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Judgment: approved by the Court for handing down | ***Delivered:*** **24/02/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

LEE HOSIE

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Before: Morgan LCJ, Weatherup LJ and Keegan J

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MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against the appellant's conviction at Belfast Crown Court on 29 January 2016 in a trial before His Honour Judge Grant sitting with a jury of the following three counts:

1. Possession of a firearm or imitation firearm with intent to cause fear or violence, contrary to Article 58(2) of the Firearms (NI) Order 2004
2. Threats to kill, contrary to section 16 of the Offences Against the Person Act 1861
3. Making off without paying, contrary to Article 5(1) of the Theft (NI) Order 1978

The appellant was sentenced to a determinate custodial sentence of 4 years imprisonment comprising 2 years in custody and 2 years on licence.

The issues in the appeal concern the determination of whether a proposed witness was an expert and the directions that a judge should give in circumstances where an accused does not call witnesses who appear to have been able to give relevant evidence on his behalf. Mr Turkington appeared on behalf of the appellant and Mr McClean for the PPS. We are grateful to both counsel for their helpful oral and written submissions.

Background

[2] The prosecution case was that at 11.48pm on 3rd December, 2012 a call was made to Value Cabs for a taxi to bring a fare from the Mount Vernon area of Belfast to Donegall Pass. A taxi driver called Philip Rush was dispatched to Ross House in Mount Vernon to collect the fare. Although the driver was expecting a female passenger the appellant, who had a strong smell of alcohol coming from him, got into the front passenger seat and confirmed that the taxi was for him and that he wanted to go to Donegall Pass.

[3] Mr Rush's evidence was that, *en route,* the appellant was speaking on his phone during which he told the person on the other end that 'he was only doing what he had been told and that he would be getting £100 as usual this morning for what he got.' Mr Rush records that the appellant then said that he was told the 'the Provies had fired a shot from the Short Strand' and he kept saying, 'I can't say too much, you know the score.'

[4] He then repeated that report of the shot being fired to Mr Rush when the phone call had ended before asking him if he was 'a prod or a taig.' The appellant then referred to time that he had spent in prison and rhymed off his prison number to Mr Rush, becoming aggressive and agitated in the process. When Mr Rush then braked at the lights near Belfast Metropolitan College in the city centre he heard the dull thud of something falling from the appellant's jacket or lap into the front passenger foot well. Mr Rush said he looked over and saw a black finished handgun similar to police Walther type pistols. He stated that the appellant then picked it up, put it over to the other side of his lap and said, 'mind your own business.'

[5] For the remainder of the journey Mr Rush said that the appellant was repeating, 'you must be a taig.' On turning into Donegall Pass the appellant made another phone call and asked, 'Do you want me to go to the hide or where?' Mr Rush was then handed the phone to allow the other person to explain directions to Rainey Way in Donegall Pass.

[6] The appellant got out on arrival there to speak to an associate, one of two who were waiting adjacent to a silver Peugeot 307, and then returned to the driver's side of Mr Rush's taxi. Mr Rush assumed that this was to pay the fare but the appellant bent down at the window and produced a gun and said, 'the next time you are cheeky with me I'll blow your fucking brains out.' And then, 'I'll fucking shoot you.' One of the associates is then reported to have said, 'Here you, wind your fucking neck in. We've more important stuff to do.' Mr Rush also recorded the appellant as saying, 'You're lucky that I only have a couple of rounds otherwise you'd be getting it.' Mr Rush then reversed back out and the appellant walked away towards his associates.

[7] In his initial interviews on 7 February 2013 the appellant denied being in the taxi. Mr Rush then identified him in a VIPER procedure on 18 August 2013. The appellant was interviewed again on 8 January 2014 but still denied being in the taxi

and said that he had been in his flat all night. However, in his defence statement filed on 14 November 2014 some 2 months before the anticipated date of the trial, he accepted that he had been in the taxi. He claimed that there had been a disagreement about the fare. He had been rude to the taxi driver and accused him of over-charging. He further claimed that a friend had paid the balance of the full fare as he did not have enough money. He denied having possession of a firearm or anything resembling one. He may have had some tins of beer in his pocket. He claimed that he had given a false account at interview because he was scared when he heard the allegations and told the police that he was not in the car.

The issues in the appeal

[8] In preparation for the trial the appellant's advisors retained the services of John McGlinchey of Forensic Engineering Solutions. Mr McGlinchey is an Incorporated Engineer and a Member of the Institute of Engineering and Technology. He holds two MSc science degrees. It had not been possible to inspect the particular vehicle which Mr Rush had been driving as it was owned by the taxi company and had been sold on at auction. By means of a third-party disclosure application the registration documents and invoice for the vehicle were obtained and Mr McGlinchey examined a Skoda vehicle of the same type used by Mr Rush.

