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Regina v Faryadi Sarwar Zardad

No: 200505339/D3

Court of Appeal Criminal Division

7 February 2007

[2007] EWCA Crim 279

2007 WL 261182

Before: Lord Justice Keene Mr Justice Stanley Burnton Mr Justice MacKay

Wednesday, 7th February 2007

Representation

- Mr F Jennings QC & Mr J O'Keefe appeared on behalf of the Appellant.
- Mr J Lewis & Mr P Taylor appeared on behalf of the Crown.

Judgment

Lord Justice Keene:

1 On 18th July 2005 in the Central Criminal Court before Treacy J, this appellant was convicted of conspiracy to torture and conspiracy to take hostages. On 19th July 2005 he was sentenced to 20 years' imprisonment on each count to run concurrently and was recommended for deportation. He now appeals against conviction by leave of the Full Court, following a refusal of leave by the Single Judge.

2 Leave was granted on only one of the grounds of appeal, the ground which concerns a direction given by the trial judge as to how the jury should approach the issue of a previous inconsistent statement by a witness.

3 Both the charges alleged an agreement between the appellant and others in the period 1992 to September 1996 in Afghanistan. The appellant had, at that time, been a military commander in one of the factions engaged in the civil war in that country, the faction known as Hezb-e Islami. That faction controlled areas to the south and southeast of Kabul including a town called Sarobi. That was a major strategic centre, amongst other things because it was located on the only significantly usable road for heavy transport between Pakistan and Kabul, a town which was controlled by the opposing faction Jamiat-e Islami.

4 The appellant had his main military base at an old Russian camp on the main road to Kabul, about 8 kilometres on the Kabul side of Sarobi.

5 The Crown's case was that the appellant had a checkpoint on the road by his base (checkpoint 1 as it was described), at which most of the incidents founding the charges took place. The appellant denied that there was such a checkpoint. His evidence was that he merely had his military base there, though he accepted that the soldiers at that base operated under his command.

6 The Crown called a number of witnesses as to incidents amounting to torture and hostage taking occurring at this alleged checkpoint. There was also evidence of there being another checkpoint between the appellant's base and the town itself at a road junction, that being described as checkpoint 2. There was an issue at trial as to whether that was controlled by the appellant.

7 Evidence of vehicles, usually buses and commercial vehicles, being stopped by armed men at places including checkpoints 1 and 2 and of goods and money being taken, sometimes

accompanied by violence, was given by foreign aid workers, a United Nations official and a number of Afghan witnesses; some of them, it should be noted, opponents of Hezb-e Islami.

8 They said that the checkpoint at the appellant's base was the main one and that there was usually but not always a physical barrier, such as a chain across the road. Some of the more temporary checkpoints were removed after complaints to the leader of Hezb-e Islami.

9 Evidence of specific incidents of violence and detention was given by a number of witnesses who travelled the roads through Sarobi during the period in question. People described being taken from vehicles, often buses or vehicles laden with goods, by men with guns and being beaten and kicked, or being taken to the appellant's base, sometimes a basement or bunker there, sometimes a metal container, and then being beaten with guns, sticks or electric cable. Some times people were chained or held in a confined space with up to 20 others. The beatings, it was said, went on for days or weeks repeatedly.

10 Some of those concerned were, it was said, left scarred or with internal injuries. One man had fuel poured over him and threats were made to set it alight. Often this violence was connected with demands for money. Sometimes it was directed at traders whose goods were seized. People who were detained were often told that their families had to pay large sums to secure their release or, if they were Panjshiri, they would be kept for exchange. The prosecution adduced identification evidence showing the appellant's involvement in these events.

11 It was the Crown's case that the actions of soldiers involved in these incidents took place with his knowledge and approval and in some cases in his presence, or with his direct involvement, in order to extend and reinforce the control of his faction in the area, and to obtain money and goods to help finance its cause.

