No: 201804133/C4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2020] EWCA Crim 1286

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday 17 June 2020

LADY JUSTICE CARR DBE

MR JUSTICE WILLIAM DAVIS

THE RECORDER OF SOUTHWARK
HER HONOUR JUDGE KARU
(Sitting as a Judge of the CACD)

R E G I N A
v
CONSTANCE HOWARTH

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Mr G Carter-Stephenson QC appeared on behalf of the **Applicant**
Mr P Greaney QC appeared on behalf of the **Crown**

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. On 21 March 2007 in Preston Crown Court, the applicant, now 51 years old, was convicted by a unanimous jury of conspiracy to murder, contrary to section 1(1) of the Criminal Law Act 1977. On 8 May 2007 she was sentenced to life imprisonment with a minimum term of 20 years. Her application for leave to appeal against sentence was dismissed in 2007 ([2007] EWCA Crim 2928).
2. She was tried alongside two co-accused, Ian McLeod ("McLeod") who was also convicted of conspiracy to murder, and Warren Mason ("Mason") who was acquitted of conspiracy to murder. Robert Spiers ("Spiers") had fled abroad in the aftermath of the incident in question but was extradited in 2009 and convicted in 2009 in a second trial.
3. This is the applicant's renewed application for leave to appeal against conviction alongside a necessary application for an extension of time of some 11 ½ years. We have had the benefit of submissions from Mr Carter-Stephenson QC for the applicant and Mr Greaney QC for the respondent.

The facts

4. The prosecution's case was that between 4 and 13 March 2016 the applicant, Spiers, McLeod, Richard Austin ("Austin") and Carlton Alveranga ("Alveranga") were engaged in a conspiracy to murder. The conspiracy reached its conclusion in a shooting in a public house on 12 March 2006. On that day, a Sunday, at about 2.15pm, two masked armed men, being Austin and Alveranga, entered the Brass Handles Public House in Pendleton, Salford. It was a family pub and a football match was being aired on the television at the time. The two men went immediately to a room known as The Vault where David Totton ("Totton") was sitting with Aaron Travers ("Travers") and fired a number of shots in their direction. Totton and Travers were seriously injured but survived. The gun fire caused mass panic inside the public house. However, a number of customers fought with the gunmen and disarmed them. During the struggle, the two gunmen, Austin and Alveranga, were themselves shot and fatally wounded. They fled from the public house before collapsing and dying a short distance away.
5. The relevant background is as follows. In 2006 two gangs in Manchester were at war with each other: the Doddington gang and the Gooch gang. There had been a series of “tit for tat” shootings involving the two rival gangs which had resulted in fatalities, in particular the death of Ramone Cumberbatch, a known Doddington gang member and boyhood friend of Austin who was shot dead by a known Gooch gang member in September 2005. In the same year a further known Doddington gang member, Jonathon Crawley, was also shot dead. A 19-year-old member of the Gooch gang was convicted of and is currently serving a life sentence for that murder.
6. McLeod was the leader of the Doddington gang of which Austin and Alveranga were also members. Marcus Callaghan ("Callaghan") was a member of or associated with the Gooch gang. Callaghan was in the Brass Handles Pub at the time of the shooting. Totton and Travers were shown by way of police enquiries not to have been regular drinkers in the Brass Handles Public House. Their presence there on that day was purely by chance. But they had been out in the North nightclub the night before the shooting with Callaghan, Anthony Richards and other males from the Salford area. Also present in the nightclub that night were various members of the Doddington gang, Ryan McLeod,

Mason and three unnamed others. Some sort of incident occurred within the night club. The group, including Totton, Travers and Callaghan, had gone from the nightclub to a party on the estate behind the Brass Handles Public House and then decided to go on to the public house to continue their drinking.

