**********REPORTING RESTRICTIONS**********

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IN THE COURT OF APPEAL **[2018] EWCA Crim 1857**

CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 19 July 2018

B e f o r e:

LORD JUSTICE TREACY

MRS JUSTICE MAY DBE

THE RECORDER OF PRESTON - HIS HONOUR JUDGE BROWN
(Sitting as a Judge of the CACD)

R E G I N A
v
DWAYNE EDGAR
ROBERT LAINSBURY
JAKE ALAN ANTHONY WHELAN

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Mr Kamlish QC appeared on behalf of the **Appellant**s

Mr J Price QC appeared on behalf of the **Crown**

J U D G M E N T
(Draft for approval)

**********REPORTING RESTRICTIONS**********

LORD JUSTICE TREACY:

1. On 20 December 2016, in the Crown Court at Cardiff, these appellants were convicted of murder. They were subsequently sentenced and in due course an appeal against the length of sentence was allowed in each case. They now appeal against their convictions with leave of the single judge. The grounds of appeal common to all assert that the integrity of the trial was fatally compromised by bias on behalf of a juror, Lauren Jones. In those circumstances, the verdicts are said to be unsafe.

2. In the circumstances of this case it is not necessary for us to set out the facts underlying the convictions in any great detail. If a defendant has not had the benefit of a fair trial to which he is entitled, then the strength of the case for the prosecution is irrelevant. If the trial has not been fair, then there has been no real trial at all and a conviction cannot be sustained by reference to the strength of a case against an accused.

3. Lynford Brewster was stabbed to death on the evening of 12 June 2016 in broad daylight in a residential part of Cardiff in front of a number of local residents. He had been involved in an argument with Whelan on the morning of 12 June and on that evening a number of witnesses saw three men chasing the deceased down an alleyway, where he received his fatal stab wounds. Whelan was seen getting into his car after the stabbing and the two men ran away through some woods. A knife and its sheath were recovered. Bloodstains on the knife matched the DNA profile of the deceased and the DNA of both Whelan and Edgar was recovered from the sheath. Lainsbury's DNA was recovered from the hand of the deceased. There was other evidence available to the Crown so that on its face the case was a strong one.

4. Several weeks after the trial an appellant’s solicitor received information that a police

officer providing family liaison, Detective Constable Bryant, who had attended court during the trial to provide support to the deceased's family, had a close relationship with a member of the jury. That officer's son was in a long-term relationship with the juror. The CPS was notified and an investigation was undertaken. An investigation by Detective Inspector Hathaway revealed considerable contact between the officer and Ms Jones prior to and during the course of the trial. There was recovered from the officer's phone a series of texts which the pair had exchanged at that time which are highly material in this appeal. It is clear that the officer initially lied about having any relationship with Ms Jones, although she subsequently admitted contacts with her in interview.

5. Consideration has been given as to whether there should be a prosecution but we understand that there is to be none. There are, however, pending disciplinary proceedings against the officer.

6. As far as the juror is concerned, she did not respond to invitations to assist the inquiry and at an earlier hearing in this court it was decided that since there was no dispute about the facts which had come to light, there was little purpose in prolonging matters with a view to ascertaining whether any bias on the part the juror was actual and subjective as opposed to objective. The court was concerned that the interests of justice would be better served by a prompt hearing of this appeal when the essential facts were already known rather than incur further delay.

7. An application for the court to receive fresh evidence in the form of DI Hathway's report, the schedule of text messages received and transcripts of interviews conducted with the police officer was not resisted by the Crown. This is fresh evidence which is reliable and bears upon the integrity of the trial. We are entirely satisfied that the interests of justice require us to receive the evidence under section 23 of the Criminal Appeal Act 1968.

8. In addition, at our request, we have been provided with a copy of the transcripts of instructions provided to the jury pool on two occasions when it was necessary for the jury to be sworn in in this case. The juror, Ms Jones, was part of the panel sworn in on each occasion. At the heart of the appeal is the contention that bias on the part of the juror is established incontrovertibly by the fresh evidence.

