Neutral Citation Number: [2018] EWCA Crim 176

Case No. 2016/04780/B2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Thursday 25th January 2018

B e f o r e:

LORD JUSTICE FLAUX

MRS JUSTICE NICOLA DAVIES DBE

and

HIS HONOUR JUDGE BIDDER QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

- -

R E G I N A
(For and on behalf of the Health and Safety Executive)

- v -

PAUL JUKES

- -

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(Official Shorthand Writers to the Court)

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Mr J Ageros QC appeared on behalf of the Appellant

Mr A Long appeared on behalf of the Crown

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J U D G M E N T (Approved)

LORD JUSTICE FLAUX:

1. On 22 September 2016, following a trial in the Crown at Liverpool before His Honour Judge Trevor-Jones and a jury, the appellant was convicted of failing to discharge the duty to take reasonable care of the health and safety of employees, contrary to section 7 of the Health and Safety at Work etc Act 1974. On 15 December 2016 he was sentenced by the same judge to nine months' imprisonment and ordered to pay £7,000 prosecution costs.

2. Prior to the appellant's trial, his co-accused on the indictment, Jonathan Gaskell, Gaskells NW Limited and Michael Cunliffe had pleaded guilty to offences under the same statute. Accordingly, the trial had proceeded against the appellant alone. The appellant now appeals against conviction with the leave of the single judge.

3. The facts are as follows. Gaskells NW Limited ("the company") was a waste and recycling company based in Bootle. The company employed about 60 people and was licensed to sort about 50 tonnes of waste a day. Gaskell was the managing director of the company. The appellant was the transport and operations manager. A baling machine was used by the company to compact paper and cardboard into bales. The door which provided access to the compaction chamber was fitted with an interlocked guard which stopped the machine if the door were opened, but the interlock had been bypassed. On 23 December 2010 an employee named Mr Galka was fatally injured in the baling machine. He entered the compaction chamber to clear a blockage and was crushed by the movement of the hydraulic ram.

4. The appellant was not interviewed by the Health and Safety Executive and the police

until June 2012. He was represented by a solicitor from Russell, Jones and Walker, a firm which is now part of Slater and Gordon (his solicitors on this appeal). He provided a detailed, prepared statement in which he denied being responsible for health and safety at the premises. He stated, inter alia:

> "Des Brown was the second in command as the senior operations manager and as health and safety manager. I was not the health and safety manager. I relied on supervisors to manage operations and to ensure that employees were competent to do their job. They reported to me and I reported to Des Brown."

The prepared statement also stated that the appellant could not recall that the baler had broken down regularly and that he had no knowledge that the chamber door interlock switch had been bypassed. He stated that he had introduced a system of reporting faults, known as "Daily Defect Sheets".

5. The prosecution case was that the appellant had taken over responsibility for health and safety and the maintenance of the baling machine after Des Brown was made redundant and left the company earlier in 2010. The appellant had been made aware that the interlock had been bypassed by Cunliffe, who was a fitter employed by the company. The prosecution contended that the appellant had failed to take reasonable care for the safety of employees.

6. The prosecution relied upon a number of matters to prove its case. First, it relied upon a signed statement of the appellant dated 9 February 2011 provided to the company's solicitors, DWF, in which he said:

> "Following Des [Brown's] redundancy I took over formal

> responsibility for health and safety. I started a process of assessing the overall health and safety competency of the lads.
>
> …
>
> I'm responsible for daily housekeeping and health and safety on site, including the implementation of site safety and working practices."

The prosecution contended that those statements undermined the appellant's assertion in the prepared statement given to the Health and Safety Executive and to the police, repeated in his Defence Statement, that he was not responsible for health and safety.

7. The prosecution also relied upon the CV he had prepared in April 2011, shortly after he left the company's employment in February 2011, in which he claimed that he had been responsible for health and safety at the company.

