Case No: 200300503D1

Neutral Citation Number: [2004] EWCA Crim 1293

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice

Strand,

London, WC2A 2LL

Date: Friday 21st May 2004

Before :

THE RIGHT HONOURABLE LORD JUSTICE HOOPER

THE HONOURABLE MR JUSTICE LEVESON

and

HIS HONOUR JUDGE METTYEAR

(Sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between :

REGINA **Appella**

- and -

KENNETH ARNOLD **Respond**

- -

(Transcript of the Handed Down Judgment of

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Official Shorthand Writers to the Court)

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Mr. Paul Hynes (instructed by the Registrar of Criminal Appeals) for the Appellant

Mr Benedict Kelleher (instructed by the Crown Prosecution Service) for the Respondent

- -

Judgment

Mr Justice Leveson:

1.
On 13 May 2004, we heard this appeal and, at the conclusion of the argument, dismissed it. Bearing in mind the issues that had been argued, however, we reserved our reasons; these we now provide.

2.
On 16 Dec 2002 at the Crown Court at Croydon before H.H. Judge Simon Pratt and a jury, this appellant was convicted of two offences of wounding with intent contrary to section 18 of the Offences

against the Person Act 1861. Because of his criminal history, he was sentenced to concurrent automatic terms of life imprisonment with, in each case, a determinate period pursuant to the provisions of s 109 Powers of Criminal Courts (Sentencing) Act 2000 of 6 years less 187 days reflecting his period of remand in custody. He now appeals against conviction with the leave of the single judge.

3.
The facts giving rise to this prosecution can be shortly summarised. Between 8.00 pm and 8.30 pm on 7 December 2001, Mr Kevin Oakins left the New Inn Public House on Mitcham Road, Croydon. When he left, he noticed a man whom he knew as “Daley” speaking to two men and a woman. He thought that the two men and the woman were persons he had seen in the public house. As he moved towards this group intending to make his way home, the man Daley, called “Run”. Daley pushed his right shoulder so he moved to the left but as he did so the older of the two men, who had an object in his hand, lifted his arm and something came down into his face. In fact, he had been slashed deeply twice across the face and, in addition, stabbed to the body. Mr Oakins was unable to identify his attacker. The man uttered no word and there was no motive for the attack given or obvious.

4.
Some time later that same evening, said to be between 10.30 and 11.00 pm, Mr Christopher Morley left the Hare and Hounds Public House in Purley Way, Croydon which was in the order of a mile from the New Inn. He had been drinking and intended to telephone a taxi. As he left, he saw a man whom he vaguely knew by the name of Ricky meet with another man in the car park. He approached Ricky and greeted him whereupon the other man asked him who he was but, as he explained, the man slashed him three times deeply across his face, chin and stomach. Again, nothing was said and there was no motive for the attack given or obvious. The police commenced enquiries into both incidents (which according to the first calls to the emergency services were less than 1½ hours apart) but, initially, no progress was made.

5.
The appellant normally resides in Thailand although he had arrived back in this country on 7 December, the day of these incidents, and travelled to his parents’ home which is also in Purley Way, Croydon, less than a mile from the Hare and Hounds and over half a mile from the New Inn. He was arrested on 12 June 2002 (according to his passport having spent most of the early part of 2002 back in South East Asia). When interviewed, he made no comment although he telephoned his mother after arrest and she said “It was the day you came back from Thailand wasn’t it?” On the following day, he was identified at an identification parade by Mr Morley as his attacker. Further, it was clear that the appellant had, at least at some stage on 7 December, been in the New Inn (outside which Mr Oakins was attacked): his fingerprints were found on two half pint glasses that were seized at 3.00 am on the morning of 8 December.

6.
In the meantime, the police identified the man “Daley”. On 18 June 2002, Mr Daley Stevens was arrested and interviewed under caution. Immediately thereafter, the view was taken that it was appropriate to consider him as a witness; he was bailed and he then made a witness statement to the effect that it was the appellant, whom he knew, who had inflicted the injuries; it will be necessary to examine that statement in due course because, as was well known prior to the trial, Mr Stevens had subsequently sought to retract and refused to attend the trial.

7.

We should say something about the defence case. When he eventually came to give evidence, the appellant denied involvement in both incidents saying that he spent that evening at his mother's home sleeping from about 8 pm or 8.30 pm. until the following day. He admitted having bought a drink at the New Inn earlier that evening and said that he may have moved another glass; he did not know either injured man, Daley Stevens or "Ricky". He called a number of witnesses in support of his alibi.

