Neutral Citation Number: [2023] EWCA Crim 1280

Case No: 202203784 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE UPON TYNE
His Honour Judge Bindloss

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2023

Before :

LORD JUSTICE SINGH
MR JUSTICE JEREMY BAKER
and
HER HONOUR JUDGE MUNRO KC

- -

Between :

REX	**Respondent**
- and -	
WILLIAM BOGIE	**Appellant**

- -
- -

Penny Hall (instructed by **Armstrong Westgarth Law**) for the **Appellant**
Matthew Hopkins (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 24 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on 3 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh :

Introduction

1. This is an appeal against conviction brought with the leave of the Single Judge. The issue concerns whether admitted breaches by the police of Code of Practice D, issued under the Police and Criminal Evidence Act 1984 ("PACE"), on recognition evidence, were such that the evidence should have been excluded by the trial judge and render the convictions unsafe.

2. On 22 November 2022 in the Crown Court at Newcastle Upon Tyne the Appellant was convicted of three offences: robbery (Count 1), possession of a bladed article (Count 2) and driving whilst disqualified (Count 3). On 6 February 2023 he was sentenced by HHJ Bindloss to a total sentence of 78 months' imprisonment, which was the sentence on Count 1, with the other sentences being made concurrent. Other appropriate orders were made, including an order that the Appellant be disqualified from driving for 51 months.

3. There were two co-defendants who were also charged with robbery (Count 1). Leanne Craggs pleaded guilty to that charge on the first day of the trial. Ryan Neil was acquitted of that charge on the direction of the judge, following a submission of no case to answer.

The Facts

4. John Hogg was a delivery driver for WH Smiths. On the morning of Sunday 15 May 2022 he was making deliveries to shops in the South Tyneside area. At about 5am Mr Hogg stopped his Renault van to make a delivery of newspapers to a One Stop Shop. Just before he stopped he had noticed a Nissan Juke car travelling behind him. He said he saw a man get out and then get back in the front passenger seat, and he described the car as coming very close behind his van before backing off.

5. At the One Stop Shop Mr Hogg exited his van to deliver some newspapers. As he did this he heard someone open the Renault van driver's side door. He returned to the van and was threatened by a male armed with a knife. The male wore a plastic mask and said to Mr Hogg, "Fuck off before you get chopped up". The male stole the van, valued around £25,000, which had on board about £3,000 to £4,000 worth of newspapers. The Renault van and Nissan Juke were driven away from the scene in convoy, and Mr Hogg immediately reported the matter to police. The robbery was captured on CCTV although the footage only showed the robber from behind.

6. At 8.35am on 15 May the Nissan Juke was stopped by police. Leanne Craggs was the driver and Ryan Neil was the front seat passenger. Leanne Craggs' home address was searched and a number of newspapers, along with two rubber face masks were found. Leanne Craggs' fingerprints were discovered on the newspapers. Leanne Craggs' and Ryan Neil's DNA was present on the face masks. Mr Hogg confirmed that the masks were the same as the one worn by the robber. There was no forensic link from the Appellant to either the Renault Van or to the Nissan Juke.

Identification Evidence relating to the Appellant

7. DC Arthur and DC Sengelow were assigned to investigate the robbery when they began work on Monday, 16 May 2022. Both officers interviewed Leanne Craggs at 5.37pm on that date. The interview led DC Arthur to go to a Morrison's petrol station on 18 May to make further enquiries.

8. At the petrol station DC Arthur located some CCTV footage. It showed that around four hours before the robbery, at 1.13am on 15 May, Leanne Craggs had been at the petrol station with the Nissan Juke and a number of other people. In evidence DC Arthur said that he suspected one of the others to be the Appellant. He had never dealt with the Appellant in the flesh but had seen him from behind and also in photos. He said that he was 90 to 95 per cent certain that the person in the footage was the Appellant.

9. DC Arthur said that he returned to the police station, where he told his investigation team of what he had seen and that it was his belief that the Appellant was a male in the footage. The investigation team included DC Sengelow.

