Neutral Citation Number: [2021] EWCA Crim 1075

Case No: 202003169 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEEDS
HHJ Jamieson QC
T20207250

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th July 2021

Before :

LORD JUSTICE WARBY
MR JUSTICE WILLIAM DAVIS
and
HIS HONOUR JUDGE MAYO, RECORDER OF NORTHAMPTON

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Between :

Craig Anthony Stanton	**Appellant**
- and -	
Regina	**Respondent**

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- -

Sam Green QC, Gillian Batts (instructed by **Ian Whiteley for Parker Bird Whiteley Solicitors**) for the **Appellant**
Peter Moulson QC, Katherine Robinson (instructed by **CPS Special Crime Division**) for the **Respondent**

Hearing date: 6 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on 14 July 2021.

LORD JUSTICE WARBY:

1. In the early evening of 23 April 2020 Mohammed Butt, aged 61, was found dead in the hallway of his home. He was face down and bound by rope. His neck had been fractured. The cause of death was asphyxia resulting from a combination of a concussive head injury and strangulation with a ligature. Mr Butt, who had lived alone and had health problems, had last been seen alive by a neighbour at around 4:30pm the previous afternoon.

2. The appellant, Craig Stanton, and a co-defendant, Alexander McKay, were charged with the murder of Mr Butt. On 18 November 2020, in the Crown Court at Leeds, a jury returned unanimous guilty verdicts against both defendants. The trial judge, HHJ Jameson QC, later sentenced them both to life imprisonment, with minimum terms of 25 and 23 years respectively.

3. The issue raised by this appeal is whether Stanton's conviction is unsafe, because evidence of previous reprehensible behaviour that was adduced before the jury was wrongly admitted, or because the judge misdirected the jury about that strand of evidence.

Key features of the case

4. The prosecution case was that Stanton and Mackay had killed Mr Butt in the early hours of 23 April 2020, in the course of a burglary gone wrong. The prosecution could not say which defendant struck Mr Butt, or tied him up, or gagged him; but the prosecution case was that the defendants had acted together. Each had either done an act which caused or contributed to death, or assisted or encouraged the other defendant to do so, and thus they were jointly responsible. The burglary was said to have been financially motivated, as both defendants needed money to fund their drug addiction.

5. The prosecution relied on evidence in 9 main categories: (1) Evidence of the cause of death, adduced by way of expert pathology evidence. (2) Evidence of association between the defendants, both before and after the murder. This included telephone evidence which supported the timeline advanced by the prosecution. (3) CCTV evidence supporting the prosecution timeline, which placed both defendants together at Mr Butt's address before and during the relevant time and afterwards. (4) Admissions by both defendants that they were present in that address that night. (5) A significant comment made by Stanton when he was arrested on 1 May 2020. It was an agreed fact that he said, "*I knew it was you. I'm glad you got me.*" (6) Scientific evidence. There was DNA evidence linking both defendants to the crime scene. This included evidence that both Stanton's DNA and Mr Butt's blood were found on a pair of shorts recovered from Stanton's home, and that Stanton's DNA was found on Mr Butt's ankle. (7) Adverse inferences from both defendants' failure to answer questions in interview. (8) Lies told by Mackay in the prepared statement he provided in his police interview, when he denied presence inside Mr Butt's home. (9) Against Stanton, a body of evidence that has come to be known as the "Peter Spink Material".

6. We will come back to this last aspect of the evidence, as it is this that lies at the heart of this appeal. Before doing so, however, we set out the other key features of what was in many ways a fairly straightforward case.

7. Stanton and Mackay both admitted being together on the night in question, and entering the victim's home in the early hours of 23 April 2020. It was not in dispute that Mr Butt was assaulted at that time, and that the assault caused his death. But both defendants denied responsibility. Each gave evidence, blaming the other as the sole perpetrator of the fatal assault, and denying that he took part in, helped or encouraged it.

