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Case No: 202402726 B2
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202402730 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT
Case Nos: T20217351, T20217334, U20240719, U20240135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2024

Before :

LORD JUSTICE EDIS
MR JUSTICE BRIGHT
and
HER HONOUR JUDGE MORRIS, HONORARY RECORDER OF WINCHESTER
(sitting as a judge of the Court of Appeal Criminal Division)

- -

Between :

	THE CROWN	**Appellant**
	- and -	
(1)	**BOB**	
(2)	**BYY**	
(3)	**AEN**	
(4)	**BEK**	**Respondents**

- -
- -

Marian Lewis (instructed by **The CPS**) for the **Appellant**
Abigail Penny (assigned by the Registrar) for **BOB**
John Oliver (assigned by the Registrar) for **BYY**
S Evans (assigned by the Registrar) for **AEN**
Felix Keating (assigned by the Registrar) for **BEK**

Hearing date: 17 October 2024

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APPROVED JUDGMENT

This judgment was handed down by release to The National Archives
on 5 December 2024 at 10.30am

The provisions of s.71 of the Criminal Justice Act 2003 apply to these proceedings. By virtue of those provisions, no publication may include a report of these proceedings, save for specified basic facts, until the conclusion of the trial unless the Court orders that the provisions are not to apply. The Court has ordered that these provisions will not apply to paragraphs [1]-[31] below and this version, containing only those paragraphs, may be reported, under the anonymised title above, forthwith. Paragraphs [32] to the end must not be reported until the conclusion of the Crown Court proceedings. The full document will not be published to the National Archives until the conclusion of those proceedings.

The reason why the court has permitted the publication of paragraphs [1]-[32] now in an anonymised form is that there is little risk that they will come to the attention of any juror in the trial to come, and there is no risk of prejudice if they do. Care has been taken to avoid inclusion of any fact or opinion which might prejudice a fair trial if it were to come to the attention of a juror and the normal judicial direction on deciding cases on the evidence will address any residual small risk. It is appropriate that the more generic first part of the judgment should be published without delay.

Lord Justice Edis, giving the judgment of the court to which all members contributed:-

Introduction

1. This is an appeal by the prosecution against a ruling ("the Ruling") by the judge on 18 July 2024 when he decided that a series of witness statements from each of two witnesses who had died before trial were inadmissible hearsay. All procedural requirements to place the appeal properly before this court have been complied with, including the undertaking by the prosecution that the respondents will be acquitted unless it succeeds. The jury was discharged following the judge's ruling and this appeal is not therefore as urgent as is the case with some appeals of this kind. The delay between the hearing and the handing down of this judgment was caused by the need to give directions for disclosure and to receive further written submissions thereafter.

2. By section 67 of the Criminal Justice Act 2003, this court may not reverse the Ruling unless it is satisfied that:

    (a) it was wrong in law;

    (b) it involved an error of law or principle; or

    (c) it was a ruling which it was not reasonable for the judge to make.

The Law

3. The law relating to the admissibility of hearsay evidence is contained in the Criminal Justice Act 2003, and in *R. v Horncastle* [2009] UKSC 14; [2010] 1 Cr. App. R. 17, which is to be read together with the judgment of this court in the same case ([2009] EWCA Crim 964; [2009] 2 Cr. App. R. 15). The threads are drawn together with exceptional clarity in *R v. Riat* [2012] EWCA Crim

1509; [2013] Cr. App. R. 2, which also contains practical guidance. This appeal involves the application of established principles to the facts of this case, and does not involve any development of the law.

4. The approach taken by the judge in this case suggests that there may be some merit in adding to the practical guidance in *Riat* in the light of experience. For example, a slight re-formulation of the classic 6 step approach in *Riat* at paragraph 7 may be helpful in applying the law as explained by the court in that decision. We will endeavour to do that in this judgment, because it is necessary for the purposes of our decision to identify some flaws in the judge's reasoning notwithstanding his apparent reliance on *Riat*. For this reason, we will permit reporting of this decision up to and including paragraph [31] below. The subsequent paragraphs of the judgment address the particular case before us and our decision about the appeal. Those must remain subject to the statutory reporting restriction pending the conclusion of the proceedings in the Crown Court.

