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

Delivered: **19/05/2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MICHAEL MONGAN

Before: MORGAN LCJ, COGHLIN LJ and GILLEN LJ

COGHLIN LJ

[1] This is an application by Michael Mongan ("the applicant") for leave to appeal his conviction and sentence in respect of a number of offences alleged to have occurred on 5 June 2012 at 82 Mayogall Road, Knockloughrin. On 13 March 2013 the applicant was committed for trial at Londonderry Crown Court and on 9 April 2013 he was arraigned and pleaded not guilty to 8 counts upon an indictment alleging attempted robbery, aggravated burglary, causing grievous bodily harm with intent, assault occasioning actual bodily harm, common assault, possession of an offensive weapon with intent, driving whilst disqualified and using a motor vehicle without insurance. His trial commenced before His Honour Judge Babington, the learned Recorder of Londonderry, and a jury on 19 September 2013. On 3 October 2013 the applicant was found guilty on all counts contained in the indictment by a majority of 10-2. On 9 January 2014 the learned Recorder imposed an extended custodial sentence of 14 years together with an extended period under licence of 5 years upon count 1 together with lesser custodial sentences in respect of the other 7 counts. The applicant was represented by Mr Frank O'Donoghue QC and Mr Sean Devine while Mr Russell appeared on behalf of the prosecution. The court wishes to acknowledge the assistance that it derived from the carefully prepared and well-structured written and oral submissions advanced by all counsel.

Background facts

[2] At about 8.30pm on 5 June 2012 Theresa Convery, who was then some 70 years of age, was in the kitchen of her premises at 82 Mayogall Road, Knockloughrin near Magherafelt. One of her sons, Mr Martin Convery, was in a room at the rear of the premises assisting her grandson, Philip Convery, then aged 16, with preparations for his GCSE examinations. A blue Vauxhall Vectra car not displaying any number plates drove into the yard of the premises and a male came to the back door. The door was opened and two persons pushed their way into the kitchen area. One of these persons was wearing a balaclava and pointing a handgun. The other individual was not wearing a mask and, to adopt Mrs Convery's phraseology he was "shouting and roaring" words such as "give us the money, give us the money, we want the money." The intruders were told that the Converys did not know anything about any money. The intruder then alleged that they were after "Paul's money" and that it was "in the shed". The Converys informed them that they did not have any keys to the shed and knew nothing about any money.

[3] The intruders then threatened to abduct Theresa Convery. The intruder who was not wearing a mask left the kitchen, went out to the vehicle and returned with an iron bar. He then struck Theresa Convery with the iron bar about the hips and legs and one of her arms as a result of which she sustained severe extensive bruising.

[4] Philip and Martin Convery attempted to intervene. Philip was thrown to the floor, his face was stood upon and he was beaten with the iron bar to such an extent that he suffered a fractured skull and required 60 metal staples to multiple lacerations in his head.

[5] Martin Convery was struck with the iron bar and with the firearm thereby sustaining bruising to his arms, back and legs. He managed to escape, ran out to the road and flagged down a passing motorist who drove into the yard. The two intruders then left in the blue Vauxhall car.

[6] The applicant was arrested and interviewed by the police on 9 June 2012. During interview he said that he knew nothing about the incident and claimed that he had been at his mother's house in Belfast all day long on 5 June 2012. He initially denied having any knowledge of a blue Vauxhall but later in the course of his interviews admitted that his sister had such a vehicle and that he himself would have been in it from time to time. He said that the vehicle had subsequently been sold.

[7] On 6 June 2012 Theresa and Martin Convery gave achieving best evidence ("ABE") interviews which were recorded on DVD.

[8] On 9 June 2012 the police asked Theresa and Martin Convery to attempt Video Identification Parade Electronic Recording ("VIPER") identification of the

person by whom they had been assaulted during the incident on 5 June 2012 at 82 Mayogall Road. Theresa Convery purported to identify the applicant. Martin Convery failed to identify the applicant but purported to identify as the assailant a voluntary participant in the VIPER procedure who had not been involved in any way in the relevant incident.

[9] On 10 June 2012, while still a patient in hospital Philip Convery made a positive VIPER identification of the applicant and on 15 June 2012 he provided the police with an ABE interview which was recorded on DVD.

