

BETWEEN

REGINA

V

DYLAN GEICK

ADVICE ON EVIDENCE

Introduction

1. I am asked to advise generally on evidence and on the merits of the defence case on behalf of Dylan Geick. Mr Geick is remanded in custody charged on a single count of Robbery (of Liam Stoke) contrary to section 8(1) of the Theft Act 1968.

2. The offence being indictable only, on 8th May 2020 the case was sent to the Inner London Crown Court for trial. On 13th May 2020, the Prosecution disclosed Prosecution Material under section 3 Criminal Procedure and Investigations Act 1996 (CPIA 1996). A defence statement must therefore be served by 10th June 2020. A Plea and Trial Preparation Hearing (PTPH) is listed for 28th May and I am instructed that Mr Geick intends to plead not guilty.

3. I am also asked to advise on the indictment as it stands, and on whether Mr Geick could be convicted on a separate charge relating to criminal damage. There are questions to answer over the disclosure obligations of both prosecution and defence, and I am asked for advice on adducing bad character evidence against Mr Geick. Finally I am asked to advise on overall prospects at trial, and next steps.

Summary of Advice

4. On the strength of the prosecution evidence currently before me, there is a good prospect of having the street identification of Mr Geick excluded at trial under s.78 of the Police and Criminal Evidence Act 1984 (PACE 1984). The absence of any other identification evidence, or any physical evidence against Mr Geick, combined with the serious breach of Code D by the police in refusing to hold an identification procedure, constitute strong grounds for the court to find the evidence so adverse as to be unfair. Furthermore, Mr Geick is only alleged to have been the secondary party to the robbery, and there are discrepancies in the victim's initial and later identification evidence. If that application is successful, the prosecution's case, as it stands currently, would have no further evidence to offer, and the case against Mr Geick would be withdrawn.

5. The prosecution are very likely to seek to admit Mr Geick's two previous convictions, but there are reasonable prospects for successfully resisting their admission. The conviction for burglary will be applied for under section 103(2) of the Crime and Justice Act 2003 (CJA 2003) being an offence of the same category as that he is now charged with. We can resist on grounds of entirely different

circumstances, and it being a single conviction, although recent. The conviction for assault as evidence of a propensity to use violence can be resisted on grounds of it being a personal fight caused by college bullying. Where the prosecution has little other evidence, *Hanson* says it is more likely to be unjust to admit previous convictions.

6. Were the s.78 application to prove unsuccessful, it will be possible to make a submission of no case to answer at the close of the prosecution case, inviting the judge to apply the guidelines from *Turnbull* that in cases where the quality of the identifying evidence is poor and there is no other evidence supporting the correctness of the identification, the case should be withdrawn from the jury. Such an application would have a reasonable prospect of success.

7. Should both the s.78 and the half-time applications prove unsuccessful, on the merits of the current evidence, Mr Geick has good prospects of securing acquittal from the jury given the poor quality of the identification evidence, errors made by the police during the investigation, and his own alibi evidence supported by his friend and his mother, who should be called as defence witnesses. I include the relevant form under s.6C CPIA 1996 which needs to be served on the court and prosecution separately from the defence statement.

8. The prosecution are currently in breach of their duty to disclose relevant materials to the defence. It is therefore my opinion that a defence statement should be served immediately, on the basis of Mr Geick's instructions, in order to compel the prosecution to reconsider disclosure. I include the defence statement with this Advice. Should the prosecution fail to disclose all relevant material by the PTPH on the 28th May, then it is my opinion there are good arguable grounds for an application to be made at that hearing to stay proceedings as an abuse of process. As well as investigative errors, there is arguable evidence of bad faith on the part of the prosecution. Applications to stay proceedings succeed in exceptional circumstances only. But if the prosecution fail to disclose material essential to Mr Geick's defence then it is in Mr Geick's best interests to make the application, which has reasonable prospects for success.

9. The indictment will need to be amended by prosecution before the PTPH as it misspells Mr Geick's name and omits the additional charge of Criminal Damage, contrary to the Code for Crown Prosecutors. On the evidence, the elements of the offence are made out, and under the principles of secondary liability Mr Geick could certainly be charged with the offence. But there is a good prospect of securing his acquittal, for the same reasons given above.

