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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **14/01/13**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

AARON WEIR and GARY COLIN CROMIE

Before: HIGGINS LJ, GIRVAN LJ and COGHLIN LJ

COGHLIN LJ (delivering the judgment of the court)

[1] Aaron Weir and Gary Colin Cromie ("the applicants") apply for leave to appeal against their convictions for robbery and, in the case of Mr Cromie, possession of an offensive weapon and criminal damage. Both applicants were convicted on 22 September 2011 after a trial before His Honour Judge Smyth QC and a jury commencing on 19 September. On 28 October 2011 His Honour Judge Smyth sentenced each applicant to a determinate sentence of 6 years imprisonment in respect of the conviction of robbery, 2 years and 6 months of that sentence to be served in custody and the remainder to be served on licence. In addition, Cromie received sentences of 9 months and 3 months concurrent respectively for the offences of possession of an offensive weapon, namely a hammer, and criminal damage. Separately, Mr Cromie had pleaded guilty to possession of a quantity of cannabis in respect of which he received a 3 months concurrent sentence. Mr James Gallagher QC and Mr Noel Dillon appeared on behalf of the applicant Cromie while the applicant Weir was represented by Mr Brian McCartney QC and Ms Niamh McCartney. Mr Paul Ramsey QC and Ms Sheena Mahaffey appeared on behalf of the Public Prosecution Service. The court is grateful to all sets of counsel for their carefully prepared and well marshalled written and oral submissions.

The factual background

[2] On 14 July 2010 Gareth Whiting and Emma Clarke were working in Aiken's Garage Store at Balloo, County Down. At about 8.30pm Gareth Whiting was working on paper returns and looking out through a window at the forecourt. In a

statement made to the police on the same day Gareth Whiting said that, as he looked out, he observed two males walking past the front of the premises whom he recognised as being from the local area. One, he recognised as the applicant Cromie who had been a fellow pupil at Comber High School. He described that individual as being 18 years of age, 6 ft. 2 inches tall, of medium build and having medium length brown hair which was "messy style" on top. He stated that he was wearing a light grey coloured top and dark bottoms. Gareth Whiting described the second male as being approximately 5 ft. 7 inches tall, of medium build and aged about 20 years with short light blond hair. He said that he was also wearing a light grey coloured hooded top and dark bottoms. He recognised the second male as the applicant Weir, whom he named as Aaron Seales, a person with whom he had attended Comber Primary School. He described how both men had walked across the forecourt close to the front of the premises from the direction of Killyleagh towards Lisbane at which point they had disappeared from his view. Mr Whiting said that, approximately 2 minutes later, he saw a man approaching the front door of the premises carrying what appeared to be a hammer in his right hand. The man struck the window of the front door with the hammer causing it to shatter, entered the shop and approached the till striking it with the hammer and shouting "give me all the money". Mr Whiting said that he immediately recognised the voice of Gary Cromie. He said that the second male had remained close to the front of the premises. Mr Whiting said that he had opened two tills from which he had removed money which was placed into a bag that the applicant Cromie had produced. Mr Whiting stated that the incident lasted approximately 2-3 minutes, that the applicant Cromie was wearing a black woollen balaclava with two eyeholes and black woollen gloves. He said that he could see Cromie's hair through one of the eyeholes and that it was brown in colour. Mr Whiting said that the second man, who stayed near the front door, was also wearing a black coloured balaclava and that, after the robbery, both men had run out of the front door and turned in the direction of Lisbane. It appears that approximately £350-£400 was taken from the premises.

[3] Emma Clarke was also working in the premises at the material time and she described how she had been brushing the floor of the shop when a male broke the glass in the front door with a hammer. She saw two males enter the shop and head towards the till area. One of them demanded money. Ms Clarke was frightened and went to the back of the shop where she remained with a female customer. She said that the male who had been carrying the hammer was wearing a black woollen mask, a grey hooded jumper and dark tracksuit bottoms. He was approximately 6 ft. in height and of medium build. She described the second male as dressed in the same manner with a black woollen mask and that he appeared to be of the same height and build as the man with the hammer.

