

ENGLAND AND WALES / JUDGMENT

Davies v R.

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Neutral Citation Number: [2018] EWCA Crim 327 IN THE COURT OF APPEAL (CRIMINAL DIVISION) ON APPEAL FROM MERTHYR TYDFIL CROWN COURT HHJ Curran QC Case No: 201600408 C1 Royal Courts of Justice Strand, London, WC2A 2LL Date: 01/03/2018 Before : LORD JUSTICE HAMBLLEN MR JUSTICE SWEENEY and HH JUDGE CHRISTOPHER KINCH QC (Sitting as a Judge of the CACD)

- ----- Between : David John Davies
- and - Regina Appellant Respondent
- -----
- ----- Mr Rees for the Appellant Mr Sefton for the Crown Hearing date : 23 February 2018
- ----- Judgment Approved Lord Justice Hamblen :

Introduction

1. 2. 3. On 13 October 2015, in the Crown Court at Mold before HHJ Curran QC the appellant was convicted, by a majority of 10 to 2, on a single count of robbery and sentenced to 12 years 9 months imprisonment. He appeals against conviction by leave of the full court. He also seeks leave to call fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968. The outline facts 4. On 12 December 2014 an armed robbery took place at the home address of the Higginbotham family at St Harmon near Rhayader in Wales. Three masked men entered the property and threatened the family with a shotgun. They were wearing gloves and tied two of the family members up with cable ties and duct tape: Geraint Higginbotham (“Geraint H”) and his father, Gerard “Ian” Higginbotham (“Ian H”). They stole £1000 in cash. The males were collected by a fourth individual in a car and left the scene. The prosecution case 5. The prosecution case was that the appellant was one of the men who took part in the robbery. To prove its case the Crown relied upon the following: - (1) (2) (3) (4) (5) (6) Automatic number plate recognition evidence – this led police to a VW Golf motor vehicle, LS06 KKO (“the car”), seen to be travelling in the general direction of the Higginbotham’s home on the day of the robbery. Fingerprint evidence - the appellant’s fingerprints which were found on the exterior of the front passenger door of the car. DNA evidence - a full DNA profile matching the appellant was found on the inside surface of a pair of black and brown gloves (“the gloves”) found under the front passenger seat of the

car. A mixed DNA profile with the appellant as a possible contributor was found on the inside surface of a single black glove, one of a pair also found under the front passenger seat. Evidence of fibres – fibres from the gloves matched fibres found on the duct tape recovered from a bin at the Higginbotham's address which had been used to restrain them. Cell site analysis - analysis of the appellant's mobile telephone was consistent with him travelling to the area of the robbery on 5 December 2014 (one week before the robbery). According to the Crown this visit was open to the interpretation of the scene being reconnoitred, and in any event connected the appellant with the area in which the robbery occurred. The phone was not in use for a period of time on 12 December 2014, the time period consistent in part with when the robbery was taking place. In interview the appellant said that he was not involved in the robbery then made no comment to all questions asked. The Crown said that adverse inferences should be drawn from the appellant's failure to mention the alibi defence later relied upon by him. The defence case 6. 7. The defence case was that the appellant knew nothing about the robbery and had no involvement in it. The appellant gave evidence in accordance with his defence statement. He accepted that he went on an innocent trip to the Rhayader area on 5 December 2014 to purchase a quad bike. He had driven there with his friend Wesley Lovering and a man named Sam Davis to pick up the bike from Sam Davis' grandparents and deliver to a farmer known to the appellant late that evening. That was the first time he had met Sam Davis, who was no relation of his. On 12 December he went on a trip with his friend, Lovering, to buy a small amount of drugs and drove in the direction of Rhayader. He drove the car, which he had borrowed a few days earlier because his own car had broken down. Lovering gave him directions, they arrived at a location and Lovering made some phone calls to the person meeting him. After about two hours Sam Davis arrived and got into the car. Lovering and Sam Davis did their drug deal then Sam Davis asked the appellant to give him a lift to Monmouth. The appellant was happy to do so and dropped Lovering and Sam Davis at an address in Monmouth. He went home to collect his girlfriend then joined them again at a party. He found the gloves between 12 and 25 December 2014 when he was cleaning the car. He tried them on then took them off and put them in the passenger side of the car. He had not touched them since. He had not seen the black gloves before. He knew nothing about the robbery and did not take part in it. He called no evidence in support of his defence. He had given a no comment interview on the advice of his solicitor. 8. 9. The evidence at trial relating to Sam Davis and Lovering 10. 11. 12. 13. 14. 15. 16. During examination in chief of Geraint H, when asked questions about why he had not reported the robbery at the time, said that he was terrified and did not want anything to come of it. When asked why he said: "Because by that time I had realised who it could have been and perhaps they would come back". He was then asked by the judge what he meant by saying he realised who it could have been. In answering follow-up questions from counsel he said he thought it could possibly have been Sam Davis, somebody who had made threats to him six months before. He said this would have been the man with sunglasses and no mouthpiece cut out "because he has got a distinctive looking mouth". He was asked about this in cross examination and explained that Sam Davis had been a really good friend of his, had distinctive eyes and lips, that he would have recognised him and

