43/87

COURT OF APPEAL (ENGLAND)

R v BRITTON

Lord Lane CJ, Kennedy and Roch JJ

9 March 1987

[1987] 2 All ER 412; (1987) 85 Cr App R 14; [1987] Crim LR 490; [1987] 1 WLR 539

CRIMINAL LAW – EVIDENCE – ADMISSIBILITY OF DOCUMENTS – REFERENCE IN COURT TO PART OF CONTEMPORANEOUS DOCUMENT TO REFRESH MEMORY – CROSS-EXAMINATION ON OTHER PARTS OF DOCUMENT – WHETHER DOCUMENT ADMISSIBLE – EFFECT OF WHERE DOCUMENT ADMITTED.

1. Cross-examining counsel may inspect a document used by a witness to refresh memory in order to check its contents without making the document evidence. Counsel may cross-examine on those parts of the documents which the witness has used to refresh memory without making it evidence. However, if cross-examination extends beyond that part of the document used by the witness to refresh memory, the party calling the witness may insist on the document's being treated as evidence in the case.

Gregory v Tavernor **[1833] EngR 919; 172 ER 1241; (1833) 6 C & P 280;**
Senat v Senat **(1965) P 172; [1965] 2 All ER 505;, applied.**

2. The effect of admitting the document into evidence is solely to show consistency in the witness not as evidence of the truth of the facts stated in it.

R v Virgo **(1978) 67 Cr App R 323, applied.**

3. A distinction should be drawn between cross-examining counsel's looking at notes used to refresh a witness's memory and calling for and looking at other documents. Where the latter occurs, the party calling the witness may insist on the documents' being treated as evidence in the case.

Palmer v Maclear **[1858] EngR 813; (1858) 1 Sw & Tr 149, referred to.**

LORD LANE CJ gave the judgment of the court. *[After referring to the facts and the circumstances surrounding the compilation of the document used by the witness to refresh his memory, His Lordship continued]* ... **[WLR 541]** The ground of appeal briefly is that the judge was wrong in his decision on the submission, that he should have allowed the document to be made an exhibit and should have allowed the jury to see it. It is therefore necessary to examine the authorities in order to see what the true situation is. There appears to be a long-standing rule of the common law regulating the admissibility of the *aide-mémoire* in these circumstances. That rule is as follows: cross-examining counsel is entitled to inspect the note in order to check its contents. He can do so without making the document evidence. Indeed he may go further and cross-examine upon it. If he does so and succeeds in confining his cross-examination to those parts of it which have already been used by the witness to refresh his memory, he does not make it evidence. If on the other hand he strays beyond that part of the note which has been so used, the party calling him – in this case the appellant represented by Mr Buchan – may insist **[542]** on it being treated as evidence in the case, which will thereupon become an exhibit.

The cases upon which that common law rule is based, and to which we have been referred, are these: *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; (1833) 6 C & P 280, 281 where Gurney B observed:

> "The memorandum itself is not evidence; and particular entries only are used by the witness to refresh his memory. The defendant's counsel may cross-examine on those entries, without making them his evidence. The defendant's counsel cannot go into evidence of the contents of other parts of the book without making it his evidence; but he may cross-examine on the entries already referred to, and the jury may also see those entries if they wish to do so."

More recently Sir Jocelyn Simon P in *Senat v Senat* [1965] 2 All ER 505; (1965) P 172, 177

observed:

> "(Counsel) says that where a document is inspected by opposing counsel in the conduct of the suit, it becomes evidence which that counsel must put in. He cited to me a decision of Wrangham J in *Stroud v Stroud (No.1)* [1963] 3 All ER 539; (1963) 1 WLR 1080, where he himself was counsel. In my view the mere inspection of a document does not render it evidence which counsel inspecting it is bound to put in. I think that the true rules are as follows: there a document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it, without making it evidence. Moreover he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the retry of the witness: *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; (1833) 6 C & P 280. But if a party calls for and inspects a document held by the other party, he is bound to put it in evidence if he is required to do so: ..."

In view of some of the arguments adduced before the judge in the court below, it should perhaps be noted that there is a distinction to be drawn between looking at notes used by a witness to refresh his memory and calling for and looking at other documents. Once again in an elderly case that is made clear, the case being *Palmer v Maclear* [1858] EngR 813; (1858) 1 Sw & Tr 149. Sir Creswell Creswell said to counsel, p151: "you may look at the notes made by the witness to refresh his memory; but you cannot look at the letters without putting them in evidence, if required by the plaintiff." The witness there was in fact holding the letters in his hands.

