The interests of justice? When should the court issue a witness summons?

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Cases cited
R. v Dania (Jordan) [2019] EWCA Crim 796; [2019] 4 WLUK 519 (CA (Crim Div))

Legislation cited
Criminal Procedure (Attendance of Witnesses) Act 1965 (c.69) s.2

Crim. L.R. 1041 It has long been assumed by the courts and practitioners that, save in wholly exceptional circumstances, where a witness is likely to be able to give material evidence on the facts in issue, it will be in the interests of justice to assist the party wishing to call them to secure their attendance at court by the issue of a witness summons. The interests of justice have been considered to be best served by a jury hearing all relevant material evidence and deciding the case according to that evidence. That general assumption appears to have been significantly limited by the recent decision of the Court of Appeal in *Dania* , [1] and courts and practitioners will need to change their approach to such applications. In *Dania* , the Court appears to have endorsed the practice of the trial judge assessing the truthfulness of the evidence the witness is likely to be able to give as a preliminary question before deciding to what extent the party ought to be supported in securing the witness's presence. It further endorsed the right of co-defendants (in a "cut-throat" trial) to object to the evidence on the basis that it may implicate them, and thus not be in the interests of justice.

D was one of five youths charged with the murder of KY. The Crown's case was that the five were part of a group of eight who spent several hours looking for KY and his associates, intending to take revenge for earlier confrontations. It was never the Crown's case that all of the eight shared that intention; three of the group were regarded as innocently present during the events of that evening. One in particular, BL, only knew one of the five defendants (not D but a fourth defendant, EAS). BL had provided a statement to the police early in the investigation and was never treated as a suspect. His statement was served by the prosecution as part of their case, and the contents of that statement were opened in full to the jury, as the Crown intended at that stage to call him as a witness. In his witness statement, BL described how four of the group chased KY and collectively stabbed him to death. Importantly, he described his own friend EAS as being one of that group of four. CCTV footage showed the group approaching the road where KY was found in two distinct groups; BL—and D—were in the second group, a significant distance behind the first group, which contained the four co-defendants. The attack itself was not shown on CCTV, but CCTV did show the group leaving the scene by the far end of the same road, and again BL and D were in close company with each other. It was D's case that the attack was carried out by his four co-defendants, ***Crim. L.R. 1042*** but that he was not involved,

and that he, like BL, remained some distance from the fighting. BL's account was plainly capable, if accepted by the jury, of demonstrating that the attack was carried out by four attackers not five, and thus providing significant support to D's case, and as the CCTV did not show the attack, that was potentially critical evidence not available from any other source. BL's evidence was also highly destructive of the case for EAS, as it clearly suggested that he was one of the principal attackers, even though he was a friend of BL. EAS in turn sought to implicate D.

The trial judge invited the Crown to reconsider whether they themselves should indeed call BL, as his evidence was clearly capable of supporting D. The Crown initially took the view that they were obliged to call BL, consistent with their duty of fairness and in compliance with the duties set out in the familiar case of *Russell Jones* .[2] Unsurprisingly, BL was reluctant to attend court, and so the Crown applied for a witness summons to secure his attendance. The application was granted, and in due course BL attended court, where he remained for several hours. During the luncheon adjournment, he decided to leave court, and did so. The Crown then indicated that they would not apply for a warrant for his arrest, and that they no longer considered themselves bound to tender him as a witness. The judge endorsed their decision and did not herself raise the issue of obtaining a witness warrant.

It was at this point potentially arguable that the Crown was not complying with its duty under *Russell-Jones* to secure at least the attendance of the witness, but it was also clear that they were not prepared to do so, and neither was the judge. This may have provided a potential ground of appeal in itself, but one of the obvious weaknesses in such an appeal based on that prosecutorial duty is that it would be argued that the defence could themselves have called the witness had they wished to do so. No doubt mindful of that position, D's counsel himself applied for a witness summons in respect of BL, and it was assumed by all parties that the application would be granted as a matter of course. That assumption was wrong: the application was refused, and that refusal was later upheld by the Court of Appeal. The grounds for that refusal, and for the Court of Appeal upholding that decision, need very careful examination.

The statute

The issuing of a witness summons in the Crown Court is governed by section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 , the material part of which is in the following terms:

> 2.
>
> (1) "This section applies where the Crown Court is satisfied that —
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> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
>
> (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that ***Crim. L.R. 1043*** person to give evidence or to produce the document or thing.
>
> (2). In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to—
>
> (a) attend before the Crown Court at the time and place stated in the summons, and
>
> (b) give the evidence or produce the document or thing."

