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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

WILLIAM RAY LAMONT

Before: Nicholson LJ, Campbell LJ and Gillen J

NICHOLSON LJ

Introduction

[1] William Ray Lamont ("the appellant") has appealed against his conviction on 30 May 2002 before Her Honour Judge Philpott QC ("the judge") and a jury on two counts of an indictment. Leave to appeal against conviction was given by the single judge. He has not appealed against the sentence of 16 months' imprisonment suspended for three years on both counts.

[2] The particulars of the first count were that the appellant (with two other men, Thomas Diver and Cecil Crumlish) on 7 June 1996, with a view to gain for himself or another or with intent to cause loss to another, dishonestly obtained the execution by Albert Ballentine of a valuable security, namely a Northern Bank cheque, number 205950, in the sum of £15,000 by deception, that is to say, by false oral representations that he, the appellant, was known as "Billy Wright", a person who owned plant and machinery in England being purchased by Diver and Crumlish, partly financed by Albert Ballentine and that business commitments in South Africa necessitated him going there and that he owned and would sell to the said Albert Ballentine a Mitsubishi Jeep for £20,000 whereas in truth and in fact these representations and others were false.

[3] The particulars of the second count were that the appellant, with Diver and Crumlish and a person not before the court, on 16 June 1996 dishonestly obtained the sum of £100,000 from Albert Ballentine with the intention of permanently depriving him thereof by deception, that is to say, by false oral representations that the person not before the court was the representative of a person known as "Billy Wright", empowered to receive the said money and transmit it to the said "Billy Wright" whereas in truth and in fact this was part of a deception in respect of the financing of a plant and machinery deal in England which did not exist or was not intended to be completed by the persons involved.

[4] Mr John Orr QC who appeared with Mr McNeill for the appellant informed the court that the only issue on the appeal was whether the applicant was "Billy Wright". His contention was, as set out in the Notice of Grounds of Appeal, that the judge erred in law in allowing the case to go to the jury for the following reasons: (a) on a proper application of the Turnbull guidelines she should have withdrawn the case from the jury; (b) the injured party [Albert Ballentine] was the sole identification witness and in considering his evidence the judge should have had regard to the following – (i) his comments at the identification parade, which was on video and shown to the jury; (ii) his evidence, through no fault of his own, was not strong due to confusion and vagueness – it was poor and unsupported. The grounds of appeal were supplemented by a written skeleton argument and oral submissions which are discussed later. Ms Jacqueline Orr QC and Mr Connell appeared for the Crown.

Evidence of identification

[5] Mr Ballentine, who was 70 years of age at the time of the trial, gave evidence that he met "Billy Wright" for the first time at the PSV Centre in New Buildings, Co.Tyrone in June 1996. Diver and Crumlish, whom he already knew, came there in a van with Wright and came over to his jeep which he had parked there. Diver introduced him to "Billy Wright" who got into the back of the jeep. He could not remember whether "Billy Wright" sat directly behind him or sat behind the front seat passenger nor could he remember whether there were headrests in the jeep. It was daylight and they talked for about ten minutes. He himself was a devout member of the Church of Ireland and had committed his life to the Lord from the age of 27. "Billy Wright" told him that he too was a member of the Church of Ireland, originally from Southern Ireland but now living in London. Much of their discussion would have been about the work "Billy Wright" was doing for the Lord which included the distribution of tracts and new testimonies (sic) for the Lord and Wright's hope that Diver and Crumlish would have religious "conversions". Wright said that he worked with the travelling community of whom Diver and Crumlish appear to have been members. Mr Ballentine formed the impression that Wright was a genuine Christian man.

[6] There was a discussion about the sale by "Billy Wright" to him of a Mitsubishi Shogun Jeep which Wright told him was "almost new", "the back of the vehicle had never been sat in" and "it was in good shape and good order." There was also talk between him and Wright about Wright's need for £100,000 in cash in order to complete a deal in England involving the purchase of machinery by Wright which was worth £300,000. He was led to believe that "Billy Wright" was a genuine person by the way that he talked to him and put himself across. Subsequently he wrote a cheque for the purchase of the Mitsubishi Shogun at £15,000 and cashed a cheque for £98,000, adding £2,000 from his own personal account at home in cash which he handed over to another man not before the court on behalf of "Billy Wright" in the presence of Diver and Crumlish. He never saw the money again and he never saw the Mitsubishi Shogun. Thus he lost £115,000.