10. Finally, I am told Mr Geick is currently remanded in custody. It is now a week since his arrest. On 14th March 2020, Mr Geick pleaded guilty to a commercial burglary, an imprisonable offence, and was sentenced to a two year Community Order. His arrest and charge are thus a breach of that Order and prosecution grounds for refusing bail. However, the case papers contain no evidence that Mr Geick is likely to fail to surrender to bail, commit further offences if freed, or interfere with witnesses. He is enrolled in College and lives with his parents. There are therefore strong grounds on which to apply for Mr Geick's bail, and Instructing Solicitors are urged to make that application immediately. I would be happy to appear for Mr Geick should the prosecution oppose the application. Details of Mr Geick's level of compliance with his Rehabilitation Activity Requirement would greatly assist.

Summary of Facts

11. On 7th May 2020 at approximately 0130am Liam Stoke was walking past the Newton Road exit of the Elephant and Castle London Underground station. Mr Stoke says he was approached by two white men, both around 5ft 3 inches tall, and aged 18 or 19 years old. Mr Stoke describes the first man as wearing a black hooded top, with the hood pulled up, dark jeans, and white trainers. This man asked him whether he had a light for a cigarette and when Mr Stoke replied, 'No', the man grabbed Mr Stoke's arm and pulled him backwards. He then grabbed Mr Stoke's throat and pushed him up against the wall, saying, 'You're on our turf, and you're being jacked, now let's see what you have.'

12. Mr Stoke describes the second man as wearing a dark zip up top, dark baggy skater-style trousers, and a black beanie hat on his head. This second man was standing two or three feet away from Mr Stoke as Mr Stoke was being assaulted. The first man took Mr Stoke's wallet and put it in his jeans back pocket. The wallet contained GBP20 in the form of one GBP10 note and two GBP5 notes. The attacker then took Mr Stoke's mobile phone, a Nokia 312, held it up for the second man to see and said, 'Look at this bruv, Jurassic .. you get me?' The second man laughed, before the attacker threw the phone hard down on the ground. Both men then ran off along Newton Road. Mr Stoke's phone was rendered inoperable immediately following the assault. It is now working again, but has been left with dented and loose casing.

13. At about 0140am, a police patrol car saw Mr Stoke waving for help and stopped. PC Andrew Tailor was in the front passenger seat as the operator, while PC Gino Bellaqua was driving. The patrol was part of 'Operation Peregrine', a local police initiative aimed at reducing street crime in the Elephant and Castle area. PC Tailor identified himself and PC Bellaqua as police and showed Mr Stoke his warrant card. Mr Stoke explained what had happened and PC Tailor asked him to get into the car for a 'drive around' to try and find who had robbed him. Mr Stoke told the officers the robbers had run down Newton Road towards Brampton Road.

14. As PC Bellaqua drove down Newton Road and turned right into Brampton Road, PC Tailor recorded first descriptions of the robbers from Mr Stoke. PC Tailor says Mr Stoke told him the man who attacked him was wearing a dark hooded top with the hood pulled up, while the second man was wearing a dark hooded top with the hood down and a pair of baggy jeans. The black beanie is not mentioned in PC Tailor's statement.

15. Approaching a male walking along Brampton Road, approximately three quarters of a mile from Elephant and Castle underground station, Mr Stoke says PC Bellaqua asked him, 'There's a young guy up ahead, is that one of them?' Driving by the man slowly, Mr Stoke says he took a good look at him, and was sure it was the man in the baggy skater trousers who was with the man who had attacked him. PC Bellaqua then asked Mr Stoke, 'Well Liam, what do you think .. is that one of them?' to which Mr Stoke replied, 'Yes, that's one of them. I'm sure. He was the guy in the baggy jeans, and he was with the one who grabbed me by the throat.'

16. PC Tailor then got out of the car and asked the man, Mr Geick, for his name and age, which he gave, and to empty out his pockets, which he did. Mr Geick had one five pound note on his person and a student ID. He told PC Tailor that he had been at a friend's house and was walking home. PC Tailor then arrested Mr Geick and cautioned him. No further identification procedure was conducted with Mr Stoke.

