APPROVED

NCN: [2021] EWCA Crim 1935
No. 202101114 B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Tuesday, 23 November 2021

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE JAY

HIS HONOUR JUDGE BLAIR QC

(RECORDER OF BRISTOL)

REGINA

V

ABDIRAHMAN IBRAHIM

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Mr. S. Perian, QC appeared on behalf of the appellant.

Mr B. O'Neill, QC assisted by Ms S.Deb appeared on behalf of the Crown.

JUDGMENT

LORD JUSTICE POPPLEWELL:

1.
The appellant stood trial before his Honour Judge Donne, QC and a jury in the Crown Court at Inner London on two charges. Count 1 charged murder. Count 2 charged assisting an offender by purchasing petrol for the destruction of one or both of the cars used in the murder. He was convicted on both counts on 29 March 2021. He appeals against conviction with leave of the single judge limited to two grounds, and renews his application for leave on the two grounds for which leave was refused.

2.
The murder took place in the context of a history of violence between North London gangs. The victim, Alex Smith, who was only 16 at the time, associated with people who were members of the Cumbo gang, although he was not a member. The Cumbo gang was in conflict with the Agar Grove gang, whose drug dealing territory was in the Camden area. There had been a history of tit for tat incidents of violence between the Cumbo and Agar Grove gangs since 2017. Most recently, on 19 May 2019, the occupants of a stolen black Audi attacked the occupants of another vehicle, who included Arif Biomy, a member of the Agar Grove gang. Biomy received serious stab wounds to the abdomen and chest and was hospitalised for several weeks. When the Audi was recovered, it had fingerprints from two associates of the Cumbo gang, Mohammed Choudhury and Roman Omid. Biomy declined to make a witness statement but told the police that the attack was likely to have targeted him as a result of his association with the Agar Grove gang. It was the prosecution case that the murder of Alex Smith, which took place three months later, was in response to this latest incident as part of the continuing gang warfare.

3.
At about 10.30 pm on 12 August 2019 Alex Smith left Nando's in the Euston area, in company with Nariman Omid (Roman's brother), Mohammed Choudhury and Guystone Henriet, all of whom were associated with the Cumbo gang. Between about 10.00 p.m. and 11:00 pm that evening, occupants of two stolen cars with false plates, one a Ford Fiesta and the other a Seat Leon, were captured on CCTV and by ANPR searching for that group in the Cumbo gang area. In the Seat Leon were Biomy, driving, Yassin Abdi, in the front passenger seat, and the appellant in the rear passenger seat. In the Ford Fiesta were Syed Saliban, with Tariq Monteiro as the front seat passenger, and Siyad Mohamud in the rear, all three Agar Grove gang members.

4.
When Alex Smith's group had been located, three of the Agar Grove gang got out of the vehicles. Tariq Monteiro and Siyad Mohamud got out of the Fiesta, and Yassin Abdi got out of the Seat. Those three gave chase on foot. The two cars, meanwhile, manoeuvred to cut off or pursue the intended victims. One of the men on foot, Monteiro was armed with a large knife or short sword, which he brandished openly so that it was seen by a number of independent witnesses. Alex Smith was chased down in Munster Square, close to Regent's Park, just north of the Euston Road, after his companions had

dispersed, and was stabbed twice, one of the wounds proving fatal. The three attackers waited nearby until they were picked up by the Fiesta. The car then drove away and was followed by the Seat Leon shortly afterwards. The appellant was in the rear passenger seat of the Seat throughout the period from the beginning of the search until after the attackers got back into the Fiesta.

5.
The two vehicles were later driven to the Kilburn area. Just before 2.00 a.m. the appellant was seen on CCTV making an unsuccessful attempt to buy petrol in a plastic jerrycan at Tesco Esso in Maida Vale. Ten minutes later he was captured on CCTV at a BP garage in Wellington Road, where £2.59 worth of petrol was purchased. Both vehicles were then burnt out in the early hours of that morning, 13 August 2019. The three attackers Abdi, Monteiro and Mohamud fled the country in the following days. Biomy attempted unsuccessfully to do so.

