IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/02309/B1
[2022] EWCA Crim 1017

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 5th July 2022

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE SPENCER

SIR NIGEL DAVIS

R E G I N A

- v -

CHRISTOPHER COLE

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Miss E Marshall QC and Miss R Upton appeared on behalf of the Applicant

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J U D G M E N T

Tuesday 5th July 2022

LORD JUSTICE GREEN: I shall ask Sir Nigel Davis to give the judgment of the court.

SIR NIGEL DAVIS:

1. The applicant, Christopher Cole, renews his application for leave to appeal against conviction, following refusal by the single judge.

2. On 25th June 2021, following a trial in the Crown Court at Lewes before Her Honour Judge Laing QC and a jury, the applicant was convicted of murder.

3. The background facts are fully set out in the Criminal Appeal Office Summary and indeed fully set out in the carefully prepared grounds of appeal. We do not, therefore, need to set them out in any great detail for present purposes.

4. It is sufficient to say that paramedics were summoned to a camp site in Seaford, Sussex on the morning of 13th May 2018. They had been called by the applicant who said that he had awoken in a tent which he shared with his partner, Sarah Clayton, and had found her not to be breathing. Sarah Clayton was in due course to be certified as dead.

5. Inevitably there was a pathological investigation. The Crown's pathologist, Dr Randall, found no direct evidence of signs of strangulation or smothering. Nor was there any evidence as to any other cause of death. Sarah Clayton had otherwise been a fit and healthy young woman. Dr Randall gave the cause of death as "unascertained". She said in her evidence that she could not exclude sudden arrhythmic death syndrome; nor could she exclude smothering as a cause of death. In effect, those were the only two candidates.

6. A pathologist called by the defence, Dr Fegan-Earl, largely agreed with Dr Randall. He accepted that these were, in reality, the only two available options. However, Dr Fegan-Earl's opinion was that sudden arrhythmic death syndrome could be excluded in view of the lack of any evidence of any defensive injuries to Miss Clayton, or any other physical or forensic signs of smothering.

7. Both experts, however, were agreed that the ultimate cause of death was a jury matter.

8. The Crown relied, as part of its case, on the evidence of a number of individuals who had been at the camp site on the night in question, to the effect that they had heard the applicant and the deceased quarrelling in their tent that night. In particular, there were two women who had been in a tent adjoining the tent of the applicant and Miss Clayton. They gave detailed evidence. One of those women had in fact been sufficiently concerned at the time to send texts to a friend between 01.28 and 01.56 saying things such as "I think he's strangling her. She's choking". The other woman also made notes on her phone, recording the applicant saying things like (according to her) "If you don't shut up, I'll make you shut up". There was also other evidence referring variously, for example, to "very strange choking noises", "muffled screaming" and "weird grunting sounds".

9. The defence at trial launched a strong attack on the reliability and consistency of this evidence, particularly the evidence of the two women in the adjoining tent. Ultimately, it was, on the face of it, a matter for the jury to assess all of this evidence.

10. However, as part of its case the prosecution desired to adduce bad character evidence under the provisions of section 101(1)(d) of the Criminal Justice Act 2003. In particular, there was sought to be adduced evidence from a previous girlfriend of the applicant, a woman called

Kirsty Llewellyn. She had been in a relationship with the applicant some years earlier. That relationship evidently had ended badly. She was to give a statement recording what she said was the applicant's jealous, violent and controlling behaviour during their relationship. Amongst other things she stated that, on occasions, he had resorted to strangling her or restricting her breathing. However, it was to be noted that there had been no criminal proceedings, let alone conviction, brought against the applicant at the time.

11. At all events, the judge acceded to the prosecution application, in the face of strong opposition from the defence, to allow the evidence of Miss Llewellyn to be adduced, albeit the judge imposed some restrictions as to what could be adduced and also rejected various other aspects of the prosecution application.

12. What is now sought to be said is that the trial judge had been wrong to do so. It is submitted that such evidence was only there to boost what otherwise was a weak case; that it was unfairly prejudicial to the defence; and that it would give rise to satellite litigation and distract the jury from the main issue in the case.

13. However, in agreement with the single judge, we can see no error in the judge's ruling on this aspect of the matter. The judge had given a detailed and thorough ruling in which she expressly addressed all the points raised by the defence. Miss Marshall QC submitted to us, as she had before the trial judge, that the evidence, in particular of the two women in the adjoining tent, was wholly inconsistent and unreliable, and may have been tainted by contamination. She made various other such criticisms and sought to categorise that evidence as weak and submitted that, overall, it therefore made the prosecution case weak, especially when set in the context of the inconclusive medical evidence.

14. However, the judge rejected the argument that the prosecution case was weak and that the

bad character evidence was simply being adduced, contrary to principle, in order (as it was said) to, bolster a weak case. We consider that such an evaluation was entirely open to the trial judge. Indeed, on one view it could be said that this was potentially a strong prosecution case, notwithstanding the inconclusive forensic evidence, in particular given that the two women had seen fit at the very time in question to make the notes which they had made, even if it was to be said that thereafter their evidence had its unsatisfactory features. The judge was further entitled to reject the argument that to introduce the evidence of Miss Llewellyn was liable to give rise to undue satellite litigation or to distract the jury from the main task at hand. Indeed, the entire evidence concerning the incidents referred to by Miss Llewellyn were, we gather, dealt with in around a day. Certainly the position was quite unlike that illustrated in cases such as *O'Dowd* [2009] EWCA Crim 905. Moreover, such evidence went directly to the key matter in issue in the case; that is, as to how it was that the deceased, Sarah Clayton, an otherwise healthy young woman, came to die that night. Indeed such evidence went to the heart of the defence case, which was to the effect that her death on the night in question, and set in the context of all else that was heard that night, was in effect an entire coincidence. In all the circumstances the judge was further justified in concluding, as a matter of evaluation and discretion, that to admit such evidence was not unduly and unfairly prejudicial to the defence so as to be excluded under section 101(3) of the 2003 Act. Accordingly, all the various ways of criticising the judge's ruling in this respect, in our view, are not well founded, do not give rise to any arguable ground of appeal and there is no basis for legitimate attack in this regard.

15. A further complaint was shortly made before us, to the effect that the judge had wrongly permitted adverse inferences to be put forward by the prosecution in respect of three matters raised at trial by the defence, but not mentioned by the applicant in interview. In our judgment – and again in agreement with the single judge – those three matters were entirely properly left to the jury as matters from which an adverse inference could, if the jury saw fit, be drawn. These were indeed matters relied upon by the defence at trial which had not been the subject

of any explanation in interview, and could reasonably have been raised by the applicant in interview had he seen fit to do so.

16. We should add that when it came to the summing-up, the judge gave impeccable directions in law on the bad character evidence. She stressed, amongst other things, that such evidence formed but part of the whole case. She also gave impeccable directions in law as to the use to which the failure to answer questions on those three matters could properly be put by the jury.

17. Overall, we conclude that there is no arguable substance in any of the various criticisms raised. We agree with the single judge. We therefore refuse this renewed application.
