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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 13 February 2020

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE EDIS

MR JUSTICE CHAMBERLAIN

R E G I N A
v

JUSTIN CLARKE

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NON-COUNSEL APPLICATION

J U D G M E N T

LORD JUSTICE SIMON:

1. On 30 January 2018, following a trial in the Crown Court sitting at Woolwich, before Sir Peter Openshaw and a jury, the applicant (now age 64) was convicted of the murder of Paul Milburn (count 1), conspiracy to defraud (count 3) and offering to supply a Class B drug cannabis (count 4). The following day he was sentenced to life imprisonment for murder with a minimum term to be served of 25 years less 492 days on remand.

2. He renews his application for leave to appeal that conviction following refusal by the single judge.

3. Since the grounds of appeal are based on the trial process it is convenient to focus on those complaints, but before doing so we should at least refer to the striking circumstances of what appears to have been a drug deal that went wrong.

4. The charges arose out of events that occurred on the afternoon of Monday 26 April 1993. Paul Milburn had been a builder, but had fallen on hard times and turned to dealing in cannabis. He told friends that he was about to do a drug deal which might turn his fortune around. He borrowed a black Saab vehicle from a friend and drove to Noke Lane near St Albans for a pre-arranged meeting in the afternoon. At around 4.30 a passerby noticed a black Saab blocking the road and the driver slumped at the wheel. He called the police. When officers arrived they found the car engine revving and the driver dead at the wheel, with his foot on the accelerator. The driver's window was smashed. There was £13,500 cash in the boot.

5. A post-mortem examination established that he had been shot once, at close range, in the right shoulder. The bullet had killed him. A ballistic expert established that the window had been broken before the shot was fired. The shot was fired from a revolver or self-loading pistol and such a weapon could not be fired accidentally.

6. The prosecution case was that the applicant, together with three associates, had arranged to meet Paul Milburn with a view to carrying out a fraudulent drug deal in a quiet country lane. The plan was to cheat him out of thousands of pounds by passing off bars of wax made up to give the appearance of blocks of cannabis resin. The four men had arrived in two cars to meet Paul Milburn and his associate (a man known as "Ginger") who were in the black Saab, driven by Paul Milburn. As the transaction was in progress the applicant, who had been hiding in nearby bushes, ran towards the Saab pointing a gun. Ginger made off across the fields, and the applicant broke the driver's window and shot him. They all then fled the scene.

7. At trial two of the applicant's associates gave evidence for the Crown describing the sudden and inexplicable conduct of the applicant in shooting Paul Milburn. A statement was read from the third of these associates. All three had been convicted of participation in the fraud, and the judge warned the jury to treat their evidence with caution since they may have had their own reasons for giving evidence for the prosecution.

8. The applicant disappeared before he could be arrested. Eventually he was traced in Germany where he was arrested nearly 13 years later, in February 2016. He was extradited to the United Kingdom and charged on 26 September 2016. He made his first

appearance in the Crown Court on 29 September.

9. Although it is broken down into a number of separate complaints, the focus of the grounds of appeal is that the applicant was tried while unrepresented and in his absence that this was unfair and throws substantial doubts on the safety of his convictions.

10. It is necessary now to consider what happened between the first appearance in the Crown Court in September 2016 and the trial that began on 15 January 2018. During this time he was represented by three firms of solicitors at various times. The trial was initially set for 17 March 2017 but was adjourned because he said he was not ready. A further trial was set for a date at the beginning of October 2017. The applicant was not represented and did not appear at the hearing. The prosecution applied for the trial to take place in his absence. That application was heard by Holroyde LJ on 5 October. The applicant said that Messrs Imran Khan Solicitors had been prepared to represent him at this stage, with Mr Khan QC acting as trial advocate; and that when he had become unavailable he was unable to find anyone else. The judge heard evidence from Mr Patel of Imran Khan Solicitors that their services had in fact been dispensed with in August 2017.

11. Holroyde LJ granted an adjournment and making various orders designed to ensure that the applicant could obtain suitable representation and that the trial would go ahead on the next occasion. However, he warned the applicant that this should be regarded as his last opportunity to arrange representation and that if he did not engage with the process the trial might proceed in his absence.

