

IN THE COURT OF APPEAL
ON APPEAL FROM THE
HIGH COURT OF JUSTICE

Court of Appeal Ref: A2/2005/1093

QUEEN'S BENCH DIVISION

Lower Court Reference:
Claim Number: HQ03X03360

B E T W E E N:

ALIN TURCU

Claimant/Appellant

- and -

NEWS GROUP NEWSPAPERS LTD

Defendant/Respondent

CLAIMANT'S SECOND SKELETON ARGUMENT RE
PERMISSION TO APPEAL

1. Introduction

This skeleton argument is served in support of C's application for an oral hearing for permission to appeal, alternatively, a re-consideration on paper of the proposed appeal. The application arises as a result of the emergence of evidence from Florim Gashi,¹ the sole source of the article complained of. This evidence alone, if accepted in whole or part, would be destructive of D's defence of justification. The defence depends on the existence of a genuine plot to kidnap Victoria Beckham. Gashi's statement suggests that there was no such plot and that the various acts which the Judge regarded as evidence of such a plot, were all set-up. This skeleton should be read in conjunction with the skeleton lodged in support of C's original application². If granted permission, C intends to pursue the original grounds of appeal, as well as the ground based on the fresh evidence. The fresh evidence bolsters the original application, as well as justifying permission in its own right. It illustrates the danger of relying on stage-managed covert recordings as cogent evidence of an inherently unlikely crime, when the newspaper makes a tactical decision not to call the man behind the recordings.

Principles governing admission of fresh evidence

2. CPR 52.11(2) provides: "Unless it orders otherwise, the appeal court will not receive (a) oral evidence; or (b) evidence which was not before the lower court." In *Hamilton v Al-*

¹ File 1, Tab 2

² File 1, Tab 10

Fayed [2001] EMLR 15, where the fresh evidence went solely to credit, the Court of Appeal stated:

[11]...We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective. In adopting this approach we are following the guidance to be found in the judgment of May L.J in Hickey v. Marks (6 July 2000), of Morritt V-C in Banks v. Cox (17 July 2000) and of Hale L.J in Hertfordshire Investments Ltd Bubb [2000] 1 WLR 2318.

[12] In Ladd v. Marshall [1954] 1 W.L.R. 1489 at p. 1491 Denning L.J summarised the test for introducing fresh evidence on appeal as follows:

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

[13] These principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective. In particular it will not normally be in the interest of justice to reopen a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result.

3. It is not only the interests of the parties that are relevant. There is a wider public interest in the courts getting the "right result".³ This is particularly so in a defamation case such as this, involving a major news story, prominently published (and re-published throughout the world), leading to five men's imprisonment and where the trial has also been widely reported.
4. At the permission stage, the appellant need only show that he has a real prospect of persuading the full court that the fresh evidence would justify a new trial. He does not have to win the argument to get permission; it is sufficient to show that there is an

³ See the comments of Edmund Davies LJ in Associated Leisure Ltd (Phonographic Equipment Co. Ltd) and Others v Associated Newspapers Ltd [1970] 2 QB 450 at 457D.

argument to be had. The Court can admit the evidence solely for the purpose of considering whether it justifies a new trial.⁴

Application to the facts

Apparent credibility

5. The only evidence to support the justification defence was (and remains) the covert recordings. Mazher Mahmood could only give evidence of his belief that there was a genuine plot (which was relevant only to damages). Gashi was at the centre of every recording and was privy to what happened immediately before and after. The recordings can essentially be divided into 3 categories:-
 - a) Conversation in bars and restaurants;
 - b) The recruitment of Qureshi (a.k.a. "Jaws") as driver by Adrian Pasareanu (meetings of 25 & 28 October);
 - c) The visit of Jay Sorin to the Beckham's home (29 October).

6. In finding that there was an "apparently genuine plot" the Judge was clearly influenced by b) and c). These were actions, not merely conversations prompted by Gashi in a social environment. The Judge did, nevertheless, identify a number of peculiarities about the footage. What Gashi does is to explain what happened behind the scenes. His account is consistent with the peculiarities identified by the Judge. Significantly, as far as justification is concerned, D cannot adduce any evidence to contradict Gashi. Mahmood can only deny that he was party to the set-up, but that does not assist D in respect of its justification defence. There is simply no witness evidence to justify the Beckham kidnap plot or the existence of a gang, dangerous or otherwise. Not only is there no evidence that contradicts Gashi's statement, but all the available evidence is consistent with what he says. This can be best illustrated by considering a chronology of the recordings:-

Thursday 24 October (early evening)⁵

Meeting in pub, Gashi, Adrian Pasareanu, Joe Rivas and C. Discussion of kidnap raised only by Gashi. No mention of driver. At the end of recording Mahmood to Gashi "*What about my man Jaws, when can we get him to go in a meeting?*" and "*We're going to have to think of another thing to try and help these guys down there [the Beckham's home]*"⁶.