[9] He took photographs from the area of the driver seat. He did not make any adjustments to the positions of the seats and left these as the taxi driver had positioned them. One photograph showed that with no one present in the front passenger seat there was a clear view of a small part of the passenger footwell. Mr McGlinchey prepared a report in which he referred to this photograph but did not comment on whether that view would have been affected by any change in the position of the seats. In another photograph there is a large man sitting in the passenger seat. The prosecution point out that this man is not the appellant but the taxi driver who is considerably larger than the appellant. The photograph shows that the position adopted by the taxi driver in the passenger seat prevents any sight of the foot well. In his report Mr McGlinchey asserts that with a passenger present the passenger's legs completely obscure any visibility of the footwell area.

[10] The photographs were admitted without objection. Mr Turkington sought to rely upon Mr McGlinchey as an expert and to have him called to give evidence as such. The PPS did not object. The learned trial judge refused to allow Mr McGlinchey to be called to give opinion evidence on whether a weapon dropped in the circumstances described by the appellant could have been seen by the taxi driver. He indicated that this was not expert evidence and there was a real danger that the jury would be misled by giving weight to evidence labelled as expert evidence on one of the issues which it was for them to decide. The judge also noted that Mr McGlinchey's expert's declaration did not adopt the format required in civil cases in this jurisdiction or any of the forms recommended by the Academy of Experts or the Expert Witness Institute.

[11] The leading authority on the test for the admissibility of expert opinion evidence is the Australian case of R v Bonython (1984) 15 ACR 364:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts:
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> (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience, and
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> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
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> The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

[12] In its 2011 final report *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No. 325) the Law Commission proposed that expert evidence should be sufficiently reliable, having regard to a number of specified factors, in order to be admitted. Those proposals were never enacted but have largely been incorporated in England and Wales in the Criminal Practice Directions 2015, Division V. Those provide that the factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes

proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other any testing), or which has failed to stand up to scrutible assumption;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

We would encourage those considering the admission of expert evidence to pay close attention to these factors dealing with the reliability of proposed expert opinion evidence.

[13] Those factors really bear, however, on the second part of the first question and the second question identified in Bonython. In this case the real issue turns on the first part of the first question. The expert evidence which it was proposed to call

was as to the view available to a taxi driver of the foot well in a vehicle of this type. Apart from taking photographs the proposed expert did not take any measurements, did not assess what if any impact might arise as result of a change in the position of the seating and did not make any assessment of the impact of any change in the manner in which the legs of the passenger were arranged. The opinion depended entirely upon the view shown within the photographs. In our view this was plainly a matter upon which the jury were perfectly capable of forming a sound opinion without special knowledge or expertise. To adduce expert opinion evidence on that issue would have been to mislead the jury as to their function and would have diverted them from their task. The learned trial judge was perfectly correct to decline to admit Mr McGlinchey's evidence as expert opinion evidence.

[14] Mr Turkington submitted that in the absence of a challenge from the PPS the court should in any event have admitted the purported expert evidence. He relied upon R v Reed and another [2009] EWCA Crim 2698 at [113]:

> "**[113]** Third, unless the admissibility is challenged, the judge will admit that evidence. That is the only pragmatic way in which it is possible to conduct trials, as sufficient safeguards are provided by Pt 3 and Pt 33 of the Criminal Procedure Rules to which we refer at para 129 below. However, if objection to the admissibility is made, then it is for the party proffering the evidence to prove its admissibility: see *Atkin and Atkin,* at para 9:
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>> 'This case therefore does not raise any question as to the judge's power at common law to exclude evidence tendered as expert, if it be argued that the expert is insufficiently qualified or that his evidence is insufficiently based upon expertise. We say no more about that than that there can be no doubt that such a power exists. That is because he who asserts admissibility must demonstrate it. Evidence of opinion is not ordinarily admissible. Opinion based upon identifiable expertise outside the experience of the jury is one exception. If objection be taken to admissibility (though not otherwise) it must be determined by the judge. It is for him who tenders such evidence to establish the exception, viz the expertise and that it is the foundation of the

> opinion. The power to rule on admissibility applies equally to Crown and defence'."