[4] After telephoning two people connected with the premises, including the owner of the shop, Mr Whiting rang the police at approximately 8.50pm to report the robbery. The police Command and Control Log received the call and the description of the culprits was recorded as "both wearing grey hoodies … one 6 ft. 2 inches with balaclava the other approximately 5 ft. 5 inches … both wore gloves … the taller was

the one carrying the hammer." Constable Kelly arrived at the shop at 9.07pm when Mr Whiting identified the robbers as Gary Cromie and Aaron Seales, apparently another surname by which the applicant Weir was known. He described Gary Cromie as being 6 ft. 2 inches tall, approximately 18 years old and wearing a grey hoodie and black jeans while Aaron Seales was approximately 20 years of age, 5 ft. 7 inches tall wearing a grey hoodie and dark trousers. Constable Kelly also spoke to Emma Clarke.

[5] As a result of speaking to Mr Whiting and Ms Clarke Constable Kelly circulated descriptions of the suspects and the applicants were arrested on the following morning, 15 July, at premises at 11 Ardvanagh Meadows, Bangor. Both applicants were interviewed by the police and agreed that they had been on the forecourt of the garage store at about 8.30pm on the date in question but both denied carrying out a robbery of the shop. They told the police that they had been together from late afternoon fishing and had walked through the forecourt of Aiken's Garage to Balloo where they bought beer and cigarettes. They said that they then took a taxi to Carryduff and ultimately to Bangor where they went to the house occupied by the applicant Weir's girlfriend, Laura Gracie. They were arrested on 15 July at those premises. Both voluntarily surrendered items of their clothing to the police. During the course of the trial the applicant Cromie gave evidence in his defence but the applicant Weir did not.

The grounds of the application

[6] The single judge refused both applicants leave to appeal. Before this court counsel focussed upon two grounds in support of the applications:

(i) the quality of the evidence of identification of the applicants as the robbers; and

(ii) the contents and significance of a note passed from a member of the jury to the learned trial judge.

The identification evidence

[7] While he accepted that the learned trial judge had properly and effectively discharged his duty to direct the jury with regard to identification evidence in accordance with the decision of the Court of Appeal of England and Wales in R v Turnbull & Anor [1977] QB 224, Mr McCartney on behalf of the applicant Weir set out a number of matters which he submitted should have raised significant concerns about the evidence of Mr Whiting. These were as follows:

(a) Despite his assertion in his statement to the police that he had "immediately" recognised the individuals, Mr McCartney drew attention to the fact that Mr Whiting did not appear to have identified either of them or remonstrated with either of them during the course of the robbery.

(b) Despite his claim of immediate identification, Mr Whiting had not identified either individual to the police in his initial telephone call at 8.50 pm and, in giving evidence, he was unable to give a clear explanation as to why he did not provide the names until the visit of Constable Kelly to the shop.

(c) Mr Whiting seems to have told Constable Kelly that, prior to the robbery, he had seen two persons "acting suspiciously" outside the shop whereas in his police statement he simply referred to two males who had "walked past the front of the premises".

(d) In the course of his telephone call to the police Mr Whiting appears to have said that he heard the voices of both intruders whereas, in his statement, he referred only to the voice of the applicant Cromie.

(e) Mr Whiting estimated that the incident lasted for some 2 to 3 minutes while Ms Clarke estimated that the whole incident lasted about 30 seconds. There were significant differences between their respective descriptions of the offenders and it was difficult to reconcile Mr Whiting's reference to hair protruding through the eyehole of the balaclava with a contemporary photograph of the applicant Cromie.

(f) Mr Whiting gave one of the reasons for identifying the applicant Weir as the fact that they had both attended the same primary school but that must have been several years prior to the incident.

[8] Mr Gallagher adopted the submissions advanced by Mr McCartney with regard to identification and emphasised that, in the absence of any supporting forensic evidence, the prosecution case depended entirely upon a physical and voice identification carried out by a single witness.

