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COURT OF APPEAL (ENGLAND)

R v MAYNARD & ORS

Lord Justice Roskill, Lord Justice Ormrod and Watkins J

March, April 1979 — (1979) 69 Cr App R 309

EVIDENCE – ADMISSIBILITY – IDENTIFICATION – IDENTIFICATION BY PHOTOGRAPH NOT FOLLOWED BY IDENTIFICATION PARADE – WHETHER EVIDENCE ADMISSIBLE – TRIAL – LENGTH – DUTY OF JUDGE AND COUNSEL TO KEEP TRIALS WITHIN MANAGEABLE LENGTHS AND NOT PROLONG TRIALS UNNECESSARILY,

Although an identification by photograph not followed by an identification parade has plainly dangers analogous to the dangers of a dock identification; nevertheless, such evidence is admissible provided the trial judge warns the jury to disregard it unless it accords with the principle laid down in *Turnbull* [1977] QB 224; [1976] 3 All ER 549; (1976) 63 Cr App R 132; [1976] 3 WLR 445 – for everything depends upon the jury's view of the strength or weakness as the case may be of the particular identification in question. The Court reiterated what it said in *Kalia* (1974) 60 Cr App R 200 that trial judges have a duty to curb irrelevancy and to try to keep trials within lengths and of counsel to observe the warning given in *Simmonds* (1967) 51 Cr App R 316; (1969) 1 QB 685 on that subject.

[For identification by photograph, see Archbold (40th ed.), paras. 1350, 1351 and identification parades see ibid para. 1352. Upon the question of identification from a photograph the following appears. Ed]:

The next ground of appeal concerns the alleged inadmissibility of what for brevity we will call the Sharon Saggs identification of Reginald Dudley and Maynard as having called at the Saggs' house and asked to see Cornwall in the summer of 1975, a visit denied by both men. It is clear that Sharon Saggs had never mentioned this incident, if indeed it occurred, until a date in December 1975. It is also clear that she was never shown photographs of Reginald Dudley and Maynard until January 8, 1976, when she first made the identification of those two men as visitors in the summer of 1975. The identification was therefore some six months after the incident occurred. It was about a week before the various accused were arrested. The admissibility of this evidence was the subject of a trial within a trial for some two and a half days between December 11 and 14, 1976. The learned judge decided to admit this evidence after every conceivable argument had been advanced in an effort to persuade him to exclude it. The identification by photograph was not followed by an identification parade. Mr Mansfield did not argue, indeed he could not have successfully argued in the light of the recent but apparently still unreported decisions of this Court in *Capaldi* (November 23, 1973) and *Brett and Ince* (28 July 1975), that it was wrong for the police to have shown photographs to Sharon Saggs in an effort to identify one or more suspect. But what was strenuously argued by Mr Mansfield was that this identification by photograph was inadmissible because it had not been followed by an identification parade.

It is to be observed that the current Home Office Circular on this subject was not in force in 1976 when the alleged identification took place. It is obvious that an identification by photograph not followed by an identification parade may be a very weak identification. It can also be said, of course, that notwithstanding the recent amendment of the Home Office Circular, on Identification Parades, an identification by photograph followed by an identification parade may be unreliable, since the person asked to identify the suspect may well, consciously or subconsciously, be influenced by having seen the photograph rather than by anything which he recalls having seen at the material time. An identification by photograph not followed by an identification parade has plainly dangers of a dock identification. For this reason, most properly, Sharon Saggs was not asked when she went into the witness-box at the Central Criminal Court to identify Reginald Dudley or Maynard in the dock. The Crown relied solely upon the fact that those she identified from photographs were in fact Reginald Dudley and Maynard.