suggested this might have been why he kept his eyes and mouth covered. He said he could not say it was him “for definite” but added “since then he has been going round telling people that he did do it”. He then explained he had not spoken to Sam Davis himself but had heard this from somebody else. In re-examination he said that the people who bought cocaine off him would know Sam Davis. The witness statement of the father, Ian H, was read. It included the following passage in relation to one of the robbers (male 3): “I feel I know this person because I recognised his posture”. He also said: “I recognised the way this male moved”. He was asked about this in cross examination and confirmed that he mentioned no name in his statement. In re-examination he was then asked if he could say who that person was and he answered: “Yes”. When then asked who he believed it to be he replied “Sam Davis”. Following this evidence the appellant’s counsel, Ms Jenkins, raised with the judge her concern about the naming of Sam Davis given that it was said in the appellant’s defence statement that he was with him that day. The exchanges concluded with the following: “Ms Jenkins: Well can I have a little time to go and speak to Mr Davis because the difficulty, of course, is that if I make a submission that I don’t think this jury can fairly determine this case and ought to be discharged, that, of course, has significant implications so far as Mr Davis is concerned if the trial can’t be restarted straightaway. And I do need to take instructions from him before I go ahead and blunder into that application. But I do have concerns, your Honour. Judge Curran: Very good, well you are perfectly entitled to take instructions about the matter, but I don’t think that the consequences would be as devastating as you fear.” 17. On the following morning the court was informed that no application for discharge would be made. Ms Jenkins explained as follows: “I have taken instructions and considered how I can deal with that part of the evidence with the officer in the case. I have discussed it with my learned friend and effectively given him indication of matters I would want the officer to deal with, which I understand will not be an issue at all. “Simply in relation to the investigation of this offence, which I think will remedy that which was . . . ” . . . what I considered to be an issue yesterday. So I am content to proceed with the same jury.” 18. 19. 20. The officer in the case, DS Bevan, was then called. In cross-examination he was asked whether Ian H had mentioned Sam Davis as being present. He said he was mentioned; that he thought he would have been questioned about whether he knew him because of the way the investigation continued; that he never went on to say that Sam Davis was present “but there was an element of suspicion, I recall, that he somehow knew that male”, although the name was not mentioned in any of his statements. He was then asked about Sam Davis and explained that he had been interviewed under caution in relation to the offence. He was then asked to confirm that the decision had been taken that he was not to be prosecuted, to which he replied: “Unfortunately so, yes”. In re-examination he was asked about whether any other individuals had been investigated in respect of the robbery, and he replied that Lovering had been investigated, arrested and interviewed but no further action was taken by the CPS. The judge’s directions 21. In the light of the admission of this evidence relating to the possible identification of Sam Davis, the judge directed the jury as follows: “Now the man, Sam Davis, you have heard a certain amount about Sam Davis, both from the prosecution witnesses and from the defendant. In