5. The court in *Riat* explained at paragraphs [5] and [6] that a decision to admit hearsay evidence involved two "paired expressions" used in *Horncastle.* Hearsay may be admitted if it is *either* demonstrably reliable *or* its reliability was capable of proper testing and assessment. Hearsay which is demonstrably reliable is unlikely to be problematic. The difficult cases will concern evidence which is *not* demonstrably reliable but whose reliability is said to be capable of proper testing and assessment. If the judge rules that it is, then that testing and assessment will be a function of the jury. This means that "the court is concerned at several stages with both (i) the extent of the risk of unreliability;

and (ii) the extent to which the reliability of the evidence can be safely tested and assessed", see *Riat* at [6]. That paragraph concludes:-

> "Independent dovetailing evidence may reduce the risk both of deliberate untruth and of innocent mistake……. The availability of good testing material (admissible under s.124) concerning the reliability of the witness may show that the evidence can properly be tested and assessed. So may independent supporting evidence."

6. Section 124 of the 2003 Act says this:-

> **124 Credibility**
>
> (1) This section applies if in criminal proceedings—
>
> (a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and
>
> (b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.
>
> (2) In such a case—
>
> (a) any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;
>
> (b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;
>
> (c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself.
>
> (3) If as a result of evidence admitted under this section an allegation is made against the maker of a statement, the court may permit a party to lead additional evidence of such description as the court may specify for the purposes of denying or answering the allegation.
>
> (4) In the case of a statement in a document which is admitted as evidence under section 117 each person who, in order for the statement to be admissible, must have supplied or received the information concerned or created or received the document or part concerned is to be treated as the maker of the statement for the purposes of subsections (1) to (3) above.

7. The purpose of section 124(2) is to enable evidence which tends to undermine the reliability of the hearsay statement to be adduced before the jury to enable them to assess its reliability. This encompasses any evidence relevant to credibility (abrogating the common law rule as to the finality of answers in cross-examination on issues of credit only) and any other statement made by the maker of the statement which is inconsistent with it. If the existence of material undermining the credibility of the maker of the statement or a previous inconsistent statement by that person were invariably a reason for excluding the statement section 124 would not be necessary.

8. The passage in *Riat* cited above does not only mention material admissible under section 124 as material which may enable the reliability of a hearsay statement to be assessed by a jury. It also mentions independent dovetailing evidence and independent supporting evidence. As we shall explain below, the critical flaw in the decision of the trial judge in this case was his failure to take properly into account the fact that the contents of the statements of the two witnesses he was considering (Witness 1 and Witness 2) were largely agreed by the defence and were supported in most respects by very strong independent supporting or dovetailing evidence. A further important flaw in his reasoning was his concentration on flaws in the statements. He was able to address those flaws because they were apparent and therefore matters which the jury would be able to take into account in deciding whether the statements were reliable or not. They were not necessarily fatal to the reliability of the disputed parts of the statements, but were matters which enabled that reliability to be tested and assessed.

9. Thus, the second witness to die, Witness 2, made his final statement explaining why he and Witness 1 (who had died by that stage) had agreed to suppress the truth which, he said, was that they had encountered the defendants because they allowed them to use their flat to deal in drugs. Previously, both witnesses had said that the defendants had simply burst into their flat and attacked them for no reason. This change of account was a very significant reason for the judge's decision to exclude the evidence. But it was agreed the witnesses were attacked in their own home with knives by a group of people. Whoever did that committed the offences charged whatever their motive. In three cases the defendants denied participation and in the fourth (a man whose DNA was found on a knife) the defendant said he was acting under duress. Therefore, a change of account as to the motive of the attackers was not central to the *disputed* evidence.

10. Further, none of the defendants disputed that they had travelled from London a few days earlier and had been staying in the witnesses' flat, and this is confirmed by mobile phone video recordings which show some of them in the flat over this period. There was other evidence that the defendants had been dealing drugs from the flat and there were counts on the indictment to reflect this. There was strong evidence that both the deceased witnesses were users. The new account was significantly more plausible than the first and there was an obvious reason why the witnesses may have chosen to suppress it at first. A jury could rationally decide in these circumstances that the fact that Witness 2 chose to confess the truth eventually was a reason to support his credibility on the issue of the identity of his attackers.

11. The change of account also gives rise to another important consideration. Both Witness 1 and Witness 2 made identifications at procedures whereby they identified the defendants as their assailants. The fact that none of the defendants disputed having been in the flat for a few days, and the video footage that confirms this, means that Witness 1 and Witness 2 therefore knew them quite well. The chances of a mistaken identification are significantly reduced by this, and it tends to support Witness 2's new account as being the truth.

