Neutral Citation Number: [2021] EWCA Crim 226

Case No: 201903882 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
HHJ Chapman
Case No's: T20067327, 365, 366, 396 & 414

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE WILLIAM DAVIS
and
MRS JUSTICE MAY DBE

- -

Between :

GARY WILLIAMS	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

ANDREW EVANS (instructed by **David Phillips and Partners**) for the **Appellant**
PAUL JARVIS (instructed by the CPS) for the **Respondent**

Hearing date : 28 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am on Monday 22nd February 2021.

Dame Victoria Sharp P:

Introduction

1. Gary Williams ("the appellant") was convicted on 17 May 2007 in the Crown Court at Wolverhampton of the following offences:

   Count 1 – Possessing a firearm with intent to endanger life contrary to Section 16 of the Firearms Act 1968;
   Count 3 – Possessing a prohibited firearm contrary to Section 5(1)(aba) of the Firearms Act 1968;
   Count 4 – Possessing expanded ammunition contrary to Section 5(1A)(f) of the Firearms Act 1968;
   Count 9 – Violent Disorder contrary to Section 2(1) of the Public Order Act 1986;
   Count 10 – Wounding with intent to cause grievous bodily harm contrary to Section 18 of the Offences against the Person Act 1861.

   On 16 July 2007 the appellant was sentenced to imprisonment for public protection with a minimum term of 7 years in relation to Counts 1 and 10. Concurrent determinate terms were imposed in relation to Counts 3 and 4 with no separate penalty on Count 9. He was tried with four other men who were charged with associated offences. One of his co-accused was a man named Isaac Frazer. Frazer was convicted inter alia of possession of firearm with intent to endanger life. This was not the same firearm as that referred to in Count 1. He was sentenced to imprisonment for public protection. The minimum term in his case was 5 years.

2. In 2010 the appellant applied for leave to appeal against his convictions on Counts 1, 3 and 4. His application was based on medical evidence relating to an injury he had sustained at the time of the incident involving the firearm. The evidence had not been called at the trial. It was said that it supported the appellant's case that he had not had possession of the firearm as alleged by the prosecution because the injury was consistent with the appellant having been struck with a blunt object such as a firearm. His case at trial was that this is how he had sustained his injury. He alleged that it was his co-accused Frazer who had struck him in this way. The applications for leave to appeal and for permission to rely on medical evidence were refused: [2011] EWCA Crim 128. The full Court determined that the appellant could have called the evidence at trial. There was no reasonable explanation for his failure to do so. He chose to run his defence in a manner which did not include any reference to medical evidence. He had been treated immediately after the incident some 35 miles away under a false name. For tactical reasons he did not disclose this at trial. Thus, the evidence sought to be introduced did not meet the criterion in Section 23(2)(d) of the Criminal Appeal Act 1968.

3. The case comes before us now by reference of the Criminal Cases Review Commission ("CCRC") pursuant to s 9(2) of the Criminal Appeal Act 1995. The CCRC decided to refer the convictions on Counts 1, 3 and 4. They did so on the grounds that there was fresh evidence that the appellant did not bring the firearm to the scene of the relevant incident and that the fresh evidence supported the appellant's case that the firearm had been in the possession of the co-accused Frazer. The fresh evidence consisted of what was said to be a confession by Frazer that the firearm was his.

The background facts

4. Shortly after 2.30 p.m. on 26 June 2006 the co-accused, Frazer, left the Footlocker store in Wolverhampton City Centre. He was carrying a branded carrier bag from the shop containing items of clothing he had purchased there. He was next caught on CCTV about an hour later emerging from a shopping centre onto Cleveland Street. As he came onto Cleveland Street the appellant parked his car on Temple Street close to an alleyway leading down to Cleveland Street. CCTV footage showed the appellant leaving his parked car apparently in a hurry. He left it with its doors open. The appellant went down the alleyway towards Cleveland Street. By now Frazer was walking up the alleyway from Cleveland Street. The two men met. A revolver was produced by one of the men. The prosecution had no direct evidence as to which one did so. The gun was fired. It had not been manufactured to fire live rounds; rather, the barrel had been drilled out. This process had not been carried out to a high standard. The consequence was that the bullet jammed between the cylinder and the barrel. That resulted in two small pieces of metal being ejected from the side of the revolver. As soon as the gun was fired the appellant left the scene in the direction of Temple Street. When he did so he had the Footlocker bag belonging to Frazer and the gun. The appellant's evidence to the jury was that he had picked them up in panic. Frazer ran off in the opposite direction.