17. In his interview at Balham Police Station later that morning, Mr Geick told officers that he had nothing to do with the robbery, had been mistakenly identified and that he was 'walking home from a mate's house' just before being arrested.

18. In his proof of evidence dated 13th May 2020 Mr Geick states that on the evening of 6th May he was with his friend Carl Tank at Mr Tank's house from about 10pm until about 0135am the next morning, when he decided to walk home. According to Mr Geick, Mr Tank's house is three to four minutes walk from Brampton Road, where he was arrested. Brampton Road is three quarters of a mile from Elephant and Castle underground station, a distance that would take at least 15 minutes to walk.

19. On 13th May 2020 PC Bellaqua was shown CCTV footage from two cameras covering the street area outside the Newton Road exit of the Elephant and Castle London Underground station. PC Bellaqua watched the two sets of footage starting at 0115am through to 0140am from the 7th May, but formed the view that the cameras did not cover the area where the robbery had taken place and so decided not to seize it, but asked the station manager to retain it. On 13th May, the Prosecution served case papers and unused materials, but Instructing Solicitors are yet to receive any of the material marked disclosable.

The Indictment

20. Mr Geick's name is twice misspelled as 'Dylan Galt' on the Indictment. The Criminal Practice Directions Part 10A.10 make clear that it is for the prosecution to amend the indictment, which needs to be lodged seven days in advance of PTPH. Those instructing should make the prosecution aware of this mistake when serving the defence statement. It would be contrary to the spirit of the Criminal Procedure Rules (CPR) for defence to seek any advantage from a spelling error.

21. Likewise, CPR Part 10.2(1) says the Indictment must contain a paragraph called a 'count'. The current Indictment does not. Those instructing should also make the prosecution aware of this mistake when serving the defence statement.

22. Mr Geick is alleged to have been the secondary party to the offence, which means the Indictment could charge him specifically with aiding and abetting the principal offender. In practice, however, secondary participants are usually charged as principal offenders.

23. The Indictment does not contain a charge of Criminal Damage, although the elements of the offence are made out on Mr Stoke's statement. However, it is not the duty of the defence to remedy the prosecution's indictment, and it is not in Mr Geick's interests to seek further charges against him. Therefore no action needs to be taken on this point.

Prosecution Evidence

24. The incident described by Mr Stoke is clearly capable of satisfying all the elements of the offence of robbery. The prosecution allege Mr Geick was the secondary party to the robbery (the man in the black beanie hat who stood by) not the principal offender (the man with his black hood up) who actually stole Mr Stoke's wallet while using force.

25. Mr Geick denies being present at the robbery and therefore the issue at trial will be identification. But for the purposes of completeness I will briefly set out the

evidential tests the prosecution must meet in order to establish the secondary liability alleged against Mr Geick.

Secondary Liability

26. Section 8 of the Accessories and Abettors Act 1861 (as amended) provides that, 'Whosoever shall aid, abet, counsel or procure the commission of an indictable offence is liable to be tried, indicted and punished as a principal offender.' Therefore, Mr Geick could be convicted of robbery even though he played no part in the *actus reus* of the offence. Section 6 of the Act allows for accessories to be tried even when the principal offender is not in custody, as in this case.

27. The principles applicable to all cases of secondary liability were set out in *R v Jogee; Ruddock v The Queen* [2016] UKSC 8. Secondary liability requires proof of a conduct element accompanied by the necessary mental element.

28. The requisite conduct element is that the secondary party encouraged or assisted the commission of the offence by the principal party. The Supreme Court found that both 'association and presence are likely to be very relevant evidence' in establishing the conduct element.

29. The requisite mental element in assisting or encouraging is 'an intention to assist or encourage the commission of the crime' and includes situations where the secondary party encourages the principal to 'commit one of a range of offences'.