⁴ Hamilton v Al Fayed at [67].

⁵ Video CGB/2. Transcript - File 2, Tab 2

⁶CGB/2 page 102A

Gashi's evidence [W/s 5-8, 12]: Conversation on the subject was prompted by him; nobody took it seriously, discussion hypothetical. Mahmood's idea that Jaws should be driver and pushing to get any of the 5 to go to the Beckham's home.

Thursday 24 October (later) No recording provided

Meeting at C's home, Gashi, Adrian and C

Gashi's evidence [16]: Recording destroyed by Mahmood because it exposed set-up.

Friday 25 October⁷

Meeting at restaurant Gashi, Adrian, C and Jaws. Jaws recruited by Adrian as driver subject to Luli Krifsha's consent. Immediately before the meeting Gashi leaves Jaws and the recording equipment in the car to "instruct" Adrian (as is apparent from transcript).⁸

Judgment⁹ [71]: *"the most likely explanation remains that this was a genuine discussion as part of the preparation, however desultory, for a kidnapping"*.

Gashi's evidence [8-9]: Adrian agreed to go with the pretence as a favour. Gashi told Adrian what to say and prompted him during meeting.

Saturday 26 October (night)¹⁰

Meeting at Atoca Portuguese restaurant Gashi, Adrian, Jay, Luli, Joe & C

Judgment [74]: *"loud, indiscreet, jocular and completely non-productive"*.

Gashi's evidence [6]: Hypothetical conversation introduced by him at a social event with a party atmosphere.

Sunday 27 October¹¹

Gashi and Luli. No mention of recruitment of Jaws.

Judgment: [80] *"...it is odd that Luli says nothing about it [recruitment of Jaws] on any of the intervening taped conversations between 25 and 28 October"*.

Gashi's evidence [11]: Luli did not "authorise" recruitment of Jaws and knew nothing about it. He did not tell him because he would have been suspicious.

Monday 28 October¹²

Meeting at Gashi's home: Gashi, Adrian and Jaws. Adrian confirms Luli's agreement to recruit Jaws. Gun brandished by Adrian who claims it is "his best friend" and identifies Victoria Beckham as the target.

Judgment [82]: *"Mr Price submitted that the whole performance was phoney and, in particular, that I should be able to see that from Pasareanu's smirk. I agree that one's impression on viewing the tape, which I did several times, is that it seems rather "stagey"*.

Gashi's evidence [10-11]: The meeting was stage-managed. He asked Adrian to continue the pretence with Jaws. The gun was a replica and belonged to Gashi. Luli as the "boss" was an invention. Luli knew nothing of Adrian's dealings with Jaws.

Tuesday 29 October (midday)¹³ (video recording by Mahmood from a car but no recording by Gashi of the participants)

Gashi, Jay and 2 friends visit the Beckham's home.

⁷ Video CGB/3. Transcript - File 2, Tab 3

⁸ CGB/3 pages 125-129

⁹ File 1, Tab 15.

¹⁰ Video CGB/7, Transcript File 2, Tab 5

¹¹ Audio Recording CGB/9, Transcript File 2, Tab 6

¹² Video CGB/10. Transcript, File 2, Tab 7

¹³ Video CGB/11. Transcript File 2, Tab 8

Judgment [83]: *"It was reminiscent of a coach party alighting at a stately home... One has to ask, on the other hand, what they were there for."*

Gashi's evidence [12]: Jay did not know he was visiting the Beckham's home.

Tuesday 29 October (later)¹⁴

Gashi and Luli. No mention of the recruitment of Jaws or trip to Beckham's home.

Judgment [84]: *"I agree it was curious that nothing was said to Luli about the visit to the Beckhams' home which had taken place that very day."*

Gashi's evidence [12]: Luli knew nothing.

Thursday 31 October¹⁵

Meeting at Jay's home, Gashi, Jay and Jaws. Gashi introduces Jaws to Jay.

Discussion of kidnap. Jaws tries to get Jay to agree to snatch the children. Immediately before meeting, Gashi leaves Jaws and the recording equipment in the car.¹⁶

Judgment [90]: *"Enormous glasses of vodka are drunk but there is little by way of constructive conversation."*

Gashi's evidence [13]: Aim of the meeting was to get Jay to talk about the Beckham's children. Before the meeting he told Jay what to say.

