**IN THE COURT OF APPEAL**
**CRIMINAL DIVISION**

Case No: 2021/01750/B5

NCN: [2022] EWCA Crim 151

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 13th January 2022

**LORD JUSTICE HOLROYDE**

**MR JUSTICE LAVENDER**

**HER HONOUR JUDGE WENDY JOSEPH QC**

**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E G I N A**

**- v –**

**MATEUSZ MACIEJEWSKI**

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**Mr P Joyce QC and Miss A Joyce** appeared on behalf of the Applicant

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**J U D G M E N T**

**(Approved)**

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Thursday 13th January 2022

**LORD JUSTICE HOLROYDE:**

1. On 17th May 2021, at the conclusion of a trial in the Crown Court at Derby before Her Honour Judge Shant QC and a jury, this applicant was convicted of murder. He was subsequently sentenced to custody for life, with a minimum term of 22 years.

2. The applicant now renews his application for leave to appeal against conviction following refusal by the single judge.

3. For present purpose, the relevant facts can be summarised very briefly. On the afternoon of 8th December 2019 the applicant (then aged 19) went with three other men - Sahib Mann, Callum McConnell and Gursimran Mann - to the home of Karl Taylor. There was a confrontation, in the course of which the applicant inflicted severe stab wounds to Mr Taylor's abdomen and leg. Mr Taylor died some days later of sepsis and multiple organ failure consequent on the abdominal wound.

4. At trial, the applicant denied that he had been armed with a knife when he went to Mr Taylor's home. His case was that it was Mr Taylor who was the aggressor and was armed with the knife. He gave evidence that he had acted in self-defence, that the knife wounds were inflicted during a struggle, and that he did not intend to kill or to cause really serious injury.

5. The prosecution case against the applicant relied, amongst other things, on evidence of the following: that the applicant had been heard to say "Don't worry, I've shanked him" as he stepped back from Mr Taylor with the knife in his hand; that he and his three co-accused had disposed of their clothing and taken other steps to cover their tracks; that he had disposed of the knife and changed his mobile phone; that he had sent text messages to his girlfriend in which he effectively admitted the stabbing, but made no mention of self-defence or accident; and that, posing as someone else, he had made phone calls to the hospital and to Mr Taylor's partner, enquiring about Mr Taylor's condition and asking that life support should not be turned off. The prosecution also relied on evidence of the applicant's relevant previous convictions, his failure to mention when interviewed that he had acted in self-defence and that the wounds were inflicted accidentally, and lies told by him in interview.

6. The applicant was convicted, as we have said. His three co-accused were acquitted.

7. No criticism is made of the judge's legal directions to the jury. The sole ground of appeal relates to the judge's rejection of a submission during the trial that he should discharge the jury or order a separate trial of the applicant. We summarise the circumstances in which the judge made that ruling.

8. The trial took place during the Covid-19 pandemic. The courtroom had been configured to comply with social distancing requirements. Some jurors sat in the jury box, but others sat elsewhere in the courtroom.

9. The dock contained eight seats, in two rows. At the start of the trial, the applicant and Gursimran Mann were seated in the back row. The other two defendants were in the front row, and dock officers occupied the remaining seats. However, when evidence began on 20th April 2021 the defendants in the back row found it difficult to see the screens on which the CCTV footage was being shown. At their request, they were moved, so that all four defendants were sitting in the front row, with dock officers in the back row. The result of that move was that the applicant was sitting in very close proximity to jurors 11 and 12.

10. The prosecution evidence was concluded on 28th April 2021. The first defendant, Sahib Mann, then gave evidence and was cross-examined. At the conclusion of his evidence on 29th April, it was anticipated that neither Gursimran Mann nor McConnell would give evidence, but that the applicant, who was last on the indictment, would.

11. At 13.50 that day, however, jurors 11 and 12 sent the following note to the judge:

"Please can the defendant Mataus be moved away from jury number 11 and 12 as it's intimidating us and causing us concern."

12. The judge rightly took prompt steps to have the two jurors separated from the other members of the jury. She discussed the note with counsel at length. Mr Joyce QC, then as now representing the applicant, submitted that a fair trial was no longer possible. The judge arranged for each of jurors 11 and 12 separately to be asked to expand upon their note, to say what had caused them to feel intimidated and be concerned, and to say whether they had discussed this with any other juror.

13. To the first question, juror 11 replied in writing as follows:

"I wanted the defendant Mateaus moved a seat or two away from me as for the past few days in court he has been staring at myself and juror 12, during time in the court room. If he could swap seats with Simi or Saby that would make me more comfortable."