[7] Mr Ballentine told the court that he later received an envelope posted from London in which were five photographs of a Mitsubishi Shogun. He assumed that the photographs were sent to prove that "Billy Wright" had such a vehicle. The envelope and the photographs were taken into the custody of the police. "Billy Wright" subsequently telephoned him from Dublin asking him to advance VAT money in respect of the machinery as he was "in trouble with the customs" but he had no further dealing with Wright. As the letter was posted on 5 June 1996 the meeting with "Billy Wright" must have been at the beginning of June.

[8] When he discovered that he had been deceived, Mr Ballentine went to the police. He gave a description of "Billy Wright". He was, he said, 5ft 8 inches to 5ft 9 inches tall, had a roundish face, was clean shaven, had short black hair going grey and was about 50 years of age, maybe 45 and of stocky build. At an interview with the police in November 1998 the appellant gave his date of birth which indicated that he was 52 at the time of the offences. At another interview a detective described him as 5ft 5 inches to 5ft 6 inches tall, stout build, ruddy complexion, white hair combed back thinning on top, clean shaven, glasses, tidy appearance. The judge pointed out to the jury that the appellant had white hair in 1998, not short black hair going grey and that there was no evidence as to his actual height.

[9] On 26 November 1998 Mr Ballentine went to Donegall Pass RUC Station to attend an identification parade. He was brought into a room where there were a number of men sitting down and asked if he recognised anyone in that line-up. He did recognise a person and after pondering for a short time and viewing the people in the line he came to the conclusion that number 7 in the line was "Billy Wright". This was the appellant. A video-recording was shown to the jury of Mr Ballentine picking out the appellant on the parade as "Billy Wright". He was told that he had been brought there to see if he could pick out "Billy Wright". He was told that the person might or

might not be there and if he could not make a positive identification he should say so. He was to walk along the parade at least twice, taking as much care and time as he wished. He would then be asked whether the person was on the parade and, if he was, to identify him by reference to his number on the parade. He then walked along the parade. The video-recording showed him picking out the appellant. In answer to the question whether he, "Billy Wright" was there, he replied: "Yes, I think so". Then he paused, said "Yes" paused again and said: "Number 7". In cross-examination he said that he had a small doubt, that he was not 100 per cent sure. He was well at the time of his meeting with "Billy Wright" in June 1996 and at the time of the identification parade. During the period in between those events he had two strokes.

Supporting evidence

[10] Expert evidence established that the envelope containing the five photographs was posted to Mr Ballentine from Tottenham Post Office on 5 June 1996. A police officer gave evidence that the distance between the appellant's home in London and the post office was two miles and that there was one post office nearer his home than Tottenham Post Office.

[11] Expert evidence established that the five photographs sent in the envelope to Mr Ballentine were taken by a polaroid camera. The same camera could have taken a photograph (of a red and black lorry) found in the appellant's home as the result of a police search. The camera itself was not found in the house. A mobile phone belonging to the appellant's son (who lived in his father's house) was also taken from the appellant's home.

[12] On a date unknown, Crumlish was found by a police officer to have an envelope (or note) in his possession on the back of which the name "Billy" and two numbers were written. The numbers were 8087309 and 0463523006. These were (a) the telephone number of the business premises of the appellant's son and (b) the telephone number of the appellant's son's mobile phone seized from the appellant's home (save that the correct number was 0468523006). This "note" was found on Crumlish before the appellant was arrested but it was not established when the two numbers were written or by whom they were written. The judge ruled that this was not supporting evidence.

[13] The appellant was arrested on 24 November 1998 at his home in North London. As stated, it was two miles from there to Tottenham Post Office. He was brought back straightaway to the police station at Strand Road, Londonderry and interviewed there under caution in the presence of his solicitor. The interviews were tape-recorded. When asked whether he knew Mr Ballentine or had ever used the name "Billy Wright", he replied: "No comment". He gave the same answer to a number of questions alleging

fraud. He did answer questions about his family. He said that his son had a mobile phone but he did not have one; he used his son's phone. He said that the number of this mobile phone which had been seized from his house that morning was 0463523006. These same figures on the note found on Crumlish contained the same error. An inference might have been drawn that he gave the incorrect number to Crumlish or that he wrote the number down on the note found in the possession of Crumlish but, as stated, the judge ruled it out. After the identification parade on 26 November 1998 which Mr Ballentine attended, he said: "The gentleman has made a mistake." When talking about his family he said that he visited his daughter in the Shankill area about half a dozen times in the previous five years. He was born and reared there.

