No. 201903879 B3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1788

Royal Courts of Justice

Tuesday, 9 November 2021

Before:

LADY JUSTICE CARR

MR JUSTICE SPENCER

SIR NIGEL DAVIS

REGINA

V

STEVEN FRANCIS BOYLE

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MR A. BARTHOLOMEUSZ appeared on behalf of the Appellant.

MR P. GREANEY QC appeared on behalf of the Respondent.

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JUDGMENT

LADY JUSTICE CARR:

Introduction

1
This is a renewed application for an extension of time of 250 days and leave to appeal against conviction, alongside an application for permission to vary the proposed grounds of appeal.

2
The applicant, along with his co-accused Mark Fellows ("Fellows"), was charged with the murder of John Kinsella (Count 1), the attempted murder of Wendy Owens (Count 2) and the murder of Paul Massey (Count 3). The prosecution case was that the two defendants had carried out the assassination of two prominent gangland figures three years apart, and attempted to murder Wendy Owens as she attempted to impede the shooting of Mr Kinsella, who was her partner at the time.

3
Following a lengthy and high profile trial before William Davis J, as he then was, ("the Judge") in the Crown Court at Liverpool, the jury convicted both Fellows and the applicant on 16 January 2019. Fellows was convicted of both murders, but acquitted of the attempted murder of Ms Owens. The applicant was convicted of the murder of Mr Kinsella, but acquitted on the other two counts. Fellows was made the subject of a whole life order. The applicant, then aged 36 years, was sentenced to life imprisonment with a minimum term of 33 years.

4
The gravamen of the application for leave to appeal against conviction is that the applicant's conviction is at least arguably unsafe on the basis i) that the jury was misled as to the extent of his previous convictions; ii) that an alternative verdict should have been left to the jury; and iii) that there was material non-disclosure on the part of the prosecution.

5
For the purposes of the application, the applicant has had the benefit of pro bono representation by Mr Bartholomeusz, who did not appear below. Mr Paul Greaney QC, who prosecuted below, has also attended court today in order to offer any necessary assistance.

The Facts

6
The offending alleged on Count 1 arose out of the following events. At around 5.45 a.m. on 5 May 2018 Mr Kinsella and Ms Owens left their home in Rainhill with their dogs and went for their usual morning walk. Their routine was to walk from home in Rainhill to Norlands Lane and then on to Warrington Road. They would then follow this road until they reached a roundabout and then proceed through an opening known locally as the “Pigsty". This took them on to a field and a track running alongside the M62. As they walked along this track, a man cycled up behind them on a mountain bike.

He stopped, produced a handgun and shot Mr Kinsella twice in the back. Ms Owens charged at the man and he then shot at her. The bullet missed her; she fled from the scene onto the hard shoulder of the motorway. The gunman then cycled closer to the deceased and shot him again twice, this time in the back of the head, before cycling away.

7
The prosecution case was that Fellows was the man who had killed Mr Kinsella, assisted by the applicant acting as a lookout. The applicant was said to have parked his Clio vehicle ("the Clio") in a place that enabled him to see when Mr Kinsella and Ms Owens were out walking so as to alert Fellows accordingly.

8
Mr Kinsella was said to have been associated with a gang operating in Salford and the applicant and Fellows were said to have been associated with a rival gang which called itself “the A team”. It was the prosecution case that it was in this context that the applicant and Fellows had jointly planned the murder. They had travelled to the area and tried to commit the murder first on 28 April. However, they had arrived too early on that occasion and missed Mr Kinsella and Ms Owens. Due to Fellows' work commitments it was said that 5 May was the first opportunity for the two to try again.

9
Amongst other things, the prosecution relied upon evidence that the applicant and Fellows had together committed offences of robbery, vehicle taking and escape between 2000 and 2003; on Fellows’ previous convictions for drugs and firearms offences; and on the applicant's previous convictions for drugs, robbery, burglary, theft and firearms offences.

