Neutral Citation Number: [2019] EWCA Crim 1741
No: 201805052/C4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 9 October 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

HIS HONOUR JUDGE DEAN QC
(Sitting as a Judge of the CACD)

R E G I N A

v

JAYDEE DORSETT

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Mr F McGrath appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 27 July 2015, at the conclusion of a trial in the Central Criminal Court before Spencer J and a jury, this applicant was convicted of murdering Isaiah Ekpaloba and attempting to wound Lamont Roper with intent to do him grievous bodily harm. No appeal was brought at the time. However, on 5 December 2018 (well over 3 years out of time) application was made for a long extension of time to make an application for leave to appeal against conviction, on the basis that fresh evidence has become available which casts doubt on the safety of the convictions. The application was refused by the single judge, who gave detailed written reasons explaining his decision. The application is now renewed to the Full Court.

2. For present purposes it is sufficient to summarise the facts very briefly. In doing so, we shall for the most part refer to people by their surnames. We do so for convenience and intend no disrespect.

3. On the afternoon of 9 January 2015, Roper and Ekpaloba travelled by taxi to the applicant's flat. They were accompanied by a third man who has never been identified. Roper and Ekpaloba went into the flat. There was a fierce struggle, in the course of which both the applicant and Ekpaloba received numerous knife wounds. Neighbours heard the noises of that struggle, in which there was a lull before violent activity resumed. There were signs that Roper and Ekpaloba had searched the flat. A quantity of skunk cannabis, with a street value of several hundred pounds, was found concealed in the kitchen. Scales and polythene bags consistent with the preparation of cannabis for supply were also found. Roper, who appears to have been uninjured, was caught on CCTV leaving the flat at almost exactly the same time as the applicant made a 999 call to the ambulance service. Ekpaloba, with his clothing heavily bloodstained, left the flat 1 minute 20 seconds later. He, Roper and the unidentified third man drove away from the scene in the taxi. As they were doing so the applicant emerged from his flat, armed with a knife, and attempted unsuccessfully to stab Roper through the window of the taxi.

4. When the police arrived at the flat the applicant said that two hooded men, whom he did not know, had tried to rob him in his home and had attacked him.

5. Evidence relating to phone usage did not show any direct contact between the applicant and either Roper or Ekpaloba. The three men did however have a common contact, a young woman called Ronai Gittins. A further common contact was another young woman, Amber Williams. The evidence showed that Gittins had called Ekpaloba at a time when the men in the taxi were travelling towards the applicant's flat and again at a time when Ekpaloba and Roper were probably in the flat. Significantly, the applicant called Gittins for just over 4 minutes at a time when all three men were in the flat. That call ended just over 30 seconds before the applicant rang 999 which, as we have said, was also about the same time as Roper was leaving the flat.

6. Ekpaloba died a short time after the incident.

7. The applicant was arrested. When interviewed under caution he submitted a 6-page prepared statement but declined to answer questions. In the prepared statement the applicant expanded upon his account of being attacked in his own home, saying that he had acted in self-defence and in fear of his life. He said nothing in the statement to suggest that he knew either of the two men and he made no mention of the 4-minute telephone call which he had made to Gittins. We think that a striking omission, given that, on his account of events, the applicant was making that call at a time when he was in fear for his life.

8. In the course of the police investigation Roper was interviewed about two suspected conspiracies to burgle. The police suspected that both Gittins and Williams had been involved in the first, which related to premises unconnected with the applicant. Gittins was also suspected of involvement in the second, which did relate to the applicant's flat.

9. At trial the applicant's defence to the charge of murder was that he had been acting in lawful self-defence. His defence to the second charge was that he had not intended to cause really serious injury. He did not give evidence.

10. He was tried together with Roper, who was charged with conspiring with Ekpaloba and an unknown person to rob the applicant. Roper gave evidence in his own defence to the effect that he and Ekpaloba had gone to the flat to buy cannabis and that a fight had started between Ekpaloba and the applicant. Roper was convicted.

11. No criticism is or could be made of the judge's careful directions of law to the jury. Those directions included a direction in conventional terms not to speculate about what might have been said by other persons had they been called as witnesses. Both Gittins and Williams were mentioned in this regard, which we take to indicate that Williams' name had featured fairly prominently in the evidence. In his directions in relation to self-defence the judge explained to the jury that if the applicant may have been believed that the man he stabbed was a trespasser, then his use of force would only be unlawful if, in the circumstances as he believed them to be, it was grossly disproportionate.