particular you heard that he had certain features in common with the robber who wore dark sunglasses or was thought to have certain features in common with him. Sam Davis is not on trial, of course, but he is linked to the defendant in ways you know about and was strongly suspected by Geraint Higginbotham as being involved in the robbery. There was no identification of Sam Davis in any real sense; the man kept his face masked and wore the sunglasses. Even if there had been a positive identification of him, however, it would be necessary for me to warn you of the special need for caution in any case of disputed identity. One matter which was mentioned, the apparent attempt to mask his features to cover up his distinctive lips and eyes, as described by Geraint, is self-evidently insufficient, as, if they were masked, no one could tell if it was him or not or if they were particularly distinctive lips or eyes. Another matter, Ian's description of the way in which he moved, is again quite insufficient for you to draw any positive conclusion at all. And upon the basis of those pieces of evidence, you could not draw any conclusion against Sam Davis at all. What the circumstantial evidence in general tells you about the possible involvement of Sam Davis is another thing which is quite separate from purported identification of him. And that is a matter entirely for you." 22. In relation to Geraint H's evidence the judge stated: "He was asked, "On 12th December, did you think the men had the impression that you had money?" "Yes," he said. "You have said that Sam Davis was the only one I had a problem with and that he was the one with the crowbar?" "Yes," he said. "Did you think it was Sam Davis because you recognised him?" He said, "Well, Sam Davis has distinctive lips and eyes." "And because they were covered up, you thought it was him?" "Yes." He said, "I couldn't recognise him for definite." Well I have already indicated to you the way to approach that." 23. In relation to Ian H's evidence the judge stated: "And he was cross-examined. And he was asked whether, in view of what he had said about the third man, "You didn't give any name to the police?" And he said, "I can't remember. No." But then in re-examination he said thought it was, he said, "I believe it was a young lad called Sam Davis," but that, ladies and gentlemen, was apparently purely from the way he stood or moved, which is, you may think, wholly insufficient for anyone to form any definite identification." 24. In relation to the evidence of DS Bevan he stated: "He said that if Ian Higginbotham had been asked if he knew Sam Davis, he thought he would have been asked that, if he knew him, but he had never said he was involved, he said there was simply an element of suspicion. And he confirmed that Sam Davis had been spoken to and interviewed under caution and that, following that, the Crown Prosecution Service had decided there should be no further action taken." The grounds of appeal 25. The grounds of appeal are: (1) (2) (3) (4) (5) Trial counsel (i) failed to apply to exclude any evidence of or reference to Sam Davis by Geraint H or Ian H (ii) failed to avoid Sam Davis' name being referred to as someone the Higginbothams had been involved in a dispute with some months earlier. The evidence was irrelevant and inadmissible. Trial counsel failed to prevent the leading of evidence from Ian of a description of male 3 (namely Sam Davis), especially with reference to his posture. Trial counsel wrongly adduced in evidence through the officer in the case that Sam Davis had been interviewed under caution and that the CPS had decided there should be no further action taken. This led to re-examination of the officer to establish that Lovering was also interviewed about the robbery. Trial counsel failed

to advise the appellant properly about discharging the jury following the purported identification of Sam Davis. The judge's direction to the jury as to the purported identification of Sam Davis was insufficient to cure the prejudice caused thereby. (6) In all the circumstances, the conviction is unsafe. The fresh evidence 26. 27. 28. 29. The appellant sought leave to adduce fresh evidence from himself, his mother (Karen Oaten) and a psychologist's report from Dr Ruth Bagshaw. He also requested that trial counsel, Ms Jenkins, be called so that she could be questioned about the conduct of the trial and the taking of instructions from the appellant in relation to whether an application to discharge the jury should be made, which was in dispute. It was common ground between the parties that such evidence should be given and we gave leave to do so. It was agreed that the evidence of Dr Bagshaw could be read. Her report dated 23 March 2017 concludes that the appellant has a number of psychological vulnerabilities related to his comprehension of verbal information, his capacity for processing information when under stress, literacy skills and communication skills that would place him at risk of lacking competence to participate meaningfully in court proceedings without adjustments. Appropriate adjustments could include the assistance of a professional intermediary to ensure that he understands information needed to instruct his legal representative. The evidence of the appellant and his mother went primarily to whether instructions were sought or given in relation to the potential application to discharge the jury. The appellant's evidence was that he had difficulty remembering the trial. He could not remember Sam Davis's name coming up in evidence or whether Ms Jenkins came to speak to him at the end of that day. He said that she did come down to speak to him a couple of times and that could have included the end of the first main day of the trial, but that he did not have a discussion with Ms Jenkins about Sam Davis' evidence. He said that he did not really know what discharging the jury meant, that he had difficulty in understanding what was taking place at trial and what Ms Jenkins said to him, and that he was not very good with words. 30. The appellant's mother's evidence was that she attended the trial every day; that at the end of the first main day of the trial she had had a conversation with Ms Jenkins about Sam Davis's name coming up in evidence; that Ms Jenkins did not think that it would be a problem but would think about it and get back to her; and that Ms Jenkins talked about how the case might be stopped but that if the trial carried on it might be a reason for an appeal. She said that she left court before Ms Jenkins that day but that when she spoke to the appellant that evening on the telephone he said that he had not seen Ms Jenkins. She did not, however, speak to Ms Jenkins about why she had not gone to see the appellant or why she had not asked for the trial to be stopped. She also said that Ms Jenkins had said that the trial had been done by Friday as she had a rape case starting on the Monday.