10
The applicant denied any involvement in the attack at all. In his defence statement he stated:

"I deny that I performed the role of spotter. I deny that I assisted Fellows to carry out the attack. I deny that I waited to assist Fellows in the aftermath of the murder if assistance was required."

11
In the witness box the applicant accepted prior contact with Fellows in the context of a request by Fellows for the applicant to collect money for him money, money which the applicant said he assumed would represent the proceeds of drug dealing. This explained, he said, why he was with Fellows in the Warrington Road area on both 29 April and 5 May 2018. On the latter day he was not acting as a lookout, rather he was just waiting for Fellows. Fellows then arrived and gave him a backpack, which the applicant expected to contain money. Instead, he saw that it contained a gun. He then drove to a relative's home and abandoned the Clio. On his account, he returned to the Clio the next day to move it a short distance away to somewhere where Fellows might readily find it, left it unlocked and informed Fellows where it was so that Fellows could retrieve the gun which the applicant left in the car.

Agreed Facts

12
Amongst the evidence agreed under s.10 of the Criminal Justice Act 1967 were the following facts:

i)
That when the Clio was recovered by the police on 15 May 2018 it was locked. The only way that it could be locked was by using the key or electric fob (agreed fact 328). This reflected the agreed

evidence of DS Neil Hughes, the officer who checked the driver's door when the Clio was recovered. (This evidence presented obvious difficulties for the applicant's version of events as we have set it out above.);

ii)
That the applicant had previous convictions, including for firearms offences in 2011. In this regard, agreed fact 276 stated:

"... When [the police] searched the area through which [the applicant's car passenger] had run, officers found a bag containing a loaded Baikal handgun with a silencer attached to it and 82 rounds of unfired live ammunition ... [The applicant's] fingerprints were found on the bag containing the bullets and his DNA was found on the firearm ... [The applicant] entered a not guilty plea to offences of possessing a handgun and possessing ammunition without a certificate. He was convicted of both offences at trial."

13
In his written legal directions and orally the Judge directed the jury as follows in relation to the agreed facts, referring to the applicant's previous convictions:

"...on various dates between 1999 and 2015. In particular, in 2011 he was convicted after a trial of possessing a loaded handgun and 82 rounds of live ammunition. This demonstrates that in 2011 he was willing to have a loaded firearm and a significant amount of ammunition in his possession. This may be used by you as some support for the proposition that he was willing to involve himself in offences involving firearms in 2015 and 2018. It cannot be the main, let alone the sole, reason for concluding that he was involved in such offences in 2015 or 2018 nor that he was someone with a tendency to use a firearm."

14
The issues for the jury on Count 1, in summary, were whether they were sure that Fellows was the man who murdered Mr Kinsella and if so, whether they were sure that the applicant had encouraged and assisted Fellows in his plan to do so.

Grounds of Appeal

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Mr Bartholomeusz submits, first, that the jury was misinformed in relation to the applicant's previous convictions. It was originally submitted that the s.10 admission at paragraph 276 was incorrect: whilst the applicant had been convicted in 2011 of possession of the handgun and of the ammunition within it, he was acquitted of possession of the silencer and the 82 rounds of ammunition. The applicant had tried to point this out in his evidence in cross-examination. The error should have been corrected. It is submitted that the jury may have rejected his defence in reliance on the misinformation. They were given the impression that the applicant's previous convictions were worse or more serious than they were. This resulted in i) the applicant's propensity to commit offences involving firearms being overstated; ii) the prosecution being able to suggest that the applicant was still a criminal associate of Fellows in 2012; iii) the jury being deprived of the opportunity to consider that a previous jury at least partially accepted the applicant's account in an earlier trial and iv) the jury being able to conclude that the applicant was not credible due to the fact that his evidence in the witness box was contrary to the agreed facts and legal directions. Reliance was placed on R v M[2012] EWCA Crim 1588 at [15] where it was stated that a jury should not be misinformed in any way which might suggest that the defendant's previous convictions are worse and more serious than in truth they are.