8. Stanton admitted being a drug user, who used alcohol, cannabis and crack cocaine, which he said he paid for from his benefits and from selling crack to others. Stanton said he and Mackay were staying close to one another. They went out together that night. He had thought Mr Butt's home belonged to someone known to Mackay and that the two men were going there to smoke crack cocaine. He had helped Mackay climb in through the window, then remained outside for a while. Entering the address, he saw Mr Butt bound, gagged and injured. He removed a cloth from Mr Butt's mouth and he and Mackay both left. Butt was still alive when they did so. He must have got Mr Butt's blood on his shorts when he removed the gag. His DNA was on Mr Butt's ankle because he had fallen over onto Mr Butt. He denied acting with Mackay to assault the deceased, or doing anything to cause death.

9. Mackay was also a self-confessed drug user. He said that Stanton was someone he had only met quite recently. He had been persuaded by Stanton to put on gloves and climb through the window of Mr Butt's home so they could burgle it. Mackay had been intoxicated with drink and drugs, naïve and intimidated, and had thought the house was empty. Having climbed in, he let in Stanton and went to the kitchen. Hearing a commotion, he looked in to see Stanton pinning Mr Butt against the wall and punching him repeatedly, then throwing him to the floor with a massive impact, after which Mr Butt did not move again. Mr Butt had a pair of shorts in his mouth. Mackay played no part in this. He had tried to stop Stanton from further assaulting the deceased. Stanton had responded by assaulting him with a pan. When they left Mr Butt was alive, bound, injured but ungagged.

10. Mackay had 18 convictions for 36 offences between 1992 and 2016. These included 5 burglaries of a dwelling and 2 offences of going equipped for burglary. His most recent conviction was in 2016, for dwelling burglary with another. These matters, including some details of the offending, went before the jury as agreed facts. Stanton relied on these convictions to support his case that Mackay's account, where it contradicted that of Stanton, should not be accepted.

11. Stanton had 13 convictions for 22 offences between 1995 and 2013. The most recent was a conviction for attempted robbery in a residential property, and possession of an offensive weapon, a Samurai sword – an offence committed with another defendant. For this, Stanton had been sentenced in July 2013 to 6 years' imprisonment. These matters also went in as agreed facts. Mackay relied on these convictions as evidence that Stanton had a propensity to be violent and as evidence damaging his credibility, making it less likely that Stanton was telling the truth and more likely that he had acted alone.

12. The prosecution had applied for permission to adduce the defendants' convictions as bad character evidence. But by the end of the trial, the prosecution was not seeking to rely on the convictions of either man. In his closing address, Mr Moulson QC made this clear to the jury, telling them not to convict either defendant just because he had previous convictions, and that each defendant could say what he wanted about the other.

The prosecution relied on Mackay's evidence to bolster its case against Stanton, and the other way around. It also relied on both defendants' failure to mention in their defence statements some of the matters they had relied on when giving evidence.

The Peter Spink material

13. This is the label that has been given to evidence adduced from and about Peter Spink, a vulnerable man aged 84. In 2017, Spink had formed a relationship with a 34-year-old drug addict named Kate Toohey. Spink alleged that this relationship was an exploitative one, in the course of which Toohey obtained money from him by holding out promises of sex which remained unfulfilled. She brought friends round who used his house to take drugs, and in due course a closure notice was made by the local authority in respect of Spink's property, to protect him. In late 2019 or 2020, Toohey entered into a relationship with Stanton, which is how he got to know Spink.

14. On 1 April 2020, Spink made allegations to the police which led to Stanton and Toohey being charged with offences relating to the obtaining of money from Spink. On 20 April 2020, Toohey was remanded in custody. Stanton was released on bail. A closure order was made in respect of Stanton's home.