To the second question, she replied:

"It made me feel intimidated as he stared at me quite a bit, and when looking at my screen at the CCTV footage, I could see him in front of me. It just makes me feel rather uncomfortable to see him looking at me for significant amounts of time."

To the third question, she replied:

"The other jurors know I was concerned as I told them after the first day I noticed him staring at me."

14. To the first of the same three questions, juror 12 replied in writing as follows:

"When I first sat down in seat 12, I felt someone staring, looked up and I saw the defendant I believe called Mathius staring. He did not look away but would keep staring across in my direction. It made me feel uncomfortable. I noticed that this was not just a one-off occasion. As time has gone on, I stated to one of the clerks about how this defendant was making me feel uncomfortable about looking over in my direction. The clerk shrugged it off. As I said to Juror 11, 'I don't know if I am being over-sensitive, but I keep seeing Mathius looking in our direction' and she confirmed the same. I have

taken to moving my chair to the left as my gaze is not fixed frontways. However, during evidence I can see him still looking, staring."

To the second question she said:

"The constant staring, if eyes meet staring you out and not diverting his gaze. It does come across as intimidation and not in a normal manner. I have noticed him staring even when I try to avert my eyes, I still see him glancing over."

To the third question she said:

"The only juror I have explained my concerns was juror 11 and it was because at first I thought I might have been over sensitive and to ensure it was not just me reading into the situation. However, after keeping an eye on the situation I noticed he was even trying to see what I was writing as I am so close and if I look directly ahead due to the position of my seating I can see all the defendants but it's only the defendant closest to me that is constantly looking over in my direction which is uncomfortable and I want to be focused on listening to everything without feeling distracted by this situation."

We should say that it is common ground that the reference in juror 12's note to a "court clerk" is almost certainly a reference to a court usher.

15. After further discussions with counsel, the judge directed that the seating arrangements in the dock should revert to those which had been in place at the start of the trial. The result was that the person sitting closest to jurors 11 and 12 would be a dock officer. In addition, the judge arranged for juror 12 to be moved to a different part of the courtroom and for juror 11's seat to be repositioned so that she would face the witness box.

16. Jurors 11 and 12 were then called into court separately. The judge explained to them that the defendants had been sitting in the front row so that they could all see the screens, that it was not the applicant's fault that he was sitting close to the jurors, and that it was not his fault that if he looked to his side it would give the impression that he was staring at a juror. She further explained the revised seating arrangements and asked each of the two jurors:

"Do you feel able to continue as a juror and remain faithful to your oath or affirmation to try the defendant in accordance with the evidence and without concern?"

17. Both jurors answered that question in the affirmative. Juror 12, however, paused before answering. She was asked to write out any further concerns, and responded by writing:

"Can I not be facing the same way?"

18. Mr Joyce asked the judge to investigate the reference by juror 12 to having spoken to an usher. The judge asked juror 12 to provide a further note in this regard. In her reply, the juror indicated that she could not remember which usher it was. She said that it had been a passing comment when leaving court, and that she was not sure if it had been heard.

19. All twelve jurors were then brought into court, with jurors 11 and 12 occupying their new positions. The judge told them that the issue which had arisen because of the close proximity of two jurors to the dock, and which had now been resolved, should play no part in their deliberations and should not be held against any of the defendants. She reminded them of their duty to try the case according to the evidence. Each juror was then asked if he or she felt able to continue as a juror and

remain faithful to their oath or affirmation to try the case in accordance with the evidence without concern. All twelve replied in the affirmative.

20. Mr Joyce thereafter made his submission that the judge should either discharge the whole jury, or discharge jurors 11 and 12, or order that the applicant be tried separately from the other defendants. Those applications were not supported by the other defendants and were opposed by the Crown. Having heard submissions, the judge refused the applications. She indicated that she would give her reasons in writing at a later date.

21. There was then an adjournment over a bank holiday weekend, after which the trial proceeded with the applicant giving his evidence.

22. In the written reasons which she subsequently provided to counsel, the judge said that her explanation to the jury may perhaps have been a generous interpretation of the applicant's behaviour, but it was utterly fair to him. She said that the concerns of jurors 11 and 12 had been focused on their proximity to the applicant, which had now been addressed. Both jurors had stated clearly that they could deliver a fair verdict in accordance with their oaths. The judge did not accept the submission that there was a conflict between juror 12's initial reference to speaking to an usher and her later indication that the comment may not have been heard. There was no basis for regarding that juror as dishonest. Nor did the judge accept that the fact that the matter had not been raised earlier was a cause for concern. She said that it had been a developing situation, as was indicated by juror 12 asking juror 11 whether she was being over-sensitive. All jurors had confirmed that they were able to try the case on the evidence, and they would be given further directions in due course.