12. It is possible that the reason why the judge erred in the respects we have briefly summarised is the fact that he took his guidance on the law from the 6 steps identified in paragraph 7 of *Riat*. These are a model of clarity, but perhaps can be re-crafted slightly in the light of the experience of this case. Hughes LJ, as he then was, said this:-

> "The statutory framework provided for hearsay evidence by the CJA 2003 can usefully be considered in these successive steps:
>
> i) is there a specific statutory justification (or "gateway") permitting the admission of hearsay evidence (ss.116–118)?
>
> ii) what material is there which can help to test or assess the hearsay (s.124)?
>
> iii) is there a specific "interests of justice" test at the admissibility stage?
>
> iv) if there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s.114(1)(d))?
>
> v) even if prima facie admissible, ought the evidence to be ruled inadmissible (s.78 of the Police and Criminal Evidence Act 1984 (PACE) and/or s.126 of the CJA 2003)?
>
> vi) if the evidence is admitted, then should the case subsequently be stopped under s.125?"

13. Steps (ii) and (v) describe the stages when the court engages with the "paired expressions" and, in a case where admissibility is really in issue, will usually be considering the second of them. This concerns evidence which is *not* demonstrably reliable. At this point, the court will be deciding whether the reliability of the statement is capable of proper testing and assessment. Paragraphs 17 and 18 of the judgment in *Riat* provide valuable guidance about step 2. Paragraph 18 says:-

> "In our view, the judge will often not be able to make the decision as to whether the hearsay evidence be admitted unless he first considers, as well as the importance of the evidence and its apparent strengths and weaknesses, what material is available to help test and assess it. If it is the Crown which is seeking to adduce the evidence, and if the evidence is important to the case, the judge is entitled to expect that very full enquiries have been made as to the witness' credibility and all relevant material disclosed; that will not be confined simply to a check of the Police National Computer for convictions. If it is the defendant who is seeking to adduce the evidence, and the evidence is important to the case, the judge is entitled to expect that the defendant has supplied sufficient information about the witness to enable such proper checks to be made. Moreover, both counsel and the judge must keep the necessity for disclosure of s.124 material in mind throughout the trial and in the light of the way it develops."

14. In the present case, the judge was not assisted as he might have been by consideration of the first accounts given by both Witness 1 and Witness 2 to police officers in the immediate aftermath of the events. His attention seems not to have been drawn to the statement of the officer who summarised the initial account of Witness 1, and he had no opportunity at all to appraise the initial account of Witness 2, which was recorded on body worn video footage by a different police officer. That recording is in the unused material, and we have listened to it. It is very important that some of the account of Witness 1 and most of the account of Witness 2 was first volunteered very soon after the

events. Spontaneity in proffering an account has often been regarded as a factor supporting reliability.

15. It is also significant that there was inadequate disclosure by the prosecution of the documents concerning the circumstances in which Witness 2 came to give his last statement, with its change of account about the context in which he was attacked. This disclosure failure does not appear to have been central to the Judge's decision. If it had been, he would no doubt have ordered disclosure, as we have done.

16. The Judge did refer to the fact that the prosecution had disclosed the extensive previous convictions of both of the witnesses, but had not disclosed much more than this. He rightly referred to *Riat* paragraph 18 and said that he was not satisfied that the prosecution had complied with its requirements. However, we apprehend that this too was not critical to his decision, or (again) he would have required the prosecution to provide additional disclosure, as we have done. In the circumstances of this case, it was necessary for the prosecution to disclose the circumstances of all the witnesses' convictions, whether the witnesses pleaded guilty or were convicted after trial, whether the witnesses have given evidence and (if so) whether their evidence has been disbelieved and anything relevant from police occurrence logs in which either of them was named. It should not require an order from the trial judge, let alone an order from this court, to prompt the prosecution.

17. We consider that the explanation of step (ii) in the "six steps" in paragraph 7 of *Riat* should be expanded to include reference to the content of paragraphs 6 and

18. We will end this part of this judgment with a reformulated series of steps to attempt to achieve this, among other things.