5. A witness named Edwards saw both men leave. Edwards heard Frazer said in reference to the appellant "he shot himself". This was of significance because of the injury suffered by the appellant. It was over his right eye. This was consistent with trauma. One potential mechanism was the ejection of shrapnel from the side of the gun. If that were the mechanism of injury, it would make it more likely that the appellant had fired the gun.

6. The appellant ran to a cul-de-sac a short distance away on the other side of Temple Street. He dropped some of the clothing. He then hid the Footlocker bag beside a drainpipe on a nearby building. The gun was inside the bag. The appellant's account to the jury was that he had simply thrown down the bag. When scientifically examined DNA attributable to the appellant was found on the gun. There was no scientific evidence linking Frazer with the gun.

7. Shortly after the incident in the alleyway there was a violent confrontation in the centre of town involving Frazer and a number of other young men. Frazer had a gun which he fired. The prosecution case was that the appellant had by then returned, armed with a knife with which he stabbed one of the other men.

8. The appellant's case in evidence was that Frazer was a stranger to him. In the alleyway the gun had been produced by Frazer, who had tried to rob him. Frazer had demanded that the appellant give him the gold chain being worn by the appellant. The appellant said that he had run at Frazer and they had scuffled. In the course of the scuffle Frazer had struck him with the gun and the gun had fired. The appellant's evidence was that they then had broken away from each other. The gun and the bag had dropped to the floor. The appellant's case was that he picked them up. After he had deposited the bag containing the gun, he had left the area and he had not returned. He had not been present at the later violence.

9. The appellant called two witnesses, Ashley James and Amy Cunningham, in support of his case. According to them they witnessed the confrontation in the alleyway. They saw the appellant. They recognised him because Ms Cunningham knew the appellant's girlfriend. They said that the other man (who must have been Frazer) produced the gun. Neither of these witnesses made themselves known to the police until some six months later. Prior to that they had made statements to the appellants' solicitor. Those statements were made at the same time and were virtually identical. The evidence of Cunningham at trial about what she saw and when she saw it was inconsistent with what could be seen on CCTV.

10. The jury rejected the appellant's account. In relation to the incident in the alleyway they were sure that it was the appellant, and not Frazer, who had brought the gun to the scene. The jury were also sure that the appellant was involved in the later violence and that it was he who had stabbed one of the other young men. The latter incident formed the subject matter of Counts 9 and 10 on the indictment. There was no appeal in 2011 in relation to those counts. There is none now.

11. In sentencing the trial judge found that, on the evidence, the appellant had sought to ambush Frazer in the alleyway. The judge noted that the appellant and Frazer were leading figures in opposing gangs in Wolverhampton. It had not been a chance meeting.

Developments since 2011

12. The appellant was released on parole in September 2013. He was recalled to prison in March 2014. He was re-released in January 2015 but was only at liberty for a few weeks before a further recall to prison. In November 2015 he was released again on parole. That remains the position.

13. Frazer was released on parole prior to the appellant's release. So far as we can ascertain from the material we have, this occurred at some point in 2011. In the early hours of 13 December 2014 Frazer, together with two other men, robbed a shopkeeper in Wolverhampton of his day's takings. Frazer was armed with an imitation firearm. One of his co-accused had a machete. The shopkeeper was struck to the head with the imitation firearm in the course of the robbery. Frazer and the other two men were tried by a jury in the middle of 2015. They were convicted. Frazer was sentenced on 4 August 2015 to an extended determinate sentence comprising a custodial term of 12 years and an extended licence period of 5 years.

14. At his sentencing hearing the judge (HH Judge Warner) was provided with a letter. The judge referred to it in his sentencing remarks as follows:

> "I have read what is, as I have observed, a very articulate letter from you and I accept that that is a letter which comes from you and not from someone who has written it in the prison and you have just put your signature at the end. What it shows is what a tragedy it is that you, who are someone who obviously with that degree of ability to put a letter like that together and to have the insight that you have got into your position, have not been able to pursue an ordinary, civilised way of life in our society would have committed these offences that you have. I can only

> hope that when you are eventually released that those good intentions that you have said in that letter and which I believe to be genuine ones at the moment in fact continue."