In the present case it is conceded that Mr Aylett did in his cross-examination go outside those parts of the *aide-mémoire* which had been used by the witness in chief to refresh his memory. Consequently, if those authorities are accurate, the document became evidence and should, on the application of counsel for the defence, have been admitted in evidence. What the effect of exhibiting such a document might be is another matter. The decision of this court in *R v Virgo* (1978) 67 Cr App R 323, shows that their effect is solely to show consistency in the witness producing them, and they are not to be used as evidence of the truth of the facts stated in the *aide-mémoire*. Mr Buchan readily accepts that **[543]** fact and indeed, expressly accepted it before the court below. He prefaced his submissions with that concession.

As we say, the argument in the court below seems to have gone off on the wrong tack, largely on the question of the applicability of *Lord Denman's Act* (section 4 of the *Common Law Procedure Act* 1854 (17 & 18 Vict. c125)) which was irrelevant. Mr Aylett has submitted to us boldly, to use a word which he himself employed, that the rule that we have endeavoured to express no longer obtains, at least so far as criminal trials are concerned. He submits that the *aide-mémoire* can only be put before the jury, to use his own words, if there is a clear allegation of forgery, or if the document is put in to rebut a suggestion of recent fabrication. It is to be observed that in *Cross on Evidence*, 6th ed. (1985) pp254-255 the following passage appears:

> "There is an old general rule, inadequately explored in the modern authorities, that, if a party calls for and inspects a document held by the other party, he is bound to put it in evidence if required to do so. But ..." - and then he cites the passage from *Senat v Senat* [1965] 2 All ER 505; (1965) P 172,177 which we have already quoted, and goes on - "If, therefore, a witness refreshes his memory concerning a date or an address by referring to a diary, he may be cross-examined about the terms or form of the entries used to refresh his memory without there being any question of the right of the party calling him to insist that the diary should become evidence in the case. On the other hand, if the witness is cross-examined about other parts of the diary, the party calling him may insist on its being treated as evidence in the case."

We respectfully adopt that passage. It is, in the view of this court, still good law and accordingly we reject the submission of Mr Aylett that somewhere along the line that old common law rule has now disappeared. Mr Aylett founds his submission in part upon the judgment of this court in *R v Sekhon* (1987) 85 Cr App R 19; *The Times* 2 January 1987, the judgment of another division of this court presided over by Woolf LJ. There Woolf LJ sets out in tabular form a number of circumstances in which the sort of evidence which the judge here declined to admit should be admitted. But it is to be noted that Woolf LJ, so far from in any way casting a doubt upon the older decisions to which we have referred, said (See the transcript, at p8):

> 'Where a document is used to refresh a witness's memory, cross-examining counsel may inspect that document in order to check it, without making it evidence. Moreover he may cross-examine upon it without making it evidence provided that his cross-examination does not go further than the parts which are used for refreshing the memory of the witness ...."

He cites *Gregory v Tavernor* [1833] EngR 919; 172 ER 1241; 6 C & P 280. So he too is approving the existence of the common law rule. It may be a dangerous application for the defendant to make, because it may very well be that the effect of the jury seeing the document will be, to say the least, counterproductive. As indicated by this court in *R v Virgo* 67 Cr App R 323 in any particular case where the judge takes the view that the interests of justice so require, he will have a discretion to refuse to allow the document to go before the jury, if this could give rise to prejudice to the defendant. Here, in contradistinction from the usual case, the application was being made by the defendant and not being made by the prosecution.

Consequently we have come to the view that there was a material irregularity in this case. What we then have to decide is whether or not this is a proper case for the application of the proviso to section 2(1) of the *Criminal Appeal Act* 1968, the proviso reading, as everyone knows:

> "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

We have to ask ourselves whether, in the light of irregularity, the conviction was unsafe or unsatisfactory. First of all, the jury, despite the noble efforts of Mr Buchan to disabuse them of any such impression, must have wondered why they were being denied the sight of this document which they knew had been in question. They may have felt that the failure to show them this document was in some way a sinister indication of something to hide on the part of the defendant.

We find it impossible to say what might have been the result on this trial, where the credibility of the appellant was at the root of the whole case, had this document been before the jury as Mr Buchan submitted it should be. The result of that is, we consider that the circumstances are such that the conviction was unsafe and unsatisfactory, and consequently this appeal must be allowed and the conviction quashed.