18. It follows from the passage in paragraph 18 of *Riat* that in taking the admissibility decision the court is required to consider the importance of the evidence in the case as a whole. It may be the sole and decisive evidence, and yet admissible. If it is, then the scrutiny of the court on the "paired expressions" will be intense. If it is not "demonstrably reliable" that scrutiny will be of the ability of the jury to test and assess its reliability. This will focus on the issues in the case. We heard some argument about whether a judge is entitled to take into account the contents of the defence statement in deciding admissibility. The answer to that is obviously: Yes. The defence statement is operating in this respect exactly as the statute intends. It is not before the jury as evidence, but it informs a decision about what material is to go to the jury. It would be absurd to require decisions as to admissibility to be made in ignorance of the issues in the case and therefore of the importance of the evidence.

19. The step that relates to the exclusionary powers in section 78 of the Police and Criminal Evidence Act and section 126 of the 2003 Act is not simply a rehash of step (ii). By this stage, the court will have decided at step (ii) that the reliability of the evidence can be properly tested and assessed by the jury, and the exclusionary powers may be exercised for good reason notwithstanding this fact.

20. The judge concluded his ruling by saying this:-

> "Overall, I have come to the view that their reliability, their reliability cannot be safely assessed and, and for that reason I am not persuaded, at step two, that I should admit the statements.

> "If I'm wrong about my assessment of step two then for the similar reasons that I have already given I would refuse admission of the statements either under section 78 or under section 126 of the Criminal Justice Act 2003 at step five in the test."

21. There is no difficulty in judges ruling on admissibility of evidence through more than one route. It is a perfectly appropriate way of dealing with this question. Indeed, if the evidence is actually admissible (or to be excluded) by more than one route, then it is the right way to do it. If the decision in *R v Ali* [2024] EWCA Crim 77 has been understood to suggest otherwise, then that should be corrected. The difficulty highlighted in that case primarily related to the judge's direction to the jury.

22. However, the judge's ruling in this case on Riat step (v) is difficult to follow. He had just found that the reliability of the evidence could not be safely assessed and was therefore inadmissible. If he was wrong about that, then the evidence could be safely assessed and was admissible at step (ii). Why then would it be excluded at step (v)? The judge gave no good reason for this, referring only to the "similar reasons I have already given". But this ruling was being made on the basis that he was wrong about those reasons. There is no proper basis in this case for excluding at Riat step (v) evidence which is admissible at step (ii).

23. That being so, it is not necessary for us to deal with the question, on which we did not hear argument, about whether section 126 involves a discretionary decision and is reviewable as such, or whether it requires a judgment. In this case the prosecution's appeal is really against the ruling at step (ii) and, if that is wrong, so also must be the exclusionary decision at step (v).

24. The final observation we wish to make about the *Riat* 6 steps concerns the final step, which relates to section 125. The judge did not refer to this step at all, but it is an important part of the process when dealing with important hearsay evidence. At the admissibility stage, the judge knows that there will come a time (at any time after the close of the prosecution case) when he or she will be obliged to decide whether:-

> "the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe"

25. And if so the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

26. This duty is an important safeguard which should, in our judgment, be considered by the court, at its own initiative if no party raises it, in all cases where it applies. This is because the Act places a duty on the court, and does not say that the duty only arises if a party raises the question. In some cases this may occur at the stage when a submission of no case to answer may be made, but we would suggest that most commonly it would arise at the close of all the evidence when the issues will have become very clear, and the importance of the hearsay statement and any difficulty a defendant has in challenging it can be assessed. This is consistent with *R v.TM* [2020] EWCA Crim 1343 [23], which requires the court to have regard to all the evidence when making an evaluation under section 125. This is not a reason why inadmissible evidence should be admitted, but it is a reason why a court can be more confident in its judgment that the reliability of a hearsay statement can be safely assessed and tested. That inevitably involves a prospective view of how things will develop in the trial,

and courts do not need to be unduly pessimistic about that. If it should transpire that the evidence is so unconvincing that a conviction would be unsafe then the court has this additional means of ensuring that justice is done.

27. If, as we anticipate, the section 125 exercise is carried out at the close of evidence and just before the advocates' closing speeches, the Judge will by this point have crafted the direction to the jury about the hearsay evidence. The Judge therefore will be able to assess safety in the light of that direction, which the jury will receive if the case continues. Such a direction should in our view be tailored to the facts relevant to the testing and assessment of the hearsay evidence, and not merely a generic warning.

