IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1001

CASE NO 202000943/B5

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 11 June 2021

LORD JUSTICE COULSON

MR JUSTICE WALL

RECORDER OF REDBRIDGE

(HIS HONOUR JUDGE ZEIDMAN QC)

(Sitting as a Judge of the CACD)

REGINA

V

SCOTT CRUTCHLEY

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MR J HILL QC appeared on behalf of the Applicant.

J U D G M E N T

LORD JUSTICE COULSON:

1 The applicant is now 26. On 20 February 2020 in the Crown Court at Leeds (Jay J and jury), the applicant and his two co-defendants were convicted of the murder of Jonathan Dews. The following day, 21 February, he was sentenced to imprisonment for life with a minimum term of 21 years. He renews his application for leave to appeal against conviction following refusal by the single judge.

2 The issue on this renewed application concerns events that occurred during the trial. We are very grateful to Mr Jamie Hill QC for his clear and scrupulously fair explanation of the relevant events and the issues that arise from them. We have read his skeleton argument and heard his succinct submissions this morning.

3 Because the renewed application arises out of an event or events during the trial, it is unnecessary to say very much by way of the background facts. The two co-defendants, Redmond and Metcalfe, along with the applicant, were alleged to have murdered a Mr Dews on the night of 5 December 2019. From their arrest the following day, each man sought to blame one or both of the others for the murder. It was therefore a classic multi-defendant cut-throat murder trial.

4 So, although Redmond admitted to having murdered Mr Dews at his first interview, in his subsequent interview he said that he had lied, and he instead blamed both Metcalfe and the applicant for the murder. In interview, Metcalfe implicated Redmond and said that he had not been involved in the killing. In his own interview, the applicant blamed Redmond and Metcalfe and said that, after the murder, Metcalfe threatened him to keep quiet. In subsequent interviews, however, the applicant did admit causing some violence to Mr Dews.

5 At trial, Metcalfe did not give evidence. Redmond blamed both Metcalfe and the applicant, although he said it was Metcalfe who had slit the victim's throat and was the ringleader throughout. Redmond made no admissions of having been involved in any violence.

6 In his own evidence at trial, the applicant said that he had assaulted the victim and stamped on him which, he said, had been a reaction to learning that the victim had committed a fraud in the name of his deceased mother. He also admitted that he had helped to clean up the blood and the potential fingerprints after the subsequent fatal assault on Mr Dews which, he said, he had had nothing to do with. He said that he was threatened by Metcalfe not to leave or to tell anyone and he had been told by Metcalfe to clean up the house.

7 The particular events which give rise to the renewed application are these. The applicant began giving evidence slightly after 10.30 am on Tuesday 11 February 2020. The judge noted that he was not particularly forthright when answering Mr Hill's questions in-chief. In the afternoon he was cross-examined by counsel on behalf of both Redmond and Metcalfe. His evidence was generally as we have outlined.

8 It subsequently became apparent that at lunchtime on that Tuesday, that is to say just before the applicant was cross-examined by counsel for the two co-defendants, Police Custody Officer Mr Fernandez Relva heard Metcalfe say to the applicant that he was lying and called him "a grass". PCO Relva heard Metcalfe say something like "just wait until we get you back to prison" or "you'll get it when you get to prison". As the judge noted, he was not aware of that incident on the Tuesday and in his subsequent ruling the judge said that he detected no change in the applicant's demeanour or comportment between the morning and afternoon sessions.

9 The following day, Wednesday 12 February, another PCO, Mr Rhys Henderson, received

information from colleagues that Metcalfe had threated the applicant in the van on the way to court and that other prisoners were calling him "a grass". Mr Henderson also heard Redmond make a threat of physical violence to the applicant but the applicant was not present at the time that that threat was uttered.

10 The applicant was reluctant to give further evidence on Wednesday 12 February. However, following legal argument from all counsel, the judge ruled that the applicant could give his evidence in the absence of his two co-accused. The applicant resumed his evidence that afternoon when he was cross-examined by Mr Kealey QC for the prosecution. As the judge later noted, during that session the applicant "adhered to the essential elements of his account in relation to the actions of Redmond and Metcalfe". As the judge also noted, the applicant's evidence on the Wednesday was not very helpful to his own case and made little or no difference to the respective cases of Redmond and Metcalfe. The judge accepted that the applicant's demeanour on the Wednesday was not as robust as it had been the previous day but he had been able to acquit himself as well as he could. As the judge put it, “he was in no way oppressed by the questions being asked”.