12 The appellant denied that he was involved in any of the incidents alleged or that men under his command were responsible, or that they took place in areas under his control. His evidence was that it would have degraded him to have been involved in such matters. He also denied that there was any checkpoint outside his main base, and he said that there were no detention facilities there and he had nothing also to do with checkpoint 2. In any event, his evidence was that he was often away from the base fighting, so even if the jury found the offences had been committed there, it did not mean that he was party to any agreement to commit them.

13 One of the prosecution witnesses was a journalist called Stefan Smith. He gave evidence about an incident in 1993 which had been the first time he had seen the appellant. He described this incident as being “in Sarobi”. It became clear that what he meant by this was at the appellant's camp or compound, to the west of the town.

14 Mr Smith described how he had been on a bus going from Jalalabad to Kabul, along with a number of ethnic Tadjiks from the Panjshir Valley. There had been evidence already that the Panjshir Valley was where a commander called Masood, from a rival faction, opposed to the appellant's faction, had his home base.

15 Mr Smith's evidence was that the bus went through a checkpoint in the centre of Sarobi town and then up the hill on a winding road to a checkpoint at the appellant's compound. He described the base and spoke of a makeshift barrier across the road. The bus was stopped there by a group of soldiers carrying Kalashnikovs. Mr Smith said there was an argument and then Mr Smith and the women and children on the bus were taken off it and one of the armed men got in. At that stage, Mr Smith noticed that the appellant was standing on the opposite side of the road with the others, about 5 metres away. They were all shouting and looking very animated. The bus was then driven 200 metres or so further on, with the male passengers still on it, and then taken off the road on to a dirt track where it stopped. Six or seven armed men jumped into a pick-up truck and followed it. Mr Smith said that he could still see the bus but he did not keep watch on it all the time. He heard a very heavy series of gunshots, lasting up to a minute, and he could see four or five men firing into the bus with Kalashnikovs. None of the occupants got off.

16 According to Mr Smith's evidence the appellant was there when the pick-up with the armed men followed the bus and stopped. His camera, he said, was taken from him by one of the soldiers and then eventually a bus came from the other direction, onto which he was pushed, and he was then taken back to Jalalabad. That was his evidence-in-chief.

17 In cross-examination, he accepted that he had met a well-known and respected journalist, Mr Sandy Gall, about eight months or so after this 1993 incident and had spoken to him about it. Mr

Gall had, in 2003, made a statement in which he had set out his recollection of this conversation, some 10 years earlier, and of the account of the incident given to him by Mr Smith. There is no doubt, as Mr Smith accepted, that there were a number of differences between the account he had given in Court and the account which, according to Mr Gall, who later gave evidence at trial, had been given to him. We shall have to return to those differences in due course in this judgment, but they included such aspects as whether Mr Smith had been on the bus to begin with, or had instead seen it arrive, and whether it was going to or from Kabul. It was also contended by the defence that there was an important difference as to where the incident had happened.

18 In due course therefore, the trial judge had to give — and did give — directions to the jury about how they should deal with the situation of a previously made inconsistent statement by a witness. In so doing, the judge referred, as an example, to the evidence of Mr Smith. The judge said this (at Volume I of the transcript of his summing-up, pages 47 to 49):

"How do you approach such a situation? Well, if you are sure that the witness had previously made a statement which conflicts with his present evidence, you can take into account the fact that he made such a statement in the past when you are considering whether he is believable as a witness.

It is really no more than common sense: if a person has in fact on a previous occasion given a description of an event, which differs from the description which he gave when he was giving evidence, then if the difference is important and not a trivial one, you would naturally feel the need to examine that witness's evidence with care in deciding whether he or she is a reliable witness. As I review the evidence with you a little later on, looking at individual witnesses and what they have to say, I will draw your attention as to where this situation arises.

Where an earlier inconsistent statement has been made and you are satisfied that there has been such an earlier inconsistent statement, you are entitled also, in addition, to consider the content of that earlier statement as evidence in the case.

When you are considering some alleged earlier inconsistent statement, first of all, you have to ask yourself: are we satisfied that such a statement was made? Secondly, you will have to ask yourself whether it was — the statement made on the earlier occasion was reliable material or whether it represents a misunderstanding or a repetition of a rumour or information which was secondhand and not within the witness's own knowledge, or whether it is flawed for any other reason.