16
Faced with material produced in response to this renewed application by the respondent, Mr Bartholomeusz's position has had to shift. His complaint now is limited to a complaint by reference to the inclusion in agreed fact 276 to the reference to conviction for a handgun with a silencer. Mr Bartholomeusz maintains that this limited error, nevertheless, at least arguably, can be said to render the applicant's conviction unsafe.

17
Secondly, it is submitted that an alternative verdict of assisting an offender with intent to impede his apprehension or prosecution contrary to s.4(1) of the Criminal Law Act 1967 ought to have been left to the jury. This is in fact a completely new ground not contained in the original grounds of appeal, which suggested rather that an alternative offence by reference to s.46 of the Serious Crime Act 2007 should have been left to the jury. Mr Bartholomeusz sought to fill this gap by advancing an oral application to vary. He submits that the s.4(1) offence was an obvious and viable one on the evidence, such that the Judge was obliged to leave it to the jury. In answer to a query from the court as to why, if so obvious, no one appears to have identified this alternative at the time, Mr Bartholomeusz suggests that the reason was that the applicant's full case only came out very late in the day.

18
Thirdly, Mr Bartholomeusz has submitted that the prosecution case was that the Clio was used by the applicant for the purpose of serious crime. The applicant had asserted that he would not have abandoned the Clio vehicle near to the scene of a murder, as he had travelled in this car with his partner, Ms Watson, and his children. It was only after the trial, it is said, that the applicant became aware that the police had forensically linked Ms Watson to the vehicle. The submission is that such evidence would have supported the applicant's case, or at least undermined that of the prosecution.

19
Further, it is said that the statement of Ms Sarah Osbourne, which was allegedly not disclosed to the applicant at trial, would have supported his case that someone had been to the vehicle before it was seized by the police, when the driver's door was found to be locked. Ms Osbourne stated that on one occasion she had seen the Clio's hazard lights activated. This is a reframing of the original ground three, which was that a reconsideration of the evidence and unused material had meant that the evidence of DS Hughes could be considered misleading. Again, however, there is no proper application to vary.

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Fourthly, the applicant does seek, by way of a formal application to vary, to add a new fourth ground of appeal as follows. Evidence in relation to Fellow's subsequent prosecution for an offence of conspiracy to murder from 2015 and his subsequent conviction for conspiracy to cause grievous bodily harm was not disclosed at trial. The applicant was not implicated in any of those events. It is said that this material would have demonstrated that it was less likely that the applicant would have been required by Fellows to assist in this offence. On the one hand, Fellows' joint offending with the applicant ceased in 2003: on the other, Fellows was part of a conspiracy involving others in relative proximity in time to the murder of Mr Kinsella.

21
Cumulatively, these grounds are said to render the applicant's convictions at least arguably unsafe.

22

In the normal way, the applicant was obliged to waive privilege. The responses from trial counsels are contained, amongst other things, in a letter dated 6 July 2021. We also have the very considerable benefit of updated and detailed written grounds of opposition from Mr Greaney on behalf of the respondent. That response came and carried with it a number of important attachments. Mr Greaney has submitted today that upon receipt of the written grounds of opposition, together with their attachments, this renewed application should simply have been abandoned.

Discussion and Analysis

Ground One

23
First, it is now clear beyond doubt from material retrieved by the respondent from archives that the agreed fact at paragraph 276 was entirely accurate, save to the extent that it was in fact an understatement. The applicant's conviction was not for only 82 rounds of ammunition, but rather 85. The relevant records, including the transcript of the sentencing remarks, show that the applicant was convicted of both offences referred to in paragraph 276: possession of a firearm and possession of 85 rounds of ammunition. Further and in any event, for the very full reasons given by the Single Judge, on the broader, let alone the narrower basis now advanced, ground one is wholly without merit. The applicant was represented by experienced counsel. Under s.10 of the Criminal Justice Act 1967, the admission by a party of a fact is conclusive evidence against that party of that fact in those proceedings and on appeal, unless the court, whether at trial or on appeal, grants leave for the agreed fact to be withdrawn.