8.
Before the start of the trial, Mr Paul Hynes (who also appears for the appellant today) made an application to sever the indictment so that the two allegations of wounding with intent could be tried separately. He argued then, and repeats the argument, that although the counts were lawfully joined in the same indictment, each was evidentially weak and the risk was that the two would be added together so that the sum total of the evidence was unfairly greater than the value of the individual constituent parts that directly affected each separate case.

9.
The learned judge approached this application without any consideration of the separate issue whether the evidence of one attack was admissible in relation to the other by way of similar fact, making the perfectly accurate point that a decision on the latter does not predicate the way in which he should approach joinder and severance. Having cited Regina v. Blackstock 70 Cr App Rep 34, and assuming for the purpose of the argument that he would not resolve the question of similar fact in favour of the Crown, he took the view that the usual warning that the jury must not add all the counts together or use evidence on one count as evidence on the other was one which the jury was perfectly capable of following. He thus refused to sever. This ruling was well within the proper exercise of his discretion, and this ground of appeal fails.

10.
In any event, the ruling became academic because, at the conclusion of the evidence, the learned Judge ruled that the evidence on each count fell within the category of similar fact on the basis of "the unlikelihood of coincidence". If he was correct about that, there could never be any merit in the appeal against his refusal to sever; at its highest, he would have had to make the decision as to the issue of similar fact earlier than he did (having heard argument on the issue at the same time as the application to sever was made). If he was not correct, given that he gave the jury directions as to similar fact, there is, equally in any event, an unarguable basis for quashing the convictions.

11.
It is thus convenient to deal with the question of similar fact at this stage. In short, the Crown relied on a number of features of these two offences. First, both were committed on the same evening, within a comparatively short time of each other at locations comparatively proximate to each other; both were unprovoked, were initiated without explanation and were apparently motiveless; both occurred as the victim had left a public house and approached his attacker who was with at least one other person; in each case, the victim was the subject, first, of a deep slash or slashes to the face with a sharp implement causing in both cases full thickness wounds to the cheek and both were injured by being stabbed or slashed to the abdomen. In that regard, the Crown contended that the injury caused to the cheek in each case was broadly similar in shape and size.

12.
We interpose this analysis to deal with a ground of appeal concerning the admissibility of photographs of the injuries. Mr Hynes submitted that the photographs could only excite prejudice and were of little probative value given the absence of medical evidence as to causation. The learned judge ruled that

provided the jury did not seek to set themselves up as experts, but dealt with the matter in a common sense way, the photographs were relevant to the issue whether there was one attacker or two. The submission was renewed (albeit accepted as a ‘makeweight’) in this court. In our judgment the approach of the learned judge was faultless.

13.
Returning to the issue of similar fact, it is necessary to start with the formulation set out in Director of Public Prosecutions v. P [1991] 2 AC 447 by Lord Mackay in these terms (at page 462):

“.. I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include ‘striking similarity’ in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.” (Emphasis added)

In relation to identity cases, he later spoke of “evidence of a character sufficiently special reasonably to identify the perpetrator”.

14.
This decision (along with the line of authorities on which it was based, subsequent cases, and academic comment) has been the subject of detailed analysis in R v W (John) [1998] 2 Cr App Rep 289 in which Hooper J (as he then was) put the test in cases involving identity in clear terms:

“Evidence tending to show that a defendant has committed an offence charged in count A may be used to reach a verdict on count B and vice versa, if:

the circumstances of both offences (as the jury would be entitled to find them) are such as to provide sufficient probative support for the conclusion that the defendant committed both offences,

and it would therefore be fair for the evidence to be used in this way notwithstanding the prejudicial effect of so doing. ”

15.
Mr Hynes argues that the circumstances were not such as to satisfy this test or any of the tests of sufficient probative force, rebuttal of coincidence, affront to common sense or ultra cautious jury otherwise referred to in the authorities. We do not agree. These were not just random attacks; rather, they were quite specifically launched on two different men outside public houses in Croydon each of whom had approached the attacker to be met, without comment, explanation or motive, with explosive violence with a sharp implement which was both immediately to hand and used first to the face and then to the body. Both cheek injuries penetrated through the full thickness of the cheek. Although violence associated with drinking and public houses is not at all unusual, the combination of each of

these features, along with their proximity in time and place was such as entitled the judge to be satisfied that the jury were entitled to be sure to the high degree of cogency required that it would be an affront to common sense to reject the similarity between the two incidents as a coincidence.