It is possible that an inconsistent statement or an apparently inconsistent statement may demonstrate that a witness is unreliable. That he is a person who cannot give the same account twice in relation to particular events. That is one conclusion you might come to.

Another conclusion you might come to is that any difference you find between things that the witness has said in evidence from that which he said on earlier occasions is that all that has happened is that there has been a change of emphasis or detail which is not of significance in your view.

It may be that you conclude that the reason there are two apparently conflicting statements is because there has been an element of misinterpretation or misunderstanding or people have got at cross purposes.

You will have to look at each of those different possibilities in evaluating the question of previous inconsistent statements."

It will be seen that in that passage the judge gave two different tests for determining whether the conflicting earlier statement had been made. The first was whether they were "sure" that the witness had made such an earlier statement. The second, which the judge used on two occasions, was whether they were "satisfied" that he had made it.

19 It is contended on the appellant's behalf that there are two things wrong with those directions. First, it is submitted that it seems to put the burden of proving that the previous inconsistent statement was made onto the defence, and that that was itself a misdirection. Secondly, the use of the word "sure" was the wrong test. The jury, it is contended, did not need to be sure that Mr Smith had made such a previous statement before they could take account of it.

20 Mr Jennings QC, on behalf of the appellant, refers to the specimen direction No 29 produced by the Judicial Studies Board, which deals with such a situation, and which reads as follows:

“1. [X has admitted that he] You may be satisfied that X] made a previous statement which was inconsistent with the evidence he gave in court. [*Identify the inconsistency* .]

2. You may take into account any inconsistency [and X's explanation for it] when considering X's reliability as a witness. It is for you to judge the extent and importance of any inconsistency. *(If appropriate:)* If you conclude he has been inconsistent on an important matter, you should treat both his accounts with considerable care.

3. If, however, you are sure that one of X's accounts is true [in whole or in part], then it is evidence you may consider when deciding upon your verdict[s].”

21 That, it is said, keeps the burden of proof on the prosecution, whereas the direction given in the present case transferred it to the defence. Mr Jennings argues that it is indeed enough for the jury to feel a doubt about the existence of the previous inconsistent statement; if they feel that there was something said which is capable of being treated as a previous inconsistent statement, that in itself should be capable of leading them to conclude that they have doubts about the evidence given by the witness in court.

22 As for the standard of proof: to require the jury to be sure is a standard, it is argued, applicable to what the prosecution has to prove in a criminal trial, even in a case where there is a burden resting on the defence. The standard of proof, even where the burden is to be discharged by the defence, is never more than a balance of probabilities. Consequently, says Mr Jennings, the judge's direction on this aspect by embodying the criminal standard again amounted to a material misdirection.

23 So far as the burden of proof is concerned, we do not accept that the directions given by the judge, which we have quoted, wrongly transferred the burden — as distinct from the standard of proof — onto the defence. Any party, whether prosecution or defence, seeking to undermine the evidence of a witness for the other side in this way, has to produce evidence, or to obtain it through cross-examination, to show that there actually has been a previous inconsistent statement.

24 If the party in question does not discharge that burden, there is no issue of a previous inconsistent statement for the jury to consider. Hence, the Judicial Studies Board's direction relied on by the appellant refers, correctly in our view, to the jury being satisfied that the witness made such a statement. That means no more than that the jury has to decide that the witness did so. Indeed, we observe that in the course of his own written skeleton, Mr Jennings not merely relies upon the way in which the matter is put in the Judicial Studies Board Specimen Direction, but goes on to suggest what the direction her should have been. It begins by saying: “You may be satisfied that Stefan Smith made a previous statement which was inconsistent with the evidence he gave in court.” The suggested direction on behalf of the appellant continues subsequently with these words: “If you conclude he has been inconsistent on an important matter”, and so on. Mr Jennings no longer maintains that position, but in our view the way in which he put it in the course of his written skeleton is correct. That is all that a jury has to decide.