15. The CCRC have recovered a typewritten letter from the Crown Court file relating to Frazer's trial and sentence in 2015. It bears a signature. On the face of it the letter was intended to provide an explanation for Frazer's relapse into serious crime. The third paragraph of the letter reads as follows:

> *"During the time I was released in 2011 I thought that I had all the necessary tools in place that I had learned from my drug rehabilitation courses to stay drug free. I got employed as a chef and my life was on the up as my drug recovery was under control. But then in 2013 this all came crashing down on me like a ton of bricks. The reason being that Gary Williams was released from prison and this had a detrimental impact on my recovery. I completely relapsed into drugs because I became extremely paranoid that he may come and seek revenge on me. I believed this because of what happened in 2006 when I tried to shoot him and he also got convicted for the gun that I left at the scene which he then spent a long time in prison for something that he did not do and I was to blame."*

The letter went on to say that he believed it had all gone wrong

> *"because I was unable to express myself and what was going on in my head with regards to the events of 2006. As this is now off my head, I know I will be able to use the tools to full effect when released in the future."*

16. The CCRC first became aware of the letter's existence in July 2017. On 22 July 2017 the appellant wrote to them enclosing an advice from counsel then instructed by him. In the advice counsel stated that the appellant had been advised by a reporter that a letter had been handed to the judge by counsel representing Frazer at the sentencing hearing in 2015. It was said that in the letter Frazer had accepted responsibility for the firearm offences for which the appellant had been convicted in May 2007 and further that he had been the owner of the gun in 2006 and had attempted to rob the appellant. Counsel had attempted without success to obtain the letter. He suggested that the CCRC should be asked to use its powers to obtain the letter from the Crown Court.

17. This was the trigger for the CCRC recovering the letter from the court file. The CCRC attempted to contact the sentencing judge via Wolverhampton Crown Court to see if he could confirm that the letter in the court file was the one to which he had referred when sentencing Frazer. The judge by now had retired and the Crown Court was unable to contact him. Prosecution counsel at the sentencing hearing was asked for her recollection of a letter being provided to the judge. She recalled that the judge was given a letter but she did not recall by whom. She had no recollection of what was in the letter. She said "I think the judge may have said that it was something for the police to investigate but I….know nothing about any police investigation".

18. The CCRC made contact with Frazer and asked to meet him in order to discuss the letter and its contents. His response was terse and anything but articulate. He wrote as follows:

> *"I don't want to meet because I have no idea what letter your on about, I didn't pass anything during my sentenceing??? Besides I got sentenced by video-link! I guess this Gary Williams is trying to be clever again."*

19. Frazer's response was handwritten on a form provided to him by the CCRC. It was signed by him. The signature bears a reasonable resemblance to the signature on the letter recovered from the Crown Court file though it cannot be said to be identical. No effort has been made to instruct an expert to conduct a comparison because there is insufficient material with which to do so. The CCRC made their reference on 23 October 2019. At no point did they approach counsel who represented Frazer at the sentencing hearing before HHJ Warner in August 2015.

20. The appellant's current counsel (Mr Andrew Evans) and solicitors were instructed following the making of the reference. In January 2020 counsel provided an advice setting out the basis on which the appeal was to be argued. He relied solely on the matters set out in the CCRC's reference.

Issues relating to the fresh evidence

21. Although the appellant has been represented by counsel and solicitors since the beginning of 2020, no further enquiries have been made and no steps taken beyond the investigation conducted by the CCRC.

22. No effort has ever been made to contact counsel who defended Frazer in 2015. There would be limits on what he could say about his conduct of the sentencing hearing absent any waiver of privilege by Frazer. However, almost certainly he would be in a position to say whether the letter recovered from the court file at Wolverhampton was handed by him to the judge and how he came to do that. In addition, we have no transcript of the sentencing hearing other than the judge's sentencing remarks. What defence counsel said in mitigation and in any exchanges he had with the judge might have shed light on the provenance of the letter.