31. Ms Jenkins' evidence was that she was a solicitor advocate of 16 years experience and had always been a criminal practitioner; that she had previously acted for the appellant in relation to proceedings at Gloucester Crown Court in which the prosecution had ultimately offered no evidence; that the appellant had been on remand in relation to those proceedings and that when they came to an end he was immediately arrested and charged in respect of

these proceedings, and that she had appeared in all the court hearings in both matters save for proceedings in the magistrates' court. 32. 33. She said that the appellant's mother was there throughout the trial and was anxious to be kept up to date but that she could not recall whether she had any specific conversation with her about what to do in relation to the evidence concerning Sam Davis. She stated that after court finished at the end of the first main day of the trial she went down to the cells to see the appellant to discuss what had taken place in relation to the mention of Sam Davis' name and to decide whether to apply to discharge the jury or to carry on. She said they talked about the issue of Sam Davis, the nature of identification evidence, and the directions which could be given to the jury. She said the options were to apply to discharge the jury and have a new trial or to carry on and deal with the matter through directions from the judge. She said that she advised the appellant that with proper directions the identification evidence was not fatal and the appellant was anxious that there should not be further delay as he had been in custody for some time. She also said that she explained that there might be a tactical advantage in drawing out in evidence that Sam Davis and Lovering had been interviewed but not charged so as to show that they existed and that they could play it two ways. She said that they agreed how to proceed and that she would not seek to discharge the jury and that, since they were in agreement, she did seek to have any document signed to reflect the agreement made and instructions given. During the course of evidence she did, however, produce a handwritten note which recorded that the trial finished at 16.25 hours that day and thereafter: "Conf family/conf client in cells. Leave 16.50pm". She had not thought to produce this before as it did not say anything what had taken place or about advice given or instructions received. 34. She explained that it was always contemplated that the appellant would give evidence and that they might want to elicit evidence that his alibi witnesses, Sam Davis and Lovering, had been arrested, but no action had been taken in order to show that they were not straws in the wind and to explain why they may be reluctant to come forward as alibi witnesses. She said that no final decision had been taken about this, but that their hand was forced when Sam Davis' name came up in the prosecution evidence; that when his name was first mentioned she did not want to create a fuss and bring attention to it and that she wanted to time to think how to deal with the matter, as she informed the judge. She agreed in cross examination that she did not want the evidence of purported identification of Sam Davis; of his knowledge that the Higginbothams were drug dealers; or that Sam Davis had been telling people he was responsible for the robbery and that she was concerned about whether this was so prejudicial that the trial might be compromised. She confirmed that she had had another trial due to start the following week but that this had been returned as it quickly became clear that the trial would not finish that week; that she was not under pressure to finish that week and that it was no disadvantage to her if the jury were discharged and the trial had to start again. She said that it never occurred to her in either of the cases in which she represented the appellant that he did not understand what she was saying, nor was this ever suggested by him or his mother; that getting a psychological report was never "on her radar"; that he gave cogent instructions, and that he had given instructions on matters of evidence, including scientific evidence. 35. 36. 37.