25 Of course the burden of proving guilt of the charges in question rested on the prosecution, but the judge made it perfectly clear to the jury in his summing-up that the burden of proving a defendant's guilt remained “from first to last” on the Crown (see Volume I, page 23).

26 Where Mr Jennings is on stronger ground is in respect of the standard of proof. We are in no doubt that the judge did err when he used the word “sure” in the early part of the direction to which we have referred, and Mr Lewis QC, for the respondent, does not seek to argue otherwise. The jury does not have to be satisfied to the criminal standard of proof that a witness has made a previous inconsistent statement. To that extent it seems to this Court that there was here a misdirection.

27 The issue at the heart of this appeal is whether that renders these convictions unsafe. It is argued on behalf of the appellant that it does, because the jury may have been misled into improperly rejecting the evidence of previous inconsistency on Mr Smith's part and so accepting his evidence, when they might have rejected it. That evidence was capable of having a significant effect on the jury. Apart from the incident itself, it would, contends Mr Jennings, have undermined the appellant's credibility generally, if the jury accepted what Mr Smith had to say in court. His evidence was important. He was, we are told, the only westerner to give evidence going directly to the charges contained in the indictment. Moreover, his evidence was not merely

relevant to the charge of torture but was relevant in effect to both charges. If the jury accepted Mr Smith's evidence of the appellant's presence at the time of the incident described, that was bound to affect the whole case and lead to a conviction on both counts. Mr Jennings submits that there were clear problems with others of the witnesses who were called by the Crown. He has taken us through those witnesses, whose evidence has been conveniently summarised in the form of a schedule. We do not need to recite that in detail in this judgment, but we have taken the point made there on board.

28 It is submitted that if the jury accepted Mr Smith's evidence because of the misdirection, it would have been very much easier for them to have ignored the weaknesses in the evidence given by the other prosecution witnesses. In effect, this misdirection may have tipped the balance.

29 The Crown's response is that the use of the word "sure" in the direction given ought to be seen in context. That context is one where the judge then went on twice to refer, quite properly and simply, to the jury being "satisfied" that the witness had made such a previous statement, and then when the judge came to deal in detail with the conflict in the evidence, later in his summing-up, he made no reference to the jury having to be "sure". He told them at one point, "You will have to consider the situation and work out for yourselves where you think the truth lies about all of this." Subsequently he said this: "You will have to puzzle out whether this means you cannot rely on and accept the evidence given by Stefan Smith, or whether there is some other explanation for the difference of recollection between Mr Sandy Gall and Stefan Smith".

30 Mr Lewis also contends that the error went unnoticed by counsel for either side at trial, despite the fact that the judge had invited counsel, at the outset of his summing-up, to raise with him any significant error or omission. That does indeed seem to be the case. The judge did so invite counsel, and Mr Jennings responded in due course at the short adjournment by raising two matters, neither of which concerned this error. That being so, argues Mr Lewis, it is probable that the use of the word "sure" went unnoticed by the jury, as Mr Jennings admits it went unnoticed by him.

31 This Court sees some force in this argument of the Crown's but only a modest amount. One simply cannot know what impact the use of this word had on the jury's deliberations. It may seem unlikely, for the reasons given by Mr Lewis, that it had much impact, but one cannot assume that that is the position and one of course cannot know that is the position.

32 The prosecution also argues that this error by the judge affects only the torture conspiracy charge and not the hostage-taking charge. Mr Smith's evidence was only relevant, it is said, to the former. Mr Lewis points out the judge's very careful directions as to considering each count separately: he described them as two distinct alleged conspiracies, and separate incidents of torture were set out as distinct from a number of separate alleged incidents of kidnapping. Consequently, whatever may be the position in relation to the torture charge, it cannot, it is said on behalf of the prosecution, affect the hostage-taking charge.

33 That may be, but the jury had, amongst other things, to assess the appellant's credibility and character, and the effect on those aspects of the case of the evidence given by Mr Smith may well have influenced the jury on both the counts. It seems to us that, if Mr Smith's evidence was accepted by the jury, it may well have a very profound influence on their attitude to both these charges.