16.
We have dealt with this ground of appeal because its resolution is relevant to the final, and most difficult, issue raised on this appeal. This concerns the way that the learned Judge dealt with the evidence of Mr Stevens. As we have said, after his arrest, he made a statement as a witness in which he identified the appellant. Because of its importance, we quote all the relevant part of the statement which was in these terms:

"On Friday 7th December 2001 I went alone to the New Inn pub, Sumner Road, Croydon. I had gone there for a drink, and had done so on my own. I was sat down at a table near the juke-box. … I cannot remember what time I went to the pub, and I am not sure what time people arrived, but there were some local people that I recognised, because I used to drink at the New Inn quite regularly. I can remember a man called Kevin being in the pub, he is a regular there, and was at the bar on his own. I have known Kevin to talk to … I am quite sure I spoke to him that night.

Whilst I was in the pub that evening a group came in three men and a woman. I recognised one of the men to be a man I know as Kenny Arnold, I did not know the other two men, although they were both white. I have never met these two men before. I remember saying "Hello" to Kenny and the rest of the group, and a short while later I spoke with the woman. I recognised her, because she lives nearby and I knew that she is Kenny's daughter. She is about, 17, 18 years old and wears glasses. I was talking to her because she is local, and I have seen her around but I don't know her name.

This group of people were sat at a table at the back of the pub, the daughter was sat opposite me, I was talking to her but I can't remember what we were talking about. The group seemed quite drunk, as it they had been out before coming into the pub. They must have stayed for about an hour, they then left. I must have come out of the pub about ten minutes after them; I don't think Kevin was there when I left.

As I left I noticed Kenny and the rest of the group, because they were standing to the right of the entrance as you leave. As I walked out of the pub Kenny walked up to me, I could see he was very drunk, he talked to me, but his speech was too slurred to understand. As he spoke to me he approached me until he was right next to me, at which time I could fee something sharp against my balls that I thought was a knife, but I did not see it. I took it from what Kenny was saying that he was warning me away from his daughter. I said to Kenny, "You're off your fucking head mate."

As this was happening I saw Kevin approach us, he was walking towards us along Sumner Road as if he was coming from the direction of the off-license further up; he was walking towards Mitcham Road. As Kevin came closer towards us I said, "He's got a knife mate." Kevin came towards us regardless; he had his arms stretched out in front of him. I moved away from Kenny and as Kevin approached, he and Kenny argued, but I cannot remember what was said. I then saw Kenny punch Kevin in the head several times until Kevin fell to the floor. I did not see Kenny use a knife. By this time I was standing near to the off-license, Kenny saw me there and started to walk quickly towards me, I ran away towards Addington Road, and that was the last I saw of him.

I ran round the block back onto Mitcham Road, when I was stood on the other side of Mitcham Road I looked down Sumner Road, by which time everyone was gone, I then went home. When we were outside the pub, myself and Kenny, his friends were a short distance away. I did not see them attack

Kevin. At the time that Kevin started to argue with Kenny he was drunk, he was staggering, and his speech was slurred. I was not drunk, although I had been drinking. The two men with Kenny left the scene as the argument started. His daughter stayed nearby on the corner of Sumner Road and Mitcham Road.

The whole incident from when Kenny approached me outside the pub, until me seeing everyone was gone must have been about ten to fifteen minutes. When I saw Kenny outside the pub I was a short distance away, I was further when I was standing near to the off-license. The night was dark, but there was street lighting, the night was clear at the time. I had an unobstructed view. I recognised Kenny Arnold and his daughter. I am scared about what may happen to me having given this statement to police, and I am genuinely scared about my safety. I have just remembered the name of his daughter, its Stacey. ”

The name of the appellant’s daughter is, in fact, Stacey.