10. On 20 May 2022 DC Sengelow attended the petrol station with DC Arthur to view the footage. He identified one of the males present on the footage as the Appellant. In evidence he said that he had previously dealt with the Appellant face to face on two occasions in 2019, as well as seeing him in photos.

11. DC Sengelow said he downloaded the petrol station footage onto a USB stick and returned to the police station, where he reviewed the footage. He created still images from the footage. However, by the time of the trial, some of the moving footage that gave rise to the still images from 1.13am at the petrol station had been lost. This was the part of the footage that showed the male in it without his Covid mask and showed him laughing.

12. The prosecution case at trial was that the man in the petrol station footage at 1.13am was the Appellant. Because of his distinctive clothing and the link to the Nissan Juke, the prosecution said that the Appellant was the same man seen in the footage at 5am robbing Mr Hogg at knife point.

13. The defence case was that the male at the petrol station at around 1am was not the Appellant, and he had been wrongly identified by police. It was his case that the Appellant was not the person shown on the CCTV footage carrying out the robbery. The defence suggested there were at least two other potential candidates who might have been the robber. Mr Hogg had identified a person on CCTV as the robber, and Leanne Craggs had been in contact with a male called Daniel Ryan, who fitted the description of the robber.

14. When the Appellant was interviewed he made no comment. He did not give evidence at trial.

15. The issue for the jury was whether they were sure that the man seen in the distinctive clothing in the petrol station at around 1.13am was the Appellant. If they were sure that he was, they also had to be sure that he was the man seen in the later footage robbing Mr Hogg.

Code of Practice D

16. The relevant code of practice under PACE is Code D on the identification of persons by police officers, which had effect from 23 February 2017.

17. Part (b) of the Code is concerned with 'Recognition by controlled showing of films, photographs and images'. Paragraph D:3.34 explains that this part of this section applies when, for the purposes of obtaining evidence of recognition, arrangements are made for a person, including a police officer, who is *not* an eye-witness: (a) to view a film, photograph or any other visual medium; and (b) on the occasion of the viewing, to be asked whether they recognise anyone whose image is shown in the material as someone who is known to them.

18. Paragraph D:3.35 provides as follows:

> "To provide safeguards against mistaken recognition and to avoid any possibility of collusion, on the occasion of the viewing, the arrangements should ensure:
>
> (a) that the films, photographs and other images are shown on an individual basis;
>
> (b) that any person who views the material:
>
> (i) is unable to communicate with any other individual to whom the material has been, or is to be, shown;
>
> (ii) is not reminded of any photograph or description of any individual whose image is shown or given any other indication as to the identity of any such individual;
>
> (iii) is not to be told whether a previous witness has recognised any one;
>
> (c) that immediately before a person views the material, they are told that:
>
> (i) an individual who is known to them may, or may not, appear in the material they are shown and that if they do not recognise anyone, they should say so;
>
> (ii) at any point, they may ask to see a particular part of the material frozen for them to study and there is no limit on how many times they can view the whole or any part or parts of the material; and
>
> (d) that the person who views the material is not asked to make any decision as to whether they recognise anyone whose image they have seen as someone known to them until they have seen the whole of the material at least twice,

> unless the officer in charge of the viewing decides that because of the number of images the person has been invited to view, it would not be reasonable to ask them to view the whole of the material for a second time. A record of this decision must be included in the record that is made in accordance with paragraph 3:36."

19. Paragraph D:3.36 provides as follows:

> "A record of the circumstances and conditions under which the person is given an opportunity to recognise an individual must be made and the record must include:
>
> (a) whether the person knew or was given information concerning the name or identity of any suspect;
>
> (b) what the person has been told *before* the viewing about the offence, the person(s) depicted in the images or the offender and by whom;
>
> (c) how and by whom the witness has asked to view the image or look at the individual;
>
> (d) whether the viewing was alone or with others and if with others, the reason for it;
>
> (e) the arrangements under which the person viewed the film or saw the individual and by whom those arrangements were made;
>
> (f) subject to paragraph 2.18, the name and rank of the officer responsible for deciding that the viewing arrangements should be made in accordance with this Part;
>
> (g) the date time and place images were viewed or further viewed or the individual was seen;
>
> (h) the times between which the images were viewed or the individual was seen;'
>
> (i) how the viewing of images or sighting of the individual was controlled and by whom;
>
> (j) whether the person was familiar with the location shown in any images or the place where they saw the individual and if so, why;
>
> (k) whether or not, on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone know to them, and if they do:

(i) the reason;

(ii) the words of recognition;

(iii) any expression of doubt; and

(iv) what features of the image or the individual triggered the recognition."