15. On 10 and 16 June 2020, Spink gave recorded ABE interviews to the police. Spink's account was that his relationship with Toohey continued, as did her financial demands; but from the time he got to know Stanton the way in which money was obtained from him had changed. Stanton had introduced himself as someone who was in a Manchester gang. Stanton and Toohey used Spink's bank card to obtain cash and services without his consent. Spink alleged, among other things, that he spent the weekend of Friday 27 to 29 March 2020 with Toohey and Stanton in the course of which he was held against his will and subjected to threats and violence by Stanton. Stanton assaulted him by ripping off his Carelink alarm necklace, rifled his wallet, threw him down on a settee and threatened him with further violence. Spink was rescued when his granddaughter, Gemma Gillan, reported him missing and police tracked him down. On 1 April 2020, said Spink, Toohey and Stanton took him to the bank in an unsuccessful attempt to coerce him into getting more money for them. The police became involved.

16. HHJ Jamieson QC originally gave leave for counts against Toohey and Stanton, reflecting the Spink allegations, to be added to the indictment. But Toohey was unfit to plead, and for this and other reasons it was determined that the Spink counts should be severed, and the single count of murder tried alone. The prosecution then applied to adduce the Spink material as bad character evidence in that trial. Mackay supported the application. Leave was granted by the Judge on the first day of the trial, when he gave a brief extempore ruling. After the trial, he provided detailed written reasons.

17. Collectively, the Judge's reasons can be summarised in this way. Assuming but without deciding that the Spink material was bad character within the meaning of s 98 of the Criminal Justice Act 2003, it was admissible under s 101(1)(c) as important explanatory material; and under s 101(1)(d) as evidence relevant to an important matter in issue between Stanton and the prosecution, because it tended to rebut Stanton's defence that the reason for his presence at Mr Butt's house was an innocent one, and to show a propensity to use or threaten force to obtain money or other property from vulnerable men; and it was admissible under s 101(1)(e) as having substantial probative value in relation to an important issue between the two defendants, namely who used the fatal

violence on the deceased. The Judge acknowledged Mr Green's submission that admission of the material could skew the trial by generating satellite issues, but held that case management control could be exercised, and clear directions to the jury would avoid any unfairness to Stanton.

18. Spink's evidence in chief was adduced by means of his ABE interviews. Before these were played, the Judge directed the jury that the relevance of this evidence was limited, going essentially to Stanton's circumstances at that time, and how he might have reacted. The recorded interviews having been played, Spink was cross-examined over a video-link. He was challenged by Counsel for Stanton, Mr Green QC, about inconsistencies between his evidence and previous statements he had made. It was suggested that he had sexually assaulted Toohey, Stanton's case being that Spink had a motive to lie because he wanted to discredit Toohey in case she complained to the police of his assault on her.

19. Giving evidence, Stanton accepted that Spink had come to stay with him and Toohey for the weekend, and that they had all gone to the bank together on 1 April. He said on that occasion he had become upset and angry with Spink when Toohey told him that Spink had sexually assaulted her. But Stanton denied the allegations Spink had made. He had not used violence or threats towards Spink. He accepted that money had passed from Spink to him. But he explained this as repayments in respect of a £950 loan he had made to Spink.

The summing up

20. The Judge prepared written legal directions, which he circulated in draft to Counsel before speeches. At the start of his summing-up, the Judge provided the jury with hard copies of the final version, which he read out and expanded upon orally. The Peter Spink material was dealt with at several points in the legal directions. At an early stage (paragraph 5 of the written version), the Judge gave the standard direction, that the fact that Spink had been cross-examined over a video-link was no reflection on Stanton and irrelevant to the jury's approach.

21. Having directed the Jury as to the burden and standard of proof, and the ingredients of the offence of murder, and set out the route to verdict, the Judge came (at paragraph 7) to directions on "how you should approach specific areas of evidence". The first topic was expert evidence. The second was previous statements of witnesses. The primary focus here was Peter Spink's evidence. The Judge reminded the jury that his evidence about the weekend of 27-29 March was at odds with the account he gave when he first spoke to police officers on Monday 30 March. He had told them that he had just spent a pleasant weekend with friends. Challenged about this, Spink's explanation was that he had been tired and confused. Stanton's case was that the original account was the truth. The Judge directed the jury appropriately on how to approach inconsistent statements.