9. The approach of this court to the question of bias is not controversial. Bias may be actual or subjective on the one hand; on the other hand, it may be apparent to a fair-minded observer, or objective. The question will be whether a fair-minded and informed observer would conclude that there was a real possibility or real danger that the juror was biased. We have considered In Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 and Porter v Magill v Weeks [2001] UKHL 67. It is agreed that if only one member of the jury panel was biased in the way described, that would be sufficient to taint the whole panel.

10. The Crown has not in the circumstances sought to sustain the safety of these convictions but has correctly recognised, following R v McIlkenny & Ors [1991] 93 Cr App R 287 at page 310, that the safety of the convictions is a matter for the court.

11. The evidence before us shows that at the relevant time Lauren Jones had been the girlfriend of the police officer's son for some months prior to the start of the trial on which she served as juror. The son lived at home with his mother, the police officer. The officer had almost 30 years' service and had been assigned to assist the bereaved family in June 2016. She had also taken a witness statement from the deceased's partner. The officer and the juror were clearly on friendly terms in the months prior to the trial, regularly exchanging texts demonstrating this. The officer became aware that the juror had been summoned to perform jury service at the time when this trial was due to take

place. There is an exchange of texts on 11 October 2016 explicitly referring to this.

12. In the days immediately preceding the start of the trial they exchanged a number of texts referring to the trial. They include the following:

(i) On 27 November 2016 there was a message from the officer to the juror: "The Murder trial is put back til 1st. Not that that matters cos they'll hold u til then if they need to. Remember what I sed though, as long as you don't know any of the witnesses that's fine. But u could say ur a teacher in llanederyn but you don't know or have any dealings with any of them. If u do know any of them though ul have to say but say how u know them. I won't be there hardly and I'm not a witness anyway so that ok u don't need to worry bout that. Don't tell any of them who u r to me tho in case they think I've told u about it although u know I haven't xxx".

(ii) Within 2 minutes the juror replied: "Ooh is it, I'll just be honest. I don't know them personally. But I do see one member of the family regularly at school so not sure what will happen there. Looking forward to whatever I'm selected for though! Will be a good experience xxx".

(iii) About 10 minutes later the juror sent a further message: "I don't know her but I see her almost every day. I've never spoken to her I just see her when she drops the little boy off and picks him up. So it's difficult really because she would 100% know who I was as soon as I saw her".

(iv) The officer in further exchanges asked if the person whom the juror knew in her capacity as a teaching assistant was the victim's sister. The juror confirmed this. The juror concluded these late night exchanges by saying: "I'll just be honest, I wouldn't mind really cause I'd wanna do that trial but it's just seeing her everyday afterwards if the result isn't in their favour xxx".

(v) On the following day, the officer sent a message to the juror saying: "If ur on the murder ul be finished same time as me most days u can have a lift to mine afterwards if u wanted x". There was an immediate reply from the juror saying: "Fab thanks! The bus is a nightmare x".

13. Those exchanges immediately prior to the trial clearly showed the officer's awareness that the juror might well be involved in the trial and both parties' knowledge that the officer would be concerned with the trial, as well as the important fact that both were aware that the juror knew the victim's sister. She saw her regularly at school collecting her young son, who attended the nursery where Ms Jones worked. The exchanges also reveal that the juror was concerned about her position if there was not a conviction.

14. The trial was due to start on 1 December. On that morning, the first phase of two jury empanelments involving the juror took place. Later that day there was an exchange of messages which showed that the officer had been in the courtroom at that time and had seen the juror looking nervous in the courtroom. Despite the juror's close connection with the officer and her knowledge that she was involved in the case, she said nothing about that or about her connection to the sister of the deceased. At one point she did say something to the effect that she was a teacher at the school but went no further than that. She appears to have followed the advice given in the first text mentioned.

15. The police officer also failed to say anything to anybody although she was aware that the juror was sitting on the murder trial.