Ruling on Admissibility of Identification Evidence

20. The defence argued that the identification evidence of DC Arthur and DC Sengelow was inadmissible and ought to be excluded under section 78 of PACE. It was also argued that the still images taken from CCTV footage which was subsequently lost were inadmissible under section 78. Counsel for the defence submitted that both officers had failed to comply with Code D, specifically paragraphs D:3.35 and D:3.36. In addition, the only footage of the male at the petrol station without a Covid face mask on had been lost. There were screenshots of the unmasked male, however they were of poorer quality than the other stills and it was not known which camera they had been taken from. They were not time marked.

21. A *voir dire* took place between 10 and 15 November before HHJ Bindloss, at which both DC Arthur and DC Sengelow gave evidence. On the main issue before him, the Judge ruled that:

> "… I have come to the view that, notwithstanding the failures to satisfy Code D3.36 on the day of the viewing, this is no mere bald assertion by these two police officers, nor is the recognition evidence inherently poor. On the information that has come to light since, the jury will have plenty of material available to them to be able to assess the accuracy, or otherwise, of the police officers' recognition evidence. There is material to test what the police officers are saying. There is material open to Miss Hall [counsel for the defence] to cross-examine the police officers about their recognition. In addition, the jury will have the original footage and the stills, and they can compare those directly to the defendant themselves".

22. In reaching that decision the Judge applied the recent decision of this Court in *R v Yaryare and Others* [2020] EWCA Crim 1314; [2020] 4 WLR 156.

23. The Judge also rejected the submission that the stills should not be admitted in evidence given that the footage from which they had been taken had been lost. In reaching that decision the Judge applied the decision of the Divisional Court in *R (Ebrahim) v Feltham Magistrates' Court* [2001] EWHC 130 (Admin); [2001] 1 WLR 1293.

Ruling on Submission of No Case to Answer

24. Following the close of the prosecution case, counsel for the defence submitted that there was no case for the Appellant to answer, on the basis that the recognition evidence was poor and there was no supporting evidence before the jury. The Judge ruled that:

> "I have come to the view that this recognition evidence is reasonably good. It is certainly sufficient to go before the jury. In addition, the jury have the CCTV images and the stills [so] that they can make their own comparison.
>
> Although there are a number of weaknesses, those are a matter for the jury to consider. I have looked at the trial compendium and reminded myself of the direction that should be given in recognition evidence cases like this and it lists a number of bullet points setting out the weaknesses, if there are any, and that … they should be identified for the jury and the jury should be told to keep those in mind when assessing whether a recognition is reliable or not and it is clear to me that this is one of those classic cases.
>
> The police -- two police officers have purported to recognise. The jury must make their own assessment of that. I have a duty to point out the weaknesses and direct the jury to be cautious, and I will, and the jury can safely be left, properly directed, to consider this evidence and applying the second limb in *Galbraith*, reminded myself [*sic*] that this is an ID case and the additional factors in *Turnbull* should be carefully considered. In my judgment, a jury properly directed could safely convict Mr Bogie and Miss Hall's submission fails".

25. As that passage makes clear, the Judge had well in mind the principles in *R v Galbraith* [1981] 1 WLR 1039 (Lord Lane CJ); and *R v Turnbull* [1977] QB 224 (Lord Widgery CJ).