12. The applicant failed to attend his trial on 15 January 2018 and the judge, having set out the history, ruled that the trial should proceed in his absence. The applicant provided no evidence of any steps taken to obtain representation and the judge decided that there were compelling reasons for the trial to proceed in his absence, including the fact that he was in custody in HMP Belmarsh, closely adjacent to the Crown Court and refusing to engage with the trial process, the public interest in pursuing the prosecution without further delay and the position of witnesses including vulnerable witnesses.

13. In our view, no properly arguable criticism can be made of this decision. Furthermore, the judge was careful to ensure the fairness of the trial in both directing the jury on the issue of the applicant's absence; in summing-up the case fairly, directing the jury to consider the motives for accomplices in giving incriminating evidence; and taking all reasonable points that might be taken on the applicant's behalf.

14. The applicant complains that by proceeding in his absence the judge failed to take into account his mental health. However, there is no suggestion, let alone supporting evidence, that he was unfit to participate in a trial or to attend court. He had been represented by counsel and solicitors on 27 March 2017, 19 May (the date of arraignment), 9 June and 30 June 2017 and no suggestion had been made as to his unfitness to participate in the trial.

15. We note that on 24 January 2018, following enquiries, the court had been informed that no mental health concerns had been raised by the mental health team responsible for the applicant.

16. It is clear that the applicant made a conscious decision not to attend his trial.

17. A further point is taken that the trial was unfair or unlawful because the custody time limits were relied on so as to "coerce" the applicant into a trial for which he did not have adequate time to prepare, and that the trial was listed for 15 January 2018 to "punish him" for his previous non-attendance at court.

18. Both these contentions are wholly without merit. As the single judge noted, the custody time limits were repeatedly extended to allow him to obtain representation and the trial was listed on 15 January 2018 after further adjournments had been allowed for the same reason.

19. Finally, there is a complaint that the applicant was not served with all the prosecution material. That complaint is also baseless. All used and unused material was served by the Crown and the judge was satisfied that the applicant had the documents.

20. The impression that the applicant was engaged in "playing the system" is not dispelled by the course of his renewed application for leave to appeal.

21. The application was lodged by the applicant at the beginning of October 2018 (208 days out of time). From the start he asked for further time to instruct new lawyers and perfect his grounds. He was allowed some time for this purpose administratively, but nothing further was received and so the application was considered and was then refused by the single judge in May 2019.

22. The application was renewed and listed for hearing on 30 July 2019. Shortly before that date the applicant made a request to vacate the hearing and indicated that he might wish to abandon the application. The request to vacate was granted by Males LJ who directed that the applicant must now confirm whether he wished to pursue or abandon the application. He was given until 30 September 2019 either to abandon the application or to lodge further grounds, and confirm or otherwise that counsel had been instructed. He was also told that if he failed to do so the case would be re-listed and that no further adjournment would be given. Nothing further was heard from him.

23. All letters to him from the Registrar's office have been returned with a letter from the applicant stating that he was refusing to accept any further correspondence from the Registrar whom he felt was persecuting him.

24. We should add that yesterday afternoon the court received two communications: the first from the applicant and addressed to the Registrar beginning: "I hereby formally and unequivocally demand the de-listing of my application for permission for leave to appeal". The letter continues in the same tone with entirely unjustified complaints of bad faith against the Court of Appeal office. The second is a short email from counsel's clerk saying that subject to the "appellant" organising a third party contact and signing a client care agreement, a named leading counsel was happy to accept instructions by way of Public Access.

25. In the light of all the previous warnings, we declined to adjourn this hearing. Even with the assistance of leading counsel, this application has no prospect of success.

26. This is a case in which a defendant has taken a conscious decision not to engage in the Criminal Justice System. It was his right to do so, but it was a choice made in the knowledge that it would have consequences because he was repeatedly warned that this would be so. There was no breach of his Article 6 rights. The trial was fair, despite the difficulties caused by the approach adopted by the applicant for reasons known only to himself. In the event the prosecution case was overwhelming. We are quite satisfied that the convictions are safe. The renewed application is dismissed.