The grounds of the application

[10] In response to an application by Mr O'Donoghue the court granted leave to amend the grounds of the appeal against the conviction to read as follows:

(a) The evidence through the VIPER procedures in relation to both Philip and Theresa Convery ought to have been excluded by the trial Judge exercising his discretion under Article 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") for the following reasons:

(i) There were several breaches of the PACE Code of Practice which so adversely affected the fairness of the proceedings that the positive identification evidence of Philip Convery and the qualified identification evidence of Theresa ought to have been excluded by the trial Judge in the exercise of his discretion.

(ii) The evidence of Theresa constituted a qualified identification and, as such, it could only be admissible in limited circumstances. Such circumstances would include a case where the evidence was relevant and probative in so far as -

(a) it was supported or was at least consistent with other evidence indicating that the defendant committed the crime or

(b) the explanation for the non/or qualified identification might help to place in its proper context and show that other evidence given by the same witness might still be correct. Mr O'Donoghue submitted that if Philip Convery's evidence was properly to be excluded under Article 76(1) it followed that there was no other evidence to render Theresa Convery's evidence admissible under ground (a) nor was there any

explanation for the qualified identification that would permit the inclusion of the evidence under the second limb of the test for admissibility.

(b) The evidence in relation to the sighting of Vauxhall Vectra YEO 65XA on 2 May 2012; and the sighting of the same on 1 June 2012 ought to have been excluded pursuant to Article 76 of PACE.

(c) If the identification was to be admitted, the learned trial Judge had failed to direct the jury properly or at all on the fact that the evidence of Theresa Convery amounted to a qualified identification and to explain to the jury the role of such evidence in the jury's deliberation.

(d) The learned trial Judge, in the course of his directions to the jury, permitted the jury to treat Theresa Convery's evidence as evidence of a positive identification of the applicant, which it was not, and a qualified identification could not be transformed into a positive identification.

The relevant statutory provision and code

[11] Article 76(1) of PACE provides as follows:

> "76-(1)In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[12] Article 65 of PACE empowers the Secretary of State to issue Codes of Practice in connection with, inter alia, (b) the detention, treatment, questioning and identification of persons by police officers.

[13] Code D is a Code of Practice for the identification of persons by police officers issued in accordance with Article 65 of PACE having effect in relation to any identification procedures carried out after midnight on 31 January 2008.

[14] Annex A of Code D applies to Video Identification and the following are the relevant provisions of Annex A:

"2. The set of images must include the suspect and at least 8 other people, who so far as possible, resemble the suspect in age, general appearance and position in life.

3. The images used to conduct the video identification shall, as far as possible, show the suspect and other people in the same positions or carrying out the same sequence of movements. They shall also show the suspect and other people under identical conditions unless the identification officer reasonably believes:

(b) Any difference in the conditions would not direct a witness's attention to any individual image.

4. The reasons identical conditions are not practicable shall be recorded on forms provided for the purpose.

10. The identification officer is responsible for making the appropriate arrangements to make sure, before they see the set of images, witnesses are not able to communicate with each other about the case, see any of the images which are to be shown, see, or be reminded of, any photograph or description of the suspect or be given any other indication as to the suspect's identity, or overhear a witness who has already seen the material. There must be no discussion with the witness about the composition of the set of images and they must not be told whether a previous witness has made any identification.

14. After the procedure, each witness shall be asked whether they have seen any broadcast or published films or photographs, or any descriptions of suspects relating to the offence their reply shall be recorded."

The descriptions provided by the relevant witnesses

[15] Theresa Convery told the police that the individual without a mask was small and of stout build. She described his clothing and said … "he wasn't fair haired, he would have been more on the darker side, he wouldn't have been blonde or fair and he did an awful lot of shouting and he was wild, he was terrible." She said that he was the more aggressive of the two individuals and that it was that person who carried out the assaults with the iron bar. She estimated his age as being between 25

and 30 "maybe" that his hair might have been light brown but she did not think that he had any facial hair. She described his accent as "just normal enough."

[16] In cross-examination during the trial Theresa Convery estimated that the incident took "up to half an hour". She confirmed that the individual without a mask had been continually shouting and that he was arrogant, very aggressive and, in her description, "a wee thug". She agreed with counsel that she had not observed a scar on the individual's nose or that his face was significantly freckled. She again described his accent as "normal enough". When asked whether there was a distinctive traveller's accent she said "Some of them, like, have it. Some of them would have a northern accent." She agreed that she had not suggested to the police that the individual concerned had either a southern Irish or a traveller brogue. She emphasised that he had been continually "roaring and shouting".