6.
At an earlier trial Biomy was convicted on 25 February 2020 of the murder of Alex Smith. Yusuf Yusuf, another Agar Grove gang member, pleaded guilty during that trial to assisting an offender by setting fire to the Seat Leon. The appellant had not been tried at the same time as those two because he was at the time of their trial suffering from a drug induced psychosis and was not then fit to stand trial.

7.
A combination of ANPR, CCTV and cell site evidence established that on the day of the killing the appellant had been with Biomy during the day in Southampton in the Seat Leon. The appellant said in interview that he had been assisting in running a county line drug dealing operation selling cocaine. They returned together to London in the car in the evening, and arrived at Ridgmount Place, Biomy's address, at about 21:50, where they remained for about 20 minutes. During this time the appellant moved into the driver's seat whilst Biomy was inside, then returning to the passenger seat. The Seat Leon then travelled to Conway Mews, the home of Monteiro, where it arrived seconds after the Ford Fiesta. During this period, whilst at the home of Monteiro, the appellant said in interview that he got out and smoked some weed which was offered to him by those present, whom he described as Somali boys whom he did not know. The Fiesta then left on a search quarter of an hour later, and was away for about 15 minutes before returning. Once it returned, the Seat then left to make a search without the Fiesta, driving repeatedly around the streets before returning eight minutes later.

8.
Just before 11.00 p.m., both cars left Conway Mews together. They went to number eight Longford Street, a block associated with the Cumbo gang. This was where Monteiro emerged from the Fiesta with the large knife, making no attempt to conceal it, as he ran across the road in front of both cars and into the entrance of number eight, followed by Mohamud. Biomy manoeuvred the Seat Leon and Abdi then got out to join the other two on foot, entering the building.

9.
When the three emerged from number eight, Abdi went to the Seat Leon and at first approached the front passenger door. The rear passenger door was then opened from the inside about halfway. Abdi then pulled it fully open from the outside. He did not, however, get in, but returned to number eight. The Seat then continued the pursuit into Osnaburgh Street with Monteiro, Mohamud and Abdi remaining on foot. Thereafter events unfolded as we have described.

10.
The appellant was arrested in Southampton on 14 August 2019. In interview he answered "no comment" to all questions. He was further interviewed on 11 September 2019, and again, answered

"no comment" to all questions. He was then re-interviewed by police on 12 March 2020, following his discharge from a psychiatric unit where he had been treated for the drug induced psychosis. He told officers that he was not a member of any gang associated with Biomy, whom he knew as AR, or any other gang. He was unaware, he said, that there was any history between Biomy or his group and Alex Smith. He had been introduced to what he called older boys who got him to sell drugs as a runner in return for food and money. This was initially in the Camden area in the week before the killing, when he earned £100 a day. He was then offered £1,000 a day and moved to Southampton as a drugs runner there. On 12 August, he said, he had been selling cocaine for Biomy as a runner in the Southampton area during the day before returning with him to London. He said that he knew that the older boys from their faces were members of the Agar group gang, although he did not know them personally. He did not say in interview that he knew that Biomy was a member of the Agar Grove gang or associated with them.

11.
He went on to say in interview that by the time they got to the friend's house (ie Monteiro's house in Conway Mews), he was tired due to his consumption of drugs and from being involved in selling them. He went to sleep on the back passenger seat. He did not remember there being any third person in the car. He did not at any stage open the rear door for Abdi to get in. If that was what happened outside number eight, it must have been Biomy who did so from the front seat. At some point he remembered the car driving around and then stopping, and saw people running around. He stayed in the car in the same position, slumped in the rear passenger seat. He said he had not seen any weapons and was unaware that anybody had any. He explained that he had been pressured by the Somali boys to buy the petrol -- these, he explained, were different Somali boys from those he had met earlier --, but he said he was not involved in setting fire to the car and did not know of any intention to use the petrol for that purpose.

12.
The appellant did not give evidence.

13.
The two grounds on which leave to appeal was given are those which were rejected by the judge in a ruling on the admissibility of bad character evidence. The prosecution made a bad character application in respect of evidence of the conduct of the appellant's brother Hamza Ibrahim, with whom the appellant had been living. The material which it was sought to introduce was that Hamza was an associate of those in the Agar Grove gang, who had been in their company on nine occasions between December 2018 and 28 June 2019 in the context of possession and dealing in cannabis. His contact with associates of those in the Agar Grove gang was not with any of the three men on foot who were the principals in the attack on Alex Smith.

