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Discretion to exclude hearsay evidence under s.126 Criminal Justice Act 2003

R v Drinkwater [2016] EWCA Crim 16

Keywords: criminal evidence; hearsay; exclusionary discretion; s.126 Criminal Justice Act 2003

D, the appellant, was convicted of two counts of rape, two of robbery and one of indecent assault. He appealed on the ground that the trial judge should have permitted him to adduce hearsay evidence under s.116(2)(a) of the Criminal Justice Act 2003 rather than excluding the evidence in the exercise of her discretion under s.126 of the 2003 Act. The case concerned separate brutal attacks on three young women in Berkhamsted on two different occasions in 1984 (the latter incident relating to two victims). The attacks, by a man with a large knife who was wearing a balaclava, took place late at night when the women were walking home. There were striking similarities between the three attacks and the jury had been properly directed that it was entitled to conclude that the same man had committed all of the attacks, the issue being whether D was the man. The main hearsay evidence took the form of a confession made to the police by H, who had died 7 years before D's trial. The confession had not been mechanically recorded and H, who had sought to retract the confession immediately after making it, had refused to sign a statement that had been typed out for him to sign.

D had been interviewed as part of the original police investigation in 1985. In 2012, when the attacks were reinvestigated, specimens from the victims were re-tested and their DNA profiles were found to match D's DNA profile. D denied that he had committed the offences, asserted that he had no idea how DNA matching his profile had been present (if it was his DNA that was present) and suggested that (if it was his DNA) its presence in the samples must have been a result of contamination from samples taken from different victims in relation to different incidents. (D already had a number of convictions by the time of the original investigation in 1985 and had regularly 'visited' Berkhamsted Police station.) The defence did not adduce any scientific evidence in support of the suggestion of contamination and did not challenge the DNA evidence adduced by the prosecution. In particular, the defence did not challenge the prosecution's evidence in relation to the re-testing of a sample taken from H that there was no support for the view that H had contributed his DNA to the results.

The defence asserted that there was a credible possibility that H might have perpetrated the second attack (the attack on two victims). H had appeared at a hotel about half a mile from the scene of the attack, wet, covered in mud and claiming that he had been in a fight. He had asked the taxi driver who had taken him home not to tell the police about him. When interviewed by the police he had admitted being involved in the attack but had denied wearing a balaclava (and, as was indicated above, had then sought to retract the confession and had refused to sign a statement that had been typed out by the police for him to sign).

One of the victims, who knew H, had made a statement suggesting that he was a “dreamer” who was “always looking for attention” and that “she didn’t think he could have done it”.

As requested by the defence, various matters relating to H were put before the jury at D’s trial as formal admissions under s.10 of the Criminal Justice Act 1967. The facts admitted included: that knives, a sword and a balaclava had been discovered when H’s home was searched; that H’s father had stated that H had had another balaclava but that this had not been recovered; that H had been arrested on suspicion of rape and had admitted involvement in the latter offences but had denied wearing a balaclava, had refused to sign the statement that had been typed out and had sought to retract the confession. The defence was also permitted to read witness statements that had been taken when H had been investigated.

The defence desired to adduce some additional hearsay evidence but the prosecution did not agree to its admission so the defence applied to have it admitted under s.116(2)(a). This evidence comprised: the statement that H had refused to sign; parts of a report into the investigation of H made by W, a police officer, who had conducted the interview of H which had resulted in the typed statement; H’s detention record; and notes of an examination of H at the police station by a doctor.

The main focus of D’s appeal concerned the statement that H had refused to sign and W’s report. The relevant parts of the report concerned: H’s admission that he was the man at the hotel; his initial denials that he had been involved in the incident; his changes of story, including the statement that he refused to sign; his retraction of that statement; and his reasons for retracting it. In the report, W indicated that H’s statement did not contain any details which the attacker alone would have been aware of and that the police’s efforts to determine whether H should continue to be a suspect had been unsatisfactory. Whilst some of the statements in the report were multiple hearsay, W was available to give evidence so the judge had not been required to consider the issue of multiple hearsay when determining whether to admit the evidence.

The judge, exercising her discretion under s.126 of the 2003 Act, declined to admit the hearsay evidence. In reaching her decision, the judge, relying upon guidance provided by the Court of Appeal in *R v Riat* [2012] EWCA Crim 1509, considered the non-exhaustive factors contained in s.114(2) of the 2003 Act.

On appeal, D asserted that that the judge’s decision “was irrational, and outside the range of reasonable decisions that were open to her on the facts [and] that the threshold for exclusion of evidence tendered by the defence was a lower one than that for evidence tendered by the prosecution” (at [43]).

Held, dismissing the appeal, the precise scope of the s.126 discretion may require further consideration but the Court of Appeal’s “strong preliminary view [was] that, in order to prevent the potential admission of barely relevant evidence, section 126 permits the court to exclude hearsay evidence which lacks significant probative value” (at [40]). The judge had followed the same approach and, upon the assumption that this was the correct approach, her conclusion could not be faulted. Indeed, even if the scope of s.126 was narrower, detailed

consideration of the hearsay evidence in question made it obvious that it had been properly excluded. The hearsay evidence did not prove or assist in proving anything; it was of no value in determining D's guilt or innocence, and it undermined D's case, based on the admitted facts, that H had possibly been the attacker. The detention record and the notes of the examination of H by a doctor, which showed that H had been fit to be interviewed, were insignificant if H's statement and W's report were not admitted and the judge had been entitled to exclude them too.