[14] Mr Orr QC applied for a direction that the case should be withdrawn from the jury after the close of the prosecution case. The judge gave her ruling in writing, doubtless after the evidence was completed. She referred to his first argument that the prosecution evidence fell within the second limb of R v Galbraith [1981] 73 Cr.App.R 124 and to a number of points made by him in support of the argument. She stated that the matters raised "clearly go to credit and are the province of the jury". His second argument was, she said, based on the principles in Turnbull's case. She reviewed the evidence and referred to Mr Lynch QC's submission for the prosecution. She stated that having heard the evidence of identification given by Mr Ballentine and having had the advantage of observing his demeanour, she was of the view that he was confident, although allowing for the possibility of mistake, that he had picked the right man. The supportive evidence was (1) that the accused came from North London, (ii) that a letter containing the photographs of the jeep and posted to Mr Ballentine came from a post office in Tottenham about two miles from the accused's home, (iii) that a polaroid camera was found in his house [she was corrected about the finding of the camera] similar to the type of camera which took the photographs of the jeep sent to Mr Ballentine, (iv) in the two years prior to arrest and interview Mr Lamont admitted that he had been in Northern Ireland to see his daughter. She rejected the other evidence advanced by the Crown as supporting evidence.

She stated that the identification evidence of Mr Ballentine was not of such a weak or poor quality intrinsically that it could not be left to the jury particularly in view of the evidence which was capable of being supportive. Accordingly she rejected the application for a direction.

Arguments on the appeal

[15] The skeleton argument submitted on behalf of the appellant relied, firstly, on the Turnbull guidelines. The quality of the identifying evidence was poor and unsupported and, accordingly the judge should have withdrawn the case from the jury, it was contended.

The Crown had put forward four matters in support of the identification evidence. The judge accepted two of them and added a matter which was not canvassed. One of the Crown contentions about the polaroid camera fell as it did not accord with the evidence. The remaining Crown contention was of very limited value. Furthermore, the use by the judge of the appellant's statement in interview that he had visited his daughter in Northern Ireland was weakened by an absence of any evidence before the jury as to when he made these visits. It was further argued that the differences in description by Mr Ballentine and his comments at the identification parade should have strengthened the application to remove the case from the jury.

Secondly, reliance was placed on the principles enunciated in Galbraith and Shippey [1988] Crim.L.R. 767. The judge should therefore have stopped the trial at the end of the prosecution case. As to the supporting evidence he contended that the posting of an envelope two miles from the appellant's home in London was not significant. It might have been so in a rural setting. The photographs found in the appellant's home could not be linked with the building yard owned by the appellant's son. It was incorrect to state that the polaroid camera was found in the appellant's home. The argument advanced by the Crown that the use of the Christian name "Billy" was significant was ignored by the judge and not mentioned to the jury. There were no fingerprints on the stamps, on the envelope or the photographs nor was any DNA found on them. The evidence about the telephone numbers was ruled out. The "supporting evidence" relied on by the judge was, therefore, such that it should not have been used to confirm the evidence of Mr Ballentine.

[16] The identification evidence was of poor quality. "Billy Wright" was in Mr Ballentine's vehicle in daylight for ten minutes at most. There was a front seat passenger who was not "Billy Wright". Mr Ballentine was unable to say whether Wright sat behind him or behind the front seat passenger although he thought it more likely that Wright sat behind the front seat passenger. He was unable to recollect whether there were headrests. He did not spend all his time in conversation with Wright. He agreed that the period spent in the vehicle might have been slightly less than ten minutes. There was not necessarily eye to eye contact. He was able to gauge Wright's height as he walked over from the van to Mr Ballentine's vehicle. This differed from the detective's estimate. There was a gap of almost two and a half years before the identification parade. The court was aware of the comments made by him at the identification parade. In cross-examination he said that he could not be 100 per cent sure of his identification. He referred to Archbold at 14-7:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a

> longer observation made in difficult conditions….the judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

He referred to Daley v The Queen [1994] 1 AC 117 – relying on the headnote:

> "*Held*, allowing the appeal, that where the trial judge considered that the quality of the identification evidence was poor and insufficient to found a conviction, and there was no other evidence to support that identification evidence, he should withdraw the case from the jury at the end of the prosecution case; but that where the strength of the prosecution evidence depended on the determination of a witness's reliability, and on one possible view of the facts there was evidence upon which a jury could properly convict, the judge should not stop the trial even if he regarded the prosecution evidence as uncreditworthy but should leave the case to the jury; that since the trial judge had rationally considered the prosecution's case on identification to be too weak to sustain a conviction she should have withdrawn the case from the jury with a direction to acquit the defendant; and that, therefore, a miscarriage of justice had occurred and the conviction would be quashed."

We note that the judgment of their Lordships was delivered by Lord Mustill. At 129D he said:

> "A reading of the judgment in *Reg v Galbraith* [1981] 1 WLR 1039 as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. By contrast, in the kind of identification case dealt with by *Reg v Turnbull* [1977] QB 224 the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and

> therefore not sufficient to found a conviction and indeed as *Reg v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the "quality" of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible course of injustice. Reading the two cases in this way, their Lordships see no conflict between them."