7. It was the prosecution case that the applicant was in a conspiracy to murder with Austin and Alveranga, McLeod, Mason and Spiers. The intended victim was someone inside the public house, probably but not certainly Totton and/or Travers. Reliance was placed on the following evidence:
8. on the day of the shooting the applicant was interviewed at the police station as a witness. She gave an account that she had been watching football at the Brass Handles Pub but had been in the toilet when the shooting took place. Within minutes of her leaving the police station telephone evidence showed that she had been in contact with telephones linked to Spiers and McLeod;
9. telephone contact between the applicant, McLeod and Spiers. Of the nine contacts from McLeod to the applicant between 1 January 2006 and 12 March 2006, six were made on 12 March. Of the 35 contacts from the applicant to McLeod over the same period, 14 were made on 12 March 2006. Of the seven contacts from McLeod to Spiers over the same period, five were made on 12 March 2006. Of the four contacts from Spiers to McLeod over that same period, all were made on 12 March 2006. Of the two calls from Spiers to the applicant between 18 January 2006 and 12 March 2006, both were made on 12 March 2006. All calls from the applicant were made using the number ending 752;
10. the applicant was in the public house in the immediate lead up to the shooting and in heavy contact by telephone with both McLeod and Spiers in that period. At the moment the gunmen entered the Brass Handles Pub she left the room to go to the toilet;
11. on the day of the shooting, the applicant concealed her connection to the 752 handset from DC Fernandes and from the investigators when interviewed under caution (save for the final interview) and also the fact that she disposed of the 752 handset in the immediate aftermath of the shooting;
12. the handset and SIM cards for McLeod's 420 number and Spiers' 148 and 493 numbers were not recovered despite address searches having been undertaken. An inference was that they too were disposed of.
13. The applicant was arrested on 9 May 2006. Police searched her address and found two mobile telephones in the lounge. Neither of these was the 752 phone on which she had made and received calls on 12 March. Following her first interview on 10 May 2006, the applicant handed in a prepared statement and refused to answer any more questions.
14. The applicant worked for PMS Securities, later known as Icarus. Spiers was one of the directors and managers of PMS and the applicant would report to him and other managers. Spiers was a Salford man and she would socialise with him in the Brass Handles public house. No weapons were ever recovered and someone inside the public house tore out CCTV equipment immediately after the shooting, with the result that CCTV evidence of the inside of the pub was not available.
15. The defence case was a denial of any involvement in conspiracy to murder, either as a spotter or any other role. The applicant gave evidence at trial. The Brass Handles was her local public house and she had every reason to be there that Sunday. It was not the usual public house frequented by Totton and Travers and she could not have known in advance that they would be in there. She was in the lounge at the time of the shooting

with a limited view to The Vault and unable to communicate the position of anyone there. She was in the ladies' toilet when Austin and Alveranga entered The Vault and she only knew that something was wrong when she heard sounds like a fire cracker, followed by people rushing into the toilets. She admitted that she had lied about her work for PMS and by saying that she did not know Travers. The reason that she had disposed of the 752 telephone was because she had been receiving threatening calls on it and wanted nothing more to do with it.

Disclosure application

16. We record at the outset that Mr Carter-Stephenson's position was that today's hearing should be treated as a directions hearing only in order to make extensive disclosure orders. In particular, the applicant contends that there has been a failure, predominantly due to a failure by the applicant's former legal team to make the relevant requests, to disclose material going to the suggestion that this was inter-gang related violence with Callaghan, who was in the Brass Handles public house at the time of the shooting, as the target. The execution of such a plan did not need the applicant as a spotter. There was no evidence that the applicant knew Callaghan.
17. To this end a schedule of some 37 disclosure requests has been produced. Overnight, having been invited to participate by the court at short notice, Mr Greaney produced a fulsome response to that schedule. We rely on its content as a whole.
18. In the light of that response, Mr Carter-Stephenson limits his application for disclosure today to two requests only: requests 9 and 27 of his schedule. Request 9 relates to all telephone data held in relation to PMS between 1 January 2006 and 30 March 2006. Request 27 relates to the disclosure of CCTV footage from cameras around the area outside the pub.
19. As for request 9, Mr Carter-Stephenson submits that it is necessary to see this material in order properly to set out the applicant's case at trial. Reference is made to a telephone chart produced on behalf of the applicant showing the IMAC landline dates for the PMS activity. As for the CCTV footage the subject of request 27, the submission for the applicant is that this footage is central to the applicant's case. Concern is expressed at the information now provided by the respondent to the effect that there is no sufficiently high-quality footage available for any meaningful identification to take place.
Mr Carter-Stephenson submits that the CCTV footage would establish the timeframe of the events, provide clarity as to the arrival of the group from the party beforehand and establish who in the group was of potential proximity to the two victims and Callaghan.
20. We note that on 12 August 2019 the applicant's solicitor confirmed to the Criminal Appeal Office that the application for leave was fit for consideration without more and that the papers were ready to be placed before the single judge. It is not clear to us what has changed since then and why the applicant suggests that the application is now not fit for consideration by the court. For these reasons and for further reasons which will become apparent, we decline to take the unusual course of considering further disclosure directions at this stage before considering the question of leave. Mr Carter-Stephenson was invited to proceed to his submissions on the full renewal application, which he duly did.