[17] On 16 June 2012 Philip Convery was interviewed by the police at the Child Abuse Investigation Unit at Maydown. He described the individual without a mask as "short and stumpy" perhaps 5 foot 8 inches with gingerish hair on his face "like a scruffy bum fluff beard". He said that he was fat and overweight. During the course of his interview he referred to the individual as "ginger boy".

[18] When giving evidence to the jury Philip Convery described the individual by whom he had been assaulted as being "fat and stubby" and that he "had ginger hair and he had scruffy beard and he had freckles." He said that his hair looked ginger "from under the light that was there." In cross-examination he estimated the individual's age as "in his 20s". But agreed that when he had been interviewed by the police he said that he was "in his 30s" adding that it was hard to judge the age of somebody just by looking at them. He was closely cross-examined about describing the individual as having ginger hair as compared to applicant whom counsel described as "21 years of age and he doesn't have ginger hair." He agreed in cross-examination that the individual concerned did not have a distinctive accent that he could recognise. He thought it might have been a Ballymena accent.

The VIPER identification procedure

[19] The jury were shown the DVD sound recording of the VIPER procedures in which both Theresa and Philip Convery took part. The same recordings were played for the benefit of this court. Each was shown a DVD compilation of the face and shoulders of some 9 individuals selected for their generally similar appearance. The individuals shown had the opportunity to choose the item of clothing they were to wear on their upper body. Eight of the participants shown elected to wear some form of collarless shirt some of which had v-necks others of which had round necks. Some were block coloured in different colours while others were the subject of some form of decoration. The applicant was the only person who chose to wear a polo type shirt with a collar. At all times before and throughout the procedure the applicant was attended by his solicitor. During the course of the procedure an

attending police officer used a pro forma document to address certain questions to the witness and to record notes.

[20] The video DVD confirmed that Theresa Convery carefully examined all 9 of the individuals shown. It is clear that, during the second showing, she raised her hands as if to draw a frame in relation to number 5 and number 8. After seeing all 9 of the participants she asked to see all again and then to be shown 1, 3, 5, 7 and 8. After a further viewing of all of the participants she asked to see 3, 5 and 8 and then said "I think it was number 5." Number 5 was the applicant whom she identified as the person who had been shouting about the money and who had hit her and her grandson. She was then asked to confirm her identification and did so.

[21] On the same day Martin Convery took part in the VIPER procedure. He narrowed down his identification to either number 4 or number 7 neither of whom was the applicant.

[22] On 10 June 2012, at the Royal Victoria Hospital, Philip Convery took part in a VIPER identification procedure. Owing to his age, his mother, Imelda Convery was present as an appropriate adult. At all times Philip Convery remained in his hospital bed and a VIPER procedure was displayed upon a laptop. The images of those participating were shown twice to the witness who was then asked whether he wished to see all or any part of the DVD again. Philip Convery replied "No, I know". When asked whether he had identified any individual he replied "Yes definitely number 6 – no mistake". He identified number 6 as the person by whom he had been beaten. It is common case that number 6 was the applicant and that was formally confirmed by the witness. The DVD demonstrated that during the identification procedure carried out by Philip Convery his mother was sitting at his bedside but in such a position that she was unable to see the screen of the laptop. During the course of the procedure Philip Convery's mother can be seen using her mobile phone to send one or more text messages.

[23] The order in which the images of the participants appeared on the DVD was altered before being shown to each of the identifying witnesses and steps were taken to ensure that there was no contact between the witnesses.

[24] Theresa Convery was cross-examined before the jury as to an apparent inconsistency between her evidence and the note made by the constable attending her VIPER identification. She was asked about saying "I think it was number 5" to which she replied "I just don't know what the number was but I was sure it was the person I picked." It was put to her by counsel that such a reply conveyed the very clear impression that she was not sure about the identification. Theresa Convery responded:

> "No, I thought that I said to the policeman, definitely it's that one there. I'd never forget his face."

After some further questioning the matter was finally put to her as follows:

> "Question - What I am suggesting to you is that you are qualifying the identification in case you are wrong. In other words, you didn't say, I am sure, number 5, I am sure, number 5, I have no doubt. You said I think it was number 5.
>
> Answer - Well, then, that must be right.
>
> Question - Isn't that right? Just in case you were wrong, isn't that right?
>
> Answer - Yes."