14.
It was the prosecution case that this was relevant and significant evidence which played an important part in undermining the appellant's defence that he was unaware of what was happening on the night in question, and was unaware of any gang related animosity towards the group being pursued. This supplemented other evidence of Hamza's association with members of the Agar Grove gang, including in particular, evidence that when Biomy had arrived at University College Hospital on 19 May 2019 with serious knife injuries, Hamza Ibrahim attended the hospital three minutes later. He did so together with another Agar Grove associate and together with Siyad Mohamud, who had a bleeding injury to his hand. Siyad Mohamud, it will be recalled, was one of the three Agar Grove gang members on foot in the attack on Alex Smith three months later.

15.
The prosecution contended that the jury could conclude from the bad character evidence which it sought to introduce that Hamza's arrival at the hospital and his other contact with Siyad Mohamud, which included telephone contact on 12 and 13 August, was not a coincidence, but was referable to Hamza's close and long-standing association with the Agar Grove gang, and that given that the appellant and his brother Hamza were living together, the appellant would be likely to have known of the Cumbo gang attack on Biomy and its gang warfare background, especially as the appellant had been dealing drugs for Biomy, and so there would have been no reason for Hamza not to share the information about what had happened to Biomy. The evidence was, therefore, admissible, it was submitted, under section 100(1)(a) of the Criminal Justice Act 2003 as important explanatory evidence. Alternatively, it was admissible under section 100(1)(b) as having substantial probative value in relation to a matter in issue in the proceedings which was of substantial importance in the context of the case as a whole.

16.
On behalf of the defence it was submitted that the bad character evidence about Hamza had no relevance to the live issue in the case which was whether the appellant knew that the principals, that is Monteiro, Mohamud and Abdi, intended to kill or cause at least really serious harm, and encouraged or assisted them sharing that same intention. Alternatively, it was submitted on behalf of the defence, the bad character evidence should be excluded under section 78 of the Police and Criminal Evidence Act 1978 because its prejudicial effect outweighed its probative value. It was prejudicial, it was submitted, because it might lead the jury to adopt a speculative line of reasoning and to conclude that the appellant was guilty merely by association with his brother.

17.
The judge ruled the evidence admissible stating:

"[...] the jury would be entitled to conclude that, given his brother's association with the Agar Grove gang and presence at University College Hospital on 19 May, this defendant must have greater knowledge of the gang, its history, its membership and its desire for revenge than he has admitted. That being so, this evidence is prima facie admissible under section 100(1)(a) and section 100(2)(b) as important explanatory evidence but particularly under section 100(1)(b) as being relevant to an important matter in issue."

18.
He went on to consider section 78 of the Police and Criminal Evidence Act and determined that the admission of the evidence would not have such an adverse effect on the fairness of the proceedings that it should be excluded in the light of the defendant's admitted involvement in county lines drug dealing in Southampton and his having made £100 per day selling cannabis in Camden.

19.
The judge gave a full and careful direction to the jury in the course of his summing-up as to the use to which the jury could put the material. He gave a firm caution against it being used merely to impute guilt by association and he also warned the jury that the process of reasoning, which the prosecution invited the jury to adopt, was not one which necessarily followed.

20.
Mr Perian QC has developed before us the same two lines of argument which were addressed to the judge and rejected by him.

21.
Section 100 of the Criminal Justice Act 2003 provides:

"100 **Non-defendant's bad character**

(1)
In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a)
it is important explanatory evidence

(b)
it has substantial probative value in relation to a matter which—

(i)
is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,or

(c)
all parties to the proceedings agree to the evidence being admissible.

(2)
For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

(a)
without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b)
its value for understanding the case as a whole is substantial."

22.
It is important to keep in mind that both section 100(1)(a) and section 100(1)(b) impose a higher threshold to admissibility than mere relevance. Section 100(2) makes clear that in order to qualify as admissible explanatory evidence the evidence must be "important", which means both that its value for understanding the case as a whole is substantial and that without it the jury would find it difficult or impossible properly to understand other evidence in the case. The test of "substantial probative value" in relation to a matter in issue in section 100(1)(b) imposes a requirement that the evidence has an enhanced capability of proving or disproving the matter in issue which itself must be a matter of substantial importance in the context of the case as a whole over and above mere relevance to that issue (see, for example, R v Musone [2007] EWCA Crim 1237; [2007] 2 Cr App R 29 at 46, and R v Phillips [2013] EWCA Crim 2935; [2012] 2 Cr App R 25 at 39-40).