The Note from the Jury

[9] During the course of cross-examination by Mr Dillon, on behalf of the applicant Cromie, Detective Constable Nesbitt confirmed that, subsequent to their arrest, a number of items of clothing had been seized from each of the applicants. He was then asked whether the items had been submitted for forensic analysis and, if so, whether any of the items, in the case of Mr Cromie in particular his jumper and footwear, had contained fragments of glass which might have been linked to the door panel in the premises broken during the course of the robbery. The Detective Constable confirmed that, during the examination of the scene, he had directed that glass samples should be taken from the smashed panel. However, he reminded the court that the clothing had not been seized until after the arrest of the applicants on the following morning and he said that, consequently, it could not be submitted for forensic analysis because of "the 4 hour rule". When the learned trial judge and counsel expressed puzzlement as to the existence and purpose of such a rule, the

Detective Constable maintained that it existed and that he had discussed it with his Supervisor. The Supervisor, in turn, had contacted a forensic manager who had confirmed that, because of the lapse of time, unfortunately, the clothing could not be usefully examined.

[10] Detective Constable Nesbitt was then cross-examined by Ms McCartney on behalf of the applicant Weir. She also referred to the absence of any forensic evidence to link her client to the alleged offences. At that point the learned trial judge drew the attention of counsel to the fact that he had just received a note from the jury and the following exchanges took place:

> "Judge Smyth:
>
> Actually I have just received some information about this from a member of the jury. The 4 hour rule is the percentage of glass fragments that is projected at 80% recovery rate. After 8 hours it drops to approximately 36%, after 12 hours it drops significantly to approximately 13%. And that apparently is the origin of what you have called the 4 hour rule.
>
> Mr Dillon:
>
> I have learned something.
>
> Judge Smyth:
>
> I think it is the rate of dispersion of glass fragments. I think we can accept from that, unless it is challenged, that there is a 4 hour rule and that you were told that there is no point examining the clothing.
>
> The Witness:
>
> That's correct Your Honour."

[11] Shortly thereafter the jury withdrew for lunch and the learned judge furnished the note to counsel after removing the number identifying the particular juror. With regard to the note the judge then observed:

> "I have no reason to question that, but I just don't know how accurate it is, but I imagine that it is not that – I have no reason either to confirm it or question it. I don't think it affects matters one way whatsoever. A member of the jury is doing a Diploma in Forensics and has studied glass issues. Now, whether those are accurate or

> inaccurate I don't know, but I don't think it affects the issues in this case, but counsel no doubt will address me if I am in any way incorrect."

[12] While the learned judge noted that the content of the note tended to indicate that a member of the jury had specialist knowledge, he also emphasised that, whatever the significance of the 4 hour rule, no clothing had been tested. Mr Dillon agreed that the thrust of his cross-examination had been to emphasise the dearth of any supporting evidence and that he was not making any strong submission with regard to the jury. During the course of his directions to the jury at the conclusion of the case the learned trial judge made no further reference to the note, the absence of any forensic examination of the clothing or the 4 hour rule and he received no requisitions from counsel with regard to any of those matters.

[13] Both Mr McCartney and Mr Gallagher were critical of the manner in which the learned trial judge had dealt with the note from the jury. Their criticisms included submissions that:

(a) The trial judge should have brought the note and its contents to the attention of counsel in the absence of the jury.

(b) That in reading out the note to the jury the learned trial judge was permitting the admission of expert evidence unsupported by objective data or the testimony of an expert witness. That was particularly important in a case which depended upon the identification evidence of a single witness and the observation by Detective Constable Nesbitt that "… we had very little evidence to go on and clothing was very important …" Detective Constable Nesbitt further observed that he knew from previous experience that if the offenders had smashed the window with a hammer in the manner alleged there was "… bound to be glass fragments on their clothing" and counsel reminded the court that both applicants had willingly surrendered their clothing when arrested by the police on the following morning.

(c) The juror who had been responsible for the note clearly had some form of specialised knowledge and it was impossible to say to what degree dissemination of that knowledge amongst the other members of the jury might have affected the outcome of the case.

(d) The reading of the note in the context of the evidence given by Detective Constable Nesbitt may have left the jury with the impression that no forensic examination was even possible after 4 hours thereby depriving the applicants of the opportunity to establish that such an examination had been carried out with negative results.

