57/82

COURT OF APPEAL (ENGLAND)

ALAN KELSEY

Taylor CJ and McCullough J

27 November 27, 18 December 1981 — (1982) 74 Cr App R 213

EVIDENCE – WITNESS REFRESHING MEMORY – CONTEMPORANEOUS NOTE OF CAR NUMBER MADE BY POLICE OFFICER AT DIRECTION OF WITNESS – WITNESS SEEING NOTE MADE AND VERIFYING ACCURACY WHEN READ OUT TO HIM – POLICE OFFICER GIVING EVIDENCE OF THAT FACT – WHETHER WITNESS ABLE TO REFRESH MEMORY OF CAR NUMBER FROM POLICE OFFICER'S NOTE.

The appellant was convicted of offences of burglary and appealed against his conviction on the ground that a witness called for the Crown was wrongly permitted to refresh his memory about a car registration number by reference to a note made at the witness's dictation by a police officer and verified orally but not visually as accurate at the time by the witness. The officer in question had given evidence to prove that the note he produced was the one the witness saw him making and heard him read back.

HELD: As the officer had established that the note produced was the one the witness had seen him make and read back, the witness confirming its accuracy, the trial judge had been correct in allowing the witness to refresh his memory as he did from it about the car's registration number.

Dicta of Winn J in *R v Mills* (1962) 46 Cr App R 336, 342; [1962] 3 All ER 298; (1962) 1 WLR 1152, 1156, not applied.

[For witness refreshing memory from documents, see Archbold (40th ed.) paras 515-516a.]

TAYLOR J: On March 17, 1981, at Sheffield Crown Court, this appellant was convicted of three offences of burglary. He was sentenced to a total of four years' imprisonment. He now appeals against conviction and applies for leave to appeal against sentence. *[His Lordship stated the facts and continued]* ... The one ground of appeal against conviction is that Hill should not have been allowed to refer to the officer's note. Mr Purnell argues that a witness can only refresh his memory from a note he has made himself or [and here he uses the words of Winn J in *R v Mills* (1962) 46 Cr App R 336, 342; [1962] 3 All ER 298; (1962) 1 WLR 1152, 1156]: "from a note made by some other person which he has contemporaneously, in the sense of within a short time, himself seen, read and adopted as accurate." Mr Purnell asserts it is essential the witness should read the note himself; it is not enough that it should be made in his presence and read over to him.

In *Mills* (*supra*) a constable had heard and tape-recorded a conversation between the defendants in the cells. He was allowed to refresh his memory of what they said by reference to a note he made from the tape recording shortly after the event. That procedure was approved on appeal. The Court did not have to decide when A may be allowed to refresh his memory from a note made by B. The *ratio* was simply that A may refresh his memory from a tape recording or from a note he has made from a tape recording. The passage from the judgment of Winn J cited above was therefore *obiter*.

Shortly after that passage, Winn J said (at p342 and p1156 respectively):

> "In this case the constable set a machine to perform the functions which otherwise would have been performed by a pen or pencil in his own hand, and used the record produced by that piece of mechanism, which he was employing as his tool, in order to refresh his memory when he was giving evidence. If that be not precisely the right way to look at the matter, though the court thinks it is, an alternative approach is this: that the machine, albeit inanimate, was set by the constable to perform the function of making a record and very soon after the conversations had taken place the constable adopted as accurate the record which that machine had made, and thereupon it became his own record."

So, despite the earlier words of Winn J, upon which Mr Purnell relies, in that very case

the officer was verifying the "note" or record on the tape recording by hearing it played back rather than by having "seen, read and adopted it" if the officer in that case had simply played the tape back to satisfy himself, when his recollection was fresh, that it had accurately and wholly recorded what occurred and had not gone on to make a written note therefrom, there can surely be no doubt that he could at the trial have been allowed to refresh his memory by playing the tape again. If that be so, the situation was very similar to the present case. Here Hill dictated the number, not to a machine, but to an officer who recorded it. That officer then "played back," not mechanically but orally, what he had recorded. Hill heard it and satisfied himself the officer had got it right. Providing the officer testified at the trial, as he did, that this was the note which was dictated by Hill and read back to him, the Crown argue that Hill could refresh his memory from it.

We were referred to two more cases. In *Jones v Metcalfe* (1967) 3 All ER 205; [1967] 1 WLR 1286, an eye witness to an accident mentally noted a lorry's registration number and reported it to the police. On the strength of this information the police interviewed the defendant, who admitted driving a lorry bearing that number. The eye witness could not at the trial recall the number. There was no document made either by him or the police. It was held, on appeal, that there had been no evidence to prove the identity of the lorry at the scene. Lord Parker CJ, referred in his judgment to *Grew v Cubitt* (1951) 49 LGR 65, in which an eye witness had got his wife to write down a vehicle number and a police interview with the defendant followed. Lord Parker said, at p207F:

> "In that case it is to be observed that the prosecution case could have been proved in one of two ways; they could have called the wife who wrote the number down; equally they could have asked the independent witness whether he had seen his wife write the number down and if so, on production of the note, he could have refreshed his memory and stated what the number was."