24
As we remarked during the course of this hearing, an agreed fact is not something to be tampered with lightly. There is nothing to confirm that the issues now raised were raised during trial, when they should have been raised (if to be raised at all). In any event, any partial inaccuracy would not in any way have arguably undermined the safety of the conviction for murder. The issue to which possession of the gun and the ammunition went was whether the convictions in 2011 supported the proposition that the applicant was willing to involve himself in offences involving firearms in 2015 and 2018. There is no dispute that the officers did find the agreed items, that the applicant's fingerprints were found on the bag containing the bullets. His DNA was found on the gun and he was convicted of its possession.

25
Finally and again, even if the agreed fact had been inaccurate as originally alleged, it was not capable of making any material difference of the jury's assessment of the case overall. The prosecution did not suggest the applicant had been lying in his evidence when he stated falsely that he had been acquitted of the offence of possession of ammunition. The jury was directed not to use this evidence as the main, let alone sole, reason for concluding that the applicant was involved in the murder: a direction which they clearly followed given their acquittal of the applicant on Count 3. Trial counsel's response to the applicant's enquiries for the purpose of this appeal also confirm that any limited inaccuracy, which we now in fact know did not exist in any event, was not a material matter for concern in context.

Ground Two

26

We consider the merit of the submissions as now advanced, but would emphasise the importance of making proper application to vary if what is essentially a fresh ground is to be advanced on any renewed application for leave.

27
An alternative verdict must be an obvious one which arises as a viable issue on a reasonable view of the evidence, including any defence evidence: see R v Coutts[2006] UKHL 39 at [23]; R v Barr[2016] EWCA Crim 216; 261 CLR 768 at [22]; R v Braithwaite[2019] EWCA Crim 597 at [34] and R v M[2019] EWCA Crim 1094 at [21] to [27].

28
Whether to leave an alternative offence to the jury calls for an exercise of judgment. The authorities emphasise the advantage of the trial judge over this court in assessing the appropriateness or otherwise of raising alternative verdicts which would always be a fact-specific exercise. This court will not interfere with a judge's exercise of judgment unless it is clearly wrong. The authorities also make it clear that the assessment is to be made by reference to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, not alternatives which ingenious counsel may identify through post-trial research.

29
In our judgment, it is simply not arguable that an offence contrary to s.4(1) of the Criminal Law Act 1967 was an obvious alternative to the count of murder facing the applicant. It did not reflect either side's case. It was flatly contradictory to his defence statement. It was not consistent with any reasonable assessment of the evidence and would have served to confuse the jury. The prosecution case was that this was a planned murder in which the applicant and Fellows had played a knowing part. The applicant's case was that he was not involved in the murder and had subsequently been handed the backpack that Fellows had used to commit it.

30
We would also note that, to even begin to advance a case for an alternative offence, the express instructions of a defendant after full advice as to the potential consequences of such a course of action are required. The fact that a conviction under s.4(1) was not an obvious alternative verdict is borne out by the fact that the idea never appears to have occurred to trial counsel or the (highly experienced) Judge presiding over a very lengthy trial. Certainly, it was never raised by anyone. Equally, it is hardly a promising platform for today's purposes that in the original grounds of appeal s. 4(1) was not mentioned at all, rather s.46 of the Serious Crime Act 2007 was relied upon. We do not consider this ground to be remotely arguable. It cannot be said, arguably or at all, that the Judge's approach was arguably wrong, let alone clearly wrong.

Ground Three

31
Ground Three has two limbs to it. Again, there has been no proper application to advance effectively a new case. The suggestion now is that there was non-disclosure of tests carried out on items within the Clio to establish a scientific link to the applicant’s partner, Ms Watson, and alleged non-disclosure of Ms Osbourne's statement. In fact, prior to trial, there had been no testing on any item within the Clio for a scientific link to Ms Watson. There was no arguable failure to disclose. It was only after the applicant raised fresh grounds that such testing was commissioned. In any event, we ask ourselves what difference this evidence would have made. It was not in dispute that the applicant's partner and

family used to travel in the Clio. There was no reason why a scientific link to Ms Watson should not have been made with items in the car at some stage.