30. It is my opinion that Mr Stoke's description of the attack meets the tests in *Jogee* to establish liability for the robbery and for criminal damage against the secondary party to this offence. Mr Stoke's evidence is that the secondary party had 'moved closer and was standing about two or three feet away' during the attack by the principal. The principal offender is said to have joked with the secondary party about the age of Mr Stoke's mobile phone, in response to which the secondary party laughed. Furthermore, the principal offender is said to have told Mr Stoke that he was 'on our turf' and that was why he was being robbed at this location, suggesting an element of historical and ongoing criminality by the two men working together.

Identification

31. However, while in theory *capable* of establishing liability on the secondary party to the offence, the prosecution case as it stands rests entirely on the street identification of Mr Geick by Mr Stoke. There are good prospects for discrediting the street identification evidence under *Turnbull* criteria and on grounds of a likely minor breach and an almost certain major breach of PACE 1984.

32. In cases depending wholly or substantially on the correctness of an identification of the accused which the defence claims is mistaken, such as the case against Mr Geick, the guidelines set out in *R v Turnbull* [1977] QB 224 can be used to assess the quality of the identification evidence.

33. *Turnbull* requires the circumstances of Mr Stoke's identification of the secondary party to be examined closely. The defence case will be that, in all the circumstances, Mr Stoke's initial identification of the secondary party was of poor quality, a fleeting observation made in poor light and under extreme stress.

34. Firstly, Mr Stoke was being held by the throat and then by the chest as the principal attacker went through his pockets. It would be natural for Mr Stoke's attention to be focussed largely, if not exclusively, on the man threatening his physical integrity. Given the high prevalence of knife crime in London, it would not have been unreasonable for Mr Stoke to have been looking very closely at his attacker for signs of a knife.

35. Furthermore, the attack took place around 0130am, the end of a long evening, and Mr Stoke had been at a friend's house. Had he drunk any alcohol at all? If so, that would impair his judgment. It was dark. Was the area well lit, or had the attackers chosen a place not covered by streetlights or CCTV?

36. During the street identification of Mr Geick, Mr Stoke states that he 'took a good look' at the man walking slowly up Brampton Road and was 'sure it was the male with the baggy 'skater' trousers, who had been with the male in the hooded top.'

37. However, there are inconsistencies between the description of the secondary party given by Mr Stoke in his Witness Statement and the Statement of PC Taylor, who took the first descriptions of the attackers. Mr Stoke says the secondary party was wearing 'a dark zip up top and dark baggy type [...] skater trousers.' He also says the secondary party was wearing a 'black beanie hat', a quite distinctive piece of clothing. PC Taylor, however, says the secondary party was wearing 'a dark hooded top, but with the hood down and a pair of baggy jeans.' There is no mention by PC Taylor of the beanie hat.

38. Furthermore, neither Mr Stoke nor PC Taylor mention whether Mr Geick was wearing a beanie hat when he was arrested. The prosecution could remedy this weakness if PC Taylor's Evidence and Action Book and the Record of first description show that in fact Mr Geick was wearing a black beanie hat at the time of his arrest. The custody record from Balham Police Station for Mr Geick should also include a custody photo that will show whether he was wearing a black beanie hat, as well as a description of his belongings and his height. The DVD of Mr Geick's interview might also show him wearing a beanie hat, or not. Obtaining these items is thus important evidence for the defence.

39. *Turnbull* requires that where, in the judgement of the trial judge, the quality of the identifying evidence is poor (such as a fleeting glance or difficult conditions) and there is no other evidence that supports the correctness of the identification, the case should be withdrawn from the jury. Should the gaps in the prosecution evidence fail to be remedied, such as by Mr Geick's custody photo or DVD interview showing him to be wearing a black beanie hat, then there are good prospects for making a successful half-time submission of no case to answer based on *Turnbull*.

40. Should the evidence show that Mr Geick was wearing a black beanie hat at the time of his arrest, and the case proceeds through to the end of the trial, the prosecution case will have been strengthened. But the judge will still be likely to give the jury the *Turnbull* warning to exercise special caution before convicting on grounds of a single eyewitness. Such a warning increases the prospects of Mr Geick being found not guilty.