Grounds of appeal

21. The over-arching submission for the applicant is that as a result of material non-disclosure during the course of the trial, either because of a failure by the prosecution

to disclose or a failure by the defence legal team properly to examine the issues, the whole presentation of the case against the applicant was affected. She was prevented from putting forward the alternative hypothesis that this was gang-related violence which would not have involved the need for a spotter, which she was expressly identified as being by the prosecution.

22. The grounds of appeal are developed as follows:
Ground 1. Material was not disclosed by the prosecution or requested by the defence which demonstrated that the contact between the applicant's telephone and that of McLeod and Spiers was consistent with ordinary business contact predating any suspicion of conspiracy. The prosecution was in possession of telephone records for the mobile telephones of the applicant, Spiers and McLeod from at least early January 2006 on but failed to disclose that material. There was also, it is suggested, a failure to disclose the landline records for PMS and IMAC. If these documents were not available because of a failure by the defence team to inspect or press, then the applicant, it can be said, did not receive a fair trial.

23. Ground 2. Complaint is made that the content of text messages between the mobile phones of the applicant, McLeod, Spiers and others were not obtained by the prosecution or, if obtained, not disclosed or requested by the defence. The content of the text messages, although limited, would have shown that the applicant's innocent explanation for the telephone calls was correct and that those who were to be involved in the ultimate shooting were already moving towards carrying out the planned shooting prior to any mobile telephone contact with the applicant, a matter wholly inconsistent with the prosecution's case. In response to the respondent's indication that the telephones had simply never been available for inspection on behalf of the prosecution, the suggestion is made that the service providers should have been contacted in an attempt to obtain the material in question;

24. Ground 3. Despite being in possession of a substantial amount of intelligence material relating to the alternative motive of inter-gang violence for the shooting, other than that being advanced by the prosecution, there was no disclosure of such material. This is said to be "a major failing". An alternative motive would have negated the case against the applicant and her alleged role in the conspiracy. Reference is made to admissions made in the Spiers' trial and the manner in which the case was opened against the applicant where she was expressly identified as a spotter. It is said that this was crucial material which should have been part of initial disclosure and it would have put a very different complexion on the case;

25. Ground 4. Despite being aware from the unused material of the presence at the scene of the shooting of Callaghan, the applicant's representatives made no request for disclosure of this gang-related intelligence material. Again, this it is said would have undermined the case against the applicant, premised, as we have indicated, on her being a spotter;

26. Ground 5. It is said that there was undisclosed CCTV footage which would have shown movements of the rival gang just before and after the shooting. The footage which was disclosed only commenced after the shooting took place;

27. Ground 6. The defence legal team failed to make an application to exclude the interview of the applicant not under caution on the day of the shooting when she was clearly under the influence of alcohol. It is said that what she said was damaging, firstly because she lied, and secondly because she omitted material facts on which she was later

cross-examined;

