IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 202102009/B5
[2022] EWCA Crim 115.

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 28th January 2022

LADY JUSTICE SIMLER DBE

MR JUSTICE FRASER

MR JUSTICE MORRIS

R E G I N A

- v –

BEN BELHAJ-FARHAT

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Miss E Papamichael appeared on behalf of the Appellant

Mr O Newman appeared on behalf of the Crown

J U D G M E N T

Friday 28th January 2022

LADY JUSTICE SIMLER: I shall ask Mr Justice Fraser to give the judgment of the court.

MR JUSTICE FRASER:

1. This is an appeal against conviction brought with the leave of the single judge. The appellant has been represented before us by Miss Papamichael, who also appeared for him at the trial. The prosecution has been represented by Mr Newman. We are grateful to both of them for their very helpful written and oral submissions.

2. On 4th June 2021, following a trial in the Crown Court at Kingston Upon Thames, the appellant was convicted of one count of burglary, contrary to section 9(1)(b) of the Theft Act 1968 (count 2 on the indictment). He was acquitted of another count of attempted burglary (count 1).

3. On 15th July 2021 he was sentenced to a term of three years' imprisonment for the offence on count 2 (the minimum mandatory sentence required, pursuant to section 314 of the Sentencing Act 2020, given his previous convictions).

4. The offence of which the applicant was convicted had occurred during the two year operational period of a suspended sentence order of two years' imprisonment. That sentence had been imposed on 18th September 2019 for an offence of burglary and for an offence of assault by beating an emergency worker. The sentence for the latter offence was a concurrent term of three months' imprisonment, which was also suspended. The sentence of imprisonment for the burglary only was activated, with a reduced term of 18 months. It was ordered to run consecutively to the sentence for the burglary on the instant indictment. The overall sentence was, therefore, one of four and a half years' imprisonment.

5. The facts of the offence of burglary for which he was convicted in June 2021 are as follows. On 23rd July 2020, a burglary took place at a flat in Palliser Road, London W14. (These are the facts on count 2. We do not need to deal with the facts on count 1, on which he was acquitted). That flat was located on the third floor of a residential block. At the time of the burglary, the building was surrounded by scaffolding as there were building works taking place. The occupiers had previously been asked by the site manager to leave the windows to their flat unlocked as the builder would be on-site between 8 am and 4 pm and would require access.

6. The flat in question was occupied by three people. On 23rd July 2020, the last of the three occupiers of the flat left the property at about 2.30 pm, leaving it empty. When she returned at about 3.15 pm, she discovered that the flat had been burgled during that 45 minute period when she had been out. Items were missing from the flat, and she found a cigarette roll-up propped up against a frame on the front door inside the flat. This was handed to a scenes of crime officer. All three occupants of the flat confirmed that it was not their cigarette. Upon forensic examination, the cigarette roll-up was found to contain the appellant's DNA.

7. The prosecution case was that the presence of the cigarette butt containing the appellant's DNA which meant that the appellant was the burglar. The evidence adduced in support of this case was: first, agreed evidence in respect of the cigarette and DNA; secondly, bad character evidence admitted by the judge on a contested application that went to propensity; and thirdly, adverse inferences from a failure by the appellant to answer questions in interview. The appellant had answered "No comment" in interview.

8. The defence case was that there were too many uncertainties surrounding how the cigarette butt may have got into the premises.

9. The judge gave two rulings on the subject matter of the appeal before us to which we will turn in the grounds of appeal. The first was on 2nd June 2021 in relation to the application by the prosecution to adduce evidence of the appellant's previous convictions for burglary and theft in 2014, 2017 and 2019. The prosecution sought to use the gateway under section 101(1)(d) of the Criminal Justice Act 2003, namely that it was relevant to an important matter in issue between the defendant and the prosecution.

10. In her ruling, the judge ruled that the presence of the cigarette butt left at the scene, containing the appellant's DNA, was strong evidence against the appellant. This was not a case where the Crown were seeking to rely on weak evidence by bolstering it with adducing evidence of the appellant's previous convictions. She therefore ruled that the evidence was admissible, that those three convictions would go before the jury, and that the jury would be given clear directions about how such evidence could be used.

11. The second ruling was on a submission of no case to answer made on behalf of the appellant in respect of count 2. That ruling was given the following day, on 3rd June 2021. The defence had relied upon the second limb of *Galbraith*, namely that the evidence relied on by the prosecution was so tenuous in nature that a jury properly directed could not convict upon it.

