ms Carr did not identify him.

The trial

5. At the conclusion of the prosecution case a submission was made to the trial judge that he should withdraw the case from the jury on the basis that no reasonable jury properly directed could convict on the available evidence. The trial judge rejected that submission. In his ruling he said that, where the finding of DNA attributable to a defendant at the scene of a crime was the sole evidence against a defendant, it was necessary to examine the circumstances of the particular case. Whether such evidence was sufficient to justify consideration by a jury would be dependent on the particular facts of the case. He concluded that the totality of the evidence called by the prosecution was sufficient to go before the jury.

The legal principles

6. This court has very recently had the opportunity to review the authorities relating to DNA evidence and the extent to which such evidence of itself can provide a sufficient basis for a jury convict: see *R v FNC [2016] 1 Cr.App.R. 13* at paragraphs 19 to 26. It is not necessary for that review to be repeated here. The conclusion of the court was that the authorities established that, where it was clear that DNA had been directly deposited in the course of the commission of a crime by the offender, a very high DNA match with the defendant would be sufficient without more to give rise to a case for the defendant to answer. That was the factual position in FNC. A man had masturbated onto the complainant and left semen on her clothing. There was no doubt that the man whose semen it was had committed the offence of indecent assault. A DNA profile was obtained from the semen. No match was then found on the database. Over 10 years later the appellant was arrested for an unrelated matter. His DNA profile was obtained. It matched the DNA profile of the semen, the match probability being 1:1 billion. Applying the decision of this court in *Sampson and Kelly [2014] EWCA Crim 1968* and the approach suggested by Lord Bingham CJ in *Adams (No.) [1998] 1 Cr. App. R. 377* this court allowed the prosecution's appeal against the terminating ruling of the judge at first instance. There was plainly a case for the defendant to answer that the semen on the clothing was his.

7. In *FNC* it was noted that there were decisions of this court in which the defendant's DNA had been found on movable articles left at the scene of a crime such as a hat or a scarf where the court had quashed convictions based solely on that evidence: see *Grant [2008] EWCA Crim 1890* ; *Ogden [2013] EWCA Crim 1294* . In *Bryon [2015] 2 Cr.App.R. 21* it was stated that, where a movable item with mixed DNA profiles, one being the defendant's, was found at the scene, this would not be sufficient on its own to support a conviction. The court in that case suggested that the same may be true even if there is a single DNA profile on the item. In *Bryon* the conviction was upheld because the DNA evidence was supported by bad

character evidence. It is clear that the court in *Bryon* would not have upheld the conviction in the absence of supporting evidence pointing towards the appellant.

The submissions of the parties

8. On behalf of the appellant it is argued that this was a case where the prosecution case relied solely on the presence of the DNA of the appellant on a car at the scene of the offence. On the basis of the proposition stated in *Bryon* the submission of no case to answer ought to have succeeded. There were plausible explanations to account for the presence of the appellant's DNA which did not involve him being party to the robbery. The presence of a second DNA profile meant that it was impossible to say whether the person who touched the door handle at the time of the robbery was the appellant or some other person.

9. The argument put on behalf of the respondent was that this was a case in which there was other evidence which tended to show that the appellant was the robber independent of the DNA evidence. The robber's general description matched that of the appellant. His response on arrest showed that he knew what had been stolen in the robbery. The appellant had lodged a defence statement in which he had said that he was in the general vicinity of the robbery when it occurred, the judge being entitled to take that into account at the close of the prosecution case. The circumstances called for an explanation and the appellant's silence in interview meant that an adverse inference could be drawn.

Conclusion

10. We are satisfied that this is a case in which, at the close of the prosecution case, the only evidence to connect the appellant to the robbery was the DNA evidence. The matters relied on before us by the respondent did not provide supporting evidence of the kind referred to in *Bryon* . The description given by the victim could have applied to thousands of men in South London. His response on arrest was equivocal at best. The defence statement was not in evidence and thus was of no probative value. No adverse inference could be drawn by reason of the appellant's silence in interview since, at the point the judge was considering the submission of no case, he had not relied on any fact or matter not mentioned in interview. He had simply put the prosecution to proof. If the proposition stated in *Bryon* represents the proper approach where the evidence is as it was here, the trial judge here should have withdrawn the case from the jury.

11. *Ogden* and *Grant* were cited to the judge. He proceeded on the basis that some supporting evidence was needed since the DNA profile was on a movable article (insofar as a car can be described as an article). He decided that support was to be found in the fact that the defendant's home address was in the postal district SW6 whereas the car in which Ms Carr was sitting at the time of the offence was in SW19. The judge acknowledged that there was no evidence before the jury as to the relative positions of those postal districts. However, he asked rhetorically "how could there have been secondary transfer or indeed primary transfer other than by the defendant actually putting his hand on the handle where he lives in SW6 and the car was in SW19." We understand the logic underlying this question. But the evidence told him nothing as to relative positions of the place where Ms Carr had left her car and the home address of the appellant. Nor did it tell him anything about whether the car might have been in SW6 at some point or whether the defendant had some innocent reason to be in SW19 at any time. The evidence relied on by the judge of itself did not support the finding of the appellant's DNA profile in the way anticipated in *Bryon* as being necessary.