The respective submissions on identification

[25] Mr O'Donoghue advanced a number of specific submissions with regard to the evidence of identification and the means by which that evidence had been obtained:

(i) The video identification VIPER procedure had been conducted in breach of a number of paragraphs of Annex A to Code D of PACE and Mr O'Donoghue relied, in particular, upon breaches of paragraphs 2, 3 and 10. In such circumstances, Mr O'Donoghue argued that the learned trial Judge should have excluded the identification evidence as having an adverse impact upon the fairness of the trial in accordance with Article 76 of PACE.

(ii) He further submitted that even if not excluded, the learned trial Judge failed to deal properly and effectively with the said breaches in his charge to the jury.

(iii) Mr O'Donoghue submitted that the identification evidence of Theresa Convery encapsulated in the observation that "I think it was number 5" could not be regarded as anything other than a qualified identification and a qualified identification could not become a positive identification at trial through questioning. Mr O'Donoghue relied upon the authorities of R v George [2002] All ER (D) 441 and R v Brown [2011] All ER (D) 186.

(iv) Mr O'Donoghue argued that as a consequence of the breaches of the PACE code and/or the obvious inconsistencies the evidence of identification by Philip Convery should not have been admitted and, if it had been excluded, it was logically inevitable that the qualified identification by Theresa Convery should also have been excluded.

(v) In the event that the identification evidence of Theresa and Philip Convery was admitted, Mr O'Donoghue submitted that the learned trial Judge had failed to properly and adequately direct the jury with regard to the `qualified' nature of the evidence of Theresa Convery.

(v) Mr O'Donoghue also submitted that the evidence relating to the sighting of the Vauxhall Vectra motorcar on 2 May and 1 June 2012 should have been excluded from consideration by the jury in accordance with Article 76 of PACE.

Discussion

The VIPER procedure

[26] The video record of the VIPER procedure was shown to the jury and, as we have indicated earlier, was also viewed by this court. As recorded earlier, the tops worn by the various participants in the procedure differed in respect of colour, collar shape and decoration. It is accepted that the applicant exercised his choice of shirt in the presence of his solicitor and that neither he nor the solicitor made any contemporaneous complaint about the clothing provided or the overall nature of the procedure. After giving the matter careful consideration we do not consider that the shirt worn by the applicant constituted a breach of any relevant paragraph of Annex A of Code D of PACE. By way of objective confirmation of such a conclusion we note that the shirt does not appear to have played any role whatever in the identification purported to have been carried out by Martin Convery.

[27] There is no doubt that Philip Convery's mother was shown to have been texting on her mobile at the time when the VIPER procedure was being carried out in the hospital. It was suggested that, in some way, she may have been relaying information about the identification procedure on the previous evening. There are a number of reasons why that is not likely to be the case. Firstly, careful viewing of the video does not suggest any direct verbal or non verbal contact between Mrs Convery and Philip at the material time and Mrs Convery is sitting in a position from which she was unable to see the screen of the laptop. Secondly, neither Theresa Convery nor Martin Convery had been told the identity of the persons whom they had identified on the previous evening and, upon each occasion, the numbers of those taking part in the procedure had been varied. In such circumstances it is very difficult to conceive of any information that could have been effectively conveyed to Philip Convery that would have materially assisted in identifying the applicant.

The nature of the identifications made by Theresa and Philip Convery

[28] There is no doubt that Philip Convery had a good opportunity to observe the appearance of the person by whom he was savagely beaten while trying to protect

his grandmother. He made what could only be described as a strongly positive identification of the applicant in hospital on 10 June 2012. The VIPER procedure in the course of which he made that identification was before the jury. In addition, the jury had the benefit of examination, cross-examination and submissions by counsel with regard to the alleged inconsistencies between the descriptions provided in statements by Philip Convery. The jury received careful direction from the learned trial Judge with regard to the descriptions provided by Philip Convery in terms of age, hair colour, accent and freckles. In the circumstances, we are left in no doubt that the identification evidence of Philip Convery was properly admitted by the learned trial Judge and made the subject of appropriate directions in the course of his charge to the jury.

[29] Consequently, in our view, the evidence of Theresa Convery was admissible even if it was properly held to be a "qualified identification" since, as such, it supported and was consistent with the positive identification made by Philip Convery.