11 On the following day, Thursday 13 February, the applicant refused to continue with his evidence. It appears that that evidence would have involved another 45 minutes to an hour of cross-examination by Mr Keeley and, in the judge's estimation, some 10 to 15 minutes re-examination by Mr Hill. The applicant said that because of "everything that had happened in the past 48 hours" he was not prepared to give any more evidence. He also said that he was not prepared to explain to the jury why he was not continuing.

12 Witness statements were prepared by PCO Relva and PCO Henderson containing the information that we have outlined. Mr Hill applied for permission to call that evidence. The judge carefully considered that application and heard from all other counsel in the case. In a detailed ruling, given on the afternoon of Thursday 13 February, the judge ruled that, on a proper analysis, the evidence as to the threats was either inadmissible or irrelevant, or both. In his subsequent summing-up, as the judge promised that he would do in his ruling, he expressly referred to the applicant's entitlement not to conclude his evidence and he told the jury that no adverse inference was to be drawn against him because of it. It was, and remains, Mr Hill's submission that the subsequent conviction of the applicant was unsafe because the jury were not permitted to hear evidence from the custody officers.

13 Mr Hill’s skeleton argument in support of the application for permission to appeal encapsulates the point in the following way at paragraph 6:

> "The evidence of the co-accused’s threats towards Mr Crutchley was of significant importance in three ways: firstly, it showed that the co-accused continued to act in an aggressive and overbearing manner towards him just has they had during the night of the murder; secondly it showed that they continued to act as a two man team despite Redmond having given damning evidence against Metcalfe; and, thirdly, the evidence would have helped contextualise why Mr Crutchley chose to stop giving evidence; and may have overcome the disadvantage of counsel not being able to re-examine. The evidence clearly had substantial probative value for Mr Crutchley’s defence, both to the Crown’s case and his defence against the cases advanced by his co-accused."

14 It was that application which the single judge refused in brief terms, noting that the judge had decided that the officers' evidence was irrelevant to the issues in the trial, and that the judge "was best placed to determine that question and it is not arguable that he was wrong".

15 It is first necessary to analyse, as the judge did, what evidence might have been admissible, before coming on to deal with questions of relevance. The judge decided that PCO Relva's evidence about the threat made by Metcalfe to the applicant, on the lunchtime on the Tuesday, was admissible. However, he found that Mr Henderson's evidence as to what had happened in the prison van was entirely hearsay, because Mr Henderson had not been in the van. That evidence was therefore inadmissible. The judge also noted that, although Mr Henderson had heard the threat by Redmond (the making of which was apparently accepted by Redmond's counsel), it had not been uttered in the presence of the applicant and was therefore immaterial to the applicant's case.

16 We agree with the judge's analysis of the evidence in the witness statements. Mr Henderson could not give hearsay evidence about what had happened in the van and, although he could give evidence about the physical threat uttered by Redmond, since it had not been delivered to or heard by the applicant, it could have no relevance to the applicant's defence to the murder charge. In the circumstances, the real issue concerned the alleged threat made by Metcalfe to the applicant on the Tuesday lunchtime. It is that evidence which needs to be tested by reference to the three specific matters raised by Mr Hill in his advice.

17 First, it is said that the threat showed Metcalfe acting aggressively, just as he had done on the night of the murder. In our view, that could not have been seriously in issue in any event. It will be recalled that Redmond gave evidence that Metcalfe had slit the victim's throat. The jury would have been in no doubt that, if Redmond was telling the truth, Metcalfe was an extremely violent man. It did not need the threat to the applicant uttered in the dock for that to be demonstrated.

18 As for the alleged link between the threat made on the Tuesday lunchtime during the trial to the alleged threats made by Metcalfe to the applicant on the night of the murder, the judge analysed that very carefully in his ruling. That was in part because much turned on the timing of the alleged threats. On one view, by the time Metcalfe made the threats to the applicant (if that is what he did), Mr Dews was already dead. But in any event it was plain that the applicant had already committed the necessary criminal offences to justify his conviction for joint enterprise murder by the time the threats were uttered: he had also committed violence against Mr Dews; he had not left the house; and he had been involved in the clean-up.

19 So the evidence was that the threats made by Metcalfe at the time of the murder, assuming that they were made, played little, if any, causative role. It is important to note that in this context the applicant was not running any sort of defence based on duress and, as I have said, he accepted that he had committed acts of violence because he was angry with the deceased for using his dead mother's name to found a fraud claim. That again demonstrates that any threats made by Metcalfe were of little relevance to the applicant's own conduct. So on the basis of that analysis, we do not consider that the first complaint has been made out.