The Court of Appeal's decision

It was accepted by the judge, and by the Court of Appeal, that the requirements of s.2(1)(a) for issuing a witness summons were indeed met in this case. BL was clearly someone "likely to be able to give evidence likely to be material evidence"; he was an eyewitness to all of the events before, during and after the attack, and a member of the defendants' own group. No witness could be better placed to do so. The application to issue the witness summons on behalf of the defendant was refused on the basis that the conditions of s.2(1)(b) were not established—it was not "in the interests of justice" to issue the summons on the defence application, even though the trial judge had earlier found it to be in the interests of justice to issue the summons for the same witness when it was applied for by the prosecution.

In dismissing the appeal, Holroyde LJ, delivering the judgment of the Court, did not simply find that the conviction was nonetheless safe, but endorsed the approach of the trial judge, and it is that new approach which practitioners will need to be aware of.

The first aspect of that approach which appears to be new is that the trial judge invited submissions from co-defendants as to the interests of justice generally, and specifically as to the potential impact of the evidence upon their cases. As to the potential impact of the witness's evidence against co-defendants, Holroyde LJ stated at [44]:

"In our judgment, the assessment of the interests of justice in this regard will necessarily be a fact-specific judgment based upon an evaluation of all relevant circumstances…. .it seems to us that the assessment of the interests of justice will often involve the judge in balancing competing interests."

Although he later stated that the assessment must not "unfairly subordinate the interests of the defendant who wishes the witness to be called to the interests of co-accused who take the opposite view", it is clear from the use of the word unfairly that the Court envisaged circumstances where the interests of the defendant who wishes the witness to be called could fairly be subordinated. In *Dania* , the evidence from BL that the attacking group contained four individuals, rather than five, assisted Dania himself, but BL went further and identified one specific co-defendant as one of the four (he only knew this co-defendant, as the others were strangers to him). That the evidence potentially strongly implicated a co-defendant was clear, but that would not ordinarily lean a court towards preventing a jury hearing the evidence. It was direct evidence of his guilt, rather than peripheral prejudicial ***Crim. L.R. 1044*** material. This aspect of the ruling does not appear to sit comfortably with the general approach to admissibility in "cut-throat" trials, as for example expressed by Lord Goff in *Lobban* [3] :

"… So far as [some] decisions suggest that a judge in a criminal trial has a discretionary power at the request of one defendant to exclude evidence tending to support the defence of another defendant they are contrary to well established principles and do not correctly reflect the law of England or of Jamaica."

The potential significance of this aspect of the Court of Appeal's ruling in *Dania* is that, in future, anyone adversely affected by the potential evidence that a witness the subject of an application for a summons might give must now be entitled to object to the issue of the summons, and the court is required to perform a balancing exercise between the competing interests *of all the parties*, albeit that the balance would still be weighted to some degree in favour of the applicant. This is a dramatic difference from previous practice.

The second important aspect of the judge's refusal, which again was endorsed by the Court of Appeal, was that the judge had herself assessed the witness as "potentially unreliable", solely on the basis that the witness was an associate of the defendants and may have an interest in self-protection in giving evidence, and solely based on the contents of the witness's original statement, which had not at least initially troubled the Crown, who had sought themselves to rely upon BL and had opened BL's statement in full to the jury. The Court of Appeal rejected the argument that it was necessarily in the interests of justice that the jury should be the ones to perform that assessment, and held that a trial judge is entitled to perform an assessment of the potential reliability of the witness and was entitled to refuse to issue a summons based simply on that paper assessment. The Court went on to add that it would be slow to interfere with any such assessment.

It follows on from this second point, that in all cases where an application is to be made for a witness summons, those who wish to oppose the application must be entitled to invite the court to consider whether or not, on a preliminary assessment, the witness may be considered to be potentially unreliable (as opposed to unreliable *simpliciter*).

The case also raises a third issue, of equality of arms. No explanation was given by the trial judge or the Court of Appeal as to why the interests of justice had been found to be served when the prosecution made their application, but was no longer found to be served when the defence made their application in respect of the same witness. The Court of Appeal did not address this point at all. They also in due course declined to certify any of these three points as a point of general public importance, although they may still fall to be considered by the ECHR .

The resulting verdicts on charges of murder were thus delivered by a jury who were not able to hear for themselves the evidence of a key eyewitness, because the trial judge had formed her own view on the potential unreliability of an eyewitness, and denied the defence the apparatus for securing the witness's attendance so that the jury could form their own view. The absence of any explanation to the jury for them not hearing from the witness, when the evidence ***Crim. L.R. 1045*** had been opened but not

mentioned again, only serves to underline the potential unfairness. If the interests of justice were indeed served by this, then the assumption that juries should determine the primary facts in a case is at best rather an over-simplification. It awaits to be seen to what extent trial judges will feel comfortable with this development.

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Footnotes

1 *Dania [2019] EWCA Crim 796* .

2 *Russell-Jones [1995] 3 All E.R. 239; [1995] 1 Cr. App. R. 538; [1995] Crim. L.R. 833* .

3 *Lobban [1995] 1 W.L.R. 877; [1995] Crim. L.R. 881* .