12. Counsel for the appellant, Miss Papamichael, submitted that a DNA profile on such a readily moveable object as a cigarette at the crime scene was of insufficient probative value to establish a case to answer when the premises had been left insecure, builders had had access, and the scaffolding alarm had not been activated. Although it was acknowledged that there was a very strong inference that the cigarette had been dropped during the burglary, and given the DNA match and that therefore the jury could be sure that the DNA on the cigarette came from the appellant, there was no other evidence to link the appellant to the offence. It was also submitted on behalf of the appellant that although the appellant had not put forward in interview any explanation for the presence of his DNA on the cigarette, a cigarette is not a unique object, and the appellant could not reasonably have been expected to account for the presence of his DNA on that cigarette.

13. It is obviously correct to focus on the evidential position at the conclusion of the prosecution case when considering a submission of no case to answer. No account can be taken of the appellant's evidence, as it was given after the trial continued.

14. Although it is correct to observe that the DNA evidence was on a readily moveable object, the cigarette butt was found propped up inside the property, and discovered immediately the burglary was discovered after the occupant returned on the afternoon of the burglary. We quote from the grounds of appeal in this respect which identify the circumstances of the cigarette:

> "When they returned, they learned that the flat had been entered and property stolen. Florence Guy, one of the residents, found a cigarette which appeared to have been rolled up and smoked before being discarded in the flat. This roll-up was found propped up against the frame of the front door."

We also refer to Agreed Fact 1 at the trial, which stated as follows:

> "The roll-up cigarette found by Florence Guy was taken as evidence by a scenes of crime officer and it was subsequently

> tested for DNA. A match was found between the DNA on the cigarette and the [appellant]. The estimated likelihood of a match if the DNA originated from someone other than the [appellant] was one in one billion. There was no DNA from any other persons found on the cigarette."

15. The prosecution submitted that there was no legal or evidential principle that a case cannot be left to a jury solely on the basis of the presence of a defendant's DNA on an article. The relevant factors are summarised in Archbold and they include: first, whether there is evidence of some other explanation for the presence of the DNA; secondly, whether the article was apparently associated with the offence itself; thirdly, how readily moveable was the article; fourthly, whether there is evidence of some geographical association between the offence and the offender; fifthly, for mixed profiles, whether the appellant's DNA profile is the major contributor to the overall DNA profile; and sixthly, whether it is more or less likely that the DNA profile attributable to the appellant was deposited by primary or secondary transfer.

16. Reference was also made to *R v Tsekiri* [2017] EWCA Crim 40, which we will come to when we deal with the detailed submissions and the grounds of appeal.

17. The prosecution case at the point of the submission of no case to answer can be summarised as follows. The DNA was deposited on a cigarette butt found propped up on the inside frame of the front door. The appellant had been the sole contributor found on that cigarette butt. He had offered no explanation for the presence of his DNA on the cigarette butt in the burgled property. The appellant had previous convictions for burglary in 2014, 2017 and 2019. Accordingly, it is said that there was a clear inference that, as the only contributor, the appellant had smoked the cigarette butt and from its location the cigarette butt had been left there by the burglar. There was therefore a clear and strong inference that the appellant was the burglar.

18. The judge ruled that there was a case to answer on count 2. She considered *Tsekiri*, to which we have already referred, and noted that there was no evidential or legal principle that a case could never be left to a jury solely on the basis of the presence of a DNA profile on an article left at the crime scene. Whether it was appropriate to do so would depend on the particular facts of each case. In the case in question, there was no explanation as to why a cigarette butt containing the appellant's DNA profile had been found inside the property immediately after a burglary had occurred, and a jury properly directed would be entitled to infer both that the butt was placed inside the property by the burglary, and on the basis of the DNA extracted, that the appellant was that burglary.

19. The trial therefore continued. The appellant gave evidence. He said that he did not know where he was on the date in question; he was most likely at his sister's house. He also said that his stepfather lived nearby; that he was a chain smoker; and that he had smoked on the front steps of blocks of flats in different locations and on different occasions. He was convicted on count 2, as we have explained, and acquitted on the other count.

20. There are two grounds of appeal. They are as follows, in the order set out in the grounds. First, it is said that the judge erred in not acceding to the submission of no case to answer at the conclusion of the prosecution's case. That submission had been made solely in respect of count 2 (the count upon which the appellant was convicted), and the judge gave her ruling, as we have observed, on 3rd June 2021. The second ground is that the judge erred in allowing the prosecution to adduce evidence of the appellant's bad character in respect of the previous convictions for burglary. That ruling had been given the day before, on 2nd June 2021. We

have the benefit of a Respondent's Notice from the prosecution, and, as we have already observed, both counsel have made oral submissions to us today.

21. The test in *Galbraith*, which is to be applied on any submission of no case to answer, is well known and does not require elaboration. The first limb deals with a case where there is no evidence; the second limb deals with a case where there is some evidence, but that evidence is said to be of a tenuous character, for example, because of inherent weaknesses or vagueness or because it is inconsistent with other evidence. This is summarised in the current edition of Blackstone at paragraph 16.57. The editors summarise that there is a requirement, when considering a submission of no case to answer, that the court considers the evidence as a whole, including both its weaknesses and strengths.