Summing Up

26. The Judge gave written directions to the jury, informing them of the breaches of Code D and warning them of the weaknesses in the identification evidence. He also repeated these points in his summing up. No complaint is made about the written directions or the summing up as such but it is submitted by Miss Hall that the dangers of admitting the recognition evidence of the police officers were such that no direction could cure the problem. That evidence should not have been admitted and the case should not have been allowed to go before the jury at all.

Grounds of appeal

27. On behalf of the Appellant Miss Hall advances the following three grounds of appeal:

(1) The Judge erred in ruling the identification evidence of both DC Arthur and DC Sengelow as admissible. The admission of this evidence casts doubt on the safety of the conviction.

(2) The Judge erred in ruling the CCTV stills, taken from footage which was then lost, as admissible. The admission of this evidence also casts doubt on the safety of the conviction.

(3) The Judge was wrong to allow the case to continue before the jury at the close of the prosecution case. The identification evidence was poor and there was no supporting evidence.

28. On behalf of the Appellant Miss Hall acknowledges that her central ground of appeal is Ground 1.

29. It was and is common ground that the police officers in this case failed to comply with paragraphs D:3.35 and D:3.36 of Code of Practice D. As the Single Judge observed when granting leave to appeal:

(1) Both officers knew that the Appellant was a suspect for the robbery having interviewed/been made aware of the contents of the interview with the suspect Leanne Craggs.
(2) Both knew that the CCTV of the Morrison's petrol station footage was of potential importance in obtaining evidence to identify whether the Appellant was or was not present at that time.
(3) Despite that DC Arthur (a) viewed the footage on his own on 18 May without making a detailed note of the circumstances of the viewing and why he could identify the Appellant from what he viewed, he having had some brief contact with the Appellant in August 2019; (b) told DC Sengelow that he had positively identified the Appellant from the footage before the latter had seen the footage for himself; (c) did not make a statement about his recognition until 20 October, some five months later, when it was known that the recognition was being challenged.
(4) Further, despite (1) to (3) above, DC Sengelow viewed the CCTV evidence on 20 May and made a statement later that day but failed to mention that, prior to that viewing, he had been told by DC Arthur that DC Arthur had recognised the Appellant, and did not meet the requirements of Code D paragraph D:3.36 as to how and why recognition was made.
(5) Whilst DC Sengelow did attempt to make a copy of the relevant CCTV evidence at the time, for reasons unknown a copy of the most significant part of that evidence, when the person of interest is seen without a face mask, was not either copied or retained and did not find its way into the compilation video.

30. Miss Hall also emphasises that, although Code D refers to the risk of collusion, she does not allege bad faith or intentional collusion, but submits that there are other dangers which the Code is designed to prevent, for example the danger of "confirmation bias", which can be subconscious.

31. Miss Hall emphasises that there was simply no other supporting evidence before the jury against this Appellant. He was not forensically linked to the stolen newspapers or the rubber masks found at Leanne Craggs' address. There was no evidence that he was associated with Leanne Craggs or Ryan Neil. He was not forensically linked to the stolen van or the Nissan Juke. There was no cell site evidence or eyewitnesses to put him at the scene.

32. Miss Hall points out that at trial the defence suggested that there were at least two other candidates for the robber. First, Mr Hogg had told police that he had seen the robber shortly after the incident. He was shown some CCTV and identified a male on that footage as the person he had seen. He said he was "positive" that that was the male who had robbed him. In fact that male was not this Appellant. Secondly, the Appellant was aware of another male, Daniel Ryan, who matched the description of the male at the petrol station. There was evidence (in the form of agreed facts) that Daniel Ryan was 6 feet 2 inches tall and of slim build. He was the partner of Kimberley Whitehead, who was present at the petrol station, and had given his address to police around the relevant time, as 2 Capulet Terrace. That is the address where Leanne Craggs was seen to attend in the Nissan Juke shortly before her arrest.

33. In respect of the evidence of DC Arthur Miss Hall says that he initially said that he had made some notes while he was at the petrol station but, when cross-examined, accepted that he had added to his notes later. Further, he told DC Sengelow that he had recognised the Appellant but no note was made about this for another five months. Thirdly, both officers were given the Appellant's name in the handover package to them.