22. Immediately after this, the Judge reminded the jury of his earlier direction that the Peter Spink material was relevant to Stanton's circumstances on 22-23 April 2020, and how he might have reacted to them. Later, he explained the potential relevance of the material in more detail. He identified the prosecution case, supported by Mr Mackay:

> "… Mr Stanton became involved in the exploitation of Mr Spink in the weeks leading up to the death of Mohammed Butt. … the Spink evidence … generally, shows that Mr Stanton needed money to fund his drug addiction, that he … had a propensity to exploit the elderly and vulnerable and that, when Katie Toohey was remanded in custody … Mr Stanton no longer had access to Mr Spink and to his money, he broke into Mr Butt's house, intending to steal or rob and that, whilst doing so, was involved, they say together with Mr Mackay, in assaulting and killing Mr Butt. In other words, the prosecution submit that Mr Stanton had a tendency to obtain money from the vulnerable by dishonest and violent means and a motive to burgle or rob Mr Butt because he no longer had access to Mr Spink's money."

23. The Judge then gave the jury a legal direction, that the Spink material could lend support to the case for Mackay if they thought it might show the tendency or motive contended for. But it could only be treated as providing any support for the prosecution case if the jury were *sure* that it established the tendency or motive alleged; and even if they were sure of that they should not convict Stanton wholly or mainly for that reason.

24. Summing up Spink's evidence to the jury, the Judge did so "fairly briefly" as he put it, explaining that its importance was "confined in the way that I have indicated."

Submissions

25. The grounds of appeal fall under two main headings. First, it is said that the Judge was wrong to allow the Peter Spink material to go before the jury at all. Mr Green has reviewed the various grounds relied on by the Judge in his oral and written rulings for concluding that the evidence was admissible under s 101(1)(c), (d) and (e) of the 2003 Act. He submits that some of the reasons given are inconsistent with one another, and that all of them were mistaken. Even if, in principle, the evidence was admissible as prosecution evidence under s 101(1)(c) or (d) says Mr Green, it should have been excluded under section 78 of the Police and Criminal Evidence Act 1984. Its probative value, if any, was very limited and far outweighed by its prejudicial impact. The prejudice to Stanton included skewing the trial by creating a major piece of satellite litigation that featured in 4 of the 9 days the prosecution took to present its case. Mr Green accepts that the Judge had no discretion to exclude this evidence if it was admissible on behalf of Mackay under s 101(1)(e), but he submits that it was not admissible for that purpose, as its probative value was not "substantial".

26. Secondly, and in the alternative, it is argued that the Judge erred in directing the jury as to how they could use the Spink material to reach their verdicts in relation to the charge of murder. Mr Green submits that the Spink material was not capable of supporting the case for Mackay or the prosecution's case in the ways in which the Judge said that it was.

27. For the prosecution, Mr Moulson QC submitted in writing that the Judge was right to hold that the Spink material was admissible under ss 101(1)(c), (d) and (e). In respect of the first two gateways, the Judge was right not to exercise his exclusionary powers, and to leave the evidence to the jury. He had no such power in relation to the third

gateway. It was submitted that the criticisms of the summing-up are really a repetition of the other grounds, and lack any substance.

28. On the issue of propensity, Mr Moulson drew attention to what he said were a number of striking similarities between Stanton's conduct, as described by Spink, and the facts of the alleged murder: unwarranted entry to an occupied home address; assault on a vulnerable elderly male; and false imprisonment – given that Mr Butt was tied up. Mr Moulson added, more subtly perhaps, that in each case there was the removal of the means by which to contact the authorities. Spink's care alarm had been ripped off, and Mr Butt's mobile phone had disappeared.