Whatever the s.126 threshold was, it had not been surmounted by the hearsay evidence that D had wished to adduce. Section 126 does not require the court to apply a different threshold when hearsay evidence is tendered by the defence to that which it is required to apply when such evidence is tendered by the prosecution. The overwhelming DNA evidence had "entitled the jury to conclude that there was no realistic possibility that [H] might have been responsible, to reject the defence's 'contamination' theory, and to be sure that the perpetrator who ejaculated on each occasion was [D]" (at [51]).

COMMENTARY

Section 126 of the Criminal Justice Act 2003 provides as follows:

- (1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—
 - (a) the statement was made otherwise than in oral evidence in the proceedings, and
 - (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.
- (2) Nothing in this Chapter prejudices—
 - (a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (c. 60) (exclusion of unfair evidence), or
 - (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).

As the Supreme Court recognised in *R v Horncastle* [2010] 2 AC 373, s.126(2) preserves the court's statutory and common law discretions to exclude evidence tendered by the prosecution. The concern of the Court of Appeal in the instant case was with s.126(1), which, as the Court of Appeal recognised in this case, unlike the exclusionary discretions preserved by s.126(2), may be deployed so as to exclude defence evidence.

In its 1997 Report, *Evidence in Criminal Proceedings: Hearsay and Related Topics*, the Law Commission had envisaged that the provision which now exists in the form of s.126(2) would operate as follows:

The new power to exclude superfluous hearsay would be available in relation to all hearsay evidence which would otherwise be admissible under our recommended scheme. We envisage that exercise of this power will be appropriate only in exceptional cases, where the probative value of the evidence is so slight that almost nothing is gained by admitting it. This power will help the opposing party and also ensure that the court's time is not wasted, thereby meeting the point which concerned some respondents, that the admission of hearsay would lead to a lot of barely relevant evidence being adduced. (Law Com No.245, para.11.18)

So far as judicial views in relation to the proper scope of s.126(1) are concerned, the Supreme Court in *Horncastle* at [36] indicated in obiter observations that “the section adds a further obligation upon the judge to exclude hearsay evidence if its admission would generate satellite disputes which would cause an undue waste of time such as to outweigh the case for admitting it”.

Obiter guidance provided by the Court of Appeal in *R v Riat* was relied upon by the trial judge in the present case and was also considered by the Court of Appeal, which cited Hughes LJ's suggestion that,

[s]ection 126 provides a free-standing jurisdiction to refuse to admit hearsay evidence. It does not apply to any other evidence tendered in a criminal case. If the evidence is tendered by the Crown, it stands in parallel to the general jurisdiction under s 78 PACE, which power is specifically preserved by s 126(2)(a). It goes, however, further than s 78 because it applies also to evidence tendered by a defendant, which might, of course, be targeted either at refuting Crown evidence or at inculpating a co-accused.

The exact ambit of s 126 is not in question in any of our present cases and may need further consideration when it directly arises. The section makes specific reference in s.126(1)(b) to the possibility that hearsay evidence may be held inadmissible because it may generate undue waste of time upon satellite issues. But the jurisdiction provided by the section is not on its face limited to such a case; it explicitly extends to an assessment of the value of the evidence. The section appears under a side heading which, although not part of the enacted terms of the statute, suggests a general discretion, and such appears to have been assumed to be its effect, albeit without detailed argument to the contrary, in both *Gyima* [2007] EWCA Crim 429 and *Atkinson* [2011] EWCA Crim 1746. (*Riat* at [23]-[24]).

As was indicated above, the Court of Appeal in *Drinkwater* at [40], whilst accepting that “the exact scope of the discretion to exclude hearsay evidence under section 126 CJA 2003 may need further consideration, if and when the point arises” held the “strong preliminary view [that] in order to prevent the potential admission of barely relevant evidence, section 126 permits the court to exclude hearsay evidence which lacks significant probative value”. The Court also agreed with counsel for the appellant that the guidance in *Riat* relating to s.126 was “very persuasive...[T]he section relates to evidence which is prima facie admissible and relevant...[and] as the Court said in *Riat*... the wording of the section gives the court the

power to assess the value of such ‘out-of-court’ statements when determining whether to exclude them” (at [42]).

The Court of Appeal in *Riat* suggested that, “[t]he non-exhaustive considerations listed in s 114(2) as directly applicable to an application made under s 114(1)(d) are useful aides memoire for any judge considering the admissibility of hearsay evidence, whether under that subsection or under s 78 PACE, or otherwise” (*Riat* at [22]). Similarly, the Court of Appeal in the present case agreed with counsel for the appellant that, “the section 114(2) factors are a helpful common sense checklist which assists the court in assessing their value and therefore in deciding whether they should be excluded or not” (at [42]). Fundamentally, the Court considered that, upon the facts, “the case for exclusion ‘taking account of the danger that to admit it would result in undue waste of time...taking account of the value of the evidence’ was overwhelming” (at[50]).

Whilst the Court of Appeal in both *Riat* and *Drinkwater* was not prepared to come to a final conclusion as regards the scope of the exclusionary discretion conferred by s.126(1) of the 2003 Act, when read together these cases have, for practical purposes, provided guidance which should enable the criminal courts to exercise their exclusionary discretion so as to exclude marginally relevant hearsay evidence, whether tendered by the prosecution or the defence, the admission of which would unduly waste the court’s time.

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