34. Further, Miss Hall reminds this Court that DC Arthur had only seen the Appellant once in person but this was three years earlier. The Appellant was at that time in a cell, lying on his side and facing away from DC Arthur so DC Arthur had never seen him standing or seen his face. In substance therefore he was reliant upon police intelligence.

35. Turning to the evidence of DC Sengelow, Miss Hall says that he attended the Morrison's petrol station with DC Arthur but DC Arthur then took a phone call and so DC Sengelow viewed the CCTV footage with the manager. He had already been told by that time by DC Arthur that he had recognised the Appellant. DC Sengelow made no notes at all at that time and, when he did so later, they did not provide the detail required by Code D. Further, in the *voir dire* DC Sengelow appeared to say that he had viewed the footage many times but there appeared to be a record of his having done so only on one date in July and thereafter in November, which was after his second witness statement and close to the time of trial.

36. Turning to the quality of the evidence, Miss Hall points out that the police gave evidence that they had seen the man was laughing, in footage which is no longer available because it has been lost and therefore could not be seen by the jury. But they did not spot that the man had a missing tooth (which was an agreed fact at the trial). Nevertheless, Miss Hall acknowledges that she was able to point this out to the jury as tending to undermine the evidence of the police officers.

37. Miss Hall also reminds this Court that the missing footage was the only time when the man in it had removed his face mask fully but we do not know whether that was what

led the police to say that they recognised this Appellant. In the footage which was before the jury, which we have viewed, the man at the Morrison's petrol station at all times has the mask covering his mouth although it is just below the nose. The only stills of the full face are of a lower quality.

38. Miss Hall acknowledges that, if Ground 2 on this appeal stood alone, that would not be sufficient but she submits that it reinforces Ground 1.

39. Turning to Ground 3, Miss Hall submits that, although it is essentially the same argument as under Ground 1, it is different in that, by the end of the prosecution case, the jury had heard the evidence of the police officers, which was slightly different from their evidence at the *voir dire*.

The Respondent's submissions

40. On behalf of the Respondent Mr Hopkins submits that:

(1) The Judge was right to admit the identification evidence of DC Arthur and DC Sengelow.
(2) The Judge was right to admit the CCTV stills from the missing footage.
(3) The Judge was right to refuse the submission of no case to answer.

41. In relation to Ground 2, Mr Hopkins submits that admitting the three still images without the moving footage from which they were taken did not have such an adverse effect on the fairness of the proceedings that it should have been excluded. He points out that the Judge rightly took into account the leading authority of *Ebrahim* and concluded that there was no serious prejudice to the defence because the moving footage was missing. Indeed he considered that the absence of that footage was likely to hamper the prosecution more than the defence. The defence were able to point to this as a "hole" in the prosecution case and invite the jury to conclude that the prosecution had failed to prove its case because it had lost footage which should have been put before them.

42. Turning to Ground 3, Mr Hopkins submits that, although there were two other candidates for the robber, Mr Hogg's evidence was plainly so unreliable in the circumstances of this case that it did not undermine the recognition evidence of the officers. Mr Hogg had not seen the face of the robber because he said it was covered by a full face Halloween mask. When asked if there was any other reason beside height and build to make him "positive" it was the robber, he said that "maybe" the robber had the same pants as the man in the CCTV footage but it was clear from that footage that the robber had very different pants to the man he was pointing out.

43. In all the circumstances therefore Mr Hopkins submits that the Judge was well entitled, applying the well-known principles in *Galbraith*, to conclude that the submission of no case should be rejected, since this was an issue of fact which was eminently suited for determination by the jury.

44. As is common ground, the central ground on this appeal is Ground 1. On this Mr Hopkins submits that the Judge correctly directed himself as to the "key factors" for

admitting recognition evidence where there has been a breach of the PACE Code, by reference to the decision of this Court in *Yaryare*: (1) whether there was a detailed explanation for the basis of the recognition; and (2) whether the jury were in a position to view the relevant material for themselves.