23. No steps were taken to require the attendance of Frazer for cross-examination. His response to the CCRC makes clear that he would not attend voluntarily. However, no application was made pursuant to CPR Part 39.7 to order Frazer to attend. In the course of the hearing Mr Evans acknowledged that it would be highly unusual for this Court to act on the basis of fresh confession evidence when we had not heard from the person said to have made the confession and when the circumstances of the making of the confession were uncertain. He was unable to point us to any equivalent precedent.

24. There is no evidence of the identity of the reporter who is said to have advised the appellant about the handing of the letter to the judge at the sentencing hearing. The appellant has not explained how and when he was contacted by the reporter. Since we have no transcript of the hearing other than the sentencing remarks, we do not know

the extent to which the contents of the letter were aired in open court or whether the appellant was referred to by name. Counsel who advised the appellant in 2017 recited what the reporter apparently had said, namely that in the letter Frazer accepted that he had attempted to rob the appellant. The letter does not include anything to that effect. Since we have no evidence from the reporter, we are not in a position to determine whether the reporter's comments were accurately recited in counsel's advice. If they were, we do not know how the reporter came to say what he did.

The legal framework

25. The court's jurisdiction to receive fresh evidence is governed by Section 23 of the Criminal Appeal Act 1968. The relevant parts of Section 23 are as follows:

> *(1) For the purposes of an appeal…. under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—*
>
> *.....*
>
> *(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.*
>
> *(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—*
>
> *(a) whether the evidence appears to the Court to be capable of belief;*
>
> *(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;*
>
> *(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and*
>
> *(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.*

26. The previous appeal which the appellant attempted to mount on the basis of fresh evidence foundered because he had no reasonable explanation for his failure to adduce that evidence at trial. The medical evidence on which he wished to rely could have been obtained in 2007. It was the appellant's choice not to do so. The letter provided to the sentencing judge in 2015 self-evidently could not have been adduced in 2007. There is an obvious and reasonable explanation for the failure to adduce this evidence at the trial.

27. The other three matters to which the court must have regard are cumulative. Although those matters are neither exhaustive nor conclusive in relation to the court's consideration of the interests of justice, they require specific attention. In the event of a conclusion that any one of them is not established, it would be highly unlikely that the court would receive the evidence. In this case it is not submitted that there are other matters relevant to the interests of justice. Nor is it suggested that we should receive the evidence in the event that one or more of the statutory matters cannot be

established. On behalf of the appellant Mr Evans submits that we can be satisfied of all of the matters set out in Section 23(2). For the respondent Mr Paul Jarvis (who did not appear at the trial in 2007) argues that, although section 23(2)(d) may have been met, none of the other requirements are satisfied.

Discussion

28. It is appropriate to consider first whether the evidence relied on is capable of belief. Mr Evans submitted that the letter was a confession of guilt by Frazer in terms which exonerated the appellant. He adopted the reasoning of the CCRC in their Statement of Reasons when making their reference to this court. The matters he relied on were: the letter apparently was signed by Frazer; it was accepted as genuine by Judge Warner in 2015; it was produced by Frazer to explain why he had committed the offence in December 2014; the content of the letter was not necessary to establish the mitigation being put forward; there was no reason to suppose that the letter was written with a view to benefiting the appellant. Mr Evans drew attention to the fact that the offence in 2014 involved Frazer striking his victim to the head with an imitation firearm. This was very similar to the allegation made against Frazer by the appellant in relation to the events of 2006.

29. Mr Jarvis relied on the fact that Frazer had been disbelieved by the jury in 2007 when they rejected his assertion that the gun he had in the later incident was an imitation firearm. Frazer subsequently contested the robbery at trial in 2015. Again he had been disbelieved. This was a poor starting point for accepting what he said in the letter as being capable of belief. When Frazer was asked about the letter by the CCRC, he denied any knowledge of it. Mr Jarvis argued that the reasoning of the CCRC that Frazer may have forgotten about the letter was credulous. He further submitted that, if Frazer is to be regarded as credible, his denial of the letter fatally undermined the believability of the confession in the letter. Finally, Mr Jarvis said that, assuming that the letter was submitted by Frazer at his sentencing hearing in 2015, it was a necessary part of the mitigation being put forward that there was an admission of responsibility for wrongdoing. This was an indicator that he was capable of rehabilitation.

