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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE MARTIN SPENCER

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

R E G I N A

v

LEWIS EDWARD CHORLTON

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NON-COUNSEL APPLICATION
J U D G M E N T
(Approved)

MR JUSTICE MARTIN SPENCER:

1. By this application the applicant seeks leave to appeal, together with an extension of time, against his conviction at Bolton Crown Court, before His Honour Judge G Smith and a jury on 15 January 2016, for wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861. For this offence he was sentenced to an extended sentence of 16 years' imprisonment comprising a custodial term of 12 years and an extended licensed period of 4 years.
2. In order to understand the context for this application it is necessary to explain the circumstances of the offence and the evidence relied on by the prosecution which led to the applicant's conviction.
3. In the early hours of 5 July 2015 the victim of the offence, Michael Dunn, was walking in Bolton town centre with friends after a night out and as the group approached the corner of Nelson Square and Bradshawgate a car pulled up. The passenger window was rolled down and the male passenger threw or squirted ammonia into Mr Dunn's face. This has caused him to lose the sight of his right eye.
4. This assault was witnessed by a number of people including Lauren Johnstone, who gave evidence that she recognised the passenger of the car as the applicant, Mr Chorlton. She also identified the driver as a male called "Ronnie Byron". She said she had known the applicant for 18 years and had seen him a few weeks earlier in the town centre with his sister, Casey, and his niece, who had been in a pram or pushchair. In relation to this offence, Ms Johnstone said she was standing just a few feet away, that she had an unobstructed view and the window of the car was down. The passenger's head was out of the car's window as he leant out, was not in shadow and the street was well lit. Although she said she thought she had viewed the applicant over a period of 5 to 10 minutes, she accepted that it could have been shorter, when informed that CCTV footage suggested that it had been a maximum of 1.5 minutes. She said that it had felt longer because "when it's cold time stands still".
5. Ms Johnstone had told Stacey Phillips, whom she was with at the scene, that the attacker was Lewis Chorlton, the applicant. Lauren Johnstone also said she had told Emma Daniel that it was Lewis Chorlton but Emma Daniel told the court that Lauren had only given the name of the driver (Ronnie Byron) and then she, Emma Daniel, had rung the emergency services telling them in turn that Ronnie Byron had been driving.
6. The identification of Mr Byron was relied upon by the prosecution who were allowed to adduce evidence that the applicant and Mr Byron had together been previously convicted on 30 September 2006 of having entered premises as trespassers, stolen car keys and at the time had on them a weapon, namely a CS gas canister. It was the prosecution case that this corroborated or confirmed the correctness of the identification by Lauren Johnstone, as it would be an astonishing coincidence if Ms Johnstone had mistakenly identified in the car two separate individuals who happened to have a conviction for an offence committed together

involving possession of an offensive weapon of a similar nature, that is something that can be used to spray a noxious substance at somebody else.

7. The issue at the trial was one of identification, namely whether Lauren Johnstone had correctly identified the applicant as the passenger in the car who committed the assault on Mr Dunn.
8. The prosecution case was a strong one, relying on the following evidence or factors.
 - (i) Evidence given by Lauren Johnstone identifying the applicant as the passenger of the car.
 - (ii) Evidence given by Stacey Phillips, including that Ms Johnstone had told her at the time that the applicant was the attacker.
 - (iii) Evidence by Emma Daniel, including that the only name Ms Johnstone told her at the time was Ronnie Byron, the driver.
 - (iv) Evidence from Shaun Doyle, the manager of Diamonds Nightclub in Bolton, including that on three occasions the applicant's girlfriend, Ella Kaye, had attended the nightclub and asked questions about their CCTV coverage. On the first occasion she asked whether their CCTV covered the outside as there had been an incident (something to do with her boyfriend and friends) a few weeks previously at the start of July. A week or two later he noticed Ella Kaye in a car parked close to the club. Another week or two later he saw two females in the car and Ella Kaye asked him if the CCTV cameras would capture faces where their car was parked. The car on that day was parked bumper to bumper facing the other way round from where the vehicle would have been on the day of the incident and he confirmed that it would and he heard the female say: "They must have him".
 - (v) Evidence given by Mr Stanton, including that he had also seen Ella Kaye attend the nightclub with another female. They asked about the CCTV cameras and whether if someone was sat in a car outside they could be seen by the cameras and when he answered "yes" the female comments: "Oh it looks like they must have seen them".
 - (vi) The applicant's behaviour on arrest including that he jumped over a fence into an alleyway and ran away from the police officer.
 - (vii) The agreed facts.
 - (viii) The applicant's "no comment" interview and lack of details about an alibi in his defence statement; and finally,
 - (ix) bad character evidence to support the identification, that is the applicant's previous conviction for aggravated burglary committed with Ronnie Byron in 2006 in which a CS gas canister had been carried as a weapon.
9. The defence case was that the applicant had been mistakenly identified. The applicant gave

evidence that he had not been in Bolton town centre with his sister and his niece on the previous occasion and that on the night in question he had been with a prostitute called "Jenny" from around 10.30 for an hour. He then visited his grandmother, Lily Foy, who had driven him and his girlfriend Ella to a hotel because the hot water and central heating at his house was not working. He accepted that he had asked Ella to visit Diamonds Nightclub because he thought the police were not investigating the matter properly and he wanted the people who had actually been in the car to be caught. He explained he had run away from the police because he had not realised they were police officers and had been half asleep when they banged his door down.