17.
This was an impressive statement and, on the face of it, potentially powerful evidence. Shortly thereafter, however, there was an important development. On 2 August, Mr Stevens answered his bail. He was advised that he was not to be charged but he asked to speak with the officer in charge of the case, Det. Con. McDonagh. In the presence of his mother and his solicitor, he told the officer that on 26 June, when out with his mother, he had been approached by the man whom he said was responsible for the assault and threatened that if he gave evidence at the forthcoming trial he would be dead. The officer (who described Mr Stevens’ demeanour as ‘very worried and scared’) tried to get him to make a statement about what amounted to a criminal offence but he refused to make any statement and required contact only through his solicitors (attempts to contact him subsequently being ignored). Although he did not say so in as many words, if he was approached by the attacker, his identification of the appellant could not be right: by 26 June, the appellant was in custody.

18.
In the event, Mr Stevens did not attend the trial and the Crown sought to read his evidence under section 23(3)(b) Criminal Justice Act 1988 (“the Act”) on the basis that the witness would not give oral evidence through fear. The learned judge dealt with this application having heard a body of evidence on a voire dire. He first heard Det. Con. McDonagh who described Mr Stevens’ demeanour as “very worried and scared”. He heard from Mrs Lisa Matthews, Mr Stevens mother, who gave evidence of the threat and said that his fear had persisted to the extent that he had gone to live with his father at an address which she did not know. He also heard evidence from Mr Stevens’ solicitor Mr Dunmill.

19.
With that analysis of the facts, we turn to the law. The relevant parts of the Act are as follows:

“23. (1) [A] statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if…

(ii) the requirements of subsection (3) below are satisfied. ….

(3) he requirements mentioned in subsection (1)(ii) above are –

(a) the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and

(b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

...

26. Where a statement which is admissible in criminal proceedings by virtue of section 23 ... above appears to the court to have been prepared ... for the purposes –

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard –

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and

(iii) to any other circumstances that appear to the court to be relevant."

20.
Mr Hynes conceded before the learned judge (as was abundantly clear) that the application properly fell within section 23 of the Act; his submissions were then, as they are now, addressed to the discretion vested in the court under section 26. In that regard, it is important to underline that the starting point is that the statement should not be admitted.

21.
In giving leave having regard to his view of the interests of justice, the learned Judge dealt with each of these heads with care. Referring to Regina v. Dragic [1996] 2 Cr App Rep 232, he considered that the fact that Mr Stevens identified the appellant by name was no automatic bar. Further, he had no doubt that, having regard to what he had been told by Det. Con. McDonagh, Mrs Matthews and Mr Dunmill on the voire dire, the defence were in a position to controvert the statement. As to 'other circumstances' he did not agree with the submission that the statement would be a distraction: the identity of Mr Oakins' attacker was the main focus of the first count. He also rejected the concern that if it was to be put to the officer that he had suggested the appellant's name, he might be putting his character in issue; he said that the position was no different if Mr Stevens had given the evidence, bearing in mind that there was little room bearing in mind that this could not, in reality, be simple mistake. In any event, he said that any application would be subject to his discretion and not automatic. Finally, he dealt with the contention that the evidence of Ms Matthews (that Mr Stevens told her that the statement was wrong and that he had been threatened by somebody other than the appellant) of itself made the reading of this statement wrong. He said:

"I do not think that is right. If it were, then only agreed or the most anodyne of statements would be read under these provisions. It will be for the jury to decide what they make of the evidence though they will have to be directed carefully.

To my last consideration, I have had regard to the question of unfairness both under section 78 of the Police and Criminal Evidence Act and Article 6 and do not find any such unfairness as envisaged by those sections."

There is no question that the jury were directed carefully: although we have not seen the transcript of what was said when the statement was read, it is clear from the summing up that the jury were warned both at that time and during the summing up, prior to the jury being reminded of its contents. No criticism of any sort is made by Mr Hynes of what was said to the jury.

22.
Although the learned judge referred to Article 6 of the European Convention on Human Rights, he did not elaborate. Article 6(1) entitles everyone to "a fair … hearing" which is given a broad and purposive interpretation. Specific aspects of the general right are set out in Article 6(3) of the Convention which provides, among other requirements, that:

"Everyone charged with a criminal offence has the following minimum rights: …

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

23.
On the face of it, if this provision fell to be construed like an English statute (which it does not), it would appear that there would be little place for section 23 of the Act. The effect of the provisions has, however, been considered in a large number of cases and reviewed in Regina v M (KJ) [2003] EWCA Crim 357 [2003] Cr App Rep 21 p 322. We gratefully adopt the detailed summary provided by Potter LJ in the following terms:

"57. The position in the jurisprudence can best be summarised by a quotation from PS v Germany [(33900/96)] in which the court, referring in particular to the decisions in Doorson, Van Mechelen, Windisch and A.M. v Italy, [(1996) 22 EHRR 330, 55/1996/674/861-4, (1991) 13 EHRR 281, (1999) 37019/97 respectively] summarised the matter as follows:

"19. The Court recalls that the admissibility of evidence is primarily a matter for regulation by national law and that as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling on whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair …

20. This being the basic issue, and also because the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1 (see, amongst many other authorities, the Van Mechelen and Others judgment …) The Court will consider the applicant's complaints from the angle of paragraphs 3(d) and 1 taken together.