23.
The way in which the judge expressed his conclusions does not make clear that he had this enhanced threshold in mind. That may be because Mr Perian's argument was that the evidence was not relevant at all to the live issue in the proceedings.

24.
Nevertheless, we think that he was correct to admit the evidence as having substantial probative value in relation to what was an important issue in the proceedings under section 100(1)(b). The

appellant's case was that he was unaware that there was any history between Biomy or his group and anyone being chased, or of any gang related motive for pursuing them. His case, reflected in his account in interview, was that he was largely unaware of the activity going on. If the jury rejected that account, and there were strong reasons for rejecting it on the evidence, the jury would still need to address carefully what the appellant knew of the purpose of what was going on, and in particular, what the motive was for searching out and chasing down those who were being pursued. An important issue in the case, indeed at the very heart of it, was whether the appellant was aware of what was going on, and importantly, whether as the prosecution alleged, he knew that it was a search for rival gang members for the purposes of a gang related revenge attack. The bad character evidence was part of an important body of evidence which had substantial probative value in relation to this issue. Hamza's long-term criminal association with members of the Agar Grove gang would permit the jury to infer that Hamza was himself fully aware of the gang war background to the events three months after his visit to the hospital, and of the motive for activity on that evening. That is particularly so in the light of his attendance at the hospital in company with two other gang associates, three minutes after Biomy arrived with gang war inflicted injuries. It had substantial probative value in itself over and above the evidence of the fact of Hamza's attendance at the hospital and those with whom he was in company, which was admissible without recourse to the bad character restrictions. Without the bad character evidence, the defence would have been able to argue that Hamza's presence at the hospital, and indeed, also the calls between him and Mohamud on 12 and 13 August, were no more than innocent association and did not themselves suggest gang membership or any knowledge on Hamza's part of the gang history or the nature of the injuries to Biomy. The evidence of Hamza’s gang background made it more likely that he would have been aware both that the attack on Biomy was part of a gang war and that there was to be retribution for it by an attack on Cumbo gang members.

25.
Before us Mr Perian argued that it was impermissible speculation for the jury to conclude from Hamza's visit to the hospital that he met Biomy at the hospital, that the injury to Siyad Mohamud was gang related, or that by reason of the visit Hamza would have had any knowledge of the gang attack on Biomy. The bad character evidence about Hamza’s gang connections meets that very argument. There would be nothing, in our view, impermissible about the jury drawing a conclusion from the bad character evidence, coupled with the evidence as to what happened at the hospital, that Hamza was well aware of the gang related attack on Biomy.

26.
If the jury were satisfied of Hamza's knowledge in this respect as a gang member, then the jury could properly reason that taken with the fact that the brothers were living together and that the appellant had himself been dealing drugs for Biomy for a week, it was unlikely that the appellant, who had been trusted to remain in the Seat throughout the chase was unaware of the purpose of what was taking place. Mr Perian submitted that that was a matter of pure speculation. We cannot accept that submission. It is a process of reasoning which the jury could legitimately adopt, and it was precisely this potential chain of reasoning which meant that the bad character evidence had substantial probative value on an important issue in the case.

27.
The alternative ground relied upon by the prosecution and the judge, namely that the bad character evidence was admissible under section 100(1)(a) as important explanatory evidence is, in our view, more difficult to support. We would accept that it was explanatory evidence in relation to Hamza's

attendance at the hospital. It explains his presence as a gang member, not a mere friend or acquaintance of Biomy or the other two who were there with him. Without it the jury might not have felt able to treat Hamza's presence at the hospital as being associated with gang membership with the attendant knowledge that would imply. But we would question whether it meets the test of being "important" explanatory evidence as defined in subsection (2), and in particular, whether without it the jury would have been unable to understand, or would have had difficulty in understanding the relevance of the evidence which the prosecution was putting forward of Hamza's attendance at the hospital on that occasion. However, since the evidence was admissible under section 100(1)(b) (subject to the arguments on section 78 of the Police and Criminal Evidence Act, to which we will come), it was properly admitted on that basis, and we need say no more about Section 100(1)(a).