41. The quality of the identification evidence is further undermined by police breaches of PACE 1984. Code D of PACE 1984 at section 3.2(b) states that police officers must take care 'not to direct the eyewitness' attention to any individual unless, taking into account all the circumstances, this cannot be avoided.'

42. Mr Stoke states that PC Bellaqua, who was driving the patrol car, said to him, 'There's a young guy up ahead, is that one of them?' PC Bellaqua confirms that, having observed Mr Geick wearing baggy trousers, he asked Mr Stoke if he could see the person who robbed him. Mr Stoke also recalls being asked by PC Taylor, 'What do you think, is it him?', although both PCs Taylor and Bellaqua say that second question was asked by PC Bellaqua.

43. The statements by PC Bellaqua clearly drew Mr Stoke's attention to Mr Geick and is thus arguably a breach of Code D. However, it is likely the court would consider the breach a minor one, being unsupported by any further evidence of singling out Mr Geick.

44. However, the failure to conduct a formal identification procedure, as required under Code D paragraph 3.12, is a serious breach of PACE 1984. In his police interview, Mr Geick makes clear he disputes being the person Mr Stoke claims to have seen during the robbery. That dispute triggers the obligation on the police to hold an identification procedure. Paragraph 3.12 of Code D makes clear that the only circumstances in which such an identification procedure serves no useful purpose is when the suspect admits being at the scene of the crime. The statement by DC Nadia Trent that an identification procedure 'wouldn't serve any useful purpose' is thus strong evidence of the breach of Code D.

CCTV

45. The poor quality of the street identification and subsequent breach of PACE 1984 are made all the more significant by the absence of any corroborating CCTV identification evidence against Mr Geick, and breaches by the prosecution in failing to disclose the relevant footage.

46. PC Bellaqua viewed CCTV footage from the relevant time from two cameras covering the street area outside the Newton Road exit of the Elephant and Castle London Underground station, where the prosecution allege the robbery took place. PC Bellaqua formed the view that the 'cameras did not cover the area where the robbery had taken place' and so failed to seize the footage.

47. The duty to seize, retain and disclose relevant evidence is created by CPIA 1996 Part II, Code of Practice 2.1, 3.1-3.7, 5.1, 5.3-5.5, 7.1-7.3 and 8.2-8.3 and paragraphs 4-6, 10, 14-15, 23, 25, 28 of the Attorney General Guidelines: Disclosure of Information in Criminal Proceedings. Although PC Bellaqua instructed the station manager to retain the footage, in a case turning on identification, the absence of the accused at the time and place of the alleged offence is clearly relevant evidence, and falls to be disclosed. In failing to seize and disclose the footage the prosecution are clearly in breach of the CPIA 1996.

48. Furthermore, in marking the notes from PC Bellaqua's viewing of the CCTV as 'not to be disclosed' the prosecution appears to be deliberately withholding crucial identification evidence from the defence. This is *prima facie* evidence of acting in bad faith and/or at serious fault which, if not remedied promptly following service of the defence statement, in my opinion provide strong grounds for an application to stay proceedings as an abuse of process.

49. No further effort has apparently been made by the police to locate alternative CCTV footage that may have recorded the alleged robbery, or the two men as they ran up Newton Road. Nor has any effort been made to locate CCTV footage that

may support Mr Geick's alibi. CPIA 1996 Code 3.5 states that, 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.' The prosecution have clearly not pursued all reasonable lines of inquiry and so are in breach of the Code.

50. The PTPH provides an opportunity for the defence to suggest reasonable lines of inquiry to the prosecution. However, as stated, it is my opinion that if the prosecution do not attempt to remedy their breaches through full disclosure following service of the Defence Statement then an application for a stay of proceedings should be made at the PTPH.

Bad Character Evidence

51. While the prosecution have strong grounds to argue for the admission of both Mr Geick's two convictions as relevant to a propensity to steal and threaten or use violence there are reasonably good prospects for successfully resisting.

52. On 27th September 2019, Mr Geick was convicted of Assault Occasioning Actual Bodily Harm after pleading not guilty. He was fined GBP100 and ordered to pay GBP100 in compensation. Mr Geick says he was involved in a fight with another student after college who had been provoking him with name-calling.