21. All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defence. As a general rule, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage …

22. In appropriate cases, principles of fairness require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular, where life, liberty or security of person are at stake, or interests coming generally within the ambit of Article 8 of the Convention …

23. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities …

24. Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, whether during the investigation or at the trial the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 …"

58. In Luca v Italy [(2003) 36 EHRR 46] where, in very different circumstances, the defendant was unable to demand the presence of an important witness at trial or to cross-examine him, the court observed at paragraph 40 of the judgment:

"As the court has stated on a number of occasions … it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3(d). The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6." (emphasis added)

59. The judge rejected the submission for the defence that the last sentence of that paragraph could admit of no exceptions. Certainly, if it did, then sections 23 and 26 of the 1988 Act could never apply in a case such as the present where the essential or only witness is kept away by fear. That would seem to us an intolerable result as a general proposition and could only lead to an encouragement of criminals to indulge in the very kind of intimidation which the sections are designed to defeat. Certainly, decisions of this court before the passage of the Human Rights Act 1998, as well as common sense, suggest that no invariable rule to that effect should be either propounded or followed. Where a witness gives evidence on a voire dire that he is unwilling to give evidence as a result of a threat which has been made to him, and the judge draws the inference that the threat was made, if not at the instigation of the defendant, at least with his approval, this should normally be conclusive as to how the discretion under section 26 should be exercised: see R v Harvey [1998] 10 Archbold News 2, CA. So too, as made clear in a case concerning a witness too ill to attend who gave clear identification evidence in his witness statement, this court observed:

"The fact there is no ability to cross-examine, that the witness who is absent is the only evidence against the accused and that his evidence is identification evidence is not sufficient to render the admission of written evidence from that witness contrary to the interests of justice or unfair to the defendant per se. What matters in our judgment, is the content of the statement and the circumstances of the particular case bearing in mind the considerations which section 26 require the judge to have in mind.": per Lord Taylor CJ in R v Dragic [1996] 2 Crim App R 232 at 237

60. In R v Gokal [1997] 2 Crim App R 266 this court, considering in advance of the Human Rights Act the assistance from the European cases then available, and with express reference to the Unterpertiner case and the Kostovski case, concluded that, when considering the question of the likelihood or otherwise that the defendant could controvert the statement of one absent witness, the court should not limit itself to the question of whether the accused himself could give effective evidence so as to do so; it should also consider the reality of his opportunity to cross-examine or call other witnesses as to the relevant events, or to put the statement maker's credibility in issue by other means. That being so, we would not subscribe to any formulation of the approach to be adopted which states without qualification that a conviction based solely or mainly on the impugned statement of an absent witness necessarily violates the right to a fair trial under Article 6."

24.
What is the position in this case? There was, of course, no issue that Mr Stevens was in fear and there was direct evidence from his mother that he had been threatened with being shot. If, as Mr Stevens told the police, he was threatened by the attacker, it is clear that it could not have been this appellant. On the other hand, it is difficult to see the benefit to anyone else of these threats or why the appellant should be in danger of being shot by someone he was not implicating in any crime and against whom, once Mr Stevens had given evidence, it would have been almost impossible to bring home a prosecution. Why the attacker should expose himself in this way is difficult to comprehend. Having said that, quite correctly, the learned judge did not express any opinion on the origin of these threats; neither do we.