34 There is no doubt that there was, irrespective of Mr Smith's evidence, a powerful case against the appellant on both charges. There were many witnesses who testified as to incidents of torture and hostage-taking at the hands of the appellant's soldiers. Mr Jennings has submitted, in his written skeleton, that if Mr Smith's evidence was accepted by the jury, the Crown would have established that there was a checkpoint outside the appellant's base and that it was used for intercepting innocent civilians. In addition it would have gone to show that the appellant knew of the checkpoint and its purpose. That is true; and it is also true that those were central issues in the case. But there was a mass of evidence from prosecution witnesses that there was such a checkpoint there, manned by the appellant's men, and that people were stopped there. The evidence of Mr Smith added relatively little on that particular aspect. To take just one illustration: the jury heard from two aid workers, Mr Willoughby and Mr Strickland, that there was a checkpoint there where people were stopped and money taken. Many Afghan witnesses gave evidence to that effect. It seems to us that the real significance of Mr Smith's evidence

concerned the alleged incident of the shooting of the bus passengers. It was undoubtedly very dramatic evidence.

35 It is in that connection that we, in this Court, need to consider the significance of the misdirection on the safety of the conviction. That in turn involves examining the significance of the alleged inconsistency in the two accounts of the bus incident. There were, as we have indicated, undoubted inconsistencies in detail. As we have said earlier, they included whether Mr Smith had originally been on the bus itself, and from which direction it was coming. There were also discrepancies about whether he could see the bus after it had been driven off with the men in it; whether he subsequently saw the bodies, and when his camera was taken.

36 However, at no point in the course of this trial was it put to him in cross-examination that his account of this incident was a fiction; that he had made it up. Indeed it was never put to him that he might be mistaken about some such incident having occurred at all, even honestly mistaken. In other words it was never suggested to him that the incident never happened. What was put to him was that he could be mistaken as to where it happened, which he denied, and as to the appellant's involvement. That might have been important, if the two accounts of the incident differed in location and in respect of the appellant's involvement.

37 The defence sought to suggest that what Mr Smith had told Sandy Gall was that the incident had taken place in the centre of Sarobi, near the bazaar where, according to the evidence, there was also a checkpoint, but one not controlled by the appellant. That, however, does not seem to have been Mr Gall's evidence. This Court has the benefit of transcripts of the evidence, both of Mr Smith and of Mr Gall. We emphasise that we have read them in full. What Mr Gall recollected Mr Smith telling him was that the incident took place “in Sarobi”, and at a checkpoint. Mr Gall made no mention of the bazaar or the town centre. Given Mr Smith's own reference in his evidence in court to first meeting the appellant “in Sarobi”, when he undoubtedly meant at checkpoint 1 by the appellant's camp, there was no apparent conflict between the two accounts on this aspect.

38 Of even greater significance, it seems to us, the inconsistencies between the two accounts did not relate to whether or not the appellant was present at the incident. At no time did Mr Gall tell the jury that Mr Smith had said to him that the appellant was not present. On the contrary, it became clear when Mr Gall was re-examined that Mr Smith had told him about the incident when they were specifically discussing the appellant. Mr Gall was asked: “What was the name of the person involved?” His answer was: “Mr Zardad”.

39 So while, if the jury had accepted Mr Gall's evidence, they might well have had doubts about some of the details of the incident, and about Mr Smith's recollection of such details, Mr Gall's evidence could not have led them to doubt the crucial elements of the incident as described by Mr Smith at trial, that is to say, the fact that such an incident had happened and that the appellant was involved.

40 That being so, the judge's error in using the word “sure” in relation to the previous statement of Mr Smith was not of significance in the case. We add, therefore, that to the particular points we have referred to already, about the way in which the judge dealt in detail with how the jury should approach the alleged inconsistencies between the two accounts.

41 Taking the matter in the round, this Court is satisfied as to the safety of these convictions and it follows that this appeal is dismissed.

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