53. As the matter in issue in this case is identification not the facts of the offence, the prosecution are most likely to seek to admit the conviction through the gateway of section 103(1) CJA 2003 as evidence of the propensity of Mr Geick to commit offences of the kind with which he is charged and/or a propensity to be untruthful. Robbery requires the element of assault to be made out, while Mr Geick pleaded not guilty to his Assault charge, but was convicted.

54. The Assault conviction can be resisted on grounds that a spontaneous fight with a bully after college is not at all the same as a pre-mediated street robbery of a random stranger. Furthermore, the secondary party to the robbery is not alleged to have used any violence himself against Mr Stoke.

55. On 10th April 2020, Mr Geick pleaded guilty to burglary of a building site during which he and some friends stole tools worth some GBP1,500. The prosecution are likely to seek to admit the conviction for burglary under s.103(2) of the CJA 2003, being the same category of offence as the one Mr Geick is now charged with.

56. While defence cannot resist the 'same category' argument, and while the conviction is very recent, we can argue that the circumstances of the stealing were entirely different to the offence now charged, involving no violence towards any individual. It is a single conviction so is less evidence of propensity, and his having pleaded guilty is evidence *against* propensity for Mr Geick to be untruthful.

57. In the alternative, the defence can argue that even if admissible, the prosecution identification evidence is so weak that the judge should follow the principle laid down in *R v Hanson* [2005] 1 WLR 3169, CA that 'if there is no, or very little, other evidence against the accused, it is unlikely to be just to admit his previous convictions, whatever they are.'

Exclusion under s.78 PACE

58. In my opinion, on the merits of the prosecution evidence as it currently stands, there is a good prospect of making a successful application to have the street identification of Mr Geick excluded from trial under section 78(1) of PACE 1984.

59. Section 78 grants the court a discretion to exclude prosecution evidence if it appears to the court that, 'having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.' The application is made at trial before the prosecution present their evidence.

60. The defence can argue that Mr Stoke's initial eyewitness account was obtained in circumstances that would arguably lead to a *Turnbull* acquittal. The street identification was then carried out in minor breach of Code D of PACE 1984. That breach was then compounded by the police's refusal to conduct a formal identification procedure, in serious breach of Code D. Relevant CCTV was not seized and disclosed. Indeed, efforts were made to withhold vital evidence from the defence. Finally, the police made no efforts to pursue all reasonable lines of inquiry. Taken together, it is my opinion there are good prospects for the court finding the admission of the street identification, in such circumstances, 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

61. If the s.78 application were to be successful the prosecution would have to choose to offer no evidence and the case against Mr Geick would be dismissed.

Abuse of Process application

62. There are strong grounds, on the prosecution case as it currently stands, to argue that the case against Mr Geick ought to be stayed as an abuse of process. However, it is my opinion that such an application is, at this stage, premature to make, and because of that would have weak prospects of success. A stay is a 'measure of last resort' (*DPP v Fell* [2013] EWHC 562 (Admin)) and as such the judge hearing an application at this stage would invariably ask defence why we have not sought relevant evidence through disclosure. There are two weeks until the PTPH in which to obtain the relevant evidence.

63. However, having been served with the defence statement, should the prosecution continue to fail to disclose to the defence relevant evidence before the PTPH then it is my opinion that an application to stay proceeding should be made at the PTPH and would have reasonable prospects of success. For that reason, I will briefly advise on the merits of such an application.

64. The general test for staying proceedings for abuse of process is set out in *R v Maxwell* [2011] 2 Cr App R 31, SC as two limbs. First, the defendant must prove he cannot receive a fair trial due, for example, to a serious prejudice arising from lost evidence, which cannot be remedied by the trial process. The second limb is that a stay is necessary to protect the integrity of the criminal justice system, for example in cases where it would be unfair to try the defendant due to serious misconduct or fault by the prosecution.

65. In cases where the issue is missing evidence, such as CCTV footage, the tests set out in *R (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23 DC will apply. First, there must have been a breach of a duty to obtain relevant CCTV footage. The defendant must have suffered prejudice as a result of that breach,

which then cannot be remedied within the trial process. Furthermore, there is a standalone test of whether, due to an element of bad faith or serious fault, it would be unfair to try the defendant.

