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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 18 December 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
(VICE PRESIDENT OF THE CACD)

MRS JUSTICE MCGOWAN DBE

MR JUSTICE KERR
R E G I N A
v
PRASHAD SOTHILINGHAM

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Mr J Scobie QC appeared on behalf of the **Appellant**
Mr M Fenhalls QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. THE VICE PRESIDENT:

2. **Background**

3. On 24 August 2016, in the Central Criminal Court, on an indictment containing three counts against him of murder, wounding with intent and violent disorder, the appellant was convicted of violent disorder. The jury could not agree on the counts of murder and wounding with intent. He was retried in 2017, by which time a man called Selvarajan (whom he had blamed for the murder in the first trial) had been added to the indictment. Selvarajan and the appellant ran what is colloquially called a cut-throat defence, each blaming the other for the murder. On 13 June 2017, the appellant was convicted of murder and wounding with intent. Selvarajan was acquitted of murder and convicted of wounding with intent and violent disorder. We do not need to rehearse the details of the other accused save to say none were convicted of the murder but some were convicted of violent disorder. On 14 June 2017, the trial judge, His Honour Judge Bevan QC, sentenced the appellant in total to imprisonment for life on the murder count with a minimum period of 29 years less time spent on remand as specified.

4. The appellant appeals on one ground, namely the judge's decision to allow the transcript of an ABE (Achieving Best Evidence) interview with the deceased, Justin Croos, in which he accused the appellant of another violent incident a few weeks before the killing to be given to the jury and retained by them for use in their deliberations. No objection is now taken to the fact that Mr Croos' ABE interview was played to the jury.

The facts

5. We can state the facts shortly. The killing arose as a result of a power struggle between two parts of what had once been the same Tamil gang in South London known as the Tooting Boys. The gang divided into the Elders, of which the deceased was one, and the Youngers, of which the appellant was one. A family known as Santharatanam was said to have a heavy influence on their associates within the gang. Evidence was given that members of the gang were engaged in various criminal enterprises including credit card fraud and serious violence.

6. On 23 November 2015, approximately 20 of the gang engaged in a fight. Some were armed with bottles, knives, axes, cricket bats and stumps. The fight left one man, Mr Croos, dead having suffered a severe blow to the head from an axe, one with a fractured skull and one with three fingers that had been virtually severed.

7. The prosecution relied on evidence from the complainants who survived and seven associates of theirs who had been present. Each identified the appellant as the assailant with an axe who hit Mr Croos to the head. Three further associates gave evidence of the build-up to the attack but not the fatal blows. Two independent witnesses gave evidence that they had seen part of the incident but did not identify any of the parties. Some of the build-up to the fight was captured on CCTV and the footage was relied on by the prosecution to support the evidence of their witnesses.

8. The appellant's case was that there had been no bad feeling between him and the deceased. On the contrary, they were good friends. He accepted he was present on 23 November 2015 but claimed his role was attempted peacemaker. Whilst he was trying to calm things down a fight broke out and the deceased had produced the axe or machete, Selvarajan had disarmed the deceased and presumably must have been responsible for the deceased's injuries.

9. Selvarajan's case was that he had been present on 23 November but had neither been armed nor took any part in the violence and had not seen the deceased being injured. The appellant later confessed to him that he was responsible.

An incident on 23 September 2015

10. This appeal relates to rulings made by the judge in relation to an attempted robbery and attack on Mr Croos on 23 September 2015. PC Sulieman was off duty when he came upon the deceased outside Tooting Broadway station. He saw men running away. The deceased claimed that the appellant and three others attacked him, the appellant pulled a knife from his sock and demanded his phone. In a video recorded ABE interview, using the services of an interpreter, Mr Croos described the attack upon him, giving details of the alleged attackers' names, addresses and clothing and again claimed the appellant had a knife.

11. The appellant was arrested. He denied presence at or involvement in the attack and claimed Mr Croos was a friend.

12. At the first trial, evidence in relation to the prior attack on Mr Croos was called by agreement but not as to the truth of its contents but as to the fact an allegation had been made. According to Mr Fenhalls QC for the Crown, true or false it provided a motive for the appellant to attack the deceased; and according to Mr Scobie QC for the appellant, if false it showed the pressure that the Santharatanams put upon their associates and upon Mr Croos.