Discussion

The Identification Issue

[14] We have carefully considered the submissions advanced by counsel on behalf of both applicants with regard to the issue of identification in the context of the trial judge's directions to the jury. At an early stage in his charge the learned trial judge emphasised that the primary and only issue for the jury was "fairly and squarely" that of whether the applicants were the robbers and that was an issue of identification. Furthermore, he made clear that, from the prosecution point of view, the case depended "… wholly on the accuracy of one identifying witness, Mr Whiting." In such circumstances he emphasised that the truthfulness and reliability of such a witness were two separate matters. The learned trial judge gave detailed general directions about the risks inherent in cases dependent upon identification evidence and the need for caution on the part of juries when considering such evidence. He drew the attention of the jury to the differences in height and build contained in the description given by Ms Clarke observing that for Mr Whiting to be accurate her description must to some extent have been inaccurate. He also reminded them that Mr Whiting had not volunteered that he knew the robbers or given their names to the police in his telephone call nor had he manifested any sign of recognition during the course of the robbery.

[15] The trial judge specifically alerted the jury to the real possibility that a mistaken witness could appear very convincing and that this could even happen in cases of purported recognition. He reminded them that it was important not just to listen to the witness but also to take into account the circumstances in which the witness claimed to have made the identification or recognition and the degree to which any such identification or recognition was consistent with any other relevant evidence in the case.

[16] The learned trial judge reminded the jury that it was accepted by the applicants that they had walked past the store very shortly before the robbery and that, as they passed the window they had been correctly recognised by Mr Whiting. However, he pointed out that this had been a casual recognition and, as such, quite different from the stressful experience of confronting the robbers, both of whom wore balaclava masks. He reminded the jury that "voice recognition" had clearly played a significant part in Mr Whiting's conclusion that Mr Cromie had been one of the robbers and outlined to the jury the risks and difficulties that might arise in relation to such a form of identification. He also referred to the risk of "unconscious transference" which had been raised by Ms McCartney on behalf of the applicant, Weir. The judge suggested that this was really a "common sense" proposition, namely, that a witness might reach an assumed but wrong conclusion as to identification simply because of the short time between an accepted casual recognition and the stressful confrontation. The applicant Weir did not give evidence and the learned trial judge directed the jury that, in such circumstances, they could draw an inference that he did not have an answer to the identification evidence or an answer that would stand up to cross-examination. That was in accordance with the reasoning of Girvan LJ in R v McConville and Others [2012] NICC 10. However, in

doing so, he suggested that the support provided by any such inference might be very limited in the particular circumstances and again urged them to concentrate upon the strengths and weaknesses of the identification evidence itself. We consider that the learned trial judge properly directed the jury on the issue of identification and that they were entitled to arrive at the conclusion which they reached

The Note from the Jury

[17] The reference to the "4 hour rule" arose during the course of the evidence given by Detective Constable Nesbitt when, in an answer to questions about collecting forensic evidence, he volunteered that the clothing of the applicants had not been submitted to the Forensic Science agency because they had not been arrested and their clothing seized within 4 hours of the incident. He pointed out that the robbery had occurred at about 8.30 pm on 14 July and that the applicants had not been arrested until the following day in Bangor at 10.10 am. He confirmed that he had raised the issue with his superiors who, in turn, had clarified the attitude of the Forensic Science agency. It is clear that, on receipt of the note, its contents were read out twice by the judge in open court in the presence of the jury.

[18] In the absence of the jury, during the luncheon break, the learned trial judge made the note available to counsel and informed them of the course of study being pursued by the member of the jury by whom it had been provided. The judge suggested that the fact that no clothing had been tested was, in practical terms, "an end of the matter" but he invited counsel to address him with regard to the content of the note, any specialised degree of knowledge on the part of a member of the jury or to make any other relevant submission. Neither counsel indicated that they wished to do so and, in particular, neither counsel contended that, as a consequence of the appearance of the note, the relevant member or the entire jury ought to have been discharged from further duties. We note that when the note was first produced and discussed in the presence of the jury counsel had declined an opportunity to arrange for someone from the Forensic Science agency to attend and explain the 4 hour rule. Leave to call such a witness could have been given in accordance with R v Blick (1966) 50 Cr App R 280. We understand that the legal representatives of the applicant Cromie did make further inquiries with the forensic science facility after the trial and were informed that the rule was a rule of practice adopted by the agency in this jurisdiction but no application was made to this court to admit fresh evidence.