38. We find that Ms Jenkins did go down to speak to the appellant after court on the first full day of the trial. As she had explained to the judge, she needed to speak to the appellant about whether or not to make the application to discharge and to take instructions. This is what she then did. Her note shows that it was not a long conference but we accept her evidence as to what was said and agreed. While the appellant may not have fully understood all the implications of the two courses of action proposed, we are satisfied that he agreed that the best course to take was not to seek discharge of the jury. This was confirmed to the judge in open court the following day and there was no suggestion then from the appellant that this had not been agreed or were not his instructions. Indeed, no such suggestion was made until the oral renewal of the application for leave to appeal. We are also satisfied that the appellant was able to follow and understand the essence of the matters which were being discussed with him. We have carefully considered the transcript of his evidence and we note that this demonstrates an ability to understand and to respond to questions, and to state when he does not understand what he is being asked. We accept Ms Jenkins' account of the conduct of the trial and where there is a difference between her evidence and that of the appellant (whose evidence was very vague and claimed to be able to remember very little) and his mother, we prefer the evidence of Ms Jenkins. The appeal
39. Mr Christopher Rees for the appellant submits that trial counsel should have applied to discharge the jury in the light of the inadmissible identification evidence relating to Sam Davies. The failure to discharge the jury meant that inadmissible prejudicial evidence was wrongly presented to the jury. The identification of Sam Davies was devastating evidence for the prosecution because: (1) The appellant's case was alibi and his alibi was presence with Sam Davis and Lovering; (2) (3) (4) (5) (6) The prosecution established Sam Davis lived near the Higgingbothams and was known to the Higgingbothams; The prosecution established Sam Davis had acknowledged that the Higgingbothams dealt cocaine and the robbers demanded the money for "coke"; Sam Davis provided the motive for the robbery. Geraint volunteered before the jury that Sam Davis had told people in the community that he had committed the robbery and that admission had been reported to him. Trial counsel's attempt to cure the admission of prejudicial identification evidence of Sam Davis by adducing in evidence through the officer in the case made matters worse as when the officer was asked to confirm that a decision was made not to prosecute Sam Davis he replied "Unfortunately not." This attempt to rectify the wrongful admission of the identification of Sam Davis led to the officer expressing his disagreement with the decision not to charge and would have risked confirming "no smoke without fire" prejudices. Further, this led to re-examination of the officer to establish that Lovering, the alibi witness of the appellant, was also interviewed about the robbery as well. This evidence should not have been adduced as it amounted to pure prejudice.
40. Mr Rees submits that the judge's direction as to the purported identification of Sam Davies was insufficient to cure the prejudice from the wrongful admission of the purported identification. The direction concluded as follows: "... And upon the basis of those pieces of evidence, you could not draw any conclusion against Sam Davis at all. What the

circumstantial evidence in general tells you about the possible involvement of Sam Davis is another thing which is quite separate from the purported identification of him. And that is a matter for you". 41. 42. It is submitted that, although the direction warns against relying on the purported identification, the direction is undermined by inviting the jury to consider what the "circumstantial evidence tells you about the possible involvement of Sam Davis" and that this is an invitation to accept that Sam Davis was involved. In all the circumstances, the grounds, individually and cumulatively, mean that the conviction is unsafe. There was no reason why the defence asked for the Higgingbothams to be called as witnesses. The evidence should have been read and the parts relating to recognition of posture and/or Sam Davis should have been deleted. The prosecution should not have been permitted to adduce the identification Sam Davis and his purported admissions to committing the robbery as this provided a motive for the crime and also destroyed the appellant's alibi. The prosecution should not have been allowed to adduce the arrest and interview of Lovering as this further served to undermine the appellant's alibi. This was reinforced when comment was made by the prosecution as to the failure of the Defence to call either Sam Davis or Lovering. The trial should have been conducted without any reference to Lovering or Sam Davis being involved or suspected of being involved in the robbery. In those circumstances the verdicts may well have been different particularly as, even without the wrongful admission of this evidence, the jury convicted by a majority. 43. In developing these submissions orally, Mr Rees stressed that the critical error made by Ms Jenkins was in not making an application to discharge the jury. That was the only reasonable decision for her to make. The conduct of the trial was thereafter fundamentally flawed and fatally compromised. Everything that went wrong thereafter flowed from that initial wrong decision. Once the Sam Davis evidence was in play the prosecution were able to and did take full advantage of it, to the serious prejudice of the appellant. This court could not be sure that the verdicts would have been the same if the Sam Davis evidence had been excluded. Accordingly the conviction was unsafe and should be quashed. 44. In opposition to the appeal, Mr Nicholas Sefton for the Crown contends that the grounds of appeal do not render the conviction unsafe. In particular, he submits that: (1) The case against the appellant was based upon forensic evidence directly linking the appellant to the robbery, with supporting circumstantial evidence. The defence was alibi yet the two alibi witnesses were not called to give evidence on the appellant's behalf. The jury were entitled to ask themselves why that was the case. The purported identification or lack thereof of Sam Davis could not have had any bearing upon the jury's decision in light of the evidence in the case and the judge's composite directions. The jury were entitled to discount the appellant's version of events which they did having been properly directed as to the law, including the appellant's failure to answer questions in interview save for an initial denial. (2) The grounds of appeal amount to criticisms of trial counsel's approach to the case. The course of action adopted was upon the explicit instructions of the appellant, having been advised properly with reasoned, tactical decisions being undertaken on his behalf. 45. In his oral and further written submissions, Mr Sefton stressed that Geraint H and Ian H were entitled to give evidence of their belief as to the attacker and that an application for discharge would have likely been refused; that the