66. Applying the *Ebrahim* tests to the failure to seize and disclose CCTV in this case, and the failure to investigate any other relevant CCTV evidence, there are sufficient grounds to support an application to stay proceedings. The prosecution will argue any prejudice can be remedied through either a s.78 PACE application, through cross examination of the police officers, through directions to the jury, or in the defence's closing speech.

67. However, defence can rely on the ruling in *Ali v CPS* [2007] EWCA Crim 691, that in considering whether or not to grant a stay the court will have regard to whether there is sufficiently credible evidence, apart from the missing evidence, on which the jury might safely convict. *Ali* found that in the absence of CCTV footage the risk of an incorrect finding of guilt based on poor quality identification is significant, irrespective of the safeguards provided by the trial process.

68. Furthermore, as per paragraph 60 above, the prosecution has attempted to withhold other vital evidence from the defence, and has failed to investigate all reasonable lines of inquiry. This supports an application under the second limb of *Maxwell* that it would be unfair to try the defendant due to serious misconduct or fault by the prosecution.

Defence Evidence

69. Mr Geick's instructions are that he has an alibi both for the time and place of the robbery and for the presence of the GBP5 note in his pocket. If both witnesses agree to give evidence in support of Mr Geick's defence, come up to proof, and are of good character then, should the case go through to trial, there is a good prospect of their testimony establishing the reasonable doubt required for the jury to acquit.

70. Mr Geick says that he was present at the house of his friend Carl Tank until 0135am on 7th May 2020, when he left to walk home. Mr Stoke says he was robbed around 0130am on the 7th May. Mr Geick gives the address of Mr Tank's house as 14 McKinley Street, which he says is '3-4 minutes walk from Brampton Road' the location where he was arrested. Both PCs Tailor and Bellaqua indicate that Mr Geick was arrested on Brampton Road shortly after 0140am. The timings thus appear to support each other.

71. The police officers state that the distance from Elephant and Castle underground station to Brampton Road is about three quarters of a mile. That would take around 15 minutes to walk. Therefore, if Mr Geick did indeed leave Mr Tank's house at around 0135am it would have been impossible for him to have travelled to the vicinity of Elephant and Castle underground station, whether on foot or by vehicle, and participated in the robbery of Mr Stoke before the police arrived to assist Mr Stoke at around 0140am.

72. Mr Geick refers to being at 'a mate's house' in his police interview the morning after being arrested, but in the transcript the interviewer asks nothing more about it. This needs to be checked against the DVD. Furthermore, it is possible that a note was made by the interviewer about the possible alibi defence. I have thus included a request for disclosure of the notes from Mr Geick's police interview in the Defence Statement attached.

73. In the Schedule of Unused Material, item 9 refers to the 'Evidence and Action Book of PC Bellaqua (13/05/20) notes from interview with potential witness'. Whether this potential witness was Mr Tank or a witness to the robbery itself, the notes from the interview are fundamental to the defence's ability to prepare its case, and certainly fall to be disclosed.

74. In his instructions, Mr Geick says that the GBP5 he showed PC Tailor on arrest had been given to him by his mother the previous evening to pay for a taxi home from Mr Tank's house. Mr Geick says he is nervous about walking alone late at night since an attack on him. Thus Mr Geick's mother could give evidence on a number of relevant matters in issue: whether Mr Geick was present at the robbery or not; whether the GBP5 note he was carrying was stolen or not; and to elaborate on evidence that Mr Geick is afraid of being attacked which goes to the issue of Mr Geick's propensity, or not, to be involved in violent street crime.

75. It is my opinion that Mr Tank and Mr Geick's mother should be called as defence witnesses as providing alibi evidence. There is no indication that either will not be competent and compellable. I have listed them as witnesses in our Defence Statement and in the relevant form as per s.6C CPIA 1996, both attached here, and which need to be served separately on the court and prosecution now.