23. In his written and oral submissions on behalf of the applicant, Mr Joyce argues that the circumstances which arose made it impossible for the applicant to have a fair trial. He submits that jurors 11 and 12, and any juror to whom either of them said anything about their concern that the applicant was staring at them, had failed to comply with the judge's instruction at the start of the trial that they should immediately raise any matter of concern with her by sending a note. He submits that if the jurors had complied with their duty, it would have been possible for the judge to take appropriate action promptly. As it was, the trial had continued to the point at which it is submitted that it was impossible to correct the situation. Jurors 11 and 12 had felt uncomfortable and intimidated throughout and had been distracted from listening to the evidence. Mr Joyce further submits that the applicant could not give his best evidence when he was fearful of making eye contact with any of the jury as he stood in the witness box. Mr Joyce further questions the honesty of juror 12's assertion that her comment to the court usher may not have been heard. He suggests that she had changed her story in that regard. He submits that if the juror did speak to a court usher, then that usher also failed in her duty to report the matter to the judge. When the matter was belatedly raised, Mr Joyce accepts that the judge asked appropriate questions, but he submits that her enquiries could not, and did not, address the harm that had already occurred. He submitted that a juror asked whether she could continue to try the case fairly was, in practical terms, bound to answer in the affirmative. He seeks leave to appeal on the basis that the conviction should be quashed and a retrial ordered.

24. This being a renewed application for leave, we have not heard oral submissions on behalf of the Crown, but we have read a Respondent's Notice in which it is submitted that the judge dealt with the matter properly and in accordance with Criminal Practice Direction VI (Trial) 26M.1 to 26M.26. Nothing emerged which gave any real grounds for believing that the applicant could not receive a fair

trial, and it is submitted that the judge was entitled to conclude that it was not necessary to discharge all or any of the jury or to sever the applicant's case from the trial of his co-accused.

25. We are grateful to Mr Joyce for his submissions, and all the more so because he and his junior have been good enough to act pro bono.

26. When jurors 11 and 12 sent their first note to the judge, she and counsel were confronted with an unexpected and difficult situation. We understand, of course, why Mr Joyce was and is concerned on behalf of the applicant. The judge in our view dealt with the matter entirely correctly. The Practice Direction makes clear that when a possible jury irregularity comes to light, the primary concern of a judge should be the impact on the trial. Having isolated the two jurors, discussed the matter with counsel and ascertained further information from the jurors, she rightly focused on whether they and their colleagues would be able to reach their verdicts on the basis of the evidence alone. The judge was, in our view, entitled to conclude that they would. We regard the following considerations as important.

27. First, the judge was in the best position to assess events during the trial, and was entitled to conclude that the concerns of jurors 11 and 12 arose because of the proximity of the applicant to them. None of the other jurors, sitting a little further away, complained that he had been looking or staring at them. The judge was able to explain the reasons why the seating arrangements had been changed, and to emphasise that it was not the applicant's fault that his seat was so close to the jurors that it could easily appear that he was staring at them. She was also able to ensure that the layout of the courtroom was adjusted so as to end the problem.

28. Secondly, the reference by jurors 11 and 12 to the applicant's conduct "intimidating" them has to be seen in the context of their fuller explanation that his frequent looking in their direction was making them feel uncomfortable. Neither juror said that she had in fact been unable to concentrate on the evidence. Neither said that she was in fear of any adverse consequence or that she felt under any pressure to reach a particular verdict. All twelve jurors confirmed their ability to try the case in accordance with the evidence. There is, in our view, no basis for doubting their assurances. We cannot accept the submission that a juror who did in fact feel sufficient concern about his or her ability to try the case fairly would not be able to say so. On the contrary, it seems to us, a juror who was frightened or apprehensive could say so and would be expected to say so.

29. Thirdly, we see no arguable merit in the submission that the jurors and/or their colleagues had failed to comply with the judge's instructions. As the judge said in her ruling, the matter raised by the two jurors was one which developed over a period of time. It was not a single event which they could be expected to report as soon as it happened.

30. Nor do we see any arguable merit in the criticism that juror 12 changed her account in relation to what she had said to an usher. Like the judge, we see no necessary inconsistency between the juror's two statements.

31. in those circumstances, we see no basis on which it could be argued that any or all of the jurors were prejudiced against the applicant so that he could not have a fair trial. It is accordingly not arguable that the judge should have acceded to the applications to discharge two, or all twelve, jurors, or to sever the trial of the applicant.

32. We would add that the prosecution case against the applicant was very strong.

33. For those reasons, which are essentially the same as those given by the single judge, we see no arguable basis on which the safety of the conviction could be challenged. Grateful though we are to counsel, this renewed application accordingly fails and is refused.

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