29. In oral argument, Mr Moulson also supported the Judge's direction to the jury that the Spink material went to motive. It was capable of supporting the prosecution case that Stanton set out to burgle Mr Butt to gain funds to feed his drug habit, a matter he told us he had mentioned twice in his opening address to the jury. Addressing the evidential cogency of the point, Mr Moulson argued that it was not until Toohey was remanded in custody, just three days before the death of Mr Butt, that Stanton would have seen that the regular funding stream that had been available from Spink was definitively cut off. Even if he had thought in early April that he would get no more from Spink that might dilute but would not destroy the force of the point.

Assessment

30. The Judge's extempore ruling at the start of the trial was short and a little unclear. We would accept that the reasons given in the detailed written ruling delivered after conviction are not only more extensive, they are also rather different in some respects. The Judge's approach to each of the gateways we have mentioned has been subjected to a detailed critique by Mr Green, and we agree that not all of the reasoning is wholly consistent or convincing. We are not persuaded, for instance, that the Spink material qualified as important explanatory material within the definition in s 102 of the 2003 Act. The prosecution case would have been readily comprehensible without it.

31. But we think it necessary to begin by taking a step back, to address the preliminary question of whether this was bad character evidence within the meaning of s 98(a). As Sir Brian Leveson P pointed out in *Ditta* [2016] EWCA Crim 8 at [7]:

> "Section 98(a) of the 2003 Act provides that where evidence is "to do with the alleged facts of the offence with which the defendant is charged", no bad character application need be made in relation to that evidence. In *R v Sule* [2013] Cr App R 3, Stanley Burton LJ commented, at [11], that the words "to do with" have a broad application: they would certainly cover prior conduct which provided a reason for the commission of an offence.*"*

See also, to similar effect, *Okokono* [2014] EWCA Crim 2521 [60] and *Lunkulu* [2015] EWCA Crim 1350 [96-99].

32. By the end of the trial, if not before, the Judge had reached the conclusion that the Spink material, if accepted, was probative of a motive to commit an acquisitive offence to feed Stanton's drug addiction. His written legal directions reflected this. In answer to

a question from the Court, Mr Green told us that he had not objected to that direction at the time, when reviewing the written directions in draft before speeches. He frankly admitted that he had overlooked it. He pointed out, rightly, that this ground had not been mentioned in the Judge's extempore ruling. It is also the case, however, that the grounds of appeal do not contain any challenge to this direction, or complain that it was wrong in principle or unfair to leave the Spink material to the jury on this basis. Mr Green submitted to us orally, though, that the Spink material was not logically probative of the motive of gain. Proof that Stanton needed money to buy drugs was enough. Evidence that a funding stream had recently been cut off was a separate matter. Alternatively, the link was tenuous and remote and the evidence was so prejudicial that it should have been excluded.

33. In our judgment, the Judge was correct on this point. Logically, a drug addict is more likely to commit acquisitive offences if he has no readily available resources than he is when he has a reliable regular income. If such a person loses his income, by reason of dismissal or resignation from a job, or for any other reason, that affords or strengthens a motive for theft or burglary. Taken at its highest, the Spink material showed that Stanton, over the months before the alleged murder, had become accustomed to obtaining money from a vulnerable old man. That funding stream had quite recently been cut off. That would give Stanton a good reason to take part with Mackay in the burglary of someone like Mr Butt. We acknowledge Mr Green's point, that the Spink/Stanton relationship came to an end in early April, but Spink and Toohey remained in some kind of relationship. The issue of timing was one for the jury, and in any case a three-week gap could not be said to defeat the probative value of the point.

34. The Spink material was therefore evidence about recent events, going to motive. It was evidence "to do with the facts of the offence", the admission of which did not need justification via any of the gateways provided for by s 101. If that had been necessary, evidence of motive would in our view have been admissible under s 101(1)(d), as evidence going to a matter in issue between the prosecution and the defence.