16. On the following day, 2 December, the first jury was empanelled. The jury was given an information sheet showing names of witnesses in the case, including two members of the deceased's family. During the process of swearing the jury another juror reported in the presence of Ms Jones that she knew the brother of the deceased. A second juror was

excused since he knew a witness who was a friend of one of the accused. Both those jurors were excused by the judge, who made plain that it was impossible for them to serve in the circumstances. Ms Jones must have witnessed those exchanges, yet she failed to declare her close connection with the case. The case was then opened but that jury had to be discharged because of timetable problems for two jurors.

17. On the same day, the officer phoned Ms Jones and a 51-second conversation took place. We do no know what was said between them.

18. On the following day, a Saturday, both the officer and the juror attended a family party for members of the officer's family.

19. On Monday, 5 December, a second jury was empanelled. It included Ms Jones. Again this jury had been provided with the case information sheet and the judge asked whether any of them knew the people involved in the case or those who might be giving evidence. Again nothing was said by Ms Jones to alert anyone to her connections with this case. That evening she and the officer exchanged texts, which clearly suggest that the juror was well aware that DC Bryant had been at court that day and would probably be attending on the following day.

20. On 8 December, the judge announced a non-sitting day for later in the trial and this change potentially interfered with plans the juror had for a hair appointment and a day out with the officer. The officer advised the juror to tell the usher that she had an appointment for the day in question which could not be changed. Her advice was not to say that it related to a hair appointment, merely to say that it was an appointment that had already been changed once. The juror replied, accepting that advice.

21. These exchanges emphasise the close relationship between the pair and show that each of them was prepared to connive in giving misleading or incomplete information to the court

in order to suit their own personal convenience.

22. A little later on the evening of 8 December the juror spoke to the officer by phone in a call lasting more than 11 minutes. We do not know what was said on this occasion. On 9 December, the juror text the officer apparently with a view to visiting her home that evening. On 13 December, there is a further message in which the officer refers to checking whether the juror needed a lift to court. By this stage defence evidence was being called.

23. The totality of the messages shows a close familiarity between the pair, with each fully aware of the other's connection with the case. The officer was a family liaison officer or acting as such during the trial. She provided support at court to the deceased's mother and sister, both of whom attended significant parts of the trial. She had been in court at the time of at least one of the jury empanelments and was present during evidence given by each of the accused. At no stage did she report the matter to anyone; nor did the juror.

24. Instead, they maintained contact during the trial, with the officer offering to drive the juror on occasions, an offer which one message shows the juror accepted with enthusiasm. They met at a family party between the two jury empanelments and colluded in a plan to mislead the court in order to preserve a previously arranged day out. In addition, there were telephone calls between them during the trial whose contents are unknown to us.

25. The police inquiry's dealings with the officer reveal that she lied in the initial stages to two officers about having had any relationship with the juror, leading to the inference that she realised that her connections with the juror were improper in the circumstances. It also appears that she was not truthful about the point at which she knew that the juror was involved in this murder trial.

26. This material reveals a shocking state of affairs. We have no hesitation in holding that the

clearest case of bias on the part of the juror is established. Any fair-minded and informed observer would conclude from the facts that there was a real possibility or danger that the juror was biased. Despite ample opportunity, she failed to declare either her connection with an officer whom she knew was closely connected with the victim's family or her connection with the deceased's sister or her concerns about how that person might react if they met following a not guilty verdict. Moreover, the juror had shown herself willing to participate in a deception of the court in order to pursue relatively trivial arrangements for her own private satisfaction. Both parties failed utterly in their civic duty as citizens and both of them must have known that at the time.

27. Since the officer's disciplinary proceedings have yet to take place, we say nothing further as to the outcome of them. However, it is crystal clear that this juror should never have sat on this trial and that the assertion of objective bias is fully made out.

28. In the circumstances, this trial was fatally flawed and the safety of the convictions is totally undermined. The folly of the juror and the police officer have wasted vast amounts of time and cost the public a great deal of money. Moreover, the agony for the victim's family is inevitably prolonged. We very much regret that fact.

29. However, there has not been a fair and proper trial because of the conduct of the officer and the juror and in those circumstances it is our duty to act. We allow the appeal. We quash each of these convictions. It is plainly in the interests of justice that in this serious matter there should be a retrial and we so order.