12. The sole basis on which leave to appeal against conviction is now sought is a statement which has been provided to the applicant's present legal representatives by Williams. In this she says that the incident was not connected with drugs but was a revenge attack upon the applicant because he had been sexually involved with Gittins when she was the girlfriend of Ekpaloba. Williams says in the statement that she was present on an occasion when the applicant was rude to Gittins, who became angry and upset. Williams says that she heard Gittins then make a call to Ekpaloba in which Gittins told Ekpaloba that a man was threatening to beat her up and told Ekpaloba to come to his house and

"sort him out". Williams says in her statement that she mentioned this matter to the police when she herself was arrested, though not as part of any recorded interview.

13. On the applicant's behalf Mr McGrath submits that the effect of the fresh evidence which Williams is able to give is to render both the convictions unsafe. He contends that the explanation which she gives for the presence of Ekpaloba and Roper at the applicant's home "undermines the Crown's attack upon the credibility of the applicant's claim to have been acting in lawful self-defence". He argues that the prosecution case at trial was that Roper and Ekpaloba went to the applicant's flat to rob the applicant of drugs and/or money. Implicit in that allegation, suggests Mr McGrath, was that the two men had grounds to believe that the applicant was a drug dealer. Mr McGrath submits that a person who has a reputation as a drug dealer is less likely to be creditworthy and so the fact that the prosecution case put forward only that suggested motive had a tendency to undermine the claim of self-defence.

14. In his oral submissions developing this point, Mr McGrath has sought to argue that a jury knowing of what Williams said might take the view that the two men who entered the flat would have used a greater level of violence than if they were merely there to rob a drug dealer, and might also take the view that the victim of their attack, namely the applicant, would have believed himself to be in greater peril, as the victim of an attack motivated by sexual jealousy, than he would have been as a drug dealer attacked by people who wanted his drugs or his money.

15. Further, in developing his submissions Mr McGrath has placed heavy emphasis upon the fact that in a "no comment" interview of Roper, one of the questions asked by the police was an enquiry as to whether the attack may simply have been due to Ekpaloba being angry because he thought that Gittins had had sexual activity with the applicant at a time when she was or was regarded by Ekpaloba as his girlfriend.

16. The application is resisted by the respondent and we have considered the written submissions made in a respondent's notice.

17. We begin by considering the application for a long extension of time. It is made on the basis that Williams wrote to the applicant following his conviction, saying that he had been attacked because Gittins had set him up. The court has been provided with a copy of that letter and Mr McGrath has today helpfully been able to show us a photocopy of the envelope in which it was sent. From this it appears that it was sent to the applicant in prison in late February 2016.

18. A statement from the applicant's present solicitor indicates that she was first shown the letter in late July 2016. No explanation has been put forward as to why this letter, now

said to be of such importance, was not brought to the attention of solicitors until about 5 months after it is said to have been received. The solicitor then made attempts to contact Williams but did not succeed until early December 2016. The solicitor then managed to speak to Williams on the phone and took an account, from which a draft statement was prepared and sent on the same date to Williams so that she could check and sign it. It was not returned. Nearly 18 months went by for which we have no explanation. In May 2018 Williams made contact with the solicitor and gave permission for the solicitor to obtain various documents including notes made by Williams' own solicitor at the police station when she was arrested. Eventually, the draft statement was signed by Williams on 18 January 2019. Somewhat curiously it concludes with a reference to the granting of permission in relation to the police station notes, something which, on the face of the solicitor's statement, was not even ventilated until months after the statement was drafted.

19. When asked what was the applicant's position in relation to his knowledge, as at the date of trial, that the deceased Ekpaloba was the boyfriend of Gittins at a time when the applicant was sexually involved with Gittins, Mr McGrath indicated that his instructions were that as at the date of trial the applicant "had not made that connection". We are bound to say that we find that extremely difficult to accept. As we have indicated, the telephone evidence before the jury shows contact between the applicant and Williams in the days around the violent incident at the applicant's home.

20. The interview of Roper, which would have formed part of the material available in the trial of the two men, contained the passing reference by the police officer to the possibility that a sexual motive may have been in play.

