

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 17/15

(Ind. 90/11)

C#5801/11

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Dan Kelly

Appellant

BEFORE

**The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon (Cecil) Dennis Morrison, Justice of Appeal**

Appearances: Laurence Aiolfi of Samson & McGrath for the appellant and Nicole Petit- Tyson for DPP.

JUDGMENT

Revised from transcript of oral judgment given on 16 August 2016 and Approved
Released 26 August 2016

The Honourable Sir Richard Field, JA

On 16th July 2015, following a trial by jury presided over by Justice Swift in the Grand Court, the appellant, Dan Kelly, was convicted of causing grievous bodily harm with intent and was sentenced to 7 years' imprisonment. The appellant now appeals against conviction and sentence.

It was the Crown's case that the appellant stabbed Norman Clarke twice in the Club 7 night club in the early hours of 10 December 2011. There was never any doubt that Mr Clarke was stabbed twice that night in Club 7. The questions for the jury was whether they were sure that it was the appellant who attacked Mr Clarke and, if they were, whether, when the appellant carried out the attack, he intended to inflict on Mr Clarke really serious bodily injury.

The only eyewitness to the attack called by the Crown was Mr Clarke himself. The Crown's case rested therefore on the identification of the appellant as the assailant by Mr Clarke.

Three grounds of appeal against conviction are advanced on behalf of the appellant. First, it is contended that the appellant's conviction is unsafe because of the presence on the jury of a Mr Keevon Douglas who acted as the jury's foreman and who possibly was at Club7 performing as a DJ at the time of the attack on Mr Clarke. The second ground of appeal is that the jury wrongly, albeit inadvertently, heard evidence of the appellant's bad character. The third ground of appeal is that the trial judge misdirected the jury on the issue of identification.

In light of the questions raised by the appellant as to the inappropriateness of Mr Douglas being a member of the jury, this court ordered on 17 November 2015 that there be an enquiry conducted by a police officer who had had no involvement in the investigation or prosecution of the appellant in these proceedings.

The outcome of the ensuing investigation is a signed statement made by Mr Douglas. In this statement, Mr Douglas confirms that he is a DJ known as "DJ Von" and that in 2011 he used to perform as a DJ at Club 7. Mr Douglas also states that he cannot recall exactly if he played as a DJ at Club 7 on the night of the 9th and the early morning of 10th December 2011 but he accepts that it is a possibility that he was at Club 7 at this time because 9th December 2011 was a Friday and he used to play at Club 7 on Fridays. Since the attack on Mr Clarke, Club 7 has closed down.

Mr Douglas further says in his statement that he did not know Dan Kelly and can honestly say that he had no knowledge of the case, the appellant or the victim prior to the trial. He was not influenced by any third party prior to the trial and his own judgment and communications with other members of the jury were based solely on the evidence presented during the trial.

The transcript of the first morning of the trial shows that a list of names, including that of the appellant, was read out to the jury in waiting, who were asked to indicate when they came to be sworn if they knew anyone so named. None of the members of the jury in waiting told the court that they knew any of the people whose names were read out. They were not asked to say if they were present at the club on the night and in the early morning of the ninth and tenth December 2011 when the stabbing of Mr. Clarke took place.

In his written submissions addressing the first ground of appeal, Mr. Aiolfi, on behalf of the appellant, contended that this was a case of apparent bias. He argues in those submissions that a fair minded and informed observer, having considered all the relevant facts, would conclude that there was a real possibility that the jury was biased. In our view, this is a case not so much of apparent bias, but one of procedural irregularity.

At the hearing on 17 November 2015, Moses JA asked Counsel for the Crown, Ms Petit-Tyson, if she would accept that if in fact the foreman of the jury had been present at the club on the night in question, that would be a very serious matter, to which Ms Petit-Tyson replied: "That is an objection that would have been taken if we

knew at the time,” and she went on to confirm that had she known the foreman had performed as a DJ on the night in question she would never had the man on the jury, let alone as foreman.

In the course of her submissions on the substantive appeal, Ms Petit-Tyson contended that she would only have objected to Mr Douglas serving on the jury to avoid the risk that some question might arise after the trial that undermined the jury’s verdict. Given Mr Douglas’s statement that that he knew nothing about the attack on Mr Clarke until the trial and that his own judgment and communications with other members of the jury were based solely on the evidence presented during the trial, there was no risk of any injustice and accordingly the appellant’s conviction was a safe conviction.

In our judgment, notwithstanding Mr. Douglas’s statement that he knew nothing about this attack before the trial and only took into account the evidence given at the trial, there is a material risk that he was present at the scene and might therefore have taken into account, whether consciously or subconsciously, matters known only to him and not given in evidence, particularly when considering the issue of identification which depended in part on the layout, lighting, degree of crowding and overall ambience of the club at the relevant time.

Not only must justice be done in a criminal trial, it must be seen to be done. In our judgment, Mr Douglas’s presence on the jury was a material procedural irregularity that renders his conviction unsafe.

It follows that, for the reasons we have given, this appeal is allowed and the appellant’s conviction must be set aside and a re-trial is ordered.

Newman JA

Field JA

Morrison JA