30. We are satisfied that the confession contained in the letter recovered from the court file is not capable of belief. We have already set out the various issues surrounding the letter and its provenance. We do not repeat them. Taken together they cast significant doubt on the genuineness of the letter. We bear in mind that we have been invited to receive this evidence as credible material sufficient to undermine the case placed before the jury in 2007 without any evidence from Frazer himself, from anyone involved in the provision of the letter to the court in 2015 and/or from the reporter who is said to have alerted the appellant to the letter's existence.

31. Even if we could be satisfied that the letter was genuine, we would not find that it was capable of belief. In 2015 Frazer had just been convicted of a very serious offence committed when he was on licence from the indeterminate sentence imposed in 2007. He had been willing to say anything necessary in order to avoid that conviction. He had failed in this endeavour. In the sentencing exercise he wished to persuade the judge that, despite having contested his guilt, he genuinely wanted to rehabilitate

himself. That required some trigger for his relapse into drug taking and his failure to keep out of trouble after his release from prison on licence in 2011. The mere fact of the release from prison of the appellant would not have provided the necessary trigger. Frazer had to say that he feared revenge from the appellant as a result of which he became paranoid. This fear could only be explicable if Frazer had done something for which the appellant might wish to seek revenge. The CCRC observed that the terms of the letter were not required to establish the mitigation. They suggested that fear of the appellant on the part of Frazer would be more explicable if the appellant had been the aggressor in the first incident in 2006. We disagree. For Frazer's purpose to be served, he required the element of revenge.

32. In those circumstances we conclude that a letter composed by a man who tried to deceive a jury in 2006 and again in 2015 and who had his own purposes to serve in claiming that he had caused the appellant to be wrongly convicted is not capable of belief. We are strengthened in that conclusion by the fact that, when the CCRC asked him about the letter, Frazer denied any knowledge of it. It does not assist the appellant to say that Frazer might have had a motive to disavow the letter. This only goes to emphasise the fundamental unreliability of Frazer.

33. Our finding in relation to the credibility of the letter is sufficient to dispose of this appeal. Even if we were to conclude that, theoretically, it was capable of belief, it would not have afforded any ground for allowing the appeal. The evidence that the appellant was the person who produced and fired the gun in the alleyway was very strong. He sustained an injury consistent with firing the gun and being struck by shrapnel. There was no dispute that he had left the alleyway with the gun. His explanation of how he came to do that stretched credulity. There was scientific evidence linking him with the firearm whereas there was no such evidence in relation to Frazer. Although disputed by the appellant, it was established that he had hidden the gun rather than throwing it away. On the jury's verdict he lied about his return to the area and his involvement in an attack on another man using a knife. The weight to be attached to the so-called confession is so slight that it would not have had any impact on the outcome of the case.

34. In those circumstances it is not necessary for our determination of this appeal to reach any concluded view on the admissibility of the letter in proceedings involving the appellant and Frazer. However, the point was fully argued and it is appropriate that we express our view, albeit obiter.

35. In writing Mr Evans argued that, had the letter been available at trial, it would have been served on the prosecution by those representing the appellant. He suggested that it was "inconceivable that the prosecution would not have charged Frazer" with the firearms offences with which the appellant was charged. He went on to say that the prosecution might have discontinued the case against the appellant rather than present opposing cases before the jury. We reject both of those propositions. It is wholly unrealistic to suppose that the prosecution would have charged Frazer on the basis of a doubtful confession when the surrounding evidence did not support the confession. Still less would the prosecution have discontinued the case against the man in respect of whom the evidence was very strong.

36. Mr Evans's subsidiary submission was that the confession in the letter would have been admissible under Section 76A of the Police and Criminal Evidence Act 1984. The relevant parts of this provision are as follows:

> *(1) In any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*
>
> *(2) If, in any proceedings where a co-accused proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—*
>
> *(a) by oppression of the person who made it; or*
>
> *(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence for the co-accused except in so far as it is proved to the court on the balance of probabilities that the confession (notwithstanding that it may be true) was not so obtained.*
>
> *(3) Before allowing a confession made by an accused person to be given in evidence for a co-accused in any proceedings, the court may of its own motion require the fact that the confession was not obtained as mentioned in subsection (2) above to be proved in the proceedings on the balance of probabilities.*

37. Mr Evans submitted that the letter was a confession made by Frazer. Frazer was charged in the same proceedings as the appellant. The confession was relevant to the issue of who produced the gun in the alleyway and, in consequence, the guilt of the appellant in relation to the counts concerning that firearm. There would have been no basis to exclude the confession, there being no evidence of oppression or things being said or done to render the confession unreliable.