32
As to the statement from Ms Osbourne, it is difficult to see in the light of the applicant's defence statement how it met the disclosure test. But in any event its existence and contents were set out in detail in the schedules of non-sensitive unused material disclosed well before trial. It was also one of the many attachments to the respondent's notice on this application. The applicant's lawyers did not pursue the point now raised in any way and one can understand why. It is most unlikely that the jury would have concluded that anyone was in the car on 14 May 2018. Ms Osbourne said in terms that she had seen no one go to it. If someone had gone there, that could only have been the applicant or someone acting with his consent, given that the vehicle was found locked by the police, the agreed evidence was by the key or remote activation fob and both were in the applicant's possession, on his own account.

Ground Four

33
An applicant seeking to rely on a ground of appeal not identified in the appeal notice must apply for permission to do so, in accordance with Criminal Procedure Rule 36.14(5) and Criminal Practice Direction IX 39C. These reflect the general principles identified in R v James[2018] EWCA Crim 285 at [38]. In deciding whether to vary the grounds the court will take into account the following (non-exhaustive) list of issues:

i)
The extent of the delay;

ii)
The reason for the delay;

iii)
Whether the issues/facts were known to the applicant's representative at the time he or she advised the applicant regarding any available grounds;

iv)
The overriding objective of acquitting the innocent and convicting the guilty and dealing with the case efficiently and expeditiously;

v)
The interests of justice.

The hurdle is rightly recognised as a high one.

34 It is said for the applicant that he was not aware of the facts giving rise to ground four when his original notice of appeal and grounds were lodged. Fellows was only sentenced on the matters raised in November 2020. Further, the applicant has only had the benefit of representation by counsel since then.

34
There is, however, no merit in the applicant's suggestion that the prosecution failed to disclose evidence in relation to the separate prosecution of Fellows on a separate conspiracy to murder. Mr Greaney tells us, and we have no reason whatsoever to doubt, that it was well known at all material

times that other allegations, including of conspiracy to commit serious offences, were being considered against Fellows and others. The broader investigation known as Operation Leopard implicating Fellows was referred to in the schedules of unused material. It was clear from that material, for example, that Fellows was suspected of the involvement in the attacks on Williams and Khan.

35
Further, all that could possibly have been said at the applicant's trial would have been that Fellows was under suspicion in respect of other matters. He certainly had not been convicted. And there would have been every reason not to pursue this point. The prosecution case against the applicant was that Fellows was a member of a violent gang with which the applicant was also associated. The potential implication of Fellows in further attacks with others would have served to bolster that case. We note that trial counsel have not suggested for one moment that it is an avenue that they would have chosen to pursue.

36
Given the extent of the delay in seeking to raise ground four, its lack of merit, it would not be the interests of justice or in accordance with the overriding objective to grant the application to vary to advance it. We refuse the application.

Extension of Time

37
An extension of time will only be granted where there is good reason to give it and, ordinarily, where the defendant will otherwise suffer significant injustice: see R v Hughes[2009] EWCA Crim 841 at [20]. The principled approach is to grant an extension if it is in the interests of justice to do so: see R v Thorsby [2015] EWCA Crim 1. The court will examine the merits of the underlying grounds before deciding whether to grant an extension.

38
Through a letter from his solicitors dated 20 November 2019, the applicant sets out the reasons for the delay and the difficulties in finding funds or the means to achieve further advice from fresh counsel. The respondent invites us to view his suggestions as to the degree of difficulties experienced with a high degree of scepticism. However, the applicant's explanation, even if accepted, does not amount to a good reason for delay of over 35 weeks. In any event, in the absence of any merit in the application, we decline to grant the necessary extension of time.

Conclusion

39
For these reasons, whether viewed individually or cumulatively, the proposed grounds of appeal are without merit. Both the application for an extension of time and, so far as necessary, the renewed application for leave to appeal conviction and any related applications to vary are refused.

40
Standing back, we agree with Mr Greaney that, (at the very latest) upon receipt of the respondent's notice with its attachments, this renewed application should have been abandoned.

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