[19] In R v Karakaya [2005] 2 Cr App R 5 after the jury in a rape trial left court the jury bailiff discovered a number of documents downloaded from internet sites containing campaigning views about rape and the relationship between rape and the criminal justice system. The Court of Appeal Criminal Division observed that two linked bedrock principles of the administration of criminal justice and the rule of law had been contravened, namely, that of open justice and the entitlement of both prosecution and defence to a fair opportunity to address all the material considered by the jury in reaching its verdict. Similarly in R v Fricker (1999) 96(30)

L.S.G. 29 a note revealing significant specialised knowledge, that was capable of directly undermining the defence, on the part of one jury member was not delivered to the judge until just before a verdict was reached. By contrast in this case the content of the note was read in open court and counsel were afforded an opportunity to advance any submissions they wished including arranging for the attendance of a witness from the forensic science facility.

[20] We bear in mind that this was a very experienced judge who had to arrive at a practical decision in the circumstances of the particular case once the note had been read in the presence of the jury. The note purported to provide an explanation of the four hour rule apparently based upon the evidence becoming less conclusive with the passage of time. In the absence of any contrary submissions from counsel the learned trial judge took a practical decision to focus on the evidence that was before the court which was solely that of identification. As we have noted above, he concentrated his final directions to the jury upon the caution required when dealing with evidence of identification. He correctly directed the jury with regard to the burden and standard of proof, reminded them they should decide the case only on the evidence heard in court and firmly emphasised that there was no other evidence against the applicants. In particular, the CCTV system was not switched on, no balaclavas or hammer had been recovered and no fingerprints or traces of DNA had been found. He reminded the jury that, according to the applicant Cromie, both men had been wearing the same clothes they had worn the day before when they were arrested in Bangor on 15 July and that the clothing had been voluntarily surrendered to the police. While he did not specifically refer to the possibility of clothing being contaminated by glass fragments, the absence of a forensic examination or the note from the jury, no requisitions in relation to any of those matters were advanced by counsel at the conclusion of his charge.

Determination

[21] We have carefully considered the submissions advanced by counsel with regard to the manner in which the learned trial judge dealt with evidence of identification in the course of his directions to the jury. Having done so, we are not persuaded that any material error or misdirection has been established in relation to that issue.

[22] We have also carefully considered the content and provenance of the note from the jury and the manner in which it was introduced during the course of the trial. While it might well have been dealt with by the learned trial judge in a somewhat different manner, we are not persuaded that, in the circumstances of this case, the pragmatic approach that he adopted with the offer to call a relevant witness, his invitation to counsel for submissions and his emphasis to the jury that the only evidence for them to consider was that of identification rendered these convictions unsafe in the circumstances. Accordingly, these applications will be refused.

[23] For the benefit of future guidance we would suggest the following approach:

(i) Initially the trial judge should give careful personal consideration to any note or other written communication received from the jury for the purpose of determining the appropriate course of action.

(ii) Apart from cases in which the note refers to something completely unconnected with the trial or contains material that ought not to be disclosed by the jury, such as voting figures, the contents of the note and the judge's proposed response should be communicated to the defence and prosecution in open court but, initially, in the absence of the jury. The note itself should be made available for examination by the legal representatives of both parties unless there is some specific reason not to do so (R v Gorman [1987] 1 WLR 545).

(iii) Unless there is some good reason not to do so, it is good practice to invite counsel to make any representations they may feel appropriate with regard to the proposed answer.

(iv) Depending upon the content and form of the note it may be necessary to discuss with counsel whether a need has arisen to consider giving a carefully crafted direction dealing with the matter, calling further evidence or discharging a particular juror or the entire jury.

(v) Once an agreed response has been determined with the assistance of counsel the jury may be recalled and the answer delivered, once again, in open court. Each case is fact specific. The particular form of answer will depend upon the particular circumstances of the case and the note or other communication. Responses might include, for example, a reminder of an oral direction already delivered, a further oral direction emphasising the duty to consider only the evidence given during the trial or a specific written direction on a matter of law.