28. Ground 7. Although it is conceded that an application would have been unlikely to succeed, complaint is made that no consideration was given to an application to seek severance of the trial of the applicant from that of her co-accused. There may, in the light of gang-related material disclosure, have been a conflict between her and her co-accused. The application, it is suggested, should have been made;
29. Ground 8. Complaint is made that those representing the applicant failed to advise her of the need to call evidence from Spiers. It is suggested that there should have been a request to delay the trial in order for him to be extradited back and also a failure to cross-examine a Crown witness, Brian Higgins.
30. Finally, as for delay, it is submitted that, given the merit in the appeal, it would be in the interests of justice for the necessary extension of time to be granted. It is said that the applicant originally received negative advice on appeal. A number of authorities have been referred to, with particular reliance being placed on R v King [2000] 2 Cr App R 391 where an extension of time of twelve-and-a-half years was granted.

The Respondent's position

31. The respondent maintains that the application is unarguable with or without the disclosure sought. The application is more than a decade out of time. The grounds lack any real substance and are in material respects inaccurate, as set out in a full Respondent's Notice. It is also said that the applicant has failed to acknowledge that the disclosure test at this stage is that stated by the Supreme Court in R v Nunn [2015] AC 225 (as summarised accurately in the Attorney General's Guidelines on Disclosure at paragraph 72).

Analysis

32. We address the question of delay first. An extension of time will only be granted where there is good reason to give it and ordinarily where the defendant will otherwise suffer significant injustice: see R v Hughes [2009] EWCA Crim 841 at [20]. The principled approach is to grant an extension if it is in the interests of justice to do so: see R v Thorsby [2015] EWCA Crim 1. The court will examine the merits of the underlying grounds before making a decision on whether to grant an extension of time.
33. The delay in advancing this application is vast, almost eleven-and-a-half years. Even taking on board the fact that the applicant originally received negative advice on the merits of the appeal, there is no sensible justification for the delay since then, nor has any proper explanation been advanced, in particular as to why the matter was not progressed in the context for example of Spiers' trial in 2009. The issue that now excites the applicant, namely whether another, Callaghan, was the intended target of the shooting by members of a gang with whom she had no involvement was very much in issue in that trial. The applicant had a close association with Spiers, and they instructed the same solicitors. Nor was the matter progressed in 2013 when disclosure requests were made on her behalf and refused (in 2014). The applicant instructed her present solicitors in December 2014.
34. There is little or no explanation for the delay in question. Moreover, the delay has caused real prejudice given that the applicant's trial leading counsel has now sadly died and her trial junior counsel, who retired some 11 years ago and no longer has any of his case notebooks, can remember very little by way of assistance. The original prosecution legal team is also no longer available and fresh lawyers and police officers have had to be

brought to the case.