8. The prosecution relied upon the pleas of guilty of the co-accused, expert evidence as to the poor condition and maintenance of the baling machine, the failure to undertake risk assessments and provide operating procedures, and the lack of training, instruction and supervision of the staff.

9. The defence case was that the prosecution had overstated the appellant's responsibilities. He had not been aware that the guard had been bypassed or that there was any risk that an employee might access the chamber while the machine was live. He had taken reasonable care, bearing in mind the nature of his role and his limited training and experience.

10. In evidence the appellant said that his role had expanded into many areas involving

health and safety, but that he had always reported to Des Brown, and, after he left, directly to Gaskell. He acknowledged that the baler had been in poor condition, but said that he had not been responsible for maintenance of it by October 2010.

11. In relation to the witness statement dated 9 February 2011, the appellant acknowledged that the signature appeared to be his, but claimed to have no recollection of signing it. If he had signed it, he would have done so only after pressure from Gaskell. He had been bullied by Gaskell and the atmosphere had become bad. Gaskell had wanted to mitigate his own position and had stated that if the appellant did not sign the statement, then the appellant's legal costs would not be covered. He did not agree the contents, particularly where it stated that he had been solely responsible for health and safety. In relation to the CV, he accepted that he had prepared it as a "selling document", but maintained that he had never been the health and safety manager.

12. The appeal relates to two rulings by the judge. The first concerned the admissibility of the statement of 9 February 2011. The statement was provided at the request of the company's solicitors, DWF. The original trial was adjourned to enable the appellant to search the company's computer records contained on an NAS drive and a Dell tower. The contents were downloaded on to readable hard drives for each of the prosecution and the defence. The prosecution did not originally conduct any search, but shortly before the present trial, they conducted a limited search, which revealed for the first time an unsigned copy of the statement as an attachment to an email from Gaskell to his brother. The signed statement was then found sitting on Gaskell's electronic desktop computer.

13. On the first day of the present trial an issue arose as to the admissibility of the signed

statement. On behalf of the appellant, Mr James Ageros QC submitted that it should not be admitted on the basis that it was a privileged document. The appellant had given the statement at a time when he was an employee of the company, and DWF were acting on behalf of the employees and the company. The court had previously ruled that the police could not look at or rely on privileged material which derived from the company' computer records. Mr Ageros eschewed any suggestion that the prosecution had acted improperly in producing the statement. He put his submission on the basis of the "lack of a joined-up approach" as to what should be looked at.

14. In ruling that the statement was admissible, the judge held that it was material evidence. It contradicted the appellant's accounts in his interview and defence statement that he had not been responsible for health and safety. At the time that the statement was provided to DWF, there were no investigations or proceedings in existence. Proceedings may have been contemplated, but the fact that a statement was provided did not make it privileged. It may have been used in proceedings; it was not a communication between the appellant and his solicitors; and any privilege would not have been the appellant's. Furthermore, there was no allegation of bad faith by the prosecution. It was part of a vast volume of material obtained in the course of the investigation. Even if privileged, once in the hands of the other party it was admissible, subject to the power and discretion to exclude it under section 78 of the Police and Criminal Evidence Act 1984. In assessing fairness, the judge had to consider fairness to both the prosecution and the defence. In the circumstances, he did not consider it unfair to adduce the statement.

15. The second ruling to which the appeal relates concerns the subsequent conviction of Gaskell in October 2013 of an offence of conspiracy to pervert the course of justice, where Gaskell was one of 28 people who had prevailed upon an employee at the local

magistrates' court to alter details on driving licences to avoid totting up or disqualification. The appellant sought to adduce that evidence as bad character evidence. Mr Ageros put this forward in the alternative under section 101(1)(e) of the Criminal Justice Act 2003, that it had substantial probative value in relation to an important matter in issue between the appellant and a co-defendant (Gaskell); or, if Gaskell was not to be treated as a co-defendant but was a non-defendant, Mr Ageros put it alternatively under section 100(1)(b) of the Act, that it had substantial probative value in relation to a matter which was in issue in the proceedings and which was of substantial importance in the context of the case as a whole.