fact that there was an argument between Geraint H and Sam Davis and Ian H's fear of Sam Davis did not go to the issue as to whether the appellant was present at the time of the robbery, and that the failure to apply to exclude such evidence was a tactical decision made on behalf of the appellant having regard to the time he had already served on remand and potentially to assist in explaining why he was not going to call any alibi evidence, and that this was a decision with which he agreed. 46. As stated in Archbold 2017 at 7-83: "The failings of counsel may directly or indirectly lead to the conclusion that a conviction is unsafe. What is clear, however, is that decisions made in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with the defendant, will not without more render a conviction unsafe even though the court of Appeal may disagree with them; particularly does this apply to a decision as to whether or not to call the defendant. Conversely, if a decision was taken either in defiance of, or without proper instruction, or when all promptings of reason and good sense pointed the other way, this may render a conviction unsafe: see *R. v Clinton*, 97 Cr. App. R. 320, CA." 47. 48. As explained by Buxton LJ in *Day* [2003] EWCA Crim 1060 (at [15]): 'in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.' - see also *Ekaireb* [2015] EWCA Crim 1936. In the light of the evidence we have heard, we are satisfied that the decision not to apply to discharge the jury was a tactical decision made in good faith by Ms Jenkins with the agreement of the appellant.

49. Ms Jenkins' view at the time was that the prejudice caused by the introduction of the evidence relating to Sam Davis could be largely cured by appropriate directions being given by the judge. This was a view which could reasonably be taken. Neither the evidence of Geraint H nor that of Ian H provided proper evidential basis for identification of Sam Davis as one of the robbers. Male 3's eyes and mouth were covered and you cannot identify someone simply from how they move. 50. 51. 52. 53. 54. On the other hand, establishing in evidence that Sam Davis and Lovering had been interviewed, but not charged, potentially assisted the appellant's alibi evidence, as it would show that they were real people and provide an explanation as to why they may not be willing to give evidence. Indeed, it had been contemplated that such evidence might be adduced even before the evidence about Sam Davies unexpectedly came out during the prosecution evidence. Although this did not appear to feature in the decision making at the time, a further possible advantage was that if, contrary to the appellant's case in relation to the identification evidence, the jury did consider that Sam Davis may have been associated with the robbery, that could provide an explanation for the gloves found in the car and their linkage with the duct tape used. As matters stood, the appellant had no explanation for the gloves other than that they had been left in the car at some stage by some unknown person who, it would appear, just happened co-incidentally to be associated with the robbery. In summary, there was more than one course of action which could be taken. It was decided on balance to make use of evidence about Sam Davis being before the jury and to draw that evidence out further to assist the

defence of alibi. That was a decision made in good faith after proper consideration of the competing arguments. It was made after discussion with the appellant and with his agreement. We do not consider it to be an incompetent decision. It was a tactical trial decision which could reasonably be made in the circumstances as they appeared at that time. In any event, even if a different decision had been made it by no means follows that the judge would have discharged the jury, or would have been required so to do. The judge's own view, as expressed at the time, he did not think that "the consequences would be as devastating as you fear." Evidence of Sam Davis's motive and knowledge of the Higginbothams' drug dealing could have been properly adduced by the prosecution in any event. Nor are we satisfied that the trial process was thereby rendered unfair or the conviction unsafe. The judge's directions clearly instructed the jury to disregard the identification evidence. This is not undermined by the judge's correct statement that that did not affect the circumstantial evidence of Sam Davis' "involvement" (as opposed to his "identification"). The defence obtained the advantage of being able to offer an explanation as to why there were no alibi witnesses. There was strong forensic and circumstantial evidence against the appellant in any event and, in particular, the powerful evidence relating to the gloves, for which the appellant offered no plausible explanation. There was also his striking failure to mention his defence of alibi in interview.

Conclusion

55. For all these reasons the appeal must be dismissed.

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