30. We will now give directions as to that.

Is there just a count of murder on the indictment?

MR PRICE: My Lord, yes.

LORD JUSTICE TREACY: There is no reason why the matter should not be retried in

Wales?

MR PRICE: We have been discussing that, my Lord. There is concern that locally there may be some awareness of the circumstances that have given rise to the decision that you have made today, albeit I apprehend the court would wish to place an embargo on the publication of the judgment, but I nevertheless draw that to the court's attention.

LORD JUSTICE TREACY: We will come to the question of reporting restrictions in a moment. I think what I will do will be to direct that the venue for retrial be determined by the presiding judge of the Wales circuit and then if either of you or others involved in the case have specific representations to make, he can consider those and make a determination as to venue.

MR PRICE: Thank you, my Lord.

31. LORD JUSTICE TREACY: The next matter will be the question of whether these appellants should remain in custody or be released on bail. What is the Crown's position?

MR PRICE: They should remain in custody, if you please.

LORD JUSTICE TREACY: Mr Kamlish?

MR KAMLISH: I could not properly make a bail application.

LORD JUSTICE TREACY: Thank you.

32. Then there is a question about reporting of these proceedings. What do you want to say about that?

MR PRICE: As I said, my Lord, I would invite the court to place an embargo on the publication of this judgment pending the conclusion of the retrial.

MR KAMLISH: Yes, I cannot disagree with that.

THE JUDGE: We will just rise for a moment. Thank you.

MR KAMLISH: Before my Lord rises, could I just mention the question of venue. In

circumstances where the question of whether or not the venue should be the same, the same for a retrial, is live, as here, it is normal for the court to do what the court has just done, which is to send it to the original court for the presider to make a decision. Can I just raise one issue, logistical issue. My client is a category A prisoner. There is no category A prison within reasonable distance of the Cardiff Crown Court. He cannot therefore be housed anywhere near Cardiff for this trial or for any interim hearing. It is just a matter that we have not fully investigated, we have just discovered that there is no such facility near Cardiff. My learned friend told me this morning that he understands, I presume he gets this from the police or possibly the family, that the fact of the potential for this conviction to be quashed because of the juror problem is a matter that is known in the area, it goes beyond just a case, it has more personal and human interest and it may be that I don't know whether the court would consider sending it to somewhere else for the first hearing, such as Bristol, where there is a nearer category A prison, then the presider can decide at Bristol, or the resident judge.

LORD JUSTICE TREACY: I don't envisage that the presider would convene a hearing in relation to venue. What I have in mind is that you would make written submissions and he can deal with the matter administratively.

MR KAMLISH: Or if a hearing is necessary, it can be done without the parties, just counsel.

LORD JUSTICE TREACY: Yes. So, those may be submissions you want to make in due course as to where the venue should be, but I think for the purpose of deciding venue, I see no reason why it cannot be dealt with administratively by written submissions.

33. Just before we rise, I will just ask the law reporter present whether they want to say anything about the question of reporting restrictions?

THE LAW REPORTER: Yes, my Lord. I would be interested in reporting the case if the restrictions could be lifted.

LORD JUSTICE TREACY: So, you are opposing counsel's application?

THE LAW REPORTER: Yes, but I have no real grounds other than the case would be of reportable interest for one of our series.

LORD JUSTICE TREACY: Thank you, we will consider that.

(A short adjournment)

34. LORD JUSTICE TREACY: The formal directions are as follows. We allow the appeal and quash the convictions. We order a retrial on an indictment which is to be served containing a count of murder against each of the three appellants. We direct that the appellants are re-arraigned on a fresh indictment within 2 months. As to venue for trial, we direct that that be determined by the presiding judge for the Wales circuit. Any submissions as to the appropriate venue for retrial should be submitted in writing to the presiding judge within 21 days of today. We direct that the appellants be held in custody pending their retrial. We make an order pursuant to section 4(2) of the Contempt of Court Act 1981 restricting reporting of the proceedings until after the conclusion of the retrial.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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