7. Gashi's evidence is consistent with the following features of the covert footage (and the case generally):-
- The stage-managed appearance of the footage involving Adrian and Jay. The visible prompting by Gashi.
 - The leaving of recording equipment in the car for unrecorded discussion with both Adrian and Jay, before their respective introductions to Jaws.
 - The absence of any previous discussion about the recruitment of a driver. Mahmood's direction to Gashi to get Jaws involved.
 - The absence of a recording of the visit to the Beckham's home and the second meeting on 24 October.
 - The lack of apparent purpose to the introduction of Jaws to Jay, except as a means of getting material on tape concerning the Beckham's children. The fact that no reference was made to Adrian's previous "recruitment" of Jaws.
 - The fact that it was always Gashi who raised conversation about the kidnap.
 - The unexplained escalation from jocular banter to acts ostensibly in furtherance of a plot and then back to jocular banter.
 - The absence of co-ordination, planning or leadership. Luli, the supposed gang-leader, appears to know nothing about Jaws (even though he has supposedly given authority to his recruitment) or Jay's visit to the Beckham's home. The various "gang" members do

¹⁴ CGB/12. Transcript, File 2, Tab 9

¹⁵ Video CGB/13, Transcript, File 2, Tab 10. Video CGB/15, Transcript, File 2, Tab 11

¹⁶ CGB/13 page 371

not know what the others are doing. This was because they were not a gang but a series of individuals targeted individually by Gashi to obtain material on tape.

- The powerful financial motive on Gashi's part to acquire the "evidence" necessary to run such a sensational story.
- The inherent unlikelihood of a plot to kidnap Victoria Beckham, particularly one involving C and the other 4 accused men.

8. Not only is there no evidence to contradict Gashi, but there is no feature of the covert footage with which it is inconsistent. Furthermore, Gashi's evidence is corroborated by the following:-

- Adrian's statement to the police in interview shortly after arrest.
- The evidence from the APCOA internal inquiry that Robin Hallsworth supplied Gashi with a gun,¹⁷ together with the fact that no gun was recovered from Adrian, notwithstanding that he had no pre-warning of his arrest.
- It is likely that proper disclosure from D will provide support to Gashi's claims that cash payments were made for previous stories (which was hidden from the police by Mahmood to downplay the amount paid for the kidnap story) and of regular contact between Mahmood and Gashi during the trial.¹⁸

9. It will, no doubt, be submitted that Gashi is not a credible witness. He told lies to the police and has previously asserted that the plot was genuine. As it happens, he did not give evidence at trial or in the criminal proceedings and it is not known whether, had he done so, he would have maintained that the plot was genuine. It is accepted that an appellant must show that the fresh evidence is apparently credible. An element of the test obviously relates to the credibility of the witness, but the fact that the witness has previously given a dishonest inconsistent statement is not an automatic bar. The issue is the apparent credibility of the evidence. That depends on the particular facts of the case. In particular, whether it is corroborated or rebutted by other evidence and the motives operating in the mind of the witness at the time of the original statement and the recantation. What makes Gashi's evidence entirely credible is that it is corroborated by all the other available evidence and, as far as justification is concerned, there is no evidence to rebut it. This is not a case, such as *Ladd v Marshall*, where there is a direct conflict of oral evidence and one of the witnesses who gave evidence at trial changes sides. Moreover, Gashi has no apparent motive for lying in the witness statement that

¹⁷ See witness statement of Gary Weston, File 1, Tab 7.

¹⁸ See witness statement of Gashi [17 -19], File 1, Tab 2.

he has recently provided to C's solicitors. This is to be contrasted with the powerful financial motive that led him initially to claim to the police that the kidnap plot was genuine. Gashi's witness statement to C's solicitors is consistent with what he told Professor Roy Greenslade before he was interviewed by them.¹⁹

Unavailability at trial

10. The evidence could not have been obtained with reasonable diligence for use at trial. Gashi was D's source, who had given a statement to the police adverse to C.²⁰ His whereabouts were unknown. So far as C's solicitor was aware, he was on a witness protection programme. There was no reason to believe that he would assist C's case.

Influence on the result

11. The issue is the effect of the evidence, if believed.²¹ There can be no doubt that D's defence of justification could not survive the acceptance of Gashi's evidence in whole or in part. For example, if the recruitment of Jaws was not genuine, there can be no serious plot, because no serious kidnappers would become involved in play-acting of that kind.
12. As to the outcome on the action as a whole; the words were clearly seriously defamatory of C (D did not contend otherwise). There was no defence other than justification. It follows that the acceptance of Gashi's evidence would be conclusive in C's favour.

Other factors

13. C's primary submission is that the Ladd v Marshall conditions are (or are arguably) satisfied. Nevertheless, there are additional factors in the context of the overriding objective to deal with cases justly, which bolster C's application:-
- a) The reason why the Judge did not have the benefit of Gashi's evidence at trial was because D made a tactical decision not to call him.