45. Mr Hopkins' submissions are set out in detail at paragraphs 15-23 of the Respondent's Notice, which warrant quotation in full:

> "15. First, a detailed explanation was given in this case during the *voir dire*. DC Arthur was able to say that he viewed the petrol station footage and first *suspected* the man was William Bogie when he walked through the door of the petrol station, then he became 90-95% sure the man was Mr Bogie as he watched more footage. He explained that the man's height, build, hair and face allowed him to recognize Mr Bogie. He explained that he had seen Mr Bogie's height and hair from an observation of him in a police cell in August 2019 and that he had seen bulletins with Mr Bogie's face on subsequently and that is how he recognized the face. He said that he specifically recognized the face because of its thin appearance. He said that at one point during the footage when the man was around the refrigerated area he may have had the mask down or off but he could not be sure.
>
> 16. DC Sengelow was able to explain in evidence that he had sat across an interview table from Mr Bogie for 15 minutes in December 2019 and also walked him to a cell. He had then spent one to two hours watching the petrol station CCTV footage at the police station after he seized it and was 'very sure' it was Mr Bogie. He could explain that he recognized him from the height and build, the face, eyes and hair. He said it was an 'overall general recognition'. He accepted that he had been told by DC Arthur that the man in the footage was Mr Bogie but he did not believe that had influenced his judgment.
>
> 17. These detailed explanations gave the jury a much better basis on which to assess the reliability of the recognitions than existed in the cases of *Smith* [*R v Smith* [2008] EWCA Crim 1342; [2009] 1 Cr App R 36] and *JD* [*R v Deakin* [2012] EWCA Crim 2637], where the officers were essentially making bare assertions that they recognized the offender as the defendant but could not explain why.
>
> 18. Second, the jury in this case was in a position to view the 'relevant material' (as the court in *Yaryare* put it). They could compare the man in the petrol station CCTV to the defendant in the dock and the custody photos. This was the 'objective means' envisaged in *Smith* by which the jury could test the accuracy of the officers' recognition.

> 19. The jury were to have at their disposal high quality still images from the available CCTV in the petrol station showing the man with the face mask underneath his nose, revealing a large portion of his face hair and ears from multiple angles. The moving footage also lasted over five minutes.
>
> 20. There were also lower quality images from the missing petrol station CCTV where the man had pulled the mask down under his chin fully revealing his face.
>
> 21. The jury were given custody photos of the defendant taken 16 days after the robbery to allow them to compare the man in the footage with the man in the custody photo. They would also be able to observe Mr Bogie in the dock during the trial (which in the event lasted five days).
>
> 22. The jury also had a custody photo taken in December 2019 of Mr Bogie which they could use to test DC Sengelow's ability to recognize the man in the footage from the man he interviewed in December 2019. The Court in *Yaryare* at para 24 specifically identified the importance of the jury being provided with a custody photo showing a defendant's appearance the last time an officer purporting to recognize him would have seen him. The December 2019 photo showed that Mr Bogie had not changed his appearance.
>
> 23. The jury were thus able to use the CCTV footage … to assess the ability of the officers to recognize someone in it, in conjunction with everything else they knew about the circumstances of the recognitions (including the breaches of PACE)."

46. Mr Hopkins accepts that one of the more important failures in this case was that no contemporaneous note was made by the police officers as to which features had led them to recognise this Appellant in the footage. Nevertheless, Mr Hopkins submits that the recognition evidence was not inherently poor. He contrasts it with the case of *Smith*, where there was no recognition of the defendant's face at all; and the case of *Deakin*, where there was the bare assertion of recognition. In this case, in contrast, the officers did in due course (in the *voir dire*) give evidence as to the details which had led them to recognise the Appellant: for example DC Sengelow recognised the top half of the Appellant's face, by reference to the hair colour and length of hair. Further, Mr Hopkins points out that the jury were themselves able to observe the Appellant in the dock. The decision of this Court in *Yaryare* confirms that it is not inherently wrong for there to be such a comparison to be made by the jury.