35. R v King (supra) involved a "special and unusual" situation (see [53]) where it was clear that the appeal was bound to succeed and where to refuse leave because the application was out of time would have resulted in an application to the Criminal Cases Review Commission, followed by a successful reference to this court. As the court said (at [52]) it is "very rare" to grant an extension of time of such magnitude. In our judgment, in order for an extreme extension of the necessary length here to be granted there would have to be a compelling case indeed on the merits.
36. Against this background we turn to consider the merits, taking each ground in turn. We note at the outset that the applicant was represented throughout trial by experienced leading and junior counsel.
37. As for ground 1, there is no good reason to doubt the respondent's fully particularised statement that the material referred to (other than material relating to PMS and IMAC) was in fact disclosed, either as part of the prosecution case or as unused material. Further, the applicant was always able to assert that her telephone contact on 12 March 2006 was not out of the ordinary. However, the analysis of the evidence of the applicant's telephone contact with Spiers and McLeod demonstrated precisely the contrary. As for the PMS/IMAC landline records, the subject of disclosure request 9, it was not in issue that PMS and IMAC had had dealings with each other prior to the shooting. No disclosure was required and in any event the data is no longer available despite the best efforts of the respondent.
38. Ground 2 is also unsustainable. The content of the text messages was and is unavailable since investigators were unable to recover any of the relevance devices, including the applicant's own handset containing the 752 number which the applicant had herself disposed of. There was no arguable failure to disclose. As for the suggestion that service providers could have been contacted, it is entirely unclear what the outcome of any such enquiry would have been. It is purely speculative. As for the applicant's analysis of the prosecution case in respect of the interplay between McLeod, Spiers and the applicant, the fact is that the prosecution case satisfied two juries and it is not for us to re-assess its strength.
39. It is convenient to take grounds 3 and 4 together. The applicant's defence statement, even as amended, did not give rise to any disclosure requirement relating to gang warfare. Nor can it be said that the material was disclosable on the basis that it would have undermined the prosecution case. The prosecution did not advance any particular motive and its case did not depend on establishing the identity of the intended target, as to which it was equivocal. The case was put on the basis that the intended victim was someone inside the public house, probably but not certainly Totton and/or Travers.
40. The respondent describes the Callaghan theory as "highly speculative" not least since Callaghan is of mixed heritage and bears no resemblance to either Totton or Travers. The theory failed in the 2009 trial of Spiers. The respondent has confirmed in terms that at the time of trial the police held no information to suggest that Callaghan was the intended target of the shooting.
41. The Callaghan theory would also have involved the applicant effectively accusing McLeod of organising the shooting because of gang rivalry. Given the applicant's close contact with him, that would not have exonerated her. The case against her based on her telephone contacts and, for example, lies and disposal of the handset with number 752

would have remained.

42. Finally, advancing the theory would have exposed the applicant to the likelihood, if not certainty, of her previous convictions for perverting the course of justice in the context of a serious gangland murder and firearms offences being admitted before the jury.
43. As for ground 5 and the complaint made in relation to CCTV footage, the applicant accepts that the footage from the Brass Handles public house was stolen after the shooting and so is unavailable. She therefore targets CCTV footage from other cameras situated around the public house. It does not seem to us that the matters that it is suggested might be revealed from that material are of any real significance, for example Austin and Alveranga entering and leaving the public house or Totton and Callaghan entering the public house, which they clearly did. The timings were largely not in dispute. Further, the respondent has retrieved other footage and converted it. It has reviewed a third of that material and found nothing of sufficient quality to assist in identification. In any event and again, the case against the applicant based on her telephone contacts and for example lies and disposal of her handset would have remained. Further and as before, any attack on others by the applicant risked the jury learning of the applicant's bad character.
44. As for ground 6, at the time of the interview in question the applicant was not a suspect. The officer took the view that the applicant was fit to be interviewed. She herself stated at the time that she was neither drunk nor sober, but "sociable". The applicant was able to tell the jury that she had been drinking at the time. The question was one of reliability not admissibility. In any event, given the applicants later repeated lies in interview under caution, the admission of this evidence could not arguably render the conviction unsafe.
45. Moving on to ground 7, an application to sever would have been doomed to failure; the applicant concedes that it was unlikely to have succeeded. This cannot be said to have been an exceptional case justifying severance in a trial of alleged co-conspirators.
46. In relation to ground 8, Spiers was not available to give evidence, having fled the jurisdiction. If he had been available he would have been in the dock alongside the applicant. Cross-examination of Higgins might have implicated Spiers but would not have exonerated the applicant. Taken at its highest, Higgins' evidence would have made no difference to the outcome of the applicant's case. We note that Higgins gave evidence at Spiers' trial.
47. We conclude our analysis by considering the general complaints made on behalf of the applicant of failures on the part of her former legal team properly to represent her. Amongst other things, the complaints demonstrate quite how prejudicial the huge delay in this application has been, given that there can be no longer be meaningful response from the applicant's previous representatives. We cannot identify any arguable substantive failures.
48. For all these reasons, we do not consider that the appeal stands a real prospect of success and it would not be in the interests of justice to grant the necessary extension of time. We dismiss the application for an extension of time and leave to appeal against conviction. We do not do so without thanking both leading counsel again for their helpful assistance and in particular for the quality of their written submissions.

proceedings or part thereof.

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