16. The judge rejected the application. He rejected the submission that Gaskell was a co-defendant. He pointed out that, under section 104, propensity of a co-defendant to be untruthful is only admissible if the conduct and nature of his defence is such as to undermine the defendant's defence. That could not be the case here where Gaskell had pleaded guilty and taken no part in the trial.

17. In relation to section 100, the judge noted that it was not suggested that this was important explanatory evidence within subsection (1)(a). So far as reliance on subsection (1)(b) was concerned, the prime issues in the case were what were the appellant's role and responsibilities and whether he took reasonable care in discharging those duties. Whilst the evidence of Gaskell's conviction might be of some probative value, the judge held that it fell short of having substantial importance in the context of the case as a whole.

18. In support of the appellant's appeal in respect of the judge's ruling that the 9 February 2011 statement was admissible, Mr Ageros reiterates, as he did before the judge, his

submission that, at the time, DWF represented the company and all the individuals associated with it, including the appellant. The appellant had attended a meeting with DWF and had been asked to describe his role and responsibilities. He was subsequently provided with the draft statement which he was asked to sign. It was privileged, having been created with the assistance of solicitors for the dominant purpose of anticipated civil or criminal litigation. Although it was not clear whether the privilege was that of the appellant, the company or Gaskell, Mr Ageros submitted that none of them had waived privilege. As a privileged document, the prosecution should not have seized it or used it, whosever privilege it was. The judge's earlier order had been that the prosecution should regard any communication between the company or Gaskell and their solicitors as privileged, but, notwithstanding that order, the prosecution had continued to search material without checking its provenance. Had they done so, they would have appreciated that the statement was privileged and should not be used.

19. Mr Ageros repeated before this Court, as he had submitted before the judge, that there was no allegation of impropriety. But, in effect, he continued to pursue (albeit in a muted sense) a case that there had been a "lack of a joined-up approach" by those acting for the prosecution in relation to the question of privilege.

20. In his written grounds of appeal, Mr Ageros submitted that the statement had been obtained in disregard of the judge's earlier order, which he said was a serious matter which should have led to the exclusion of the statement, although he did not pursue that suggestion in his oral submissions to this court.

21. In the Respondent's Notice, and in his submissions before us, Mr Long argued on behalf of the prosecution that the statement was not privileged. At the time in February 2011,

which was only a matter of weeks after the incident, no proceedings were contemplated, but investigations were being conducted by the company as to what had occurred. In any event, Mr Long submitted, if the statement was privileged, the privilege was that of the company or Gaskell, not the appellant. DWF did not represent the appellant. He had never been a client of the firm; nor had they represented him in any capacity. The statement had not been examined or obtained in breach of the judge's earlier order. It was not a communication between Gaskell and DWF. In the circumstances, even if it was privileged, it was obviously admissible and probative, and the judge had exercised his discretion correctly in refusing to exclude it under section 78.

22. In our judgment, Mr Long's submission that the statement was not privileged is correct. A document will only attract litigation privilege, whether in the context of civil or criminal litigation, if three conditions are satisfied: (1) litigation is in progress or reasonably in contemplation; (2) the relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation; and (3) the litigation is adversarial, not investigatory or inquisitorial: see per Lord Carswell in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 at [102] and Archbold 2018 at 12-7.

23. At the time, in February 2011, no decision to prosecute had been taken by the Health and Safety Executive and matters were still at the investigatory stage. An investigation is not adversarial litigation. As Andrews J said in *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 QB, [2017] 1 WLR 4205 at [154]:

> "The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution."