13. Mr Scobie opened his case at the very beginning of the re-trial by claiming that there was a friendship between the appellant and Mr Croos. He explored the incident on 23 September in his cross examination of prosecution witnesses in an attempt to show it was a false allegation. He did so because he anticipated an application by Mr David Jeremy QC for the co-accused Selvarajan to adduce the evidence in any event. Having noted the way in which the case had been presented by Mr Scobie, Mr Jeremy applied for hearsay evidence of the allegation of 23 September to be adduced pursuant to section 109 of the Criminal Justice Act 2003 as truth of its contents. Mr Jeremy argued that if the appellant attacked the deceased only two months before the killing, it demonstrated a hostile animus on his part towards the deceased. He also wished to correct what he called a ‘misleading impression’ given to the jury of the incident by Mr Scobie’s questioning. Mr Scobie strenuously denied that he had given the jury a false impression. He had accepted the inevitable, namely that the evidence of the 23 September attack was bound to be adduced in the context of a great deal of evidence of "tit-for-tat" violence but invited the judge to conclude it should not be admitted as a potentially true allegation.

14. The judge noted in his ruling the extensive bad character evidence adduced by the defence. This included exploring with prosecution witnesses their acquittals on charges of murder and other serious allegations of violence. Most of the allegations were vague and/or of some age but this particular allegation was not. He found that it was potentially credible and substantially probative as between the two accused, the appellant and Selvarajan. If it was false, it assisted the appellant's case; if it was true, it assisted Selvarajan's case. The judge was satisfied that without the evidence, the jury would be left with a wholly misleading picture albeit he placed no criticism on Mr Scobie for the way in which he had presented the appellant's case.

15. The evidence that the appellant attacked Mr Croos included:

i) 16. evidence of 999 calls made by Mr Croos and PC Sulieman;

ii) 17. a recording of Mr Croos' ABE interview;

iii) 18. a transcript to assist the jury in following what Mr Croos had said;

iv) 19. a statement from PC Sulieman; and

v) 20. evidence called from Mr Croos' girlfriend as to his response after the alleged attack.

21. Either before or during the presentation of this evidence, (it is not still clear), the judge was asked to make a second ruling in relation to Mr Croos' interview. It was agreed that the interviews of Mr Croos and the appellant about the 23 September should be played to the jury and that the jury would need the transcript to assist them understand what Mr croos was saying whilst the recording was played. However, Mr Jeremy objected to a copy of the appellant’s interview about 23 September incident being placed in the jury bundle unless it was accompanied by a written summary of Mr Croos' ABE interview. The Crown's position was that both interviews should be played but no copies provided for the jury.

22. The judge felt that he had to strike a balance between the prosecution and the appellant but also between the two defendants. He concluded it did not seem unfair for the appellant to have his written prepared statement and interview in evidence but provided the written summary of the deceased's interview also went in. Once the recording of Mr Croos’ interview had been played no-one re-visited the issue of whether the jury should be allowed to retain the written summary of what he had said during their deliberations. It therefore remained with them and during their retirement they asked to see the video recording for a second time. The judge refused to allow them to do so.

The appeal

23. Mr Scobie argues on the appellant's behalf that the convictions are unsafe because the judge allowed the jury to retain a copy of the transcript of Mr Croos' ABE interview in relation to the incident in September. He argued that there was neither a very good reason nor were there exceptional circumstances to justify the jury being allowed to retain the transcript. He submitted that it gave rise to the very danger on which this

court has focused in the past, namely that the jury may have given disproportionate weight to the transcript particularly where he was unable to cross-examine the witness.

24. Mr Scobie argued that the evidence in relation to this incident was obviously significant; the jury seems to have thought so because they asked to watch the ABE of Mr Croos again. Itw as significant because if the jury was satisfied the appellant attacked the deceased weeks before the killing, this provided strong support for the prosecution case and for the co-accused's case that it was the appellant and not Selvarajan who had killed Mr Croos. Furthermore, the evidence severely undermined the appellant's credibility since it was a major platform of his case that he bore the deceased no ill will.

25. Mr Scobie invited us to look at the evidence as a whole to counter the suggestion made by Mr Fenhalls in his written submissions that the case against the appellant was strong. Mr Scobie reminded the court it was to a very large extent dependent upon witnesses who were not independent witnesses in that they were associated with the deceased and the other victims of the violence, they were all at the time entrenched in gang-related disputes and they were all on the other side of the disputes from the appellant's group.