21. Be all that as it may, in our view, nothing approaching a satisfactory explanation has been put forward as to why some two-and-a-half years have passed between the time when the applicant first gave instructions about Williams' letter and the time when she signed a witness statement. It is said by Mr McGrath, rightly, that Williams is only a young woman (17 at the time of the relevant incident) and had the anxiety, which might be expected to stem from the fact that she herself had come under suspicion of involvement in conspiracy to rob. But nonetheless, the passage of time is very substantial and no real explanation has been given for it.

22. The only explanation put forward for the fact that the applicant himself did not at any earlier stage raise this suggested alternative motive for the attack is, as we have said, that on Mr McGrath's instructions the applicant had not made the connection. We have already expressed our doubt about that proposition.

23. In all the circumstances, we can see no basis on which the extension of time could be granted. We are not persuaded, if Williams was in a position to give any material

evidence, that there was any good reason why she could not have been called as a witness at the trial.

24. Nonetheless we have gone on to consider the merits of the ground of the appeal, to see whether they are of such strength as to assist the applicant in relation to the extension of time. In this regard Mr McGrath has addressed us in detail but we are unable to accept that any arguable ground of appeal has been made out.

25. In relation to the charge of murder, the focus of the trial was on whether the prosecution had proved that the applicant was not acting in lawful self-defence when he inflicted the fatal wounds on Ekpaloba. Given that the applicant's case at trial was that Ekpaloba and Roper were trespassers in his flat, that he did not know who they were and that he thought they had come to rob him, we find it difficult to understand how the suggested fresh evidence could assist the defence case. We are unable to accept the submissions of Mr McGrath, in our view speculative, as to how the jury might have contemplated differing levels of violence according to whether the motivation was sexual or greed.

26. If Williams was to give evidence suggesting that the two men had gone to the flat to beat the applicant up as an act of revenge, that would, at best, do no more than provide an additional or alternative possible motive for the visit to the flat. The possibility of a drug-related motive was inescapably part of the case because Roper's evidence was that he and Ekpaloba had gone to the flat to buy drugs. The suggestion that the applicant's case was prejudiced by reference to drugs therefore seems to us to overlook the fact that the jury would in any event hear evidence to the effect that the applicant was a drug dealer.

27. In addition, it must be noted that the judge's correct direction on the issue of self-defence required the jury to consider what the applicant honestly believed to be the circumstances prevailing at the time when he stabbed Ekpaloba. The applicant's case at trial was that he thought he was being attacked by unknown men who had come to rob him. As we understand Mr McGrath's submissions, that remains his case. But even if his case in that regard were now to alter, it seems to us that the applicant faces insuperable difficulties in advancing this ground of appeal. If at the time he genuinely did not know who his attackers were, and had no reason to think that their intrusion into his home was anything to do with his sexual activity with Gittins, then the proposed evidence of Williams could not possibly assist him. If, on the other hand, he did know who the men were and did know what their motive might be, then no credible explanation has been put forward for why that case was not presented at trial. In that event also, we would repeat that no explanation has been given to our satisfaction for why Williams could not have given evidence at trial.

28. It was also suggested in writing, though not in oral submissions, that if Williams'

evidence had been available to the defence at trial, that might have affected the applicant's decision as to whether to give evidence. No satisfactory explanation has been put before the court as to why that would be so.

29. As to the charge of attempted wounding, it suffices to say that we see no possible basis on which the applicant's conviction could be said to be unsafe because Williams has subsequently made the statement to which we have referred.

30. The circumstances in which fresh evidence may be admitted on appeal are set out in section 23 of the Criminal Appeal Act 1968. This court, in considering whether to receive any fresh evidence, must have regard to all the circumstances but in particular, to a number of factors including whether the evidence appears to the court to be capable of belief, whether it appears to the court that the evidence may afford any ground for allowing the appeal, whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal and whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

31. We see no basis on which this proposed fresh evidence could be said to satisfy those criteria. Mr McGrath has made his submissions on the unspoken premise that everything contained in Williams' recent statement would be admissible in evidence. We accept, as a matter of principle, that some of it would be, but we are by no means sure that all of it would be. We have already expressed our views as to whether any reasonable explanation has been put forward as to why the evidence was not available at trial. But most importantly, we are entirely satisfied that the proposed evidence is not capable of affording any ground for allowing the appeal.

32. We therefore agree both with the reasons and with the conclusion of the single judge. There is no arguable basis for challenging the safety of these convictions.

33. The renewed applications are accordingly refused.