Authority

47. As we have mentioned, in his ruling the Judge had regard to the decision of the Divisional Court in *Ebrahim*. In that case the Court held that, where a stay on the ground of abuse of process is sought on the basis that relevant material is no longer available, the Court should first determine whether the police or prosecutor had been under any duty to obtain and/or retain that material; but if there were no such duty there could be no question of the trial being unfair on that ground; though if there had been a breach of such a duty any unfairness resulting from it should normally be dealt with in the course of the trial; that no stay should be imposed unless the defendant showed on the balance of probabilities either that by reason of such a breach he would suffer serious prejudice to the extent that it was impossible for a fair trial to be held or that there had been such bad faith or serious fault on the part of the police or prosecution that it was not fair that the defendant should be tried.

48. In giving the judgment of the Court Brooke LJ said, at paragraph 25:

> "Two well-known principles are frequently invoked in this context when a court is invited to stay proceedings for abuse of process. (i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and prosecution, because the fairness of a trial is not all one-sided; it required that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. (ii) The trial process itself is equipped to deal with the bulk of the complaints on which the applications for a stay are founded."

49. At paragraph 26, Brooke LJ said that the power of a Court to regulate the admissibility of evidence by the use of its powers under section 78 of PACE is one example of the inherent strength of the trial process itself to prevent unfairness. The Court's attention can be drawn to any breaches by the police of the codes of practice under PACE, and the Court can be invited to exclude evidence where such breaches have occurred. That is of course what occurred in the present case.

50. At paragraph 27, Brooke LJ continued that it is commonplace in trials for a defendant to rely on "holes" in the prosecution case, for example a failure to take fingerprints of a failure to submit evidential material to forensic examination. He also noted that often the absence of evidence such as a video film is likely to hamper the prosecution as much as the defence.

51. Finally, at paragraph 28, Brooke LJ quoted what had been said by Lord Lane CJ in *Attorney General's Reference (No 1 of 1990)* [1992] QB 630, at 644:

> "… no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be

> held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court."

52. In the present case, the Judge was not satisfied that there would be "serious prejudice" to the Appellant by reason of the loss of the footage from which the stills had been taken.

53. The Judge also referred to the recent decision of this Court in *Yaryare*, in which Fulford LJ (Vice-President of the Court of Appeal, Criminal Division) summarised the authorities in this area of law as follows, at paragraphs 87-88:

> "87. … whether a failure to follow Code D renders the verdict unsafe will depend on the particular facts of the case, and the court will need to consider the extent and significance of any breaches of the Code and any consequential unfairness that have been caused (see *Deakin* at [28]).
>
> 88. … although the impact of the breach or breaches of Code will, therefore, vary between cases, two notable strands are to be discerned from the authorities. On the one hand, there are cases such as *Smith* and *Deakin* in which no contemporaneous record was kept and the recognition evidence was inherently poor. In *Smith* the recognition was based on no more than his stature and his clothing 'it's everything, it's not one particular thing, it's the whole really' but not including recognition of his face (see the judgment at [64] and [65]). In *Deakin*, the officer who suggested he recognised the appellant gave no details as to what features led him to this conclusion, and instead simply stated that he was in no doubt that the man in the green T-shirt was the appellant (see the judgment at [7]) having viewed the footage 3 times. On the basis that the evidence should have been excluded, the conviction in *Smith* would have been quashed had there not been additional material implicating the appellant and in *Deakin* the conviction was quashed. On the other hand, in cases such as *Chaney* [*R v Chaney* [2009] EWCA Crim 21; [2009] 1 Cr App R 35] and *Lariba* [*R v Lariba* [2015] EWCA Crim 478; [2015] Crim. L.R. 534], notwithstanding the failure to apply Code D (including in *Chaney* promptings by other officers that the defendant may be in the stills or CCTV footage), if a detailed explanation is given of the basis for the recognition, particularly when the jury is in a position to view the relevant material itself, it may—depending always on other factors—be fair to admit the recognition evidence."

Assessment

54. As both sides agree, the central ground on this appeal is Ground 1. We remind ourselves that this Court does not sit to re-hear the case as if it were the court of first instance.