We agree with the analysis of the judge in that case at [160] to [161] as to when a criminal prosecution can be said to be in reasonable contemplation:

> "160. However, the situation is rather different where the investigation is into suspected criminality. One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them, other than the prospect of sanctions being imposed after the event. A person may well have reasonable grounds to believe they are going to be subjected to a civil suit at the hands of a disgruntled neighbour, or a commercial competitor, even where there is no properly arguable cause of action, or where the evidence that would support the claim has not yet been gathered. Criminal proceedings, on the other hand, cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met. Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.
>
> 161. Of course, a person who knows that he had committed a criminal offence may reasonably anticipate that if certain facts come to light, a prosecution is likely to follow, even if there is no investigation currently underway. Likewise, the state of knowledge of the prospective defendant may be such that, even before the investigation has concluded, it knows that it has, in Mr Lissack's words, 'a problem which makes criminal prosecution a real rather than a fanciful prospect'. …"

24. The difficulty with Mr Ageros' argument that the statement attracts litigation privilege is that there is no evidence from the company or from Gaskell, let alone from the appellant, that at the time that these investigations by the company were taking place in February 2011, any of them had enough knowledge as to what the investigation would unearth or had unearthed when the Health and Safety Executive concluded its investigations, that it could be said that they appreciated that it was realistic to expect the Health and Safety

Executive to be satisfied that it had enough material to stand a good chance of securing convictions. It does not seem to us that it is any answer to that point and the critical absence of evidence that, as Mr Ageros submitted to us today, where there is a death and on the face of it a breach of duty, the Health and Safety Executive normally prosecutes. There is, as we have said, no evidence as to the state of mind of any of the people who were subsequently prosecuted, nor any evidence from the Health and Safety Executive as to the stage of their investigation as at 9 February 2011.

25. It is said by Mr Ageros that the statement was made on a form which referred to section 9 of the Criminal Justice Act 1967 and that it had the usual rubric: "If it is tendered in evidence I shall be liable for prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true". However, in our judgment that is insufficient to establish, without more, that a criminal prosecution was in reasonable contemplation. It is noteworthy in that context that the appellant was not even interviewed by the police and the Health and Safety Executive until June 2012 – sixteen months later. Mr Ageros prayed in aid that DWF are solicitors experienced in this field, but it did not seem to us, in the absence of any evidence from DWF as to their reasons for using this form, that we should simply assume from the fact they did so that it could be said that criminal proceedings were in reasonable contemplation of the company and Gaskell.

26. One of the striking aspects of this case is that neither the company nor Gaskell has ever claimed privilege in this statement, even if it was in fact privileged, which we have held it is not. Privilege does not simply float in a vacuum; nor can it just be inferred, as Mr Ageros seems to assume. Unless the other party to litigation accepts a claim to privilege, a party has to claim privilege. If the company and Gaskell had ever sought to claim

privilege, they would have had to provide appropriate evidence. The claim could then have been properly tested, if necessary through cross-examination.

27. Accordingly, we consider that the appellant fails at the first hurdle in that the statement was not privileged at all. However, even if it were privileged, the appellant's submission that the privilege was his is misconceived. The privilege was that of the company or Gaskell – DWF's clients. DWF never acted for the appellant. As they confirmed in an email dated 18 August 2017, they did not represent him at any stage during 2010 or 2011. Although the single judge stated that the issue for whom DWF had acted should be capable of agreement before the appeal was heard, no such agreement was forthcoming, even after that clear statement of the position in the email from DWF. In those circumstances, on 23 January 2018 the Court ordered that Mr Ageros should serve a short skeleton argument explaining the basis upon which that statement by DWF that it did not act for the appellant is said to be open to challenge.