10. He called his grandmother, Lily Foy, to support his alibi and also called his sister Casey Chorlton to confirm that she had not been in Bolton town centre with the applicant and her niece on the basis that Lauren Johnstone's identification of the applicant was on the previous occasion unreliable thereby casting doubt on her identification of the applicant on the night in question. Despite that evidence the applicant was convicted.
11. The applicant now seeks to rely on further evidence which has been uncovered by a private investigator and which it is said was not known to the applicant at the time of his trial. This further evidence is
 - (i) Evidence of Jacqueline Holroyd, Casey Chorlton's manager at work, who confirms that Ms Chorlton had been at work on 9, 10 and 11 June 2017, which were the days covering the previous incident when it was said that Ms Johnstone had seen the applicant in Bolton town centre.
 - (ii) Evidence that Casey Chorlton's shift commenced at 1.30 pm on those days, those being days that Lauren Johnstone said covered the period she had seen the applicant.
 - (iii) Evidence of Casey Chorlton confirming that on the days when she worked she had to deliver her daughter to her parents to look after her daughter and so she would not have been out shopping with her niece in Bolton on such a day.
 - (iv) Evidence of Edward Stanton, the doorman at Diamonds Nightclub on 5 July, who had spoken to the occupants of the vehicle through the car window and who despite being in the best position to identify the occupants of the vehicle had never been asked to participate in any identification procedure by the police nor been asked to make a statement.
12. In a Respondent's Notice, the prosecution submits that the applicant was convicted on good quality identification evidence from Lauren Johnstone and that there was a wealth of evidence to support the correctness of this identification. They contend the evidence of Casey Chorlton is not fresh evidence because she gave evidence at trial. They contend that the evidence of Jacqueline Holroyd will not assist the applicant because this suggests that Casey Chorlton was first logged onto the electronic monitoring system at work at 15.50 hours, not 13.30, suggesting that she started work some 2 hours 20 minutes later than suggested in the grounds of appeal and at a time when is in fact not inconsistent with her having been in Bolton town centre with the applicant earlier in the day. So far as the evidence

of Edward Stanton is concerned, he had in fact provided a signed statement to the police and the contents of that statement render his belated evidence either unbelievable or of no probative value. He had been spoken to by the police 3 weeks after the incident and had said he could not remember the incident. He had viewed CCTV and then said this had not jogged his memory and he had signed a statement confirming that he could not remember anything about the car or its occupants and that statement had been served on the defence as additional evidence. It was therefore appropriate that he had not been asked to take part in an identification parade and the fact when asked to view a photograph of the applicant 2 years later, he confirmed he did not recognise the applicant and did not in fact assist in any suggestion that it was not the applicant who had been the passenger in the car.

13. On that basis the prosecution submit that the fresh evidence makes no difference to the evidential matrix that was before the jury and does not impinge on the safety of the conviction.
14. The issue on any appeal against conviction would be whether the conviction is unsafe. The applicant seeks to adduce fresh evidence to support his contention that the conviction is unsafe. This is covered by section 23 of the Criminal Appeal Act 1968 which sets out the test for admitting fresh evidence, namely "whether it is necessary or expedient in the interests of justice".

Subsection (2) of section 23 provides:

"The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) 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
- (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

15. In refusing leave to appeal the single judge (Knowles J) gave the following reasons:

"On the proposed material, the proposed appeal is not arguable.

1. There is no suggestion that the Jury were wrongly directed on recognition/identification. The Judge went through evidence in detail in this connection.
2. Ms Johnstone accepted that she could have been mistaken about the previous time she saw Mr Chorlton, so the jury would have been able to weigh that uncertainty.
3. Even if she was mistaken about that previous time, the mistake may have been about

when rather than whether she saw him then. The proposed witnesses Jacqueline Holroyde and Casey Chorlton (the latter gave evidence at trial) go primary to when she might last have seen him.

4. The fact that the proposed witness Edward Stanton is unable to identify Mr Chorlton does not cast arguable doubt on the conclusion reached by the Jury on the evidence of identification they did have."

We agree with those comments and consider that, as submitted on behalf of the prosecution in their respondent's notice, there is nothing in the additional proposed evidence capable of rendering this conviction unsafe.

16. In renewing this appeal the applicant seeks to rely on further matters, not set out in the draft grounds of appeal submitted on his behalf by Mr Richmond QC, namely that in his summing up the learned judge referred to the substance thrown or squirted into the face of Mr Dunn as being acid rather than ammonia. It is said this would have been prejudicial to the applicant given the publicity surrounding acid attacks which had recently met with public outrage and harsh sentences. The applicant points out that acid and ammonia are at completely different ends of the pH scale and they are different substances with different uses and harms.
17. Although it is true that on a few occasions the learned judge did erroneously refer to acid rather than ammonia in his summing up, in our view this does not affect the safety of the conviction. The issue for the jury did not surround the nature of the substance sprayed into Mr Dunn's face which was harmful and caused him to lose the sight in his right eye: the issue was identification. The nature of the substance did not impinge on this issue at all. The jury were aware from the prosecution opening and the agreed facts that the substance in question was ammonia and we cannot see that they would have been influenced at all by the inadvertent references to acid by the learned judge when it came to their deliberations on the issue of identification.
18. In those circumstances, we refuse the applications for both an extension of time to appeal and for leave to appeal.

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

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