20 Mr Hill's second complaint is that the evidence of the threats during the trial would have demonstrated that Metcalfe and Redmond were acting as a team both during the killing and thereafter. We are bound to say that, on the material that we have seen, that criticism has not been made out. This was not a case in which Redmond and Metcalfe were ganging up on the applicant. On the contrary, in his interview, Metcalfe implicated Redmond and, in his evidence, Redmond implicated Metcalfe, even going so far as to say that it was Metcalfe who had cut the victim's throat. So there was nothing about this case which indicated that Metcalfe and Redmond were in some way acting together against the applicant.

21 Furthermore, it is right to note that again on the evidence, the applicant did not at any stage dissociate himself from Redmond and Metcalfe. Not only did he not go to get help on the night of the murder, but he stayed with his co-accused on the day after the murder, going with them to Scarborough, where there was CCTV footage of them in the McDonald's in Scarborough smiling together. Accordingly, we do not consider that the second complaint about the non-admission of the evidence has been made out.

22 The third reason why it is said that the evidence should have been admitted was because it would have helped the jury "contextualise" why the applicant had stopped giving evidence. On our first reading of the papers we thought there may be something in that criticism. On analysis, however, the principal difficulty with this line of argument is that, just as the judge noted in his ruling, the applicant refused to tell the jury that he was not prepared to give further evidence because he had been threatened. As a result there was a logical inconsistency in the complaint that the judge did not allow in the evidence of the threat made by Metcalfe, in circumstances where the jury would have had no evidence from the applicant that it was that threat which caused him to cease giving his evidence. There would have been an obvious lacuna and, in our view, it would not have been proper for the jury to speculate on why there was or could have been such a link.

23 We note that the judge gave the applicant plenty of time to consider and reconsider his position. However, he remained adamant that he did not want to continue giving evidence. That was his right. The judge gave the jury a clear direction to the effect that they could not hold against him the fact that he was not completing his evidence. So, for those reasons, it seems to us that the judge was right not to admit that evidence to "contextualise" the cessation of the applicant's evidence.

24 During the course of his oral submissions this morning, Mr Hill referred to the possible relevance of the threats in the judge's subsequent assessment of the levels of culpability as between the defendants. We do not see the link. It seems to us that the applicant received a significantly lower minimum term because, on the evidence, his was a lesser role. The judge's sentence had nothing to do with the events which formed the subject of this renewed application.

25 So for those reasons we have concluded that the judge was entitled to rule that the evidence of Metcalfe's threat in the dock was irrelevant and added nothing to the applicant's own evidence about what happened on the night of the murder. But just standing back from Mr Hill's individual criticisms, we also consider that it is important to look at this issue in the light of the trial as a whole. Those with experience of multi-defendant murder trials, where each of the defendants is blaming one or more of their co-accused, will know that bad feeling and threats, and even actual violence, can sometimes break out between the defendants during the trial itself. Not even scrupulously careful offender management can

avoid the risk that sometimes sparks will fly. It is not generally appropriate for a jury to become distracted by hearing about such events unless it is plainly relevant to the issues in the trial. Moreover, as Mr Hill rightly acknowledged, the positions of other co-defendants also come into play and the judge has to reach a conclusion taking into account all of the different and competing interests.

26 We acknowledge that the leading case in this area of the law is *R v Haxihaj* [2016] EWCA Crim 83, where a threat was admitted as evidence. But in that case, as Lloyd Jones LJ (as he then was) made plain at paragraphs 31 to 33, the evidence was particularly stark: the threat had been made before the trial had started and was also bound up in a threat to the co-accused to blame somebody entirely different for the crime. On that basis, it is easy to see why that evidence was admissible. In our view, the present case was very different.

27 Finally, it is important to say that, even if the judge should have permitted the evidence about Metcalfe's threat to be adduced, it does not seem to us that the absence of that evidence has affected the safety of the applicant's conviction. Although the applicant might be said to have played the lesser role, the evidence against him was still considerable and it included his own admissions of violence to the victim on the night in question. He was the only one of these defendants to make such an admission. The safety of that conviction is not, in our judgment, imperilled in any way by the absence of any evidence about Metcalfe's threat during the trial.

28 Accordingly, although Mr Hill's submissions have been carefully and clearly articulated, we have concluded that we must refuse this renewed application for permission to appeal against conviction.