35. The Judge's decision not to exclude the evidence was a proper one. There is clearly some force in Mr Green's submission that the introduction of the Spink material gave rise to a satellite trial which was apt to distract attention from the important issues in the case. But we do not agree with his further argument, that such distraction was or might have been materially to Stanton's disadvantage. Rather the contrary, in our view. Mr Green was able to make some headway with Spink, and the surrounding evidence, which tended to undermine the overall prosecution case. In the process, he was able (for example) to cross-examine the prosecution witness Stephen Connolly, to elicit evidence supportive of Stanton's case that Spink had indeed committed a sexual assault on Toohey.

36. Nor do we accept that the Spink allegations were unduly prejudicial because they were (in Mr Green's word) "scandalous". It is true that the evidence included allegations of false imprisonment, and the use of threats and some violence. That was an integral part of Spink's account, which could not be excised. But whilst a submission of this kind may be cogent, where evidence that is not directly related to the offence reveals behaviour that is more reprehensible than the offence itself, it has little weight when the offence charged is one of murder. Moreover, the Judge was at pains to ensure that the jury understood the limited role this evidence could play in the overall scheme of things.

37. The first basis on which the Judge left this evidence to the jury was therefore a rational and legitimate one, and he gave appropriate directions. In our judgment, the same is true of the second basis on which the Spink material was left to the jury. The prosecution did not argue and nor did Mackay that this evidence showed a propensity to break into someone's house, and attack the occupant when disturbed. Rightly so, in our view. The case on propensity was put, and left to the jury, on a much narrower and more specific basis. The matter is perhaps finely balanced, but in our view there was a rational and sufficient case to be made for the admission of this evidence under s 101(1)(d) and (e) for the purposes identified by the Judge, and we are not persuaded he was wrong to leave it to the jury on that additional basis.

38. We add that even if we had not concluded that the Spink material was admissible for this second purpose, we would have dismissed this appeal. It is necessary to see the matter in its overall context. The essence of the prosecution case was simple, and the evidence was very strong. The CCTV evidence showed that the two men first went to the area of Butt's house for a few minutes before coming away and then returning. On the second occasion they were in the vicinity of the house for about an hour. There was ample evidence to show that burglary was the purpose for which the defendants broke into Mr Butt's house, as Mackay alleged, and some to suggest that it succeeded. There was evidence of an untidy search of the house, including Butt's pockets being turned out. Whether the defendants took any property is impossible to say. Only Butt would know. But cell site evidence placed his mobile telephone in the house prior to the burglary, and moving away from the house at about the time the defendants left. It has never been found.

39. Stanton made an incriminating statement on arrest, then said nothing of substance in interview. The account he later gave was hard to credit. It was not just that his co-defendant alleged that Stanton had killed Mr Butt. The scientific evidence clearly tended to implicate him. His explanation for it was implausible, and undermined by his failure to mention much of it in his defence statement. His account of events was decidedly odd. If the stated purpose of the visit to Mr Butt's house was to smoke crack, it is hard to understand why he had to give Mackay a leg up to get in, or why he stayed outside for nearly an hour after that before Mackay let him in. If Mackay, acting alone, had attacked Butt in the meantime, why would he let Stanton in after the event, making Stanton a witness to his criminality?

40. The Spink material was properly before the jury on the issue of motive. The Judge was emphatic as to its limited relevance. His propensity direction in standard terms represented a safeguard for the appellant, providing protection against misunderstanding or over-reliance on this material by the jury. They were explicitly directed that they should not treat the Spink material as providing any support for the prosecution case unless they were sure that it established the motive or propensity contended for.

41. In all these circumstances, we do not think it could be said that Stanton's conviction is unsafe, even if (contrary to our view) the jury was misdirected on the issue of propensity. For these reasons, this appeal is dismissed.