[17] Ms Orr QC for the Crown submitted that this was not a weak identification case. It did not come within the Turnbull guidelines as to stopping a case from going to the jury. It was an identification not made in difficult or distressing circumstances. The discussion which Mr Ballentine had with "Billy Wright" about religious faith was one about which he felt deeply. The rest of the discussion was about business matters, not trivialities. It was daylight and "Billy Wright" was in his company for ten minutes. The judge and jury saw a video-tape recording played twice and could judge Mr Ballentine's demeanour at the identification parade.

In her ruling at the close of the Crown case the judge had rejected two points, namely, the finding of the telephone numbers referred to at [12] and the use of the name Billy when the appellant was called William or Billy but took into account the posting of the envelope and the polaroid photos, correcting her error that the polaroid camera was found in the appellant's home. The fact that the appellant admitted coming to Northern Ireland yearly was capable of being supportive evidence. Mr Ballentine had picked out a man from North London who did visit Northern Ireland, whose home was close to the place where the envelope containing the photographs of the jeep was posted and who had access to a polaroid camera which could have taken the photographs.

Our conclusions

[18] We do not consider that the evidence of identification came within the guidelines set out in Turnbull which require the judge to withdraw the case from the jury and direct an acquittal in the absence of supporting evidence. The judge had, as the jury had, the opportunity of observing the demeanour of Mr Ballentine in the witness-box. The judge had an opportunity of seeing twice the video-tape of the identification parade and of hearing what was said by Mr Ballentine. She heard the evidence of the inspector who conducted the parade. She heard Mr Ballentine describe his meeting with "Billy Wright" and his attendance at the identification parade. It was, we consider, a matter for the jury to decide whether the identification by Mr

Ballentine was a positive one or a qualified one, bearing in mind what he did and said at the parade and what he said in the witness-box.

[19] In addition the judge relied on three pieces of evidence as capable of supporting the identification at the close of the Crown case. Mr Ballentine had picked out a man whose home was in London. Shortly after he met "Billy Wright" and had a conversation with him which included an offer by Wright to sell him a Mitsubishi Shogun, an envelope arrived by post addressed to Mr Ballentine containing five photographs of a Mitsubishi Shogun. It had been posted in London near or at a post office two miles from the appellant's home. There was one post office nearer his home. It could have been a coincidence but in our view it was also capable of supporting the identification and the judge was entitled, as she did, to leave it to the jury as a piece of evidence capable of providing such support. In addition, at the close of the Crown case but not at the time when she was directing the jury, she relied on the fact that the appellant had access to a camera capable of taking the photographs. The effect of the evidence was that the photographs could have been taken by a polaroid camera which had been used to take a photograph seized from the appellant's home. The actual camera was not found but the appellant had access to it. Again it could have been a co-incidence but it was also capable of providing support for the identification. She also held that the fact that the appellant admitted at interview that he visited Northern Ireland once a year or so "to see his daughter", was capable of supporting the identification. Mr Ballentine had picked out on the parade a man from London who might never have been in Northern Ireland.

[20] She rejected as supporting evidence the fact that one of the two people, who accompanied "Billy Wright" to New Buildings and sat in Mr Ballentine's jeep for ten minutes, was found at a later stage to have in his possession an envelope on the back of which was written the mobile telephone number of the appellant's son and the business telephone number of his son, seemingly because there was no evidence as to when it was found. The word "Billy" was also written on it. As she ruled it out, we must ignore it. She directed the jury that they should ignore all evidence other than the posting of the envelope with the photographs from Tottenham Post Office as supporting the identification. The appellant got as favourable a direction from the judge as he could have hoped for.

[21] We refer to the decision of this court in The Queen v Pollock (2004) NICA 34. Kerr LCJ referred to R v Galbraith [1981] 1 WLR 1039. He pointed out that the Court of Appeal in *Galbraith* was careful to warn that where there was evidence whose reliability fell to be assessed by the jury, it would not be right to stop the case, whatever view the judge had formed of it. We respectfully adopt that statement, adding that in the present case the judge had no misgivings about allowing the case to go to the jury.

[22] As to the safety of the conviction we refer to paragraph [32] of the judgment in Pollock in which the Lord Chief Justice stated:

> "(1) The Court of Appeal should concentrate on the single and simple question "does it think that the verdict is unsafe?"
>
> (2) This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> (3) The court should eschew speculation as to what may have influenced the jury.
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> (4) The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

This court does not have any sense of unease about the correctness of the verdict, let alone a significant sense of unease.