26. Mr Scobie took us to previous decisions on the principles to be applied in deciding whether to allow a jury to have a transcript of evidence and directions that should be given. As far as we can ascertain they were not put before the trial judge or if they were, not in any detail. In R v Popescu [2010] EWCA Crim 1230 the court analysed the available guidance. In Popescu, the jury had been given transcripts of the ABE interview with the complainant and had kept them during their deliberations. Between paragraphs 34 and 39, the court made the following general observations:

> "34. The practices and safeguards which have been developed in relation to the use of transcripts by the jury are all founded on one central principle, which is the right of the defendant in a criminal trial to have a fair trial, with no unfair procedural or evidential advantage being given to the prosecution. If this right to a fair trial has been infringed, then the verdict cannot be regarded as safe, however strong the case is against the accused: see Randall v the Queen [2002] 2 Cr App R 17 at page 28 per Lord Bingham of Cornhill. The question in this case is whether that right was infringed so as to render the verdicts against the appellant unsafe.
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> 35. We venture to suggest some general comments before coming to the particular facts of this case. First, the general rule must be that great care must be taken before a jury is given transcripts of an ABE interview at all, even whilst the video is being shown. It should only be given to the jury after there has been discussion of the issue between the judge and counsel in the absence of the jury, and it should only be done if there is a very good reason for it, eg the evidence would be difficult to follow on the screen or the audio quality is very poor.
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> 36. Secondly, if the transcripts are given to the jury, we suggest, first, that the judge must warn the jury then and there to take care to examine the

> video as it is shown, not least because of the importance of the demeanour of the witness in giving evidence. Thirdly, the transcript should, save perhaps in very exceptional circumstances, be withdrawn from the jury once the ABE video evidence in chief has been given. Again, if the jury is to retain the transcripts during the cross-examination, this possibility must be given positive thought before it is done, and should, if possible, be discussed in the jury's absence before the start of the evidence in chief, if practicable. If the jury are to retain the transcripts, the reasons why the jury are being permitted to do so should be explained to them.
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> 37. Fourthly, if the transcripts are retained during cross-examination, then they should be recovered once the witness had finished his or her evidence. The general rule must be that the jury should not thereafter have the transcripts again.
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> 38. Fifthly however, it must be for a very good reason. It must be discussed with counsel in the jury's absence and the judge should give a ruling on it. Sixthly, the jury should not, except perhaps in exceptional circumstances, be permitted to retire with the transcripts. Those exceptional circumstances will usually only be present if the defence positively wants the jury to have the transcript and the judge is satisfied that there are very good reasons why the jury should retire with the transcripts.
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> 39. If the jury is to do so, it must again be the subject of discussions with counsel and a specific ruling from the judge. The judge must explain to the jury, in the course of his summing-up, why they are being allowed the transcripts and the limited use to which they must put them, viz. to aid them to understand the evidence in chief of the relevant witness and, if it be the case, that the defence wants the jury to retain the transcripts. If this course is adopted, then it is incumbent upon the judge to ensure that the cross-examination and re-examination of the witness is fully summed up to the jury, and the jury must be specifically reminded that they must take all that evidence into consideration in their deliberations, and must not be over-reliant upon the evidence in chief."

27. The court then returned to the ultimate issue for them, namely the safety of the conviction. On the facts of that case they dismissed the appeal.

28. However, Mr Scobie invited us to note the court's emphasis on the requirements that must be met before a jury is provided with a transcript and allowed to retain a transcript.

29. He also put before us the decision in R v Sardar [2012] EWCA Crim 134, where those principles were applied and an appeal allowed because a jury was allowed to retire with a transcript in the absence of any good reason and warnings from the judge.

30. Applying the principles to the facts of this case, Mr Scobie's principal submission is that the judge has incorrectly performed the balancing exercise by favouring the interests of the co-accused Selvarajan.

31. He contends, firstly, that there was no good reason or exceptional circumstances for the jury to retire with the transcript. Second, the judge, although he gave the jury the standard hearsay directions, failed to give the jury an explanation as to why they had the transcript or a warning on how to use it. This warning was said to be particularly necessary where there had been no cross-examination of Mr Croos. Third, the provision of the transcript gave both the prosecution and the co-accused an evidential advantage. Fourth, as we have indicated, he described the evidence of what happened on 23 September as of crucial significance in the case.

32. Mr Fenhalls, on behalf of the prosecution, set out the history of the applications in his written submissions and then shortly in his oral submissions this morning. He reminded the court that the evidence was adduced at the instigation of the second defendant and it was the second defendant who was anxious to achieve parity with the appellant. The Crown remained, effectively, neutral and content with the evidence being adduced. The best way for the jury to see the evidence once the judge had ruled that it was admissible was for them to watch the ABE interview recording and with the assistance of the transcript.

33. Although he acknowledged the usual rules on providing transcripts to a jury, Mr Fenhalls pointed out that this was an unusual case and arguably the usual rules did not apply. In any event, the judge dealt with all the evidence accurately and fairly and was painstaking in his efforts to present the case fully and fairly to the jury, including the competing arguments of the defence teams. In truth, it did not matter whether the allegation was true or not, the important point was that the allegation was made. As the judge observed in giving his ruling, if it was false, it assisted the appellant; if it was true, it assisted Selvarajan.