76. Service of the Defence Witness information to the prosecution means the police should interview Mr Tank and Mr Geick's mother, if they have not already done so. Before doing so they should give Instructing Solicitors a reasonable opportunity to be present. They will also check both witnesses for any previous convictions. I would urge Instructing Solicitors to contact both witnesses as soon as possible and attend the police interviews. Should the police fail to interview by 25th May, Instructing Solicitors should take witness statements and send those as soon as you have them.

Disclosure

77. The prosecution is currently in breach of their disclosure obligations, both in a failure to provide disclosed materials and in wrongly withholding material that falls to be disclosed. Should the breaches fail to be remedied by the PTPH or even continuing through to trial, they will provide strong grounds for arguing for a stay, dismissal or acquittal, as set out above.

78. Under s.3 CPIA 1996, the prosecution is under a duty to disclose evidence in its possession which, 'might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused'. Under s.7A, the duty to disclose relevant material is an on-going duty.

79. The prosecution purport to have discharged their section 3 obligation by way of the letter dated 13th May 2020 and the accompanying Schedule of Unused Material listing 9 items. However, Instructing Solicitors tell me they have yet to receive any of the material marked as disclosable, being: a copy of the DVD of Mr Geick's interview (item 6); the Record of first description (item 7); the CAD or CRIS reports (items 4 and 5). The prosecution have thus not discharged their section 3 obligation.

80. Not considered yet in this opinion, the CAD transcript suggests an eyewitness to the robbery called 999. As the case turns on identification, the contents of that transcript are vital to assisting the defence prepare its case.

81. The Evidence and Action books of PCs Taylor and Bellaqua (items 2 and 3) are listed as available to inspect, and Instructing Solicitors are requested to visit Balham Police Station for the purpose of obtaining details from those books, being the contemporaneous identification description of the two alleged offenders, an issue that goes to the defence's case of mistaken identity.

82. The listing of Mr Geick's custody record (item 1) as 'not to be disclosed' breaches PACE 1984 Code C paragraph 2.4 which states that the defence is entitled to a copy of the accused's custody record, whether the accused is detained or has left custody. That custody record should include a photograph of Mr Geick, which may or may not show him wearing a black beanie hat, evidence which is central to the strength of the prosecution's case. It clearly falls to be disclosed under s.3 CPIA 1996.

83. The 'Notes of PC Bellaqua 13/05/20 re London Underground CCTV' (item 8) is also listed 'not to be disclosed'. The case turns on identification, and footage of the scene of the robbery at the time it is alleged to have taken place is clearly capable of undermining the case for the prosecution or assisting the case for the defence. Further, as argued above, prohibiting such clearly disclosable material is strong evidence of an element of bad faith, supporting an abuse of process application.

84. The same argument applies to item 9, described as 'Evidence and Action Book of PC Bellaqua (13/05/20) notes from interview with potential witness'. Again, this clearly falls to be disclosed under s.3 CPIA 1996.

85. It is reasonable for the defence to believe that, were the prosecution following all reasonable lines of inquiry, there may be further material not listed on the Unused Schedule which should fall to be disclosed, such as CCTV footage from Local Authority cameras on Newton Road showing the attackers running off, or CCTV footage from near Mr Brick's house on McKinley Street showing Mr Geick leaving.

86. However, an application for further disclosure under s.8 of CPIA 1996 cannot be made until the defence have served on the court and prosecution a defence statement and the prosecution has purported to comply with its disclosure obligations by notice under s.7A(5). Therefore, Instructing Solicitors are requested as follows:

Next Steps

- Serve the attached Defence Statement and Witness form on the court and prosecution, with a note highlighting mistakes on the Indictment
- Contact Mr Tank and Mr Geick's mother and take witness statements from them if the police do not do so
- Apply for a bail hearing for Mr Geick at the Crown Court at Inner London
- Write to Ellen McComb, Senior Crown Prosecutor at Balham Branch to demand the prosecution immediately comply with its disclosure obligations, as argued above
- Update me by 25th May, at the latest, on disclosure and defence witnesses

If I can be of any further assistance, please do not hesitate to contact me in Chambers.

A. Barrister, BPTC student
City Law School, London
13th May, 2020