55. The task which the trial court has to perform under section 78 of PACE is not strictly speaking an exercise of discretion because, if a court decided that admission of the evidence in question would have such an adverse effect on the fairness of the proceedings that it ought not to admit it, it cannot logically exercise a discretion to admit it: see *R v Chalkley* [1998] QB 848, at 874 (Auld LJ); *R v Twigg* [2019] EWCA Crim 1553; [2019] 1 WLR 6533, at paras 42-43 (Singh LJ); and *R v Boxall (Arthur)* [2020] EWCA Crim 688, at para 49, where it was said that the exercise of the judgment under section 78 is more properly described as "an evaluative decision ensuring there is a fair trial in accordance with Article 6 ECHR [European Convention on Human Rights]" (Spencer J).

56. Nevertheless, when considering an appeal from the decision of the trial judge, in particular when there have been breaches of the codes under PACE, this Court would have to be satisfied that no reasonable judge, having heard the evidence, could have reached the conclusion that he did: see *R v Quinn* [1995] 1 Cr App R 480, at 489 (Lord Taylor CJ); and *R v Dures (Thomas)* [1997] 2 Cr App R 247, at 261-262 (Rose LJ).

57. This Court will not interfere with the evaluative judgment of the trial judge simply because it might have taken a different view. Ultimately the test which this Court must apply under section 2(1) of the Criminal Appeal Act 1968, as amended, is whether a conviction is safe or not. If it is not safe, this Court must allow the appeal; if it is safe, the Court must dismiss the appeal.

58. In the circumstances of this case we have reached the conclusion that the convictions are safe. Despite the acknowledged breaches of Code D, which were multiple and significant, this case is one, in our view, where the judge was entitled to conclude that fairness did not require the exclusion of the recognition evidence of DC Arthur and DC Sengelow. The judge's rulings, which we have summarised above, are careful and thorough. He referred to the relevant authorities and applied the correct principles.

59. In essence we accept the Respondent's submissions, which we have summarised above. We bear in mind in particular the following features of this case. First, although the contemporaneous notes which should have been made in detail were not made, there was evidence before the court later, at the *voir dire*, in which the police officers did explain the precise reasons which had led them to recognise the Appellant. This was not a case of mere assertion. Furthermore, this was evidence which the jury were able to assess for themselves by comparing the visual images which were before them. We have also viewed the still images and the video footage for ourselves. With the exception of the still images where the male in them is unmasked, they are clear and of a good quality and most of the face can be seen, as the Covid mask covers the mouth but not the nose.

60. The fact that there were breaches of Code D and the weaknesses in the evidence were pointed out to the jury by the judge in his written directions and his summing up, as were the inherent dangers in relying on identification and recognition evidence. Accordingly, we reject Ground 1.

61. As for Ground 2, Miss Hall rightly recognises that this would not be sufficient on its own for the appeal to succeed. We do not consider that it adds anything of substance to Ground 1. As we have noted above, the Judge took careful account of the principles set out by the Divisional Court in *Ebrahim* and was not satisfied that there had been "serious prejudice" to the Appellant by reason of the loss of the footage from which the stills had been taken. This was potentially damaging to the prosecution case as it left "holes" in their case, which the defence were able to point out to the jury.

62. Turning to Ground 3, the classic authority of this Court on how a submission of no case to answer should be treated by the trial judge is *Galbraith*, at page 1042 (Lord Lane CJ). If there is no evidence that the crime alleged has been committed, the judge should stop the case. Where there is some evidence that it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence, (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty to stop the case; but (b) where the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the province of the jury and where, on one possible view of the facts, there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. There will be borderline cases but these can safely be left to the discretion of the judge.

63. Applying those principles to the present case, we do not consider that the judge was required to stop the case after the close of the prosecution evidence. This was a case in which the judge could properly conclude that the issues of fact raised by the evidence were ones that should be left to the jury to determine, after the necessary warnings he had to (and did) give them.

Conclusion

64. For the reasons we have given this appeal against conviction is dismissed.