34. He accepted that no-one at trial focused on the need or the possible need to withdraw the transcript from the jury's hands or to give directions additional to those the judge had proposed in his circulated draft directions. Mr Fenhalls argued that the fact that very experienced counsel was not alerted to the possibility of either withdrawing the transcript or giving further directions, even when the jury asked to see the ABE again, may give the members of this court some indication of the importance placed on it at the trial.

Our conclusions

35. First, we have no doubt that the hearsay evidence of Mr Croos was admissible at the instigation of the co-accused, for the reasons given by the judge and now accepted by Mr Scobie. Arguably, it may also have been admissible at the behest of Mr Fenhalls for the prosecution. Both Mr Scobie and Mr Jeremy had taken full advantage of the latitude given to the defence by adducing large quantities of allegedly bad character evidence, much of it unproven and said to discredit witnesses. Mr Croos' account was

plainly part of that history. It was also relevant to the relationship between the deceased and his alleged killer.

36. Second, we endorse the observations in Popescu, based as they were on previous decisions that have stood the test of time. Thus, it is the duty of the trial judge to ensure that a defendant receives a fair trial and no unfair advantage is given to the prosecution. In most cases it will not be necessary for the jury to be given a transcript and a trial judge should only agree to such a course after careful consideration. If a transcript is given to the jury during the presentation of the evidence to help them understand it, it should usually be withdrawn from them before they retire. If the jury is given and/or allowed to retain a transcript, the judge should give the jury clear directions on how they should approach it.

37. We should add this in relation to those principles. It is right to acknowledge that the conduct of trials has moved on considerably since the decisions considered in Popescu. It is now common practice to give juries written directions, routes to verdict, and written summaries of agreed facts and omissions. Juries are trusted to abide by the judge's directions and approach those summaries appropriately. Furthermore, if any juror is adept at note-taking, they may well take with them to the jury room a virtually verbatim written note of the evidence or, of course, a jury may invite a judge to repeat his or her summary of the evidence. However, the principles expressed in Popescu do still apply where a trial judge allows contentious evidence to be put before the jury in written form and although they do not relate directly to the appeal before us, they provide us with some general guidance.

38. Bearing that in mind we return to the facts of this case. The judge's duty to ensure a fair trial for the appellant was somewhat complicated by his duty to ensure a fair trial for the co-accused who was running a cut throat defence.

39. It may be, and we repeat it is still not clear because neither Mr Scobie nor Mr Fenhalls were present on the day the submissions were heard, that in the heat of the trial the judge was not given the assistance that we have been given on the principles expressed in Popescu. Had he been taken to them, we acknowledge his decision may have been different. He may have refused to allow any written summaries or transcripts to go to the jury (as the prosecution had argued and as the individual members of this court may well have decided) or he may have allowed only a copy of the appellant's interview to be retained by the jury. However, it does not follow that he was wrong to reach the decision that he did. In our view in the unusual circumstances of the case, it was an option open to him.

40. We also accept it would have been preferable had the judge added a short direction warning the jury not to place undue weight on a transcript. However, we note that although the judge, as is common practice, circulated his proposed directions to the advocates, no-one suggested that he should include such a direction. As Mr Fenhalls suggested, that gives us a very good indication of how important such directions were thought to be to those who were closely involved in the dynamics of the trial.

41. His Honour Judge Bevan QC was one of the most experienced criminal judges in the country before his retirement and as his remarks make crystal clear, he was acutely conscious of the difficult balancing exercise he had to perform. The transcript related to a previous incident, not the day of the killing. Both Mr Scobie and Mr Jeremy relied upon evidence of the allegation in their different ways. The judge was bound to tread a difficult path in achieving fairness to both.

42. In any event, the jury did not need the transcript, to remember the important essence of Mr Croos' account namely that he had been attacked by four men on 24 September, one of whom was the appellant armed with a knife. We have read the full transcript of his interview with care. Once one excludes the officer's repeated attempts at clarification, and the translation, Mr Croos added some detail as to the nature of the attack for example the clothing and home addresses of the attackers, but nothing of any great significance to the appellant's trial, particularly in the context of the extensive allegations and counter-allegations of violence.

43. We do not accept, therefore, that the jury's retention of a copy of the transcript affected the fairness of the appellant's trial, coupled as this was with clear warnings as to how the jury should approach the hearsay evidence of Mr Croos. Having considered the summing-up as a whole, the judge was scrupulously fair. Accordingly, we are not persuaded that the provision of the transcript or the judge's directions taken as a whole have in any way undermined the safety of the conviction and the appeal must be dismissed.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: Rcj@epiqglobal.co.uk