25.
In relation to the exercise of discretion under section 26, Mr Hynes advances a number of propositions. First, he argues that normally, a witness in fear will not have resiled from his statement and the mischief at which the provisions are directed is an unwillingness, through fear, to give what is said to be truthful and reliable testimony in the normal way ("I stand by what I said, but I am now afraid to say it"). In this case, on the other hand, it appears that Mr Stevens would not have implicated the appellant not through fear of him but because he no longer asserted that the identification was reliable ("I do not stand by what I said but I am afraid to say that"). Further, had he attended and given evidence to the effect that it was not the appellant, although (as Mr Hynes conceded) he would have faced cross examination by the Crown as a hostile witness, assuming that he stuck to the second account, there would have been no admissible evidence against the appellant at all whereas because the statement was read, there was evidence for the jury to evaluate however weak that was and whatever health warnings were attached to it.

26.
Whereas Mr Hynes' point is valid when based on the assumptions that he makes, the difficulty with the argument is that it is entirely speculative. Mr Stevens had refused to make a second statement to Det. Con. McDonagh and there is no basis for concluding that he would have been prepared to go further if it had been possible to bring him to court. Further, if he had attended to give evidence, and refused to say anything, once again, based on the officer's evidence of the graphic threat and his demeanour, it would have been open to the trial judge to conclude that he did not give evidence through fear (see Regina v. Gray [2004] EWCA Crim 100). If he gave evidence, Mr Stephens would have had to explain how and why he provided the very extensive (and, indeed, graphic) detail set out in his original witness statement; in the circumstances, it is extremely unlikely that he would have attempted to do so. Thus, Mr Hynes postulate is far more theoretical than real. Nevertheless, it is a point to weigh in the balance.

27.
Mr Hynes' second submission rightly pointed to the fact that Mr Stevens had made this statement just after having been released on bail following his arrest and, equally correctly, submitted that the defence were disadvantaged in not being able to cross-examine him. Also of significance, however, was the abundant evidence available to controvert the statement all of which was admissible pursuant to section 28 and Schedule 2 of the Act. First, there was the interview under caution (to such extent as it revealed inconsistencies). Secondly, there was Det. Con. McDonagh to speak of the contradictory evidence account he has given and, indeed, the circumstances of Mr Stevens' arrest. Thirdly, there was Mrs Matthews (who was present when the threat was uttered and who could also give hearsay evidence of her son's asserted identification of the person who threatened him. Finally, there was Mr Dunmill, the solicitor. Although private conversations might have been covered by privilege, at the very least he also could have spoken of the meeting with the police (as he did on the voire dire). These are points to weigh in the balance, as the learned Judge did.

28.
Finally, Mr Hynes relied on Luca v. Italy and, in particular, the citation to which Potter LJ in Regina v. M (KJ), above, referred in paragraph 58 of his judgment. He submitted that Mr Stevens' evidence was the sole and determinative evidence. It is true that at the time of the learned judge's ruling, it was; the fingerprints were insufficient to do any more than put the appellant at some time at the public house. This was because, at that stage, no decision had been reached about the similar fact evidence. Once it had been decided that the Crown was entitled to rely on similar fact, the answer is different. If the jury were sure that these attacks were by one and the same person, the evidence available in the second attack to prove that it was the appellant who committed it (which is the identification evidence coming from Mr Morley) is also evidence in relation to the first attack. The question can be posed in this way: absent any evidence from Mr Stevens, would there have been a case to answer on the first attack? When pressed, Mr Hynes conceded that, if similar fact evidence was rightly admitted, there was. In the light of our conclusion that it was, therefore, the evidence of Mr Stevens was not, in any event, the sole or determinative evidence in the case.

29.
The learned judge analysed section 26 correctly and although he had not then decided that the evidence of the second attack was admissible by way of similar fact, that conclusion would only have served to strengthen the view that he reached. In our judgment, he was entitled to reach the conclusion that, having considered the test set out in section 26 of the Act, in the interests of justice the statement ought to be admitted under section 23. To such extent as he did not consider any of the points which have been argued before us, we are satisfied that the result would have been the same. Given that there is no criticism of the way in which this matter was left to the jury in the light of the rulings which he gave and that the only criticism of the summing up (not made in the Notice of Appeal) was rightly not pressed in argument, the challenge to the safety of these convictions fails and this appeal is dismissed.

30.
We cannot leave this case without sounding a word of caution. The reference in Luca to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning Mafia-type organisations is echoed across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this Court concerned with the conduct of criminal trials is likewise. Inevitably, applications under section 23 will follow but this judgment should not be read as a licence for

prosecutors. Very great care must be taken in each and every case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well, depending on the circumstances, jeopardise infringing the defendant’s Article 6(3)(d) rights; even if it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.