Disclosure

28. At the hearing, we gave directions for further disclosure by the prosecution of material relevant to the testing of the hearsay statements, and allowed an opportunity to the parties to make further written submissions in the light of that disclosure. This exercise has revealed a state of affairs which permits and requires a further restatement of principle.

29. In *Riat* Hughes LJ at paragraph 18, quoted at [13] above very clearly explained that a hearsay application by the prosecution where the evidence is important requires that "very full enquiries have been made as to the witness' credibility and all relevant material disclosed". This is particularly so where and the evidence is not "demonstrably reliable", and the enquiry concerns the ability to assess and test it safely. In this case the prosecution failed to comply with this requirement. Its efforts in this regard were nugatory. Quite remarkably, the first accounts of the witnesses recorded on police body worn cameras were not

part of the prosecution case, although they were quite obviously an important means of testing the reliability of the later witness statements. Further, there was no evidence before the court about the circumstances in which the final crucial statement of Witness 2 was made. This was a very serious case, and, we would have thought, one which deserved a thorough investigation and presentation. The judge may have been entitled to exclude the evidence for this reason, although he would have been required to consider the possibility of giving directions to require a proper disclosure exercise before doing so. He did not explore this issue in this way and we are required to consider the ruling he gave and not one which he might have given.

Result

30. We are satisfied that the judge's ruling was wrong and not a reasonable ruling for him to make. We therefore allow the appeal, and rule that the hearsay statements are admissible. At the trial, which will now take place before a different judge to be assigned by the relevant Presiding Judges, the trial judge will be required to consider the position under section 125 of the 2003 Act to determine whether the case should be left to the jury. This will occur after the parties have adduced all the evidence on which they rely, and we say nothing about what the result of that exercise should be.

The *Riat* steps reformulated

31. Having made those observations, we suggest that the *Riat* 6 steps may be reformulated as follows, resulting in 7 steps. There is a new step 1 dealing with disclosure and an expanded steps 3 and 7, formerly (ii) and (vi). In most cases the review of disclosure should not be a burden on the court. The obligation is

on the prosecution to inform the court that it has done its job properly and to produce the results of the investigation. It is to be hoped that that will be enough in most cases. In including the disclosure obligation as one of the steps we are adding it to a checklist, but not in any way changing what *Riat* already requires:-

> "The statutory framework provided for hearsay evidence by the CJA 2003 can usefully be considered in these successive steps:
>
> 1. is the court satisfied that the prosecution has adduced all relevant evidence, and disclosed all relevant unused material to enable the court to assess the extent to which the hearsay evidence is demonstrably reliable and, if not, the extent to which it can be safely assessed and tested? If not, should the court simply refuse the application or do the interests of justice require directions for a proper disclosure process?
>
> 2. is there a specific statutory justification (or "gateway") permitting the admission of hearsay evidence (ss.116–118)?
>
> 3. what material is there which can help to test or assess the hearsay? This may be undermining evidence admitted under s.124, or other inconsistent evidence and it may also be independent dovetailing or supporting evidence. The court is required to make a judgment on the basis of all the evidence, having regard to the issues in the case and the importance of the hearsay to those issues.
>
> 4. is there a specific "interests of justice" test at the admissibility stage?
>
> 5. if there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (s.114(1)(d))?
>
> 6. even if admissible, ought the evidence to be ruled inadmissible (s.78 of the Police and Criminal Evidence Act 1984 (PACE) and/or s.126 of the CJA 2003)?
>
> 7. if the evidence is admitted, then should the case subsequently be stopped under s.125? This safeguard should be considered in all cases where it applies, at the initiative of the court if the parties do not raise it. It will generally be best determined at the conclusion of all the evidence. This is reinforced by the fact that this is the stage when the judge is likely to have drafted legal directions and to be consulting counsel about them. In a case of this kind, where the

> prosecution seeks to prove an important and disputed fact by relying on hearsay, the judge is required to give a careful and tailored direction to assist the jury in deciding whether they can safely rely on the hearsay or not. Its sufficiency will be relevant to the safety of any resulting conviction and it will be helpful for the judge to have regard to it when carrying out the assessment required by section 125.

The rest of this judgment, from here to the end, cannot be reported until the conclusion of the proceedings in the Crown Court

The case specific reasoning.

32. [Omitted from version for immediate publication]