22. Here, that evidence would include the bad character evidence, if it were correctly admitted. For that reason, in our judgment, the correct approach is to consider, first, the strength of the case when the bad character application was made, and whether that ought to have been admitted. We will therefore deal with that ground first. This is the correct approach, and it is also relevant as, if the bad character evidence *was* properly admitted, that became evidence as to propensity, which the judge could properly take into account. We therefore consider the grounds of appeal in the reverse order in which they are identified in the Perfected Grounds of Appeal. However, the issue of the strength of the case based on the DNA evidence has to be considered as part of the consideration of the challenge to the judge's rulings permitting the bad character evidence to be admitted. Whether there is a strong case, or, put another way, a weak case based solely on the DNA evidence, falls to be considered by this court when considering that ground of appeal. We will, therefore, deal with the bad character ground.

23. As is widely known, the Criminal Justice Act 2003 allows evidence of bad character to be admitted, provided that it is permissible through one of a number of what have come to be referred to as “gateways”. These are listed in section 101(1)(a) to (g) of the Act. Here, the appellant's previous convictions were for burglary. They had occurred in 2014, 2017 and 2019, and the gateway relied upon was that in section 101(1)(d), namely that the evidence was relevant to an important matter in issue between the defence and the prosecution. By section 103(1)(a) propensity to commit offences of the kind charged – here burglary – is taken to be an issue between the defence and the prosecution, except where that propensity does not make it any more likely that the offender is guilty of the offence charged.

24. In the leading case of *R v Hanson* [2005] EWCA Crim 824, a judgment of the court which was delivered by the Vice President of the Court of Appeal Criminal Division, the following was stated:

> "15. If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of noncompliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense …"

That authority does, however, go on to state as follows:

> "18. Our final general observation is that, in any case in which

> evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. …"

The passage continues and identifies the way in which the jury should be directed when bad character evidence of this type is admitted.

25. We would emphasise the sentence in that judgment that "Evidence of bad character cannot be used simply to bolster a weak case". This is how Miss Papamichael characterises the evidence in this case, absent the bad character evidence. She portrays the prosecution case concerning the DNA on the cigarette butt as weak, and submits that the judge wrongly allowed the evidence of the appellant's previous convictions to be adduced in order to bolster that weak case.

26 We remind ourselves that if a judge has directed himself (or, as here, herself) correctly, this court will be very slow to interfere with a ruling as to admissibility and will only interfere if the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong. The judge here correctly directed herself as to the law, applied the correct principles, and came to a common sense conclusion.

27. In order to consider that properly, we have to consider the characterisation of the prosecution case as weak. As far as DNA evidence is concerned, a number of cases have been cited to us where this subject has been debated. In giving the judgment of the court in *Tsekiri*, to which we have already referred, William Davis J (as he then was), in a court presided over by the Lord Chief Justice, said:

> "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 to convict: see *R v FNC* [[2015] EWCA Crim 1732]; [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; [and] *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. …"

The decision in *Bryon* has been subject to some doubt in other cases, for example *FNC* at [30].

28. Returning to the principles, DNA evidence is always a matter of fact and degree when characterising whether a case is a strong or a weak case. In *Tsekiri* the judgment at [14] through to [21] identifies the approach of the court, as explained in [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."

There are then listed in the following six paragraphs different relevant factors that will be considered, although at [21] it is made clear:

> "This is not an exhaustive list and each case will depend on its own facts. …"

Identifying the first of those factors at [15] the question posed in the judgment is as follows:

> "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 [Act] 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."

29. In the instant case, there was no question of a mixed match and there was no mixed DNA profile. On the contrary, the appellant was the sole contributor with a clear match – and we have already identified Agreed Fact 1 – and the possibility of secondary transfer was not even put to the expert. By its nature, DNA on a cigarette butt is DNA upon a moveable object. There are an almost infinite number of different types of moveable objects, and their type and the circumstances in which they are found will vary enormously from case to case. It cannot be elevated to a principle that DNA evidence of this type, taken by itself, must be equated to a weak case simply because the object is moveable; or in the absence of an explanation can be characterised as a weak case. Each case must depend on its own facts. The DNA match here was strong and the appellant was, as we have said, the sole contributor. In addition, the circumstances in which the cigarette butt was found all formed part of the framework within which the trial judge had to consider the strength of the case. This includes both the location and timing of the discovery of the moveable object.