12. However, it does not follow that this appeal must succeed. We are satisfied that the approach set out in *Bryon* is not correct. *Bryon* on its facts was not a case where the DNA profile was unsupported by other evidence. Therefore, when the court in *Bryon* observed that the authorities established a rule that, where there was such a case, the evidence would not be sufficient to support a conviction, the observation was obiter. It was not necessary to found the decision of the court. The court in *Bryon* relied on *Grant* and *Ogden* to support that observation. In *FNC* this court considered that it was open to question whether those cases were correctly decided or at least whether they establish the rule suggested in *Bryon* . We agree. As the court noted in *FNC* the techniques of DNA analysis have improved markedly in the last decade and what was insufficient

scientific evidence a decade ago will not necessarily be insufficient now. Although this factor did not affect the validity of the decision in *Ogden* , the more recent case, there were particular evidential problems in *Ogden* . The item left at the burglary was a scarf bearing two blood stains. One of the stains was tested. The DNA profile of that stain matched the defendant's DNA profile, the match probability being 1:1 billion. But the other stain was not tested. Before any further test could be carried out to see if a full profile could be obtained from that stain and, if so, to see whose profile it was, the scarf was destroyed. In any event there was no evidence that the burglar had shed any blood in the course of the burglary. In those circumstances *Ogden* must be treated as a case on its particular facts which does not give rise to any principle of general application.

13. In *Bryon* there was no consideration of why a DNA profile on an article left at the scene of a crime unsupported by other evidence could not be sufficient to found a conviction. We can see no sensible rationale for such a principle. As was noted in *FNC* it would be inconsistent with the approach taken in cases of facial mapping: *Hookway [1999] Crim.L.R. 750* ; *Weighman [2011] EWCA Crim 2826* . Whilst it is true that, in cases involving facial mapping evidence, a jury also will be able to view the images considered by the facial mapping expert in order to assess the expert's opinion, this feature does not amount to a meaningful distinction. By definition the images in a case in which facial mapping evidence is adduced are likely to be of insufficient quality to allow the lay observer to draw a safe conclusion as to the person shown in the images. Whilst a jury in such a case would assess the validity and reliability of the expert evidence, the jury would not be able safely to compare for themselves the questioned images with images of the defendant any more than a jury would be able or entitled to make their own assessment of the computerised images of a DNA profile. In any event, as was observed in *FNC* , the jury's ability to consider the questioned images in a facial mapping case would be of little added value when there are bound to be other people of similar likeness to the images as well as the defendant.

14. The facts of this appeal require us to determine the position when a defendant's DNA profile at the scene is the only evidence. In our view the fact that DNA was on an article left at the scene of a crime can be sufficient without more to raise a case to answer where the match probability is 1:1 billion or similar. Whether it is will depend on the facts of the particular case. Relevant factors will include the following matters.

15. Is there any evidence of some other explanation for the presence of the defendant's DNA on the item other than involvement in the crime? If a defendant in interview gives an apparently plausible account of the presence of his DNA profile, that might indicate that the prosecution had not raised a case to answer. On the other hand, the total absence of any explanation would leave the evidence of the defendant's DNA unexplained. This is not to say that the absence of explanation of itself would provide additional support for the prosecution case. Section 34 of the Criminal Justice and Public Order allows for the possibility of an adverse inference capable of being considered when a judge determines whether a defendant has a case to answer in which case the adverse inference would be additional support for the prosecution case. But that is unlikely to arise in a case involving DNA evidence for the reasons as explained fully in *FNC* at paragraphs 14 to 18. Rather, the absence of explanation in such a case would mean that there would be no material to undermine the conclusion to be drawn from the DNA evidence.

16. Was the article apparently associated with the offence itself? Here the DNA profile was found on the door handle which was used by the offender in the course of committing the offence. There can be no doubt that the offender did touch the article in question. The position could be different if the article was not necessarily so connected with the offence e.g. if a DNA profile were to be found on a cigarette stub discarded at the scene of a street robbery.

17. How readily movable was the article in question? A DNA profile on a small article of clothing or something such as a cigarette end at the scene of a crime might be of less probative force than (as was the case here) the same profile on a vehicle.

18. Is there evidence of some geographical association between the offence and the offender? The facts of this case are an example of this.

19. In the case of a mixed profile is the DNA profile which matches the defendant the major contributor to the overall DNA profile?

20. Is it more or less likely that the DNA profile attributable to the defendant was deposited by primary or secondary transfer? In this case the expert evidence was that secondary transfer was an unlikely explanation for the presence of the appellant's DNA on the door handle.

21. This is not an exhaustive list and each case will depend on its own facts. The crucial point is that there is no evidential or legal principle which prevents a case solely dependent on the presence of the defendant's DNA profile on an article left at the scene of a crime being considered by a jury.

22. On the facts of this case it is quite clear that there was a case for the appellant to answer. His was the major DNA profile on the door handle of the car which was used by the offender in the course of the robbery. The expert evidence was that the likely reason for the defendant's DNA profile being on the door handle was that he had touched it. At the close of the prosecution case there was no explanation for this fact. The rhetorical question posed by the judge demonstrated some geographical connection between the location of the offence and the appellant albeit not sufficient to amount to supporting evidence qua Bryon.

23. No suggestion is made that the conviction otherwise is unsafe. None could be made. The appellant did not give evidence. Thus, the jury were simply invited to conclude that the prosecution had failed to prove its case. The jury were quite entitled to reject that proposition in part because they could rely on the appellant's failure to give evidence. At that stage the jury had no explanation of the presence of the appellant's DNA plausible or otherwise.

24. It follows that the appeal is dismissed.