28. In his skeleton argument served on 24 January 2018, Mr Ageros explained that the appellant had never sought to obtain evidence from the company or from Gaskell to support his claim to privilege, partly because he contends that privilege can be inferred from the statement and the surrounding material, and partly because the appellant considers that (as Mr Ageros put it): "Gaskell and through him his legal representatives had tried in the aftermath of the accident to 'railroad' him into accepting having a role and responsibility he did not have". The skeleton argument continues:

> "… the appellant had no confidence that any answer obtained from solicitors instructed by Jonathan Gaskell would be helpful …"

That apparent marked reluctance to accept a statement by solicitors who were officers of the court was surprising. At one stage it appeared to the Court that it might be open to criticism. But, having raised the point with him at the hearing today, Mr Ageros has made it clear that he does not suggest for one minute that this Court should not accept what is said by DWF as solicitors and as officers of the court. Indeed, as emerges from a subsequent email from the solicitors now acting for the Health and Safety Executive to the Criminal Appeal Office, dated 24 January 2018, at the relevant time when DWF wrote that email on 18 August 2017, they had ceased to act for Gaskell and the company who had instructed new solicitors. As we have said, Mr Ageros no longer pursues any argument or insinuation that what DWF had said was not true and accurate. He has essentially moved away from the suggestion that the privilege was that of the appellant to saying that the document was privileged and in one sense it mattered not whose the privilege was. As we have held, we consider that the document was not privileged; and that even if it were, it was not the appellant's privilege.

29. As the maker of a statement given to the party who was entitled to rely upon litigation or legal advice privilege, the appellant was at best a potential witness who cannot rely upon the company or Gaskell's privilege for his own benefit: see Phipson on Evidence (19th edition) at paragraph 23-28. The fact that the company or Gaskell might have claimed privilege over the document – although, as we have said, they had never in fact done so – was not in itself a reason for excluding it if it was otherwise admissible and probative. Obviously, if it had been obtained improperly in breach of the order of the court or in knowing disregard of that privilege, that might lead the court to exclude it under section 78, but that is not this case.

30. Furthermore, in his submissions to us this morning, Mr Ageros accepted that in circumstances where the statement had not been obtained properly, if the other party to the relevant litigation has obtained a copy of the statement, it is admissible in evidence, even if it is a privileged document. In these circumstances, given that any privilege was not that of the appellant and the statement was otherwise clearly admissible and of probative value, we consider that there was no unfairness to the appellant in its admission, and that there is no basis for any criticism of the judge's exercise of his discretion under section 78 of the Police and Criminal Evidence Act. This ground of appeal is dismissed.

31. We turn to the second ground of appeal which relates to the conviction of Gaskell. It is important to note that the reason why the appellant sought to adduce this evidence was essentially to support his case that Gaskell was an unreasonable, deceitful, untruthful and manipulative man, as is clear from the skeleton argument which was before the judge.

32. Under section 104 of the Criminal Justice Act, such evidence would only have been admissible if the defence which Gaskell ran sought to undermine the appellant's defence. It did not. Gaskell did not run a defence at all; he had pleaded guilty. As Mr Long says, although much reference is made on behalf of the appellant to a "cut-throat defence", that is a misdescription. Rather, it is an attempt by the appellant to pass the blame. Despite the submission of Mr Ageros to the contrary, we consider that Gaskell was not a co-defendant within the meaning of section 101(1)(e) which, given the terms of section 104, is only concerned with a co-defendant who is tried in the same proceedings before the same jury, which Gaskell was not.

33. As far as its admission as evidence of the bad character of a non-defendant is concerned,

since Gaskell was not a witness, his credibility could not be in issue. The judge correctly identified the principal issues in the case. Whilst this evidence of Gaskell's character could be said to be of some relevance to those, it simply cannot be said to be of substantial probative value in relation to those issues, let alone of substantial importance in the context of the case as a whole. We agree with Mr Long's written submissions that this bad character evidence was at best of peripheral significance and that, in any event, the point that the appellant wished to make about Gaskell's manipulative and difficult character, he was well able to make in his own evidence and was supported by the evidence of Miss McLaughlin, the former contracts manager, who was a prosecution witness.

34. We consider that the judge was right to exclude the evidence of Gaskell's conviction and that, in any event, the appellant suffered no unfairness through its exclusion.

35. Neither of the grounds of appeal even begins to establish that this conviction is unsafe. Accordingly, the appeal is dismissed.