Both Reginald Dudley and Maynard denied going to the Saggs' house on that summer day to ask for Cornwall, or indeed at all. There was, however, separate police evidence of admissions of the visit. These alleged admissions were also emphatically denied by both Reginald Dudley and Maynard. Notwithstanding that counsel for the Crown had been scrupulously careful not to invite Sharon Saggs to identify either Reginald Dudley or Maynard at the trial in the dock, Mr Waley for Maynard asked her to do so. She did not do so: she completely broke down. Mr Waley described this moment as emotive and suggested that the jury might have given more weight to it than they should, particularly as it was known that Sharon Saggs had been under police guard ever since she made the identification by the photographs. Mr Waley complained of this fact, though the reason for it seems obvious enough. The learned judge listened for two and a half days to arguments for and against the admissibility of this evidence. He exercised his discretion in favour of admitting the evidence, indicating that he would give all proper warnings when the time came. When the time came he told the jury to disregard the identification evidence unless they also accepted the police evidence on the alleged admissions. We are quite unable to see how it can be said that this evidence was inadmissible. Its weight was a matter for the jury. We would only interfere with the learned judge's exercise of his discretion after a long argument and a trial within a trial if we thought that in some relevant aspect the learned judge had exercised his discretion upon some erroneous principle. We are wholly unable to see how it can be said that he did so.

The learned judge commented that Sharon Saggs had never varied from her story. Mr Mansfield said that that fact of itself detracted from the reliability of the identification rather than confirmed its accuracy. Abhorrence to a possibly mistaken identification, he said, was one of the characteristics of the honest but unreliable witness. In theory, of course, this is possible, but there can be no certain generalisation in these matters, and in these identification cases, provided the judge gives a proper warning as to the given dangers of all identifications and any particular identifications, in accordance with the principle that this Court recently laid down in *Turnbull* [1976] 3 All ER 549; (1976) 63 Cr App R 132; [1976] 3 WLR 445; (1977) QB 224, everything depends upon the jury's view of the strength or weakness, as the case may be, of the particular identification in question.

Finally, Mr Mansfield contended that there was nothing out of the ordinary in this case to prevent the holding of an identification parade, that the photographs in question were not contemporaneous with the time of the alleged visit or indeed with the time of the alleged identification, and in any event were old photographs, the last point seemingly not explored at the trial. All these matters were of course relevant to the quality of the identification. As regards the last the learned judge did point out that certain small photographs that had been used had been taken before September 1975 and none was a police photograph in the usual sense of that phrase. Indeed, the photograph of Reginald Dudley which was the subject of much debate at the trial was his own property.

Having regard to the immense care taken over this issue and the way in which it was dealt with both at the trial within a trial and subsequently, we not only see no reason for saying that this photographic identification was inadmissible, but we find ourselves quite unable to say that its admission renders the verdicts against Reginald Dudley and Maynard unsafe or unsatisfactory. It is for those reasons, and without going into further detail or unnecessarily further lengthening this judgment that each member of this Court is of the clear view that the appeals of both Reginald Dudley and Maynard fail and must be dismissed.

[On the question of time occupied in the hearing this excerpt is taken from the judgment of Lord Roskill]: … We cannot part from this case without saying something more about our concern at the length of time which this trial took. We think it may assist if we refer to what this Court (James LJ, May J and myself) said in giving the judgment of the Court in *Kalia* (1974) 60 Cr App R 200, where a trial had taken a quite unnecessarily long time. I take leave to quote the whole of the relevant passage in the judgment of the Court, which I gave, starting at the bottom of p209:

> "Now, no one doubts for one single moment, and let this be said as clearly as possible, that nothing must be allowed to deter counsel from carrying out their instructions and doing their duty to their clients. But if I may borrow some language used in *Simmonds* (1967) 51 Cr App R 316; (1969) 1 QB 635 by Fenton Atkinson J as he then was, in giving the judgment of the Court at p326 and. p693 of the respective reports, 'Whilst in no way detracting from counsel's duty to his client, he can and should exercise in the interests of justice as a whole a proper discretion so as not to prolong cases

unnecessarily. It is no part of his duty to raise untenable points at length or to embark on lengthy cross-examination on matters that are not in truth in issue.' The learned judge than went on to deal with the details of that case. It is worthwhile recalling, since this happened in the memory of some older, though not younger, members of the Bar, what was said in this Court and subsequently by the Lord Chancellor in the House of Lords in *Mechanical and General Inventions Co Ltd v Austin and Austin Motor Co Ltd* (1935) AC 346. That was a civil case and perhaps more latitude should be allowed to counsel in a criminal case. In this Court two leading counsel, both at the top of their profession, were severely criticised in these terms by the then Master of the Rolls, Lord Hanworth (cited at p359). 'There remains one feature of this case upon which, in association with my colleagues, I desire to make serious comment – that is the cross-examination to which the leading actors on either side, Mr Lehwess and Sir Herbert Austin were subjected.'"
