CRIMINAL LAW ARTICLE

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Convictions based solely on DNA evidence

In February 2017 the Court of Appeal ruled in the case of *R v Tsekiri [2017] EWCA Crim 40* that where the sole evidence against a defendant was his DNA profile on a moveable object found at the scene of a crime, this would be sufficient to raise a case to answer. This decision overruled the position previously set out by the Court of Appeal in a number of cases including the case of *R v Bryon [2015] EWCA Crim 997*.

In *Bryon*, the defendant was charged with the theft of cash at a supermarket. A mixed DNA profile was found on an item left at the scene and the major proportion of the DNA matched the DNA of the defendant with a likelihood ratio of one in a billion. In addition to that evidence, the defendant had a conviction for theft carried out in exactly the same way. In giving his judgment Jackson LJ stated *"it is clear from the authorities that where a moveable item is left at the scene with mixed DNA profiles, one of which matches the defendant's profile, that on its own is not sufficient to support a conviction"*.

The Court of Appeal also suggested that the same may be true even if there was a single DNA profile on the item. The conviction was upheld but only because the DNA evidence was supported by the defendant's bad character.

Then followed the case of *R v FNC [2016] 1 CrAppR 13.* The Court of Appeal began questioning previous authorities where convictions based solely on DNA found on movable objects left at the scene had been quashed *(Grant*

[2008] EWCA Crim 1890; Ogden [2013] EWCA Crim 1294).

The case of ***FNC*** did not deal with moveable objects, but with DNA directly deposited during the course of the commission of an offence (semen left on a pair of trousers during a sexual assault). The Court observed however that improvements in the analysis and techniques of analysis of DNA had improved markedly in the last decade and so DNA on an article left at the scene may be sufficient to raise a case to answer where the match was in the order of one in a billion.

This was considered further in the case of *Tskeri* where a woman was attacked in her car in South-West London. A man opened the driver's door and a struggle ensued, during the course of which a gold necklace was snatched from around her neck. The door handle was swabbed for DNA and a mixed DNA result was obtained. The scientist who examined the result concluded that the profile consisted of components relating to a single major contributor and to at least one minor contributor. The DNA from the major contributor was consistent with the DNA profile of the appellant and the match probability was one in a billion.

The scientist could not say when the major components of the DNA had been deposited or what the source was of those components i.e. blood, saliva or some other bodily deposit. The scientist said that the deposit of the major contributor could have been due to the person touching the door handle or due to secondary transfer though she considered secondary transfer was unlikely given that the DNA in question was the major contributor to the profile.

The victim was unable to identify the defendant and the defendant gave a no comment interview. At trial, a half-time submission was made on the basis that the DNA was the sole evidence against the defendant and in light of the case of *Bryon* there was no case to answer. The argument was rejected, the defendant did not give evidence and he was subsequently convicted.

The Court of Appeal was satisfied that the DNA evidence was the only evidence linking the defendant to the robbery and it proceeded on the basis that the car was an item left at the scene. The Court went on to hold that where an article was left at the scene of a crime, there could, depending on the particular facts of the case, be a case to answer. It further concluded that the approach set out in *Bryon* was not correct. *Bryon* was not a case where the DNA profile was unsupported by other evidence and therefore, when the court observed that the authorities established a rule that, where there was such a case, the evidence would not be sufficient to support a conviction, the observation was obiter.

The Court of Appeal went on to identify a number of factors that should be taken into account when deciding whether there was a case to answer, not limited to but including:

(i) whether the defendant had provided a plausible explanation for the finding of the profile;
(ii) whether the article was associated with the crime itself;
(iii) how readily moveable the item was;
(iv) whether there was a geographical association between the offence and the offender;
(v) in a mixed profile, whether the offender matched to the major profile; and
(vi) whether primary or secondary (innocent) transfer was the more likely.

It appears therefore that there is no legal or evidential principle preventing a case solely dependent on the presence of a defendant's DNA profile on an article left at the scene of a crime being considered by a jury. A matching DNA profile either directly connected to the crime or just on an object found at the scene can be enough to convict.

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