Diplock LJ, at p208C, said of the *Jones' case* (*supra*):

> "If when the independent witness gave the number of the lorry to the policeman, the policeman had written it down in his presence, the policeman's note could have been shown to the independent witness and he could have used it, not to tell the magistrates what he told the policeman, but to refresh his memory,"

In *McLean* (1968) 52 Cr App R 80, the victim of a robbery dictated something shortly afterwards to C, including a car number which C wrote down. The victim did not see the note; nor it would appear, was it read over for him to check. There was no evidence as to the car number from the victim; C's evidence of the car number from the note was held on appeal to be hearsay and inadmissible and the conviction was quashed.

Commenting on *McLean's case*, the learned editor of *Phipson on Evidence* (12th ed), at para 1570, note 11, says:

> "All that this case decided, however, was that where A called out the number of a motor car to B, who recorded it, B cannot give evidence of the number, A having forgotten it. *Non constat* but that if A had seen B's note and checked its accuracy he could have been allowed to say: 'although I have no recollection of the number, I am confident that that is the number.' In any event it is not easy to see why *McLean* (*supra*) was decided in the way that it was. If A says 'the number I dictated to B is correct' and B says 'I correctly recorded the number,' it is difficult to see how this differs in principle from when A has made the note himself."

The learned author of *Cross on Evidence* (5th ed), at p468 said of *McLean* (*supra*): "This may with some justice appear to be nothing but pedantry run wild." It is important to stress, however, that in *McLean* the Court was dealing with an attempt to prove a car number, not by allowing the witness who took it to refresh his memory from a note he had dictated, but by the evidence of the scribe who wrote it down. Although logically defensible, this mode of proof might, if permitted, open the doors to allowing a witness' whole account of an incident, which he had dictated to an officer at the time and since forgotten, to be given at the trial by the officer.

That problem has been expressly envisaged by Professor Cross (*op cit* at p468) and Professor Smith ((1978) Crim LR 58). However, it does not arise if the note is used simply to enable the original witness to refresh his memory on a point of precision. A witness may refresh his memory

as to such a fact or figure which easily escapes or eludes human memory. Thus, for example, a date or time or an address, the exact words of a remark, a car or telephone number, are properly matters upon which a witness is entitled to refresh his memory. They are the precise details which sharpen and point his general evidence, and are to be distinguished from the narrative or events itself which the witness gives from his recollection. The most recent statement of the rule as to when a witness may refresh his memory from a document is contained in *Attorney-General's Reference (No. 3 of 1979)* (1979) 69 Cr App R 411, where this Court at p414 approved a passage in *Archbold* (40th ed), at para 515, as follows:

> "... a witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with, the facts to which he testifies. 'Contemporaneously' is a somewhat misleading word in the context of the memory refreshing rule. It is sufficient, for the purpose of the rule, if the writing was made or verified at a time when the facts were still fresh in the witness' memory."

The question we have to decide is, therefore, whether witness A can verify a note he dictates to B only by reading it himself, or whether it is sufficient if the note is read back by B to A at the time for confirmation. In most cases we would expect the note to be read by A if it is made in his presence. But what of the instant case, or cases involving the blind or the illiterate? In our view there is no magic in verifying by seeing as opposed to verifying be hearing. *Mills and Rose* (*supra*), the tape recording case, illustrates this, and shows that Winn J's words were somewhat too restrictive.

What must be shown is that witness A has verified in the sense of satisfying himself whilst the matters are fresh in his mind, (1) that a record has been made, and (2) that it is accurate. If A makes a "contemporaneous" note himself, or if A reads and adopts at the time a "contemporaneous" note made by B, A may refresh his memory from it without need of another witness. In a case such as the present a second witness will be required. Hill dictated the number, heard it read back and confirmed its accuracy. But although he saw the note being made, he did not read it, so it was necessary for the officer also to be called to prove that the note he produced was the one Hill saw him making and heard him read back. Once that was done, we are of the opinion that Hill could refresh his memory from it. To adopt Professor Smith's phrase ((1978) Crim LR, 58) the document was made "under the supervision of" Hill. We consider the learned judge was right to allow him to refresh his memory as he did. Accordingly this appeal against conviction is dismissed.

[The application for leave to appeal against sentence was refused.]