44. *"It is to be noted that those representing the Defendant in the present libel action have chosen not to call Mr Gashi. The undermining of Mr Gashi's credibility appears necessarily to have led to the abandonment of the criminal proceedings in 2003. In the current proceedings, it is said that his evidence, although it would no doubt be relevant to the issues, is not essential to enable the Defendant to prove its case of justification. That is because it needs only to rely upon the evidence of Mr Mahmood and Mr Qureshi as to their dealings with the gang and*

¹⁹ See witness statement of Professor Greenslade, File 1, Tab 6.

²⁰ See Bills v Roe [1968] 1 WLR 925 where the witness was in the opponents "camp".

²¹ See Hodson LJ in Ladd v Marshall [1954] 1 WLR 1489 at 1493.

the conversations recorded with the hidden devices. Thus the explanation for not calling Gashi would seem to be that he was surplus to requirements. I think that this may be tongue-in-cheek. I must clearly assess the taped exchanges carefully having regard to the civil standard of proof. The absence of Gashi, however, makes that exercise more difficult."

It is to be inferred that D took the view that cross-examination of Gashi would have assisted C's case. Moreover, it appears that Mahmood was in regular contact with Gashi at the time of the trial and concerned to ensure that he did not give evidence²².

- b) Gashi alleges that Mahmood destroyed the tape of a meeting between Gashi, Adrian and C, which would have exposed the plot as a set-up. It is surprising that no recording of that meeting was ever disclosed, notwithstanding that it followed closely after a recorded meeting. Such misconduct, if proved, would, of itself, justify a new trial.
- c) The case has attracted massive public interest. The article occupied the first 7 pages of the News of the World and was followed-up throughout the national and international media. C and his co-accused were held in prison on remand for over 7 months until the charges were dropped. Considerable anxiety has also been caused to the Beckham family; even the Queen has apparently commiserated with Mr Beckham.²³ The outcome of the libel trial has been widely reported both here and abroad, in particular Romania. In consequence of the judgment below, it is now widely believed that there was a genuine plot to kidnap Victoria Beckham. The News of the World has relied on the judgment as a complete vindication. Every time Mahmood claims a new scalp, the Beckham kidnap story will be part of inevitable puffing of his reputation, presented to millions of readers as a proven fact (with the imprimatur of the court).²⁴ The decision as to whether to admit fresh evidence involves balancing the need for finality with the desirability of obtaining the right result. The public interest in this matter and the continuing references to it by D weigh in the balance in favour of getting the right result and against finality.
- d) It is accepted that an appeal will involve additional cost and that this will not be recovered by D, if successful. That would be regrettable, but it is not a reason for depriving C of permission to appeal, if the proposed appeal is sufficiently strong.

²² See witness statement of Gashi [19], File 1, Tab 2.

²³ As was apparent from Mr Beckham's autobiography extracts of which were in the trial bundle.

²⁴ See the cuttings exhibited to the witness statement of David Price, File 1, Tab 5.

Moreover, any new trial would only be ordered if the Court was of the view it would be warranted (and C had failed in his submission that the Court of Appeal can enter judgment in his favour without a new trial (see original skeleton)). C would not seek exemplary damages at a new trial (in order to limit the witness evidence) and the parties are very familiar with the covert recordings. Insofar as the "financial position of each party" (Rule 1.1 (2)(iv)) is relevant, it should weigh in C's favour. As Simon Brown LJ observed in *Grobbelaar v News Group Newspapers* [2002] All ER 437 at [40]: "*If newspapers choose to publish exposés of this character, unambiguously asserting the criminal guilt of those they investigate, they must do so at their own financial risk*". For D it is a risk worth taking.

Application to seek oral hearing out of time/Amendment of appeal notice

14. C's original application for permission to appeal was rejected by Keene LJ on 14 July 2005. C's solicitors were notified on 18 July 2005. Rule 52.3(5) provides that a request for an oral hearing must be filed within 7 days after notice that permission has been refused. C did not apply for an oral hearing within 7 days.²⁵ Rule 52.6 repeats Rule 3.1(2)(a) which provides that the court may extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)). An appellant may therefore seek permission to request an oral hearing outside the 7 day period. The appeal process is not concluded until after the rejection of an application at an oral hearing.²⁶ PD52 5.25 provides that an appellant's notice may be amended with permission.

15. In the light of the fresh evidence, C now wishes to seek permission to appeal on the basis of an amended appellant's notice. This would require permission to list an oral hearing. (Alternatively, it would be open to the Court to grant permission to appeal on paper on the basis of the amended notice). It would be unjust for C to be in a worse position for having already made an application for permission to appeal before he was aware of the fresh evidence. C has acted swiftly since becoming aware of the fresh evidence. Had C requested an oral hearing in July it would not have been listed until the forthcoming term. There is no significant delay and no prejudice to D.

DAVID PRICE

30 September 2005

²⁵ See witness statement of David Price [2], File 1, Tab 5.

²⁶ *Slot v Isaac* [2002] EWCA Civ 481.