30. In our judgment, this was a strong case, as the judge herself concluded. The submission that the bad character evidence was admitted to bolster a weak case is rejected. Written directions were given to the jury on the bad character evidence in conventional form. It is important to note that this was correctly done and, quite rightly, no challenge is brought on this appeal to the content of those directions in terms of their technical accuracy. The necessary and correct warnings were given to the jury following the admission of the evidence. The bad character evidence was properly admitted by the judge. We dismiss this ground of appeal.

31. We must also consider the submission of no case to answer, which forms the other ground of appeal. As we have already observed, the evidence must be taken as a whole when considering such a submission, both its weaknesses and strengths. We have considered the nature and strength of the DNA evidence already in considering the ground challenging the admissibility of the bad character evidence. In both grounds of appeal the appellant relies heavily upon the case of *R v Killick* [2020] EWCA Crim 785. In that case, Holroyde LJ giving the judgment of the court refused the renewed application by the prosecution against a terminating ruling by the trial judge upholding a submission of no case to answer. That case concerned a burglar (whose face was obscured) spotted on CCTV stumbling and dropping something on the floor of a hairdressing salon in the course of a burglary. The item was later found to be a screwdriver. It had a mixed match of DNA on it, which included, in part, the DNA of the defendant in that case. He had no explanation for why his DNA was found on that object, which was plainly a moveable one. The Recorder had earlier refused to allow evidence to be adduced of his bad character, namely that he was a drug dealer. The prosecution sought leave to appeal against both rulings: first, the bad character; and secondly, that there was no case to answer. The prosecution's application was refused. The Court of Appeal found that both the rulings were correct.

32. However, as we have observed when dealing with *Tsekiri*, each case must depend on its own facts in this respect. It cannot be elevated to a principle that because the court took one particular view of DNA evidence on one particular set of facts, that necessarily translates across to other cases on other facts, where the objects are different and the circumstances in which they had been found are different as well. The finding in another case, for example *Killick*, does not assist the appellant here. It is not strictly necessary to distinguish this case for the reasons that we have explained. In any case, it was an application for leave to appeal against a terminating ruling, and not an appeal. But even if it were authority, one would need to read no further than [8] of that case, where it is clearly stated:

> "… The scientist who analysed the DNA findings said that they were what she would expect if the respondent had had contact with the handle of the screwdriver; but she was unable to comment on when he might have done so or whether he was the most recent person to have done so. She had found traces of a minor DNA profile, but these were insufficient for any meaningful comparison to be made."

That is very different to the evidence in this case. As we have already observed, this was a strong case. One need only to re-read Agreed Fact 1 to see that the DNA evidence in this case cannot readily be equated to mixed match DNA evidence in other cases. In this case, the chances of the DNA not being that of the applicant was 1 in 1 billion.

33. Further, although the judge's ruling in the instant case on the submission of no case to answer was made without reference to the bad character evidence, which had been admitted as admissible evidence as a result of her ruling the day before, the appellant's previous convictions were evidence in the case, even though they are bad character evidence. Therefore, in assessing the weight of the evidence against the appellant, the judge would have been entitled to take this bad character evidence into account too. The DNA evidence on the cigarette butt did not have to be weighed in isolation from everything else when she was considering the submission of no case to answer. She does not expressly refer to the bad character evidence in her ruling; nor does she recite that she has taken into account the bad character evidence, although it is relied upon by the prosecution in its Respondent's Notice. We are clear that she would have had it in mind, given that she had heard the other application only the previous day.

34. Even without the bad character evidence having been admitted, we are satisfied that the trial judge properly weighed up the probative value of the DNA evidence against the appellant. The location and timing of the discovery of the cigarette butt are important components of that evidence. We are satisfied that it cannot be said either that the judge misdirected herself or that she was wrong in her conclusion that the weight of the evidence was such that the case could properly proceed and safely be left to the jury. This ground of appeal, therefore, also fails.

35. In the circumstances, and regardless of the order in which the two separate grounds of appeal are advanced, or the sequence in which they are considered, there is nothing in the points skilfully advanced before us by Miss Papamichael to demonstrate that the appellant has led us to conclude that the judge was wrong in either of her two rulings which are under scrutiny on this appeal. On the contrary, we are satisfied that she was right. The appeal will, therefore, be dismissed.

36. There is one final point to which we must return. At the beginning of this judgment we observed that there was no express statement in the court below concerning activation of the

suspended sentence order of three months' imprisonment for assault by beating an emergency worker. We are of the view that it is unnecessary in the circumstances to activate that sentence which is a view that must have been implicitly held by the sentencing judge, because she did not do so. She plainly considered that it would have been unjust to do so, but did not expressly state that in court. That should have been stated, but we refer to that point here solely for completeness.

37. This appeal therefore fails, as we have explained, and is dismissed. We repeat our gratitude to counsel.