38. Mr Jarvis argued that Section 76A was enacted in order to give effect to a recommendation of the Law Commission made in its report published in 1997 entitled Evidence in Criminal Proceedings: Hearsay and Related Topics. The Law Commission drafted a provision which was repeated in Section 76A as enacted. The Law Commission referred to *Myers* [1996] 2 Cr App R 335 and expressed the view that the ratio in *Myers* should be given statutory force. *Myers* concerned two defendants jointly charged with murder. An out of court confession by one defendant was admitted at the instigation of the other defendant in support of his defence. This court upheld the admission of the evidence. By reference to those matters Mr Jarvis submitted that Section 76A cannot apply where, as here, the defendants are not jointly charged with the same offence. "Another person charged in the same proceedings" means jointly charged.

39. The origin and operation of Section 76A were considered by this court in *Finch* [2007] EWCA Crim 36 at [16]. In *Finch* Hughes LJ (as he then was) considered the meaning of the term "another person charged in the same proceedings" in the context of an argument that this included someone who had been charged jointly with the defendant who wished to rely on the out of court confession but who had pleaded guilty in advance of the trial. It was concluded with certainty that someone who had pleaded guilty was not charged in the same proceedings. Such a person is not a person charged with an offence for the purpose of his status as a witness. In consequence such a person is compellable as a witness in the trial of any remaining defendant. Section 76A cannot have been enacted in ignorance of those propositions of law. Hughes LJ characterised the rationale behind the introduction of Section 76A in this way:

> "The new rule, and for that matter the decision in *Myers* , were designed to meet the problem faced by defendant A who, if charged in the same trial as B, could not call B into the witness box because section 1 of the 1898 Act prevents B from being called except on his own application. That obstacle, however, does not exist except where A and B are tried together."

40. Given the facts in *Finch* it was not necessary for the court directly to address the issue which would arise in any trial of the appellant and Frazer. However, the court's reasoning set out above suggests that, in the present case, Frazer's out of court confession would be admissible under section 76A. Albeit not jointly charged with the same offence, Frazer would not be compellable in proceedings in which he remained as a defendant on trial. Thus, if Section 76A were not to apply to the circumstances of a joint trial of the appellant and Frazer, the appellant would have no route to the admission of the evidence other than Section 114(1)(d) of the Criminal Justice Act 2003. We are not persuaded that someone in the appellant's position should be limited to that route. The natural meaning of "charged in the same proceedings" does not require that the persons concerned are jointly charged with the same offence. We observe that, in his commentary on *Finch* in the Criminal Law Review (June 2007), Professor Ormerod offered as an example of the proper application of Section 76A a case in which two co-defendants were charged with separate but related offences. The example he gave was of a defendant charged with handling wishing to rely on the out of court confession of the defendant charged with theft which revealed that the alleged handler could not have known that the goods were stolen when he received them. That example is different on the facts to this case but the principle must be the same.

41. We reach that conclusion in relation to the application of Section 76A even though we are doubtful whether the letter would be admitted pursuant to Section 114(1)(d) of the Criminal Justice Act 2003 as being in the interests of justice. It is not necessary for us to recite the list of factors set out in Section 114(2) to which a trial judge must have regard when considering the interests of justice. Suffice it to say that a judge must have regard to the circumstances in which the statement was made, the reliability of the maker of the statement and the reliability of the evidence of the making of the statement. For the reasons we have set out in relation to the credibility of the letter, we doubt that the letter would be admissible pursuant to Section 114(1)(d).

Conclusion

42. For the reasons given, we are satisfied that the fresh evidence on which the appellant relies does not meet the interests of justice test for admission on appeal and casts no doubt on the safety of his convictions in relation to his possession of a firearm. The appeal is dismissed.