[30] Mr O'Donoghue was critical of the directions given by the learned trial Judge with regard to the evidence of Theresa Convery. In the course of his charge to the jury, after referring to the identification by Philip Convery as "unequivocal," the learned trial Judge went on to refer to the identification by Theresa Convery in the following terms:

> "You may consider (the identification) is also unequivocal, or you may feel it is somewhat less than that, that it be what we might call a qualified identification."

He reminded the members of the jury of her participation in the VIPER procedure and how, after reviewing a number of the images displayed she had said: "I think it was number 5". The learned trial Judge told the jury:

> "She took considerable time over it; you may think. Does this suggest particular care in coming to her decision? Does it suggest something else to you? These are matters that you will want to think about; it is up to you."

He reminded the jury of the reply that Theresa Convery had given to counsel in the course of cross-examination who had asked her "Well, the word `think' did you use that word because you thought you might be wrong?" To which she had responded "Yes".

Apart from referring to the possibility that the identification by Theresa Convery was "qualified" the learned trial Judge gave no further explanation of that term to

the jury. We note that no criticism was made of his admission by counsel in the course of requisitions.

[30] In the case of R v George [2002] EWCA Crim 1923 the learned Lord Chief Justice delivering the judgment of the Court of Appeal in England and Wales made the following observations at paragraphs 34 and 35:

> "34. We fully recognise the dangers involved of wrong convictions occurring in identification cases. This is the reason for the requirement that in all identification cases clear *Turnbull* directions must be given. We also accept that counsel for the defence is usually faced with a difficult task in challenging an honest witness who has made a mistake in identity. We also agree that prosecuting counsel must be cautious and avoid conducting his examination of a witness who has failed to make a positive identification in a manner which suggests to the witness that but for this fact or that fact the witness would have made a positive identification. An identification which is qualified cannot be transformed into one which is unqualified by careful questioning. It remains qualified and a jury should be aware of this. Equally a defendant must not be convicted on the evidence of a qualified identification alone.
>
> 35. However, there are at least two situations where a qualified identification may in appropriate circumstances be both relevant and probative. First, where although the weight of the evidence will still be less than a positive identification, it supports or at least is consistent with other evidence that indicates the defendant committed the crime with which he is charged. Secondly, the explanation for a non or qualified identification may help to place the non or qualified identification in its proper context and so, for example, show that the other evidence given by the witness may still be correct. Otherwise, a non or qualified identification could be used to attack the credibility of other evidence given by a witness when the explanation for this may show that such an attack is unjustified."

[31] When cross-examined by counsel as to whether in saying that "I think it was number 5" Theresa Convery had meant to convey that she was not sure of her identification she initially rejected the suggestion saying "I was sure I didn't say in

case I was wrong." When pressed about the matter the following exchange took place:

> "Q – You said I think it was number 5.
>
> A – Yes.
>
> Q – What I am suggesting to you is that you are qualifying the identification in case you are wrong. In other words you didn't say, I am sure, number 5, I am sure, number 5, I have no doubt. You said I think it was number 5.
>
> A – Well, then, that must be right.
>
> Q - Isn't that right? Just in case you were wrong, isn't that right?
>
> A – Yes."

In such circumstances, we are satisfied that the learned trial Judge properly left the issue as to whether Theresa Convery made a positive or qualified identification to the jury.

[32] However, in our view, it was necessary for the jury to be given further guidance as to the concept of "qualified identification" within the context of the particular circumstances of the case. For example, the jury ought to have been told that an accused should not be convicted upon qualified identification evidence alone and that a qualified identification cannot be transformed into one which is unqualified by careful questioning. They should also be informed that, although the weight of a qualified identification will be less than that of a positive identification, such an identification may well serve to support or be consistent with other evidence indicating that the accused committed the crime with which he is charged. For example, the qualified identification by Theresa Convery was clearly consistent with other evidence in the instant case namely, the positive identification by Philip Convery and, to a lesser extent, the evidence relating to the blue Vauxhall Vectra motorcar.

[33] In view of our conclusions with regard to the additional directions that the learned trial Judge ought to have given to the jury in relation to "qualified identification" we have given careful consideration to the whole of the evidence in this case. Having done so, even if the jury concluded that the evidence of Theresa Convery amounted to a "qualified identification", the absence of adequate direction would not have made any difference to the verdict reached by the jury. We are not

persuaded that this conviction was in any respect unsafe and, accordingly, the application will be dismissed.