28.
As to section 78 of the Police and Criminal Evidence Act, it is difficult to see that the material was of any significant prejudicial effect so far as the appellant was concerned. It comprised criminal associations of his brother Hamza, not him. So far as his own criminal associations were concerned, they arose from his own admissions in interview of drug dealing on the day in question in Southampton and for a week beforehand. He was in fact given the benefit of a modified good character direction by reference to his previous clean record, notwithstanding this admission. If there were any risk of prejudice to the appellant from Hamza's conduct by way of guilt by association, which we would regard as slight, it was amply met by the judge's direction warning the jury against it.

29.
We turn to the grounds on which leave to appeal was refused which are the subject of renewed application. The first asserts that the judge made improper comment on two aspects of the evidence in his summing-up which undermined arguments for the defence which had been advanced in its closing speech. One relates to the judge's comment on the receipt of a call on the phone ending 1550 in the Seat Leon after the attack. This was from Siyad Mohamud at 23.15 and lasted 25 seconds. The 1550 number was an iPhone which had been used extensively for drug dealing during the day when the appellant and Biomy were in Southampton, with the appellant buying a top-up for it at one point during the day. There was evidence that it had been used by others, not the appellant, on at least two occasions. Conversely, it was accepted by the appellant that it had been used by him on two occasions on the evening in question prior to the attack, at 21.13 and 21.54, to create a video of himself and to access his Outlook account, respectively.

30.
One argument advanced is that the judge wrongly invited the jury to conclude that it was the appellant who received the call at 23.15, which because it was from an Agar Grove gang member, would undermine his defence that he had no association with gang members other than Biomy. In fact, however, the judge did not suggest that the call had been made to or taken by the appellant. He merely raised the question whether the appellant would have heard at least the end of the call when he was in the car. Mr Perian submitted that, nevertheless, because the judge dealt with this call in the context of a passage in the summing-up in which he also made reference to Biomy driving the car around and being seen at times to have both hands on the wheel, the inference was that he was inviting the jury to conclude that it was the appellant who received the call. We do not think that any fair reading of the summing-up suggests such an inference. There was no objection taken at the time to this passage in the summing-up, and in our view, there is nothing in this point.

31.

The other complaint relates to what the judge said about the £2.59 spent on petrol at the BP garage in Wellington Road. The judge said that Mr Perian had commented in his speech that this was an unusual sum, as indeed he had. The judge then referred to the account of the appellant in interview that he had been asked to "fill up" the can with petrol. The complaint is that the judge involved himself in advocacy in suggesting that this meant or might mean that there was already petrol in the can. In fact, the judge merely observed that the jury would no doubt be familiar with the type of container and might think that it was a standard, five-litre, green container, and the judge asked whether the explanation for the odd amount paid might be that it was already half full, whilst reminding the jury that it was a matter for them. He went on to say that it might not matter very much since they had no expert evidence of the amount of petrol used in either of the fires in which the cars were burnt out and they did not need to be experts to know that petrol would act as an accelerant. Again, there was no complaint about this aspect of the summing-up from defence counsel at the time. In our view, it was a proper comment upon the evidence. The appellant's case was that he had been asked to "fill it up." In any event, it was at that point of little significance to the case, as the judge correctly observed.

32.
There is, in our view, no arguable case of any improper conduct by the judge, let alone anything that could undermine the safety of the conviction.

33.
The final renewal ground is that there is a lurking doubt about the safety of the conviction. This is, in our view, hopeless. This was not a weak case and there was no submission of no case to answer at the conclusion of the prosecution case, following which the appellant did not give evidence. In R v Pope [2012] EWCA Crim 2241; [2013] 1 Cr App R 14, Lord Judge LCJ said at paragraph 14:

"If [...] there is a case to answer, and after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the 'lurking doubt' concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."

34.
There are no such exceptional circumstances in this case. We do not have any lurking doubt about the safety of the conviction, let alone one which by a reasonable analysis of the evidence or trial process leads to the inexorable conclusion that the conviction is unsafe.

35.
Accordingly, the appeal is dismissed, as is the renewed application.

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