[15] Although we well understand the pragmatic attraction of admitting expert opinion evidence to which no objection is taken it must be remembered that it will be the task of the trial judge to direct the jury as to its assistance in determining the issues before them. Where, as in this case, it becomes apparent to the trial judge that the proposed expert evidence does not appear to relate to a matter which is properly the subject of expertise in the particular case we would encourage judges to raise the issue with counsel prior to the admission of the evidence and make a determination on admissibility.

[16] After the trial judge's ruling on expert evidence Mr Turkington indicated that an agreement had been reached between the prosecution and defence that it would be put to Mr Rush that Mr McGlinchey had sat in a similar vehicle without adjusting the seat and would have said that he could not see anything in the footwell. The learned trial judge indicated that it was not appropriate to put the question in terms of what the witness was going to say but that the issue of the view could still be put to him. An agreed statement of facts was apparently drawn up at a later stage between counsel but the defence elected not to use this. Mr Turkington sought to call Mr McGlinchey as a non-expert witness to give evidence of what he was able to see having inspected the vehicle although it appears that he also intended to introduce Mr McGlinchey's professional qualifications. The learned trial judge was obviously concerned about the impression that might be created that this was expert evidence and declined to allow Mr McGlinchey to be called.

[17] We accept that the evidence of what Mr McGlinchey saw was *prima facie* relevant and therefore admissible. We also accept, however, that it was important that the jury should not treat this as expert evidence. There was no proper basis upon which Mr McGlinchey's professional qualifications were relevant in this case. We do not consider that the prohibition on calling Mr McGlinchey to prove what he could see affected the run of the case or called into question the safety of the conviction. The photographs were before the jury and the information relating to the issue was plainly before them.

[18] The second issue raised by the appellant concerned the following passage in the judge's charge:

> "Now you have heard mention of alibi. The defendant on his own evidence had a clear alibi, you may think. You may say and you would be entitled to accept this in answer to some questions that I asked him, that two people were available to him who could say that he did not have a gun in the circumstances, that he did not show it, he did not point it at Mr Rush or at any time threaten to blow his head off. They

were present. He told you they saw this and they would be in a position to give evidence about that.

At the first interview the defence said that he had no alibi, although in fairness to him you should bear in mind that this was at a time when he admits he was telling lies by denying that he was ever in the taxi.

Now, however, he asks you to believe that he is telling you the truth and you are entitled to ask yourselves why did he not tell the police about his alibi and rely upon it before you."

[19] Although this is characterised as alibi evidence the real issue is the extent to which the judge was entitled to comment in relation to the failure of the appellant to call potential witnesses. The approach which should be taken to this has been set out by the English Court of Appeal in R v Khan [2001] EWCA Crim 2001:

"17. In the absence of guidance, juries will inevitably speculate first as to why an apparently relevant witness has not been called, and secondly, as to what evidence that witness might have given had he been called. There will be situations in which the jury are entitled to ask themselves why the defence have not called a witness, as acknowledged in *Gallagher* and *Wilmot*. A universal requirement to direct the jury that they must not speculate as to why a witness has not been called might, as between prosecution and defence, work unfairness in some situations. On the other hand, to give no direction may be to invite speculation and thereby to work injustice. To comment adversely may work injustice to the defence because there may be a good reason, but one which in some circumstances it would be unfair to disclose to the jury, such as previous convictions which may damage the defendant by association, why the witness has not been called. Moreover, there may be an issue between prosecution and defence as to whether a witness is available. The judge cannot be expected to try an issue as to availability before deciding whether or not to comment on the failure to call the witness.

18. There is no simple answer to the problem and much depends on the judge's sense of fairness in the particular situation. In our minds, (as of those of the Court in *Wright*) the dangers of making adverse

> comments and of failing to warn the jury not to speculate will usually be the paramount consideration. On the other hand, now that a defendant's failure to give an explanation in interview or his failure to disclose his case in advance may be the subject of comment, the case for permitting comment on failure to call an available and obviously relevant witness may be stronger. The absence of power to comment would be an encouragement to dishonest evidence naming persons alleged to know of relevant events, if they can be named in the certain knowledge that the jury will be directed not to speculate on why they have not been called."

[20] The learned trial judge had earlier given a direction about the importance of not engaging in speculation. This was a case in which the appellant maintained that the witnesses were available. On the appellant's case they saw everything that happened and indeed engaged in paying off the taxi driver. Against a background where the appellant had already given a lying account about his movements on the evening in question it would in our view have been inappropriate to leave this issue in the air without giving the jury some measure of direction. We consider, therefore, that despite the well-known dangers associated with the drawing of an adverse inference this was an appropriate case in which to give the direction.

Conclusion

[21] For the reasons given we do not consider that the conviction is unsafe. The appeal is dismissed.